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Legal Tender in the Euro Area

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Contents

1 Overview 1

2 Foundations 4

2.1 Currency, money, cash, and legal tender 4
2.2 Introduction of the euro 9
2.3 Qualification of the euro 10
2.4 Distribution of competences 12

3 The euro area 15
4 Euro banknotes 19
5 Euro coins 24
6 Legal tender 28

6.1 Main features 29
6.2 Euro banknotes and coins 31
6.3 Substitutes 32
6.4 Restrictions of the use of legal tender 36

6.4.1 The development 36
6.4.2. Conformity with the monetary law of the EU 38
6.4.3. Due process and civil rights 45

7 National currencies within the euro area 47

7.1 Development 47
7.2 Unilateral acts 49

7.2.1 Exit or withdrawal from the euro 49

7.2.1.1 Lack of an entity to leave 50
7.2.1.2 No partial exit following Article 50 TEU 53
7.2.1.3 No recourse to the law of nations 55

7.2.3 Exclusion or revocation af admittance to the euro 61
7.2.4 Parallel currency 64

7.3 Consensual arrangements 65

8 Abolition of cash 68

8.1 Advocates 68
8.2 Consequence: Restricting the possession of precious metals or foreign currency ... 68
8.3 Legality 73

9 Fighting counterfeiting 75

9.1 Administrative procedures 75
9.2 Training programme 78
9.3 Repression 79
9.4 Reports 81

1 Overview[1]

With the increasing pressure to abolish cash and the moves to restrict its use the regulation of legal tender in the primary law of the EU has gained enhanced attention. The core provision is Article 128 TFEU which contains the rules on the issue of banknotes and coins. It is supplemented by Art. 16 Statute, treating banknotes as well with minor deviations from Article 128 TFEU. It is part of the institutional setup of the monetary authorities and their competences, objectives, tasks, and powers[2] in Articles 127-132, 282-284 TFEU. 1

Para 1 of Article 128 TFEU governs the issue of euro **banknotes** and vests in them the status of **legal tender** within the Union; **only** banknotes having this quality (→ para 31-35). It is part of the monetary policy, which has been conferred in total to the Union, Art. 3.1 (c) TFEU. It is the function of para 1 to transfer the competence in view of the issue of euro banknotes **within the EU** to the **European Central Bank (ECB)**. Both clauses are applicable, however, only for Member States whose currency is the Euro. 2

Para 2 governs the issue of euro coins. The power to issue coins has remained the **sole competence** of the **Member States** (→ para 12, 25).[3] Systematically, this clause has to be interpreted as an **exception** from the general rule of Article 3.1 (c) TFEU. 3

2 Foundations

2.1 Currency, money, cash, and legal tender

The terms currency, money, cash, and legal tender have different meanings and have to be distinguished in a legal context[4] even if their usage in economics or politics is much more blurred. 4

An official definition of the term **currency** by the Eurosystem does not exist. Here it shall be understood as the object produced by the monetary system of a sovereign entity as designed or adopted by its legal order. In a narrower sense, the monetary instruments issued 5

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[1] Parts of the paper are taken from Siekmann (2017a and 2017b) but all are expanded and deepened with enhanced references.

[2] For the distinction see Siekmann (2016b). The primary law carefully eschews the term "mandate" which has almost universally suppressed the precise and differentiating statutory terminology.

[3] Smits (1997), p. 210; Freimuth, in Siekmann (2013), Art. 128 TFEU para 87; unclear Manger-Nestler (2008), p. 265.

[4] Freimuth, in Siekmann (2013), Art. 128 TFEU para 4.

by such a system, like notes and coins, are called currency as well.[5] As they are not produced or backed by a (monetary) authority, and definitely not seeking it, "digital currencies" (cybercurrencies" or "cryptocurrencies"), e.g. bitcoin, ripple, Ethereum, or IOTA, are no currencies in the legal sense of the word.[6] They were distinctively designed as a private, decentralized alternative aloof from any (central) authority. If they are considered to be money is a different question (→ para 6).[7]

The term **money** is widely used for anything that is generally accepted as money[8] or somewhat more specific: everything that fulfils the functions **means of payment**, **unit of account**, and **store of value**.[9] This might be practical for economic analysis but is neither consistent with the evolution of money[10] nor with the treatment of monetary claims in most private law codifications. Both the **origins** of **coins** in the 7th century B.C.[11] and of **banknotes** in the 6

[5] Kien-Meng Ly (2014), p. 589, however without clear delineation; for different definitions see Herrmann (2010a), p. 73 et seq.

[6] Kien-Meng Ly (2014), p. 589; for Bitcoins: German Federal Ministry of Finance, BT-Drucks. [Official *Bundestag* prints] 17/14530, 41.

[7] In some respects they function like cash, see Kaplanov (2012), p. 173.

[8] Deutsche Bundesbank (2015), p. 12; in favour of a merely functional view of money also from a legal perspective Simitis (1960-1961), p. 416, 427, emphasizing the characteristic of money as value in itself Simitis (1960-1961), p. 414 et seq.; in this direction also Connors/Davies (2016), p. xxi: "... two salient facts: "one, that money is not just a means of exchange but has commodity value and is of intrinsic value in itself; and, two, that money does not have to be made up of anything of value, in that accepting it has value in itself is enough for the money to be used in exchange for goods".

[9] See e.g. Mishkin (2016), p. 96–98; Auerbach & Kotlikoff (1998), p. 172 et seq. The legal system does not provide a uniform term of money, see Simitis (1960-1961), p. 408, also contradicting *Mann,* who differentiates between the abstract term of money and a concrete species of money (p. 409).

[10] In-depth analysis by Grierson (1998), p. 9–11, 23: Both the medium of exchange function and the measure of value have to be judged as decisive but not the function store of value. Unless the commodities used for exchange bear a fixed relationship to a standard we would, however, still only deal with barter. He considers the standard of value function as the decisive criterion for money (p. 13, 15, 20). In China "pre-coins" of base metal were used much earlier but "round" coins evolved there probably at the same time as in Asia Minor, see Davies (2002), p. 57, 59.

[11] Martin (1996); Laum (1924), p. 3 et seq.; Grierson (1978), p. 2; accepted in modern legal publications, see e.g. Herrmann (2010a), p. 11 et seq.; Omlor (2015), p. 2297 et seq.

17th century[12] point to the acts of sovereigns.[13] Even the hypothesis that their origin is at least as much the resolution from a religious or societal obligation (guilt, wergeld, bride-wealth) is now increasingly accepted.[14] Even the "pre-coins" or "tool-coins" were "state authenticated" by an inscription they wore.[15] In the beginning, also banknotes were not generally accepted means of payment; at least not until this was ordered by the government. They were predominantly considered an instrument to raise cheap credit; mainly for the sovereign.[16] It was also the ruler who stipulated that contributions and taxes were discharged using papers that had been issued by the authorities, and not only gold or silver coins.[17] At this stage, monetary instruments, which were accepted by cashiers of the state, can be denoted as money in the legal sense of the word. However, private persons were not legally obliged to accept them. At a later stage, when they had been given the status of legal tender, they had to be accepted for transactions among private persons to disburse monetary claims (→ para 28 et seq.).[18] Keeping this in mind, *Knapp* was right in stating that "money is a creation of the legal system".[19] This position has been challenged many

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[12] Siekmann (2016a), p. 500–504; see for the – earlier – development in China Davies (2002), p. 181–184; Connors/Davies (2016), p. 186 et seq. A picture of an – early – Chinese note is displayed in Deutsche Bundesbank (2015), p. 15.

[13] Grierson (1998), p. 5 et seq. 23: "not to be sought in the market"; Davies (2002), p. 91; Connors/Davies (2016), p. 94 et seq.

[14] Mitchel Innes (1913), p. 397 et seq., who considered coins at their origin to be mainly tokens or tallies in the hand of a creditor to prove a debt, for example of a buyer who had received a good in a sale (p. 395 et seq.); Laum (1924), p. 3 et seq.; distinctively Grierson (1978), p. 7, 12–19: "notion of value", elaborating extensively the legal, linguistical and ethnological foundations, basically to prevent retaliation and bloodfeud or to compensate for a loss; Martin (1996), p. 264, 270, 273, stressing the fulfilment of fiscal needs of the polis due to the lacking of "a central authority to compel contributions or labour through the threat of force"; Davies (2002), p. 1, 88.

[15] Davies (2002), p. 57; Connors/Davies (2016), p. 58 et seq.

[16] Siekmann (2016a), p. 500, 513 et seq.

[17] See for Germany Siekmann (2016a), p. 503; for the United States Mitchel Innes (1913), p. 402, who already emphasized that "money, then, is credit and nothing but credit".

[18] Siekmann (2016a), p. 506–508.

[19] Knapp (1905), p. 1: "*Das Geld ist ein Geschöpf der Rechtsordnung; es ist im Laufe der Geschichte in den verschiedensten Formen aufgetreten: eine Theorie des Geldes kann daher nur rechtsgeschichtlich sein*." [Money is a creation of the legal system; it has appeared in history in various forms: a theory of money can therefore only be a work of legal history.]. It was, however, a now almost forgotten German law professor - at that time in Basel - who had made the same discovery using partially the same wording decades before Knapp. For the sake of academic and historical truth, it is G. Hartmann who should be credited with the "State Theory of Money", Hartmann (1868), p. 4, 7, 12, 48; (critical) review by Karlowa

times[20] without convincing reasons.[21] As a result, money in a legal sense of the word has to be equated with legal tender (→ para 28 et seq.).[22] In this sense "digital currencies" are not money.[23] Nobody is obliged to accept them and their function as unit of account and store of value is highly questionable.[24]

Legal tender is the formal qualification of an instrument of payment by an act of the competent sovereign which has to be accepted both by government entities and private persons to discharge monetary claims. The recent drive to inhibit its use or to curtail its function is highly questionable from a legal point of view (→ para 36-46). 7

The term **cash** is generally used for (domestic) banknotes and coins.[25] The exact delineation is increasingly blurred by electronic substitutes; but as long as they are not issued or endorsed by a monetary authority, they cannot be judged as cash even if they are named "cash-card" or the like. As long as coins and banknotes are – the only – legal tender the terms are equivalent. 8

(1869), p. 526, but agreeing that the recognition by the legal system is essential for the virtue of being money (at 536 et seq.); see already before him: Ravit (1862), p. 12, but less clear.

[20] E.g. Simitis (1960-1961), p. 420–422, criticizing it as an instrument of the absolute ruler never doing any wrong and a tool to legitimize takings by the monetary policy; Schumpeter (1970), p. 56; Wray (2016), p. 631–652; from a legal perspective, see: Schmidt (1997), p. 81 et seq.; Vischer (2010), p. 4, 17 et seq.; for disagreeing with the critics, see already Menger (1883), p. 176, with comprehensive citations from (ancient) history (p. 172–174).

[21] See Siekmann (2016a), p. 500–504, 508–511; ibid (2017a), p. 158 et seq. This result is also backed by numismatic research, see Grierson (1978), p. 5 et seq., 10, 19, 23: "legal status" as the "essential quality of coin".

[22] Kien-Meng Ly (2014), p. 589; Siekmann (2016a), p. 511; ibid. (2017a), p. 160, with further references; most recently accepted by Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 1; disagreeing Simitis (1960-1961), p. 410, 435, 465. A different question is, however, whether the term money is compellingly tied to a tangible object, denied by ibid., p. 412, 416, 431 et seq. with the main argument that "book money" cannot be counterfeit and the risk of insolvency of the issuer of "book money" is negligible. This was before the legislation on "bail-in".

[23] Kien-Meng Ly (2014), p. 589; Beck (2015), p. 585; Siekmann (2017a), p. 160; disagreeing: United States District Court, Eastern District of Texas, Case 4:13-CV-416, 6th of August 2013, without proper reasoning and only relying on its (possible) use as money; Case C-264/14 *David Hedqvist* (ECJ 22 October 2015) para 48–53, in respect to VAT treating "unconventional currencies" like legal tender; annotation by Beck & König (2015b), p. 869–871.

[24] Beck (2015), p. 581.

[25] Freimuth, in Siekmann (2013), Art. 128 TFEU para 5; Siekmann (2017a), p. 160.

2.2 Introduction of the euro

With the beginning of the year 1999, the last, irrevocable step towards the implementation of the monetary union had been taken.[26] The European Monetary Union entered its third stage and the euro became the official currency of the Union. The exchange rates of the old currencies towards the euro were irrevocably fixed and the euro was officially introduced in the eleven Member States which had been admitted to the euro.[27] Until euro banknotes and euro coins were introduced, the euro was only used as "book-money" parallel with the old currencies. Euro banknotes and euro coins were actually issued on 1 January 2002.[28] The Member States were allowed to use their national banknotes and coins for a transition period of six months as legal tender parallel to the new currency. Those national banknotes and coins were considered sub-entities of the euro.[29] Following Art. 49 Statute, the ESCB has to guarantee that the citizen of a (new) euro area can change their old currency.[30] To achieve this objective the national central banks of each Member State have to entertain at least one location where this is possible.[31] But also afterwards, the national central banks could exchange national currency for the new tender "according with their laws and practices".[32] This is done free of charge by the Bundesbank. The introduction of the euro in non-euro Member States follows basically the same procedure as the initial

9

[26] Decision of the Council of the European Union meeting in the composition of Heads of State or Government of 3 May 1998, O.J. L 139/30 (1998); based on: Protocol on the transition to the third stage of Economic and Monetary Union, annexed to the Treaty establishing the European Community of 29 July 1992, O. J. C 191/87 (1992).

