

EUROPEAN BUSINESS LAW REVIEW

Reprinted with many thanks from EUROPEAN BUSINESS LAW REVIEW, Vol. 25 (2014), Issue 5, pp. 665-679 with permission of Kluwer Law International. 2014/09/12



Wolters Kluwer
Law & Business

Distribution

In North, Central and South America,
sold and distributed by Aspen Publishers Inc.
7101 McKinney Circle
Frederick MD 21704
United States of America

In all other countries, sold and distributed by
Turpin Distribution
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

Subscriptions

European Business Law Review is published bi-monthly. Subscription prices for 2014 [Volume 25, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 933/USD 1244/GBP 686
Online subscription prices: EUR 864/USD 1152/GBP 635

This journal is also available online at www.kluwerlawonline.com. Sample copies and other information are available at www.kluwerlaw.com. For further information please contact our sales department at +31 172 641562 or at sales@kluwerlaw.com.

Advertisements

For Marketing Opportunities please contact marketing@kluwerlaw.com.

Information

Contributions should be emailed to Iris Chiu, Executive Editor, at EBLReditorial@gmail.com.

This journal may be cited as [2014] EBLR 605-758.

Book Reviews

Book reviews may be sent to Iris Chiu, Executive Editor,
European Business Law Review at EBLReditorial@gmail.com.

Copyright

© 2014 Kluwer Law International

ISSN: 0959-6941

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th floor, New York, NY 10011, United States of America. E-mail: permissions@kluwerlaw.com.

Visit our website at www.kluwerlaw.com

Editorial Board

- Guido Alpa** *General Editor*, Professor, La Sapienza, Rome, President of the Italian Bar.
Mads Andenas *General Editor*, Professor, University of Oslo, Director of the Centre of Corporate and Financial Law, Institute of Advanced Legal Studies, University of London.
Giuseppe Conte Professor of Law, University of Florence.
Iris H-Y Chiu Executive Editor, Reader in Law, University College London.
Francesco Capriglione Professor, Luiss University, Rome.
Jan Dalhuisen Professor, King's College, London, and University of Utrecht.
Duncan Fairgrieve Sciences-Po, Paris and the British Institute of International and Comparative Law, London.
Laurence W Gormley Barrister, Professor of European Law, University of Groningen.
Stefan Grundmann Professor, Humboldt University, Berlin.
Vassilis Hatzopoulos Assoc. Professor of Law, Democritus University of Thrace (Greece).
Peter-Christian Müller-Graf Professor, University of Heidelberg.
Renato Nazzini Reader, University of Southampton.
Barry A K Rider Director of the Institute of Advanced Legal Studies and Professor of Law, University of London; Tutor and Fellow, Jesus College, Cambridge; Barrister, England and Wales.
Jukka Snell Professor, School of Law, University of Swansea.
Jan Wouters Professor, University of Leuven.

Editorial Advisory Board

- Sir Christopher Bellamy**, Slaughter and May, London.
Sir William Blair, Royal Courts of Justice, London.
John Board, Professor, University of Reading.
Stephan Breidenbach, Professor, Europa University Viadrina of Frankfurt (Oder).
Sir Ross Cranston, Royal Courts of Justice, London.
Paul L Davies, Professor, University of Oxford.
Jacqueline Dutheil de la Rochère, Professor, University of Paris II.
Carmen Estevan de Quesada, Professor, Universidad de Valencia.
Walter Baron van Gerven, Professor, Leuven and Maastricht.
Roger Goebel, Professor, Fordham University School of Law.
Sir Roy Goode QC FBA, Norton Rose Professor of Law, Oxford.
Christos Hadjiemmanuil, Reader, London School of Economics.
Gerard Hertig, Professor, ETH Zürich.
Klaus J Hopt, Professor, Director of the Max-Planck-Institut of Comparative and International Private Law, Hamburg.

Book Review Editor:

Duncan Fairgrieve,
Sciences-Po, Paris, and
the British Institute of
International and
Comparative Law,
London.

Executive Editor:

Dr Iris Chiu,
Reader in Law,
University College
London.

- Guy Horsmans**, Professor, University of Louvain la Neuve, Brussels.
Kåre Lilleholt, Professor, University of Oslo.
John Lowry, Professor of Law, University College London.
The Rt Hon Lord Mance, Supreme Court of the United Kingdom.
Michel Menjucq, Professor, University of Paris I.
Giuditta Cordero Moss, University of Oslo.
Dr Lazaros Panourgias, European Investment Bank, Luxembourg.
Sir Richard Plender, Royal Courts of Justice, London.
Sir Bernard Rix, Royal Courts of Justice, London.
Roberta Romano, Professor of Law, Yale Law School.
Marco Roscini, Reader, University of Westminster.
David Vaughan CBE QC London.
Erik Werlauff, Professor of Law, Aalborg Universitet

Legal Options of a Withdrawal from the Euro and the Reassignment of Monetary Sovereignty

DIRK MEYER*

Abstract

A withdrawal from the eurozone requires thorough planning and preparation. Contrary to the presumption that only the creation of a monetary union would need coordination, a consensual agreement between the Member States is absolutely necessary to prevent problems for the new currency and conflicts with the remaining union. As a result of the premise of irreversibility, according to which a downgrading of euro membership is not possible, the EU Treaty explicitly does not provide for an exit from the eurozone. This article examines the legal options of a withdrawal from the third stage and necessary steps towards an exiting state having its own currency. Closing remarks consider the valid currency in old contracts.

1. Legal Possibilities of a Withdrawal from the Euro

What legal options exist for a withdrawal from the euro? According to the prevailing view, EMU is a “community of responsibilities and interests which can no longer be terminated”¹ and is an “irrevocable permanent legal community.”² Contrary to the European Monetary System (EMS/ERM), where a unilateral withdrawal was legally possible and did also take place, an exit from the eurozone is *not provided by treaty*.³ Instead, joining the EU is associated with the long-term commitment, provided the inclusion criteria are fulfilled, to introduce the euro in the third stage of EMU (Art. 139 f. TFEU).

Are there *any other reasons* that would allow termination of membership of the European Economic and Monetary Union (EEMU) and of the EMU in particular? The contract remains unclear and reveals a gap in regulation. While an ordinary termination is excluded, interpretations of the legality of a resolution for dissolution of

* Prof. Dr., Institute of Economics, Chair of Regulatory Economics, Helmut-Schmidt-Universität, University of the Federal Armed Forces Hamburg, D-22043 Hamburg, E-mail: dirk.meyer@hsu-hh.

