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Introduction

The debate on exit, exclusion, or parallel currencies in the euro area follows – as many topics in academia and politics – a cyclical pattern. It seemed to have calmed down for some time but was spurred again by the results of the elections in Greece at the end of the year 2014. It lost some momentum after the first negotiations with the new government had taken place and a consensus seemed to have been reached. Only a few days after the alleged consensus, the debate heated up again when remarks of the new rulers were spread which were perceived as outrageous. As a consequence, a rhetoric was spreading that an exit by accident might happen.

Voluntary withdrawal or forced exclusion from the euro area seemed to be a viable option for mitigating the financial burdens of some Member States whose currency is the euro. Also the introduction of a parallel currency is regularly recommended[1] as a solution for the staggering problems of some of these countries which are by no mean only financial and probably not even in the first place.

From a more distant perspective all the discussed plans, strategies and debates looked and still look quite eerie. Aloof from the real world almost nobody seems to take binding rules and institutional provisions into account. The crucial questions

[1] For example THOMAS MAYER (2014), p. 35; ID. (2015).

are not asked: Are the elaborated plans after all legally possible? How can the introduction of e new currency in a Member State – be it parallel or in substitution of the euro – solve the debt problems of such a state and its banks? Can they really lead to the aspired alleviation of the debt burden when the majority of claims are still denominated in euro?

Over time some jurisprudence has been developed that does not simply accept the introduction of a new currency by a unilateral act of a government in financial distress. The re-denomination of claims after a change of the currency is a thorny and cumbersome field of legal reasoning, especially in case the legality of the introduction of the new currency is not free from serious doubts.

The following questions which are closely related to each other but deserve a distinctively different treatment have to be answered:[2]

I. Is it legally possible for a Member State to leave the eurozone?
II. May Member State introduce a new currency parallel to the euro?
III. Can a Member State be excluded from the eurozone or the Monetary Union?
IV. May permission be granted to introduce a new currency in a Member State of the eurozone?
V. What are the consequences of an illegal exit from the eurozone?

[2] Parts of the ensuing deliberations are derived from SIEKMANN (2015).

I. Exit or Withdrawal

To begin with the result: A withdrawal from the obligations of the Monetary Union allowing the re-introduction of a currency of its own by a Member State whose currency is the euro has to be judged as illegal[3] with severe economic and legal consequences.[4] An exit from the euro area is legally not possible and economically questionable.[5] It would be an open invitation for all speculators of the world to destabilize the finances of a Member State picked to be vulnerable;[6] now the reasoning in more detail:

1. The Lack of an Entity to Join or to Leave

The European economic and monetary union is not designed as a separate entity but as an integral part of the EU. The primary law systematically only speaks of economic policy and of monetary policy (Part III, Title VIII Chapter 1 and Chapter 2 TFEU). The monetary policy for the Member States whose currency is the euro shall be conducted by the Eurosystem, consisting of the European Central Bank

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3 With in depth analysis: CHIARA ZILIOLI (2005), pp. 126, 132; PHOEBUS ATHANASSIOU (2009), p. 21; HELMUT SIEKMANN (2013), *Einführung* [introduction] margin no. 48; ROSA M. LASTRA (2015), margin no 1.62 but also considering Article 352 TFEU, however more as a possibility laid out by another author and demanding a (unanimous) Treaty change; in effect similarly: PAUL KIRCHHOF (1994), p. 72; HUGO J. HAHN and ULRICH HÄDE (2010), § 26 margin no. 7 et seq.; disagreeing - although hesitatingly and without any legal reasoning: MARTIN SEIDEL (2007), p. 617: despite the distinct missing of an exit clause like in the system of the European Monetary System (EMS): probably enabled by "unwritten community law"; questioning but without a clear solution PETER BEHRENS (2010), p. 121; unclear: ULRICH HÄDE (2011), Article 140 TFEU margin no. 59 and 63. The GERMAN FEDERAL CONSTITUTIONAL COURT 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, see BVerfGE 89, 155 (204). Whereas from its Lisbon-judgment can be inferred that an exit would not be compatible with German constitutional law, BVerfGE 123, 267 (346 f.).