[27] Art. 2 Council Regulation (EC) No 974/98, *on the introduction of the euro*, O.J. L 139/1 (1998); judged as no infringement of fundamental rights in Germany, German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 1877/97, 50/98 (31 March 1998), BVerfGE 97, 350 (370 f.); confirmed ibid., 3rd chamber (3. Kammer), 2 BvR 532/98 (22-6-1998), *Neue Juristische Wochenschrift* 1998, p. 3187.

[28] The details were contained in: Council Regulation (EC) No 1103/97 *on certain provisions relating to the introduction of the euro,* O.J. L 162/1 (1997); Council Regulation (EC) No 974/98 *on the introduction of the euro*, O.J. L 139/1 (1998).

[29] Art. 9, 15.1 Council Regulation (EC) No 974/98 *on the introduction of the euro*, O.J. L 139/1 (1998).

[30] Guideline ECB/2006/10 of 24 July 2006 *on the exchange of banknotes after the irrevocable fixing of exchange rates in connection with the introduction of the euro,* O.J. L 215/44 (2006).

[31] Art. 2.1 Guideline ECB/2006/10 of 24 July 2006 *on the exchange of banknotes after the irrevocable fixing of exchange rates in connection with the introduction of the euro,* O.J. L 215/44 (2006).

[32] Art. 16 Council Regulation (EC) No 974/98 *on the introduction of the euro*, O.J. L 139/1 (1998).

changeover. A **frontloading** and **sub-frontloading** of the new legal tender outside the euro area is possible[33] but has to be settled on a contractual basis as a loan.[34]

2.3 Qualification of the euro

It is a mainly theoretical question whether the euro is the currency of the EU[35] or of the combined Member States whose currency is the euro.[36] It is true that the primary law does not use the term common currency but it demands in Art. 3.4 TEU that the "Union shall establish an economic and monetary union whose currency is the euro." Since the economic and monetary union is not an entity by itself but an integral part of the EU (→ para 50-52), the **euro** has to be judged as the **currency of the Union**. 10

In addition, from the evolution of Article 128 TFEU and Article 16 Statute can be derived that, in contrast to the original drafts, the euro was eventually designed as a common currency with only *one* institution governing it. At least since the treaty of Lisbon no doubt is possible that the ECB is an institution of the EU[37] and not of the Member States or a separate institution by itself.[38] The exclusive competence of the EU in monetary policy (Art. 3.1 lit. c TFEU) also speaks against the interpretation as a combination of national currencies. This is also the opinion expressed by the German Federal Constitutional Court in its decision on the Maastricht Treaty, where it clearly sees the roots of the common currency in the European Union.[39] 11

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[33] Guideline ECB/2006/9 of 14 July 2006 *on certain preparations for the euro cash changeover and on frontloading and sub-frontloading of euro banknotes and coins outside the euro area,* O.J. L 207/39 (2006); Guideline ECB/2008/4 of 19 June 2008 *amending Guideline ECB/2006/9 on certain preparations for the euro cash changeover and on frontloading and sub-frontloading of euro banknotes and coins outside the euro area,* O.J. L 176/16 (2008).

[34] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 38.

[35] Häde, in Calliess & Ruffert (2016), Art. 282 AEUV para 38; Siekmann, in Siekmann (2013), Introduction para 32.

[36] Hahn/Häde (2010), section 23 para 59; consenting Freimuth, in Siekmann (2013), Art. 128 TFEU para 4; Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 2, but inconsistent in differentiating between banknotes and coins.

[37] Article 13.1 (2) TEU.

[38] Kempen, in Streinz (2012), Art. 282 AEUV para 3; Häde, in Calliess & Ruffert (2016), Art. 282 AEUV para 38; see also case C-11/00 and C-15/00 *Commission vs. ECB* [OLAF] (ECJ 10.7.2003) para 92, 135 et seq.

[39] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 1877/97and 50/98 (31 March 1998), BVerfGE 97, 350 (372).

2.4 Distribution of competences

The ECB has not been conferred the exclusive right to issue euro banknotes. They may and are issued by national central banks but need authorization by the ECB, Article 128.1 sentence 1 and 2 TFEU. The competence for issuing euro coins has remained with the Member States but the volume of the issue is subject to the approval of the ECB, Article 128.2 sentence 1. The difference in content and wording is telling[40] despite Art. 282.3 sentence 2 TFEU which states: "It [the ECB] alone may authorise the issue of the euro." This clause can only refer to banknotes. Otherwise it would overrule the considerably more detailed regulation in Art. 128 TFEU. In addition, it is only part of a more general description of tasks of the ECB. As the influence of the ECB on the issue of euro coins is explicitly limited to its volume, it has to be derived that it is unlimited in the process of authorizing the issue of banknotes.[41] But also regarding the issue of euro coins, specifications may be enacted by the EU, Art. 128.2 sentence 3 TFEU. Otherwise, the cross-border use as a means of payment would be jeopardized (→ para 26). 12

The relevant secondary law of the EU was partially enacted by the Commission, and partially by the ECB. The principles governing the division are not altogether translucent.[42] From para 2 of Article 128 TFEU can be derived that the (technical) specifications of the coins issued by the Member States have to be regulated by the Commission. 13

In respect to euro banknotes, the ECB is in principle competent to regulate details (→ para 12). There is, however, a discrepancy as to the extent of this competence. Pursuant the wording of Article 132.1 TFEU first indent, the competence of the ECB is restricted to make regulations enacting legal acts issued by the Council referred to in Article 129.14. In Article 34.1 of the Statute it has the competence "enacting regulations" of the Council *and* in general to the extent necessary to implement its tasks defined in the TFEU and the Statute. The German version of these clauses does not show this discrepancy. Unmistakably, both confer a general competence to make regulations to fulfil its tasks and not only to enact legal acts of the Council. In any case, the ECB is in principle bound to follow the legal acts of the EU, however with the reservation that they may not interfere with its capacity to 14

[40] Lost in the (questionable) German version, Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 24 footnote 60.

[41] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 5.

[42] Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 3.

discharge independently its tasks conferred by the primary law.[43] In regard to its exclusive competence to authorize the issuance of euro banknotes it also has the priority to enact rules on denomination and technical details of those notes.[44] The withdrawal and exchange is covered by this competence as well.[45]

3 The euro area

In effect, 19 of the 28 Member States have *introduced* the euro by now. The initial participating countries were Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain.[46] Greece was admitted a year before the introduction of euro notes and coins on 1 January 2002.[47] Slovenia followed in 2007, Cyprus and Malta in 2008, Slovakia in 2009, Estonia in 2011 and Latvia in 2014. The last country to be admitted was Lithuania on 1 January 2015. The United Kingdom[48] and Denmark[49] did

15

[43] Case C-11/00 and C-15/00 *Commission vs. ECB* [OLAF] (ECJ 10.7.2003) para 137 et seq.

[44] Zilioli/Selmayr (2004), p. 379; Selmayr, in Pechststein et al. (2017), Art. 282 AEUV para 97; referral of the discussion and opposing views; ibid., Art. 133 AEUV para 16; unclear Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 3 and 5 et seq.

[45] Superior Administrative Court of Hesse (Verwaltungsgerichtshof Hessen), 6 A 682/15 (23 March 2016); Selmayr (2012), p. 432; Kempen, in Streinz (2nd ed. 2012), Art. 128 AEUV para 9.

[46] Art. 1 first indent and Art. 2 Council Regulation (EC) No 974/98 *on the introduction of the euro*, O.J. L 139/1 (1998).

[47] Council decision 2000/427/EC in accordance with Article 122(2) of the Treaty *on the adoption by Greece of the single currency on 1 January 2001*, O.J. L 167/19 (2000); Council Regulation (EC) No 2169/2005 *amending Regulation (EC) No 974/98 on the introduction of the euro*, O.J. L 346/1 (2005); for the legislative history cf. EU Bulletin 5 – 2000, point 1.3.5: 3 May 2000: "the Commission adopts a proposal for a Council decision aiming the adoption by Greece of the single currency on 1 January 2001. On the basis of the report of the European Central Bank (adopted on 27 April 2000) and of its own 2000 convergence report, the Commission has concluded that Greece fulfils the necessary conditions for the adoption of the single currency and is proposing a Council decision abrogating Greece's derogation from its obligations regarding the achievement of economic and monetary union. The derogation would be abrogated with effect from 1 January 2001. The report (document COM(2000) 274 final) was endorsed by the European Parliament on 18 May".

[48] Protocol (No 15) *on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland*, O.J. C 326/284 (2010): "1. Unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under no obligation to do so. (…) 3. The United Kingdom shall retain its powers in the field of monetary policy according to national law."

[49] The exemption had the effect that all Articles and provisions of the Treaty and the Statute of ECSB/ECB referring to a "derogation" should be applicable to Denmark. The admission

not adopt the euro in accordance with the exemptions granted to them. Sweden refrained from continuing the process of introducing the euro,[50] although it would - on closer scrutiny - have fulfilled all the admittance requirements if it had adopted the due legislative acts.[51] This has been judged a breach of EU-law.[52] The other Member States which have not introduced the euro so far did not meet the necessary conditions for entry to the euro area, but have committed to joining as and when they meet them.

As a result, the following Member States of the EU have *not introduced* the single European currency to date: Bulgaria, Croatia, the Czech Republic, Denmark, Hungary, Poland, Romania, Sweden, and the United Kingdom. They are the now called "Member States with a derogation", Art. 139(1) TFEU.[53] 16

The term **euro area** describes the **Member States** in which the euro is **legal tender**. In addition to those Member States, the euro is used as legal tender in four other European countries on the basis of a **formal agreement** following Article 219.3 TFEU. These agreements 17

procedure of Article 140 TFEU should only be initiated at the request of Denmark, No 1 and 2 of the Protocol (No 16) *on certain provisions relating to Denmark*, O.J. C 326/287 (2010).

[50] Automatic consequence of the decision of the EU Council of 3 May 1998 and Article 121 para 1 phrase 3 TEC.

[51] It is not fully clear whether Sweden, a country without a derogation, does not fulfil the convergence criteria of Article 140(1) TFEU or intentionally avoids to take the next steps for introducing the euro. This issue is kept at low key but may be judged as "illegal", see e.g. Hartley (2014), p. 8 at footnote 33. The Commission in its Convergence Report 2000 indicates that "Greece has achieved a high degree of sustainable convergence justifying the abrogation of its… derogation." It notes, on the other hand, that there are "no grounds for changing the current status of Sweden." COM(2000) 274 final of 3 May 2000, p. 2. In its Convergence Report on Sweden 2002, the Commission noted that "the legislation in this field in Sweden is assessed not to be compatible with the Treaty and the ESCB Statute". The deficit in view of the Swedish Central Bank was confirmed in the Convergence Report 2016, p. 115.

[52] Häde (1998), p. 1998.

[53] Most provisions regulating the Monetary Union are not applicable to them, Article 139.2 – 4 TFEU, and do not confer any rights or impose any obligations on them, Article 42.1 Statute. The "Member States with a derogation" (and their national central banks) are almost completely excluded from the decision-making process concerning the euro and the actions taken by the ECB, Art. 139.3 and 4 TFEU, Art. 42.3. and 42.4. Statute.

allows them to issue euro coins: San Marino[54], Monaco[55], the Vatican[56], and Andorra[57] with their own design of one side of the coins. The right to mint euro coins is for them an important source of revenue for their budgets. Moreover, the euro is used in a number of overseas departments, territories and islands which are either part of euro area Member States or are associated with the EU. A complex interaction between national (constitutional) law and EU law, mainly Art. 52 TEU, Art. 349, and 355 TFEU on the territorial scope of the Treaties, determines whether the euro is used in such a territory or not; partially with exemptions in the primary law[58] and separate agreements with the respective Member States acting on behalf of those territories.[59]

In some third countries the euro has been introduced unilaterally as legal tender.[60] In other countries it is used only *de facto* as currency without being legal tender.[61] Quite often countries issue their own currency but peg them to the euro;[62] in Europe: Bulgaria Denmark, Macedonia, and Bosnia & Herzegovina (indirectly via the former Deutsche Mark)[63]; in Africa: Morocco, Cape Verde, São Tomé and Príncipe, the Comores, and all countries using the CFA; in the South Pacific the islands using the CFP. The euro is, however, not legal

18

[54] *Monetary agreement between the European Union and the Republic of San Marino* (C 2012/121/02), O.J. C 121/5 (2012).

[55] *Monetary agreement between the European Union and the Principality of Monaco* (2012/C 310/0), O.J. C 310/1 (2012).

[56] *Monetary agreement between the European Union and the Vatican City State* (2010/C 28/05), O.J. C 28/13 (2010).

[57] *Monetary agreement between the European Union and the Principality of Andorra* (2011/C 369/01), O.J. C 369/1 (2011).

