

URPP Financial Market Regulation 06 06 18

# Euro and Euro-denominated Obligations

A private law perspective

# Euro-scepticism turned into action: what then?

- No prognosis, that «something» will happen
- No evaluation of the institutional & socio-economic fitness of the Euro-zone
- No political agenda
- The strictly legal point of view
- **A «what if» exercise**
- Exploring the room for manoeuvre in view of the legal framework

# Content

- I. Lawful national measures <-> violations of EU law
- II. Consequences of violations of EU law
- III. The way forward

# Disturbances within the Euro-zone

- Currency reform, parallel currencies, «mini-BoTs»
- Capital controls and restrictions
- Sovereign Default
- Legislating a 'hair-cut'

→ different events, calling for separate legal assessments

I. Lawful national measures <-> violations of EU law

# Monetary union – the legal framework

## Primary Law

- TFEU Article 128: ECB-authorized notes “shall be the only such notes to have the status of legal tender **within the Union.**”
- Inclusion in Euro-zone comes by virtue of the membership **in the EU**,  
no two separate memberships, EU and Euro-Zone
- Member-states exempted from EURO-currency zone by virtue of agreed derogation *from Treaty*
- No isolated withdrawal from the Eurozone
- Withdrawal from the EU:  
TEU Art. 50: «Chronicle of a (currency) death foretold»

# Secondary Union law

First Euro-Regulation (EC) No. 1103/97

Second Euro-Regulation (EC) No. 974/98

Third Euro-Regulation (EC) No. 2866/98

Three Coin Regulations

## TFEU Art. 128 (1)

The European Central Bank shall have the exclusive right to authorise the issue of **euro banknotes** within the Union. The European Central Bank and the national central banks may issue such notes. **The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.**



A legal tender union → a uniform currency of account

Lawful (Eu-law compliant)  
domestic currency legislation

Unlawful tampering with the €

- Replacing the EURO with a national currency

# Parallel currencies?

- Do both «moneys» have legal tender quality?

Monetary obligations to be denominated & discharged either way

# Parallel currencies

Lawful (Eu-law compliant) domestic  
currency legislation

Unlawful tampering with the €

- Replacing the EURO  
with a national currency
- Introducing a **parallel currency**  
with legal tender quality  
TFEU Article 128: “shall be the **only**  
such notes”

# Sub- or quasi-monetary instruments

## **Vouchers**

- To be redeemed by issuer only
- Transfer possible, but only issuer is under an obligation to accept

## **Local exchange trading system (LETS)**

- Private issuers
- Barter-clubs, similar to the Swiss WIR-Money
- Closed system, no € in, no € out

Lawful (Eu-law compliant)  
domestic

Euro-currency

+

**non legal tender instruments**

Unlawful tampering with the €

Euro-currency

+

**parallel currency**  
**with legal tender quality**

# Mini-BoT: What it is (... or could be)

- BOT – Buoni Ordinari del Tesoro = Short term Treasury Bill
- claim against the government
- Not-interest-bearing
- Securitized
- Physical Notes in small denominations, hence «mini»
- Transferable
- **Means of payment** *vis a vis* the State (taxes) and state controlled entities

# Mini-BoTs: do they violate EU-law ?

- Matter here only looked into: TFEU Art. 128

vs. public debt issue:

securitisation and monetisation of outstanding tax credits



# The legal issue: Defining «legal tender»

as used in TFEU Art. 128

- Term used, but not defined in Euro-Regulations
- Art. 11 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the Euro:

“... these coins shall be the only **coins** which have the **status of legal tender** in all these Member States. Except for the issuing authority and for those persons specifically designated by the national legislation of the issuing Member State, no **party** shall be **obliged to accept** more than 50 coins in any single payment.”

- Money ≠ Legal tender
- the means of payment (money) which the monetary creditor must accept **by law**
- Only physical money qualifies as legal tender
- Some norm (act of parliament or statutory instrument) is required, binding the judiciary

# Relative legal tender?

Monetary theory: Money is what you must use to pay taxes etc.

Who decides?

ECJ

# Future potential applications of Mini-BoTs

- Social security payments in Mini-BoT
- Salaries of state personell paid in Mini-BoT
- Foreign creditors not affected

# The crossing of the Rubicon

- Upgrading Mini-BoTs to a 'true' parallel currency or a Euro-substitute:

1 Mini-BoT = 10 Euro

- Mini-BoTs become legal tender, if by law recognized as a payment for Euro-obligations
- Difficult logistics of a currency reform:

With Mini-BoTs one is «at the ready»

## II. Consequences of violations of EU law

# Domestic Courts, state 'X'

- Primacy of EU law: National currency law may not be applied
- Acte Claire: no preliminary ruling of the ECJ necessary

On top:

- Treaty violation proceedings
- State liability for damages



# Courts in other member states

- same

# Swiss Courts

- Art. 147 IPRG – Lex-monetae-Konzept

Courts in third countries, e.g. New York

# Conclusion

- Unilateral 'dirty' departure from Euro-Zone ineffective



- Ways and means to lawfully relax member states' integration in the Euro-Zone?

## III. The way forward

- Complete exit from the Euro-Zone or ***national*** parallel currency
  - Change of treaties required
  - new EU-Regulation insufficient
- An ECB-controlled parallel currency ('Eurolino')
  - satisfies the 'Economic and Monetary Union'-requirement
  - an Euro IV-Regulation would be sufficient
- Leaving the Union: Art. 50 TEU

# Parallel currencies as part of the Monetary Union

# Currency Reform Acts - essentials

- Date of Reform
- Definition of the new nominals: 'recurrent connect'
- Floating or pegged
- Sole currency or overlap with the Euro?
- Effect on existing Euro-obligations



# Statutory currency conversion: which obligations singled out?

- Domestic place of payment
- Domestic residence/domicile of debtor

Less likely:

- Lex contractus
- Nationality of debtor
  
- Combinations of the above