4 For more details see Section V below.

5 The possibility of a change of the primary law by an unanimous action of the Member States is, of course, self-evident, mentioned by ROSA M. LASTRA (2015), margin no 1.63 with further references.

6 BEATRICE WEDER DI MAURO (2010), pp. 99 et seq, points out that monetary systems that provide an exit option are inherently instable. HAL S. SCOTT (1998) discusses the situation "when the euro falls apart" pretending this would be the natural (and legal?) course of the development. Implicitly he assumes that a withdrawal is legally possible as he assesses the consequences of a withdrawal or breakup. This was written, however, before the introduction of Article 50 TEU.

(ECB) and the national central banks of the Member States whose currency is the euro. The Eurosystem decidedly has not been given legal personality, as well as the European System of Central Banks (ESCB) which is formed by the ECB and the central banks of all Member States – irrespective if they have introduced the euro or not, Article 282(1) TFEU.[7] Only the ECB is established as an institution and is granted legal personality, Article 282(3) TFEU. It is noteworthy that the Member States per se do not participate in the ESCB, only national central banks which are also the sole subscribers and holders of the capital of the ECB, Article 28.2. Statute of the ESCB and the ECB.[8]

The only clause which uses the term "economic and monetary union" is Article 3(4) TEU. It stipulates that an economic and monetary union has to be set up. Although its wording[9] is somewhat murky it may not be construed in a way as to set up an entity within the EU. It states only a goal[10] and 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. The clause may be understood as a guideline for political actions.[11]

The roots of Article 3(4) TEU can be found in the Single European Act (SEA).[12] In the heading of a new chapter inserted in the primary law of the European Community (EEC Treaty) by Article 20 SEA the term appears - but only there:
"CHAPTER 1. CO-OPERATION IN ECONOMIC AND MONETARY POLICY

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7 The euro area as such has no legal personality as well, see ROSA M. LASTRA (2015), margin no 1.60.

8 Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, Official Journal C 326/230 of 26 October 2012; afterwards referred to as "Statute ESCB/ECB".

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

10 The norm has little legal content. It comes close to a *Staatszielbestimmung* in German legal terminology and does not constitute powers or competences, MATTHIAS RUFFERT (2011), Article 3 EUV, margin no 2, 12.

11 ULRICH BECKER (2012), Article 3 EUV, margin no 5.

12 Official Journal of the European Communities of 29 June 1987, L 169/1; signed 17 February 1986 and 28 February 1986; effective 1 July 1987.

(ECONOMIC AND MONETARY UNION)". The wording of the following provisions[13] makes it absolutely clear that a closer cooperation within the Community and *not* the creation of a separate body "Economic and Monetary Union" was intended.

The Maastricht Treaty *itself* regulates in detail the economic and monetary policy of the Union, and contains all provisions needed to set up the European System of Central Banks (now Art. 282 TFEU) including its statute but without setting up a separate entity "Economic and Monetary Union". Only the actual introduction of the single currency needed additional measures.[14] In respect of *economic* policy only a small fraction of an economic union was realized as main competences remain with the Member States in this field. This is the main reason why it was kept as an "abstract goal" in the primary law of the Union. A second reason to keep the clause was to remind that in principle all (new) Member States are obliged to introduce the euro as soon as they fulfill the admission criteria.[15] In effect, no institution may be derived solely from Article 3(4) TEU.

2. The necessity of an exemption in the primary law

Each Member State is obliged to introduce the euro unless it enjoys a derogation in the sense of Article 139(1) TFEU. An exemption has been granted specifically

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[13] 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 co-operate 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.

2. In so far as further development in the field of economic and monetary policy necessitates institutional changes, the provisions of Article 236 shall be applicable. The Monetary Committee and the Committee of Governors of the Central Banks shall also be consulted regarding institutional changes in the monetary area.

