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GREXIT AS A CHALLENGE TO THE EUROPEAN INTEGRITY

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ABSTRACT

The paper analyzes the prospect of Greece exit know as "Grexit" from EU, whereas the Treaties have a specific legal regime on withdrawing – Article 50 TEU which was added to the Treaties by the Treaty of Lisbon. It confirms the possibility to leave the EU that many (but not all) legal observers believed existed beforehand. No fully-fledged Member State has in fact left the EU before or after the entry into force of the Treaty of Lisbon, although some parts of Member States have done so. Before the Treaty of Lisbon, this was accomplished by means of Treaty amendment. One of the important question is whether would it be possible for Greece to withdraw a notification to leave the EU? In the article an argument will be raised that other Member States and the EU institutions are arguably legally obliged to refuse debt relief for Greece, in accordance with the Treaties' no bail-out rule.

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…leaving the club altogether, as a few advocate, is legally possible – we have an 'exit clause' – but it's not a matter of just walking out. It would be legally and politically a most complicated and unpractical affair. Just think of a divorce after forty years of marriage… Leaving is an act of free will, and perfectly legitimate, but it doesn't come for free.

The President of the European Council, Herman van Rompuy in a speech on 28 February 2013 of the complexities of leaving the EU

There is no reference in the EU Treaties to any power of a Member State to leave EMU once it joins, or of the EU institutions to remove that Member State from EMU, whether it agrees to that or not. A Member State can only leave EMU by leaving the EU, but there is no Treaty power to throw a Member State out of the EU, or to suggest that Grexit[1] might ever be under the obligation to leave. In mid-May 2012, the financial crisis in Greece and the impossibility of forming a new government after elections led to strong speculation that Greece would leave the Eurozone shortly. This phenomenon had already become known as "Grexit" and started to govern international market behaviour. Economists have expressed concern that the phenomenon may well become a self-fulfilling prophecy[2]. On 9 February 2015, UK Prime Minister David Cameron chaired a meeting to discuss any possible ramifications in the event of an exit. During the meeting of the G-20 finance ministers in Istanbul, 2015, ministers came to conclusion that a Greek exit from the Eurozone would be very difficult for the world's economy and potentially very damaging for the European economy.

In the past we observed the case of Greenland which withdrew from the European Communities (EC) in 1985 after gaining a high level of internal autonomy from Denmark in 1979. The Greenland electorate voted on 23 February 1982 on whether to stay in the EC, deciding by 52% to 48% against continued membership (turnout 75%). There were not easy negotiations between the Greenland Government and the Danish Government, and the Danish Government and the European Commission, particularly with regard to fisheries. The Council of Ministers adopted a Decision on the terms of Greenland's withdrawal on 20 February 1984, and Greenland finally withdrew from the EEC on 1 February 1985. Greenland became associated with the EU as an Overseas Country and Territory (OCT) through the Greenland Treaty. The Treaty base for Greenland's withdrawal was the former Article 236 of the Treaty of Rome (now Article 48 TEU), which provided for amend-

[1] The "Grexit" term was introduced by Citigroup's Chief Analysts Willem H. Buiter and Ebrahim Rahbari on 6 February 2012.

[2] Economists who favour this radical approach to solve the Greek debt crisis typically argue that a default is unavoidable for Greece in the long term, and that a delay in organizing an orderly default (by lending Greece more money throughout a few more years), would just wind up hurting EU lenders and neighbouring European countries even more.

ments to the EC Treaties and entry into force following ratification by all Member States "in accordance with their respective constitutional requirements". The special status and commercial agreements linked to Greenland's withdrawal were agreed in protocols to the amendment treaty, and various legal instruments were agreed by all the Member States. Greenland continued to receive EU funding after withdrawal and had tariff-free access to the Community market for fisheries products in return for satisfactory EC access to Greenland waters for the duration of the fisheries agreement. Articles 198–204 TFEU, *Association of the Overseas Countries and Territories*, apply to Greenland, subject to provisions set out in Protocol No. 34 annexed to the TFEU on special arrangements for Greenland fisheries.

Article 2 of the Protocol attached to the Greenland Treaty clarified that there would be a transitional period during which Greenlanders, non-national residents and businesses with acquired rights under EU law would retain these rights[3]. The EU Treaties did not provide for withdrawal from the Euro. In addition, the basic conditions for EU membership outlined in the 1993 "Copenhagen criteria", include the ability to take on the obligations of membership, including the adoption of the *acquis communautaire* and "the aims of political, economic and monetary union" – in the case of the latter, subject to prior adherence to the necessary convergence criteria. There appears to be little doubt that the Member States' intention was for EMU to be irreversible and irrevocable.

The *Treaty Establishing the European Communities* in 2006, as it stood after the Nice Treaty changes but before the Lisbon Treaty ones, provided for the irreversibility and the irrevocability of the move to Economic and Monetary Union (EMU), much as originally provided in the 1992 *Treaty on European Union* (Maastricht Treaty), negotiated withdrawal from the EU would not be legally impossible even prior to the ratification of the Lisbon Treaty and that unilateral withdrawal would undoubtedly be legally controversial; that, while permissible, a recently enacted exit clause is, prima facie, not in harmony with the rationale of

[3] The Commission shall make proposals to the Council, which shall act by a qualified majority, for the transitional measures which it considers necessary, by reason of the entry into force of the new arrangements, with regard to the maintenance of rights acquired by natural or legal persons during the period when Greenland was part of the Community and the regularization of the situation with regard to financial assistance granted by the Community to Greenland during that period.

the European unification project and is otherwise problematic, mainly from a legal perspective; that a Member State's exit from EMU, without a parallel withdrawal from the EU, would be legally inconceivable; and that, while perhaps feasible through indirect means, a Member State's expulsion from the EU or EMU, would be legally next to impossible.

