Institute for Monetary and Financial Stability

HELMUT SIEKMANN

Replacing or Supplementing the Euro in Member States whose Currency is the Euro

Institute for Monetary and Financial Stability
GOETHE UNIVERSITY FRANKFURT AM MAIN

WORKING PAPER SERIES NO. 109 (2016)

Institute for Monetary and Financial Stability
Goethe University Frankfurt
House of Finance
Theodor-W.-Adorno-Platz 3
D-60629 Frankfurt am Main
www.imfs-frankfurt.de **|** info@imfs-frankfurt.de

Replacing or Supplementing the Euro in Member States whose Currency is the Euro[*]

Helmut Siekmann

Institute for Monetary and Financial Stability (IMFS)

Goethe University Frankfurt

Introduction

Working within the legal framework of the European Union and in unfathomed areas of national constitutional law, the danger is imminent that the wording of the relevant clauses is not given adequate weight. Too often the aimed at result a-priori – usually in the vicinity of the politically desired – is presented in the disguise of legal reasoning. Political wishes and normative facts are confounded for an – allegedly – good cause; both in national constitutional law and in the law of the European Union.

The debate on exit, exclusion, or parallel currencies in the euro area is a good example for this danger. From time to time, the question of a (unilateral) exit was discussed in the framework of the European Communities, also at the very beginning, but without much practical relevance and without a clear, comprehensive result.[1] The majority of scholars, however, denied such a right.[2] Only when framing the European Constitution and then the Lisbon Treaty, the question gained some attention and Article 50 TEU was inserted into the

---

[*] Substantially engrossed and augmented version of IMFS Working Paper Series No. 99 (2015).

[1] Description by *Anna Wyrzykowski (2013),* Article 50, margin no. 1-8.

[2] *Raymond Friel* (2004), p. 412; *Koen Lenaerts* and *Piet Van Nuffel* (2011), margin no. 6-014; *Rudolf Streinz* (2012a), Artikel 50 EUV [*Article 50 TEU*], margin no. 3 with further references; *Anna Wyrzykowski (2013),* Article 50, margin no. 21, referring some of the differing voices.

primary law of the Union. For practical purposes the question was resolved, the theoretical discord, however, remained.[3]

After some years of dormancy, the question came up again in the course of the yet (at its core) to be resolved financial crisis, but in a fundamentally altered setting. It was mainly economists and politicians who started a lively debate arguing that the Hellenic Republic ought to leave the European Monetary Union and introduce a new currency, which would resolve its fiscal and financial problems and "save" the euro at a single blow. With the usual aplomb, both the previous scholarly work and the corresponding legislative debate were ignored, as well as the legal limitations that might exist.[4] The wording of relevant statutory rules rarely played a role.[5] Only the strong belief in a result that was politically welcome or in line with a favored theoretical (economic) model was what counted in the time following the year 2010.

After some support programs for Greece had been installed, the excitement over the fiscal situation of the country calmed down and the interest of politicians and economists in manipulating the monetary system waned as well. Sanctioning or saving Greece by an exclusion was not high on the agenda anymore. The interest was spurred again by the results of the elections in Greece at the end of 2014 but it lost 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 newly elected leadership were spread, which were perceived as outrageous. As a consequence, rhetoric was spreading that an exit by accident might happen.[6]

---

3 *Anna Wyrzykowski* (2013), Article 50, margin no. 22 et seq., referring extensively the discussion in the European Convention.

4 Cf. the description by *Dirk Meyer* (2012), p. 25-33, who personally – being a professor for economic policy – looks at the details of the legal rules but more in the sense which possibilities they might offer than in the way of a comprehensive analysis, demonstrated by the highly selective use of academic sources.

5 With the exception of *Dirk Meyer* (2012).

6 Cf. *Norbert Horn* (2015), p. 353.

At present, the financial and monetary situation of Greece has faded from the spotlight. Now the solvency of the banking system in Italy and the exit of the United Kingdom from the European Union are the dominating topics. Especially the latter spawned a completely new field of excitement and discussion. But, gradually, it also opened the eyes for a more informed view on the related legal problems as it makes the legal procedures and the differences between the exit from the European Union and the introduction of a new currency in a Member State whose currency is the euro somewhat more apparent.

A voluntary withdrawal or forced exclusion from the euro area seemed to be a viable option – not only in the case of Greece – for mitigating the financial burdens of some Member States whose currency is the euro. Also, the introduction of a parallel currency is regularly recommended[7] as a solution for the staggering problems of some of these countries which are by no means only financial in nature and probably not even so in the first place. Another common wisdom, depreciation of a currency as an apt measure to mitigate economic problems, might as well be wishful thinking.

The following questions, which are closely related to each other but deserve a distinctively different treatment, have to be answered:[8]

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

---

7 Mainly economists, e.g. *Thomas Mayer* (2014), p. 35; *id.* *(2015)*; see for details *Dirk Meyer* (2012), pp. 81-95.

8 Parts of the ensuing deliberations are derived from *Helmut Siekmann* (2015).

I. Unilateral exit or withdrawal

In contrast to the European Monetary System an exit or withdrawal from the European monetary union is not provided for in the primary law of the union.[9]

1. Irreversibility and irrevocability of the third stage of the economic and monetary union

The European Union is set up for an unlimited time.[10] Similarly, the decision to enter the third stage of the economic and monetary union was irreversible and irrevocable.[11] These aspects could be strong arguments against the legality of an exit or a withdrawal from the monetary union.[12] The counter-argument, however, is that the unlimited duration of the Treaty and the irreversibility and irrevocability of entering into the third stage only affect the procedure as such, as well as the advancement of the European Community (Union) as a whole into the third stage, but not the status of every single Member State.[13] It would then be permissible to stop or reverse the integration process for a specific Member State; at least for some time or in extreme need.

Another argument against the legality of exit and withdrawal might be the intention of the primary law to strive for "an ever closer union".[14] This has been the common intention of the Member States but it is not sure whether it is more than an abstract goal and an enforceable obligation interdicting exit, withdrawal or introduction of parallel currencies

---

9 *Hal S. Scott* (1998), p. 201, 212; *Dieckmann/Bernauer* (2012), p. 1173.