[58] Protocol (No 18) *on France*.

[59] For details, see Hafke (2000), p. 28-33; de Sèze et al. (2011), p. 90–94, 96–99 for the communities using the euro; Siekmann, in Siekmann (2013), Einführung para 53–59; ibid. Protocol (No 17) para 6–8; ibid., Protocol (No 18) para 14, 15, 18, 20, 21.

[60] E.g. Montenegro, Kosovo, see Weenink (2004), p. 276 footnote 6.

[61] For example, in Zimbabwe, or on the British military bases Akrotiri and Dekelia on Cyprus, although the UK does not belong to the eurozone, EURO ORDINANCE 2007, Ordinance 18 of 2007 published in Gazette No. 1470 of 14 August 2007, enacted by the Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia.

[62] Such an arrangement is called a currency board if the exchange rate of the domestic currency is fixed by law to another (foreign) currency and is backed in total by reserves (precious metals, foreign currency). A famous example is the Hong Kong dollar.

[63] BAM i.e. convertible Mark.

tender there.[64] All these practices are **consistent** with the **law of nations** since no rule exists which interdicts the use of one sovereign's currency by another sovereign or foreigners outside its jurisdiction. Neither the EU as a whole nor the ECB has the right to interfere. Art. 128 TFEU **may not serve as basis for requiring a (prior) consent**.[65]

4 Euro banknotes

As has already been said (→ para 12), the ECB has *not* been granted the exclusive right to issue euro banknotes. They may also be issued by the national central banks of Member States whose currency is the euro, Art. 128.1 sentence 2 TFEU. These central banks constitute, together with the ECB, the Eurosystem.[66] They are the only institutions which command the right to issue euro banknotes. This way a **monopoly** for the members of the **Eurosystem** has been established. No other entity of the EU nor of the Member States is allowed to issue euro banknotes. 19

Since the **ECB** has the exclusive right to **authorize** the issue of such banknotes, Art. 128.1 sentence 1 TFEU, it has the **exclusive competence** to effectively control not only the volume but also all **details of the issuance**, the technical specifications of its quality and appearance, even if the notes are printed and issued, in fact, by national central banks (→ para 12, 14). In exercising this competence, the ECB has set in force several acts to regulate the details in view of euro banknotes.[67] As a result, all **euro banknotes** are **identical** and 20

[64] For more details see: Monetary and exchange rate arrangements of the euro area with selected third countries and territories, European Central Bank, Monthly Bulletin, April 2006, p. 87; European Commission (2008), p. 122. Special rules apply to some overseas territories of Member States which are not part of the territory of the EU, Article 355 TFEU; more in-depth treatment by: Krauskopf & Steven (1999), p. 651 et seq. specifically for the CFP, p. 653 et seq. specifically for the CFA; Hafke (2000), p. 28–36; de Sèze et al. (2011), p. 99 et seq. for the CFP.

[65] Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 9; see also Freimuth, in Siekmann (2013), Art. 128 para 16; unclear Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 50, 52. The ECB, however, "considers that a third country should only introduce the euro following agreement with the Community", ECB opinion (CON/2004/12) of 1 April 2004.

[66] Since the Treaty of Lisbon "Eurosystem" is defined by the primary law as the "European Central Bank, together with the national central banks of the Member States whose currency is the euro", Art. 282.1 sentence 2 TFEU.

[67] Decision of the European Central Bank of 7 July 1998 *on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/1998/6, O.J. L 8/36 (1999); amended by: Decision of the European Central Bank of 26 August 1999 *amending the Decision of the European Central Bank of 7 July 1999 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/1999/655, O.J. L 258/29 (1999);

have to be this way, no matter where they have been produced or issued.[68] Moreover, unlike euro coins (→ para 26), euro banknotes do not contain any reference to their issuing country since unlike the coins they do not have a nationally designed backside. The issuing country can, however, be identified to some extent by the letter preceding the serial number of the first series of notes.[69] The following letters have been assigned: *Belgium* Z, Cyprus G, *Finland* L, *France* U, E, *Germany* X, W, R, *Greece* Y, *Ireland* T, *Italy* S, *Malta* F, *Netherlands* P, *Poland* D, *Portugal* M, *Spain* V, *United Kingdom* H, J.[70] In the second series the first letter preceding the series number discloses the place of print.[71] The authorization precedes the actual issue of the banknotes[72] and helps the ESCB to conduct a stability oriented monetary policy.[73]

In general, 8% of the banknotes are issued by the ECB and the rest by the national central banks according to their share of the capital of the ECB.[74] The banknotes issued by the ECB 21

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replaced by: Decision of the European Central Bank of 30 August 2001 *on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/2001/7, O.J. L 233/55 (2001); amended by: Decision of the European Central Bank of 3 October 2001 *amending the Decision of the European Central Bank of 3 December 2001 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/2001/14, O.J. L 5/26 (2002);

replaced by: Decision of the European Central Bank of 20 March 2003 *on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/2003/4, O.J. L 78/16 (2003);

replaced by: Decision of the European Central Bank of 19 April 2013 *on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/2013/10, O.J. L 118/37 (2013).

[68] Krauskopf (2005), p. 244; Bartzsch et al. (2013), p. 395: "perfect substitutes"; Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 7; Siekmann (2017a), p. 163; Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 10. Scott (1998), p. 216, considers the identical design as a factor making an exit more difficult.

[69] Bartzsch et al. (2013), p. 395: "The code letter in the serial number (for example "X" for Germany) only identifies the national central bank which has ordered the printing of the banknote. For example, a banknote with the code letter "X" could have been printed by a printing press in France on behalf of the Deutsche Bundesbank and been issued by the Bank of Greece."

[70] Deutsche Bundesbank (2015), p. 41.

[71] Ibid., p. 40.

[72] Freimuth, in Siekmann (2013), Art. 128 AEUV para 23.

[73] Freimuth, in Siekmann (2013), Art. 128 AEUV para 11 et seq., 25.

[74] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 9; *incorrect* Omlor (2015), p. 2299.

are physically disseminated by national central banks since the ECB does not have an infrastructure of its own to perform this function. The **tasks** in **producing**, **dispersing**, and **controlling** the banknotes are **distributed** among the various **national central banks** but it is the **exclusive competence** of the **ECB** to set the **rules** (→ para 12, 14, 20). This has been achieved by enacting a detailed legal framework (→ para 20).[75] In practice, certain **quotas** of specific denomination of the notes have been attributed to specific national central banks (e.g. part of the ten euro bills to Greece). In case a bank overdrafts its quota, the amount is debited to its account within the TARGET II system. More in-depth research shows that about 70% of the cash issued in Germany is held abroad. "Of this the lion's share, 45% ... is in non-euro-area countries, with the remainder, 25%, in other euro-area-countries".[76] The most recent analysis confirms these results. Euro banknotes emitted by the *Deutsche Bundesbank* have almost doubled between end of 2009 and end of 2017: from 348 billion euro to 635 billion euro, an annual growth rate of 7,8 % on the average.[77]

The **procurement** follows in principle national rules but the Eurosystem has set a framework: **Single Eurosystem Tender Procedure – SETP**.[78] **Costs** incurred in connection with the issue of banknotes and gains are consolidated within the procedure to calculate the monetary income of the national central banks, Art. 32.4 (2) Statute. In case of an unforeseen demand for cash, the lacking amount of banknotes is transported to the place of demand under the direction of the ECB - similar to any other monetary system. This has happened during the Greek crisis when large amounts of cash were flown to the country. These transactions are also balanced within TARGET II. 22

The notes do not acquire the legal quality as euro banknotes from the beginning of their physical existence. An additional, **sovereign legal act** is required.[79] They have to be given willingly within the prescribed procedure into circulation by the **issuing entity** ("**dedica-** 23

[75] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 6.

[76] Bartzsch et al. (2013), p. 400, pointing out that this "corresponds" well with the estimated figures for D-Mark banknotes before euro cash was introduced. Despite the less important international orientation of the U.S. economy similar patterns can be found for the U.S. dollar, see Judson (2012), p. 85, 92, 103. Remarkable is the pattern of demand for cash relative to political and economic events. Considerably lower shares are estimated by Feige (2012), p. 146, stating a "currency enigma" as domestic citizens admit holding a lower amount of cash per capita (p. 122).

[77] Deutsche Bundesbank (2018b), p. 37 et seq.

[78] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 13, with further details.

[79] Simitis (1960-1961), p. 422; in effect also Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 9.

tion") (→ para 28). Correspondingly, a euro banknote loses this quality when it is withdrawn from circulation by the Eurosystem.[80] The withdrawal of coins falls into the competence of the Member States.[81] The withdrawal is also a sovereign legal act, no matter who is physically performing it. The legal acts of "dedication" and "withdrawal" are important in case notes get lost or stolen before issuance or after they have been withdrawn, but also for the accounting of the Eurosystem.[82] As such an act of withdrawal is missing, euro banknotes which have been damaged in an attack of mental illness do not lose their quality as legal tender and have to be exchanged.[83] The claim to "exchange damaged genuine euro banknotes" has to be based on Art. 3.1 Decision 2013/10 of the ECB[84] which is pursuant Art. 288.4 sentence 1 TFEU binding and does not only serve internal purposes.[85] The Deutsche Bundesbank is obliged to reimburse the mutilated banknotes also in view of Art. 3.3 lit. a ECB/2013/10 which does not give a claim in case of knowing and wilful damage but foresees an exception for acting *bona fide*. The Bundesbank interpretation that wilful damaging excludes this exception[86] could not be upheld.[87] On the other hand, banknotes which have been cast in acrylic after withdrawal from circulation and have been sold at the ECB's Information Centre & Bookshop as collector's item do not have to be considered to be euro banknotes – exchangeable at the Eurosystem – anymore.[88] Special rules have been

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[80] Art. 5 ECB Decision 2003/4 of 20 March 2003, O.J. L 78/16 (2003); supplemented by guideline ECB/2013/11 of 19.4.2013, O.J. L 118/43 (2013); Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 47.

[81] Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 4.

[82] For more details see Krauskopf (2005).

[83] Superior Administrative Court of Hesse (Verwaltungsgerichtshof Hessen), 6 A 682/15 (23 March 2016).

[84] Decision of the European Central Bank of 19 April 2013 *on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/2013/10, O.J. L 118/37 (2013).

[85] Superior Administrative Court of Hesse (Verwaltungsgerichtshof Hessen), 6 A 682/15 (23 March 2016).

[86] Deutsche Bundesbank: "Grundsätzlich von der Ersatzleistung ausgeschlossen sind vorsätzlich beschädigte Euro-Banknoten",

www.bundesbank.de/Navigation/DE/Aufgaben/Bargeld/Beschaedigtes_Geld/beschaedigtes_geld.html.

[87] Superior Administrative Court of Hesse (Verwaltungsgerichtshof Hessen), 6 A 682/15 (23 March 2016).

[88] Only as a result also the Administrative Court of Frankfurt am Main (Verwaltungsgericht Frankfurt am Main), 1 E 2589/06 (8 March 2007). *Neue Juristische Wochenschrift, Rechtsprechungs-Report*, p. 1119, underpinning its decision by the lack of a statutory basis for such a claim due to the repeal of section 14.3 Bundesbank Act (Bundesbankgesetz). This

set up for safeguarding the **quality and authenticity** of the notes in circulation (→ para 75-80). They are essential for securing the trust in the currency. The prescribed controls of the national central banks fulfil a public task.[89] The banknotes issued by the system are copyrighted.[90] This is considered to be compatible with their legal function[91] but would need closer scrutiny.

5 Euro coins

The term "coin" has to be thoroughly distinguished from the term "money" (→ para 6) and its underlying concept. Coins may be defined "as pieces of metal stamped, usually on both sides, with devices which relate them to the monetary units ['currency'] [92] named in verbal or written transactions, so that they represent these for all legal purposes". In the beginning, they did not serve the functions of money (→ para 6) – or at least not all of them – and thus cannot be explained as the product of (predominantly) economic needs or practical purposes.[93] The value of early coins was "far too valuable to have been use in the petty commerce of daily life".[94] Often they had a **symbolic function** or simply spared the more difficult task of **measuring** the objects of wealth by **counting** standardized tokens.[95] It was the "imposition of a recognizable mark that transforms a piece of metal into a specific unit of currency".[96] On the other hand, using coins eased the way to fraud and corruption as 24

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argumentation cannot be upheld in view of the following judgment of the Superior Administrative Court of Hesse (Verwaltungsgerichtshof Hessen), 6 A 682/15 (23 March 2016).

[89] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 15.

[90] Recital 4, Art. 1.2. lit. c Decision of the European Central Bank of 19 April 2013 *on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes*, ECB/2013/10, O.J. L 118/37 (2013).

[91] Weenink (2003).

[92] Inserted by the author.

[93] Highly critical of the common (economic) explanations of the origin of coins Mitchell Innes (1913), p. 378 et seqq., 300: "never played any considerable part in commerce", emphasizing the government objective to raise revenue and the brute force necessary that they were accepted (p. 382, 384, 387, 389, 407); Martin (1996), p. 259, with references of the opposing view; more recently see e.g. North (1994), p. 13; Grierson (1998), p. 7, 19, 20, 23; Omlor (2015), p. 2297 et seq.