The Lisbon Treaty repealed the EMU Protocol and Articles on EMU were amended to remove the timetable for the move to stage three of EMU, but the irrevocability of the adoption of the Euro was specified in the following Articles of the amended Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union if Greece wanted to leave the Euro it would have to leave the EU first[4].

While Article 50 allows a Member State to leave the Union, the negotiations for withdrawal and the framework for its future relationship with the EU could be complicated and therefore take some time to agree. Even if there is the political will for a fast track approach to applying Article 50 – which is quite possible – negotiating withdrawal would not be easy or swift. It may have become commonplace to discuss a Grexit the practicalities and implications of such a decision are far more complicated and daunting than many outside observers tend to acknowledge.

It is not even clear that Greece can leave the common currency. The EU's Lisbon Treaty does not make such provision – it only considers a country leaving the European Union. And in theory a country cannot be forced out of the bloc – it has to decide of its own accord whether it wants to stay.

It is hard to predict the economic impact of the Greece's EU membership, or equivalently, the costs and benefits of withdrawal. Framing the aggregate impact in terms of a single number, or even irrefutably demonstrating that the net effects are positive or negative, is a formidably difficult exercise. This is partly because many of the costs and benefits are, in certain respects, subjective, diffuse or intangible; and partly because a host of assumptions must be made about the terms on which the Greece would depart the EU. Any estimations of the effects of withdrawal will be highly sensitive to such assumptions, and can thus be embedded with varying degrees of optimism.

[4] "Leaving is straightforward: it involves a member state notifying the European Council – that is, the leaders of EU countries – that it wants to go. The Council then agrees the terms of the exit via a qualified majority.

The right of withdrawal, in Article 50 of the Treaty on European Union (TEU), as amended by the Lisbon Treaty provided for Member States to leave the EU if they wanted to and sets out a procedure for a voluntary withdrawal from the Union according to a State's own constitutional requirements. EU law is part of Greece law and its enactment has given this country citizens, companies and state authorities certain rights and obligations[5]. A departing State could resign from the EU under Art. 50 TEU and then apply to rejoin. That would comply with the legal formalities of the Treaties; however, the economic collapse unleashed by such a departure may make it unlikely that the remaining members of the EU would welcome the departing State back. Furthermore, technically under the Treaties, the rejoining state would be obliged to sign-up to the Euro as soon as the economic tests set out in the TEU were fulfilled (unless an opt-out were negotiated), thus rendering this method of departure less useful.

Article 50 of the amended *Treaty on European Union* (TEU) allows a Member State unilaterally to leave the EU in accordance with its own constitutional requirements e.g. member state which decides to withdraw shall notify the European Council its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. Article 218(3) specifies that The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

[5] Greece could simply leave the EU without invoking clause of art. 50 because the membership of the EU depends upon the *European Communities Act*, and Greek Parliament could end that membership by repealing that Act. See also J. H. H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, "Israel Law Review", 1985, 20, p. 282, 287.

The decision to leave does not need the endorsement or formal agreement of the other Member States. Withdrawal can happen, whether or not there is a withdrawal agreement, two years after the leaving State notifies the European Council of its intention to withdraw. However, the terms of Article 50 TEU imply an orderly, negotiated withdrawal. Article 50 of the Treaty on European Union provides a mechanism for states to withdraw from the EU. It is not intended to provide a mechanism for Member States to force a renegotiation of the terms of their existing membership of the EU whilst remaining within the EU. The withdrawal process that Article 50 sets out does include a period of negotiation.

However, Article 50(2) makes clear that this negotiation follows a decision by a Member States to leave and states that the purpose of this negotiation is to set out the arrangements for a Member State's withdrawal, taking account of the framework for its future relationship with the European Union. In addition, Article 50(4) deprives the withdrawing State not only of a vote on the terms of the withdrawal agreement but also of the right to take part in discussions about that agreement in either the European Council or the Council. The Prime Minister, by contrast, envisages a British Government playing an active and positive role in securing reforms of the EU as a whole, including through changes to the Treaties.

In accordance with Art. 50(2) TEU, a withdrawal agreement is an international agreement between the EU and a departing country. Taking into account the potential comprehensiveness of such agreement, it may fall within different categories of competence, which are either shared between the EU and its member states or exclusively of the European Union. Unless it is decided otherwise, a withdrawal treaty may have to be concluded as a mixed agreement, making the ratification procedure much longer and more complex as it will involve the member states. It has to be emphasized that a departing country will be treated as a third country during such negotiations. Moreover, unlike accession treaties, withdrawal agreements do not form part of EU primary law. Thus, unless a special formula is developed, they cannot amend the treaties on which the EU is based. This implies that alongside an international treaty regulating withdrawal, the remaining member states would have to negotiate between themselves a treaty amending the founding treaties in order to repeal all provisions touching upon the departing country. Further complexities may

be added if a departing country chooses to make a rapid move from the EU to the European Economic Area (EEA) instead. That would necessitate a third treaty regulating the terms of accession to EFTA and a fourth to deal with the accession to the EEA. The latter would require the approval of the EU and its member states, the EEA-EFTA countries and the departing/joining country.

A withdrawal includes a number of complex issues through negotiations with the other EU Member States, including a new relationship with the Common Agricultural and Common Fisheries Policies, revised trade rules with EU Member States and with third parties, changes to the arrangements for the free movement of workers throughout the EU and EEA areas, to name but a few. The Greek government would probably negotiate transitional arrangements to take account of these and other matters, and then establish a new relationship with the EU. It has been argued that a Greece could apply for a membership in the European Economic Area (EEA), a treaty between the EU, its Member States, and Norway, Iceland and Liechtenstein which extends the EU's internal market rules to the associated States.

