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Working Paper

Withdrawal expulsion from the EU and EMU: Some reflections

ECB Legal Working Paper Series, No. 10

Provided in Cooperation with:

European Central Bank (ECB)

Suggested Citation: Athanassiou, Phoebus (2009) : Withdrawal expulsion from the EU and EMU: Some reflections, ECB Legal Working Paper Series, No. 10, European Central Bank (ECB), Frankfurt a. M.

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EUROPEAN CENTRAL BANK

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LEGAL WORKING PAPER SERIES

NO 10 / DECEMBER 2009

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2000

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EXPULSION FROM
THE EU AND EMU**

SOME REFLECTIONS

by Phoebe Athanassiou

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WITHDRAWAL AND EXPULSION FROM THE EU AND EMU SOME REFLECTIONS

by Phoebus Athanassiou¹



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¹ Legal Counsel, European Central Bank. The author is most grateful to Liesbeth Van Elsen, Antonio Sáinz de Vicuña and Mikael Stenström for their helpful comments and observations on earlier drafts of this paper. This paper is devoted to the memory of Eleni Nicolou (1923 -f2009).

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ISSN 1830269-6 (online)

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Abstract

This paper examines the issues of secession and expulsion from the European Union (EU) and Economic and Monetary Union (EMU). It concludes that 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 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. This paper concludes with a reminder that while, institutionally, a Member State's membership of the euro area would not survive the discontinuation of its membership of the EU, the same need not be true of the former Member State's use of the euro.

Introduction

Until recently, to talk of ‘secession’ from the European Union (EU) would have been next to absurd, considering the EU’s contribution to lasting peace and stability in Europe, its strong attraction all along its constantly shifting borders and the success of its enlargements hitherto¹. The same could be said of a voluntary exit from EMU, ‘one of the most important growth areas of European integration’², which is widely considered to have: (i) averted costly currency crises, (ii) contributed to economic integration, market growth and prosperity across the EU, and (iii) improved the euro area Member States’ resilience to external shocks³.

Recent developments have, perhaps, increased the risk of secession (however modestly), as well as the urgency of addressing it as a possible scenario. One reason for this, ironically, is the EU’s success so far. The Union’s slow but continuing progress towards a more advanced level of integration, involving closer political and economic ties between its Member States and the transfer of an ever-increasing share of their essential sovereignty to the supranational European institutions, in conjunction with the EU’s declared ambition (unpopular with the public of some Member States) to bring new members within its fold, have created new tensions or exacerbated existing ones, testing the Member States’ commitment to the furtherance of European integration.

¹ Since the signing of the Treaty of Rome in 1957 there have been 6 enlargements, bringing the number of Member States from 6 to 27, the Union’s territory to over 4 million square kilometres and its population to 500 million people. The next enlargement could see Croatia joining the EU, possibly followed by Montenegro and Serbia.

² Thym, at p. 1733. As Thym has observed, ‘this has been realized without the participation of all Member States’, testifying to the extent to which “the asymmetric non-participation” of some Member States has become a daily practice within the EU legal order’ (at p. 1731).

³ These gains have been achieved mainly through the elimination of exchange rate risk, lowering cross-border transaction costs, lowering interest rates, and the exercise of control over inflation. For an exhaustive account of the benefits of EMU for its participating Member States, see Communication of 7 May 2008 from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Central Bank European Commission, EMU@10: successes and challenges after 10 years of Economic and Monetary Union (COM(2008) 238 final).

The increase, under the recently ratified Lisbon Treaty, of the number of policy areas where decisions will be taken by qualified majority voting rather than unanimously⁴, the economic difficulties faced by some euro area economies (and the association made between those difficulties and the euro), the rigors of the Stability and Growth Pact⁵, and the impact of EMU on the Member States' room for manoeuvre in economic policy⁶ at a time of severe financial crisis are all additional reasons why the possibility of secession from the EU or EMU, and its implications, are worth examining. This is so even if Iceland's recent application for EU membership, and the possibility of applications from other, Euro-sceptic, countries might suggest that the ongoing financial crisis may *strengthen* rather than weaken European cohesion.

If the scope for voluntary secession is worth examining, the same is true of the expulsion of a Member State from the EU or EMU (acknowledging the differences between a forcible expulsion and a voluntary withdrawal, especially where the latter is an *agreed* one). The spectacular rebuffs, in recent years, of further integration initiatives,⁷ the alarming wave of reluctance of the peoples of Europe to the perceived loss of their sovereign rights to an allegedly

⁴ The areas in question are energy, asylum, immigration, judicial cooperation in criminal matters and sport. The Lisbon Treaty also provides for a change in the qualified majority voting system in the Council. As from 2014, there will be a reduction in the number of Commissioners from 27 to 18.

⁵ The reference is to the framework consisting of a June 1997 European Council Resolution, Council Regulation (EC) No 1466/1997 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209, 2.8.1997, p. 1), and Council Regulation (EC) No 1467/1997 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2.8.1997, p. 6) (as amended in 2005, subsequent to the Stability and Growth Pact's near collapse in 2003), setting the medium term objective of budgetary positions in surplus or close to balance while keeping the government deficit within the 3 % of GDP reference value.

⁶ For a detailed account of the EMU-derived limitations on a Member State's sovereignty in the area of economic policy, see Smits (2006), pp. 131-168.

⁷ This refers to the difficulties surrounding the ratification of the Constitutional Treaty and the Lisbon Treaty, even in some Member States that have championed European integration in the past, such as France, the Netherlands and, more recently, Ireland.

‘unaccountable’ and ‘undemocratic’ EU as well as the persistent, ‘principled’ opposition of some Member States to further integration, in conjunction with the difficulties faced by some of them in steering clear of excessive budgetary deficits and in complying with their Stability and Growth Pact obligations at a time of acute financial crisis suggest that, however remote,⁸ the risk of a non-compliant Member State being expelled from the EU or EMU is still conceivable.

The purpose of this paper is to examine the legal parameters of a Member State’s voluntary or forced exit from the EU and/or EMU. This paper is divided in three parts. Part One examines the issue of a Member State’s voluntary withdrawal from the EU and/or EMU. Part Two looks at the legal and conceptual issues arising from a Member State’s possible expulsion from the EU and/or EMU. Finally, Part Three provides an overview of the implications of a Member State’s exit from the EU and/or EMU for its use of the euro. It will be argued that unilateral withdrawal from the EU would not, as a matter of public international law, be inconceivable, although there can be serious principled objections to it; and that withdrawal from EMU without a parallel withdrawal from the EU would be legally impossible. As for a Member State’s expulsion, whether from the EU or from EMU, the conclusion is that while this may be possible in practical terms – even if only *indirectly*, in the absence of an explicit Treaty mechanism – expulsion from either the EU or EMU would be so challenging, conceptually, legally and practically, that its likelihood is close to zero. The paper ends with a reminder that, even if institutional membership of the euro area would not survive a Member State leaving the EU, this would not necessarily prevent it from using the euro.

