



TECHNISCHE UNIVERSITÄT  
CHEMNITZ

First published in:

Rivista di Diritto Valutario e di Economia Internazionale. - I. 1988, Sonderdruck, S.  
305 - 321

ISSN: 0392-8748

## **The European Unit – a Foreign Currency? : A West German Point of View**

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MONARCH – Dokument

<http://archiv.tu-chemnitz.de/>

## THE EUROPEAN UNIT - A FOREIGN CURRENCY? A WEST GERMAN POINT OF VIEW

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### Abstract

La liberalizzazione dell'uso dell'ECU fra i privati nella Repubblica federale di Germania ebbe luogo soltanto verso la metà del 1987, quando la banca centrale decise finalmente di trattare l'ECU "come" se fosse valuta estera.

Questo articolo esamina in primo luogo i diversi motivi di questo passo piuttosto tardivo, alla luce dei poteri della Bundesbank di permettere di contrarre certe obbligazioni valutarie e di vietare invece altre transazioni per assicurare la stabilità monetaria ed in ausilio alla propria lotta contro l'inflazione.

Per capire meglio la natura di questi poteri di autorizzazione, nella parte seconda si tratta degli elementi fondamentali del sistema monetario europeo posti ad origine dell'emissione degli ECU, e nella terza parte si analizza la diversità nelle modalità d'uso di questa unità valutaria da parte dei privati e delle pubbliche autorità. Solo dopo una tale analisi sembra possibile una spiegazione più dettagliata circa la posizione della banca centrale verso l'ECU, specialmente riguardo alla sua utilizzazione privata.

Quindi, la quarta parte esamina la struttura legale dei rapporti economici con l'estero della Germania Occidentale, e di seguito la posizione adottata dalla Bundesbank in questo sistema.

Il punto focale dei propri poteri non si trova nelle disposizioni della Legge Economica Estera, ma nell'articolo 3 della Legge Valutaria del 1948.

Dopo aver esaminato le caratteristiche principali della "direttiva" per la liberalizzazione emessa dalla Banca sulla base di questo potere statutario, nella parte quinta si cerca di chiarire perché alcuni problemi legali di questo specifico settore restino ancora irrisolti.

Quindi, nonostante che l'articolo finisca con una valutazione piuttosto positiva riguardante la "direttiva", la conclusione deve richiamare l'attenzione sul decisivo legame tra il crescente uso privato degli ECU ed alcuni ulteriori passi verso una più stretta integrazione monetaria all'interno della Comunità Europea.

## 1. The liberalization of the private use of ECUs by the Deutsche Bundesbank

1.1. In the spring of 1987, the West German central bank, the Deutsche Bundesbank, eventually decided to treat the European Currency Unit (ECU) "like" a foreign currency within the borders of the Federal Republic, being the last central bank of the EEC member States to do so (1). The institutions of the European Communities, in particular the Commission, had worked towards this step for quite a long time and had been assisted during their promotion by governments of other member countries. The West German federal government had also taken a firm stand for a further liberalization of the licensing practice of the federal reserve bank. The special constitutional position of this monetary institution did not, however, allow any direct interventions into its decision-making processes which were going on within the Central Bank Council, the supreme organ of the Bundesbank (2).

1.2. The new attitude is primarily based upon the estimation that the rather far-reaching permission for using foreign currencies in transactions and operations of resident banks and insurance companies with their resident clients — having been in force already since 1961 (3) — did not lead to results which would be questionable from the viewpoint of a solid monetary policy. In particular the widely feared gradual substitution of the Deutsche Mark by one or a few of these foreign currencies did not take place (4). ECU as well as foreign currencies operations of West German credit institutions will also in future times remain subject to the central bank's instruments of monetary policy, i.e. not the least to the obligation to hold minimum reserves (5), and also to the banking supervision rules enacted by the federal supervisory office for

(1) Cf. the arguments made against such a step as late as in 1985 by WAHLIG, an official responsible at the Bundesbank, in : *Wertpapier-Mitteilungen* 1985, 1053 et seq.

(2) For short commentaries on the different position within the Bundesbank see, e.g., *Handelsblatt*, 25 Feb. 1986, p. 9, and 26. Feb. 1986, p. 9; more recently, an article published 12 May 1987, p. 9.

(3) Notice no. 1009/61 of Aug. 24, 1961, published in: *Bundesanzeiger* no. 167 of Aug. 31, 1961, p. 8.

(4) BAUER (director of the legal department of the Bundesbank), in: *Die Bank* 1987, 602 (et seq.).

(5) As laid down in sec. 16 of the Bundesbank Act. (of July 26, 1957, published in: *Bundesgesetzblatt I*, 745 et seq.).

the credit sector, the *Bundesaufsichtsamt für das Kreditwesen* (6).

By taking its latest measure, the Bundesbank was trying to respond to the fact, too, that there had been some progress within the E.E.C. concerning the further liberalization of capital transactions, and the ECU had reached an increasing significance with respect to international economic (business) transactions for some important member States, not the least for Italy (7). In the 1980s, a private market for ECUs has grown up, mainly arising from the activities of Italian, French, Belgian and Luxembourgian banks.