¹ Deutsche Bundesbank (1990), p 1; translated by the author.

² Herdegen (1998), p 3; translated by the author.

³ As possible reasons for the failure to take account of exit regulations, reference is made to an increased probability of their application and the complexity of these standards needed to appropriately depict all possible scenarios. Cf. Scott (1998), pp 213 ff. Conversely, the pressure to reach an agreement would increase. Cf. also Deo, Donovan and Hatheway (2011), p 4.

Member States vary.⁴ Similar uncertainty surrounds termination as a result of an important extraordinary cause.⁵ However, the consensual dismissal of a Member State and the exclusion of its rights due to serious and continued breaches of the contractual obligations are clearly legal (Art. 7 TEU).⁶ Legal and creative ways will have to be found if this regulatory gap in connection with the bail-out ban (Art. 125 TFEU) is not to result in a pathological impasse when bankruptcy looms. In any case, an international treaty should be made to regulate the conditions for exit (repayment of euro to the ECB, restitution of capital share and currency reserves to the National Central Bank). A unilateral declaration of exit would in fact be conceivable, but would be totally unacceptable in terms of peaceful coexistence within the EU.

In any case, a gradual process of disintegration has to precede a termination of membership. The 'postulate of pro-community behaviour' (Art. 344 TFEU) requires that attempts should be made to resolve the conflict not only through negotiations but also that appeals to the European Court of Justice should produce no success. A suspension of membership of the monetary union as a 'trial exit' is not possible for practical reasons.⁷ Regardless of the legal options of termination, other possible exit options should be borne in mind when considering the problem. Ultimately, the question of exiting the monetary union is more a *political question* than a legal one.⁸ Dramatic intensification of a country's financial difficulties might mean that even illegal ways are at least no longer excluded.⁹

Historical events such as the collapses of the krone and rouble zones, have adequately demonstrated the problems of an absence of exit rules for the revision of political and economic integration processes.¹⁰ In contrast, Czechoslovakia and South Africa/Namibia are examples of a proper and orderly separation.¹¹ Under the aspect of low failure costs the *establishment of an exit right* with specific regulations appears urgently needed.¹² Contractual irreversibility leads to high avoidable costs in the event

⁴ The Federal Constitutional Court (FCC) assumes in the Maastricht decision a right for the Member States to abrogate the contract. Cf. FCC 89, 155 (190). According to a different legal opinion, a termination agreement would contradict Community Law if, among other conditions, in Art. B Treaty of Maastricht the achievement of policy objectives such as "to maintain in full the 'acquis communautaire' and build on it with a view to considering" are highlighted. See Hilf (1997), pp 5/782 ff. and also Bleckmann and Pieper (1993), p 975.

⁵ See Hilf (1997), p 5/785 and the comment of the FCC in the Maastricht decision.

⁶ Cf. Hilf (1997), p 5/784 and pp 5/786 f.; Herrmann (2010a), p 417.

⁷ Cf. Hilf (1997), p 5/789.

⁸ Hahn and Häde (2010), p 308. Emphasis by the author.

⁹ Cf. Krugman (2010), who weakens Eichengreen's (2007) argument of the high transaction costs and the risk of a bank run due to the effect of the announcement. Cf. also Buiter (1999), p 184.

¹⁰ Cf. Muth (1998), pp 6 ff.

¹¹ Concerning the termination of the currency union between the Czech Republic and the Slovak Republic in 1993, see Fidrmuc, Horvath and Fidrmuc (1999) as well as Lopatka (2011).

¹² In the general budget debate for fiscal year 2010 on 17 March 2010, German Chancellor Merkel made the following demand: "We will have an agreement for the future in which it is, as a last resort, even possible to exclude a country from the euro area if it repeatedly fails to fulfil the conditions in the long term." Translated by the author.

of problems.¹³ Moreover, the principle of competition always dictates the possibility of deselection to leverage the better solution. The threat of a planned exit would also encourage the participants to compromise more willingly.¹⁴ The functionality of the exit-voice mechanism would be established.

The minimum requirements of regulations for a ‘divorce rule’¹⁵ should be included by an amendment of the TFEU. This contractual modification would include a general right to withdraw from the third stage (euro currency), which would definitely not be connected with a withdrawal from the political union. The obligation of mutual consultations, which should especially include the return of the euro banknotes, would have to ensure a more conflict-free exit. In addition, a *replacement* of ECB committees based on unanimous resolution by a request from a single member may take place in order to correct the changes of the majorities between the hard- and the soft-currency countries in the case of an exit.

The concept of *national parallel currencies* offers an interesting alternative towards a ‘rough’ exit from the EMU regarding political, economic and juridical aspects.¹⁶ In addition to the continued validity of the euro as a currency and legal tender, every euro member could autonomously introduce its own national currency. This would possibly require an alteration of Art. 128 as well as Art. 3 para. 1 lit. c TFEU. These provisions concern the repeal of the euro as monopoly currency as well as the suspension of the exclusive jurisdiction of the EU in the field of monetary policy for its Member States.

Due to the lack of appropriate arrangements, the following options are currently the subject of intense discussion:

- (a) Art. 50 TEU as amended in Lisbon explicitly provides for an exit from the EU. This would allow an exit for a juridical second and an *immediate re-entry* as a quasi treaty-compliant solution. Similar to the case of Great Britain or Denmark, the special status as a Member State with exceptional rules (Art. 139 TFEU) could allow the introduction of e.g. the *Neä Drachmä*.¹⁷ The potential problem of the time factor should not be ignored when discussing this solution. Formally, an exit-treaty would have to be negotiated and a re-entry would follow the procedure of Art. 49 TEU. However, a cooperative EU behaviour could be assumed, allowing an instant introduction of a national currency.¹⁸ Furthermore, discussions also include the possibility of a partial exit ‘as a minus compared with a full withdrawal’.¹⁹

¹³ Cf. Theurl (1992), p 302.

¹⁴ Cf. Hilf (1997), pp 5/790 f. and also Welcker and Nerge (1992), pp 94 f.