Two caveats and one clarification are apposite. The analysis in this paper is limited to an assessment of the existence of a *legal* right of withdrawal or expulsion either on the basis of the existing law (*de lege lata*) or on the basis of what it is presumed the law should be (*de lege*

⁸ The potential harm of such a development for the future of the EU and the renewed interest in the euro area’s relative security for its participating Member States (especially the ‘weaker’ ones) at a time of acute financial crisis suggest that this risk is remote.

ferenda). More importantly, this paper examines the conditions for the exercise of such rights, as well as the implications and likelihood of their being exercised. This paper will not examine the scenario of the secession of *part* of an EU Member State, motivated by a desire for self-determination and followed by a declaration of independence. Such a scenario would no doubt give rise to a number of delicate questions, not least in creating precedents for the EU's treatment of seceding entities and affecting the stability of those Member States that face secessionist demands⁹. Moreover, acknowledging that public international law is often less 'objective' and more 'political' than private law, this paper will not examine the *political* aspects of a Member State's decision to withdraw or of a decision of its partners to expel it from the EU or EMU. Finally, the fact that the possibility of withdrawal may not have existed under the EC and EU Treaties until recently does not *per se* exclude the possibility of its unilateral assertion, followed by its recognition as a *legal* right by the withdrawing Member State's former partners, nor does it have anything to say about whether or not such a right could be introduced by agreement between the parties to a treaty (as it now has). The focus of this paper is, therefore, less on whether a right of withdrawal or expulsion already existed or has rightly been introduced, and more on the practical implications of its unilateral assertion and/or its exercise, now that the right of withdrawal has been introduced into the Community legal order.

1 Unilateral withdrawal from the EU or EMU

The reference to 'unilateral' withdrawal is hardly unintentional. The distinction between unilateral and negotiated withdrawal is significant, since any inquiry into the existence of a legal

⁹ In all likelihood, the assumption that the EU would treat both the rump Member State and the seceding entity as Member States would not hold true, as the rump Member State could veto the accession of the seceding entity under Article 49 TEU (see Happold, pp. 33-34). Moreover, it cannot be in the EU's interest to have an ever increasing number of veto-wielding members, as this would make its business more difficult to manage.

right of withdrawal can only concern a non-negotiated withdrawal (negotiated withdrawals are, in principle, always possible¹⁰). The purpose of this part is to ascertain whether a right of unilateral withdrawal is compatible with the Community legal order and to examine the main features of and concerns raised by an ‘exit clause’ recently enacted now that the Lisbon Treaty has been ratified.

A A legal right of withdrawal? Doctrinal considerations

I Withdrawal under the treaties

Unlike the conditions for *accession* to the EU, which are addressed, even if not exhaustively, in Article 49 TEU¹¹, neither the founding treaties (which, with the exception of the European Coal and Steel Community (ECSC) Treaty, have no specified term)¹², nor the successive amending treaties made until the ratification of the Lisbon Treaty, made any provision for a Member State’s *withdrawal* (negotiated or unilateral) from the EU or EMU. As one author has written, there are *three* main reasons why the treaties were silent on withdrawal: *first*, it was in order to avoid putting question marks to the Member States’ commitment to the achievement of their shared

¹⁰ See the landmark 1868 ruling of the US Supreme Court in *Texas v White* (74 US 700), supporting the proposition that while the US Constitution prohibits unilateral secession (and by implication expulsion) one or more states may be allowed to leave the Union with the consent of their peers. See also Berglund, p. 150; Thieffry, pp. 15-17; and Article 54 of the Vienna Convention on the Law of Treaties.

¹¹ Article 49 TEU states that ‘any European state which respects the principles set out in Article 6(1) may apply to become a member of the Union.’ The Copenhagen European Council of June 1993 elaborated further on the conditions for EU membership (specifically, the existence of (i) stable institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities, (ii) a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU, and (iii) the ability to take on the obligations of membership, including the adoption of the *acquis communautaire* and adherence to the aims of political, economic and monetary union). The ‘Copenhagen criteria’ were supplemented by the Madrid European Council of December 1995 to include the appropriate adjustment of a candidate country’s administrative structures.

¹² Article 97 of the ECSC Treaty stated that ‘The present Treaty is concluded for a period of fifty years from the date of its entry into force’. The ECSC Treaty expired, as planned, on 23 July 2002.

objectives; *second*, it was because providing for the possibility of withdrawal might have increased its likelihood; and *third*, because to provide for this possibility would entail the daunting task of spelling out the *procedure* and *consequences* of withdrawal¹³. Whatever the force of the first two reasons, there can be little doubt that disentangling the legal and other implications of withdrawal would be a formidable challenge. For instance, withdrawal from EMU would entail: (i) creating a new currency or re-establishing the old currency of the withdrawing Member State; (ii) refunding the departing national central bank's (NCB) contribution to the European Central Bank's (ECB) capital, and reimbursing its foreign reserve assets transferred to the Eurosystem; and (iii) transferring full monetary sovereignty back to the seceding NCB, with all the practical difficulties and legal uncertainties that this would involve for outstanding monetary policy operations, especially in the case of *unilateral* withdrawal¹⁴. As for a Member State's withdrawal from the EU, the complexities surrounding it are legion, affecting the rights and obligations of every natural or legal person inside or outside the territory of the withdrawing Member State who is or who may be affected by it¹⁵. Whatever the explanation for the treaties' silence on the possibility of withdrawal, its *legal consequence* is that, until now, no Member State has had the clear option of withdrawing from the EU or EMU, especially not unilaterally¹⁶. This situation is about to change now that the Lisbon Treaty has been ratified by all 27 Member States.

¹³ See Scott, p. 215.

¹⁴ See Scott, pp. 218-225; Proctor, pp. 924-934; and Thieffry, pp. 15-17. Among other things, commentators focus on the continuity of contracts and on the uncertainty surrounding the extent to which foreign courts would recognise the validity of the redenomination of contracts between debtors established in the withdrawing NCB's jurisdiction and their foreign creditors.

¹⁵ See, e.g., Herbst, pp. 1757-1758.

¹⁶ See Herbst, p. 1755: 'there can be no serious doubt that, currently, there exists no unlimited right of an EU Member State to withdraw from the Union, *i.e.* without any further prerequisites and simply at the free discretion of the respective Member State, within the confines of its internal (constitutional) law provisions'.

The silence of Community primary law on the existence or otherwise of a legal right of withdrawal was, in any event, inconclusive¹⁷, lending itself to two fundamentally opposed interpretations. One is that a right of unilateral withdrawal existed even in the absence of any explicit reference to it in the treaties, since sovereign States were, in any case, free to exercise their sovereign right¹⁸ to withdraw from their international commitments¹⁹. The other is that the lack, until recently, of a formal exit clause in Community primary law must have been intentional, testifying to the Member States' lasting commitment to the EU's objectives and to the irreversibility of the European unification process, which is irreconcilable with a unilateral right of withdrawal. There were, pre-Lisbon Treaty, several indications in the treaties that the latter interpretation was no less plausible than the former. One was that both the EC and the EU Treaties were concluded for *unlimited* periods²⁰; another was that the original Member States' commitment 'to lay the foundations of an ever closer union among the peoples of Europe'²¹ was renewed and strengthened with each reform of the treaties, pointing to the continuity and irreversibility of the European unification project and to the apparent impossibility of secession

¹⁷ Doehring, p. 696. Hill, p. 338, has offered three possible explanations for the silence of the treaties on this matter, favouring the theory that it reflects the hope of the drafters of dissuading Member States from withdrawing.