[14] See European Commission (2006).

[15] GEIGER (2010), Article 3 TEU margin no 12; HELMUT SIEKMANN (2014), Article 88, margin no 37.

for the UK[16] and Denmark[17] in the Protocols to the Treaty of Maastricht. Similar acts can be found in the primary law admitting new Member States. If, in general, an exit from the euro area were permissible, these legal acts would have been totally superfluous.

Exit from the Monetary Union while remaining a Member State of the EU is not possible, as a separate entity “Monetary Union” does not exist. Consequently, the Treaty of Lisbon[18] provided only for withdrawal from the EU as a whole and not from a “Monetary Union”. The exit from the EU can be achieved by a simple notification of the European Council, Article 50(1) and (2) sentence 1 TEU. This is also the reason why, technically, the euro is introduced in a Member States whose currency has heretofore not been the euro by revoking an exemption, as in the case of Greece.[19]

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[16] Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, Official Journal of 26 October 2012, C 326/284: “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.”

[17] 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 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, Official Journal of 26 October 2012, C 326/287.

[18] Signed on 13 December 2007 and entering into force on 1 January 2009, Official Journal C 306/1 of 17 December 2007; rectification on 30 April 2008, Official Journal C 111/56 of 6 May 2008; rectification on 27 November 2009, Official Journal C 209/1 of 6 May 2008.

[19] Article 1 of 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, Official Journal of the European Communities of 7 July 2000 L 167/19; Council Regulation (EC) No 2169/2005 of 21 December 2005 amending Regulation (EC) No 974/98 on the introduction of the euro, Official Journal of 29 December 2005 L 346/1; for the legislative history cf. EU Bulletin 5—2000, recital 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) was endorsed by the European Parliament on 18 May”.

3. Recourse to the law of nations

A recourse to the rules of the law of nations on the termination of contractual obligations is barred for three main reasons:

(1) A special solution for the problem has been inserted in the primary law by the Treaty of Lisbon which is conclusive: Article 50 TEU.

(2) 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 institutions* even if they have (not yet) reached the quality of a federal state.

(3) 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*.

(1) Pursuant to Article 50(1) TEU, any Member State may "decide to withdraw from the Union in accordance with its own constitutional requirements". However, a partial or total exit solely from the euro area is not provided for. Before the introduction of this clause into the primary law by the Treaty of Lisbon,[20] it had been debated for quite some time whether a Member State could legally leave the European Economic Community (EEC) or – later – the European Communities (EC). This was also discussed in view of a partial renouncement. The legal literature of the time predominantly denied the possibility of an exit or withdrawal.[21] Knowing this controversy, consensus was finally reached with the introduction of Article 50 TEU. It was meant as a final answer to all questions arising from this problem.[22] As a consequence, Article 50 TEU has to be judged as being conclusive.

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[20] Signed on 13 December 2007 and entering into force on 1 January 2009, Official Journal C 306/1 of 17 December 2007; rectification on 30 April 2008, Official Journal C 111/56 of 6 May 2008; rectification on 27 November 2009, Official Journal C 209/1 of 6 May 2008.

[21] RUDOLF STREINZ (2012), Article 50 EUV, margin no. 3 with further references.

[22] OLIVER DÖRR (2011), Article 50 EUV, margin no. 3; KOEN LENAERTS and PIET VAN NUFFEL (2011), margin no. 6-015; HELMUT SIEKMANN (2012), p. 376.

From this follows that a recourse to the Vienna Convention on the Law of Treaties[23] or to general rules of the law of nations (*clausula rebus sic stantibus*) is prohibited.[24] The application of the Conventions is interdicted in the first place for reasons of the EU law.

(2) It is highly questionable whether the law of nations in general and the Vienna Convention in specific are applicable to a supranational organization such as the EU.[25] It is a subject of the law of nations and an organism which follows (internally) its own rules.