¹⁵ Cf. Muth (1998), pp 9 f. See also Horn (2011), p 1402, who prefers an exit arrangement.

¹⁶ For details of the concept of national parallel currencies, see Meyer (2012a).

¹⁷ Because the TFEU does not provide retrograde stages of development within the monetary union, the introduction of a national currency would have to be ratified as an alternative departure from the ‘third level’ by a special agreement involving all 27 Member States.

¹⁸ Cf. Seidel (2012), p 161. Seidel points to the experience of the German reunification.

¹⁹ Cf. Seidel (2010), who derived from the general right to withdrawal a right to an incomplete exit (a maiore ad minorem); similarly: Herrmann (2010a), p 417 and Vischer (2010), pp 44 f. Generally

- (b) Art. 2, para. 1 TFEU provides the possibility of an *authorization by the Union* for a national legal arrangement in cases where the EU has exclusive competences. This applies to the “monetary policy for the Member States whose currency is the euro” (Art. 3, para. 1 lit. c TFEU). A prerequisite for this reauthorization would be a unanimous resolution by the European Council to pass an appropriate cancellation agreement. By relinquishing its participation in a combined monetary policy, a Member State could use this procedure to adopt a currency of its own.²⁰ A similar example applies to fisheries policy which is also an exclusive part of EU policy. Here, too, the territorial scope was restricted by removing Greenland from the Danish state territory.
- (c) Similarly, the entry of Greece with falsified data combined with continued failure to meet the stability criteria would provide the necessary authorization to return the country to its *previous status* as a Non-Member State of the eurozone. In this connection, demotion to the group of ‘Member States with exceptional rules’ (Art. 139 TFEU) would be the desirable result. In addition, it would be necessary to annul the Council decision pursuant to Art. 140 TFEU which had led to the entry of Greece into the eurozone. Although the invalidity can no longer be enforced because the deadline has expired (Art. 263 TFEU), the continued manipulation of the debt statistics and a persistently apparent deviation from the legal stability behaviour could be cited (contrarius actus pursuant to Art. 139 et seq. in conjunction with Art. 263 TFEU).²¹
- (d) Through an *amendment of the Euro-Implementation Act*,²² Greece could be excluded from the group of euro members. Nevertheless, this would require the consensual cooperation of Greece.
- (e) Moreover, there is the legal opinion that a euro member should retain its *national authority* to implement its own independent currency without the permission of the EU.²³ The Member’s right to resign granted by the Treaty of Lisbon guarantees that all national jurisdictions do in principle persist although they had de facto been specifically transferred to the EU. A unilaterally declared exit from the euro would on the one hand be considered a violation of European law but at the same time compel the community to suspend all counteracting regulations towards implementing a national currency promptly

critical to the possibility of a withdrawal pursuant to Art. 50 TEU: Zeh (2004), pp 199 f. and Deo, Donovan and Hatheway (2011), p 9.

²⁰ Cf. Seidel (2010), p 45; Seidel (2012), p 157 and Hummer (2011), pp 263 f.

²¹ Cf. Behrens (2010). This would signal that Council Regulation (EC) No. 2596/2000 amending Council Regulation (EC) No 974/98 on the introduction of the euro (EURO VO II) should be repealed.

²² See Council Regulation (EC) No 974/98 on the introduction of the euro (EURO VO II). See Herrmann (2010a), p 417.

²³ On this see Seidel (2012) p 160 f. “The introduction of the euro as currency and legal tender in Greece has contributed just as little to the extinction of – repressed – national powers of authority concerning monetary and currency issues in Greece as has the use of the authority of the European Union for organizing monetary policy as a so-called exclusive policy ...”. *Ibid*, p 161; own translation. Seidel underlines the reverse case of involving the new eastern states of Germany in the eurozone in an autonomous manner and without any European legal act. See also Hilf (1997), p 5/786.

with due regard for the national sovereignty. At the same time, openness is a basic democratic principle of general interest (Art. 2 and 6 TEU). Consequently, for this reason alone, the withdrawal of a single Member should be accepted by the remaining Members as a matter of course.

- (f) The TEU provides different arrangements of legal development. These include on the one hand the *treaty amendment procedures* (Art. 48 TEU). On the other hand, provisions are made for the right to complementary legislation of a so-called *contract rounding-off* (Art. 352 TEU). This right can be applied if the objectives cannot be achieved by the powers previously designated in the Treaty. In particular, where an intensified level of community integration exists, reference to this legal standard will be rarely admissible since such a goal is already inherent in the basic intention of the TEU.²⁴
- (g) If more than one of the euro members are both willing to exit and implement a common northern or southern currency or a common parallel currency to the euro, this will have the effect of achieving improved monetary convergence of these countries. This addresses the instrument of an *enhanced cooperation* which “shall aim to further the objectives of the Union, protect its interests and reinforce its integration process” (Art. 20 para. 1 s. 2 TEU).²⁵ However, enhanced cooperation is excluded within the framework of exclusive competences (Art. 20 para. 1 TEU and Art. 329 para. 1 TFEU). Consequently, this juridical possibility should disappear (see point b).
- (h) In addition to the primary legal basis of community law, *international treaty law* provides conflict rules. However, the practice of international treaty law on the ‘self-contained regime’ by the EU is the subject of controversy.²⁶ Art. 60 Vienna Convention on the Law of Treaties (VCLT) provides for termination or suspension of membership in the event of a *significant breach of contract*. However, the special instructions of Art. 126; 258 and 259 TFEU and Art. 7 TEU are applicable by priority. In addition, Member States have committed “not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein” (Art. 344 TFEU). Finally, a fundamental change of circumstances in the sense of an *abolition of the basis (clausula rebus sic standibus)* allows the termination or the withdrawal (Art. 62 VCLT).²⁷ Above all, it seems to allow a termination or a withdrawal by consensus of the members (Art. 54 VCLT).²⁸ The same applies to dismissal (Art. 56 VCLT), which must be notified 12 months in advance.

²⁴ Cf. Zeh (2004), p 184.

²⁵ See as well Kerber (2012), p 34. The difficulty would probably be the quorum of nine participating Members. See Art. 20 paras 2/3 TEU.

²⁶ Cf. Kämmerer (2010), p 166; Münchau and Mundschenk (2009), p 4; Zeh (2004), pp 181 f. France still has not signed the Vienna Convention, Portugal has, but with reservations.