West German credit institutions, however, were until recently restrained from participating therein and were only able to do so via their foreign subsidiaries or affiliates domiciled beyond German borders, as sec. 4a (1) of the Foreign Economic Law (*Aussenwirtschaftsgesetz*) treats mere affiliates/branches as being legally independent and having the status of non-residents (8).

1.3. The West German central bank has neither law- nor decree-making powers (9). In fact, its authority with respect to permitting the private use of ECUs derives from the First Act for the Reform of the Monetary Order, the *Währungsgesetz* (Currency Act) which was enacted in 1948 already by the then Military Government for Germany and which has been valid till this day within the (former) three western occupied zones of Germany (10). Sec. 3 of this Act prescribes:

*"Money obligations incurred in any other currency than Deutsche Mark will become binding only when approved by the office competent for the licensing of foreign exchange operations. The same holds true for debts whose amount expressed in Deutsche Mark is to be determined by the exchange rate of such other currency or the price or a quantity of fine gold or of other goods or services"*.

This provision was amended by sec. 49 of the Foreign Economic Law, entered into force Sept. 1, 1961. On the one hand, the modification restricts the scope of the Currency Act's sec. 3, first sentence, to

(6) Cf. secs. 5 et seq. of the Law Concerning the Credit Sector (*Kreditwesengesetz*) of 1961, as amended (published in: *Bundesgesetzblatt III*, 7610-1).

(7) For more details, see *Monthly Reports* of the Deutsche Bundesbank 1987 no. 8, 30 et seq.

(8) Introduced by an amendment of March 29, 1976 (published in: *Bundesgesetzblatt I*, 869 et seq.).

(9) But see *infra*, at 5.2.

(10) On the political importance of this Act, see, in particular, ABELSHAUSER, *Wirtschaftsgeschichte der Bundesrepublik Deutschland 1945-1980* (1983) 46 et seq.

transactions and operations between two or more West German residents. Moreover, sec. 49 (2) makes clear that the competence for the licensing of the aforementioned clauses lay with the Bundesbank. This institution was founded Sept. 1, 1957, resulting from a merger between the *Bank deutscher Länder* (bank of German States) and the reserve banks of those States <sup>(11)</sup>. Before this fusion happened, there had already been close interrelationships between these various monetary institutions which all owed their existence to acts of the Military Government, too <sup>(12)</sup>. Until 1957, the *Bank deutscher Länder* had been trusted with the authority of implementing sec. 3 of the Currency Act.

1.4. This essay will look at some more details of the central bank's new attitude towards the licensing of the private use of ECU's (4.) and also discuss some legal problems still unsolved (5.). To this end, it seems necessary, to take at first a quick look at the legal instruments which govern the existence and perusal of ECUs (2.) and then to distinguish between the official and private modes of using this unit (3.).

## **2. The European Monetary System and European Currency Unit**

2.1. European units of account are older than the EMS. Thus, the European Communities were using the unit of account of the European Payments Union <sup>(13)</sup> until the system of fixed parities installed by and within the International Monetary Fund finally broke down <sup>(14)</sup>. The value of this unit was equal to the gold weight of the U.S. \$, i.e. 0,88867088 grams of fine gold. In 1975, the EEC followed the example of universal monetary organization for a second time and created a European Unit of Account of its own, quite similar to the Special Drawing Right of the I.M.F. <sup>(15)</sup>.

The unit was shaped as a basket filled with various amounts of the currencies of the (then) nine EEC member States. The weight of each national currency within this basket was determined by taking into

<sup>(11)</sup> Cf. secs. 1 and 38 of the Bundesbank Act (above, n. 5).

<sup>(12)</sup> Cf. BECK, *Kommentar zum Bundesbankgesetz* (1959) 41 et seq.

<sup>(13)</sup> Cf. BECK (n. 12) 162 et seq.; HAHN and WEBER, *Die OECD* (1976) 240 et seq.

<sup>(14)</sup> See, e.g., the lucid description by CARREAU, in: CARREAU, FLORY and JUIL-LARD, *Droit international économique* (2<sup>nd</sup> ed. 1980) 154 et seq.

<sup>(15)</sup> Cf. the comparison undertaken by GOLD, in: *id.*, *Legal and Institutional Aspects of the International Monetary System: Selected Essays, Vol. II* (1984) 659 et seq.

account the economic position and situation of the countries concerned.

The ECU is immediately linked to that former EUA. According to Council Regulation (EEC) No. 3180/78 of Dec. 18, 1978, changing the value of the unit of account used by the EMCF <sup>(16)</sup>, "With effect from 1st Jan. 1979, the Fund's operations shall be expressed in ... ECU which is defined as the sum of the following amounts of the currencies of the Member States; (from) 0.828 German mark (to) 0.00759 Irish pound (art. 1)."

The Regulation has been amended only once, with effect from Sept. 17, 1984 <sup>(17)</sup>. Since that date, the ECU is composed of

0.719	German mark,
0.0878	pound sterling,
1.31	French francs,
140.	Italian lire,
0.256	Dutch guilder,
3.71	Belgian francs,
0.14	Luxembourg franc,
0.219	Danish krone,
0.00871	Irish pound,
1.15	Greek drachmas.