(3) Furthermore, the provisions of the Vienna Convention regulating the termination of a treaty[26] may not be invoked because of their subsidiarity:

- Article 54 refers expressly to the provisions of the treaty in question:

  > "The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the other parties after consultations with the other contracting States."

- Article 56(1) clearly restricts the grounds for the termination of a treaty:

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[23] 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, Federal Law Gazette, Part II (*Bundesgesetzblatt Teil II*) 1985, p. 926.

[24] CLAUDIA ANNACKER (1998), pp. 59-61, denies the validity of the rules of the law of nations inside a supranational organisation, i.e. among the members *inter se*; CHRISTIAN CALLIESS (2011), Article 50 EUV margin no. 13, understanding the consent of Member States to the Treaty of Lisbon as an implicit renunciation of any exit rights; ULRICH BECKER (2012), Article 356 AEUV margin no. 5 without reservation; disagreeing: BERNHARD KEMPEN (2012), Article 140 AEUV margin no. 32 without regarding Article 50 EUV; ULRICH HÄDE (2011), Article 140 AEUV margin no. 63 without reasoning; OLIVER DÖRR (2011), Article 50 EUV margin no. 3 and 4, but still considering the provision as constitutive; MICHAEL RODI (2012), Article 140 AEUV margin no. 4 without considering Article 50 EUV.

[25] Cf. the material presented by RALF GÜNTER WETZEL and DIETRICH RAUSCHNING (1978), pp. 390-395. HAL S. SCOTT (1998), p. 241, discussing in depth Article 56 of the Vienna Convention on the Law of Treaties expresses doubts whether the provisions of paragraph 1 of the article are met regarding the EU law but does not come to a clear result (p. 214). This was, however, before the insertion of Article 50 TEU.

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

> "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. The nature of of the contractual law of the EU does not imply a right of denunciation or withdrawal from parts of it. The primary law of the EU has set up an elaborate system of rules on economic and monetary policy of the Union covering a wide variety of problems and situations, specifically for situations of distress (e.g. Articles 122(2), 126(3)-(14), 143, 144 TFEU) but does not contain the faintest hint that a termination for one or more Member States could be considered. On the contrary, the nature of a currency union in general forbids considering an "exit" as this would confer an inherent weakness in it. The insertation of paragraph 3 in Article 136 TFEU[27] would have been an ample opportunity to allow it if that would have been the intention of the framers of primary law.

Article 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:

> "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

Since the Treaty of Lisbon, Paragraph 1 of Article 56 of the Vienna Convention now clearly blocks Member State exit or withdrawal upon the basis of the Convention in the context of the EU. The Treaty of Lisbon created a provision which explicitly regulated withdrawal from the Union, but does not provide for exit

[27] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, Official Journal of 6 April 2011, L 91/1.

solely from the EMU. Thus there is no space for the application of Article 56 of the Convention.

In effect, the provisions on a "fundamental change of circumstances" also do not allow exit or withdrawal from the euro area. Aside from the highly problematical applicability of the Vienna Convention in the context of the EU, the pre-requisites of its Article 62 are not fulfilled:[28] Article 62(1) of the Convention stipulates, in the first place, that:

> "a fundamental change of circumstances (…) has occurred with regard to those existing at the time of the conclusion of a treaty (…) which was not foreseen by the parties."[29]

Nor will recourse to the general *clausula rebus sic stantibus* allow exit. It, too, is foreclosed or – at least – its conditions are not met.[30]

The problems with the fiscal sustainability or competitiveness of a Member State introducing the euro had been foreseen by the parties of the Treaty of Maastricht as the admission procedure imposed admission criteria,[31] and the expansion of the cohesion and structural funds[32] clearly prove. Article 126 TFEU and the Protocol on excessive deficits also regulate the matter. In addition, Article 62(2) of the Convention expressly interdicts a fundamental change of circumstances being invoked as a ground for terminating or withdrawing from a treaty "if the fundamental change is the result of a breach by the party invoking it". This would be the case not only for Greece[33] but also for other Member States which do not fulfill the rules

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[28] This article is considered to be a codification of the general law of nations: JÖRG P. MÜLLER (1971), p. 217.