[94] Grierson (1998), p. 4.

[95] Martin (1996), p. 259–263: "civic pride", "public needs" (p. 264, 270); Grierson (1998), p. 21, 23.

[96] Grierson (1978), p. 3, emphasizing that this disqualifies unstamped ingots, also found in hoards, as coin.

debasing a coin (or bullion) was much easier than debasing any other instrument of exchange like e.g. oxen. It is still a much-debated question whether debasement was in fact an instrument for financing government, a crude form of taxation,[97] or if it were the result of other causes, like over-supply of coins, adjustment to changing real prices, or rising scarcity of silver (i.e. rising relative price).[98] Crucial from a functional point of view seems not be not so much the varying content of precious metal but fluctuating buying power jeopardizing its function as time consistent yardstick. For over 500 years the coins of Rome, coins carried an image of the ruler in power and thus spread the information about who was sovereign and what his aims were. This had an augmented significance in times when the ruler was worshipped as God or godlike, e.g. during the time of Augustus.[99] In any case, modern numismatic research shows that coins had close ties to the legal system from their origin on (→ para 6).[100]

Minting coins has been one of the oldest sovereign rights of states[101] and existed long before banknotes came into use. This might be one the reasons why the competence for issuing coins in the euro area has been retained by the Member States (→ para 12). It is highly questionable whether the decision to split the competence for issuing legal tender between different institutions can still be justified.[102] Economic reasons are not apparent; leaving aside mere fiscal greed since profits from minting coins go directly into the coffers of the sovereign.[103] Maybe symbolic reasons have not yet been overcome as well. In a 25

[97] Mitchel Innes (1913), p. 387, 399; emphasizing the financing aspect: Davies (2002), p. 97 et seq.; Connors/Davies (2016), p. 100: "hidden taxation in the form of currency debasement".

[98] See for details Butcher (2015), p. 185 et seq., tending to the latter (p. 201).

[99] For details of the Augustan monetary system with almost pure gold and silver coins which functioned effectively for almost two centuries see Davies (2002), p. 95 et seq.; Connors/Davies (2016), p. 98 et seq. Against the long-term common conviction Butcher and Ponting explicate the proposition that the monetary reforms of Trajan and Nero were not *adulterations* of the Augustan system but were both attempts to establish a stable currency (2015), p. 21 et seq., 41: "recycling of old coinage" by Trajan not in connection with debasement.

[100] Martin (1996), p. 258 et seq.; Grierson (1998), p. 5, 10, 23; Davies (2002), p. 91.

[101] Emphasized by Siekmann (2015), p. 46; ibid. (2016a), p. 500 et seq. Davies (2002), p. 87, dates it back to the Lydian origins but states that "after Alexander the power to coin money became more obviously (...) a jealously guarded sovereign power"; Connors/Davies (2016), p. 90.

[102] See already Stern (1980), p. 477; Siekmann, in Sachs (2018), Art. 88 para 21; Krauskopf (2005), p. 248.

[103] Siekmann, in Siekmann (2013), Einführung [introduction], para 135, pointing out that this reservation in favour of the government had already been abolished by the allied powers in

common currency area with *one* monetary policy it is, however, indispensable that the **volume** of coin **issuance** has to be set by the same authority which is competent for conducting the monetary policy. As a consequence, the primary law requires the **approval** of the **ECB**, Art. 128.2 sentence 1 TFEU. This decision can be exercised by the ECB at **discretion**. Only cases of abuse or transgression of its limit will be controlled by the judiciary.[104]

Regarding the **harmonisation** of the **unitisation** and **technical specifications** of the coins the primary law empowers the **Council**, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, to adopt the suitable measures, however, limited to the extent necessary to permit the smooth circulation of the coins within the Union, Art. 128.2 sentence 2 TFEU. The rules have to be based upon this clause[105] as it has priority over Article 133 TFEU[106] as more specific even if Art. 133 TFEU has a wide enough scope since the Treaty of Lisbon and could (potentially) serve as basis as well.[107] The EU Council has passed the measures considered to be necessary.[108] If they all stay within its range of the competence may be called into question. As a result, **one side** of the coins is **uniform** and the other side bears a **national design**. Collector's coins or commemorative coins may be entirely designed by the Member States as long as they follow the technical specifications allowing them to circulate freely. If they deviate from 26

Germany after World War II as a wholly rational decision and was re-introduced when establishing the Bundesbank in 1957; uncritical Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 12.

[104] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 24.

[105] Unclear Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 27.

[106] Selmayr, in von der Groeben et al (2015), Art. 133 AEUV para 8, 9, 26.

[107] See for details, Selmayr, in von der Groeben et al. (2015), Art. 133 AEUV para 5, 7, who considers this article as a basis for a comprehensive "euro currency law" (para 1, 5); less wide Becker, in Siekmann (2013), Art. 133 AEUV.

[108] Council Regulation (EC) No 975/98 of 3 May 1998 *on denominations and technical specifications of euro coins intended for circulation*, O.J. L 139/6 (1998); amended by Council Regulation (EC) No 423/1999 of 22 February 1999 *amending Regulation (EC) No 975/98 of 3 May 1998 on denominations and technical specifications of euro coins intended for circulation*, O.J. L 52/2 (1999); amended by Regulation (EU) No 566/2012 of 18 June 2012 *amending Regulation (EC) No 975/98 of 3 May 1998 on denominations and technical specifications of euro coins intended for circulation*, O.J. L 169/8 (2012); replaced by Council regulation (EU) No 729/2014 *on denominations and technical specifications of euro coins intended for circulation (Recast)* O.J. L 194/1 (2014).

these standards the coins cannot be legal tender, also not in the respective Member State.[109] The **volume** of the issuance of the various coins has been set by the **ECB**.[110]

Not only the volume, unitisation, and technical specifications for euro coins are set by institutions of the EU, but also their status as **legal tender** (→ para 31). In contrast to euro banknotes this has not been done by the primary law. Rules have been enacted to secure the authenticity and quality of the coins (→ para 81).[111] 27

6 Legal tender

The public law, the *lex monetae*[112] of a country, determines which monetary signs (tokens) have to be treated as legal tender.[113] The private law follows, like in France and Germany. A concrete species of such a token acquires the property of legal tender through an act of dedication by the competent authority (→ para 23). When the private law has to decide what has to be treated as money or what instruments can be used to settle **monetary claims,** the result follows from the determination of **legal tender**. In history, legislation creating e.g. the German Civil Code (*Bürgerliches Gesetzbuch*) did not regulate how to discharge monetary claims as the public law already provided a currency order.[114] Another question would be whether legislation could alter the system. In the euro area the *jus* 28

[109] Disagreeing: Hahn & Häde (2010), § 23 para 25; Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 14, ignoring that Art. 128.2 is an exception from the transfer of all competences in monetary policy to the EU (→ para 3).

[110] This has been done on a regular basis, most recently: Decision of the European Central Bank of 8 December 2017, ECB/2017/2443, *on the approval of the volume of coin issuance in 2018 (ECB/2017/40),* O.J. L 344/61 (2017).

[111] See for more details Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 28–33.

[112] For definition and function, see already Mann (1992), p. 219 et seq., 272, 278; later: Kleiner (2010), p. 94–129, discussing in depth the various meanings of "lex monetae"; Proctor (2012), para 32.16; Vischer (2010), para 358–364; Ernst (2012), p. 52–55.

[113] Simitis (1960-1961), p. 422, but accepting "book money" as privately created money without providing a sound legal basis for this proposition (p. 423–459); Weenink (2003), p. 436; Vischer (2010), p. 1; Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 48.

[114] Simitis (1960-1961), p. 408; Grothe (1999), p. 42, with further references.

monetae has been completely transferred to the EU with the result that the concerned Member States **lost their power to define legal tender,** Art. 3.1 (c) TFEU.[115]

6.1 Main features

The primary law does not contain a definition of legal tender. From the historic development follows[116] that the principal virtue of legal tender is (i) that it **has to be accepted for settlement** of any kind of **monetary obligation** – private or public. In contrast to all other monetary instruments, (ii) the creditor is held to accept legal tender at full face value if it is offered to her or him. Complementing this characteristic, (iii) the creditor of a monetary obligation only has a claim for legal tender. The courts[117] and the legal literature[118] have adhered to these principles. They also hold for payments made to or from a government 29

[115] Proctor (2012), para 31.10; Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 45.

[116] Mitchell Innes pointed out as early as 1913 that the debased coins in the late Roman time could only be considered to be tokens but nevertheless they always kept their quality as legal tender and it was an "offense to refuse them", p. 382, 384 (draconian punishments for refusing coins of the Franconian king); for the modern literature see e.g. Grothe (1999), p. 42; Krauskopf (2005), p. 246–248; Siekmann (2016a), p. 507.

[117] See e.g. Supreme Civil Court of the German Reich (Reichsgericht), III 363/30 (3 July 1931), RGZ 133, 249 (253 et seq.); ibid., IX 241/31 (14 October 1931), RGZ 134, 73 (76); German Federal Supreme Civil Court (Bundesgerichtshof), V ZR 92/51 (13 March 1953), Neue Juristische Wochenschrift (1953), p. 897 et seq; ibid. VI ZR 209/61 (10 July 1962), LM BGB § 362 Nr. 7; ibid., V ZR 168/81 (25 March 1983), BGHZ 87, 156 (162 et seq.); ibid., Xa ZR 68/09 (20 May 2010), Neue Juristische Wochenschrift (2010), p. 2719 (2720 para 29); Superior Court of Hamm (Oberlandesgericht Hamm), 10 UF 266/87 (13 November 1987), Neue Juristische Wochenschrift (1988), p. 2115 (2116); Superior Court of Frankfurt am Main (OLG Frankfurt), " Ws (B) 151/86 (22 September 1986), Juristen Zeitung (1986), p. 1072; for the legal consequences of crediting a bank transfer to an account of a failing account holder see German Federal Supreme Civil Court (Bundesgerichtshof), VIII ZR 152/70 (2 February 1972, BGHZ 58, 108 (109).

[118] Mitchell Innes (1913), p. 405, already emphasizing that lawful money had to be accepted "at the value officially put upon them", no matter what intrinsic value it has; Fögen (1969), p. 7; v. Spindler et al. (1973), § 14 Anmerkung (annotation) 3 (p. 285); Fülbier (1990), p. 2798; Schmidt (1997/1998), Vorbemerkung zu §§ 244 ff., A 19, 24, 30; Endler (1998), p. 119; Grothe (1999), p. 42 et seq.; Selmayr (2002), p. 31 et seq., 425; de Lapasse (2005), p. 237; Angel & Margerit (2009), p. 588, 590, 592; Freimuth, in Siekmann (2013). Art. 128 AEUV Para 78, 81 with minor reservations; Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 46, 60; Beck (2015), p. 581; Beck & König (2015a), p. 135; ibid. (2017), p. 143 with further references in footnote 11; Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 1; in Principle also Meyer (2013), p. 343; Bartone (2016), p. 286; *disagreeing;* Simitis (1960-1961), p. 423-427, but not denying the obligation to accept legal tender (p. 426); Vischer (2010), section 1 para 6; Herrmann (2010a), p. 315.

entity, authority or agency.[119] These were also the main findings of the **Euro Legal Tender Expert Group – ELTEG** instituted by the Commission.[120] In 2010, the EU Commission explicitly accepted the three traits stated above: The creditor of a payment obligation may not refuse euro banknotes and coins unless the parties have agreed on other means of payment.[121]

This recommendation leaves it to the national legal systems, whether **private parties** may **agree** to follow different rules. It is a question how far the autonomy of private persons is respected by the legal system.[122] In some countries, like France, such an agreement would not be viable as it is still a criminal offence there not to accept legal tender.[123] In others, like in Germany, it is in principle admitted if a **prior consensus** among the parties has been reached beforehand.[124] It has to be questioned, however, that private persons with dominating market powers may suppress partially or in total money issued by the sovereign which would lose as a result one of its main functions. **Public sector** entities are completely barred from such an agreement as the monetary obligation follows directly from statutory rules. They are - directly or indirectly - part of the sovereign and have to accept its legal tender. It would be a contradiction in itself and undermine the confidence in a currency without any intrinsic value ("fiat money") aside from the legitimate expectation that it will be accepted as means of payment (→ para 40) if a government entity were allowed to refuse accepting the money the sovereign has created.[125] This has been grossly **neglected** by 30

[119] Supreme Civil Court of the German Reich (Reichsgericht), III 363/30 (3 July 1931), RGZ 133, 249 (254).

[120] Euro Legal Tender Expert Group – ELTEG (2010), p. 4.

[121] Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU), O. J. (2010), L 83/70; explicitly consenting Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 46.

[122] Comprehensive overview by Euro Legal Tender Expert Group – ELTEG (2010), Annex, Table 1, p. 23 et seq.

[123] As long as it is the exact amount due, see Angel and Margerite (2009), p. 588, referring also to Italy, Cyprus, and Slovenia; Kleiner (2010), p. 67, 146.; ibid. (2009), p. 565.