2.2. The E.M.S. originated from resolutions of the European Council in 1978. The more ambitious attempt of creating a European Economic and Monetary Union in a rather short period had been left off some years earlier <sup>(18)</sup>, although it may have been revived recently <sup>(19)</sup>. Furthermore, after the coming into force of the Second Amendment of the I.M.F.'s Articles of Agreement April 1, 1978 <sup>(20)</sup>, a closer coopera-

<sup>(16)</sup> See Council Resolution (EEC) No. 907/73 of Apr. 3, 1973 establishing a European Monetary Co-operation Fund (O.J. L 89 of Apr. 5, 1973, p. 2); cf. LOUIS, *Le fonds européen de coopération monétaire*, in: *Cahiers de Droit Européen* 1973, 255 et seq.

<sup>(17)</sup> The regulation of 1978 is published in: O.J. L 379 of Dec. 30, 1978, p. 1. The amending one is Council Regulation (EEC) No. 2626/84 of Sept. 15, 1984; see O.J. L 247 of Sept. 16, 1984, p. 1.

<sup>(18)</sup> Cf. my description of the events, in: *Europäische Zentralbank und Art. 24 Abs. 1 GG* (1979) 119 et seq.

<sup>(19)</sup> Cf. art. 20 of the Single European Act introducing a new art. 102 a into the EEC treaty, and, e.g., JACQUÉ, in: *Revue trimestrielle de droit européen* 1986, 575 et seq., at p. 601.

<sup>(20)</sup> See, in particular, GOLD, *The Second Amendment of the Fund's Articles of Agreement* (1978).

tion between Western European States within the international monetary system seemed badly needed. Because the European Political Cooperation was, however, not (yet) a part of the Community's legal system <sup>(21)</sup>, it became inevitable to pass some more acts by EEC organs in order to actually introduce the ECU as the centre of the EMS. Moreover, the central banks of the EEC member States had to conclude an agreement between themselves relating to a proper functioning of the new regional monetary system <sup>(22)</sup>.

With effect from July 1, 1985, Greece also joined the EMS. The currencies of the other two new Community members, Portugal and Spain, will probably be included within the currency basket's constituent parts during the next regular revision of its composition due in 1989. It remains unclear, however, whether the southerners will also in fact participate in the various mechanisms of the EMS. Further measures to increase the use of the ECU were also approved in 1985 <sup>(23)</sup>. Finally, it may be mentioned that only eight of the twelve EEC member countries are involved within the exchange rate mechanism. Greece, Portugal, Spain as well as the U.K. stayed apart, and Italy was at least granted a special privileged position therein <sup>(24)</sup>.

2.3. The ECU, however, actually may be called the heart of the EMS. The EEC Commission each day finds out and publishes its value in relation to the currencies of member as well as third States. In the framework of the EMS, four essential functions of this unit must be distinguished:

2.3-1 First of all, the ECU is the denominator (numéraire) for the exchange rate mechanism already mentioned above. Each participating currency has an ECU-related central rate which is used for establishing a grid of bilateral exchange rates. Around these rates, fluctuation margins of  $\pm 2.25$  per cent. — except for Italy — are laid down. If two (or

<sup>(21)</sup> Cf. for the situation before the entering into force of the Single European Act (July 1, 1987) E. STEIN, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1983, 49 et seq.; the modifications by this instrument are described, e.g., by GLAESNER, *Europa-Recht* 1986, 119 et seq.

<sup>(22)</sup> The agreement laying down the operating procedures for the EMS was signed and put into force on March 13, 1979. It was once amended by way of an Instrument relating to the accession of the Bank of Greece, dated June 10, 1985. The text is to be found in: *Committee of Governors of the Central Banks of the Member States of the EEC — EMCF, Texts concerning the European Monetary System* (1985) 23 et seq.

<sup>(23)</sup> See, e.g., LINDEN, in: *Zeitschrift für Wirtschaftsrecht* 1987, 668 et seq.

<sup>(24)</sup> For the U.K. position, cf. JOHNSON, *Europa-Archiv* 1986, 471 et seq.

more) currencies reach these intervention points in opposite directions, the central banks of the countries concerned must use currencies of participants in order to contain the critical situation <sup>(25)</sup>.

2.3-2 To prevent such a state of things as far as possible, the ECU is also the basis for a divergence indicator. Each currency participating in the EMS is "permitted" to deviate from its central rate. When this divergence not only reaches 75 per cent. of its maximum spread, but even crosses this threshold, then a presumption will result therefrom that the authorities concerned will correct this situation by adequate measures, namely, diversified intervention, measures of domestic monetary policy, changes in central rates and/or other measures of economic policy <sup>(26)</sup>.

2.3-3 The ECU will moreover be used as the denominator for operations in both the intervention mechanism described above and the three credit mechanisms established within the EMS, i.e. the Very-Short Term Facility, the Short-Term Monetary Support and the Medium-Term financial Assistance <sup>(27)</sup>. The first one arranges the necessary means for interventions and similar steps within the exchange rate mechanism. The amount of that facility is unlimited, but the debtor central bank must reserve the credit transaction normally not later than 45 days after the end of the month during which the other (creditor) bank(s) intervened <sup>(28)</sup>.