¹⁸ 'Sovereign power' has been defined as 'power not subject to limitation by higher or coordinate power held over some territory' (MacCormick (1999), p. 127).

¹⁹ See Zeh, p. 209. This proposition is in line with the decision in *Maastricht Urteil* (BVerfGE 89, 155 of 12 October 1993) where the German Constitutional Court stated that the States are still 'the Masters of the Treaties' and can always decide to abandon the EU, revoking their acts of accession by a contrary unilateral denunciation; and more recently in its decision in *Lisbon Urteil* (BVerfG, 2 BvE 2/08 of 30 June 2009) the German Constitutional Court found that the EU, as designed by the Lisbon Treaty, is not a federal state and that constitutional safeguards of national identity clearly exist under EU law.

²⁰ See Article 312 EC, Article 51 TEU, and Article 208 of the EURATOM Treaty. One commentator has gone so far as to treat these provisions as 'non-withdrawal clauses' (Weiler, p. 285).

²¹ See the Preamble to the EC Treaty and Article 1 TEU.



from the EU²² if the EU's objectives are to be fulfilled²³. The explicit acceptance, by new entrants, of the *acquis*, the restrictions on the Member States' power to *renegotiate* their accession agreements (except in connection with derogations or other transitional measures)²⁴, the solidarity principle expressed in Article 10 EC, and the fact that the treaties can only be amended in accordance with the procedure in Article 48 TEU²⁵ also supported the view that Member States were *not* free to withdraw from the EU or, by extension, EMU, whether by agreement or, *a fortiori*, unilaterally.

2 *The relevance of the Vienna Convention and of public international law*

In the absence of any clear guidance in the text of the treaties on the existence or otherwise of a right of unilateral withdrawal from the EU, and pending the entry into force of the Lisbon Treaty, the Vienna Convention on the Law of Treaties (the 'Vienna Convention')²⁶ was the best source for a public international law-based answer to this question. The text of the Vienna Convention suggests that although 'unilateral denunciation from treaties not providing for withdrawal is contrary to the principle of *pacta sunt servanda*'²⁷, in some cases customary international law (of

²² See, e.g., the reference in the Preamble to the EU Treaty to the 'further steps to be taken in order to advance European integration'.

²³ Harhoff, p. 29.

²⁴ The only example, to date, of a substantive renegotiation of a Member State's accession conditions is that of the UK, which between 1 April 1974 and 11 March 1975 successfully renegotiated certain aspects of its Accession Treaty.

²⁵ The argument runs as follows: a Member State's withdrawal entails an amendment of the Treaty; such amendment must be made by means of the Article 48 TEU procedure; therefore a unilateral withdrawal would be inconsistent with Article 48 TEU.

²⁶ Done at Vienna on 23 May 1969 (UN, Treaty Series, vol. 1155, 331).

²⁷ Harhoff, p. 28.

which the Vienna Convention is deemed to be a codification)²⁸ recognises a limited right of withdrawal. The Vienna Convention recognises *two* different situations where a signatory can unilaterally withdraw from a treaty that is silent on the possibility of its denunciation. One is where it is possible to establish that the parties to the treaty intended to recognise a right of denunciation or withdrawal (or where such a right can be inferred from the terms of the treaty)²⁹; the other (the *clausula rebus sic stantibus* or ‘fundamental change of circumstances clause’) is where there has been a fundamental and unforeseen change of circumstances, and: (i) the circumstances in question were an essential basis of the parties’ consent to be bound by the treaty; and (ii) the change radically transforms the extent of the parties’ obligations under the treaty³⁰.

The consensus among commentators is that the first of these situations was not relevant to the EC and EU Treaties. Given the terms and spirit of the treaties, and the long-term integrative nature of the EU, reflected in the permanence of its institutions and in the transfer of significant decision-making powers to the supranational Community institutions by the Member States³¹, there is nothing to suggest that they contained a right of denunciation or withdrawal³². In the case of EMU, Articles 4(2), 118 and 123(4) EC and its Protocol 24 on the transition to the third stage of monetary union expressly refer to the ‘irrevocable’ fixing of the conversion rates at which national currencies are to be exchanged for the euro, and to the irreversibility of the process

²⁸ The Vienna Convention applies to treaties concluded prior to 1980, incorporating customary rules in force before then.

²⁹ Vienna Convention, Article 56.

³⁰ Vienna Convention, Article 62. While there is no equivalent doctrine in common law, the same results have been achieved through the judicial doctrines of frustration, impossibility and impracticability. For a comprehensive comparative account of the doctrine’s application see Saliba.

³¹ Article 5(1) EC. For a lucid analysis of the ‘conferred powers doctrine’ and its role in the European integration process, see Goucha Soares, p. 57.

³² See, e.g., Harhoff, pp. 29-30; Berglund, p. 151; Weiler, p. 286; and Hill, pp. 346-347, who adds that the EC Treaty is unlike a treaty of alliance, the one type of international agreement where a right of withdrawal is implicit, subject to reasonable notice. *Cf.* Aust, p. 291.

leading to the adoption of the euro³³. The fact that EU membership is *voluntary* is not in itself conclusive since '[S]overeignty is ... given full expression in the right of any State to join a particular organisation, or not; but once a State decides to enter an organisation it is no longer free, and its own wishes are no longer decisive'³⁴. The EC Treaty's recognition of the existence of Member States with a derogation from EMU is similarly inconclusive, since EMU participation is, in the long run, obligatory for *all* Member States except for those that have negotiated opt-outs³⁵. As for the fundamental change of circumstances doctrine, which is accepted however reluctantly by most jurists, the consensus is that, whether in the context of the treaties or in connection with any other international agreement, its practical utility as a ground for withdrawal is limited to exceptional circumstances and that it should only be invoked sparingly, given the obvious 'threat it poses to the stability of treaties' and to the sanctity of contracts³⁶. At least one commentator has convincingly challenged the conceptual compatibility of the fundamental change of circumstances doctrine with the Community legal order, concluding that it 'might have difficulty passing legal muster in the EEC'³⁷. Another commentator has argued that its application should be limited to changes of circumstances that the signatories to a treaty have expressly

³³ See, e.g., Zilioli and Selmayr, p. 15; and Proctor, pp. 924-925. While ingenious, the suggestion made by one commentator that 'the preservation of national central banks makes it easier for countries to withdraw from EMU' and may, possibly 'have been designed to ease a breakup' (Scott, pp. 215-216) misses the point that *decentralisation* is the governing operational principle of the European System of Central Banks.

³⁴ Feinberg, p. 159.

³⁵ This clearly follows from Articles 122(2) and 123(4) EC, pointing to the obligation of non-participating Member States to maintain momentum towards the abrogation of their derogations and transition to the single currency.