10 Article 53 TEU: "This Treaty is concluded for an unlimited period".

11 Protocol on the transition to the third stage of Economic and Monetary Union, annexed to the Treaty establishing the European Community, Official Journal C 191 of 29 July 1992, p. 87.

12 *Fabian Bonke* (2010), p. 516 with further references.

13 *Martin Seidel* (2015), p. 14; *Peter Behrens* (2010), p. 121.

14 Consideration 13 of the preamble of the TEU: "Resolved to continue the process of creating an ever closer union…"; Article 1(2) TEU: "This Treaty marks a new stage in the process of creating an ever closer union…"; Article 140(3) TFEU.

in a specific Member State.[15] A more specific prohibition of substantial "re-nationalizations" may be derived from Article 3(4) TEU,[16] but it is also not certain whether such an interdiction would also cover the development in a single Member State.

A further analysis appears to be desirable.

2. The lack of an entity to join or to leave

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 headings of the embedded chapters are "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 is headlined: "The European Central Bank". In view of the tasks and functions to be executed, a similar finding has to be ascertained.

Regarding the execution of these functions, the monetary policy for the Member States whose currency is the euro shall be conducted by the Eurosystem, consisting of the European Central Bank (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.[17] Only the ECB is established as an institution of the Union[18] and is

---

[15] *Hermann-Josef Blanke* (2013), Article 1 margin no. 26: "mandate for integration" but without a clear result for the problem discussed here.

[16] *Matthias Ruffert* (2016), Artikel 3 EUV *[Article 3 TEU]*, margin no 4.

[17] The euro area as such has no legal personality as well, see *Rosa M. Lastra* (2015), margin no 1.60.

[18] Article 13 para 1 recital 6 TEU, falsely translated into German as "organ". Moreover, it has not become an "institution" only when the Treaty of Lisbon came into force, as *T.C. Hartley* (2014) states, but already on the basis of the Treaty of Maastricht. It was not in the list of the (then) existing institutions and organs

granted legal personality, Article 282(3) TFEU. It is noteworthy that the Member States per se do not participate in the ESCB; only the 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.[19]

The term "economic and monetary union" is only sparsely used by the primary law of the Union: Article 3(4) TEU and Articles 66, 121(4) subparagraph 1 sentence 1, 138(1) TFEU. The provisions in the TFEU contain only marginal references to the "function" of the economic and monetary union and not to an institution. They can be dismissed in the present context. Article 3(4) TEU deserves more attention. It stipulates that an economic and monetary union has to be set up. Although its wording[20] is deviating from the functional view of the other provisions mentioned before, it may not be construed in such a way as to set up an entity within the EU. It is a reminiscence of the three-staged introduction of the single 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.[21] This limitation is (superfluously) restated in Article 3(6) TEU. After the single currency had been introduced, the clause looks redundant but was kept in the course of the subsequent revisions of the primary law mainly in view of the newly acceding Member States. In addition, it can be interpreted as a reminder of the lasting obligation to introduce – and to keep – the euro as the currency of the Union.[22] This holds

---

laid down in Article 4 but in a separate Article 4a as it had to be instituted according to the prescribed rules.

19 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".

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

21 It comes close to a *Staatszielbestimmung* in German legal terminology *MATTHIAS RUFFERT* (2016), Article 3 EUV, margin no 2, 12.

22 *RUDOLF GEIGER* (2010), Article 3 TEU margin no 12; *MATTHIAS PECHSTEIN* (2012), Artikel 3 Absatz 4 EUV [*Article 3 paragraph 4 TEU]* margin no. 11; *HANS DIEKMANN/CARSTEN BERNAUER* (2012), p. 1173; *HELMUT SIEKMANN* (2013), Einführung *[introduction]* margin no. 10 et seq.

specifically in the case of Sweden.[23] For the Member States which enjoy a – temporary or permanent – derogation from this obligation, it can be seen as a directive for political actions.[24]

The history of Article 3(4) TEU does not provide evidence in favor of setting up an institution. Its roots reach back to the Single European Act (SEA).[25] 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 (ECONOMIC AND MONETARY UNION)". The wording of the following provisions[26] make it 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 – at that time – actual introduction of the single

---

[23] 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. *T.C. Hartley* (2014), p. 8 at footnote 33.

[24] *Ulrich Becker* (2012), Article 3 EUV, margin no. 5.

[25] 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.

[26] 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.

currency needed additional measures.[27] In terms of the *economic* side of the European Monetary and Economic Union, only a fraction of an economic union was realized as main competences in this field remained with the Member States.[28] This is also a reason why the provision was kept, in the form of an "objective" or "goal" of the Union.

In effect, it is hardly possible to derive the existence of an institution from Article 3(4) TEU from which an exit is possible. The label "European Economic and Monetary Union" disguises the fact that the "European Economic and Monetary Union" is an integral part of the European Union from which it cannot be separated.[29] Even if the opposite were true, it has to be remembered that a Member State would not wish to leave the complete "economic and monetary union" but only the "monetary" part of it for introducing another currency. This would, however, be even harder to construe without a treaty change. It would disrupt the whole logic of the union. The decision of the German Federal Constitutional Court in 1993 on the Maastricht Treaty does not lead to a different evaluation although it might impute the existence of a separate union from which a withdrawal as "ultima ratio" is possible in case of failure of the union as a stability community (*Stabilitätsgemeinschaft*).[30] It is only an *obiter dictum* without any reasoning or argumentation.

Fully consistent with this result, the primary law of the EU takes great care to avoid any language that might insinuate the access to an institution when a Member State introduces the euro as its currency. Usually the term "adoption of the euro" is used when dealing with the question of introducing the single currency or abstaining from it.[31] For example, in the

---

27 See European Commission (2006). *Christoph Herrmann* (2010a) uses the term partially integrated community [*Teilintegrationsgemeinschaft*], but without construing a separate institution (p. 218 et seq.).

28 *Bernhard Kempen* (2012), Article 119 AEUV margin no. 7; *Helmut Siekmann* (2013), Artikel 119 [*Article 119*] margin no. 23, with further references.

29 *Helmut Siekmann* (2013), Artikel 119 [*Article 119*] margin no. 21.

30 BVerfGE 89, 155 (204).

31 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

case of Greece not "access" to the monetary union was granted but a decision was repealed that had granted this Member State a derogation.[32] Technically, in such a case a "derogation" is "abrogated".