2.3-4 Finally, the Council Resolution of Dec. 5, 1978 orders the EMCF to provide for an initial supply of ECUs against the deposit of 20 per cent. of gold and the same percentage of U.S. \$ reserves currently held by central banks <sup>(29)</sup>. The ownership of these deposits

<sup>(25)</sup> The following short survey is closely linked to the text of the original Resolution of the European Council of Dec. 5, 1978 on the establishment of the EMS and related matters, section A. (as published in: *Texts concerning the EMS* (n. 22) 13 et seq.). For an early detailed exposition, see HAHN, in: *Europa-Recht 1979*, 337 et seq.; also, more recently, KOKOTT, in: *Turkish Yearbook of International Relations 1980-81*, 97 et seq.

<sup>(26)</sup> Ibid. (n. 25) nos. 3.5., 3.6. The ECU functions are listed at no. 2.2.

<sup>(27)</sup> Ibid., nos. 3.7. and 4.1. — 4.4. A system of short-term monetary support had already been set up by a former agreement among the central banks of the EEC member States, of Feb. 9, 1970 (reprinted in: *Texts concerning the EMS* (n. 25) 39 et seq.).

<sup>(28)</sup> For more details, cf., e.g., MÜNCH, in: *Recht der Internationalen Wirtschaft 1983*, 653 et seq., at p. 657; also Deutsche Bundesbank, *Internationale Organisationen und Abkommen im Bereich von Währung und wirtschaft* (3<sup>rd</sup> 1986) 272 et seq.

<sup>(29)</sup> Ibid., no. 3.8. The total value of the ECUs created in this way has fluctuated since 1979 between 27 and 53 billions (Deutsche Bundesbank (n. 28) 267).



remains with the participating central banks, since the delivery is performed by way of specified, revolving swap arrangements. In this fourth function, the ECU is to serve the settling of claims arising from obligatory interventions in participating currencies. Until recently, a creditor central bank had to accept ECU (deposits) only to a maximum of one half of its claims <sup>(30)</sup>. In Sept. 1987, however, the presidents of the central banks of the EEC member countries agreed upon an extension of the official use of the ECU, and the EEC Council (of Finance Ministers) confirmed this resolution. After the necessary legal amendments have taken place, central banks will accept for the settlement of claims in the framework of the Very Short-Term Facility the transfer of ECUs to an extent of 100 per cent. as far as this kind of settlement does not lead to a badly balanced composition of their reserves and to the creation of unreasonable ECU debtor as well as creditor positions <sup>(31)</sup>.

2.4. All those functions of the ECU are related only to a narrow circle of parties. At first, its exclusive members were the central banks and the institutional core of the EMS, the European Monetary Cooperation Fund. This organization has been acting under the direction of a Board of Governors composed of the EEC members' central banks' presidents <sup>(32)</sup>. Its operations are executed by the Bank for International Settlements <sup>(33)</sup> having the legal position of the EMCF's agent. Only since 1985, also non-EEC central banks as well as international monetary institutions may be granted the status of Other Holder enabling those organizations also to engage in ECU transactions as long as this special status lasts <sup>(34)</sup>. Further on, Community organs from the very beginning were eager to promote the progressive use of ECUs and, not the least, made use of this unit themselves. So, for example, the EEC budget is denominated in ECU, and the European Investment Bank even made this unit its sole means of operations. Therefore it was hardly surprising when bank accounts denominated in ECU were

<sup>(30)</sup> See art. 16.1 of the central banks agreement of 1979 as amended in 1985 (n. 22).

<sup>(31)</sup> Cf. no. 3 of a press notice of Sept. 18, 1987, as published in: Deutsche Bundesbank, *Auszüge aus Presseartikeln* no. 68 (of 23 Sept.) 1987, p. 3. See also WELTRICH, in: *Deutsches Verwaltungs-Blatt 1987*, 1154 et seq.

<sup>(32)</sup> Its statutes are annexed to the instrument establishing this fund (see. supra, n. 16). Cf., in particular, arts. 1-3 and 10 thereof.

<sup>(33)</sup> Cf. e.g., Deutsche Bundesbank (n. 28) 152 et seq.

<sup>(34)</sup> This extension is based upon the Decision (No. 18/85) of the Board of Governors of the EMCF of Nov. 12, 1985 (reprinted in: *Texts concerning the EMS* (n. 22) 59 et seq.).

soon opened for businessmen cooperating with the EIB, but also for EEC civil servants who received their salaries in ECU. This "private" use of ECUs started soon after the coming into force of the EMS and expanded rather rapidly during the first half of the 1980s <sup>(35)</sup>.

### 3. The official and private use of the ECU

3.1. The "official" ECU was created by various legal acts of public authorities. The private use of this unit, however, was solely the result of market initiatives and developments, and until today, there do not exist any Community rules nor laws of member States establishing details about the very existence or the essential functions of a "private" ECU. Certainly, Belgium already issued gold and silver coins denominated in ECU which attained even the quality of legal tender by royal decree <sup>(36)</sup>. But there was no explicit introduction of these coins as a second national currency besides the franc, and no other State followed this rather ambivalent example.