Art. 50 states that a Member State may decide to withdraw from the Union, in accordance with its own constitutional requirements, it means that a sovereign state may decide on the exit[6]. This is manifestly a voluntary choice, because there are no rules in the Treaty

[6] On the principle of sovereign statehood as an immutable constitutional principle, and hence a limit on the transfer of sovereign powers to the European Union, see, for example, P. Kirchhof, [in:] *Handbuch des Staatsrechts* II, third edition (2004), paragraph 21, point 84; idem, [in:] *Europarecht*, 1991, supplement 1, p. 11 (13); Randelzhofer, [in:] *Grundgesetz* (as updated in Oct. 2008), Maunz/Dürig (eds.), Article 24(1), point 204; Herdegen, [in:] *Europäische Grundrechte-Zeitschrift*, 1992, p. 589 (592); Murswiek, [in:] *Der Staat*, 32 (1993), p. 161 (162 et seq.); Di Fabio, [in:] *Der Staat* 32 (1993), p. 191 (199 et seq.); P. M. Huber, [in:] *Thüringer Verwaltungsblätter*, 1994, p. 1 (2); Breuer, [in:] *Neue Zeitschrift für Verwaltungsrecht*, 1994, p. 417 (423-4); Fink, [in:] *Die Öffentliche Verwaltung*, 1998, p. 133 et seq.; Streinz, [in:] *Grundgesetz*, Sachs (ed.), fifth edition (2009), Article 23, point 84; Rojan, [in:] *Grundgesetz*, von Münch/Kunig (eds.), Vol. 2, fifth edition (2001), Article 23, point 15 (with references); Classen, [in:] *Grundgesetz*, von Mangoldt/Klein/Starck (eds.), Vol. 2, fourth edition (2000), Article 23, point 4; Hillgruber, [in:] *Handbuch des Staatsrechts* II, third edition (2004), paragraph 32, points 41 and 108; Isensee, [in:] *Handbuch des Staatsrechts* II, third edition (2004), paragraph 15, points 30 et seq. and 196; Broß, [in:] Festschrift für Hans Hablitzel, 2005, p. 55 (57-8 and 60). For opposing opinions see Scholz, [in:] Maunz/Dürig (eds.).

stating that a Member State 'shall' withdraw from the Union in any particular circumstances[7].

Article 50(3) TEU then sets out the timing of withdrawal whereas the Greece and potential UK would cease to be EU Member State either at the date of entry into force of the withdrawal agreement or, 'failing that', two years after the notification of its intention to withdraw from the EU, unless the European Council and Greece unanimously agree to extend that period. Of course, Article 50 applies to *any* Member State that might choose to leave at any desirable time. In accordance with Article 50(4), during this period, the Greece could not participate in discussions concerning it in some EU institutions – namely the European Council and the Council, which comprises Member States ministers, therefore 'a qualified majority' vote would be recalculated without the Greece.

An official notification to withdraw will automatically result in the Greece ceasing to be a Member State of the EU, as of two years from the date of notification, unless one of two things happens: a withdrawal agreement sets a different date, or the Greece and the remaining Member States (voting unanimously) agree to extend that time limit. Presumably the date of the withdrawal agreement could be set either before or after the two-year default time limit.

Art. 50 provides for the negotiation of a withdrawal arrangement, not a deal on the Greece's future relationship with the EU, therefore Article 50(2) refers only to taking account of that 'future relationship' in the withdrawal arrangement. It seems that the details of the withdrawal arrangement and the treaty establishing that future relationship would be closely linked. The additional withdrawal treaty(ties) would aim to regulate a transition period before the treaty on the future relationship entered into force.

Article 50(3) of the Lisbon Treaty provides that the Treaties shall cease to apply to the State in question from the date of entry into

[7] A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

force of the withdrawal agreement or, failing that, *two years* after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period[8]. Such reading, however, would undermine the obligation to conclude an agreement laid down in Article 50(2) of the Lisbon Treaty. This raises the issue of the meaning of Article 50(3) of the Lisbon Treaty and its impacts on the obligation of the EU to conclude a withdrawal agreement.

The Lisbon Treaty has direct effect on the validity and applicability of EU law. Therefore, Article 50(3) of the Lisbon Treaty generally implies that the Greece will no longer be bound by EU law after its termination of the Lisbon Treaty. Consequently, EU law would no longer be applied to all future rights and obligations of Greek individuals and entities after its termination.

The two-year negotiation period set out in the Lisbon Treaty in combination with the requirement to conclude a withdrawal agreement allows the following interpretation: the two-year period may be understood as an 'escape clause' for the parties if either party breaches good faith in terms of insufficient efforts in negotiations or unreasonable conditions for withdrawal. The Lisbon Treaty, as a primary source of EU law, provides requirements for the legitimacy of all other sources of EU law that may be invoked against any EU legal act "which is intended to produce legal effects vis-à-vis third parties"[9] brought for judicial review to the CJEU under Article 263 of the Lisbon Treaty. Therefore, the withdrawal agreement from the EU and the withdrawal agreement as such may have to comply with the Lisbon Treaty and the rules of legitimacy of EU legal acts.

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[8] Lisbon Treaty (2009), Art. 50(3).

[9] Lisbon Treaty (2009), art. 263 states that The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of power.

