

Willem F Duisenberg: The euro as a catalyst for legal convergence in Europe

Speech by Dr Willem F Duisenberg, President of the European Central Bank, on the occasion of the Annual Conference of the International Bar Association, held in Amsterdam, on 17 September 2000.

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Ladies and gentlemen,

It is a great pleasure to deliver today the opening speech of the Annual Conference of the International Bar Association here in Amsterdam. The Netherlands is, of course, well-known for its national folklore of which you just witnessed an example. However, in legal circles this country is also known as the birthplace, in the year 1583, of the founding father of the modern law of nations and a truly European citizen: Hugo de Groot or, by his Latin name, Grotius. Interestingly, Grotius already dealt in his days with the challenging question as to where, on the one hand, unification of law across borders is desirable and where, on the other hand, national differences, often based on cultural diversity, stand in the way of such unification. Nowadays, this is still one of the core questions in the creation and further elaboration of a new corpus iuris monetariae for the euro. I shall enter into the details of this new body of monetary and financial law later. Let me first highlight some historic events for those of you who have come from afar and may, thus, be less acquainted with the main features of Economic and Monetary Union.

As a crown on the internal market of the European Union (EU), the euro came into existence on 1 January 1999. This occurred through the irrevocable fixing of the exchange rates of the currencies of those 11 EU Member States which qualified not only economically, but also legally, for the adoption of the euro. These Member States are: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. Greece will adopt the euro as from 1 January 2001, while Denmark will hold a referendum on the adoption of the euro on 28 September 2000. Sweden and the United Kingdom did not introduce the euro in their respective countries, but this may change, of course, in the future.

The birth of the euro was preceded, on 1 June 1998, by the establishment of the ECB, the European System of Central Banks (ESCB) and the Eurosystem. The ESCB is composed of the ECB and the 15 national central banks (NCBs) of all EU Member States. The Eurosystem is composed of the ECB and the 11 NCBs of those Member States which have adopted the euro. The six members of the ECB's Executive Board and the Governors of these 11 NCBs together form the Governing Council. This is the Eurosystem's highest decision-making body, which, among other things, has adopted the Eurosystem's regulatory framework.

In my speech today, I will elaborate upon how the ECB, but also the Community legislator, national legislators and market participants have struggled with the same question which Hugo de Groot already addressed in his days in another context: in view of the introduction of the euro, where is, on the one hand, unification of law desirable and where may, on the other hand, national differences continue to exist? Or, to remain closer to the title of my speech: where, and to what extent, has the euro acted as a catalyst for legal convergence, and where is further convergence appropriate?

As a preliminary remark, the introduction of the euro and the globalisation of the world's financial markets are clear incentives for a development towards "one market, one currency, one law". There are, however, at least two important impediments for such law to emerge in the near future.

First, there are the Community law principles of subsidiarity and proportionality. Subsidiarity requires that the Community legislator only adopts legislation if this is necessary to achieve the Community's objectives. Proportionality requires that the type of legal act to be adopted be proportionate, ie not too heavy, in relation to the objectives to be achieved.

Second, the EU consists of as many different legal systems as there are Member States, although there are, of course, similar types of legal systems of common orientation (Roman law, Anglo-Saxon law or

the Scandinavian systems). Recognition of the peculiarities of such legal systems in accordance with the principles of subsidiarity and proportionality leads automatically to legal diversity.

In addition, for the Eurosystem it is also important to mention that system-related tasks are executed in a decentralised fashion through the NCBs in their respective jurisdictions. For example, with regard to the Eurosystem's single monetary policy, the ECB's decision-making bodies decide on such policy, but the NCBs execute monetary policy operations in their respective jurisdictions.

All in all, a system of Community law has evolved, also for the euro, which is dominated, in a spectrum from high to low legislative influence, by notions such as unification, harmonisation, approximation, implementation and self-regulation. The road towards unification, if achievable at all, is of an evolutionary nature, where each legal action is determined on a case-by-case basis. This is not a bad development. After all, unification is not a goal in itself. Legal action should have a well-balanced relation to the objectives to be achieved. Particularly in the area of monetary and financial law, we have created such a well-balanced legal structure which ensures the fulfilment of the Monetary Union's objectives at present.

Let me, without the pretension of being exhaustive, briefly touch on several aspects of this new corpus iuris monetariae and explain how we, at a Community level, have tried to strike a balance between unification on the one hand, and differentiation on the other.