3. The existence of explicit exemptions from the obligation to adopt the euro

Each Member State is obliged to introduce the euro unless it enjoys a derogation in the sense of Article 139(1) TFEU.[33] An exemption has been granted specifically to the UK[34] and Denmark[35] in the Protocols to the Treaty of Maastricht. Similar acts can be found in the treaties admitting new Member States which also belong to the primary law of the Union. If, in general, Member States were to be free to enter or to leave an institution called economic and monetary union, such provisions would be totally redundant. The same would be true for the adoption of the euro or its abrogation by a Member State.

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[36]

---

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."

32 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, 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) was endorsed by the European Parliament on 18 May".

33 For references see footnote 22.

34 See footnote 31.

35 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.

36 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.

– after long debates[37] – provided only the possibility for a withdrawal from the EU as a whole and not from a "Monetary Union".

4. 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 Member State of the Union. An analogous application, however, is considered in view of exiting the monetary union. Its justification follows a line of thinking close to an *argumentum a maiore ad minorem*: If a complete unilateral exit from the EU is allowed, then an exit from a part of it should be allowed as well.[38]

The exit from the EU is not tied to any material provisions. It can be achieved simply by notifying the European Council, Article 50(1) and (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. An unintended gap does not exist.[39] In addition, as already mentioned, all the specific provisions on a derogation would be superfluous with such an interpretation. Finally, the situation regulated by Article 50 TEU differs substantially from a "withdrawal" as a separable part of the union as object of a "withdrawal" does not exist. An analogous application of Article 50 TFEU is not possible.[40]

---

[37] For references see above footnotes 1 and 3, below 49.

[38] *Martin Seidel* (2007), p. 617; perhaps also *Matthias Herdegen* (2010), margin no. 27 at the end of the first paragraph, (falsely) labelled as consensual exit; similarly *Christoph Herrmann* (2010a), p. 120; less clear *Ibid* (2012b), p. 417.

[39] Disagreeing, but without analysis *Norbert Horn* (2015), p. 354.

[40] *Phoebus Athanassiou* (2009), p. 28 et seq.; *Frank Vischer* (2010), p. 44 et seq.; *Fabian Bonke* (2010), p. 517; *Norbert Horn* (2015), p. 355.

5. 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, mainly for three reasons:

(1) 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.

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

(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) The European Union has reached a degree of integration and has developed a legal system of its own[41] which have displaced the initial elements of the law of nations[42]. This evolution makes it questionable to apply the law of nations in general, and the Vienna Convention on the Law of Treaties[43] in particular, on a supranational organization like the EU. However, common consensus has not yet been achieved in this point. With reference to its contractual nature, the primary law is still considered to be a part of the law of nations and the recourse to the rules of the law of nations is allowed, although to a widely varying degree.[44] Quite common is a restriction to the case when the remedies provided by the

---

41 *ECJ,* case 6/64, Costa vs. E.N.E.L., collection of cases, 1964, 1251 (1268).

42 Accepted as starting point in *ECJ*, case 26/62 van Gend & Loos, collection of cases, 1963, 1 (25).

43 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.

44 *Matthias Herdegen* (2010), margin no. 27 second paragraph without seeing the problem; *Dirk Hanschel* (2012), p. 999; *Norbert Horn* (2015), p. 356 et seq. with highly selective references for his view; *Ulrich Häde* (2016), Article 140 TFEU margin no. 52; see for the development of the jurisprudence of the ECJ *Daniel Thym* (2009), pp. 456-460, without a clear own position. Whether the Maastricht judgment of the *German Federal Constitutional Court* in 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

law of the supranational organization prove to be permanently insufficient or a detrimental (economic) situation arises.[45]

Nevertheless, it has to be retained that the EU itself is a subject of the law of nations and an organism which (internally) follows its own rules. It commands sovereign powers as well as the Member States. Such a "split sovereignty" is typical for federal systems even if each federalism is different and no federalism "as such" exists. From a functional perspective, the EU comes close to a federal state. "With regard to international law it is of an autonomous legal order, distinct either from constitutional law or international law."[46] The legal system of the EU is designed to be self-sufficient and shielded from interferences by the law of nations as it contains comprehensive "meta" rules of its own governing its coming into force and altering it. Therefore, the law of nations may also not be called on for filling gaps in the regulations of the EU.[47]

(2) 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,[48] 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 at the time predominantly denied the possibility of an

---

resumed in BVerfGE 97, 350 (376); nevertheless, arguing in this direction e.g. *Jan Endler* (1997), p. 536; *Fabian Bonke* (2010), p. 518.

45 *Matthias Herdegen* (2010), margin no. 27 second paragraph; *Dirk Hanschel* (2012), p. 999; *Rudolf Streinz* (2016), margin no. 108.

46 *Anna Wyrzykowski (2013),* Article 50, margin no. 9.

47 *Claudia Annacker* (1998), pp. 59-61; *Hal S. Scott* (1998), p. 241; *Juli Zeh* (2004) p. 189, after an in-depth analysis; in effect also *Kirsten Schmalenbach* (2016),Artikel 356 AEUV *[Article 356 TFEU]*, margin no 3; without reservation *Ulrich Becker* (2012), Article 356 AEUV margin no. 5; cf. the material presented by *Ralf Günter Wetzel* and *Dietrich Rauschning* (1978), pp. 390-395.

48 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.

exit or a withdrawal.[49] Recognizing this controversy, consensus was finally reached with the introduction of Article 50 TEU. It was meant as a final answer to the questions arising from this issue.[50] As a consequence, Article 50 TEU has to be judged as being conclusive.

From this follows that a recourse to the Vienna Convention on the Law of Treaties[51] or to general rules of the law of nations (*clausula rebus sic stantibus*) is prohibited.[52] The application of the Conventions is interdicted in the first place for reasons of EU law.

(3) Furthermore, the provisions of the Vienna Convention regulating the termination of a treaty[53] 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:

  "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

---

49 For references see above footnote 2.

50 *Oliver Dörr* (2011), margin no. 3; *Koen Lenaerts* and *Piet Van Nuffel* (2011), margin no. 6-015; *Helmut Siekmann* (2012), p. 376.

51 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.