Especially art. 50 TEU defines the following stages of a negotiated withdrawal:

1. Formal notice: The withdrawing Member State must first send a formal notice to the European Council. The Council is vested with the power and responsibility to negotiate and conclude the withdrawal implementation agreement. By exercising this power and responsibility, the Council, as opposed to the Member States, thus also acts as a treasurer and custodian of the "legal heritage of rights" of the individuals emphasized by the ECJ in its well-established jurisprudence. The latter is, in my opinion, the key to understanding the withdrawal provision, which is an attempt to harmonize traditional, state-centered sovereignty and the more modern type of sovereignty or autonomy of supranational organizations.

2. Adoption of negotiating guidelines: The European Council issues guidelines on the basis of which the Council negotiates the terms of exit and future relationship between the EU and that Member State a long negotiation period under Article 50 TEU would be necessary because "withdrawal from the Union would involve the unravelling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations". The two-year negotiating period would aim to conclude both the withdrawal agreement and any consequent amendments to the EU Treaties.

The negotiations would take place in accordance with Article 218(3) of the *Treaty on the Functioning of the European Union* (TFEU). The European Commission, taking into account the European Council's guidelines, submits a recommendation to the Council, which adopts a decision authorizing the opening of the negotiations and nominates the Union negotiator or the head of the EU's negotiation team.

The Council of Ministers, having obtained the consent of the EP (i.e. the EP has a right of veto over the withdrawal agreement), concludes the agreement, acting by a Qualified Majority Vote (QMV – roughly two-thirds). During the negotiation, the withdrawing Member State would continue to participate in other EU business as normal, but it would not participate in Council or European Council discussions or decisions on its own withdrawal.

The withdrawing state would be released from its obligations under the Treaties upon entry into force of the withdrawal agreement, or two

years after its notification to the European Council. This period may be extended by unanimous agreement.

3. Negotiated arrangement: The terms of exit and post-exit relationship are negotiated by the EU on the basis of recommendations by the Commission (Article 218(3) TFEU) and the Council decides by a qualified majority after receiving the consent of the European Parliament. The Member State wishing to withdraw from the EU notifies the European Council of such intention (para. 1). As such, this notification does not have any direct terminating legal effect. Instead, a minimum period of two years, which may be best described as a notice period, for negotiating the terms and conditions of a withdrawal and its implementation in the form of a withdrawal implementation agreement, is triggered by the Member State's notification to the European Council. The withdrawal implementation agreement needs to take account of the framework for the "future relationship" between the withdrawing Member State and the EU. As it appears, the drafters of the Constitutional Treaty thus assume that some kind of (legal) relationship will still remain between the Union and the withdrawing Member State even after the withdrawal has come into effect. Though not expressly mentioned in the provision, any legal consequences of the withdrawal regarding the rights and obligations for any natural persons and legal entities affected by the withdrawal need to be dealt with. In the absence of a well-drafted withdrawal implementation agreement, the specific legal consequences will remain open to doubt. What, for instance, should happen to the employees of the Union who are nationals of the withdrawing Member State? What will be the fate of the Union's offices on the territory of the withdrawing Member State? And can nationals of the withdrawing Member State still be eligible for scholarships sponsored by the EU? Is the withdrawing Member State obligated to pay its outstanding contributions?[10] Both the Union and the withdrawing Member State will have a vital interest in concluding a withdrawal implementation agreement. It needs to be noted in this context, however, that an express legal obligation to negotiate and conclude such agreement is only imposed on the Council, not on the withdrawing Member State[11].

[10] See Klabbers, *An Introduction To International Institutional Law*, 2004, p. 126.

[11] As an example in Germany constitutional requirements for a withdrawal of the Federal Republic of Germany would include an amendment of the German Basic Law (*Grundgesetz*), to be resolved in accordance with Article 79(2) of the German Basic

After Greece will decide to exit the EU, it can of course apply to become a new Member State. New MS do not automatically join the Eurozone, but they become a MS 'with a derogation', in accordance with article 139 TFEU, like for example Poland and Sweden. There is an obligation to strife towards entry into the Eurozone, but re-entry is dependent on a (political) decision by the Council. The disadvantage is that, even if exit and re-entry to the Union would coincide, there would be a considerable delay before Greece could leave, because national ratification procedures are unpredictable and needless to say burdensome.

Eurozone

Leaving the EU raises many legal as well as economic and political questions. EU law is an integral part of the law of every member state and an exiting member state would need to consider the effect of exit, not only on its legal rights and obligations as against other member states, but also on the rights and obligations of its domestic corporations, financial institutions, governmental entities and citizens. Article 3 (4) of the Treaty on European Union (TEU) provides that the Union establishes an Economic and Currency Union and that the Euro is its currency[12]. Article 119 (2) of TFEU provides that the activities of the EU encompass the single currency. TFEU Article 128 (1) provides that the Euro bills are the only legal tender within the EU. TFEU Article 139 provides for certain exemptions for so-called Member States with a derogation – the EU Council adopted a resolution (2000/427) on 19 June 2000 which states that Greece does not belong to the Member States with a derogation. Original resolution 2000/427 which declared Greece to be a Member State for which no derogation applies (with the consequence that after such resolution Greece would be a Member State to which a derogation applies within the meaning of Article 139 TFEU) and such Council adopting the resulting amendments to the Euro Introduction Regulation on the basis of

Law by two-third majorities in both the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*).

[12] In terms of its economy and financial markets, the Eurozone plays an important role globally, especially as compared to past break-up countries. The Eurozone nations currently account for roughly 20% of global GDP (measured in current US dollars at the market exchange rate), with GIIPS countries alone accounting for 6,7% of global output.