[29] For details, see JÖRG P. MÜLLER (1971), pp. 217-226.

[30] CHRISTIAN CALLIESS (2011), Article 50 EUV margin no. 13.

[31] HELMUT SIEKMANN (2015) Section 1.3.4.

[32] HELMUT SIEKMANN (2015) Section 1.4.3. (1)

[33] More Section III below.

on fiscal soundness, as specified in Article 126(1) TFEU and the ensuing secondary law. Finally, the amendment of Article 136 TFEU in cognizance of the problems bars a recourse to the *clausula rebus sic stantibus*

II. The Introduction of a Parallel Currency

It is highly questionable whether the introduction of a new currency parallel to the euro could mitigate the financial problems of the Member State in distress. All financial claims are still denominated in euro. National legislation to change this are likely to be void as the result of breaching national and international civil rights statutes. Furthermore, intricate problems of international private law would also have to be solved.[34]

In any case, such a measure would be illegal from the point of view of the primary law of the Union. Euro banknotes are the *only* legal tender within the Member States whose currency is the euro, Article 128(1) sentence 3 TFEU. Also the secondary law categorically forbids the introduction of a currency other than the euro as legal tender.[35] As the sovereignty in monetary affairs of the Member States whose currency is the euro has been transferred to the Union, Article 3(1)(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".[36]

A statute trying to introduce a new drachma, for example, as legal tender would be superseded in application by EU law, with the result that nobody would have to ac-

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[34] See for more details Section V below.

[35] Article 2 sentence 1 Council Regulation (EC) No 974/98 on the introduction of the euro, Official Journal of 11 May 1998, L 139/1; cf. CHARLES PROCTOR (2012), margin no. 29.13 emphasizing that the euro has been made the sole currency in the participating Member States judging it as the *lex monetae* of the eurozone (margin no. 29.10); similarly ROSA M. LASTRA (2015), margin no 7.99: "The prerogative of issuing currency (*ius cudendae monetae*), which is a classic attribute of monetary sovereignty, has been transferred to the supranational arena".

[36] CHARLES PROCTOR (2012), margin no. 31.10.

cept it. Also existing claims would still have to be paid back in euros. For this reason, the action would be quite meaningless from an economic point of view as well.

III. Exclusion

1. General Rules

An exclusion from the euro area by an act of the EU, of Member States, or of the euro-group is not allowed as the needed legal basis for such an onerous measure is not visible. The primary law does not provide a statutory basis for such a sanction.[37] In particular, Article 7 TEU could not serve as an instrument for an exclusion for three main reasons:

- It contains an elaborated procedure for enforcing the fundamental values of the EU and only them. It is restrained to the values laid down in Article 2 TEU such as respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights. The breach of the rules for the economic and monetary policy as such does not belong to it. Only a serious aberration from the various aspects of the procedural or substantive requirements set up by the rule of law might suffice this requirement. This is, however, not (yet) in sight;
- In line with the argumentation above, it does not provide a basis for a separate exclusion from the Monetary Union;
- Moreover, it does not even provide a basis for an exclusion from the EU as its most severe sanction for "a serious and persistent breach by a Member State" is the suspension of "certain rights of the representatives of the government of that Member State in question including the voting rights", Article 7(3) sentence 1 TEU.

[37] KOEN LENAERTS and PIET VAN NUFFEL (2011), margin no. 6-014; in general, also: CHRISTIAN CALLIESS (2011), Article 50 EUV margin no. 12, 13 but exception for extreme cases.

The petty breach of EU law by a Member State has been specifically regulated in Articles 258 and 259 TFEU. The exclusion is also not a sanction foreseen in the detailed procedure laid down there.