52 *Claudia Annacker* (1998), pp. 59-61, denies the validity of the rules of the law of nations inside a supranational organization, i.e. among the members *inter se*; decidedly *Christian Calliess* (2016), Artikel 50 EUV [*Article 50 TEU*] 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.

53 Section 3: Termination and Suspension of the Operation of Treaties.

> 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.[54] The nature 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,[55] but it 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 insertion of paragraph 3 in Article 136 TFEU[56] would have been an ample opportunity to allow it if that had been the intention of the framers of the primary law.

Accordingly, Article 70(1) of the Convention 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 on 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 an exit solely from the EMU. Thus, there is no space for the application of Article 56 of the Convention.

---

[54] *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.

[55] E.g. Articles 122(2), 126(3)-(14), 143, 144, 263 TFEU.

[56] 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.

In effect, the provisions on a "fundamental change of circumstances" also do not allow exit or withdrawal from the euro area. Aside from the problematic applicability of the Vienna Convention in the context of the EU, the prerequisites of its Article 62 are not fulfilled.[57] 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."[58]

Nor will recourse to the general *clausula rebus sic stantibus* allow an exit. It, too, is foreclosed or – at the least – its conditions are not met.[59]

The problems with the fiscal sustainability or competitiveness of a Member State whose currency is the euro had been foreseen by the parties of the Treaty of Maastricht as the admission procedure imposed strict admission criteria[60] as well, as the expansion of the cohesion and structural funds[61] clearly prove. Article 126 TFEU and the Protocol on excessive deficits also regulate the matter.[62] 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[63] but also for other Member States which do not obey the rules 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.*

---

[57] This article is considered to be a codification of the general law of nations: *Jörg P. Müller* (1971), p. 217.

[58] For details, see *Jörg P. Müller* (1971), pp. 217-226.

[59] *Christian Calliess* (2016), Article 50 EUV margin no. 13.

[60] Article 140 TFEU and the Protocol (No 13) on the convergence criteria, Official Journal of 26 October 2012, C 326/281.

[61] *Helmut Siekmann* (2015) Section 1.4.3. (1)

[62] Protocol (No 12) on the excessive deficit procedure, Official Journal of 26 October 2012, C 326/279.

[63] More sections II 3 and III below.

6. Interim results

A unilateral withdrawal from the obligations of the European 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,[64] with severe economic and legal consequences.[65] An exit from the euro area is legally not possible and economically questionable.[66] It would be an open invitation for all speculators of the world to destabilize the finances of a Member State picked to be vulnerable.[67] This result appears to be consistent also with the judicature of the German Federal Constitutional Court.[68]

---

64 With in-depth analysis: *Chiara Zilioli* (2005), pp. 126, 132; *Phoebus Athanassiou* (2009), p. 21; *Fabian Bonke* (2010), p. 520; *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; inconsistent *Ulrich Häde* (2016), Article 140 TFEU margin no. 50 et seq. on one side and margin no. 52 on the other side.

65 For more details see Section V below.

66 The possibility of a change of the primary law by a unanimous action of the Member States is, of course, self-evident, mentioned by *Rosa M. Lastra* (2015), margin no 1.63 with further references.

67 *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.

68 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). This remark was not resumed in the Euro-decision BVerfGE 97, 350 (376). Moreover, from its Lisbon-judgment can be inferred that an exit would not be compatible with German constitutional law, BVerfGE 123, 267 (346 et seq.).

II. Exclusion

1. General rules

An exclusion from the euro area by an act of the EU, Member States, or the Eurogroup is not allowed as the needed legal basis for such an onerous measure is not visible. The primary law lacks the statutory basis for such a sanction.[69] In particular, Article 7 TEU could not serve as an instrument for an exclusion for three main reasons:

- The provision contains an elaborated procedure for enforcing the fundamental values of the EU, but 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 rules for economic and monetary policy as such do not belong to them. Only a serious aberration from the various aspects of the procedural or substantive requirements set up by the rule of law might suffice to meet this requirement. Such an aberration is, however, not (yet) in sight;
- In line with the argumentation above, in view of the sanctions at hand, 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.

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 contained in the detailed procedure laid down there.

The described statutory provisions have also to be judged as conclusive. A recourse to rules of the law of nations is not allowed[70] as already delineated.

---

[69] *Koen Lenaerts* and *Piet Van Nuffel* (2011), margin no. 6-014; in general, also: *Christian Calliess* (2016), Artikel 50 EUV [*Article 50 TEU*] margin no. 12, 13, but exception for extreme cases.

[70] *Juliane Kokott* (2012), Article 356 AEUV margin no. 6; *Kirsten Schmalenbach* (2016), Artikel 356 AEUV *[Article 356 TFEU*], margin no 3; in result also *Dirk Hanschel* (2012), p. 999 et seq. even if not totally excluding the recourse to the law of nations; partially disagreeing: *Rudolf Streinz* (2012a), Article 50 EUV margin no. 13, considering it for an exclusion from the EU (not the EMU!) in "extreme cases"; also

2. Revocation of the acts of the EU admitting the adoption of the euro

It has been considered[71] that the legal acts admitting a country to the euro could be renounced, in particular by amending the regulation about the introduction of the single currency in that country,[72] disregarding 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,*[73] 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.[74] 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 ever closer integration; and not a way back and forth, Article 1(2) TEU.[75]

3. 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. The legal act allowing the Hellenic Republic to adopt the euro might suffer from a serious defect opening the door for removing the country from the euro area. In technical legal terms it could be renounceable, voidable, or invalid from the beginning on. In the case of Greece the

---

MATTHIAS PECHSTEIN (2012), Article 7 EUV margin no. 23 without reasoning; unclear *CHRISTIAN CALLIESS* (2016), Artikel 50 AEUV [*Article 50 EUV*] margin no. 17, 21 (advice to withdraw pursuant Article 50 TEU).

71 *PETER BEHRENS* (2010), p. 121; *CHRISTOPH HERRMANN* (2010b), p. 417.

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

73 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.

74 *CHARLES PROCTOR* (2012), margin no. 29.10; *CHRISTOPH HERRMANN* (2010b), p. 417.

75 *CHRISTIAN CALLIESS* (2016), Artikel 1 EUV [*Article 1 TEU*] margin no. 12: interdiction of regression.

following would have to be examined in particular: 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,[76] 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[77] 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[78] fraud,[79] or the breach of contractual obligations[80] may be worth considering but will hardly be applicable. As has been already argued,[81] 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.[82]

---

76 Article 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, 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, 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) was endorsed by the European Parliament on 18 May".

