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EXIT FROM EUROZONE UNDER THE REGIME OF THE LISBON TREATY: REALITY OR WISHFUL THINKING?

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Introduction¹

Recent financial and economic crisis has put the fate of European integration in more shadows than the previous collapse of Constitutional Treaty. Many countries suddenly found themselves under enormous strain, as they are facing exorbitant budget deficits and rapidly growing amounts of public debt. This claim is nowadays valid for almost all Member States, but for some of them the situation is almost unmanageable. The group of southern countries, often nicknamed by an acronym PIGS (Portugal, Italy, Greece, Spain) by economists, is the prime example, and of course it is Greece that has been in most troubles. Prominent women and men of Europe spent the whole spring scheming plans how to prevent Greeks from bankruptcy. Hundreds of billions of euro were raised by the remaining states from eurozone and by the IMF, often at great costs to the politicians at the national level. Mainly in Germany the bailout was a highly controversial issue, and Chancellor Angela Merkel had even persuaded Bundestag to agree with the plan by saying “The future of European and the future of Germany within Europe is at stake.”²

It is clear from the previous paragraph that despite noble claims about developing “EU constitutional pluralism” or “civic European demos”, which were so fashionable during this dying decade, in the end the integration project is primarily about money and economics. If euro fails, it might be only a precursor to the collapse of the whole EU. Yet there lies the well-known problem. The level of transnational solidarity in eurozone is limited and the public in richer states is unwilling to subsidize poorer countries, on the other hand, for a state with euro it is impossible to use monetary tools such as devaluation of its currency to boost local economy. And of course, economically strong countries such as Germany do not want euro compromised by instability elsewhere. This seeming Catch-22 has one very tempting solution- the “problematic” state could exit from eurozone. Not only the black sheep will no longer spoil the whole flock, but it could devalue its own new currency and thus increase competitiveness of exports or e.g. become

¹ The financial support of the Czech Ministry of Education for developing this paper is greatly acknowledged (Project no. 2D06016: Czech Republic in the European Union: Position and promotion of national interests).

² Angela Merkel: EU future at stake in Greek crisis. *The Telegraph*, 5 May 2010, p. 1.

comparably cheaper to other tourists destinations. Indeed, exactly this option was recommended to Greece by many economists, including the Nobel Prize laureate Paul Krugman.³ Similar views were expressed also by prominent politicians, for example by Czech President Václav Klaus, who blamed euro for Greek problems.⁴

We do not have the space here nor knowledge to evaluate if such a step might really solved the deep crisis Greece faces,⁵ the aim of this short paper is to assess the whole situation from the legal viewpoint in light of Lisbon Treaty which recently came in force. The text is divided into three parts. The first chapter discusses the legal status of membership in eurozone and if it is possible to leave it either consensually or unilaterally. Subsequent part opens the possibility of exiting eurozone together with the exit from the EU. The last chapter considers if involuntary exit is possible. It must be noted again that the whole article is based purely on legal perspective of the problem. In reality any such measure will be of more political and economical nature, not to speak about tremendous practical problems associated with it.⁶ But in our view the parties will still at least try to follow the legal framework of valid primary law, which currently means the Lisbon Treaty.

Legal status of eurozone membership and possibility of exit from eurozone

The history of birth of EU single currency is well-known and does not have to be repeated here.⁷ From the very beginning primary law indicated that the creation of euro is an irretrievable process. Art. 4 para 2, Art. 118, Art. 123 para 4 TEC⁸ declared the “irrevocable fixing of exchange rates leading to the introduction of a single currency”, Protocol no. 24 to the treaty “declare the irreversible character of the Community’s movement to the third stage of economic and monetary union”. As no part of the Treaties contained a provision which would specifically mention the possibility to withdraw from the eurozone, it is taken from the foregoing that the drafters of the Maastricht Treaty did not foresee a Member State could give up on euro.