[124] German Federal Supreme Civil Court (Bundesgerichtshof), V ZR 92/51 (13 March 1953), Neue Juristische Wochenschrift (1953), p. 897 et seq; ibid., Xa ZR 68/09 (20 May 2010), Neue Juristische Wochenschrift (2010), p. 2719 (2720 para 29); ibid., V ZR 168/81 (25 March 1983), 1605 (1606).

[125] Clearly expressed for the Federal Reserve System of the U.S.; 12 USC Chapter 3 Sub-Chapter XII section 411: "The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues.".

the court judgments on the **special contributions** financing the state broadcasting system in Germany.[126]

6.2 Euro banknotes and coins

The **primary law** has given the **euro banknotes** the status of legal tender, Art. 128.1 sentence 3 TFEU. Such a clause is lacking for **euro coins** but this gap has been supplemented by an act of **secondary law.** Art. 11 sentence 2 of Council Regulation 974/98 decrees that all coins issued by the participating Member States denominated in euro or in cent and complying with the denominations and technical specifications set by the Council "shall be the only coins which have the status of legal tender in all these Member States".[127] 31

6.3 Substitutes

From this follows that **no other instrument of payment** or other **substitutes** of cash may be treated as **legal tender** in the euro area. This holds no matter how widely such a substitute is spread, how generally it is accepted,[128] and how much pressure of government entities or privates is exerted not to use them. All attempts to hinder the use of legal tender are highly questionable in view of the EU regulations (see more → para 36-46). 32

Closer scrutiny is, however, warranted regarding the question whether the EU, the ECB, or Member States would be allowed to **declare** specific **electronic instruments as legal tender**. Simply repealing or modifying Council Regulation 974/98 (→ para 31, 62) would not be sufficient.[129] At least, this could not change the designation of euro banknotes as only legal 33

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[126] Superior Administrative Court for the State of Hesse (Hessischer Verwaltungsgerichtshof), 10 A 2929/16 and 10 A 116/17 (13 February 2018); Administrative Court of Munich (Verwaltungsgericht München), M 6 K 15.5638 (1 June 2016), *BeckRS* 2016, p. 50215; Administrative Court of Frankfurt am Main (Verwaltungsgericht Frankfurt am Main), 1 K 2903/15F (31 October 2016), *Kommunikation und Recht - K & R* 2017, p. 142, with critical annotation by Beck & König (2017): not tenable ("dogmatisch wie systematisch nicht haltbar").

[127] Art. 11 Council Regulation (EC) No 974/98 *on the introduction of the euro*, O.J. L 139/1 (1998).

[128] Disagreeing Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 49 without proper legal reasoning.

[129] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 44, with the argument that the right of the ECB to authorise the issue of coins would otherwise be infringed; in effect also Selmayr, in von der Groeben et al. (2015), Art. 133 para 2; sceptical from an economic point of view the president of the Bundesbank, Weidmann, cited in Börsen-Zeitung 15 February 2018, p. 4, seeing an enhanced risk for bank runs.

tender in Art. 128.1 sentence 3 TFEU. Only if the new (electronic) instruments could be judged as banknotes or as coins in the meaning of Art. 128 TFEU this possibility would come close to the range of the legally debatable and the next steps of assessment would come into reach. Following the generally accepted standards of interpretation, this seems hardly possible. The terms "banknote" and "coin" have been established for centuries and possess a clear meaning. Subsuming any kind of electronic instrument would be at its core an **act of legislation** and not of applying the law.

As the right of the Member States to issue coins appears as a historic reminiscence without economic justification (→ para 25), an **electronic euro banknote**, **authorized by the ECB**, would be the only debatable option if at all. For such an interpretation it would be, however, indispensable that the new instrument be functionally 100% equivalent to the existing cash, to say the least. In specific, the following conditions would have to be fulfilled: 34

- Its issuance would have to be authorised by the ECB.
- It would have to be denominated in euro.
- It would have to be useable without disclosing or identifying its owner.
- It would have to be transferable from person to person without using an intermediary and without additional costs.
- It would have to be a permanent storage of value, unlimited in volume.
- It would have to be accepted by all government entities.

By fulfilling these conditions, the pure **efficiency gains** of digitization could be realized without intruding further into the protected sphere privacy. On the other hand, the (alleged) objective of fighting money laundering peddling, tax evasion, and financing of terrorism (→ para 46), could not be achieved. In any case, (unintended) consequences and side effects would have to be taken into account. They could be staggering: Due to economies of scope and scale, large parts of the present-day **payment services** would become **superfluous** and the banking systems would have to undergo additional drastic changes. The result could well be that only **one institution** would survive – most likely a central bank as a natural monopolist. 35

6.4 Restrictions of the use of legal tender

6.4.1 The development

Already for quite some time, financial institutions, but also authorities, have exerted pressure on businesses and consumers to refrain from using cash. Even statutory rules have been passed to prohibit the use of cash exceeding a specific, but rather low limit.[130] This 36

[130] See, for example, Angel & Margerit (2009), p. 588; Häring (2016a), p. 29; ibid. (2016b), p. 29-62; Ulrich (2016) for plans in Germany. A detailed overview of the various limits and restrictions for using cash, enacted by several Member States of the EU is given in a paper by the research service of the German federal parliament (Wissenschaftliche Dienste, Deutscher Bundestag Ausarbeitung) WD 4 – 3000 – 043/16, p. 8 et seq. The thresholds range

limit usually varies from country to country with the result that the citizens do not know to which extent the legal tender of the EU may still be useable. Most notorious are the cases where the government broadcasting entities in Germany (*Rundfunkanstalten*) refuse to accept cash payments for discharging the government-imposed special contributions financing those entities; regardless of the actual use of those entities.[131] The decision of the ECB to end the production and issuance of 500 Euro banknotes is also part of this debate.[132]

37 These measures have been successful to a varying degree in the Member States of the EU whose currency is the euro. In some countries, they lead to a replacement of cash as a means of payment or storage of value on a large scale. In other Member States, like Austria and Germany, cash is still widely used. In 2017, more than 74% of all transactions in Germany were settled using banknotes and coins. Their share of the turnover fell, however, below 50%.[133] Cash held for transaction purposes has remained almost constant[134] but hoarding has grown by 7 billion euros per year since 2010.[135] Remarkable is the rapid

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from 1,500 to 15,000 euros or its equivalent for the non-euro states; For more details see Siekmann (2017a), p. 154 et seq. from which parts of the following have been derived.

[131] Based upon Section 9 para 2 sentence 2 RBStV (*Rundfunkgebührenstaatsvertrag*) in conjunction with Section 10 para 2 of the by-laws of the respective public law broadcasting institution; critically, see Häring (2015); ibid. (2016b), p. 19–27. Decisions of administrative courts have so far upheld this practice (→ para 30 footnote 126).

[132] Press release of 4 May 2016:

The ECB has decided to discontinue production and issuance of 500 € banknote;

Europa series of euro banknotes will not include the 500 €;

500 € banknote remains legal tender and will always retain its value.

The decision was criticized by: the President of the German Bundesbank, *Jens Weidmann*, Handelsblatt, 25 February 2016, p. 30; *Daniel Stelter*, Börsen-Zeitung, 7 May 2016, p. 4; the member of the German Council of Economic advisers, *Volker Wieland*, cited in: "Große Bedenken gegen Bargeldobergrenzen", Frankfurter Allgemeine Zeitung, 14 June 2016; *idem*, cited in: Frankfurter Neue Presse, 14 June 2016, p. 4; decidedly in favour of retaining the 500 € banknote, *Sebastian Jost*, Die Welt, 13 February 2016: "It protects the currency.".

[133] See Deutsche Bundesbank (2018a), p. 8, 22–24, in a representative survey (p.12). Another representative survey shows an even increasing preference for cash payments, Splendid Research (2018), p. 22, but combined with support for introducing an upper limit for using cash (p. 20); see also: Krüger and Seitz (2014), p. 20–52; Freimuth, in Siekmann (2013), Art. 128 AEUV para 6.

[134] Krüger and Seitz (2014), p. 37, 44.

[135] Ibid., p. 50.

growth of cash held by banks in stock since 2015.[136] Germany's share of the total cash issuance of the Eurosystem has grown from about 31% to approximately 47% in 2012.[137] But most of it is held abroad (→ para 21).

6.4.2 Conformity with the monetary law of the EU

Restrictions imposed by Member States are often **justified**[138] with reference to **recital 19** of Regulation (EC) 974/98.[139] This recital states that "limitations on payments in notes and coins, established by Member States for public reasons" are not considered to be "incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available". This line of argumentation is, however, **not convincing**, mainly for two reasons: 38

(1) First, it is questionable whether these considerations are compatible with the primary law of the EU. They would allow the (partial) removal of an essential trait of legal tender (→ para 29) by the various Member States although their competence in monetary policy has been transferred in total to the EU, Art. 3.1 (c) TFEU.[140] Especially the expectation that legal tender has to be accepted, namely, by cashiers of government entities, has been considered as a **main characteristic** of **legal tender**. 39

This result is backed by the jurisprudence of the German Federal Constitutional Court. In its judgment on the constitutionality of introducing the euro, the Court considered as an essential trait of legal tender that "money" can be "freely" exchanged into other goods. In 40

[136] Ibid., p. 43.

[137] Bartzsch et al. (2013), p. 400.

[138] See, for example, Napoletano (2005), p. 260; Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 48, seeing only parts of the problems discussed in the following but questioning in effect the legality of some of the measures taken (para 49).

[139] Regulation (EC) No 974/98 of the Council, 3/5/1998, *on the introduction of the euro*, O.J. L 139/1 (1998).

[140] Proctor (2012), para 31.10.

this context, it emphasised the special protection of this specific type of legitimate expectation (*Einlösungsvertrauen*), which it derived from the protection of property by civil rights.[141]

(2) The second reason follows from the **nature of a recital**. Strictly speaking, a recital is not part of the norm. It may give some insight into the motives of the lawmaker and may serve as argument in interpretation, but it is in no way binding. "However, interpretation is only possible if a norm or a clause is open for interpretation and is in need of it; mainly because it is vague, opaque or inconsistent." In regard to legal tender, such a norm or clause is, however, not in sight. "Moreover, the theme of recital 19 is nowhere to be found in the normative part of the regulation to be expounded. For these reasons, arguments from the recital have to be dismissed. They lack any normative significance for the legal question to be answered here."[142] 41

In principle, legal tender **has to be accepted** and **may be used at discretion**. Only **marginal modifications**, such as the amount of coins that have to be accepted for a payment and the obligation to change notes in cases in which not the exact amount of the owed sum of money is offered, may be consistent with the quality of legal tender.[143] If these rules are not enforced, the credibility of the whole monetary system is at risk and, simultaneously and **implicit guarantee** for institutions issuing substitutes would come into force. This holds especially for a "fiat" currency, like the euro, which is only based on **credibility.** The admissible modifications would have to be enacted by the EU as the *jus monetae* has been transferred to the EU. An exception may exist for rules belonging at its core to private law but must not obstruct the objective of the creation of a single currency, the further integration of the Member States. Euro coins and banknotes are the genuine European instruments of payment.[144] 42

It is the task of the issuing authority, the Eurosystem, to enforce the rules regardless of whether Articles 128, 133, and 282.3 sentence 2 TFEU are mainly interpreted as (mere) empowerments. Empowerments may not only be used at will by the beneficiary. In principle, they also contain an obligation for the empowered to realize them. The wording of Article 282 paragraph 4 TFEU confirms this view. 43

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[141] German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 1877/97 and 50/98 (31 March 1998), BVerfGE 97, 350 (371 et seq.); critical Lepsius (2002), p. 318, arguing against the majority of scholars (p. 317).

[142] Siekmann (2017a), p. 171.

[143] See e.g. Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU), O.J. (2010), L 83/70; doubting the conformity of the restrictions with EU law: Angel and Margerite (2009), p. 588, 590 et seq.

[144] Angel and Margerit (2009), p. 591 et seq.

National legislation contrary to these rules is not applicable. But also mere factual pressure to refrain from using legal tender is questionable and undermines substantially the credibility of the system as well. The idea of a "single currency" would be seriously damaged if a multitude of different rules of the Member States on the use of legal tender had to be obeyed.[145] The somewhat more lenient view of the ECB in the past when asked for an opinion in the process of consultation has to be questioned and is under scrutiny.[146]

6.4.3 Due process and civil rights

Restricting the use of cash may infringe substantial due process principles, like proportionality, the rule of law, and fundamental rights of citizens and businesses. In addition, the German "social-state" (*Sozialstaat*) principle is likely to be touched as the poor and not so well educated population tend to depend more on the use of cash than the wealthy and educated. The alleged benefits from suppressing the use of cash are not so apparent that they can be accepted as justification for the constraints and additional burden without differentiation and closer scrutiny. In-depth empirical research does neither confirm the gains in efficiency nor the reduction of costs handling cash, as usually is contended.[147] Even more important is the lacking empirical evidence for the alleged use of cash for criminal activities, financing terrorism, drug dealing, money laundering, and tax evasion. At least it is not apparent for a large scale use in big crime.[148] An effect of the restrictions already in force on the crime rates is not visible[149] and a correlation between the size of the underground economy and the growth of cash is at best unclear.[150] Not only the necessity of these measures has to be doubted but already their suitability. This would question their compatibility with the substantive due process principle and the rule of law (*Rechtsstaatsprinzip*). It is often disregarded that the majority of empirical studies do not

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[145] In France, the restrictions on using cash in Articles L. 112-5, L. 112-6 and L 112-7 of the French Monetary and Financial Code are treated as a "loi de police" even if it is still a criminal offence to refuse to accept legal tender as long as it is the exact amount due, see Kleiner (2010), p. 67, 146; ibid. (2009), p. 565.