The described statutory provisions have to be judged as conclusive. A recourse to rules of the law of nations is not allowed.[38]

1. Renunciation the Acts of Admittance to the Euro

It has been considered[39] that the legal acts admitting a country to the euro, could be renounced, in specific by amending the regulation about the introduction of the single currency in that country[40], not regarding whether those acts were obtained by fraud or misrepresentation. Even under the (questionable) assumption that legal acts might be revocable by the competent institutions as *actus contrarii*[41] this does not hold in the course of introducing the single currency in a staggered procedure prescribed by the Maastricht Treaty. Those acts were clearly designed to be complete, unconditional, and irrevocable.[42] Otherwise, it would have left the door open for speculative pressure. All details were meticulously regulated. A way back was not contemplated and would have been contrary to the principle dominating the formation of the EU: an always closer integration; and not a way back and forth, Article 1 TEU.[43]

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[38] JULIANE KOKOTT (2012), Article 356 AEUV margin no. 6; partially disagreeing: RUDOLF STREINZ (2012), Article 50 EUV margin no. 13, considering it for an exclusion from the EU (not the EMU!) in "extreme cases"; also MATTHIAS PECHSTEIN (2012), Article 7 EUV margin no. 23 without reasoning; unclear CHRISTIAN CALLIESS (2011), Article 50 EUV margin no. 17, 21 (advice to withdraw pursuant Article 50 TEU).

[39] PETER BEHRENS (2010), p. 121; CHRISTOPH HERRMANN (2010), p. 417.

[40] Council Regulation (EC) No 974/98 on the introduction of the euro, Official Journal of 11 May 1998, L 139/1.

[41] This is true even if Article 3 TEU may not be interpreted as a general interdiction of regression in the course of European integration, see, for this ULRICH BECKER (2012), Article 3 EUV margin no. 10, but without reasoning.

[42] CHARLES PROCTOR (2012), margin no. 29.10; CHRISTOPH HERRMANN (2010), p. 417.

[43] CHRISTIAN CALLIESS (2011), Article 1 EUV margin no. 12: interdiction of regression.

2. The Specific Circumstances in the Case of Greece

In the case of Greece, however, it could be argued that the permission to introduce the euro was obtained as a result of fraud, misrepresentation, or force. It might suffer from a serious legal defect allowing the removal from the euro area. In technical legal terms it could be renounceable, voidable, or invalid from the beginning on. In the case of Greece in specific the following would have to be examined: Does the decision of the Council of 19 June 2000 ordering that the derogation in favor of Greece shall be abrogated effective 1 January 2000,[44] which in result meant admitting Greece to the euro, suffer from such a serious legal flaw due to fraud or misrepresentation on the part of Greece[45] that it would be void or could be abolished?

The rules of the Vienna Convention on the invalidity of treaties as a consequence of error[46] or fraud,[47] or its breach,[48] may be worth considering but will hardly be applicable. The EU is - despite its origin in treaties - more than just a contractual arrangement. Also the termination or suspension of the operation of a treaty following Article 60 of the Convention because of its breach or non-fulfillment of obligations by one of the parties may be barred for the same reasons.[49]

It could be discussed if and to which extent the general rules contained in the (private) law of contracts on the validity of the declaration of intention may be applied to sovereign acts. In general, also the law of nations accepts force,[50] error,[51] and

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44 See footnote 19.

45 The questionable actions of the Greek government to obtain admittance are described by the EUROPEAN COMMISSION (2010) in its report of 8 January 2010; detailed analysis by: THEODORE PELAGIDIS and MICHAEL MITSOPOULOS (2014); GEORGE C. BITROS (2013), especially pp. 13-17.

46 Article 48.

47 Article 49.

48 Article 60.

49 Accepted by the law of nations as general principle, see FRANZ PFLUGER (1936), p. 129 also mentioning already the exit from a multilateral agreement (p. 131 et seq.)