³⁶ See International Law Commission Commentary on the draft of Article 62 of the Vienna Convention; Berglund, p. 151; and Carty, p. 832.

³⁷ Hill, p. 353, who reaches the conclusion that the fundamental change of circumstances doctrine is not relevant in the context of the treaties, first on account of the 'dynamic character of the Treaty [which] permits adjustment to change in circumstances by modification of the Treaty' and, second, because 'the EEC is required to resolve all disputes using the procedures provided by the Treaty' which does not provide for a right of withdrawal (ibid. at 354).

identified³⁸, or to situations where the European institutions, including the Court of Justice (ECJ), have acted *ultra vires* and in breach of the treaties, leaving a Member State with no option but to withdraw³⁹.

To argue that, because public international law sometimes recognises a limited right of unilateral withdrawal, the same right must have existed by analogy in the context of the treaties prior to the Lisbon Treaty would be to err threefold. *First*, it would be to disregard the *sui generis* constitutional⁴⁰ nature of the Community legal order and the ECJ's well-established interpretation of the treaties as being permanently binding on the Member States. *Second*, it would be to subscribe to an extreme and largely obsolete concept of sovereignty, at least as regards the relations of the EU Member States with each other. *Third*, it would be to overemphasise the affinities between public international law and Community law. On the first and second of these points, see the *van Gend en Loos* case⁴¹ where the ECJ famously ruled that '[T]he European

³⁸ Doehring, pp. 696-697, points to the example of the ECSC Treaty, and in particular to the reference in Article 95 to 'unforeseen difficulties which are brought out by experience in the means of application of the present Treaty, or a profound change in the economic or technical conditions which affects the common coal and steel market directly', and draws inferences from Article 62(2) of the Vienna Convention.

³⁹ *Ibid.*, pp. 698-702. In this respect, Doehring's conclusions are not inconsistent with those of another commentator who rejected the idea that a breach of the Treaty by one Member State entitled other Member States to withdraw, but left open the question of whether breaches of the Treaty by the European institutions might justify withdrawal (Hill, pp. 351-352).

⁴⁰ 'If one were asked to synthesise the direction in which the case law produced in Luxembourg has moved since 1957, one would have to say that it coincides with the making of a constitution for Europe', Mancini, p. 595. See also the Opinion of Advocate General Lagrange in Case 6/64 *Costa v Enel* [1964] ECR 585, and the ruling in Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para. 23. If Community law were tantamount to the constitution of a 'United States of Europe', secession from the EU would *prima facie* be unconstitutional, despite the treaties' silence on the question of a unilateral right of secession. The US Supreme Court's reasoning in *Texas v White* (see note 10) is again instructive, as in that case the majority ruled that Texas (an independent Republic prior to its accession to the Union in 1845) had no right to secede since '[T]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'

⁴¹ Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1.

Economic Community constitutes a new legal order of international law, for the benefit of which the States have limited their sovereign rights, albeit within limited fields'; and the *Costa v ENEL* case⁴², where the ECJ stated that:

'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves ... The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it *a permanent limitation* of their sovereign rights' [emphasis added].

On the impact of sovereignty on the fulfilment by *any* State of its international commitments, the Vienna Convention's narrowly circumscribed right of denunciation or withdrawal clearly suggests that sovereignty does not *automatically* absolve States from their treaty obligations. In other words, a claim of sovereignty is not a fool-proof legal defence to a State's failure to comply with its voluntarily assumed obligations, nor can it entitle a State to withdraw unilaterally from the performance of its obligations as it sees fit. As for the EU dimension of sovereignty, it can no longer be argued that, in their intra-Community relations, the EU Member States retain the full measure of sovereignty which they can exercise by withdrawing unilaterally from the treaties⁴³. The Member States have ceded some of their sovereignty, not to the EU as such (which is not a 'State'), but to its supranational institutions, including the ECJ, in which they are represented. Already decades ago the ECJ expressly recognised the obligation of

⁴² Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁴³ Jakab, p. 386.

national courts to set aside their domestic law, including constitutional law, if it conflicts with Community law⁴⁴. The foregoing is less an argument in support of the bold and unrealistic proposition that Member States have altogether surrendered their sovereignty, and more a reminder that the concept of sovereignty subscribed to by the advocates of a free right of withdrawal is outdated. This is at least so in the context of the EU, given the challenge to a Hobbesian ‘all or nothing’ understanding of sovereignty represented by directly applicable Community law for the best part of 50 years. The position has been aptly summarised as follows: ‘The sovereignty of member states has not been lost but rather subjected to a process of division and combination internally, and in a way enhanced externally. But the process of division and combination has taken us beyond the sovereign state’⁴⁵.

On the link between Community law and public international law and on the utility of public international law as a source of guidance on the existence or otherwise of a Member State’s right of unilateral withdrawal, Community law differs *markedly* from public international law⁴⁶, despite the similarities which have led many commentators to treat Community law as a successful emanation of public international law⁴⁷. The ECJ has clearly established that one of the key differences between Community law and public international law is that ‘with the latter, the effect of a norm in the national legal order is determined by national law, not international law; in

⁴⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, paras 16-24.

⁴⁵ McCormick (1999), p. 133. McCormick has elsewhere spoken of a ‘complex interaction of overlapping legalities’ (McCormick (1993), p. 16), while another commentator has gone so far as to speak of a ‘European Union Sovereignty’ (de Búrca, p. 450).

⁴⁶ This is without prejudice to the ECJ’s power to take account of general principles of international law; see Opinion 1/91 of the Court of 14 December 1991 on a Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area Treaty on a European Economic Area, [1991] ECR I-6079, para. 1.

⁴⁷ Leben, p. 298.

EC law however, such effect is a matter of EC law, not national law⁴⁸. This fundamental difference between the application of international treaties in the domestic law of the Member States on the one hand, and the application of the EC/EU Treaties in domestic law on the other hand, not only makes a nonsense of the traditional distinction in international law between monist and dualist systems of law, but ultimately ‘justifies the conclusion that the Community constitutes a separate legal system that may be contrasted with traditional public international law in terms of institutional structures and outcomes’⁴⁹. It follows that whatever limited rights of unilateral withdrawal States may enjoy under public international law and the Vienna Convention, these rights are not necessarily immediately relevant in an EU context, where a right of unilateral withdrawal would be at odds with some of the basic assumptions underlying the Community legal order and the idea of a lasting union among the peoples of Europe, as a ‘response to the specific internal logic of post-war Europe’⁵⁰.

3 *A right of unilateral withdrawal as a remedy?*

On a more practical level, the extent to which unilateral withdrawal is legally possible must ultimately depend on whether, viewed as a *remedy* or a *relief measure* from the withdrawing Member State’s standpoint, secession would be compatible with the scheme of the treaties. There are three hypothetical circumstances where a Member State could, in extreme circumstances, assert a right of unilateral withdrawal, whether as a remedy or by way of relief. These are where:

(i) another Member State(s) has fundamentally infringed and *continues* to infringe the treaties; *or*

⁴⁸ Betlem and Nollkaemper, p. 572. This conclusion is borne out by judgment of the ECJ in *Costa v Enel*, according to which: ‘By contrast with ordinary international treaties the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’ (para. 3).