Institutionally, legal convergence has taken place with regard to the statutes of the EU NCBs. The EU Treaty prescribes that the ESCB NCBs are independent and that the Eurosystem NCBs are fully integrated into the Eurosystem. This requires the adaptation of statutes of NCBs. However, the legal requirements for central bank independence and integration in the Eurosystem are not precisely defined in the Treaty. Therefore, the ECB and its predecessor, the European Monetary Institute, have done so themselves in their so-called Convergence Reports. These Reports assess whether a Member State qualifies for the introduction of the euro and they also contain a chapter on legal convergence. They develop features of institutional, personal and financial independence. In addition, they identify areas in which statutes of NCBs are likely to require adaptation in view of the integration of NCBs in the Eurosystem. These Reports thus gave guidance to national legislators in the process of adapting such statutes. As a result, new statutes of NCBs have come into existence, which, as far as Eurosystem-related tasks are concerned, often contain very similar provisions. Yet, the Treaty does not prescribe harmonisation of statutes and NCBs may perform own, non-Eurosystem related tasks, as long as such tasks do not interfere with the objectives and tasks of the Eurosystem. Overall, statutes of NCBs therefore still differ considerably from one another. In conclusion, there has not been harmonisation, but rather an approximation of law in this area.

Operationally, legal convergence has taken place as a result of the adoption of the ESCB's regulatory framework. This framework was prepared by the EMI and adopted by the Governing Council of the ECB shortly before the introduction of the euro.

The ESCB's regulatory framework consists of a variety of legal acts. One part is intended to be generally applicable and binding on market participants across the euro area. Another part is intended to govern the internal relationships between the components of the Eurosystem or the ESCB, as the case may be. An example of the former are ECB Regulations on minimum reserves, statistical information and ECB sanctions. They apply to all parties concerned across the euro area. An example of the latter are ECB Guidelines. These are addressed to, and binding on, Eurosystem NCBs. Usually they require implementation in those legal acts which such NCBs apply to govern the legal relationship with their counterparties. These acts implementing the ECB's legal acts may be of a regulatory or a contractual nature or a mixture thereof. This depends on the legal traditions of the jurisdictions in which they are adopted. In the former acts, the ECB Regulations, the point of gravity with regard to their application lies clearly with the ECB. In the latter, the acts implementing the ECB's rules, it lies clearly with the NCBs. In other words, in the first case there is unification of law, in the latter approximation.

The justification for this balanced approach is the following. Obviously, implementation of a single monetary policy for the euro area requires, on the one hand, a single set of rules established at, and applied by, the centre, the ECB. On the other hand, in view of the decentralised execution of such

policy, there is a need for rules, which are tailored towards each specific jurisdiction in which the actual operations with counterparties take place. Of course, the Eurosystem has established mechanisms to ensure that a level playing-field across the system for system-related tasks is maintained in order to avoid regional distortions in the implementation of the single monetary policy.

Clearly, the ECB is not the only party steering towards a level of legal convergence which is needed to reap the benefits of the introduction of the euro. The Community legislator, and in particular the EU Council, has also passed legislation in a variety of areas relating to the euro.

For example, two Council Regulations have been adopted on the introduction of the euro. These Council Regulations cover topics which, in view of the introduction of the single currency, need to be dealt with in a uniform manner. They cover issues such as the continuity of contracts, conversion rates, rounding, the substitution of the euro for the currencies of the participating Member States, transitional provisions and the introduction of euro banknotes and coins as from 1 January 2002. Since these Council Regulations are generally applicable, they are an example of a unification of law. They do not preclude, however, the adoption of auxiliary legislation at a national level.

In addition, the Community legislator has adopted Directives, in the area of payment and securities settlement systems for example, which apply to scriptural payments in euro. Since such Directives require implementation, this may be regarded as an example of an approximation of law.

Finally, the Community legislator has issued several Recommendations on topics such as banking charges for the conversion to the euro, dual display of prices and other monetary amounts, and collector coins, medals and tokens. Since such Recommendations are non-binding, they may be considered as an incentive for self-regulation, either by national legislators or market participants.

Legal convergence is not the monopoly of legislators. Market participants may contribute as well. In an increasingly globalised financial world, they do fortunately make a considerable contribution. There are various representative organisations of market participants which, in view of the introduction of the euro and the resulting integration of financial markets, have adopted, or are in the process of adopting, standard market documentation for their transactions. A good example is the European Master Agreement (EMA) of the European Banking Federation. The EMA aims to consolidate into a harmonised standard various master agreements used within the euro area and several neighbouring countries, in particular for repurchase transactions and securities lending. At the same time, it allows that the parties' preferences with regard to the applicable law, jurisdiction, contractual language and specific national legal requirements may be taken into account. The ECB welcomes such market initiatives of legal convergence.