Article 140 TFEU[13]. However, even though such EU Council Regulation would have direct effect in all relevant Member States and would need to be recognized by all courts in all Member States, it would not automatically be binding on courts of countries outside of the EU, and would not necessarily change contracts governed by a law which is not the law of a Member State.

Following an informal summit in Brussels on 23 May 2012, the Eurozone heads of state issued a message of support for Greece and stated a collective wish that Greece remains within the Eurozone. The Eurozone leaders also urged Greece to stay in the course on austerity and to complete the reforms demanded under the terms of its bailout. In the wake of the summit, however, it was widely reported that the Eurozone leaders have been advised to prepare contingency plans in the event that Greece were to exit the single currency. Given the potential consequences, the government of a member state contemplating an unilateral withdrawal from EMU would need to weigh up whether the devil they know is a worse prospect than life outside the Eurozone. A member state in financial difficulties can always choose to default on its sovereign debt and remain within the Euro, since there is currently no mechanism for ejecting a member state from either EMU or the EU.

A default by Greece would not preclude her remaining in the Eurozone. In practice, however, a defaulting Eurozone member state is likely to remain within the Eurozone only with the support (financial and political) of the other EU member states and institutions such as the ECB and the IMF. A default would be expected to lead to a global debt relief arrangement and a form of restructuring proposal being offered to creditors of the defaulting state. Eurozone member states are facing significant challenges in reducing public and private deficits and stimulating growth. In Greece, this has been combined with political instability which has led to widespread discussion as to whether or not Greece may exit the Eurozone (whether in the short, medium or longer term). A Greek exit would undoubtedly increase the potential for sovereign and corporate defaults.

[13] It is possible – the revocation of EU Council Regulation 2596/2000 of 27 November 2000, pursuant to which Greece was added to the list of Member States who participate in the Euro, so that Greece would be removed from the list of participating Member States.

There are no specific provisions in the current EU treaties for the expulsion of a member state from the Eurozone or the EU – even if a member state is in serious breach of its obligations under those treaties. There is also currently no mechanism for the Eurozone member state to leave the Eurozone voluntarily without also leaving the EU. The intention was very clear that monetary union was intended to be an irrevocable process[14]. The lack of a pre-existing legal framework for an exit from the Eurozone does not, however, make it impossible. There are three theoretical exit routes:

There is no mechanism under the Treaty of European Union (TEU), as amended by the Lisbon Treaty, for the unilateral withdrawal from the monetary union of a state which remains an EU member state. Such step would constitute a breach of its treaty obligations, be unlawful as a matter of public international law, and may affect the legal analysis of any subsequent redenomination by the courts and tribunals of other EU member states. In particular, unilateral withdrawal may affect international recognition of subsequently passed domestic monetary legislation by the withdrawing state.

A possible withdrawal by one or more states from the Eurozone raises the potential difficulty of determining whether Euro denominated obligation remains an Euro obligation or if payment will need to be made in the new currency of the withdrawing state. The starting point is that questions on the interpretation and performance of obligations are generally determined by the law applicable to the contract. However, where an obligation is expressed in a particular national currency, the principle of *lex monetae* dictates that there is an implicit choice of law of that country to determine the denomination of the payment obligation.

The *lex monetae* rule, or "state theory of money," provides that the law of the nation of the currency in which the debt is expressed, shall decide what constitutes the currency. Although Euro is, legally speaking, the currency of the EU, it is also the legal tender of each individual Eurozone member. Accordingly, pursuant to the *lex monetae* principle, an EU nation is free to exercise its sovereign powers to substitute a new national currency for the Euro currency and to then, by national law, establish a conversion rate for the exchange of former Euro obligations into the new national currency. While the exercise of this sovereign right may be considered as perfectly legal under the withdrawing state's constitutional

[14] Article 140 of the Treaty on the functioning of the European Union expressly refers to the "irrevocable" fixing of the conversion rates.

structure, such action may very well breach EU treaty provisions, and thus be considered by other member states as a violation of EU law and international obligations if carried out unilaterally.

This widely recognized principle must usually be applied regardless of the law expressed to govern the obligation itself. The difficulty with Euro denominated obligations is that there is no single country designating the *lex monetae*; Euro is a supra-national enterprise. In the event of non-consensual (and therefore unlawful) Eurozone withdrawal, enforcement of a redenominated debt obligation in a foreign tribunal may prove problematic. Where he withdrawing state remains an EU member state, the Brussels I Regulation will apply and any decision by the local courts would be enforceable within an EU member state.

However, this is subject to a general carve-out where it would be manifestly contrary to public policy to do so, something that a court may consider to be the case in the event of a unilateral Eurozone withdrawal.

The "continuity of contracts principle" – which is widely followed throughout the world's major legal systems – would ensure that both domestic and international contracts expressed in the Eurozone would remain valid and enforceable even though the Euro may no longer be the legal tender of the obligor under the contract. Assuming that the new currency unit is considered as a "reasonable substitute performance" for the original Euro payment provision, this legal principle would, in effect, thwart the classic defenses to contract enforcement such as "impossibility of performance," "frustration of contract" and "commercial impracticability", which might be posited by disgruntled parties. This continuity of contracts principle was in fact imposed upon all EU member states as a matter of law during the introduction of the Euro currency. Most nations (and US states) applied this provision within their own legal systems in order to provide stability during the Euro transition.

Any withdrawal by Greece from the European Union also includes withdrawal from the Eurozone, because the provisions that govern the Eurozone are not part of a separate treaty they are included in the TFEU. Once a EU Member State has left the organisation, it no longer has the rights and duties that the Treaty imposes with respect to the Eurozone[15].