77 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, COM(2010) 1 final; fo a detailed analysis see *Theodore Pelagidis* and *Michael Mitsopoulos* (2014); *George C. Bitros* (2013), especially pp. 13-17.

78 Article 48.

79 Article 49.

80 Article 60.

81 Above section I 6.

82 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.)

A final line of argumentation remains: It could be deliberated 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, the law of nations also accepts force,[83] error,[84] and fraud[85] 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 the ensuing legal actions has to be limited. Finally, the subsequent behavior of the victim of fraud or misrepresentation has to be taken into account.[86] Granting financial support for Greece while being fully aware of the facts of a misrepresentation might remedy the legal defects of the admittance decision,[87] whereas the principle of trust and good faith within organizations[88] 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 assuming 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.[89] An exclusion is not provided and would be illegal.[90]

---

83 *Ibid*, pp. 78-88.

84 *Ibid*, pp. 88-91.

85 *Ibid*, pp. 91-93.

86 Regulated in Article 45 of the Vienna Convention.

87 In general, *Claudia Annacker* (1998), p. 273 et seq.

88 Generally accepted *Jörg P. Müller* (1971), p. 227 et seq.

89 *Matthias Ruffert* (2016), Artikel 7 EUV [*Article 7 TEU*] margin no. 31, with further references; *Kirsten Schmalenbach* (2016), Artikel 356 AEUV [*Article 356 TFEU*], margin no 3.

90 *Koen Lenaerts* and *Piet Van Nuffel* (2011), margin no. 6-014; *Juliane Kokott* (2012), Article 356 AEUV margin no. 6 with further references.

III. Unilateral introduction of a parallel currency

It is unclear whether the introduction of a new currency parallel to the euro could mitigate the financial problems of the respective Member State in distress. All financial claims are still denominated in euro. National legislation to change this is 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.[91]

In any case, such a measure would be illegal from the point of view of the primary law of the Union.[92] 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.[93] 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".[94]

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 accept 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.

---

[91] See for more details Section V below.

[92] For a detailed analysis see *Helmut Siekmann* (2016b), section II 2 c and d.

[93] 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".

[94] *Charles Proctor* (2012), margin no. 31.10.

IV. Consensual arrangements

1. Regional adjustment

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[95] or the parts of Germany when the communist rule ended there in 1989. An exemption from core obligations of the Union would be granted to an entire Member State. Such an exemption would have a completely different quality in comparison to an adjustment of boundaries.

An exit or 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.[96] This power would, however, be indispensable because of Article 50 TEU and Articles 128(1) and 139 TFEU. It has to be kept in mind that 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 in the primary law 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.[97] This obligation may not be circumvented by 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

[95] See for details *Friedl Weiss* (1985); *Raymond Friel* (2004), pp. 409-411.

[96] *Ulrich Häde* (2016), Artikel 140 AEUV [*Article 140 TFEU*] margin no. 51.

[97] For references see footnote 22.

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.

Even unanimously *rules on competences* can legally not be changed by the interested entities. This holds also for the Member States even if they are still considered to be the "masters" of the Treaties. Such an alteration may only be accomplished following the proper procedure prescribed by the primary law in Article 48 TEU. The provisions imposed therein would largely be meaningless if another course of action were admissible. 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.

2. Empowering a Member State by the European Union

A competence of the Member States to define legal tender might be construed on the basis of Article 2(1) TFEU.[98] Although this clause provides that the Union may "empower" Member States to act within the domain of exclusive competences, it may not serve as a door opener for transferring core competences back to the Member States.[99] The creation of legal tender in the form of banknotes over the years had become one of the main reasons for establishing central banks at all.[100] Vesting this power outside the central bank would remove one of the characteristic traits of a central bank.[101]

3. Exiting and re-entering the European Union with a derogation

Exiting the European Union pursuant to Article 50 TEU and rejoining – immediately – the Union with an exemption from the obligation to adopt the euro, has also been proposed

98 *Martin Seidel* (2010), p. 45.

99 *Christoph Schaefer* (2008), p. 735; *Christian Calliess* (2016), Artikel 2 AEUV [*Article 2 TFEU]* margin no. 10; *Hans Diekmann / Carsten Bernauer* (2012), p. 1174; dissenting *Martin Seidel* (2010), p. 26, without proper reasoning; indirectly perhaps also *Christoph Herrmann* (2010), p. 415, in a peripheric remark.

100 See *Charles Goodhard* (1988), pp. 20-23, 123, however with an underlying sympathy for "free" banking; *Charles Proctor* (2012), para1.36-1.38; *Helmut Siekmann* (2016a), pp. 506-508.

101 *René Smits* (1997), p. 203 et seq.

as a viable solution.[102] In the first place, this solution would demand a lengthy procedure of negotiation and time-consuming consensus seeking. In case of a re-admittance, the normal admittance procedure following Article 49 TEU would have to be pursued, Article 50(5) TEU. In the second place, such a way of proceeding would require unanimous decisions of all Member States, the competent organs of the EU, and – possibly – referenda in some Member States. All this makes the procedure unfit as a crisis resolution mechanism. Moreover, from the legal point of view, it would be a clear circumvention of the rules for a Treaty change in Article 48 TEU and thus be illegal.

Occasionally, a "regressive differentiation" is also proposed as a possible way to allow the exit from the euro area. It is envisaged as a possible result of the negotiation following an exit from the EU pursuant Article 50(2) TEU.[103] With a lot of imagination this may be construed but it leaves many questions open regarding the details, e.g. the content of the notification. A limited content would hardly be consistent with the wording of the Article 50 TEU.

4. Treaty completion following Article 352 TFEU

It is questionable whether the competence of the Union in Article 352 TFEU to complete powers, necessary to attain one of the objectives set out in the Treaties, which have not been provided, may be invoked to enable an exit from the monetary union or to introduce a new (parallel) currency in a Member State. Even if the explicit requirements of the provision would be fulfilled, it may not be invoked in lieu of a Treaty change.[104]

The article is designed to fill gaps within the regulation of the primary law. The exit problem and the exclusive competence of the Union in the field of monetary policy, including the currency, are extensively regulated and are conclusive. The exit problem was known and

---

[102] Described by *Dirk Meyer* (2012), p. 48 et seq.