3.2. Private ECUs as well as official ones are based upon the same definition of a currency basket. This identity, however, does not follow from any legal instrument, but derives entirely from contractual agreements between participants in business transactions <sup>(37)</sup>. Nothing else can be said in respect of the use of an "open" ECU basket although this construction was promoted forcefully by the EEC Commission <sup>(38)</sup>. This means that all changes made to the ECU definition in the official sphere will be automatically and immediately reflected in private ECU contracts. It would be otherwise had the parties agreed upon a static "closed" basket. This link between the two different types of ECU uses remains exceptional, official and private use being rigidly divided in all other aspects and the first one restricted to certain Holders only. If the dichotomy did not hinder the BIS starting clearing activities also for a group of banks participating in private ECU markets <sup>(39)</sup>, it neverthe-

<sup>(35)</sup> See, e.g. SWINGS, in: *Sparkasse 1986*, 386 et seq.; also, from a Community viewpoint, *Die ECU* (1984) 25 et seq.; *Das Europäische Währungssystem* (Stichwort Europa 15/86) dated Oct. 1986, at p. 11.

<sup>(36)</sup> Cf. the commentary in: *Zeitschrift für das gesamte Kreditwesen* 1987, 337; BAUER (n. 4) at p. 603.

<sup>(37)</sup> BAUER, *ibid.*

<sup>(38)</sup> Cf. Monthly Reports (n. 7) at p. 31; also WAHLIG, in: *ECU Banking Association, Newsletter*, Sept. 1987, 9 et seq., at p. 10.

<sup>(39)</sup> Cf. BAUER (n. 4) at p. 606. LINDEN (n. 23) at pp. 677 et seq.

less forced this intergovernmental financial institution to restrain its assistance to the technical implementation of the settlements, whereas the banks' task still is taking care of the provision of the necessary means of payment. Thus, the BIS may merely undertake book-keeping operations relating to ECU sight deposits which banks are holding with the Basle based institute.

3.3. Before the modification of the licensing practice in mid-1987, ECU deposits held by West German residents with banks abroad were insignificant. On the other hand, German credit institutions were entitled to participate in underwriting business in respect of ECU bonds launched by non-residents. Until now, they have underwritten a total of more than three billion Deutsche Marks of those bonds. Just as in the case of foreign currency investments, the higher interest rates on ECU bonds appear to have been attractive to West German investors at times, while the exchange rate risk was estimated to be small, or at least predictable <sup>(40)</sup>.

#### **4. The attitude of the Bundesbank relating to the private use of ECUs within the Federal Republic of Germany**

4.1. For more than 25 years, sec. 1 (1) of the Foreign Economic Law has been declaring that all border-crossing economic transactions and operations are normally allowed without restrictions and that they can be restrained only if the law itself does enable such measures or it at least provides for certain prohibitions or controls to be established by way of governmental decree. Included in this freedom of foreign trade and investment are also capital and money transactions in relation to foreign States and their residents (but not to the "other" German State, the GDR) and, moreover, operations concerning "foreign assets" <sup>(41)</sup> and gold entered into between German residents. There is, of course, the possibility of enacting specific restrictions for capital imports and exports <sup>(42)</sup> or of fixing general limits for international payments which would have to be performed by way of a decree to be issued by the

<sup>(40)</sup> In this sense, see Monthly Reports (n. 7) at p. 36.

<sup>(41)</sup> As defined by sec. 4 (2) no. 1 of the Law; see already HAHN and GRAMLICH, in: MIZZAU (ed.), *The Policy of Liberalization in International Monetary and Financial Relations* (1986) 139 et seq., at pp. 148 et seq.

<sup>(42)</sup> See sec. 22 and 23 of the *Foreign Economic Law* of April 28, 1961 (Bundesgesetzblatt I, 481 et seq.).

Federal Government in connection with the Bundesbank<sup>(43)</sup>. But it was seldom made use of and, if at all, only during shorter periods of time<sup>(44)</sup>. Nowadays, one single prohibition is still in force concerning the regular implementation of the London Agreement on German External Debts of 1953.

4.2. The powers of the Bundesbank for regulating the private use of ECUs are therefore not derived from a (non-existing) law on (foreign) exchange restrictions and/or controls, they do not serve the purpose of securing German (foreign) economic interests against any disturbances stemming from abroad. The sole foundation for the central bank's attitude and practice in this field is a rule of a monetary law character, namely sec. 3 of the Currency Act. If a contractual obligation to pay money fits into the legal terms of sec. 3, then it remains without any binding effect, until the Bundesbank takes a positive step. But there is no duty at all for the central bank to behave in this way<sup>(46)</sup>. Certainly it may deny a properly filed application for a license only if a permission would (probably) contradict the meaning or the purpose of this legal rule. In every case in which the stability of the Deutsche Mark currency as the sole currency circulating as legal tender within the Federal Republic seems possibly endangered, the Bundesbank will hardly ever approve of an operation for which its permission is necessary<sup>(47)</sup>. In fact, the unlucky applicant is entitled to sue the central bank before an administrative court and may there require a reversal of a negative decision. But he will seldom go to the courts, since a judge would only be able to respond positively to his wishes in cases of gross failures or misinterpretations, if the central bank clearly went wrong<sup>(48)</sup>. In theory, such an event may indeed be imagined, as central bank officials are human beings, too, but in practice, it will never happen.