[15] The term "qualified majority" is defined by TFEU Article 238(3)(b). See Consolidated Version of the Treaty on the Functioning of the European Union art. 238(3), Mar. 30, 2010, 2010 O.J. (C 83).

There are three potential options for leaving the Eurozone:
(1) a fullfledged exit from the European Union,
(2) an exit via an amendment to the Treaties,
(3) an exit via the *clausula rebus sic stantibus*[16].

Three ways of exiting by Greece the Euro area are:
1) through exit from the Union (and re-entry),
2) through Treaty amendment,
3) through the Council's decision.

The European Council has to be notified of any intention to withdraw and an agreement setting out the terms for such withdrawal would need to be negotiated, approved by the European Parliament and then adopted by the Council of the European Union. The exiting member state is released from its obligations under the EU treaties at the earlier of the entry into force of the withdrawal agreement and the second anniversary of its withdrawal notification.

The obligations of the Euro are linked to the membership of a Member State to the EU. If a member state exits the Union, the Treaties are no longer applicable to that state[17].

According to the principle of good faith, the Member States must take all appropriate measures to fulfil their obligations arising out of the Lisbon Treaty and may do nothing detrimental to the proper functioning of the EU. This principle contains both positive and negative obligations for Greece as a Member State, namely (i) the obligation to

[16] Such options do not offer an adequate substitute for a right to withdraw unilaterally from the Eurozone.

[17] See for example: A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, "European Law Review", 2012, vol. 37, p. 523–540; J. Herbst, *Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?* "German Law Journal", 2005, vol. 6, 1755–1760, http://www.germanlawjournal.com/pdfs/Vol06No11/PDF_Vol_06_No_11_1755-1760_Special%20Issue_Herbst.pdf, accessed 27.11.2013; *Leaving the EU* (Research Paper 13/42, House of Commons Library, 01 July 2013), p. 9–16, http://www.parliament.uk/briefing-papers/RP13-42, accessed 27.11.2013; P. Nicolaides, *Withdrawal from the European Union: A Typology of Effects,* 2013, p. 210–219, http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf, accessed 27.11.2013; T. Oliver, *Europe without Britain: Assessing the Impact on the European Union of a British Withdrawal* (SWT research paper, German Institute for International and Security Affairs), 2013, http://www.swp-berlin.org/fileadmin/-contents/products/research_papers/2013_RP07_olv.pdf, accessed 27.11.2013.

take all appropriate measures to ensure the fulfillment of the obligations arising out of the Lisbon Treaty; (ii) the obligation to facilitate the achievements of the EU tasks; and (iii) the "obligation to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty". The Court of Justice of the European Union (CJEU) extended the duty of cooperation to *reciprocal duties* of cooperation between the EU and its Member States by its practice. In the Lisbon Treaty[18], the mutual nature of this principle has been established explicitly under Article 4. Consequently, the principle of sincere cooperation governs the actions of the EU and Greece in all areas relating to the objectives of the Lisbon Treaty.

Greek government is likely to pass legislation (the "New Currency Law") establishing (i) its exit from the Eurozone and/or the EU, (ii) a new national currency (the "New Drachma"), (iii) the fixed exchange rate for automatic conversion of all existing Euro payment obligations between the Euro and the New Drachma, and (iv) the automatic redenomination of Euro deposits, contracts and obligations into the New Drachma. The New Currency Law of Greece would be expected to address its scope and application by reference to factors such as: the identity and place of incorporation or residence of the depositor, parties or obligor; the location of the account; the governing law of the contract or obligation; and the place of payment under the contract or obligation.

Greece, having exited, would have to reapply as a new applicant to the EU and would have to meet the accession requirements, including fiscal requirements, applicable to any country seeking to join the EU. It may be difficult for Greece to satisfy all the necessary requirements in the short term. Another complicating factor is that the treaty requires member states to adopt the Euro upon meeting the specified criteria (i.e. adoption of the Euro is not voluntary for EU member state unless, like the UK and Denmark, it negotiates an opt-out).

In the case of exit, many businesses may find that their Euro deposits/accounts with banks in Greece (whether the national bank, domestic bank or domestic branch of a foreign bank) and the Euro payment obligations under their financial and commercial contracts with entities connected with Greece (including its citizens, corporations and financial institu-

[18] See for example: Case C-230/81 *Luxembourg v European Parliament* [1983] ECR 255, para 37; Case C-65/93 *European Parliament v Council* [1995] ECR I-643, para. 23.

tions), have been converted into New Drachma as a result of the application of the New Currency Law. This would give rise to numerous legal and practical difficulties. Creditors of Euro denominated obligations that are converted into New Drachma are likely to suffer considerable losses as the new currency is expected to fall in value against the Euro. Such creditors are likely to want to challenge the application of the New Currency Law and the conversion. If the redenomination of accounts, contracts and obligations becomes the subject matter of litigation (be it before the domestic courts or before foreign courts), complex conflict of laws questions are likely to arise.

Grexit from the Eurozone may in certain circumstances be unlawful, i.e. where the exit has occurred in breach of EU law. By the same reasoning, the validity of any New Currency Law may also be questionable. Capital and foreign exchange controls imposed as a consequence of the exit may or may not be lawful, depending on their terms and the availability of relevant exemptions in the EU treaties and IMF Articles of Agreement. Therefore, there is likely to be a considerable period when legal certainty as to these measures is absent. More practically, the scope of the redenomination provisions in the New Currency Law may be unclear as regards certain types of contractual arrangements. Currency Law would be introduced in accordance with an expedited timetable and would be likely to focus on domestic/retail assets and liabilities and not necessarily focus on complex financial and/or international or cross-border contracts. Lack of certainty as regards contractual obligations is likely to result in delayed performance of those obligations, which in itself could have significant knock-on effects.