²⁷ Cf. Vischer (2010), p 45.

²⁸ See Zeh (2004), pp 187 f.

2. Reassignment of the Monetary Sovereignty and the Foundation of a National Currency Statute

The legal execution of a withdrawal from the eurozone requires the reassignment of monetary sovereignty and the foundation of a national currency statute. A departure from the common currency thus requires a combination of measures based on Union and national law. In addition to the possible introduction of new primary legal rulings for an exit, secondary legal rulings concerning special issues would have to be adopted as a counterpart to regulation on certain provisions relating to the introduction of the euro:²⁹ (a) Which debt currency would be valid under certain connecting factors (e.g. debtor's residence, place of payment, ...)? (b) From which date would the new currency become legal tender? The implementation of a national currency would be the obvious but not the logically necessary consequence of the efforts.³⁰

At the beginning of a currency withdrawal, *the transferred monetary sovereignty*³¹ has to be reassigned from the EU to the withdrawing Member State. As is generally known, the devil is in the detail and thereby in problems of practical implementation. In order to except the financial help in favour of crisis states from a breach of the bail-out prohibition with legal certainty, and in order to justify possible help pursuant to Art. 143 et seq., the withdrawal of these countries from the eurozone would have to precede the granting of assistance. To take into account the urgency of assistance, it would be absolutely necessary to link the supporting provisions with a successful exit.

Art. 50 TEU as amended in Lisbon requires a time-consuming negotiating process referring to exit and re-entry procedures. This applies to the case that a partial exit (a *maiore ad minorem*) would be juridically disputable and would also be met with disapproval, as would an exit for a juridical second. An alternative is offered by the regular procedure for an amendment of the Treaty with a very time-consuming dismantling of the monetary union with the consensus of all Member States (Art. 48 para. 2 sentence 2 in conjunction with para. 4 sentence 2 TEU).³² Legal means in

²⁹ See Council Regulation (EC) No. 1103/97 on certain provisions relating to the introduction of the euro (EURO VO I) dating from 17 June 1997. See also Council Regulation (EC) No 974/98 on the introduction of the euro (EURO VO II) dating from 3 May 1998.

³⁰ Additional countries and European territories, such as Andorra, Kosovo, Monaco, San Marino and Vatican City State, currently use the EURO as legal tender. They have no part in the ECB decision-making bodies. Moreover, there is no direct access to EURO central bank money and these countries are excluded from seigniorage income. The EURO is to a large extent used as an illegal currency in Bosnia, Bulgaria and Croatia as well as in Macedonia. See Hawkins and Masson (2003), pp 22 f.

³¹ The monetary sovereignty was transferred to the EU, but not to the ECB. This results from the powers of the Council laying down the exchange rate regime for third countries (Art. 219 TFEU), and measures for payments and capital transactions with third countries (Art. 64, para. 2; Art. 66 TFEU) See also Herrmann (2010b), pp 118–120. The ECB is only an EU organ (Art. 13 TEU).

³² Consensus means the approval of the 27 EU Members, not, for example of only the 17 euro states. The exit would be legalized through their parliaments or by referendum. The regular procedure for contractual amendment derives its special significance from its character in European jurisprudence. As a concentrated form of a European political idea, this provision is also a manifestation of the fact

conformity with the contract, which could be decided by the European Council within in a short time, could be the authorization of a national legislation (Art. 2 sec. 1 TFEU), the annulment of the Council decision or an alteration of the Euro-Implementation Act. Ultimately, there is the possibility in international treaty law of unilaterally terminating the membership in the event of a significant breach of contract. However, in terms of European politics, this option would amount to a worst-case scenario.³³ From a legal perspective, a unilateral exit without consensus would be considered problematic, since the return of monetary sovereignty would possibly not have been resolved. Considering these circumstances, it might lead to a risk of the denomination of the debt currency not being recognized in contracts involving foreign elements.³⁴

The counterpart to reassignment – demonstrated on the example of Germany would have to be reflected in a constitutional amendment (Art. 23 para. 1 in conjunction with Art. 79, para. 2/3 of the Basic Law (GG)) for the *retrieval of the monetary sovereignty*.³⁵ Only after this procedure would it be possible to execute a resumed *national currency authority* in a corresponding national currency law. This would require *democratic legitimation* by means of a referendum and/or parliamentary resolution. For Germany, Art. 73 No. 4 in conjunction with Art. 88 GG governs the exercising of currency authority. Accordingly, the Bundestag would have to transfer this authority back to the German Federal Bank (Deutsche Bundesbank). A *Euro-Termination Law* would suspend the role of the euro as legal tender on the territory of the Federal Republic of Germany and repeal and replace it by a new currency. This law would also set the exchange rate and thus ensure the recurrent connection to the new currency.³⁶ Afterwards, separation from the euro would be possible and the path would be clear for the country to have its own *statute of national currency*.³⁷ This would govern the following monetary fundamentals:³⁸

- legalization of a new currency (design, denomination, etc.);
- institutionalization of a central bank (definition of tasks/assignments, its role in

that something historically new, a new chapter in the history of political systems, has been ventured and achieved by installing a power above the sovereign states –with supranationalism.

³³ Cf. also Buiter and Rahbari (2011), p 27.

³⁴ See Proctor (2011), p 19.

³⁵ Art. 88 GG: “The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank that is independent and committed to the overriding goal of assuring price stability.” Monetary sovereignty is held by the Federation pursuant to Art. 73, No. 4 of the Constitution “The Federation shall have exclusive power to legislate with respect to: ... 4. currency, money, and coinage” According to Art. 23 para. 1 in conjunction with Art. 79 para. 2 / 3 GG, it may delegate this authority to the EU and also retract this right.

³⁶ Because the recurrent connection can be chosen arbitrarily in the case of a changeover, a 1:1 ratio would be worthy of consideration to achieve simplification. A change of price labelling would not be necessary and conversion would be made easier.

³⁷ In the event of a northern euro, the Bundestag would additionally have to transfer monetary sovereignty to a Northern European Monetary Union (NEMU), which would have to be founded, through a constitutional amendment.