One explanation need to be made here. We are stating the obvious if we remind that not all Member States are part of the eurozone. Denmark and the United Kingdom negotiated permanent opt-outs, all other non-participants are legally obliged to join, but in practice they either do not fulfill the convergence criteria or are for other reasons unwilling to enter. So far, the legal obligation was not enforced by the EU (Commission). However, technically speaking all Member States are part of the Economic and Monetary Union (EMU), those not having euro are called “Member States with a derogation” (formerly Art. 122 para 1 TCE, nowadays Art. 139 para

³ KRUGMAN, Paul. *Greek End Game*. Available at <http://krugman.blogs.nytimes.com/2010/05/05/greek-end-game/> (cited 14 June 2010).

⁴ See his interview in Frankfurter Allgemeine Zeitung, 28 April 2010.

⁵ There are leading analysts who generally doubt effectiveness of this cure, see e.g. GROS, Daniel. *Will EMU Survive 2010?* Brussels: Centre for European Policy Studies, 2006.

⁶ These practical issues could be consulted in detail for example in EICHENGREEN, Barry. *The Breakup of the euro area*. Cambridge: National Bureau of Economic Research, 2007, p. 10-17; PROCTOR, Charles. The future of the euro — what happens if a Member State leaves? *Journal of Financial Transformation*, 2007, vol. 19, p. 149-155.

⁷ For detailed overview see CHANG, Michele. *Monetary Integration in the European Union*. Houndmills: Palgrave, 2009, p. 15-102.

⁸ Articles of the pre-Lisbon primary law are based on the numbering contained in the consolidated version of the Nice Treaty (OJ C 321 E, 29 December 2006).

1 TFEU).⁹ This virtual uniformity has little practical impact, but dual (triple if permanent opt-outs are included) nature of legal relationship towards eurozone will complicate our analysis.

Given the fact that the aim of the Lisbon Treaty is another step towards “ever closer union”, it could not surprise any observer that the legal status of membership in eurozone has not changed. Because the process of transformation to third stage had successfully finished years ago, numerous articles dealing with it were deleted, including the abovementioned Art. 118 and Art. 123 para 4. Even Protocol no. 24 did not make it into new text. This at first sight might have weakened the case for the irreversibility of euro, but this is not the case, because Art. 140 para 3 TFEU proclaimed that also for states acceding to eurozone the fixing of the conversion rate is irrevocable. Even if the irrevocability is no longer explicitly stated in the treaties for states which already use euro, we find it obvious that their previous obligation has not disappeared.

Still, some scholarly authorities claim that unilateral withdrawal is legally admissible, even if it is limited to “exceptional substantive conditions”.¹⁰ According to these views, exit will be based on a fundamental change of circumstances (*clausula rebus sic stantibus*), an old doctrine of public international law that was codified in Art. 62 of the Vienna Convention of the Law of Treaties and might justify breach of treaties. However, Art. 62 severely restricted the use of this doctrine and *clausula* is no longer used in international relations.¹¹ The application of the doctrine in case of EU and eurozone is impossible.¹² Similar argumentation, although without the mention of *clausula*, was applied by German Bundesverfassungsgericht in its (in)famous Maastricht judgment of 1993.¹³ Court stated that the price stability was primary goal of EMU and if it was not achieved, the agreement would become meaningless and Germany would not be bound by it. Clearly the wish of the Court was not to provide with an exit possibility, but the other way round it called for strong and stable monetary union. In any case, the text of the judgment is silent on what legal ground could Germany leave eurozone.¹⁴ In opposition to presented opinions we thus maintain the earlier claim that both current text of the Treaties and rules of public international law preclude unilateral exit from eurozone.

The conclusion on (im)possibility of exit will dramatically change when we turn our attention to negotiated withdrawal. It is widely accepted that Member States remain “Masters of the Treaties”,¹⁵ who can at any time redraft the primary law according to their will and are in this case not bound by any preceding agreements or obligations.¹⁶ Such an action could legally take only one path: revision of the Treaties. According to the constant jurisprudence of the Court of

⁹ The consolidated version of Lisbon primary law (Treaty on European Union and Treaty on the Functioning of the European Union) could be found in OJ C 83, 30 March 2010.