Legal convergence is spreading throughout Europe, crossing the borders of the EU as they stand at present. Thirteen central and eastern European countries have applied for membership of the EU. They range, geographically, from the Baltic States in the north to Turkey in the south. A precondition of membership is that the accession countries implement the so-called *acquis communautaire*, ie the around 80,000 pages of Community law provisions which, among many other areas, include legislation on the euro as well. It will be interesting to see how the accession countries enrich Europe's legal landscape. When implementing the Community's *acquis* they may, on the one hand, profit from already well established structures, which could lead to a fairly high level of harmonisation. However, taking into account the cultural diversity of the countries concerned, considerable legal differences may, perhaps, not be ruled out.

In any case, the accession countries will have to make their NCBs independent and accommodate the integration of their NCBs in the Eurosystem. It is important to note that accession to the EU and the introduction of the euro will, in all likelihood, not coincide.

From the ECB's perspective, it is furthermore important that the legislation of the accession countries in the areas of banking, securities markets, payment and settlement systems and collateral is made compatible with EU standards. After all, under the rules of the single financial passport, membership of the EU implies for financial institutions in the accession countries that they may obtain access to Eurosystem facilities such as monetary policy operations and payment systems.

This is a daunting task for the accession countries and the ECB stands ready to assist them, in close cooperation of course with all the other EU authorities involved and in particular with the Commission. Indeed, the ECB has built up extensive experience in delivering opinions on draft legislation in its field of competence where the Community and national legislators have to consult the ECB. It goes without saying that the accession countries may profit from the ECB's experience in this field.

All in all, the birth of the euro has triggered tremendous legal activity, not only for legislators specifically, but also for market participants generally. I am happy, and frankly also proud, that such activity has been successful. The ESCB's regulatory framework is an important step towards legal convergence in Europe and has proved to function well. Moreover, I am not aware of any legal derailments resulting from the introduction of the euro. An interesting example of the lack of legal problems is the continuity of those contracts in which monetary obligations are denominated in currencies which are now sub-units of the euro. The continuity of such contracts after the introduction of the euro inside and outside the EU was the subject of extensive legal studies. However, in the end, and perhaps also as a result of a provision in the EU Council's euro Regulation, legal problems did not arise in this area.

This does not mean that there is no need for further legal convergence. On the contrary, having built a solid house for the euro, refinements in its furbishment remain, of course, a matter for attention. Such refinements will no doubt follow the evolutionary path as described earlier, with attempts being made to strike a balance between the need for unification and the wish to maintain national differences.

As far as the statutes of NCBs are concerned, they may perhaps continue to converge over time, but there is no urgent need for further adaptations of the statutes of EU NCBs at present. The situation is, of course, different for those NCBs which are not yet members of the Eurosystem and the NCBs of the accession countries.

As far as the ESCB's regulatory framework is concerned, this will be subject to legal fine-tuning as and when the need arises. Since Guidelines are the backbone of the Eurosystem and may be changed overnight without difficulty, such fine-tuning - should it be necessary - will be relatively straight forward. Their implementation at a national level may, however, take more time dependent on the national practice of each NCB.

However, in a broader context there is still a lot of legal activity to be accomplished, particularly as far as the further integration of the financial markets is concerned. In this context, two initiatives merit a specific mention.

First, the EU Council has adopted a Financial Services Action Plan. This Plan provides for an ambitious legislative programme, which is envisaged to be completed by the year 2005.

Second, a Group of Seven Wise Men has been established which, under the chairmanship of my predecessor at the EMI, Alexandre Lamfalussy, has been mandated to develop recommendations on measures, including legal measures, to foster the further integration of the EU securities markets. As you can read in the newspapers on an almost daily basis, consolidation of the securities industry gives rise to a host of challenging questions. In the legal field, it will be particularly interesting to see where the Lamfalussy Group will recommend legislative action and where it will consider self-regulation by the securities industry to be an appropriate way forward.

The ECB welcomes such initiatives to take full advantage of the introduction of the euro.

Generally, the opportunities created by the euro in combination with technical developments such as e-banking and e-commerce will continue to change the landscape of the financial markets inside and outside the EU and create an incentive for further legal convergence.

Ladies and gentlemen, to conclude, as an economist I am happy to see that the introduction of the euro has acted as a catalyst for legal convergence inside and outside the EU, since legal convergence contributes to the smooth and efficient functioning of financial markets. I acknowledge, on the one hand, that national differences, based on cultural diversity, will continue to exist. However, there is no doubt in my mind that the introduction of the euro, the development of new technologies and natural

tendencies in market behaviour will continue to be important incentives for further legal convergence. In my view, the IBA is an excellent forum to contribute to the establishment of the appropriate legal structures, and I welcome the attention which several IBA Committees pay to this topic. To end with a metaphor on the waterworks for which your host country is so well-known: water will find its way naturally through paths with the fewest obstacles, but man-made dykes may channel this to the benefit of mankind.