International law

Under the Vienna Convention on the Law of Treaties from 1969, parties of international treaty can sometimes invoke a fundamental change of circumstances as a ground for terminating or withdrawing from the treaty or simply as a ground for suspending the operation of the treaty. Can this provision – also known as the *clausula rebus sic stantibus* – be brought to bear on the issue at hand by Greece?

The drafters of the Vienna Convention on the Law of Treaties sought to resolve these doctrinal rifts by creating a rebuttable presumption that

states may not unilaterally exit from a treaty that lacks a denunciation or withdrawal clause[19].

Treaty clauses that authorize exit are pervasive. They are found in a wide array of multilateral and bilateral agreements governing key trans-border regulatory issues, including human rights, trade, environmental protection, arms control, and intellectual property. More intriguingly, exit clauses impose different types and degrees of restrictions on a state's ability to legally withdraw from a treaty and the obligations it imposes. And occasionally, exit clauses are absent altogether, raising the possibility that exit may be implicitly precluded as a matter of international law[20].

Grexit implicates domestic foreign affairs issues distinct from those raised by treaty breaches. A country's failure to comply with its treaty commitments may stem from a variety of causes, ranging from simple inattention or inadvertence, to delays or re-source constraints, to deliberate decisions of national policy. Depending on the explanation, such noncompliance can be attributed to legislators, executive branch officials, judges, private parties, or some combination thereof. The mere fact that not all of the Member States have ratified the Vienna Convention is irrelevant in this context. Like many other principles enshrined in the Vienna Convention, the doctrine of *rebus sic stantibus* constitutes a rule of customary international law. As such, it is binding on all the Member States as well as on the European Union itself. Furthermore the Court of Justice of the European Union itself has acknowledged this fact. Therefore, the fact that an exit from the Eurozone concerns only part of the TFEU – namely the provisions on the Eurozone –

[19] Article 56 of the Convention provides that an agreement: which contains no provision regarding its termination and which does not pro-vide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty. Vienna Convention, supra note 1, art. 56(1), 1155 U.N.T.S. at 345. Treaties that contain express termination clauses are not governed by Article 56 and, in the absence of an express withdrawal clause, cannot be denounced prior to the time when the termination clause takes effect.

[20] See S. Rosenne, *Breach of Treaty*, Cambridge 1985, p. 117–125; I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press 1984 (2d ed.), p. 188–190; J. N. Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, Va. J. Int'l L., 1999, 39, p. 881; A. E. David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations*, New Haven and London 1975, p. 159–202 which discusses alternatives to unilateral termination and the le-gal procedures used to achieve them.

does not necessarily prevent the application of the *clausula rebus sic stantibus* either. At least according to some voices, this doctrine allows not only for the termination or suspension of a treaty, but may also – and more relevant to the problem at hand – as the basis for a right to demand the revision of a TUE.

Variety of opinions were mainly based on the idea whether EU law is qualified as part of public international law or whether it should be determined as an autonomous legal order. The prevailing view was that the establishment of the EU was for an unlimited period and consequently, Member States could not withdraw. However, EU Member States insisted on the necessity to recognize an inherent right of withdrawal for any Member State[21]. The Lisbon Treaty withdrawal is an inherent right of states that can be waived only by an express provision precluding exit or by other unequivocal evidence (such as in the *travaux pré-paratoires*) that the parties intended to prevent withdrawals. The legal route for leaving the EU is laid down in the EU Treaty since Lisbon in Article 50. Before the coming into force of this article it was doubtful whether a MS could unilaterally decide to leave the EU. Article 50 has ended this debate and describes the process through which a MS can leave the Union. Cooperation between the exiting MS and the others in this process would be useful, but is not legally required.

The EU Treaties contain detailed rules on signing up to the Eurozone, which apply to every Member State, with exceptions of Denmark and the UK[22]. Those two member states have special protocols giving them an opt-out from the obligation to join EMU that applies to all other Member States. After the Treaty of Lisbon, there's a special procedure relating to small parts of Member States (or their associated territories) becoming less (or more) connected to the EU[23]. As mentioned Article 50 gives the possibility for Member States to leave the EU, and it is clearly the only legal route to leave, as a matter of EU law. There is no possibility to throw

[21] See for example: P. Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, "European Central Bank Legal Working Papers Series", 2009, no. 10, p. 8–22, https://www.ecb.europa.eu/pub/pdf/-scplps/ecblwp10.pdf, accessed 26.10.2013.

[22] The drafters of the Maastricht Treaty wanted to ensure that monetary union went ahead, and express rules on leaving EMU would have destabilized it from the outset.

[23] But it does not apply to entire Member States, or even to territories linked to the UK (the Channel Islands, the Isle of Man and Gibraltar).

a Member State out of the EU against its will, although its membership could be suspended if there are serious and continued breaches of human rights, democracy and the rule of law (Article 7 TEU). That clause has never been used to date either[24].

A withdrawing Member State that is also a member of the Eurozone will have to adopt a new national currency. The exchange rate between the new currency and the Euro will depend on whether the withdrawing Member State has healthy public finances or whether it is debt laden. In the latter case, its new currency will almost certainly depreciate significantly against the Euro. Then the servicing of Euro-denominated debt will become costlier and perhaps impossible. This is the reason why a Eurozone member is unlikely to leave voluntarily and if it leaves it is likely at the same time to default on its obligations. Since this has never happened in the EU, the legal consequences are possible[25].