¹⁰ E.g. HERDEGEN, Matthias. Monetary Union as a permanent community based on the rule of law. *EMU Watch*, 1998, no. 52, p. 8.

¹¹ See HELFER, Laurence. Exiting Treaties. *Virginia Law Review*, 2005, vol. 91, no.7, p. 1643.

¹² Contrary see sources cited by HILF, Meinhard. Artikel 240. IN: GROEBEN, Hans von der (ed), *Kommentar zum EU-/EG- Vertrag*. Baden-Baden: Nomos, 1997, p. 786.

¹³ Judgment from 12 October 1993, BVerfGE 89, p. 155.

¹⁴ For detailed discussion of the judgment in relation to exit from eurozone see WALTERMATHE, Arbes. *Austritt aus der EU*. Frankfurt: Peter Lang, 2000, p. 117-120.

¹⁵ Term originated in and is widely used in German academia and jurisprudence (*Herren der Verträge*), see for example Bundesverfassungsgericht, Judgment of 8 April 1987, BVerfGE 75, p. 223.

¹⁶ In other words, it is entirely possible to dissolve the whole EU. See discussion and numerous sources contained in GÖTTING, Friedemann. *Die Beendigung der Mitgliedschaft in der Europäischen Union*. Baden-Baden: Nomos, 2000, p. 59-62.

Justice, Member States are not allowed to change Treaties outside the procedures contained in the Treaties for their revision,¹⁷ which means only Art. 48 TEU must be used. As a consequence a consent of all Member States is needed, not only those who are members of eurozone. What is more, Art. 48 TEU foresees the most difficult procedure possible, that is ratification of the agreement by all Member States according to their constitutional requirements, including obligatory referendum in selected countries (e.g. Ireland). While the Lisbon Treaty introduces the simplified revision procedure, the exit of Member State from eurozone will demand significant revision of Treaties, including articles outside Part Three of TFEU, therefore this new instrument shall not apply.¹⁸ Obviously it might be very complicated to persuade all states to agree with the revision without opening the Pandora Box of other demands and quests for compensations.

As was already mentioned, practical implementation of any agreement on reversibility of euro would be probably even more daunting task than its legal dimension. Perhaps the easiest way is a total breakdown of euro. In this scenario, euro as a currency will cease to exist and all Member States will introduce their own national currencies under negotiated rates. Simply, the whole third phase of EMU will be undone. Much more complicated is the situation when only one or a couple of states leave. Even under agreement, if the currency of leaving state is to be economically weaker than euro, the state(s) will be unable to defeat markets and the financial system of the exiting country will collapse.¹⁹ Therefore, the best solution in these cases would be either to fix the rates of new currency and euro,²⁰ or to create two new currencies, one for the leaving state and something such as euro II for the remaining eurozone.²¹

Withdrawal from the EU and (or) eurozone?

Preceding chapter discussed the possibility of a Member State to leave eurozone, but at the same time remain in the EU. But what if the country wishes to give up integration process entirely? Before the Lisbon Treaty, withdrawal from the EU could have been exercised only by the negotiated consent of all Member States, basically again by the revision of the Treaties.²² The Lisbon Treaty however newly includes Art. 50 TEU, which introduces unilateral withdrawal clause into the EU law fabric.²³ It is beyond this short text to analyze in detail how this clause was prepared and what it generally mean for the integration process,²⁴ further we concentrate only on its impact on eurozone membership. Art. 50 TEU states:

¹⁷ See e.g. 47/75 *Defrenne* [1976] ECR 455, para 57-57; of general constraints attributed to revision of Treaties see LENAERTS, Koen and Piet Van NUFFEL. *Constitutional Law of the European Union*. London: Sweet and Maxwell, 2005, p. 347-350.