4.3. Sec. 3 of the Currency Act, especially its first sentence, was intended to prevent a replacement of the Deutsche Mark in business

<sup>(43)</sup> Ibid., sec. 27 (1) 4.

<sup>(44)</sup> Cf. my study on *Rechtsgestalt, Regelungstypen und Rechtsschutz bei grenzüberschreitenden Investitionen* (1948) at pp. 474 et seq.

<sup>(45)</sup> Cf. HAHN and GRAMLICH (n. 41) at p. 150.

<sup>(46)</sup> See WAHLIG (n. 1) at p. 1054.

<sup>(47)</sup> LINDEN (n. 23) at p. 674.

<sup>(48)</sup> For more details, see my forthcoming commentary on *Bundesbankgesetz — Währungsgesetz — Münzgesetz* (to appear in 1988), annotations to sec. 3 of the Currency Act.

transactions by other, foreign currencies, at least in relations between German residents. But it is the second phrase which should be looked at with even greater interest today. The reason is that the nominalism which is often expressed by the equation  $\text{Mark} = \text{Mark}$  <sup>(49)</sup> has always been declared by courts, politicians as well as by legal scientists to be a fundamental rule of (German) monetary law and also of the country's budget, economic and tax policies <sup>(50)</sup>. Thus, the Bundesbank has been rather rigorous in the area of controlling payments and capital transactions. Thus far, it has never permitted any value clauses arguing those obligations to be likely to further inflationary trends <sup>(51)</sup>. This holds true in respect of monetary obligations towards residents and non-residents.

4.4 The Bundesbank has always taken the position that the ECU is not "another *currency*" in the meaning of sec. 3 of the Currency Act <sup>(52)</sup>. According to the State theory of money, there is an evident need for a legal rule (of a State or perhaps also of an intergovernmental organization which had been the transferee of monetary powers) to introduce or modify a monetary system on the basis of a statutorily determined unit of account <sup>(53)</sup>. Even if the ECU has some features of "money", and its "official" use may fulfil all essential functions of a currency, there is nevertheless neither today nor will there be in the near future a genuine European monetary system in the centre of which there had to be an institution similar to a national central bank <sup>(54)</sup>. Only such a bank would be able to issue ECU-denominated banknotes and/or coins. Until now, no Community organ would be authorized to act in this way. Also, after the coming into force of the Single European Act — July 1, 1987 —, the monetary sovereignty of the EC member countries still remained with each of those States although this instrument

<sup>(49)</sup> Cf., e.g., BRAUN, *Vertragliche Geldversicherung im grenzüberschreitenden Wirtschaftsverkehr* (1982) at pp. 21 et seq.

<sup>(50)</sup> See, in particular, the contribution by BENDA, the former president of the German Federal Constitutional Court, in: HAHN (ed.), *Das Geld im Recht* (1986) 9 et seq., at pp. 12 et seq.

<sup>(51)</sup> Cf. LINDEN (n. 23) at p. 674; FRICKE, in: *Jura 1987*, 591 et seq., at pp. 595 et seq.

<sup>(52)</sup> See, most recently, BAUER (n. 1) at p. 603; WAHLIG (n. 36) at p. 9.

<sup>(53)</sup> Cf. MANN, *The Legal Aspect of Money* (4<sup>th</sup> ed. 1982) at pp. 13 et seq.

<sup>(54)</sup> For a view which requires at first a modification of the German constitution before a European central bank could be established, see my study in: *Zeitschrift für das gesamte Kreditwesen* 1985, 334 et seq.; for an opposite view, cf. WAHLIG (n. 1) at p. 1056.

established closer links between the States' residual powers and (primary) Community law <sup>(55)</sup>. So if the Federal Republic of Germany wanted to treat the ECU "as" another domestic or "as" a foreign currency, there had to be a modification of (sec. 1 of) the Currency Act before this step could lawfully be taken. Until then, the German central bank is bound to abide by the valid law which does only allow a treatment of the ECU "like" a currency and, it being composed of Deutsche Marks and of 9 foreign currencies, "as" foreign.

4.5. The payment of ECU obligations in cash, the only way German law opens for a regular operation <sup>(56)</sup>, is possible either in one or more foreign currencies or in Deutsche Marks but not in ECUs since there are no chattels which are or could be denominated by reference to this unit of account <sup>(57)</sup>. The actual mode of payment always depends upon the contractual choice of the parties. A "genuine" foreign currency obligation may be subject to the conditions of the first sentence of sec. 3 of the Currency Act but only if all contracting parties are West German residents. No such approbation procedure will be needed if at least one non-resident participates in the operations at issue. If the payment, however, is duly to be made in Deutsche Marks, then sec. 3, second phrase, has to be applied, since the amount of this debt will be determined by the development of the rates of the other basket currencies <sup>(58)</sup>.