50 Ibid, pp. 78-88.

51 Ibid, pp. 88-91.

fraud[52] as flaws that might lead to the invalidity of a sovereign act. Even more intricate is the question whether those rules are applicable to acts designing the setup of an *institution* and its operation. Institutions, like the European Union or its integral part, the Monetary Union, are designated 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. Finally the subsequent behavior of the victim of fraud or misrepresentation has to be taken into account.[53] Granting financial support for Greece fully aware of the facts of a misrepresentation might remedy the legal defects of the admittance decision.[54] Whereas, the principle of trust and good faith within organizations[55] might require that Greece discharges its (new) obligations within this context. A failure to do so might also lead to serious legal consequences.

By all means, the general or the contractual law of nations is not applicable in case the EU contains a specific regulation of the problem. This is to be found in Article 7 TEU which provides in a staggered procedure the suspension of membership rights as most severe sanction.[56] An exclusion is not provided and would be illegal.[57]

IV. Permission to Introduce a New Currency

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. An exit or

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52 Ibid, pp. 91-93.

53 Regulated in Article 45 of the Vienna Convention.

54 In general, CLAUDIA ANNACKER (1998), p. 273 et seq.

55 Generally accepted JÖRG P. MÜLLER (1971), p. 227 et seq.

56 Article 7 TEU margin no. 3 with some *caveats*; Article 356 TFEU margin no. 5, 7 with further references; in general also MATTHIAS RUFFERT (2011), Article 7 EUV margin no. 31 et seq., with further references.

57 KOEN LENAERTS and PIET VAN NUFFEL (2011), margin no. 6-014; JULIANE KOKOTT (2012), Article 356 AEUV margin no. 6 with further references.

the introduction of a parallel currency may also not be *permitted* on the basis of Article 3(1)(c) TFEU. This clause does not comprise the power to amend primary law.[58] This power would, however, be indispensable because of Article 50 TEU and Article 128(1) TFEU. It has to be kept in mind, the euro banknotes are "the only such notes to have the status of legal tender within the Union", Article 128(1) sentence 3 TFEU.

In addition, a specific clause has delineated the Member States which are exempt from the obligation to introduce the euro, 'Member States with a derogation', Article 139(1) TFEU. This shows that the primary law (Article 3(4) TEU and others) upholds the obligation of the Member States to introduce the euro unless they enjoy an explicit exemption from this duty like the UK and Denmark.[59] This obligation may not be circumvented by a permission granted by an organ of the EU or by the Member States.

The Treaty of Maastricht imposed the strict obligation on the European Union (EU) to establish an economic and monetary union, now Article 3(4) TEU. This goal has been achieved with the formation of the European System of Central Banks (ESCB), the establishment of the European Central Bank (ECB), and the introduction of the single currency 1999/2001 as the last irrevocable step ordered by the Treaty of Maastricht. Nevertheless, the provision was upheld in the revisions of the primary law to underscore the lasting obligation to introduce the euro in those Member States whose currency is not yet the euro.

The single currency was designed to become the currency of the EU and to be the legal tender in all Member States unless an exemption was explicitly granted in the primary law of the EU, as in the case of the UK and Denmark. The newly admitted Member States are obliged to introduce the euro as their currency as soon

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58 ULRICH HÄDE (2011), Article 140 TFEU margin no. 60.

59 For references see footnote 15.

as they fulfill the admission criteria. Technically, this has been achieved by transferring the exclusive competence for the monetary policy of the Member States whose currency is the euro on the EU, Article 3(1)(c) TFEU and by bestowing the euro with the quality of legal tender, the only legal tender in the EU, Article 128(1) sentence 3 TFEU.

Even unanimously *rules on competences* can legally not be changed by the interested entities. Such an alteration may only be done following the proper procedure prescribed by the primary law, Article 48 TEU. These provisions would largely be meaningless if another course of action would be allowed. Article 3(1)(c) TFEU bestowing the *exclusive* competence in the area of monetary policy for the Member States whose currency is the euro on the EU prevails.