¹⁸ The simplified revision procedure requires ratification by all Member States nonetheless.

¹⁹ This means that if the new currency is stronger than euro, exit will be technically feasible.

²⁰ Then of course the exit does not make any sense.

²¹ For economic discussion of these issues see SCOTT Hal. When the Euro Falls Apart. *International Finance*, 1998, vol. 1, no. 2, p. 218-221.

²² For a thorough analysis see GÖTTING 2000 or ZBÍRAL, Robert. Vystoupení z EU ve světle evropského a mezinárodního práva. *Právník*, 2008, vol. 147, no. 7, p. 752-773.

²³ Art. 50 TEU is generally taken over from unsuccessful Constitutional Treaty (Art. I-60).

²⁴ In detail see ZBÍRAL, Robert. Searching for an optimal withdrawal clause for the European Union. IN: NIEDOBITEK, Matthias and Jiří ZEMÁNEK (eds), *The Constitutional Treaty – A Critical Appraisal*. Berlin: Duncker & Humblot, 2007, p. 308-323; FRIEL, Raymond. Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution. *International Constitutional Law Quarterly*, 2004, vol. 53, no. 2, p. 422-428.

“1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. 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.

3. The Treaties shall cease to apply to the State in question from the date of entry into 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.

(paras 4 and 5 left out)”

As is easily visible, provision contains no mention of euro or eurozone. What do the existence of withdrawal clause and silence on euro indicate for our analysis of unilateral exit from eurozone? Logically, there are three options, which are discussed according to their interpretative “probability”.²⁵

- a) State leaves both the EU and eurozone: The wording of Art. 50 TEU seems to opt for all or nothing approach, in other words, the withdrawing state must distance himself from all benefits of the EU, including euro. This looks like a tempting interpretation, but there are numerous challenges against it. First, it is in direct contradiction to other articles of the Treaties which speak of “irreversibility of euro” (see above), and all parts of the Treaties have same legal value (see Art. 1 TEU). Second, as was already explained, it would be practically impossible to exit from eurozone without the cooperation of other eurozone members. Both objections could be overcome with the existence of agreement (legal: revision of the Treaties, see above; practical: coordinated economic and financial steps), yet under Art. 50 TEU agreement is only optional. It must be noted that this situation evidently discriminates the members of eurozone, because in their case unilateral withdrawal would be probably impossible without agreement, while non-members might use the opportunity given in Art. 50 TEU without limits.²⁶
- b) State leaves EU, but not eurozone: Silence on euro in Art. 50 TEU, together with the notion of euro’s irreversibility in other parts of the Treaties, might validate alternative interpretation, namely that while it is possible to exit the EU, the withdrawing state must keep euro. But this option also raises number of questions. Eurozone is firm part of EU integration, and Treaties do not currently allow full involvement of any state in eurozone

²⁵ See also ATHANASSIOU, Phoebus. Withdrawal and Expulsion from the EU and EMU: Some Reflections. *ECB Legal Working Paper Series*, 2009, no. 10, p. 27-30.

²⁶ This discrimination is in conflict with Art. 4 para 2 TEU, which proclaims that “The Union shall respect the equality of Member States before the Treaties...”.

which is not a member of the EU. It is true that some states use euro unilaterally,²⁷ some even through an agreement with the EU,²⁸ but all of them could not exercise any powers (or obligations) related to membership in EMU. It is barely conceivable that a state distancing from EU would simply continue using euro and participate in all monetary institutional framework as if “nothing happened”. Also, one might assume that a state demanding withdrawal from the EU will do it in order to regain full sovereignty, so it would hardly wish to be limited in its monetary sovereignty and policy.