³⁸ Cf. Abrams and Cortés-Douglas (1993), p 11 and Herrmann (2010b), p 116.

relation to institutions such as government and legislative organ), the exclusive right of the Federal Bank to issue banknotes would be guaranteed by an alteration to Section 14 of the Act on the German Federal Bank (Bundesbank Act), the monetary instruments in Sections 15 ff. of the Bundesbank Act have to be reintroduced;

- a Coinage Act allowing and mandating the country to mint and issue coins;
- the implementation of the new currency and the provision concerning the exchange;
- the exchange rate concept.

The implementation of the new currency is associated with *two fundamental regulatory decisions*: the one about the exit and the principles of the exchange, the other about choosing the future exchange rate system. In the case of Germany or a Northern European Monetary Union (NEMU), the reasons for the withdrawal as well as the relative economic strength in relation to the Union suggest that only a flexible exchange rate would be economically viable, while in the case of Greece and the other, rather small deficit countries a merger to form a Mediterranean Monetary Union or a connection to the euro with or without fluctuation margins would appear possible.³⁹ The risk of speculative attacks would be reduced, but not eliminated.

Institutional reorganization requires the establishment of a *national central bank*. The NCBs would continue to exist within the scope of the ESCB, and perform the operative business on behalf of the ECB, which means the appropriate expertise would still be present. It would merely be necessary to reinstitutionalize the old powers. Potential provisions for disintegration of the euro exist in the form of *European clearing system TARGET2* for international payment transactions and the national clearing systems.⁴⁰ However, the TARGET system as an instrument for the creation of new loans would lead to capital exports caused externally and permanently by countries in crisis at the expense of the solvent states with a surplus. That process would have to be terminated by changing the entrance requirements.⁴¹ The *Euro-Termination Law* would have to include concrete provisions for implementation. It would focus on the following questions: who is allowed to change or who is subject to a forced conversion and for whom or for which contracts is the new currency valid. Both issues are relevant for the holders of rights or the asset position.

³⁹ Cf. Abrams and Cortés-Douglas (1993), pp 4 ff.; Taylor, Chr. (1998).

⁴⁰ Scott (1998), pp 215 ff. sees this as a significant relief for a future currency withdrawal. As further structural simplifications, he still names the national debt attributable to the national states and the largely nationalized currency reserves by the national central banks. The example of Russia and other successor states of the Soviet Union reveals only too clearly the corresponding potential problems due to missing assignments on leaving the rouble zone.

⁴¹ See Sinn (2012), especially pp 163 ff. and pp 359 ff.

3. Denomination – The Currency Debt in Existing Contracts

First and foremost, it is necessary to answer the question as to whether the existing treaties would remain valid after changing the currency.⁴² This would have to be fundamentally approved since neither a misconception by the contracting parties exists nor is there an obvious impossibility of fulfilling a contract, although the conversion might be accompanied by changes in asset positions. The question of debt currency would thus depend on the specific exit situation: is the exit taking place in agreement with EU law or does it violate EU law?⁴³ The following presupposes that the exit of a country would be in agreement with EU law. This would facilitate the enforcement of the claims in civil law proceedings and should maintain legal disputes within limits and favour their unambiguous clarification. Ultimately, international private law provides regulations to solve the matter of currency.

When considering the question as to which currency is valid as a debt currency in existing contracts, it helps to clarify a number of concepts. The currency in which the creditor must accept the settlement of the money debt is called *legal tender*.⁴⁴ Using its sovereignty enables the state to decide over its own currency within its territory.⁴⁵ The respective *statute of currency* (*lex monetae*) includes the law of currency and the monetary fundamentals of the national monetary order of the appropriate state.⁴⁶ They express the official and exclusive national establishment which is regulated by public law. This means that the application of public law is limited to the sovereign territory and its people (territorial principle).⁴⁷ Consequently, they are not able to exert any binding effect abroad. The *statute of debt* regulates the arrangement of the monetary debt ratio under private law. The nature and amount of the payment which the debtor has to deliver to the creditor is determined by setting the currency through the contractual arrangement. The statute is mainly defined by the choice of law and jurisdiction of the parties.⁴⁸ In cases not involving a foreign element, the parties normally declare the national law. With regard to a monetary reform, this arrangement is

⁴² See in detail Proctor (2011), pp 11 ff.

⁴³ Cf. Ernst (2012) in this connection. In the case of an unlawful exit, the priority of EU law would lead to the persistence of the euro as debt currency under private law. This would apply regardless of whether the contracts concerned had an international connection or were between domestic parties. Domestic courts would therefore have to apply EU law and ensure its enforcement. However, whether this would actually happen in practice remains questionable.

⁴⁴ See Grothe (1999), pp 42 ff.

⁴⁵ See Grothe (1999), p 25 ff. Pursuant to the Treaty of Maastricht the euro members have transferred their monetary sovereignty to the EU.

⁴⁶ See Grothe (1999), pp 101 ff.; Vischer (2010), pp 180 ff. This also shows the manifestation of state sovereignty. See Hahn u. Häde (2010), p 11 and pp 14 f.

⁴⁷ See Nussbaum (1925), pp 160–163; Reinhuber (1995), p 160. Interventions in currency similar to an expropriation must not be tolerated by foreigners. According to Art. 17 Charter of Fundamental Rights of the European Union, they can invoke a right to reasonable compensation and enforce this in court.

⁴⁸ See Grothe (1999), pp 42 ff. and pp 101 ff.; Vischer (2010), p 183 and pp 189 f.; Schmidt (2004), pp 694 ff.

juridically practicable without any problems. If for example a Neä Drachmä (ND) were implemented, the denomination of contracts would take place in ND currency exclusively between Greek parties.

In *contracts involving foreign elements*, the choice of the legal system is uncertain. Generally, at least two legal systems can potentially be chosen. Here the statute of debt and the statute of currency have to be in a ratio of superordination and subordination.⁴⁹ With the choice of the currency (statute of debt) the contracting parties again comply with the right of the currency (*lex monetae*).⁵⁰ A principle applies whereby “he who confides in a foreign currency, also shares its fate”.⁵¹ Accordingly, the applicable statute of currency belongs to that state which has the currency in which the debt is nominated. Consequently, a bond issue of the German Empire held by a US citizen which was nominated in Rentenmark at the time of issue had to be denominated and paid back in Reichsmark after 1924.