[103] *Oliver Dörr* (2011), margin no. 30.

[104] *ECJ,* opinion 2/94, collection of cases, 1996, I-159, margin no. 30.

has been recently decided in a specific way, which could be overturned if Article 352 TFEU served as a basis for a not consented result in the legislative process. It would in effect serve as a Treaty change without following the procedure laid down in Article 48 TEU.[105]

V. Consequences of an illegal withdrawal

Above all, serious problems that are hard to assess would arise for the debt denominated in euro in case the new currency were introduced despite the contradicting rules of EU law.[106]

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 States whose currency is the euro have lost all competences in monetary affairs. As its withdrawal from the Monetary Union or 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.[107] 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*[108] 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.[109] This result is not affected by the fact

---

105 Critical also *Juli Zeh* (2004), p. 199 et seq.; disagreeing *Hans Diekmann / Carsten Bernauer* (2012), p. 1175.

106 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.

107 *Helmut Siekmann* (2015) Section 1.2.1.

108 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.

109 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

that 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 Greece in case the Hellenic Republic introduced a new currency. The question according to which law the obligation has been created may only be used as criterion for determining the *lex monetae* in situations of *uncertainty* about the applicable currency.[110] This uncertainty does, however, not exist 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".[111]

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 without leaving the Union,
- introduce a new currency instead of or parallel to the euro,
- obtain a permission from 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 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.

The analysis presented in this essay may seem to be a pointless exercise since the attitude that "anything goes" appears to have increasingly gained ground in politics and even in legal reasoning. Almost every opinion that seems to be suitable for solving an imminent

---

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.

[110] Already described by *Arthur Nussbaum* (1925), pp. 228-231.

[111] *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.

problem within the context of the Economic and Monetary Union simply has to be legal; no objection allowed.[112] Who cares? Nevertheless, two aspects should not be forgotten:

- Following rules is highly efficient, also in the model world of economists; at least in the medium range. It builds up the necessary confidence to foster mutual reliance, which allows to evade a Nash equilibrium not being Pareto-optimal, saves costly negotiations in situations for which rules exist, and avoids tort damages. A necessary precondition is, however, that a speedy and strict sanctioning of infractions of the rules is guaranteed (e.g. "tit for tat"). This *conditio sine qua non* has been proven to be crucial – theoretically and empirically.
- Past experiences show that courts might exist out there – maybe in the district of Southern Manhattan or in Karlsruhe – that care, when it comes to adjudicate claims in matters of civil law in which the question whether a currency is in fact legal tender proves to be crucial.

---

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

References

Annacker, Claudia (1998): *Der fehlerhafte Rechtsakt im Gemeinschafts- und Unionsrecht*, Vienna and New York, Springer.

Athanassiou, Phoebus (2009): Withdrawal and Expulsion from the EU and EMU, *ECB Legal Working Papers Series* No. 10, Frankfurt am Main.

Becker, Ulrich (2012): Article 3 EUV and Article 356 AEUV, in: Jürgen Schwarze (ed.), *EU-Kommentar*, 3rd ed., Baden-Baden, Nomos Verlag.

Behrens, Peter (2010): Ist ein Ausschluss aus der Euro-Zone ausgeschlossen? *Europäische Zeitschrift für Wirtschaftsrecht*, (4): p. 121.

Blanke, Hermann-Josef (2012): Die Europäische Wirtschafts- und Währungsunion zwischen Krisenanfälligkeit und Reform, in: Arno Scherzberg (ed.), *10 Jahre Staatswissenschaftliche Fakultät*, Berlin, Walter de Gruyter, pp. 70-121.

Blanke, Hermann-Josef (2013): Article 1, in: Hermann-Josef Blanke / Stelio Mangiameli (eds.), *The Treaty on European Union TEU*, Heidelberg New York Dordrecht London, Springer

Bonke, Fabian (2010): Die „Causa Griechenland": Rechtmäßigkeit der Krisenhilfen und Möglichkeit des Ausscheidens eines Mitgliedstaates aus der Europäischen Währungsunion, *Zeitschrift für Europäische Studien – ZeuS*, 2010, p. 493-528.

Calliess, Christian (2016): Articles 1 and 50 EUV, Article 2 AEUV, in: Christian Calliess and Matthias Ruffert (eds.), *EUV/AEUV*, 5th ed., München, C.H. Beck.

Degenhart, Christoph (2013): Missachtung rechtlicher Vorgaben bei der Umsetzung der Währungsunion, in: Thomas M.J. Möllers and Franz-Christoph Zeitler (eds.), *Europa als Rechtsgemeinschaft – Währungsunion und Schuldenkrise*, Tübingen, Mohr Siebeck, pp. 85-100.

Diekmann, Hans / Bernauer, Carsten (2012), Mögliche Rechtsfolgen bei einer Währungsumstellung eines Mitgliedstaates der Europäischen Währungsunion, *Neue Zeitschrift für Gesellschaftsrecht – NZG*, 2012, pp. 1172-1178.

Dörr, Oliver (2011): Article 50 EUV, in: Eberhard Grabitz, Meinhard Hilf, and Martin Nettesheim (eds.), *Das Recht der Europäischen Union*, München, C.H. Beck [loose leaf].

Endler, Jan (1997): *Europäische Zentralbank und Preisstabilität*, Stuttgart et al., Boorberg

Ernst, Wolfgang (2012): Privatrechtliche Folgen eines Ausscheidens einzelner Staaten aus der Euro-Währung – ein Problemaufriss, *Zeitschrift für Wirtschaftsrecht*, 33 (2): pp. 49-58.

European Commission (2006): *One Currency for one Europe – The Road to the Euro*, Brussels.

Friel, Raymond J. (2004): Providing a constitutional framework for withdrawal from the EU: Article 59 of the draft European Constitution, *International and Comparative Law Quarterly*, vol. 53 (2), pp. 407-428.

Geiger, Rudolf (2010), "Article 3 EUV", in: Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur, *EUV/AEUV*, München, C.H. Beck.

Goodhard, Charles (1988): *The Evolution of Central Banks*, Cambridge Mass., MIT Press.