[146] See CON/2012/83, CON/2014/4 and CON/2014/37.

[147] Krüger & Seitz (2014), p. 108; ibid. (2017).

[148] See for example, Schneider (2016), pp. 16–21, criticising substantially the dissenting view of a study by *Kai-D. Bussmann* on the volume of money laundering, whose results are in part publicised as Bussmann & Vockrodt (2016), p. 138–143; König (2016), p. 5-9; Krüger and Seitz (2017), p. 55.

[149] Ulrich (2016); p. R86; Bartone (2016), p. 286 et seq., with further references.

[150] Pickhardt and Sardà (2012), p. 29; Graf (2012), p. 57, 62: "Summing up, the increased use of DM-banknotes and German-issued Euro Banknotes in domestic and international hoards can only to a small part, if at all, be ascribed to motives in connection with shadow economies."

support the supposition that cash is predominantly used for illegal activities. The contrary appears to be true.[151]

46 When restrictions are advocated the **benefits** of using cash are habitually ignored.[152] Such a constrained perspective does, however, not satisfy the requirements of an in-depth examination of the principle of proportionality in the narrow sense of the word. An adequate scrutiny has to balance **costs and benefits**:[153] The benefits of cash are:[154] It does not discriminate. It is simple, convenient, and fast. It does not leave traces and is crucial for protecting privacy.[155] Cash is in many situations more efficient than any other instrument of payment and is always useable – without special devices and without electricity. It does not require an internet access. In time of (natural) disaster – like the Tsunami in Japan – this has proven crucial. The functionality of other instruments of payment is in foreign countries often dubious, to say the least. Holding cash as a store of value has become increasingly **rational** in an environment where deposits are charged with high fees (falsely labelled "negative interest rates") and its opportunity costs are almost zero since equally liquid and safe assets are not available.[156] Finally it is often forgotten that the use of financial instruments other than legal tender implies an **additional risk of insolvency.** The intermediary that issues it may become insolvent but not so a central bank. **Deposit guarantee** schemes in the EU are legally and economically insufficient and in addition a **bail-in** instrument which can pose a substantial risk for depositors has been installed by the EU. Already this additional burden in comparison to using cash has to be judged as unnecessary, and hence as **disproportionate**. But also in a more general approach, balancing costs and benefits of restricting the use of cash will regularly lead to the assessment that the measure is disproportionate and hence unconstitutional.[157] Moreover, an infringement of the free-

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[151] Krüger and Seitz (2017), p. 55 et seq.

[152] Recent exceptions are: Krüger and Seitz (2014); König (2016); Siekmann (2017a), p. 173; Krüger and Seitz (2017).

[153] See for the various factors the arguments of Bacher & Beck (2015).

[154] Siekmann (2017a), p. 173; similarly Krüger and Seitz (2017), p. 4 et seq. who, in addition, demonstrate the macro-economic benefits of cash (p. 10-26).

[155] Protecting privacy is a legitimate interest and an acknowledged fundamental right of the European Union and of national constitutional law. The legal aspect corresponds well with the preferences of the people. The protection of privacy was named as one of the most important traits of an instrument of payment in a recent survey, see Deutsche Bundesbank (2018a), p. 32.

[156] Holding German government bonds implies high costs as well since they also lead to a "negative" return, in the medium range.

[157] The population in Germany also judges the benefits of cash considerably higher than its costs, Deutsche Bundesbank (2018a), p. 38.

dom of commerce and the freedom of occupation may have to be assumed in specific situations.[158] In addition the legitimate expectation that legal tender can be used to settle any kind of monetary claim (→ para 30, 40) is frustrated. Tinkering with lawful money which is solely based upon confidence is highly **imprudent**. This holds especially for a multinational currency like the euro. Restrictions unnecessarily augment anti-EU sentiments and thus jeopardizes the fundamental goals of the Union.

7 National currencies within the euro area

7.1 Development

47 During the Greek crisis (2010, 2012) economists and politicians have keenly proposed that Greece should leave the euro and create a new currency,[159] or at least, introduce a parallel currency - be it with or without permission of the Commission. In the course of.the political debate in Italy, similar demands were expressed.[160]

48 In the first place, it has to be questioned whether such a move would resolve the underlying problems of the country. All debt would still be denominated in euro[161] as the *lex monetae* (→ para 23) resides with the EU for the euro area (→ para 64) and the aspired increase in competitiveness would have been highly doubtful regarding the unresolved structural and institutional problems of the country.[162] National legislation to change this is likely to be void as a result of breaching national and international civil rights statutes. Furthermore, intricate problems of international private law would also have to be solved.[163] In addition, the population would try to defend itself. Fundamental rights and freedoms would have to be suspended or severely restricted.

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[158] Bartone (2016), p. 288.

[159] Allegedly a secret plan of the Greek Minister of Finance, *Varoufakis*, see Hirdina (2015), p. 1.

[160] See Belke (2018).

[161] Scott (1998), p. 223: "Note that if reference was made to EU law as *lex monetae*, (…) redenomination would be ineffective." This would be the case as the *lex monetae* is entirely transferred to the EU for the euro area (→ para 48, 64).

[162] See for a calculation of the costs Deo et al. (2011), p. 6 et seq., 11.

[163] See for details: Grothe (1999); Kleiner (2010); Ernst (2012); Diekmann & Bernauer (2012), p. 1175–1178; Meyer (2013), p. 343 et seq.; Siekmann (2015), p. 81; ibid. (2017b), p. 789 et seq.

7.2 Unilateral acts

7.2.1 Exit or withdrawal from the euro

Any **unilateral "exit from the euro"** would be on its face a breach of EU law.[164] A unilateral declaration or notification to "leave the euro" would be **illegal** and **void**.[165] This result appears to be consistent also with the judicature of the German Federal Constitutional Court.[166] 49

a) 7.2.1.1 Lack of an entity to leave

An **entity** to join or to leave does **not exist**. The primary law consistently only speaks of "economic policy" and of "monetary policy" in the parts where it constitutes the objectives, tasks, and functions of the (new) monetary system. The official heading of the relevant title is: "economic and monetary policy" (Part three, Title VIII TFEU). The denomination of the embedded chapters is "economic policy" (Chapter 1) and "monetary policy" (Chapter 2). The term "economic and monetary union" is carefully eschewed. The same is true for the institutional provisions (Part Six, Title I, Section 6 TFEU) which are headlined: "The European Central Bank".[167] 50

The term "economic and monetary union" is only sparsely used by the primary law: Art. 3.4 TEU and Articles 66, 121.4 subparagraph 1 sentence 1, 138.1 TFEU. The provisions in 51

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[164] With in-depth analysis: Zilioli (2005), p. 126, 132; Athanassiou (2009), p. 21; Bonke (2010), p. 516, 520; Deo et. al. (2011), p. 4–6; Siekmann, in Siekmann (2013), Einführung para 48; Lastra (2015), para 1.62 but also considering Art. 352 TFEU, however more as a possibility laid out by another author and demanding a (unanimous) Treaty change; in effect similarly: P. Kichhof (1994), p. 72; Kämmerer (2010), p. 166; Hahn & Häde (2010), § 26, para 7 et seq.; *disagreeing* – although reluctantly and without any legal reasoning Seidel (2007), p. 617, despite the distinct absence of an exit clause like in the system of the European Monetary System (EMS): probably enabled by "unwritten community law"; ibid. (2015), p. 18, with some questionable assumption without foundation and references; questioning but without a clear solution Behrens (2010), p. 121; inconsistent Häde, in Calliess & Ruffert (2016), Art. 140 AEUV para 50 et seq. on one side and para 52 on the other side.

[165] Siekmann (2017b), p. 773–783 from which parts of the following are taken.

[166] The German Federal Constitutional Court (Bundesverfassungsgericht) mentions in its Maastricht judgment a right or even an obligation to leave the EMU as an *ultima ratio*, however, only as an *obiter dictum* without sufficient reasoning, BvR 2134, 2159/92 (2 July 1993), BVerfGE 89, 155 (204). This remark was not resumed in the euro decision, 2 BvR 1877/97, 50/98 (31 March 1998), BVerfGE 97, 350 (376). Moreover, from its Lisbon judgment can be inferred that an exit would not be compatible with German constitutional law, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (11 February 2009), BVerfGE 123, 267 (346 et seq.).

[167] Siekmann (2017b), p. 774, with more details.

the TFEU contain only marginal references to the "function" of the economic and monetary union and do not presume an institution. They ought to be dismissed in the present context. Article 3.4 TEU warrants more attention. It stipulates that an economic and monetary union has to be set up. Although its wording[168] is deviating from the functional view of the other provisions mentioned before, it may not be construed in a way as to set up an entity within the EU. It is a reminiscence of the three-staged introduction of the single European currency following the Treaty of Maastricht and has little legal content after the monetary union has been formed. It does not constitute powers or competences. Specifically, the clause does not supersede the principle of conferral as laid down in Article 5.1 TEU. This limitation is (superfluously) restated in Article 3.6 TEU.[169]

The history of Article 3(4) TEU does not provide evidence in favour of setting up an institution. Its roots reach back to the Single European Act (SEA).[170] In the heading of a new chapter inserted in the primary law of the European Community (EEC Treaty) by Art. 20 SEA the term appears – but only there: "CHAPTER 1. CO-OPERATION IN ECONOMIC AND MONETARY POLICY (ECONOMIC AND MONETARY UNION)". The wording of the following provisions[171] make it clear that a closer cooperation within the Community and not the creation of a separate body "Economic and Monetary Union" was intended.[172] 52

b) 7.2.1.2 No partial exit following Article 50 TEU

According to its clear wording, Article 50 TEU does not grant a right to exit from the economic and monetary union while remaining a Member State of the Union. An analogous application following an *argumentum a maiore ad minorem* has, however, been proposed: If a complete unilateral exit from the EU is allowed, then an exit from a part of it should be admissible as well.[173] 53

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[168] "The Union shall establish an economic and monetary union whose currency is the euro."

[169] Siekmann (2017b), p. 775, with more details.

[170] O.J. L 169/1 (1987); signed 17 February 1986 and 28 February 1986; effective 1 July 1987.

[171] Article 102a: 1. In order to ensure the convergence of economic and monetary policies which is necessary for the further development of the Community, Member States shall cooperate in accordance with the objectives of Article 104. In so doing, they shall take account of the experience acquired in co-operation within the framework of the European Monetary System (EMS) and in developing the ECU, and shall respect existing powers in this field.

[172] Siekmann (2017b), p. 775 et seq.

[173] Seidel (2007), p. 617; perhaps also Herdegen, in Maunz Dürig (2010), Art. 88 para 27 at the end of the first paragraph (falsely) labelled as consensual exit ; similarly Herrmann (2010a), p. 120; less clear ibid. (2010b), p. 417.

This argument is, however, not valid. In the first place the wording of the clause does not allow such an interpretation. Moreover, the exit from the EU is not tied to any material provisions. It can be achieved simply by notifying the European Council, Art. 50.1 and 50.2 sentence 1 TEU. Any regulation of that kind is missing in regard of the monetary union but could have easily been inserted – if intended by the framers of the Treaty. After the long-lasting debate[174] which led to the insertion of Art. 50 TEU in the primary law, an unintended gap does not exist.[175] In addition, all the specific provisions on derogation would be superfluous if such a solution would be admissible.[176] 54

c) 7.2.1.3 No recourse to the law of nations

A recourse to the rules of the law of nations on the termination of contractual obligations does not provide the legal ground for an exit or withdrawal from the monetary union,[177] mainly for three reasons: 55

- Neither the general rules of the law of nations nor the special rules on the termination of treaties are applicable in the case of supranational organizations even if they have (not yet) reached the quality of a federal state.
- A special solution for the problem has been inserted in the primary law by the Treaty of Lisbon which is conclusive: Article 50 TEU.
- The specific prerequisites of the provisions on a termination or withdrawal are not fulfilled; particularly not those of the Vienna Convention on Treaties or the *clausula rebus sic stantibus*.

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[174] Se e.g. Scott (1998), p. 215; Hofmeister (2010), p. 590 et seq., with the conclusion "the situation regarding unilateral withdrawal was unclear".

[175] Hofmeister (2010), p. 592: "The Lisbon Treaty has finally put an end to this debate by inserting Article 50 into the revised EU Treaty." See also: Hofmeister (2011), p. 126; Bonk (2010), p. 517; Deo et al. (2011), p. 5; in effect also Diekmann & Bernauer (2012), p. 1173; see for more details Siekmann (2017b), p. 780; disagreeing, but without any legal analysis Horn (2015), p. 354; previously ibid. (2011), p. 1402, but more as political *desideratum* and without legal reasoning.

[176] Siekmann (2017b), p. 778.