⁴⁹ Longo, p. 83.

⁵⁰ *Ibid.*, p. 72.

(ii) the European institutions have acted *ultra vires* (in both of the foregoing cases, without the treaties appearing to offer any remedy guaranteeing an early return to legality); *or* (iii) a Member State faces extraordinary difficulties that prevent it complying with its treaty obligations. While such circumstances are within the realm of the possible, the remedies provided in the treaties for infringements of Community law do *not* include a right for an aggrieved Member State to withdraw ‘in protest’, and difficulties that temporarily prevent compliance with treaty obligations are *already* catered for in Community primary law in ways that are inconsistent with the assertion of a unilateral right of withdrawal. Specifically, in order to ensure compliance with the EC Treaty, the ECJ has jurisdiction to hear cases brought against a Member State by the Commission or by another Member State⁵¹. The EC Treaty also gives Member States an unlimited right to challenge, before the ECJ, the legality of acts of the European institutions or the ECB that are ‘intended to produce legal effects vis-à-vis third parties’⁵² *or* where their failure to act constitutes an infringement of the Treaty⁵³. In both of these cases there is a treaty obligation for the European institution whose acts have been declared void *or* whose failure to act has been established by the ECJ ‘to take the necessary measures to comply with the judgment of the Court of Justice’⁵⁴. Similarly, where a Member State’s grievance against any of its partners relates to a ‘serious and persistent breach’ of the fundamental principles laid down in Article 6(1) of the EU Treaty, the Council may suspend ‘certain of the rights deriving from the application of this Treaty to the

⁵¹ Articles 226-228 EC. While infringement proceedings brought by the Commission under Article 226 EC are far more numerous, the mere existence of a possibility for a Member State to bring an action against another Member State under Article 227 EC, alleging infringement of its treaty obligations, clearly seems to negate the need for ‘self-help’ measures, such as withdrawal.

⁵² Articles 230-231 EC. Significantly, the grounds of review include ‘lack of competence’, ‘infringement of this Treaty’ or ‘misuse of powers’, meaning that an *ultra vires* action by any of the European institutions is justiciable before the ECJ at the instance of any Member State.

⁵³ Article 232 EC. This provision operates as a complement to Article 230 EC, guaranteeing its effectiveness by ensuring that the European institutions ‘not only act within the powers given by the Treaty but act on those powers’ (Weatherill and Beaumont, p. 272).

⁵⁴ Article 233 EC.

Member State in question', including its voting rights in the Council⁵⁵. Where extraordinary domestic or international situations affect a Member State's ability to fulfil its treaty obligations, the EC Treaty provides for the possibility of Member States taking temporary measures, in derogation from the Treaty, in order to resolve 'serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'⁵⁶. These *exclusive*⁵⁷ treaty measures are applicable to a Member State's infringements of Community law and/or to extraordinary situations affecting its ability to meet its treaty obligations, and what they clearly show is that the unilateral withdrawal of an aggrieved or distressed Member State was never contemplated as a legitimate remedy or relief measure within the scheme of the treaties. Only if these remedies and/or relief mechanisms were to fail altogether, or if a novel situation were to arise which the treaties do not cater for⁵⁸, could a right of unilateral withdrawal perhaps be asserted, and even then only as a last resort, if the

⁵⁵ Articles 7(2) and (3) TEU. Articles 309(1) and (2) EC provide for the analogous suspension of the offending Member State's voting and other rights derived from the EU Treaty, either automatically, as per Article 309(1) EC, or following the procedure prescribed in Article 309(2) EC.

⁵⁶ See Articles 297-298 EC, which provide, among other things, for a duty to consult between Member States with a view to taking such measures, and for the possibility of the Commission or any Member State bringing the matter directly before the ECJ if they consider that improper use is made of the power provided for in Article 297 EC.

⁵⁷ Article 292 EC states: 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein'.

⁵⁸ The author can think of only *two* such situations. One is where the failure to act invoked as a ground for withdrawal is attributable to the ECJ rather than to any of the other European institutions, in which case the procedure provided for in Article 232 EC cannot apply since the ECJ cannot adjudicate against itself; the other is where the *ultra vires* act of any of the European institutions consists of a recommendation, an opinion or any other act which is not intended to be legally binding, in which case Article 230 EC would be inapplicable. In either case, by derogation from Articles 230 and 233 EC, which do not require proof of a Member State's individual interest (see, e.g., Case 131/86 *United Kingdom v Council* [1988] ECR 905, 927), only if the infringement of Community law fundamentally affects a Member State's core interests might this be invoked as a ground for withdrawal.

consequences of the continuing infringement of the treaties or of the crisis affecting a Member State were of a nature such as to leave it no option but to withdraw⁵⁹. Even then, a question would remain about the compatibility of a right of unilateral withdrawal with Article 48 TEU and with the procedure provided in it for amending the treaties.

Without prejudice to the possible application of the doctrine of fundamental change of circumstances⁶⁰, the conclusion is that the assertion of an implied right of unilateral withdrawal from the treaties, even in exceptional circumstances, would be highly controversial (especially in the case of EMU, where in the text of the EC Treaty it is clear that no such right was intended) except, perhaps, as a last resort in the event of an extremely serious and lasting infringement of the treaties or extraordinary circumstances affecting a Member State's ability to fulfil its treaty obligations. While public international law or the Vienna Convention may be useful sources of guidance on the existence or otherwise of a right of unilateral withdrawal, their utility is limited to contradicting the argument that, as the EU Member States are sovereign, they can unilaterally renounce their obligations under the treaties. As the law stood pre-Lisbon Treaty, 'the only acceptable way to withdraw from the Union is an agreement, ratified by all Member States'⁶¹.

Needless to say, these conclusions do not touch upon the all-important *political* aspects of national sovereignty⁶². It is, no doubt, political considerations that explain why, despite the founding treaties' silence on the possibility of secession, no Member State contested the UK's

⁵⁹ See also Hill, pp. 352-353.

⁶⁰ See Article 62 of the Vienna Convention.

⁶¹ Smits (2005) p. 465; Hill, p. 354; and United Nations, Conference on the Law of Treaties 71 (1971), Commentary on draft Article 51 of the Vienna Convention (corresponding to Article 54 of the Vienna Convention), confirming that, where a treaty is silent on its termination or withdrawal, unanimous consent by the signatories is required, as both termination and withdrawal affect the rights of all parties to a treaty.

⁶² '[T]he question of sovereignty is not a neutral, scientific one. It is a highly politicised concept, a politically highly sensitive area' (Jakab, p. 390).

threatened withdrawal in 1975⁶³ and why Greenland was allowed to leave the European Communities in 1982, following domestic opposition to the common fisheries policy and growing demands for home rule.⁶⁴ As one commentator has observed, '[A]s a practical matter if a Member State were determined to withdraw, the EEC has no sanctions that can be applied to compel lawful compliance with the Treaty. Thus, from this point of view, it really is of no consequence whether a legal right of withdrawal exists'⁶⁵. Nevertheless, the conclusions drawn in the preceding discussion provide useful insights into the rationale for the introduction, in the text of the new Treaty, of a clause expressly providing for the voluntary withdrawal of a Member State from the EU as well as a basis for assessing its implications in a Community law context. The recently enacted exit clause is considered in some detail in the following section.