Finally, the *statute of payment* contains the right of the place of payment. For example it determines whether the amount of debt in foreign currency can be paid in the local currency (according to Section 244 of the German Civil Code (BGB)).⁵² For this reason the preceding legal relations correspond to the principle of private autonomy.

If statute of debt and statute of currency coincide as is often the case for contracts between residents of one country, the new currency is considered the future debt currency. Solely in case of divergence between the statute of currency and the statute of debt in contracts with foreign elements do economically complex and juridically complex constellations arise in cases of *monetary reforms*. The international monetary law, addressed in this context, is required to clarify the question as to which material currency right is to be applied.⁵³ Figure 1 indicates different types of case configurations for currency disintegration in the eurozone.

Case (a) assumes the *withdrawal of a euro member*. For example, Greece could leave and implement the Neä Drachmä (ND). Case (b) illustrates the *exit of a group of euro members* founding an independent currency union alongside the still existing eurozone. Conceivable options are either a northern currency (North-Euro/NORDO) or a southern currency (South-Euro/SUEDO). Both cases imply the secession of a currency area from the remaining eurozone. This would at least enable compliance with contracts expressed in euro. For individual cases the debt currency would have to be determined by the contractually chosen legal system. Given a Greek bond indenture under English law, Greece would still be required to service its interest and

⁴⁹ See Grothe (1999), p 111; Reinhuber (1995), p 161 and Mann (1953), p 644. Similar, but less clear is the relationship seen by Vischer (2010), pp.182 f.

⁵⁰ See Vischer (2010), p 186.; Horn (1972), pp 262 f.; Grothe (1999), pp 104 ff.

⁵¹ See Österreichischer Gerichtshof OGH SZ 7/390 and SZ 24/184, quoted by Schuster (1998). Translated by the author. The issue of money together with its exclusive use in the domestic territory as cash/legal tender and any denomination are covered by monetary sovereignty.

⁵² See Vischer (2010), pp 184 f.; Horn (1972), pp 264 f.; Schmidt (2004), 694 ff. While the debt currency indicates the extent of payment, the payment currency shows the nature of the payment.

⁵³ See Hahn and Häde (2010), p 14.

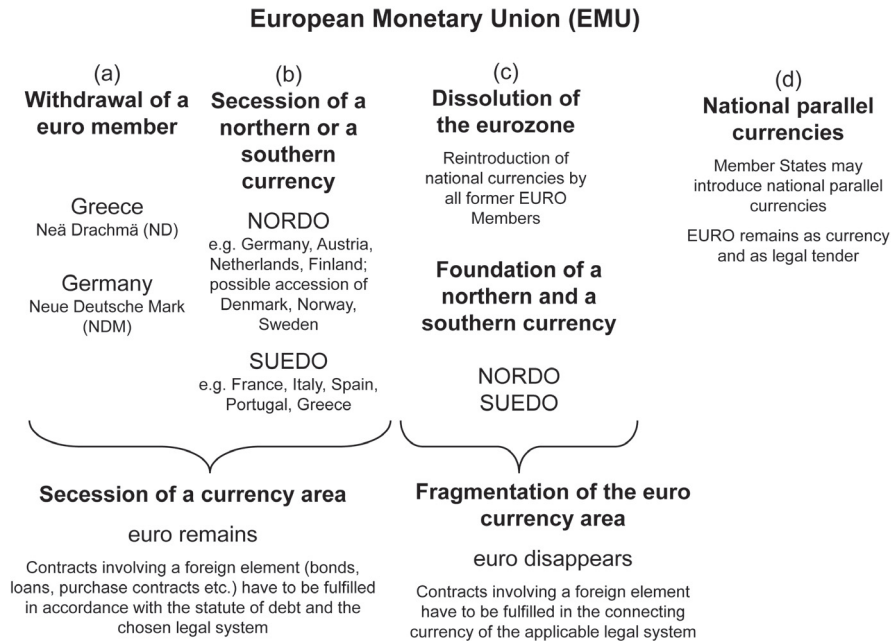


Figure 1.

redemption in euro. Case (c) describes the *(chaotic) decay of the eurozone* which would result in a return to national currencies by its former 17 Member States. Likewise, case (c) recreates the foundation of a northern and southern currency union after the dissolution of the eurozone. This currency fragmentation prevents payment being made in the former debt currency of the euro because the former currency statute has disappeared completely and been replaced by two new sovereign currencies. In this case, the debt currency is the currency of the country which has been assigned as having the responsible legal system for the contract. Finally, case (d) affects *the approval of national currencies parallel to the euro*. For already existing contracts the euro remains valid whereas the debt currency can be freely selected for future contracts.

Every monetary reform replaces the existing monetary regime by a new one. One essential task of the new statute of currency is to transfer the previous euro currency to the successor currency.⁵⁴ This *recurrent connection* ensures the technical process of transferring from euro into the new currency units by the (arbitrary) specification of a uniform conversion ratio.⁵⁵ For example, Regulation (EC) No. 2866/98 fixed the

⁵⁴ See Grothe (1999), pp 205 ff.

⁵⁵ Thus the unified standard interface does not have any formative action, but merely a declaratory effect. Problems of an appreciation/depreciation or even an expropriation do not arise. See Grothe (1999), p 209; Reinhuber (1995), pp 33 f. and Nussbaum (1925), p 48.

exchange rate from DM to euro at a uniform value of 1.95583.⁵⁶ It is juridically ambiguous whether the statute of currency merely includes the recurrent connection as a *single base connection* or whether a *differentiated connection* is also attributable to the statute of currency.⁵⁷ This distinction becomes important if the statute of debt and the statute of currency belong to different judiciaries in contracts with foreign elements. In a narrow interpretation of the statute of currency, this distinction would not be suitable whereas it would be in a wider interpretation. A wider interpretation would be equivalent to a compulsory purchase. This distinction between the *Currency Act* (lex monetae) as an expression of the currency conversion and the *Conversion Act* (lex causae) including the creditor-debtor-relation became apparent during the German monetary reform in 1948.

Summary

The article focuses on the legal options for a withdrawal from the euro area and the reassignment of currency sovereignty towards the exiting Member. Admittedly, the Treaty on European Union (TEU) does not provide for an exit from the third stage of the currency union, nevertheless a variety of conforming options can be found that could allow the consensual departure of a euro member. Likewise, the reassignment of monetary sovereignty would take place. A national currency act would subsequently have to regulate the principles of a recurrent link of the new currency and the terms of exchange. Finally, this article reveals the fundamentals of the denomination of currency in existing contracts by clarifying the relation between debt and currency statute.