- c) State leaves eurozone, but not the EU: Careful reader is probably asking why we are again turning to the point already covered in preceding chapter, where we concluded such step is impossible. But using an argument *a maiore ad minus*, would not be possible to claim that if the Treaties permit complete withdrawal, it must be possible to unilaterally reject certain parts of them as well? Obviously, while this formal logic is foolproof, it is legal and practical nonsense. Firstly it contradicts the irrevocability notion of EMU, therefore massive revision of the Treaties is needed, and secondly it opens avenue for *a la carte* integration, where Member States will be using Art. 50 TEU for selecting their participation in only preferable policies or activities.

The abovementioned list confirmed that the structure of the withdrawal clause in the Lisbon Treaty contains more questions than answers and leaves too many loose ends. Yet in such a serious matter the procedures should not be left to interpretation of “what if” and to alternative explanations. It seems that a state having euro might hardly withdraw from the EU without anticipated agreement, but even this could not be taken for granted. We assent to some authors that Art. 50 TEU is badly written and could endanger the stability of eurozone.²⁹ Even if the withdrawal clause stays as an *ultima ratio* instrument, it might have been drafted more prudently with better guarantees for withdrawing state, the EU and euro.³⁰

Forced expulsion?

In some circles an idea was floated that in case the situation in Greece or other countries deteriorate further and stability of the whole eurozone will be at stake, it will be advisable to expel the problematic state(s) from eurozone. This solution regarding Greece was for example supported by 53 % of Germans in a representative opinion poll made by Bild newspaper.³¹ Is anything like that legally conceivable?

Matthias Herdegen argued exclusion may be considered “in very extreme cases of persistent disregard of budgetary discipline”, because “the duty to tolerate a member state within Monetary

²⁷ E.g. Bosnia or Kosovo, this process called euroization is not exactly supported by the EU, for details see BRATKOWSKI, Andrzej and Jacek ROSTOWSKI. The EU attitude to unilateral euroization. *Economics of Transition*, 2002, vol. 10, no. 2, p. 445-468.

²⁸ E.g. Monaco or San Marino, which can even issue their own coins. The relations with these states are based on Art. 219 TFEU and governed by various monetary agreements and Council decisions. See *Agreements on monetary relations*, 6 October 2006. Available from http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/125040_en.htm (cited 14 June 2010).

²⁹ See SMITS, René. The European Constitution and EMU: An Appraisal. *Common Market Law Review*, 2005, vol. 42, no. 2, p. 464.

³⁰ For proposals of such clause see ZBÍRAL 2007, p. 323-328.

³¹ Only 38 % were against. Deutsche wollen Griechen den Euro nehmen. *Weltonline*, 15 February 2010. <http://www.welt.de/die-welt/wirtschaft/article6399733/Deutsche-wollen-Griechen-den-Euro-nehmen.html> (cited 14 June 2010).

Union as a matter of solidarity would be deprived of its very foundations.”³² Unfortunately, he did not support his view by any legal justification. Indeed, it is hardly a surprise as there are few to be found. The Treaties contain abundant obligations for the members of eurozone, mainly under the Stability and Growth Pact. There are also penalties attached for breach of these obligations. But none of them come even close to the expulsion from eurozone. Primary law does not even have a logical counterpart to the withdrawal clause: provision allowing exclusion of a Member State from the EU. There is a chance to “suspend certain of the rights deriving from the application of the Treaties” (Art. 7 para 3 TEU), but the use of euro will certainly not be subject to the suspension. It must be also noted that the breach of euro related obligations most probably does not belong to the list of duties which are punishable by suspension. We thus subscribe to the prevalent view of other authors that under current legal framework expulsion of any state from eurozone is impossible, no matter how seriously the given state undermines stability of common currency.

Concluding remarks

Financial and economic crisis has moved membership of Poland and the Czech Republic in eurozone beyond the immediate horizon. Both countries currently fulfill only selected Maastricht criteria, mainly the deficits of public finances are well above the required limit. Polish politicians expressed wish to join euro in 2015,³³ in the Czech Republic all firm dates have been moved several times and the majority of important actors are now proposing a range starting at 2015 and ending beyond 2020. This however does not mean the topic of this paper is of no relevance for both states. First, once they become members the same rules will apply. Second, and more imminently, as was argued above, no exit from eurozone will be possible without agreement, and in this case the consent of non-members of eurozone is required as well in order to revise the Treaties. Finally, both countries are so economically dependent on eurozone that any crisis within it is going to have massive impact on Polish and Czech economy.