B The Lisbon Treaty exit clause: a critical assessment

1 Description of the exit clause

The idea of a Member State's withdrawal from the Union was to take a new turn with the introduction of Article I-59 of the *draft* Treaty on establishing a Constitution for Europe⁶⁶, (which

⁶³ The reference is to the UK's then new Labour Government's demand for a renegotiation of its accession terms, followed by a referendum on whether the UK should remain in the Communities. The very holding of this referendum postulated the existence of a right of withdrawal.

⁶⁴ Greenland's case is not a direct precedent, both because Greenland was an overseas territory of Denmark rather than a Member State, and because Greenland's was a *negotiated* withdrawal as opposed to a *unilateral* one. For an account of the factual and legal context of Greenland's withdrawal, see Harhoff, p. 13; and Weiss, p. 173.

⁶⁵ Hill, p. 356. In the same vein, referring to withdrawal from EMU and the possible deterrent effect of the Vienna Convention, another commentator has noted that 'a country contemplating withdrawing from EMU is not likely to be deterred by the Vienna Convention, nor would there be an effective enforcement mechanism to compel adherence to the Convention if a country was determined to withdraw' (Scott, p. 214).

⁶⁶ OJ C 169, 18.7.2003, p. 22.

became, Article I-60 of the Treaty establishing a Constitution for Europe)⁶⁷. The differences in this respect between the now defunct draft Constitution and the recently ratified Lisbon Treaty⁶⁸ are only minor and of a technical nature. Article 50 of the Lisbon Treaty explicitly makes provision for the voluntary secession of a Member State from the EU. Specifically, the exit clause provides that a Member State wishing to withdraw from the EU must inform the European Council of its intention; the Council is to produce guidelines on the basis of which a withdrawal agreement is to be negotiated with that Member State; and the Council, acting by a qualified majority and after obtaining the consent of the European Parliament, will conclude the agreement on behalf of the EU. The withdrawing Member State would cease to be bound by the treaties *either* from the date provided for in the withdrawal agreement or, failing that, *two* years after notification of its intention to withdraw. A former Member State seeking to rejoin the EU would have to follow the same admission procedure as any new candidate country.

2 *Assessment of the non-EMU-specific concerns raised by the exit clause*

The exit clause, as formulated, raises at least three concerns. First, despite the references in it to a *negotiated* agreement on the details of the withdrawing Member State's departure, the exit clause recognises, effectively, a *unilateral* right of withdrawal as well as a possibility for a Member State to negotiate its agreed exit from the EU. Second, the exit clause only appears to be appropriate if only one or two Member States were to withdraw at a time, but not if there were to be a mass exit from the EU. A third, and perhaps the most serious, concern, is that the exit clause contains no special provisions on the requirements for the withdrawal of a Member State which has adopted the euro. Even if the Lisbon Treaty had not been ratified, its guidance on how to

⁶⁷ OJ C 310, 16.12.2004, p. 40.

⁶⁸ OJ C 115, 9.5.2008, p. 1.

address the possibility of a Member State's withdrawal would remain useful⁶⁹, and ventilating concerns connected with the exit clause could contribute to a more functional withdrawal mechanism being adopted upon any future amendment to the EU Treaty.

Starting with the first of these three concerns, there are at least three clear indications that the exit clause embodies a unilateral right of withdrawal⁷⁰. These are: (i) the reference, in Article 50(1), to a Member State's withdrawal 'in accordance with its own constitutional arrangements'; (ii) the fact that a Member State's withdrawal is *not* conditional on the conclusion of a withdrawal agreement, since a Member State can withdraw even if negotiations with the Council break down, provided that two years have elapsed since the notification to the Council of its decision to withdraw;⁷¹ and (iii) the fact that 'the right to withdraw is not connected with the adoption of a constitutional change that a Member State cannot accept, but introduced without such restrictions'⁷². This third consideration is crucial since it is not the element of negotiation that would make a Member State's withdrawal consensual (as opposed to unilateral), it is the *absence of restrictions* on a Member State's right to withdraw that is decisive. Negotiations would, in any case, be necessary to organise a Member State's departure. If this assessment is correct, that Member States have a unilateral right of withdrawal under the Lisbon Treaty⁷³, the exit clause

⁶⁹ As a commentator has argued 'the clause is politically important as the governments of all member states had adopted and signed the Constitutional Treaty including the possibility of voluntary withdrawal' (Emmanouilidis, p. 3).

⁷⁰ For concurring views see Herbst, p. 1756; Smits (2005) pp. 464-465; and Zeh, p. 201.

⁷¹ The two year period provided for in the exit clause for the conclusion of a withdrawal agreement is so short (especially in the case of a Member State which has adopted the euro) that the exit clause would almost seem to posit a unilateral right of withdrawal (Herbst, pp. 1757-1758). The exit clause's silence on the practical aspects of the exercise of the right of withdrawal in the absence of an agreement is inevitably a recipe for uncertainty (Zeh, pp. 206-207).

⁷² Smits (2005), p. 464.

⁷³ If all the exit clause does is to recognise the possibility of a negotiated withdrawal, its utility would be limited to organising the procedures for such withdrawal since, as seen above, an agreed withdrawal is

would appear to represent a notable departure, rather than a mere codification of international or Community law on the right of Member States to withdraw from their treaty commitments. For the reasons explained earlier, this does not sit comfortably with the fundamentally integrationist rationale of the treaties, with the *sui generis* nature of the Community legal order and, not least, with Article 48 TEU and with the specific procedure for amending the treaties that this provides (of which a Member State's withdrawal would be a prime example⁷⁴).

Why the drafters of the Lisbon Treaty introduced such an abuse-prone provision into the treaties⁷⁵ can only be a matter of speculation⁷⁶. Whatever the rationale of the recognition of a unilateral right of withdrawal, and however valid the questions that this raises, it has perhaps two redeeming features. *First*, the introduction of this new possibility may prepare the ground so that, should there be a unilateral withdrawal, it will not find the EU institutionally unprepared, helping bring a semblance of order to what would be bound to be a dramatic event and averting the risk of that event affecting the continuation of the integration process by the remaining Member States⁷⁷. *Second*, the exit clause recognises the practical reality that, politically, a sovereign Member State

always possible in principle. It can be assumed that the Community legislator would not have gone to the trouble of legislating on the issue of withdrawal if this would have been to state the obvious.

⁷⁴ See Zeh, p. 209, who concludes that the exit clause is legally permissible, as a reflection of the Member States' sovereignty; and Herbst, pp. 1758-1759, who considers the Council's involvement in the withdrawal process to be the clause's saving and legitimising feature.