[177] Kämmerer (2010), p. 166; Kokott, in Streinz (2012), Art. 356 AEUV para 6; Schmalenbach, in Calliess & Ruffert (2016), Art. *356* AEUV para 3; in result also Hanschel (2012), p. 999 et seq., even if not totally excluding the recourse to the law of nations; partially disagreeing: Streinz (2012a), in Streinz (2012), Art. 50 EUV para 13, considering it for an exclusion from the EU (not the EMU!) in "extreme cases"; also Pechstein, in Streinz (2012), Art 7 EUV para 23 without reasoning; unclear Calliess, in Calliess & Ruffert (2016), Art. 50 AEUV para 17, 21 (advice to withdraw pursuant Article 50 TEU).

(1) Partially the law of nations is deemed as being applicable,[178] at least in case no other remedy is available.[179] The European Union has, however, reached a degree of integration and has developed a legal system of its own[180] which have displaced the initial elements of the law of nations.[181] This evolution makes it questionable to apply the law of nations in general, and the Vienna Convention on the Law of Treaties[182] in specific, on a supranational organization like the EU. It is itself a subject of the law of nations and an organism which follows (internally) its own rules. "With regard to international law it is of an autonomous legal order, distinct either from constitutional law or international law."[183] The legal system of the EU should be judged as closed towards interferences by the law of nations. It may also not be called on for filling gaps in its regulation.[184] In addition, France has not signed the Convention.[185] 56

(2) Since the Treaty of Lisbon, Art. 50 TEU contains comprehensive, exclusive, and exhaustive rules for the exit problem. After the long debates (→ para 54), it was meant as a final 57

[178] Herdegen, in Maunz & Dürig (2010), Art. 88 para 27, second subparagraph, without seeing the problem; Hanschel (2012), p. 999; Horn (2015), p. 356 et seq. with selective references for his view; Häde (2016), in Calliess & Ruffert, Art. 140 AEUV para 52; see for the development of the jurisprudence of the ECJ: Thym (2009), p. 456–460, without a clear position of his own. Whether the Maastricht judgment of the German Federal Constitutional Court (Bundesverfassungsgericht), BvR 2134, 2159/92 (2 July 1993), BVerfGE 89, 155 (204), follows this line of thinking is not clear, as it is only one short remark without any reasoning or justification on which this assumption is based; not resumed in 2 BvR 1877/97, 50/98 (31 March 1998), BVerfGE 97, 350 (376); nevertheless, arguing in this direction e.g. Endler (1997), p. 536; Bonke (2010), p. 518.

[179] Herdegen, in Maunz & Dürig (2010), Art. 88 para 27 second subparagraph; Hanschel (2012), p. 999; Streinz, in Streinz (2012), Art. 50 EUV para 108.

[180] ECJ, 6/64, *Costa* vs. *ENEL*, collection of cases, 1964, 1251 (1268); for details see Hofmeister (2010), p. 595-597.

[181] Accepted as starting point by the ECJ, 26/62, *van Gend & Loos*, p. 12.

[182] Chapter XXIII Title 23.1 of 23 May 1969, entry in force on 27 January 1980; official publication in three languages as appendix to: Gesetz zu dem Wiener Übereinkommen vom 23. Mai 1969, über das Recht der Verträge vom 3. August 1985, Bundesgesetzblatt Teil II (Federal Law Gazette Part II) 1985, p. 926.

[183] Wyrzykowski, in Blanke & Mangiameli (2013), Art. 50 TEU, para 9.

[184] Annacker (1998), p. 59–61; Scott (1998), p. 241; Zeh (2004), p. 189, after an in-depth analysis; Kämmerer (2010), p. 166; in effect also Schmalenbach, in Calliess & Ruffert (2016), Art. 356 AEUV para 3; without reservation Becker, in Schwarze (2012), Art. 356 AEUV para 5; see also Wetzel & Rauschning, p. 390–395.

[185] Zeh (2004), p. 181 et seq.

answer to the questions arising from this area.[186] As a consequence, Art. 50 TEU has to be judged as being **conclusive**. It does not provide for "leaving the euro" and staying in the EU at the same time. As it is exhaustive it forbids the recourse to the law of nations for the question at debate.[187]

(3) The **conditions** of the relevant clauses of the **Vienna Convention** on the Law of Treaties regulating the termination of a treaty[188] are **not met** or may not be invoked because of their **subsidiarity**: Art. 54 of the Convention refers expressly to the provisions of the treaty in question and Art. 56.1 clearly restricts the grounds for the termination of a treaty: "A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty." Both **do not hold** in the case of the European Monetary Union.[189] Art. 70.1 of the Convention accordingly ties the release of the parties from any contractual obligation to the **observance of the rules** set up by the Convention. 58

Since the Treaty of Lisbon, Paragraph 1 of Art. 56 of the Vienna Convention now blocks a Member State's exit or a withdrawal upon the basis of the Convention. The Treaty of Lisbon has created a provision which explicitly regulates a withdrawal from the Union, but does not provide for an exit solely from the EMU. Therefore, there is no space for the application of Art. 56 of the Convention.[190] 59

In effect, the provisions on a "fundamental change of circumstances" (Art. 62 of the convention) also do not allow exit or withdrawal from the euro area as an unalienable precondition for re-introducing a national currency and national legal tender.[191] 60

[186] Dörr, in Grabitz, Hilf, Nettesheim (looseleaf, 2011), Art. 50 TEU para 3; Lenaerts & van Nuffel, para 6-015; Siekmann (2012), p. 376; disagreeing Meyer (2013), an economist, presupposing a regulatory gap to be filled - without any legal reasoning and simply declaring the problem to be less a legal than a political question, p. 335. This is not sufficient.

[187] For details see Siekman (2017b), p. 780.

[188] Section 3: Termination and Suspension of the Operation of Treaties.

[189] Siekmann (2017b), p. 781.

[190] Siekmann (2017b), p. 780 et seq.; unclear Meyer (2013), p. 340, without legal reason.

[191] Bonke (2010), p. 519 et seq.; Siekmann (2017b), p. 782; unclear Meyer (2013), p. 340, without legal reason.

7.2.2 Exclusion or revocation of admittance to the euro

An **exclusion from the euro area** by an act of the EU, of Member States, or of the euro-group is not possible as the needed legal basis for such an onerous measure is not visible. The primary law lacks the statutory basis for such a sanction.[192] In particular, Art. 7 TEU could not serve as an instrument for an exclusion.[193] 61

Renouncing the **legal acts** admitting a country to the euro has also been considered.[194] The decision or regulation about the introduction of the single currency in that country (→ para 15) could be amended, regardless of whether those acts were obtained by fraud or misrepresentation. Even if legal acts of the EU might be judged as revocable, this does not hold in the course of introducing the single currency. These acts followed a procedure prescribed in all details and were clearly designed to be complete, unconditional, and irrevocable.[195] 62

In the specific case of **Greece,** the **decision** of the Council of 19 June 2000 ordering that the derogation in favour of Greece shall be abrogated effective 1 January 2000,[196] which in result meant admitting Greece to the euro, may suffer from such a serious legal flaw due to fraud or misrepresentation on the part of Greece[197] that it would be **void** or could be **abolished.** Institutions, like the European Union or its integral part, the Monetary Union, are, however, designed to be stable and permanent and cannot work under the lasting danger of being dismantled because of defects in the founding legal acts. At least the span of time between the disclosure of such a defect and ensuing legal actions has to be limited. This is also the *ratio* of Art. 263.6 TFEU and the proposal to extend its deadline in the case of 63

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[192] Lenaerts & van Nuffel (2011), para 6-014; in general, also Calliess, in Calliess & Ruffert (2016), Art. 50 EUV para 12, 13, but conceding an exception for extreme cases.

[193] For more details see Siekmann (2017b), p. 783 et seq.

[194] Behrens (2010), p. 121; Herrmann (2010b), p. 417; Meyer (2013), p. 338.

[195] Dierdorf (1998), p. 3146; Bonke (2010), p. 523; Proctor (2012), para 29.10; as a result also Diekmann & Bernauer (2012), p. 1174; Siekmann (2017b), p. 784; see also Herrmann (2010b), p. 417.

[196] Art. 1 of the Council decision (2000/427/EC) of 19 June 2000 in accordance with Article 122(2) of the Treaty *on the adoption by Greece of the single currency on 1 January 2001*, O.J. L 167/19 (2000); Council Regulation (EC) no°2169/2005 of 21 December 2005 *amending Regulation (EC) n° 974/98 on the introduction of the euro*, O.J. L 346/1 (2005).

[197] The questionable actions of the Greek government to obtain admittance are described by the Commission in its *Report on Greek Government Deficit and Debt Statistics* of 8 January 2010, Doc. COM (2010) 1 final; detailed analysis by: Pelagidis & Mitsopoulos (2014); Bitros (2013), especially p. 13-17.

Greece[198] is arbitrary.[199] Finally, the subsequent behaviour of the victim of fraud or misrepresentation has to be taken into account. Granting financial support for Greece while fully aware of the facts of a misrepresentation ought to remedy the legal defects of the admittance decision.[200]

7.2.3 Parallel currency

The introduction of a **national currency** parallel to the euro by a Member State whose currency is the euro[201] would be clearly **incompatible** with primary and secondary law of the Union. Euro banknotes and euro coins are the **sole legal tender** (→ para 31). As the sovereignty in monetary affairs of the Member States whose currency is the euro has been transferred to the Union, Article 3.1 lit.c TFEU, "all national powers of legislation and action in the monetary law field came to an end when the euro was introduced in these states".[202] The issuance of banknotes or coins in a denomination other than euro would be a breach of EU law.[203] Aside from this, the changeover would be technically difficult, have adverse economic effects and require the infringement of civil rights, like closing the borders.[204] 64

7.3 Consensual arrangements

An exit from the monetary union or the introduction of a parallel currency cannot be justified as an adjustment of the **regional extension of the euro area**, like in the case of Greenland which was transformed into an associated overseas territory connected with Denmark,[205] or the parts of Germany under communist rule after 1989, as a whole Member 65

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[198] Behrens (2010), p. 121.

[199] Bonke (2010), p. 522, 525: no renunciation following Art. 60 of the Vienna Convention as sanctions are regulated in detail in the TFEU.

[200] Bonke (2010), p. 519 et seq.; Siekmann (2017b), p. 785; in general also, Annacker (1998), p. 273 et seq.

[201] See e.g. Meyer (2012b), p. 21; ibid. (2013), p. 336 et seq., however acknowledging that a Treaty change would be indispensable; Mayer (2014), p. 35 ; id. (2015).

[202] Proctor (2012), para 31.10.

[203] Dierdorf (1998), p. 3146; in effect also Meyer (2013), p. 336 et seq.

[204] Already described by Scott (1998), p. 218-220, for the hypothetical case of Italy introducing again its own national currency.

[205] See for details: Ungerer (1984), p. 345–352, 350; Weiss (1985); Friel (2004), p. 409–411.

State would obtain a derogation from **core obligations of the Union**, the introduction of the single currency.[206] This can legally only be achieved by an amendment of the primary law.[207] Otherwise, the rules of the primary law granting a derogation to specific Member States would run idle and would be superfluous.[208] An exit or the introduction of a parallel currency may also not be permitted on the basis of Art. 3.1 (c) TFEU. This clause does not comprise the power to amend primary law.[209] This power would, however, be indispensable because of Art. 50 TEU, Art. 28.1, and 139 TFEU.[210]

It would also be legally impossible to **empower** Member States whose currency is the euro to define legal tender and issue their own currency on the basis of Article 2.1 TFEU.[211] Although this clause allows in principle to "empower" Member States to act within the domain of exclusive competences of the Union, this does not hold for core competences,[212] like the creation of legal tender as prescribed by Art. 128 TFEU.[213] 66

As a viable path to a new national currency has also been deliberated to **exit the EU** on the basis of Art. 50 TEU and **re-enter** it immediately with a derogation.[214] Occasionally, a "regressive differentiation" is also proposed as a possible way to allow the exit from the euro area without leaving the EU. It is envisaged as the result of the negotiation following an exit from the EU pursuant Article 50.2 TEU.[215] In effect, both proposals would have to be 67

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[206] See for example Häde (1998), p. 1998; Hofmeister (2011), p. 115, 126–133. referring mainly to Art. 119.2., 140.1 TFEU and Art. 3.4 TEU in addition to the generally accepted tools of interpretation (wording, historical, systematic, and teleological). This obligation is also acknowledged by the EU Commission, see footnote 47.

[207] References for the United Kingdom and Denmark in footnotes 48 et seq.

[208] Hofmeister (2011), p. 127 et seq.

[209] Häde, in Calliess & Ruffert (2016), Art. 140 AEUV para 51.

[210] Bonke (2010), p. 520; Siekmann (2017b), p. 787.

[211] Considered by Seidel (2010), p. 45; Meyer (2012b), p. 21; ibid. (2013), p. 337, without sound legal analysis.

[212] Schaefer (2008), p. 735; Calliess, in Calliess & Ruffert (2016), Art. 2 AEUV para 10; consenting Diekmann & Bernauer (2012), p. 1174: only introducing punctual flexibility; dissenting Seidel (2010), p. 26, without proper reasoning; indirectly perhaps also Herrmann (2010b), p. 415, in a peripheric remark.