We have to add that parallel with article 50 TEU, all MS together could create a new provision in the Treaty that would set out the process for exiting the Euro. Shaping the process through which a MS could leave the Euro (but stay in the EU), would not be an increase in the competences of the Union and would be an amendment of part 3 of the TFEU. A simplified revision procedure – like the one used for the amendment of article 136 TFEU – could therefore be used. Approval (similar to ratification) of all MS would be required and there is the same disadvantage of option. Another possibility is that a Treaty amendment would add a protocol to the Treaties which would give a MS a special position with regards to the Eurozone, like for example for the UK and Denmark. The benefit – or

[24] See P. Athanassiou, op. cit.; J. Herbst, *Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?* "German Law Journal", 2005, vol. 6, 1755–1760,http://www.germanlawjournal.com/pdfs/Vol06No11/PDF_Vol_06_No_11_1755-1760_Special%20Issue_Herbst.pdf, accessed 27.11.2013; H. Hofmeister, *Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU*, "European Law Journal", 2010, vol. 5, p. 589–603; A. Łazowski, *CEPS Commentary*, "European Law Review", 2012, vol. 5, p. 523–540.

[25] M. Feldstein, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, 1997, vol. 11, J. ECON. PERSP., p. 23, 41–42. American economists in particular were quite skeptical. *Cf.* VAN OVERTVELDT, *supra* note 7, at 62. See also J. Bibow, *The Markets Versus the Eurosystem*, [in:] *The Euro, The Eurosystem, And The European Economic And Monetary Union*, D. Ehrig, U. Staroske, O. Steiger (eds.), 2011, p. 159, 161; W. Hankel et al., *The Euro-Project at Risk* 4 (Ctr. for European Integration Studies (ZEI)), Working Paper.

disadvantage – would be that such a protocol would only apply to one Member State and would not set a precedent (at least not legally).

It is possible for the Council to decide (probably unanimously and with the consent of the European Parliament) that a MS will no longer be part of the Eurozone and will become a MS 'with a derogation', by withdrawing its earlier decision on entry into the Eurozone. With regard to the membership of the Eurozone, either a MS is part of the Eurozone, or it has a derogation (or it has a special position, see option 2). So if a MS wants to exit the Euro without leaving the EU or waiting for a Treaty amendment procedure, it will have to acquire the status of 'MS with derogation' some other way[26]. This looks problematic because for all Members of the Eurozone the Council has decided that it fulfilled the necessary conditions and hence would become a Member of the Eurozone.

This is not completely unproblematic from a legal point of view, because what is the basis of the competence for the Council to do this? There are two possibilities: first, one could argue that a competence to decide on a matter always includes the competence to retract that decision. This is quite unconvincing because in most cases where such a competence to retract is recognised, it is on the basis of an explicit provision, which would not be necessary if this theory was universally recognized.

Second, this retractile power can be derived from the 'flexibility clause' of article 352 TFEU, which grants the Council – on a proposal from the Commission and with consent of the European Parliament – the ability to unanimously adopt the appropriate measures to attain one of the objectives set out in the Treaties[27].

So, it must be ascertained that for a MS to stay in the Eurozone would not endanger the Union's values and the continued existence of the Eurozone as a whole. Then it would be possible to take a decision retracting the decision to enter the Eurozone. Or it could be argued that staying in the Eurozone would be so devastating for the well-being of the people of Cyprus (and the rest of the peoples of Europe) that an exit would be legitimate in light of the objectives Treaties. Obviously the ECB thinks that

[26] Article 139 regulates the terms of this 'derogation': "Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the Euro shall hereinafter be referred to as 'Member States with a derogation'."

[27] These objectives are set out in article 3 TEU: "(1) The Union's aim is to promote peace, its values and the well-being of its peoples. (…) (4) The Union shall establish an economic and monetary union whose currency is the Euro".

an exit is not allowed under the Treaties, as does the Commission. The strongest argument the ECB rises is that the Treaties provide that when the decision is taken to abrogate the derogation, the rate of exchange between the Euro and that MS's currency will be irrevocably fixed. However, this provision (Article 140 TFEU) seems to apply only to the phase of the transition to the Euro and not to any new currency that MS might introduce. The Commission merely refers to the 'framework' of the Treaties as support for the irrevocability of the membership of the Euro area. Would the ECJ block option and the answer is probably not, given the involvement of the Commission and the European Parliament in a decision. It would truly be a political decision to let Grexit the Eurozone. It would not be easy, but it is possible.

Conclusion

Article 50 TEU, while providing for a special procedure for Member States to leave the EU, does *not* mention that the agreements which can be concluded with a departing Member State can include Treaty amendments. This is important because unlike Article 49, such agreements must be agreed by QMV and there is no requirement of ratification by national parliaments. In any event, Article 50 specifies that a Member State can leave the EU unilaterally even without such agreement. A departure of a Member State would necessarily entail at least technical amendments to the Treaties, to delete references to that Member State.

Exiting the EU by Greece is not an easy task, both for the UE and its troubled member state. The levels of integration have gone so far that a departure of a member state will have profound legal, economic and political implications for the divorcee and for the EU. One may hope that the Greece government is fully cognizant of this reality and does not push renegotiated membership terms too far or even head for the exit. Grexit should not be the triumph of imagination over common sense or hope over experience, but a decision based on a very thorough political, economic and legal analysis, as the consequences in all possible respects will be profound for all parties involved. Withdrawal of Greece or the exit of another Member State will have an important impact on other Member States. If one Member State can leave Union, this raises question for all Member States. The anti-European parties will see it as a victory and

another Member States might, more importantly, use the exit option to threaten and strike down policies, if Greece withdraws.

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