⁷⁵ For an account of the abusive use to which the exit clause could be put, see Zeh, pp. 204-205; Eerola p. 1, argues that, because the exit clause could encourage national governments to use the threat of withdrawal to extract concessions (and national electorates to elect confrontational politicians willing to act on such threats) the exit clause should be amended to require a withdrawing Member State's voters to approve withdrawal in a referendum.

⁷⁶ The insertion of the exit clause probably reflects the desire of the drafters of the Lisbon Treaty to avoid giving the impression that the Member States are captives of an undemocratic EU. The reasoning may well have been that if Member States have an institutionalised right to withdraw from the EU, they are unlikely to object so strongly to surrendering more of their sovereignty to its institutions.

⁷⁷ Louis, p. 29.

cannot be coerced into honouring commitments it no longer has an interest in. This would, in turn, help the EU avoid the legal wrangles that too legalistic an approach to a Member State's withdrawal might entail⁷⁸. The introduction of the exit clause indirectly confirms the validity of the conclusion drawn above, that such a right did *not* exist under Community law pre-Lisbon Treaty, and that nothing short of a treaty agreement between the Member States could bring it into being (if such a right existed already, the exit clause would be redundant).

The second of the three concerns identified above relates to the fact that the exit clause is conceived with a view to the withdrawal of one or two Member States at a time. While, on the face of it, it is not unreasonable for the Council to represent the EU in withdrawal negotiations, since it is the Council that negotiates EU *accessions*, if a more substantial number of Member States were to withdraw, this role of the Council could not work for the purely practical and conceptual reason of the limited legitimacy of the Council representing a 'depleted' EU in a mass exit scenario⁷⁹. The exit clause's failure to cater for a mass exit raises concerns because, as currently drafted, the exit clause does *not* preclude multiple withdrawals, an eventuality that would defeat the objective of orderly withdrawal, presumed to be the aim of the introduction of the exit clause; however unlikely a mass withdrawal, the drafters of the Lisbon Treaty should, perhaps, have catered for it. At the same time, the requirement, in the exit clause, for a qualified majority is difficult to account for, given the requirement for unanimity for EU *accessions*⁸⁰.

⁷⁸ See Weiler, p. 287, arguing that to insist on unwilling Member States remaining in the EU would be counterproductive and that allowing them to leave would, in the end, be better.

⁷⁹ The problem would not be solved by the Council negotiating with one withdrawing Member State at a time on a 'first-come-first-served' basis, since the Council would then purport to represent Member States some of which would also have notified their intention to depart. The resulting conflicts of interest could taint the objectivity, and possibly the legality, of any withdrawal negotiations.

⁸⁰ While it would be no doubt more arduous (to the point of being unworkable) for a Member State to negotiate withdrawal with each of the remaining Member States *directly* (i.e. without the involvement of the Council), this would be legally more sound and more in line with the unanimity requirement applicable to EU accession under Article 49 TEU.

The third and, perhaps, most serious concern raised by the proposed exit clause is that it does not make any special provisions for the withdrawal of EU Member States which also participate in the euro area. Because of the particular features of EMU, this concern will be addressed separately in the following section.

3 *Assessment of the EMU-specific concerns raised by the exit clause*

While the silence of the exit clause on the procedures for the withdrawal of a euro area Member State is, at first sight, understandable⁸¹, it has been criticised for threatening the stability of the euro⁸² as well as for the possibility that it might lead to a proliferation of ‘disaster clauses’ to cater for changes in the composition of the euro area⁸³. More importantly, the exit clause’s silence is problematic because it leaves room for speculation on the extent to which there is also a right of withdrawal from EMU and whether such withdrawal would necessarily be linked to a Member State’s withdrawal from the EU or could be *independent* from it. There appear to be two alternative approaches to the absence of any guidance in the exit clause on the existence of a separate right of withdrawal from EMU. One is to see it as evidence that a Member State’s right to withdraw from EMU is implicit in its right to repudiate the treaties in their entirety, so that no special procedure for it is required in the exit clause; the other is that no right of withdrawal from EMU was ever intended to exist. These two alternative interpretations of the silence of the exit clause on procedures for the withdrawal of a euro area Member State are examined in the following.

⁸¹ Why should the Treaty explicitly address a specific facet of a Member State’s withdrawal?

⁸² Smits, (2005) pp. 464-465, has referred to the risk of speculation against the euro, as has Scott (at p. 211).

⁸³ Louis, p. 28.

The first interpretation would be consistent with the view that withdrawal from EMU without a parallel withdrawal from the EU would be legally inconceivable. As seen above⁸⁴, unlike EU participation, EMU participation is a legal *obligation* for all Member States. While a Member State may be free to denounce its EU participation and repudiate its treaty obligations in their entirety, it would not be free to go back on its decision to join EMU without breaching a binding obligation, under the EC Treaty, unless it were also to withdraw from the EU. Consequently, the only way to withdraw from EMU is to withdraw from the EU. This interpretation would nevertheless be problematic; it postulates the possibility of unilateral withdrawal from EMU under the same conditions as those applicable to a Member State's withdrawal from the EU, i.e. even if *no* withdrawal agreement had been concluded between the Council (with the full involvement of the ECB) and the departing Member State⁸⁵. Such a genuinely unilateral right of withdrawal would be unthinkable in the context of EMU, not least on account of its open conflict with the plain language of Articles 4(2), 118 and 123(4) EC and Protocol 24 on the Transition to the Third Stage of Monetary Union and, in particular, with the references therein to the 'irrevocability' of the substitution by the euro of the currencies of the participating Member States and to the 'irreversibility' of the monetary union process⁸⁶.

The only alternative interpretation is that there was never intended to be a right of withdrawal from EMU, among other things because of the complex network of rights and obligations that EMU entails for its participating Member States and their NCBs and which cannot easily (and certainly not *automatically*) be unwound through a unilateral act of

⁸⁴ See, note 35 and the accompanying text.

⁸⁵ See ECB Opinion CON/2003/20 of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe (OJ C 229, 25.9.2003, p. 7) where, commenting on Article I-59 of the draft Constitutional Treaty, the ECB stressed that '[T]o the extent that such arrangements [i.e. those referring to a Member State's withdrawal] enter into the fields of competence of the ECB, the ECB understands that it will be fully associated with the Council of Ministers in the procedure' (para.18).

⁸⁶ Proctor, p. 930.

withdrawal. The necessary implication of accepting this alternative interpretation is that only an agreed exit from the euro area is possible⁸⁷. However, this argument is also problematic since, reasoning *a maiore ad minus*, to recognise, as the exit clause does, the possibility of unilateral withdrawal from the EU is to also recognise the possibility of unilateral withdrawal from a subset of the EU (namely EMU). Moreover, to accept this alternative as valid would postulate the existence of *two* different withdrawal procedures, depending on whether the Member State involved is part of the euro area or not. This would mean that EU Members could withdraw unilaterally and without the need to negotiate their departure once the two year period referred to in the exit clause has expired, while euro area Members would need to *negotiate* their withdrawal, at least from EMU. However reasonable, such a distinction might produce the perverse effect of encouraging Member States to delay indefinitely their accession to EMU in order to benefit from the apparently more lenient withdrawal requirements applicable to non-EMU participants.