[213] Siekmann (2017b), p. 787.

[214] Described by Meyer (2012a), p. 48; ibid. (2013), p. 337.

[215] Dörr, in Grabitz, Hilf, Nettesheim (2011), Art. 50 EUV para 30.

judged as a **circumvention** of Art. 50 & 128 TFEU, and of the rules for a Treaty change as prescribed by Art. 48 TEU.[216]

8 Abolition of cash

8.1 Advocates

Macroeconomists, like *Lawrence Summers*, *Kenneth Rogoff*, and *Peter Bofinger*, have explicitly demanded an outright abolition of cash.[217] They argue that only this way the monetary policy of the central banks in mature economies can re-establish the effectiveness of their instruments. Otherwise, in a world of zero or negative nominal interest rates, they would rapidly become helpless. The existence of cash might create an effective zero lower bound on nominal interest rates. This lower bound might even be a few basis points negative, as there are costs of holding cash. In addition, the arguments in favour of restricting the use of cash (→ para 46) are presented in favour of an abolition as well.[218] In the real world, impediments and onerous downsides have to be taken into account. The vast majority of the **population** is strictly **against an abolition.**[219] 68

8.2 Consequence: Restricting the possession of precious metals or foreign currency

Experience shows that severe restrictions on the use of cash or its abolition would probably not be the last step. At least in some Member States chances are high that the population would try to protect itself and use other commodities as a means of payment or store of value: rare seashells, old paintings, cigarettes, liquor, precious metals, jewels, vouchers, special drawing rights, foreign currency, just to name a few. In essence, any tangible object which is relatively rare and cannot be produced without an input of resources may serve. 69

As consequence, the possession and the use of precious metals as bullion or coins was interdicted in the past, regularly in combination with the threat of draconian punishments in case of disobedience. The same was true for the possession or use of foreign currency. 70

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[216] Siekmann (2017b), p. 788; in effect also Bonke (2010), p. 521.

[217] Rogoff (2014); Summers *(*2016); Bofinger (2015)*,* p. 56; disagreeing Thiele (2015), p. 3; see also Siekmann (2017a), p. 155 et seq. from which parts of the following are taken.

[218] See Bartone (2016), p. 286.

[219] A recent representative survey shows only minimal - and dwindling - support for such an endeavour in Germany, Splendid Research (2018), p. 16: in favour only 12.9%. vs. 14.2% in 2016. According to Deutsche Bundesbank (2018a), p. 9, 88% are against an abolition of cash or restrictions of its use.

Two well-known examples from the 20th century may be given for the United States and Germany:

(1) The possession of gold coins, gold bullion, and gold certificates within the continental United States exceeding 5 ounces was made a criminal offense for all private persons from 1 May 1933 on by Executive Order 6102 signed by President Roosevelt on April 5, 1933.[220] Immediately thereafter the U.S. dollar was substantially depreciated against the price of gold. In effect, this was an (indirect) expropriation of savings. 71

(2) In Germany, all foreign currency (and all financial instruments denominated in foreign currency) was confiscated during the hyperinflation of 1923. The regulation of 25 August 1933 was based on Article 48 of the constitution.[221] Earlier, the *Reichsbank* had been granted power to require under certain circumstances the exchange of foreign currencies or precious metals into – at that time already almost worthless – domestic currency, section 9 of the regulation of 8 May 1923.[222] 72

8.3 Legality

The primary law does not explicitly guarantee the existence of legal tender.[223] Art. 128.1 sentence 2 TFEU only states that the "European Central Bank and the national central banks *may* [emphasis added] issue such notes" (i.e., euro banknotes). For coins issued by the Member States, subject to approval by the ECB, the wording is similar in paragraph 2 of this article; but not identical (→ para 12). In addition, this language is reiterated in Art. 282.3 sentence 2 TFEU. Art. 128.1 sentence 3 TFEU decrees, however, that "the banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union". From this it follows that the primary law pre-supposes the existence of legal tender, banknotes and of coins denominated in euro. 73

As the Member States may only issue euro coins subject to approval by the ECB (→ para 12, 25-27) and as they are barred from issuing any substitutes to euro banknotes (→ para 34) as legal tender it is in effect only the ECB which has control over the existence 74

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[220] Franklin D. Roosevelt (1933), p. 111.

[221] Official Journal part I, p. 833 (Verordnung des Reichspräsidenten über die Ablieferung ausländischer Vermögensgegenstände vom 25. August 1923, Reichsgesetzblatt I, 833).

[222] Official Journal part I, p. 275 (Verordnung des Reichspräsidenten aufgrund des Notgesetzes (Maßnahmen gegen die Valutaspekulation) vom 8. Mai 1923, RGBl I, 275).

[223] See for details Siekmann (2017a), p. 162 et seq.

of legal tender. The issuing of "paper money" was, from the beginning, considered one of the characteristic tasks of central banks,[224] including the newly created ECB. If it refrained from issuing this money, it would be defective in fulfilling one of its principle tasks. A legal **obligation to issue banknotes as legal tender** or to authorise their issuance has to be acknowledged. It may be called an **"institutional guarantee"** of legal tender. The arguments against such a guarantee are either erroneous or not relevant.[225] The potentially lacking demand for legal tender is no argument against an obligation to provide it and the interpretation of Art. 127.2 4th indent TFEU is not decisive as Art. 128.1 TFEU would reach further being *lex specialis*. As a result, an abolition of cash would **not** be **compatible with the primary law** of the Union.[226] The attempts to equate bank based money ("book money") with legal tender[227] are futile as they disregard the **additional insolvency risk** connected with its use. Similarly to the assessment of restrictions to the use of cash its abolition would be even more inconsistent fundamental principles of constitutional law and a breach of civil rights (→ para 45 et seq.). Moreover, it would allow indiscriminately a **total control** over all payments and thus of all activities of the people as long as they have the faintest financial implications. This would be an infringement of the protection of privacy (*Recht auf informationelle Selbstbestimmung*) and the general personality right (*Allgemeines Persönlichkeitsrecht*) protected by Art. 2.1 in conjunction with Art. 1.1 of the German Federal Constitution which can be justified only under very narrow conditions.[228] Balancing costs and benefits of an abolition would therefore even more clearly lead to a verdict than mere restrictions.[229]

9 Fighting counterfeiting

9.1 Administrative procedures

The EU takes considerable effort to fight counterfeiting euro banknotes and euro coins. National authorities in EU countries, the Commission, the European Central Bank, non-EU 75

[224] See Goodhard (1988), p. 20–23 & 123, however, with an underlying sympathy for "free" banking; Proctor (2012), para 1.36–1.38; Siekmann (2016), p. 506–508.

[225] Submitted by Omlor (2015), p. 2299-

[226] Freimuth, in Siekmann (2013), Art. 128 TFEU para 30; Siekmann (2017a), p. 169; *disagreeing* Omlor (2015), p. 2299, who acknowledges, however, an obligation to issue legal tender based on Art. 10 sentence 1 und Art. 11 sentence 1 of Council Regulation (EC) 974/98 of 3 May 1998 *on the introduction of the euro*, O.J. L 139/1 (1998).

[227] Recently warmed up by Omlor (2015), p. 2302 et seq., with one sided focus on some older private law sources and disregarding the dominant public law quality of legal tender and the majority of younger court decisions and law review articles in Germany (→ para 23).

[228] Bacher & Beck (2015), p.35; Bartone (2015), p. 287 et seq.

[229] Bacher & Beck (2015), p.35; Bartone (2015), p. 288.

countries and international organisations join in a **multidisciplinary cooperation** in the fight against counterfeiting.[230] A multitude of legal acts has been passed to achieve this goal.[231]

The legal tender in circulation is constantly **analysed, identified, and withdrawn**, if necessary. Banks and other credit institutions must **check** the **authenticity** of all euro notes and coins that they intend to put back into circulation.[232] 76

All authorities in Member States must **send** counterfeit notes and coins to their national analysis centres for analysis and identification. Credit institutions have to withdraw from circulation all euro notes and coins which they suspect to be counterfeit and hand them over to the respective national authorities as well.[233] 77

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[230] See for the demarcation of competences between European and national institutions in the fight against counterfeiting Weenink (2004), p. 277–279, resuming a "shared competence" (p. 277).

[231] These acts have been set in force:

- Council Regulation (EC) 974/98 of 3 May 1998 *on the introduction of the euro*, O.J. L 139/1 (1998)
- Decision 2001/887/JHA *on protecting the euro against counterfeiting in connection with the introduction of the euro*, O.J. L 329/1 (2001)
- Council Decision (EC) 2003/861/ of 8 December 2003 *concerning analysis and co-operation with regard to counterfeit euro coins*, O.J. L 325/44 (2003)
- Council Decision (EC) of 8 December 2003 *extending the effects of Decision 2003/861/EC concerning analysis and cooperation with regard to counterfeit euro coins to those Member States which have not adopted the euro as their single currency*, O.J. L 325/45(2003)
- Commission Decision (EC) 2005/37/ of 29 October 2004 *establishing the European Technical and Scientific Centre (ETSC) and providing for coordination of technical actions to protect euro coins against counterfeiting*, O.J. L 19/73 (2005)
- Council Decision 2005/511/JHA of 12 July 2005 *on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro counterfeiting*, O.J. L 185/35 (2005).

[232] Decision of the European Central Bank 2010/597 of 16 September 2010 *on the authenticity and fitness checking and recirculation of euro banknotes (ECB/2010/14),* O.J. L 267/1 (2010); Authentication regulation 1210/2010 *on euro-coin authentication & handling of coins unfit for circulation*, O.J. L 339/1 (2010).

[233] Council Regulation (EC) No 1338/2001 *laying down measures for the protection of the euro against counterfeiting*, O.J. 181/6 (2001); Council Regulation (EC) No 44/2009 *amending Regulation (EC) No 1338/2001 laying down measures for protecting the euro against counterfeiting*, O.J. L 17/1 (2009); Council Regulation (EC) No 1339/2001 *extending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of*

9.2 Training programme

An exchange, assistance and training programme for the protection of the euro against counterfeiting named "Pericles 2020" has been set up. For the period 2014-2020, Regulation (EU) No 331/2014 of the European Parliament and of the Council serves as legal basis.[234] 78

9.3 Repression

Law enforcement is the main objective of Directive 2014/62/EU[235] which replaces Framework Decision 2000/383/JHA.[236] The Directive further enhances the implementation of the 1929 Geneva Convention on the suppression of counterfeiting. In the beginning, criminal sanctions were mainly reserved to the national level and only a minimum harmonization was secured by the Union.[237] The new measure is an upgrade to the Union level enabled by Art. 83.1or 2 TFEU introduced by the Treaty of Lisbon.[238] It includes tougher sanctions for criminals and improved tools for cross-border investigation. It shall protect the euro against counterfeiting by **criminal law measures**. 79

The Directive obliges Member States to punish: 80

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the euro against counterfeiting to those Member States which have not adopted the euro as their single currency, O.J. L 181/11 (2001); Council Regulation (EC) No 45/2009 *amending Regulation* No 1339/2001 *extending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency,* O.J. L 17/4 (2009).

[234] Regulation (EU) No 331/2014 of 11 March 2014 *establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the 'Pericles 2020' programme) and repealing Council Decisions 2001/923/EC, 2001/924/EC, 2006/75/EC, 2006/76/EC, 2006/849/EC and 2006/850/EC*, O.J. L 103/1 (2014).

[235] Directive 2014/62/EU of 15 May 2014 *on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA*, O.J. L 151/1 (2014).

[236] Council Framework Decision 2000/383/JHA *on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*, O.J. L 140/1 (2000); see for details Weening (2004), p. 279–281.

[237] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 53 et seq.

[238] Papapaschalis, in von der Groeben et al. (2015), Art. 128 AEUV para 62 with further details; Manger-Nestler, in Pechstein et al. (2017), Art. 128 AEUV para 15; specifically to the requirements of Art.83.2 Öberg (2011).

– fraudulent making or altering of currency

– distribution of counterfeit currency

– making and possessing counterfeiting equipment

– fraudulent making of notes and coins not yet issued.

9.4 Reports

The Commission delivers **reports** on the increasing protections against counterfeiting.[239] 81
The majority concerns only euro coins. The latest is from 2015[240] and is based on Art. 12.4 Regulation 1210/2010.[241]

[239] At first: Report from the Commission based on Article 11 of the Council's framework Decision of 29 May 2000 *on increasing protection by criminal penalties and other sanctions against couterfeiting in connection with the introduction of the euro* COM(2001) 771 final.

[240] Report from the Commission of 14 October 2015 to the Economic and Financial Committee under Article 12(4) of Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 *concerning authentication of euro coins and handling of euro coins unfit for circulation*, C(2015) 6960 final.

[241] Regulation (EU) No 1210/2010 of 15 December 2010 *concerning authentication of euro coins and handling of euro coins unfit for circulation,* O.J. 339/1 (2010); before: Commission Recommendation of 27 May 2005 *concerning authentication of euro coins and handling of euro coins unfit for circulation,* O.J. L 184/60 (2005).

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