Bibliography

a) Monographs and Articles

Abrams, R.K. and Cortés-Douglas, H. (1993), Introduction of a New National Currency: Policy, Institutional, and Technical Issues, IMF Working Paper, WP 93/49.

⁵⁶ See Regulation (EC) No. 2866/98 on the conversion rates between the euro and the currencies of the Member States adopting the euro dating from 31 December 1998.

⁵⁷ Legally, this is viewed critically by Hahn u. Häde (2010), pp 15 f. Reinhuber (1995), pp 39 ff. and Nussbaum (1925), p 162 clearly point at the uniform base connection. With the conversion of Reichsmark to Deutsche Mark (1948) the recurrent connection was 1:1 (Section 2 Währungsgesetz). Differentiated sets concerned Reichsmarkforderungen (10:1) (Section 16 Umstellungsgesetz, UmstG), excluding wages/salaries (1:1) and bank deposits (100:6,5). Also in Appendix I, 1. Section, Art. 2 of the Treaty between the GDR and the Federal Republic of Germany (1990), the recurrent connection ratio sets Mark of the DDR to Deutsche Mark at 1:1. Appendix I, 2. Section, Art. 7, Section 1 converted the general accounts receivable to 2:1, with the exception of wages/salaries, leases and rents (1:1). See Reinhuber (1995), pp 36 f.

- Behrens, Peter (2010), Ist ein Ausschluss aus der Euro-Zone ausgeschlossen?, in: Europäische Zeitschrift für Wirtschaftsrecht, vol. 21 (2010). no. 4, p 121.
- Bleckmann, A. and Pieper, U. (1993), Maastricht, die grundgesetzliche Ordnung und die „Superrevisionssinstanz“, in: Recht der Internationalen Wirtschaft, vol. 35 (1993), pp 969–977.
- Buiter, Willem H. (1999), Alice in Euroland, in: Journal of Common Market Studies, vol. 37 (1999), pp 181–209.
- Buiter, Willem H. and Rahbari, Ebrahim (2011), The Future of the Euro Area: Fiscal Union, Break-up or Blundering Towards a ‘You Break It You Own It Europe’, Global Economics View, Citigroup Research Paper, <http://www.willembuiter.com/3scenarios.pdf> (accessed on 10 March 2012).
- Deo, Stephane, Donovan, Paul and Hatheway, Larry (2011), Euro Break Up – The Consequences, UBS Investment Research – Global Economic Perspectives, London.
- Deutsche Bundesbank (1990), Stellungnahme der Deutschen Bundesbank zur Errichtung einer Wirtschafts- und Währungsunion in Europa, Frankfurt a.M.
- Eichengreen, Barry (2007), The Breakup of the Euro Area, NBER Working Paper, no. 13393.
- Ernst, Wolfgang (2012), Privatrechtliche Folgen eines Ausscheidens einzelner Staaten aus der Euro-Währung – ein Problemaufriss, in: Zeitschrift für Wirtschaftsrecht, vol. 33. (2012), no. 2, pp 49–58.
- Fidrmuc, Jan, Horvath, Julius and Fidrmuc, Jarko (1999), Stability of Monetary Unions: Lessons from the Break-Up of Czechoslovakia, ZEI Working Paper, B99–17, Bonn 1999, <http://ideas.repec.org/p/zbw/zeiwp/b171999.html> (accessed on 13 November 2012).
- Grothe, Helmut (1999), Fremdwährungsverbindlichkeiten – Das Recht der Geldschulden mit Auslandsberührung – Kollisionsrecht – Materielles Recht – Verfahrensrecht, Berlin – New York.
- Gruson, Michael (1998), Die Einführung des Euro und DM-Auslandsanleihen – Zugleich ein Beitrag zum deutschen Gesetz zur Umstellung von Schuldverschreibungen – Arbeitspapier 2/1998, http://www.jura.uni-frankfurt.de/ifawz1/baums/Bilder_und_Daten/Arbeitspapiere/a0298.pdf (accessed on 12 August 2010).
- Hahn, Hugo J. and Häde, Ulrich (2010), Währungsrecht, München, second edition.
- Hawkins, John and Masson, Paul (2003), Economic Aspects of Regional Currency Areas and the Use of Foreign Currencies, in: BIS Papers no. 17, Regional Currency Areas and the Use of Foreign Currencies, Basel.
- Herdegen, M. (1998), Die Währungsunion als dauerhafte Rechtsgemeinschaft – Ausstiegsszenarien aus rechtlicher Perspektive, EWU-Monitor, no. 52, ed. by Deutsche Bank Research, Frankfurt a.M.
- Herrmann, Christoph (2010a), Griechenlands Tragödie – der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone, in: Europäische Zeitschrift für Wirtschaftsrecht, vol. 21 (2010). no. 11, pp 413–418.
- Herrmann, Christoph (2010b), Währungshoheit, Währungsverfassung und subjektive Rechte, Tübingen.
- Hilf, M. (1997), Kommentar zu Art. 240 EGV (Art. 312 EGV i.d. Fassung des Nizzavertrages / Art. 356 AEUV), in: Groeben, H. v.d., Thiesing, J. and Ehlermann, C.-D. (ed.), Kommentar zum EU-/EG-Vertrag, vol. 5, Baden-Baden, pp 5/776–5/791.
- Horn, Norbert (2011), Die Reform der Europäischen Währungsunion und die Zukunft des Euro, in: Neue Juristische Wochenschrift, vol. 64 (2011), no. 20, pp 1398–1404.
- Horn, Norbert (1972), Das Recht der internationalen Anleihen, Frankfurt a. Main.
- Hummer, Waldemar (2011), Vom Beginn der Finanzkrise bis zu ihrem vorläufigen Ende – Der permanente “Europäische Stabilitätsmechanismus”, in: Hummer, Waldemar (ed.), Die Finanzkrise aus internationaler und österreichischer Sicht, Innsbruck-Wien-Bozen 2011, pp 231–392.
- Kämmerer, Jörn Axel (2010), Insolvenz von EU-Mitgliedstaaten – Voraussetzungen und Folgen, in: Wirtschaftsdienst, vol. 90 (2010), pp 161–167.
- Kerber, Markus C. (2012), Zeit für einen historischen Kompromiss, in: Die Parallelwährung: Optionen, Chancen, Risiken, ed. by Bundesverband mittelständischer Wirtschaft, without location 2012, pp 31–39.
- Krugman, Paul (2010), The Conscience of a Liberal, in: The New York Times, New York, 28 April 2010.
- Lopatka, Jan (2011), Lessons from Czechoslovakia: a currency split that worked, <http://uk.reuters.com/article/2011/12/08/uk-eurozone-lessons-czechoslovakia-idUKTRE7B717G20111208> (accessed on 14 June 2013).