V. Consequences of an Illegal Exit from the Euro Area

Serious and hard to calculate problems would above all arise for the debt denominated in euro in case the new currency is introduced despite the contradicting rules of EU law.[60]

It is already highly questionable, whether such debt would automatically be transformed into debt denominated in the new currency (e.g. *nea drachme*); especially as the old currency will continue to exist. The national government may, however, try to change the denomination of the existing debt by a unilateral administrative or legislative act. This act would have to be judged as void or at least not applicable since the Member State whose currency is the euro does not have competences in monetary affairs any more. As its withdrawal from the Monetary Union or

[60] For an extensive analysis of the severe consequences, in specific for all contractual obligation denominated in euro, see WOLFGANG ERNST (2012), p. 50, et seq., 57; FRANK VISCHER (2010), Section 18.

the introduction of a new (parallel) currency are illegal the EU continues to command the exclusive competence in all monetary affairs, Article 3(1)(c) TFEU.[61] Acts of a Member State in this field are void or at least illegal as well.

In general, it can be assumed that EU law is the *lex monetae*[62] governing obligations originating in a Member State. A change of the currency would at least be ineffective in view of the objective to reduce the burden of debt.[63] This result is not affected by the fact whether the law of the re-denominating country or a foreign law is governing the underlying contracts; for example it would be irrelevant whether a bond has been issued pursuant to the law of the United Kingdom or of Greece in case the Hellenic Republic would introduce a new currency. The fact according to which law the obligation has come into existence may only be used as criterion for determining the *lex monetae* in situations of *uncertainty* about the applicable currency.[64] This uncertainty is, however, not given in a case when a government by sovereign act changes the denomination referred to in a contract to another currency, *e.g.*, from euro to "new drachma".[65]

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61 HELMUT SIEKMANN (2015) Section 1.2.1.

62 For definition and function, see, already, F.A. MANN (1992), p. 219 et seq., 272, 278; later: CHARLES PROCTOR (2012), margin no. 32.16; FRANK VISCHER (2010) margin no. 358-364; WOLFGANG ERNST (2012), pp. 52-55.

63 Without referring to this crucial clause HAL A. SCOTT (1998), p. 223, comes to a similar conclusion: "Note that if reference was made to EU law as *lex monetae*, […] re-denomination would be ineffective." Nevertheless, he does not state a clear result because of the lack of precedents in the case of a surviving monetary union. ARTHUR NUSSBAUM (1925), p. 161, is searching for a line of discrimination when a sovereign ruler introduces a new currency but only in a fraction of the territory and the old currency continuing to exist in the rest of the territory. He pre-supposes, however, that the change of the monetary system has been performed lawfully by exercising a sovereign right.

64 Already described by ARTHUR NUSSBAUM (1925), pp. 228-231.

65 HAL S. SCOTT (1998), p. 223, supposes that only foreign courts would apply the *lex monetae*. This appears to be an irrevelant guess in delivering an opinion on the merits of a legal question. He cites Mann for leaving the decision to the proper law of the contract. In fact it is, however, in the first place a question of the sovereign right which has been decided by the primary law of the Union.

Conclusion

Summing up, it is legally not possible for a Member State whose currency is the euro to:

- exit or withdraw from the euro area,
- introduce of a new currency parallel to the euro,
- obtain permission by the organs of the EU or the Member States to withdraw from the euro area or to implement a parallel currency.

It is highly questionable to exclude of a Member State from the EU or the Monetary Union. Any illegal action taken within this framework will have at least serious consequences for the affected claims and property rights.

This inquiry may seem to be a pointless exercise since the attitude, that anything goes, appears to have gained increasingly ground. Anything that seems to be suitable for solving an imminent problem simply has to be legal; no objection allowed.[66] Who cares? Nevertheless, two aspects should not be forgotten:

(1) Following rules is highly efficient, also in the model world of economists; at least in the medium range.

(2) Past experiences show that out there courts might exist that care, especially in matters of civil law.

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[66] ROSA M. LASTRA (2015), margin no 1.63, also deliberates actions by Member States ignoring their (legal) obligations; in addition, referring to historical precedents.

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