4.6. The central bank's Notice no. 1010/87, dated June 16, 1987 and entered into force the same day, can only be understood wholly by referring to two former statements which dealt with similar issues <sup>(59)</sup>. As the practice of licensing certain transactions or even generally allowing other ones became well-known over many years, the Bundesbank did not want to change its mode of treating money obligations in

<sup>(55)</sup> A much deeper analysis may be found in: SIEBELT, *Der juristische Verhaltensspielraum der Zentralbank* (1987) at pp. 119 et seq.

<sup>(56)</sup> Cf. sec. 362 of the Civil Code (*Bürgerliches Gesetzbuch*) and the leading commentary work to this Code, founded by PALANDT, in comments (no. 3) to this article.

<sup>(57)</sup> Cf. HAFKE (another leading official of the Bundesbank), in: *Neue Wirtschaftz-Briefe*, section 21, pp. 907 et seq., at pp. 909 et seq.

<sup>(58)</sup> BAUER (n. 4) at p. 604.

<sup>(59)</sup> The latest Notice was published in: *Bundesanzeiger* no. 112 of June 24, 1987, p. 7472. For the Notice of 1961, see supra, n. 3. A third Notice containing principles of deciding upon licensing applications filed under sec. 3 of the Currency Act and dated June 9, 1978, can be found in: *Bundesanzeiger* no. 109 of June 15, 1978, p. 4.

respect of the incurring of ECU debts. Thus, it issued a General License encompassing all more important banking operations <sup>(60)</sup> which means that there is no more need for a special license application in those cases. This General License does not, however, extend to:

- the borrowing in ECU from non-Banks,

and

- the launching of ECU-denominated bonds by German residents <sup>(61)</sup>.

On the other hand, such securities may be purchased or sold freely, whenever they are issued by non-residents, whether they are denominated in ECU or in any foreign currency <sup>(62)</sup>.

Border-crossing transactions concerning goods and services as well as follow-up operations in connection with those import and exports are still subject to a licensing procedure. If an applicant seeks permission for a single or for a group or type of these transactions from the regional administrative offices of the Bundesbank, the *Landeszentralbanken* — their name notwithstanding, these are federal, not State institutions <sup>(63)</sup> —, he can in general expect to get a positive answer to his demand. Although it seems that until now, only few licensing procedures for (already permissible) foreign currency obligations were pending, this could be otherwise in the case of ECUs <sup>(64)</sup>.

## **5. Equal treatment of ECU and foreign currency obligations — Some remaining legal questions**

5.1. Even if the ECU is not (yet?) a “currency”, its qualities may justify treating it as a “foreign” means of payment/settlement in the same way as foreign currencies. The Bundesbank did not, however, opt for a strict classification of ECU obligations for the purposes of its latest Notice but rather held that either only the first sentence of sec. 3 of the Currency Act or also its second one might be applicable <sup>(65)</sup>. As far as the scope of the General License extends, or in the case of a

<sup>(60)</sup> An English translation of the Notice is published in the Monthly Reports (n. 7) at p. 37.

<sup>(61)</sup> Cf. BAUER (n. 4) at pp. 605 et seq.

<sup>(62)</sup> See WAHLIG (n. 38) at p. 11.

<sup>(63)</sup> They must also be distinguished from the former legally independent institutions of the same name (see supra, n. 11).

<sup>(64)</sup> Cf. LINDEN (n. 23) at pp. 675 et seq.

<sup>(65)</sup> BAUER (n. 4) at p. 604; HAFKE (n. 57) at pp. 910 and 912.

special permission granted in response to an application, the Bank's approval includes both aspects if relevant.

5.2. From a legal point of view, it is the way which lead to the results of the latest liberalization that is questionable rather than the aim of more freedom in itself. Two aspects might need a more careful analysis. First of all, the German Federal Administrative Court (*Bundesverwaltungsgericht*) in 1973 had to decide upon the scope of the authority given to the Bundesbank by the second sentence of sec. 3 of the Currency Act. The Berlin judges held that the central bank was merely impowered to grant exceptional permissions in single cases <sup>(66)</sup>. The bank would act unlawfully, however, if it tried to modify or correct the prescriptions of the Currency Act itself. Now, it seems rather doubtful whether the latest Notice took this judicial opinion into account quite sufficiently, although the announcement of June 1987 included an express reservation concerning the possibility of further alterations without any restriction. Since the General License is evidently dealing with a lot of operations which are, moreover, permitted for a group of persons hardly narrower than the whole of German nationals, and does so in a rather general and abstract way, it looks like a legal norm and not at all like an administrative act <sup>(67)</sup>. According to art. 80 (1) of the West German Basic Law (*Grundgesetz*), regulations ranking below statutes enacted by the legislature must necessarily be issued in the form of a governmental decree <sup>(68)</sup>, i.e. only the federal (or State) government(s) or federal ministers are entitled to act in that way. Its special constitutional status derived from art. 88 of the Basic Law notwithstanding, the Bundesbank is part of the executive power. It therefore could only act by way of decree if it was particularly authorized by the federal government to do so. But such a sub-delegation took place for one single task in the area of foreign economic law, and nowhere else <sup>(69)</sup>.

5.3. Furthermore, the "General" License was granted by the Central Bank Council. The competence of this organ according to sec. 6 (1) of

<sup>(66)</sup> See Decisions of the Federal Administrative Court, vol. 41 (1973) pp. 1 et seq., at p. 7.