- Mann, F.A. (1953), Währungsersplitterung und Währungsbestimmung, in: *Neue Juristische Wochenschrift*, vol. 6, no. 18, pp 643–647.
- Meyer, Dirk (2012a), Das Konzept nationaler Parallelwährungen für die EURO-Zone, in: *IFO-Schnelldienst*, vol. 65 (2012), no. 16, pp 3–12.
- Meyer, Dirk (2012b) (ed.), *Die Zukunft der Währungsunion – Chancen und Risiken des Euro*, Reihe *Wirtschaft aktuell*, Bd. 2, Münster 2012.
- Münchau, W. and Mundschenk, S. (2009), Eurozone Meltdown – Eight Scenarios how the unthinkable might happen, *EuroIntelligence Briefing Note 1*, version 3 April 2009, [http://eurointelligence.com/index.php?id=581&tx_ttnews\[tt_news\]=2413&tx_ttnews\[backPid\]=755&cHash=3c13781282](http://eurointelligence.com/index.php?id=581&tx_ttnews[tt_news]=2413&tx_ttnews[backPid]=755&cHash=3c13781282) (accessed on 5 April 2010).
- Muth, Clemens (1998), Ein Scheidungsparagraph für die EWU?, *HypoVereinsbank*, München.
- Muth, Clemens (1997), *Währungsdesintegration – Das Ende von Währungsunionen*, Heidelberg.
- Nussbaum, Arthur (1925), *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts*, Tübingen.
- Proctor, Charles (2011), The Euro – Fragmentation and the Financial Markets, in: *Capital Market Law Journal*, vol. 6, no. 1, pp 5–28.
- Reinhuber, Nikolaus (1995), *Grundbegriffe und internationaler Anwendungsbereich von Währungsrecht*, Berlin – New York.
- Schmidt, Karsten (2004), Schuldwährung, Zahlungswährung und Zahlungsort, in: Honsell, Heinrich, Zäch, Roger, Hasenböhler, Franz et al (ed.), *Privatrecht und Methode*, Festschrift für Ernst A. Krämer, Basel-Genf-München 2004.
- Schuster, Brigitte (1998), EURO – Die Auswirkungen auf bestehende und zukünftige Verträge (insbesondere Darlehensverträge), <http://www.privatrecht.sbg.ac.at/forum/schuster.html> (accessed on 12 August 2010).
- Scott, Hall (1998), When the Euro Falls Apart, in: *International Finance*, vol. 1 (1998), pp 207–228.
- Seidel, Martin (2012), Austritt aus der Währungsunion – eine freie Entscheidung Griechenlands, in: *ZEI-Working Paper B 04 2012*, http://www.zei.uni-bonn.de/dateien/working-papaer/b12_04 (accessed on 16 July 2012).
- Seidel, Martin (2010), Der Euro: Schutzschild oder Falle?, in: *Orientierungen zur Wirtschafts- und Gesellschaftspolitik*, vol. 123 (2010), no. 1, pp 39–45.
- Seidel, Martin (2007), Ausscheiden aus der Währungsunion? – Rechtliche Fragen, in: *Europäische Zeitschrift für Wirtschaftsrecht*, vol. 18 (2007), no. 20, p 617.
- Sinn, Hans-Werner (2012), *Die Target Falle*, München.
- Taylor, Chr. (1998), Fallback to a Common Currency: What to Do if EMU Stumbles?, in: Arrowsmith, J. (Hrsg.), *Thinking the Unthinkable About EMU. Coping with Turbulance between 1998 and 2002*, London, pp 104–117.
- Theurl, Theresia (1992), *Eine gemeinsame Währung für Europa – 12 Lehren aus der Geschichte*, Innsbruck.
- Vischer, Frank (2010), *Geld- und Währungsrecht im nationalen und internationalen Kontext*, Basel.
- Welcker, J. and Nerge, C. (1992), *Die Maastrichter Verträge – zum Scheitern verurteilt?*, Landsberg/Lech.
- Zeh, Juli (2004), Recht auf Austritt, in: *Zeitschrift für europäische Studien*, vol. 7, no. 2, pp 173–210.

b) Miscellaneous

- Basic Law (GG) – Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100–1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 21. Juli 2010 (BGBl. I S. 944) geändert worden ist.
- Charter of Fundamental Rights of the European Union (2000/C 364/01) on 18 December 2000.
- Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), (2008/C 115).
- Council Regulation (EC) No. 1103/97 on certain provisions relating to the introduction of the euro (EURO VO I) dating from 17 June 1997.
- Council Regulation (EC) No. 974/98 on the introduction of the euro (EURO VO II) dating from 3 May 1998.

Council Regulation (EC) No. 2866/98 on the conversion rates between the euro and the currencies of the Member States adopting the euro dating from 31 December 1998.

Council Regulation (EC) No. 2596/2000 amending Regulation (EC) No 974/98 on the introduction of the euro dating from 27 November 2000.

Decisions of the Federal Constitutional Court (FCC), BVerfGE 89, 155 (Maastricht-ruling).

Erstes Gesetz zur Neuordnung des Geldwesens vom 20. Juni 1948 (Währungsgesetz).

Umstellungsgesetz vom 20. Juni 1948 (WiGBI 1948, Beilage Nr 5, 13), das zuletzt durch Artikel 9 Nummer 1 des Gesetzes vom 20. Dezember 1982 (BGBl. I S. 1857) geändert worden ist – Drittes Gesetz zur Neuordnung des Geldwesens (UmstG). Verordnung (EG) Nr. 974/98 des Rates über die Einführung des Euro v. 3.05.1998.

Vienna Convention on the Law of Treaties (VCLT).