Exit from eurozone remains a very controversial question. At the one hand, „mature monetary union (...) is firmly rooted in the will to belong together, for an unlimited period of time”,³⁴ at the other, “in a world of sovereign states ... nothing can be regarded as truly irreversible”.³⁵ The tension between these positions will be always there. Presented contribution argued that legally any unilateral exit from eurozone is hardly conceivable, a negotiated one is possible, but still difficult. We could only hope the situation in states facing debt crisis will improve and analysis presented above stays academic, otherwise the fate of euro and European integration as such might indeed be at stake.

³² HERDEGEN 1998, p. 9.

³³ Poland set to adopt euro convergence plan. *Euractiv*, 2 February 2010. Available from <http://www.euractiv.com/en/euro/poland-set-to-adopt-euro-convergence-plan> (cited 14 June 2010).

³⁴ SMITS 2005, p. 465.

³⁵ BENJAMIN COHEN. Beyond EMU: The Problem of Sustainability. IN: EICHENGREEN, Barry and Jeffrey FRIEDEN (eds), *The Political Economy of European Monetary Unification*. Boulder: Westview, 2000, p. 202, cited by EICHENGREEN 2007, p. 2.

Shrnutí

Finanční a hospodářská krize se na jaře 2010 projevila v hlubokých problémech některých států dostát svým závazkům. Největším hříšníkem v tomto směru se stalo Řecko, které by bez záchranného balíčku poskytnutého ostatními státy eurozóny pravděpodobně bylo nuceno vyhlásit státní bankrot. Podobně nepříznivé situaci čelí další země jižního křídla eurozóny, což vedlo k výraznému oslabení eura. Mezi politiky i ekonomy panuje obava, že pokud by platební neschopnost vyhlásily i další země jako je Španělsko, nebude v silách ekonomicky silnějších členů eurozóny poskytnout další záchranné prostředky. S ohledem na kritický stav se v četných kruzích objevují názory, že nejlepším řešením pro všechny strany by bylo, aby problematický stát opustil eurozónu. Mohl by tak zvýšit svou konkurenceschopnost následnou devalvací nově zavedené národní měny, zároveň by nebyla ohrožována stabilita eura.

Předkládaný text se zabývá právními souvislostmi opuštění eurozóny ve světle nedávno přijaté Lisabonské smlouvy. Nejdříve je analyzován status členství, otázka nezvratnosti měnové unie a to, zda je možné z unie vystoupit. Docházíme k závěru, že zatímco jednostranné opuštění eurozóny možné není, lze tak učinit změnou primárního práva, která ale vyžaduje jednomyslný souhlas všech členů EU včetně ratifikace. Lisabonská smlouva však přináší novinku, obsahuje tzv. výstupní klauzuli, která dovoluje členskému státu jednostranně vystoupit z EU. Bohužel není jasné, co klauzule znamená pro členství v eurozóně či její opuštění. Příspěvek představuje možné interpretace klauzule, ani jedna z nich naneštěstí není bezproblémová. I zde platí, že bez dohody s ostatními zeměmi by bylo opuštění měnové unie téměř nemožné. V neposlední řadě je zvažována možnost vyloučení státu z eurozóny, současný právní úprava ale nic takového neumožňuje, bez ohledu na charakter a závažnost „prohřešku“ ze strany členského státu. Jak je z analýzy zřejmé, opuštění eurozóny je právně velmi problematické. K tomu je třeba upozornit (ačkoliv to příspěvek neřeší), že praktická realizace odstoupení státu z měnové unie by přinesla snad ještě více otázek.