<sup>(67)</sup> The opposite view was proposed by HAFKE (n. 57) at p. 911.

<sup>(68)</sup> A second form of infra-statutory law-making, the issuing of *Satzungen*, may be only chosen for regulating the internal affairs of a public body. Therefore, its use will be taken into account almost exclusively by bodies corporate, e.g., by towns or villages.

<sup>(69)</sup> The text refers to sec. 27 (1) 5 of the Foreign Economic Law.



the Act on the German Federal Bank (Bundesbankgesetz) primarily consists of an authority to determine the monetary and credit policy of the bank as a whole <sup>(70)</sup>. The implementation of its decisions as well as the administration of the Bundesbank and other relevant laws in general is, however, attributed to other bank organs, namely either to the *Direktorium* (Board of Directors) or to the chairmen of the *Landeszentralbanken* (secs. 7 et s. Bundesbank Act). Notice no. 1010/87 expressly provides for the competence of the last-mentioned group of officials to decide upon license applications <sup>(71)</sup>. As far as the Bundesbank Act does reserve all transactions and operations with local and regional credit institutions exclusively for the State central banks as main administrative offices of the Bundesbank, issuing a "General" License by another, albeit the supreme organ, will necessarily restrict lawful powers of the *Landeszentralbanken*.

The Central Bank Council is, however, only entitled to delimit the competences between the other two bank organs (sec. 5 of the Act) within the framework of the Bundesbank Act. Was it therefore indeed legally enabled to be as liberal as it was when it issued the latest <sup>(72)</sup> General License?

5.4. Any act of the central bank being an emanation of "public power" within the meaning of art. 19 (4) of the Basic Law is subject to judicial review. Nevertheless, it can be attacked only by such a person whose legal position might have been worsened because of the bank's behaviour. Thus, there hardly seems to be any serious danger for the liberalization since it left only winners. A German administrative court might call into question the legality of the Bundesbank Notice only in the rather remote case when an application would be denied. But as the reasons for this attitude would not be based upon the Notice but on the Currency Act's authority itself, a judicial statement about the positive content of the Notice would be merely an *obiter dictum*. More often, civil courts may have to deal with the issues described above since a creditor will have to investigate the need for a license and also whether it has already been granted before he will file a suit with some hope of success. It might be otherwise if the creditor thinks sec. 3 of the Currency Act not to be applicable at all. Be that as it may, ordinary judges are bound by the central bank's decision (only) if and

<sup>(70)</sup> According to sec. 6 (1) of the Bundesbank Act (supra, n. 5).

<sup>(71)</sup> See the second phrase of its no. 2.

<sup>(72)</sup> An earlier issue of the principles mentioned above (at n. 59) was held to be lawful by the Federal Administrative Court in its 1973 judgment (see supra, n. 66).

insofar as the Bundesbank issued or denied a license in a single case and as long as this administrative act has not been reversed by an administrative court. This judicial organ is not entitled, however, to grant the permission instead of the central bank. Its judgement may merely open the way for a new, lawful decision by the bank. In practice, most courts will bow to the superior expert knowledge of the central bank in monetary matters and therefore confirm its stand <sup>(73)</sup>.

## 6. Conclusion

The decision of the West German central bank permitting the “private use of ECUs for a broader area than before” found mostly supporting commentaries in banking and economic circles although (or because?) it lead to a mere approximation of its treatment of foreign currencies. Thus, in the case of minimum reserve obligations, only the foreign currencies element of ECU debts will be taken into account when calculating the extent to obligations not being subject to this charge <sup>(74)</sup>. So far there is indeed no different treatment. But the Bundesbank has not engaged in any ECU operations in relation to credit institutions until now. It also seems doubtful whether bills of exchange and cheques denominated in ECUs are really promising the payment of a *certain* sum of money <sup>(75)</sup>. Moreover, according to the German Commercial Code, accounting or book-keeping in ECU only (and not also in Deutsche Marks) is illegal <sup>(76)</sup>. It might be rather keen to bet on a more than peripheral use of “private” ECU’s within the Federal Republic of Germany. But such a progressive development will be crucial if the first step (by the central bank) is to be followed by more actions, not the least stemming from the federal legislative organs <sup>(77)</sup>.

<sup>(73)</sup> As did also the Federal Administrative Court in a second decision taken in 1973 (cf. Decisions (n. 66) pp. 334 et seq.).

<sup>(74)</sup> Cf. HAFKE (n. 57) at p. 914, commenting the Bundesbank Notice no. 5007/87 of June 16, 1987, published in: *Bundesanzeiger* no. 114 of June 26, 1987, p. 7645.

<sup>(75)</sup> See the rather cautions approach of HAFKE, in: *Wertpapier — Mitteilungen* 1987, 1409 et seq.

<sup>(76)</sup> Cf. sec. 244 of this Code, and also HAFKE (n. 57) at p. 914.

<sup>(77)</sup> Although the Currency Act was not enacted by the Federal Diet, the German parliament could modify this law. This view is strongly supported by a 1982 judgment of the Federal Constitutional Court dealing with another rule put in force by the Military Government (see Decisions of the F.C.C., vol. 62 (1983) 169 et seq.).