Häde, Ulrich (2016): Articles 139 and 140 AEUV, in: Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV*, 5th ed., München, C.H. Beck.

Hahn, Hugo J., and Ulrich Häde (2010): *Währungsrecht*, 2nd ed., München, C.H. Beck.

Hanschel, Dirk (2012), Der Rechtsrahmen für den Beitritt, Austritt und Ausschluss zu bzw. aus der Europäischen Union und Währungsunion, *Neue Zeitschrift für Verwaltungsrecht – NVwZ*, 2012, pp. 995-1001.

Hartley, T.C. (2014): *The Foundations of European Union Law*, 8th ed., Oxford, Oxford University Press.

Herdegen, Matthias (2010): Artikel 88 [*Article 88*], in: Theodor Maunz / Günter Dürig, edited by Roman Herzog / Rupert Scholz / Matthias Herdegen / Hans H. Klein, *Grundgesetz*, München, C.H. Beck [looseleaf]

Herrmann, Christoph (2010a): *Währungshoheit, Währungsverfassung und subjektive Rechte*, Tübingen, Mohr Siebeck.

Herrmann, Christoph (2010b): Griechische Tragödie – der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone, in: *Europäische Zeitschrift für Wirtschaftsrecht*, (11): pp. 413-418.

Horn, Norbert (2015), Das Recht zum Austritt und Ausschluss aus der Europäischen Währungsunion, *Zeitschrift für Bank- und Kapitalmarktrecht – BKR*, 2015, pp. 353-359.

Kempen, Bernhard (2012), Articles 119, 139, 140 AEUV [*TFEU*], in: Rudolf Streinz (ed.), *EUV/AEUV*, 2nd ed., Müchen, C.H. Beck.

Kirchhof, Paul (1994): Die Mitwirkung Deutschlands an der Wirtschafts- und Währungsunion, in: *Steuerrecht, Verfassungsrecht, Finanzpolitik, Festschrift für Franz Klein*, Köln, Otto Schmidt, pp. 61-83.

Kokott, Juliane (2012): Article 356 AEUV, in: Rudolf Streinz (ed.), *EUV/AEUV*, 2nd ed., Munich, C.H. Beck.

Lastra, Rosa María (2015): *International Financial and Monetary Law*, 2nd ed., Oxford, Oxford University Press.

Lenaerts, Koen, and Piet Van Nuffel (2011): *European Union Law*, 3rd ed., London, Sweet & Maxwell.

Mann, F.A. (1992): *The Legal Aspect of Money*, 5th ed., Oxford, Clarendon Press.

Mayer, Thomas (2014): *Die neue Ordnung des Geldes: Warum wir eine Geldreform brauchen*, München, Finanzbuch Verlag.

Mayer, Thomas (2015): Eine Parallelwährung für Griechenland, *Frankfurter Allgemeine*, 24 January 2015.

Meyer, Dirk (2012): *Euro-Krise. Austritt als Lösung*, Münster, Lit-Verlag.

Müller, Jörg P. (1971): *Vertrauensschutz im Völkerrecht*, Köln-Berlin, Heymann.

Nussbaum, Arthur (1925): *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts*, Tübingen, Mohr Siebeck.

Pechstein, Matthias (2012): Article 7 EUV [*TEU*], in: Rudolf Streinz (ed.), *EUV/AEUV*, 2nd ed, München, C.H. Beck.

Pelagidis, Theodore, and Michael Mitsopoulus (2014): *Greece: From Exit to Recovery*, Washington DC, Brookings Institution Press.

Pfluger, Franz (1936): *Die einseitigen Rechtsgeschäfte im Völkerrecht*, Zürich, Schulthess.

Proctor, Charles (2012): *Mann on the Legal Aspect of Money*, 7th ed., Oxford, Oxford University Press.

Ruffert, Matthias (2016): Articles 3 and 7 EUV [*TEU*], in: Christian Calliess and Matthias Ruffert (eds.): *EUV/AEUV*, 5th ed, München, C.H. Beck.

Schaefer, Christoph (2008): Die Ermächtigung von Mitgliedstaaten bei ausschließlicher Gemeinschaftszuständigkeit: Regelwidrigkeit in der Kompetenzordnung? *Europarecht – EuR*, 2008, pp. 721-725.

Scott, Hal S. (1998): When the Euro Falls Apart, *International Finance*, 1:2/1 (2): pp. 207-228.

Seidel, Martin (2007): Ausscheiden aus der Währungsunion? – Rechtliche Fragen, *Europäische Zeitschrift für Wirtschaftsrecht*, (20): p. 617.

Seidel, Martin (2010): Der Euro – Schutzschild oder Falle?, Zentrum für Europäische Integrationsforschung, Center for European Integration – ZEI, *Working Paper* B01/2010.

Seidel, Martin (2015): Aufhebung der angeblich „unumkehrbaren“ („irreversiblen“) Europäischen Währungsunion und Substituierung durch ein neues europäisches Währungssystem, *ifo-Schnelldienst* 6/2015, p. 9-22.

Siekmann, Helmut (2012): Law and Economics of the Monetary Union, in: Thomas Eger and Hans-Bernd Schäfer (eds), *Research Handbook on the Economics of the European Union Law*, Cheltenham UK and Northampton, MA, USA, Edward Elgar, pp. 355-411 [Research Handbooks in Law and Economics, Series Editors: Richard A. Posner and Francesco Parisi].

Siekmann, Helmut (2013): Einführung *[Introduction]*, Article 3 EUV [*TEU*], Articles 119 and 130 AEUV [*TFEU*] in: Helmut Siekmann (ed.), *Kommentar zur Europäischen Währungsunion*, Tübingen, Mohr Siebeck.

Siekmann, Helmut (2015): The Legal Framework for the European System of Central Banks, in: Frank Rövekamp, Moritz Bälz, Hanns Günther Hilpert (eds.), *Central Banking and Financial Stability in East Asia*, Heidelberg, Springer, Chapter 3.

Siekmann, Helmut (2016a), Deposit Banking and the Use of Monetary Instruments, in: David Fox and Wolfgang Ernst (eds.), *Money in the Western Legal Tradition*, Oxford, Oxford University Press, pp. 489-531.

Siekmann, Helmut (2016b): Restricting the Use of Cash in the European Monetary Union, in: Frank Rövekamp, Moritz Bälz, Hanns Günther Hilpert (eds.), *Cash in East Asia*, Heidelberg, Springer, [in print]

Smits, René (1997): *The European Central Bank*, The Hague-London-Boston MA, Kluwer Law International.

Streinz, Rudolf (2012): Article 50 EUV [*TEU*], in: Rudolf Streinz (ed.), *EUV/AEUV*, 2nd ed., München, C.H. Beck.

Streinz, Rudolf (2016): *Europarecht*, 10th ed., Heidelberg et al., C.F. Müller.

Thym, Daniel (2009): Auswärtige Gewalt, in: Armin von Bogdandy / Jürgen Bast (eds.), *Europäisches Verfassungsrecht*, Dordrecht Heidelberg London New York, Springer, pp. 441-488.

Vischer, Frank (2010): *Geld- und Währungsrecht im nationalen und internationalen Kontext*, Basel, Helbing & Lichtenhahn.

Weder di Mauro, Beatrice (2010): Eine andere Meinung, in: Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, *Chancen für einen stabilen Aufschwung, Jahresgutachten 2010/11*, Wiesbaden, Statistisches Bundesamt: p. 99 et seq.

Weiss, Friedl (1985): Greenland's Withdrawal from the European Communities, *European Law Review*, No. 3, pp. 173-185.

Wetzel, Ralf Günther and Rauschning, Dietrich (1978), *The Vienna Convention on the Law of Treaties,* Frankfurt am Main, Alfred Metzner Verlag.

Wyrzykowski, Anna (2013): Article 50, in: Hermann-Josef Blanke / Stelio Mangiameli (eds.), *The Treaty on European Union TEU*, Heidelberg New York Dordrecht London, Springer.

Zeh, Juli (2004): Recht auf Austritt, *Zeitschrift für europäische Studien – ZeuS*, pp. 173-210.

Zilioli, Chiara (2005): National Emergency Powers and Exclusive Community Competences – A Crack in the Dam?, in: European Central Bank (ed.), *Liber Amicorum Paolo Zamboni Garavelli*, Frankfurt am Main, European Central Bank, pp. 115-134.

IMFS WORKING PAPER SERIES

Recent Issues

108 / 2016	Helmut Siekmann	Restricting the Use of Cash in the European Monetary Union
107 / 2016	Volker Wieland Elena Afanasyeva Meguy Kuete Jinhyuk Yoo	New Methods for Macro-Financial Model Comparison and Policy Analysis
106 / 2016	Helmut Siekmann	Konstruktionsfehler bei der Einlagensicherung auf EU-Ebene
105 / 2016	Athanasios Orphanides	Fiscal Implications of Central Bank Balance Sheet Policies
104 / 2016	Helmut Siekmann	Preis- und Finanzstabilität: der Primat der Politik, der rechtliche Rahmen und das „ökonomische Gesetz“
103 / 2016	John B. Taylor Volker Wieland	Finding the Equilibrium Real Interest Rate in a Fog of Policy Deviations
102 / 2016	Tilman Bletzinger Volker Wieland	Forward guidance and “lower for longer”: The case of the ECB
101 / 2016	Helmut Siekmann	Ziele, Aufgaben und Befugnisse des Europäischen Systems der Zentralbanken (ESZB) (publ. in: Scherzberg / Can / Doğan (eds.), Die Sicherung der Geldwert- und Finanzstabilität in Deutschland und in der Türkei, 2016, pp. 79-118)
100 / 2016	Robert C. M. Beyer Volker Wieland	Schätzung des mittelfristigen Gleich-gewichtszinses in den Vereinigten Staaten, Deutschland und dem Euro-Raum mit der Laubach-Williams-Methode
99 / 2015	Helmut Siekmann	Exit, Exclusion, and Parallel Currencies in the Euro Area
98 / 2015	Helmut Siekmann	Stellungnahme für die öffentliche Anhörung der Verfassungskommission des Landtags Nordrhein-Westfalen zur Schuldenbremse
97 / 2015	José María Liberti Amit Seru Vikrant Vig	Information, Credit, and Organization
96 / 2015	Patrick Tuschl	Rechtsgrundlagen für die Vereinbarkeit von Finanzhilfen für Kreditinstitute mit dem Beihilferecht der EU im Rahmen der Finanzmarktkrise

95 / 2015	Athanasios Orphanides	Fear of Liftoff: Uncertainty, Rules and Discretion in Monetary Policy Normalization
94 / 2015	Bettina Brüggemann Jinhyuk Yoo	Aggregate and Distributional Effects of Increasing Taxes on Top Income Earners
93 / 2015	Tobias H. Tröger	Regulatory Influence on Market Conditions in the Banking Union
92 / 2015	Janis Skrastins Vikrant Vig	How Organizational Hierarchy Affects Information Production
91 / 2015	Florian Hoffmann Roman Inderst Marcus Opp	Regulating Deferred Incentive Pay
90 / 2015	Helmut Siekmann	The Legality of Outright Monetary Transactions (OMT) of the European System of Central Banks (publ. in: Rövekamp / Bälz / Hilpert (eds.), Central Banking and Financial Stability in East Asia, 2015, pp. 101-123)
89 / 2015	Helmut Siekmann	The Legal Framework for the European System of Central Banks (publ. in: Rövekamp / Bälz / Hilpert (eds.), Central Banking and Financial Stability in East Asia, 2015, pp. 43-86)
88 / 2015	Florian Deuflhard Dimitris Georgarakos Roman Inderst	Financial Literacy and Savings Account Returns
87 / 2015	Falko Fecht Roman Inderst Sebastian Pfeil	A Theory of the Boundaries of Banks with Implications For Financial Integration and Regulation
86 / 2015	Markus Behn Rainer Haselmann Thomas Kick Vikrant Vig	The Political Economy of Bank Bailouts
85 / 2014	Elena Afanasyeva Jochen Güntner	Lending Standards, Credit Booms and Monetary Policy
84 / 2014	Athanasios Orphanides	Are Rules and Boundaries Sufficient to Limit Harmful Central Bank Discretion? Lessons from Europe
83 / 2014	Tobias H. Tröger	How Special Are They? – Targeting Systemic Risk by Regulating Shadow Banking
82 / 2014	Markus Behn Rainer Haselmann Vikrant Vig	The Limits of Model-Based Regulation