Both of the foregoing interpretations of the silence of the exit clause on the existence (or otherwise) of a possibility to withdraw from EMU are so unsatisfactory that it would be unwise to attempt to choose between them on the basis of deductions, however logical or informed these may be. A potential right of withdrawal from EMU and the procedures for such withdrawal are too serious to be left to mere inference. For this reason, the author agrees with Smits that the exit clause is ‘one of the major faults of the Constitution’ (and, by extension, also of the Lisbon Treaty)⁸⁸. As for *how* the exit clause’s weaknesses might be rectified, it is argued that nothing short of the express inclusion in the exit clause of a requirement for a negotiated withdrawal from EMU (involving both the Council *and* the ECB) would suffice because: (i) withdrawal from EMU is too far-reaching and complex a matter to be amenable to the exercise of a right of

⁸⁷ Smits (2005), p. 465.

⁸⁸ Smits, (2005) p. 463, also considered the introduction in the treaties of an exit clause that does not cater for the situation of Member States participating in the Eurosystem to be a serious error that needs to be rectified, even after ratification of the Lisbon Treaty, and even if this would mean resorting to the laborious treaty revision procedure provided for in Article 48 TEU.

unilateral withdrawal (such as the right to which the Lisbon Treaty's exit clause rightly or wrongly amounts); and (ii) the EC Treaty is clearly opposed to the possibility of unilateral withdrawal, at least in the context of EMU.

4 *Intermediate conclusion*

The conclusion is that Member States could not, pre-Lisbon Treaty, withdraw unilaterally either from the EU or, *a fortiori*, from EMU, and that the only way for them to do so *legally* would be by means of a negotiated agreement with their fellow Member States. Such an agreement would necessarily involve a Treaty amendment and require the unanimous consent of its partners, in accordance with Article 48 TEU. *How likely* some Member States are to wish to withdraw voluntarily (however heartily their partners may desire their departure) can only be a matter of speculation⁸⁹. What is clear, however, is that given the serious legal and practical difficulties that the withdrawal of a Member State would entail, and which even negotiations in good faith may not suffice to overcome, those who supported the withdrawal of Member States accused of having 'thrown a spanner in the works' of European integration may well have advocated a step which, though politically imaginable, would be legally inconceivable (at least pre-Lisbon Treaty)⁹⁰.

This conclusion inevitably raises the question of whether, in the absence of its willingness to withdraw or of an agreement on the procedure for withdrawal, a Member State

⁸⁹ '[I]n the context of the current constitutional debate it is unlikely that, in view of the associated political and economic costs, one of the countries concerned would actually withdraw from the EU voluntarily' (Emmanouilidis, p. 3).

⁹⁰ See Ellemann-Jensen, 'Ireland must go', available at <http://www.project-syndicate.org/print_commentary/ellemanjensen16/English>, exhorting Ireland to 'do the rest of Europe a favor and withdraw from the European Union'.

could be *expelled* against its will, either from the EU or EMU. Part Two of this paper will examine these questions.

2 A collective ‘right of expulsion’ from the EU or EMU?

The recognition of a unilateral right of secession by the drafters of the Lisbon Treaty inevitably prompts the following question: if Member States are to have the right to secede voluntarily, should there not be a possibility for their fellow Member States to *expel* them from the EU if their participation were to be deemed undesirable or prejudicial by their partners and if the latter were to fail to persuade them to withdraw from the EU or EMU voluntarily⁹¹? Under what conditions and following what procedures could such a right of expulsion be exercised? The prospect of expulsion came to the fore in June 2008, when Irish voters rejected the Lisbon Treaty, an event that was to trigger one of the most acute crises in the recent history of the EU. This Part examines the existence of a right of expulsion from the EU and EMU⁹², the possible rationale for its introduction (assuming that such a right does not already exist) and the extent to which the lack of such a right would be an obstacle to a Member State being left behind by its partners.

⁹¹ European Parliament members of the European Peoples’ Party Convention Group strongly opposed Article I-59, and argued for such reciprocity in their suggestion for amending it. Their reasoning was that ‘such a parallel right of the Union to expel Members would also reduce the risk of political blackmailing through the means of exit threats’

(see <european-convention.eu.int/Docs/Treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf>).

⁹² As some countries are both an EU and an EMU participant, any inquiry into these questions should address expulsion from both the EU *and* EMU.

A Expulsion from the EU or EMU: doctrinal considerations

Unlike the Charter of the United Nations (UN), Article 6 of which expressly provides for the possibility of a UN Member being expelled for persistently infringing the principles of the Charter, there is no treaty provision at present for a Member State to be expelled from the EU or EMU⁹³. The closest that Community law comes to recognising a right of expulsion is Article 7(2) and (3) TEU, allowing the Council to temporarily *suspend* some of a Member State's rights (including its voting rights in the Council) for a 'serious and persistent breach by a Member State of the principles mentioned in Article 6(1)' of the EU Treaty. This might be thought of as a preliminary step to the expulsion of a Member State, but it is not the same as its definitive expulsion⁹⁴. The idea that the treaties should explicitly provide for a possibility of expulsion was discussed in the 2001-2003 Intergovernmental Conference responsible for drafting the ill-fated Constitutional Treaty, but was abandoned. The same idea resurfaced more recently in the discussions on the Lisbon Treaty, but was once again abandoned⁹⁵. If a right to expel Member States from the EU or EMU does not exist, could such a right be asserted or should it be introduced? Several considerations are relevant here, all of which militate *against* the assertion, by way of interpretation, or otherwise, of a collective right of expulsion from the EU or EMU.

The *first* objection to reading a right of expulsion into the treaties is a *formal* one. A Member State's expulsion from the EU or EMU would inevitably result in an amendment of the

⁹³ This is hardly surprising, considering that the creation of the *acquis* has been cumulative, with the institutional 'ratchet effect' denying the possibility of reversals of course (and, implicitly, of withdrawals).

⁹⁴ The reference is to the principles of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States', introduced by the Treaty of Amsterdam in 1999. The unprecedented threat by the other Member States, in early 2000, to freeze bilateral political and diplomatic contacts with Austria if Joerg Haider's Freedom Party had joined a new ruling coalition is an illustration of the circumstances in which Article 7 EC might be activated. For a critical account see Constantinesco, pp. 44-50.

⁹⁵ Ellemann-Jensen.

treaties, for which the *unanimous* consent of all Member States is necessary under Article 48 TEU. Given that a Member State's expulsion would, by definition, be contrary to the presumed wish of that Member State to continue its membership of the EU, a right of expulsion would be inconceivable, since it would have to entail an unauthorised Treaty amendment, in breach of Article 48 TEU. Besides, it is likely that some Member States would object to the introduction of a right of expulsion in the treaties, coupled with an amendment of Article 48 TEU to make that possible, since this would expose them to the risk of being forced out at some future date.

Moreover, apart from it being politically almost inconceivable, forcing a Member State out of the EU or EMU would inevitably give rise to tremendous legal complexities. This, perhaps, explains why expulsion has not been, and may never be, provided for in the treaties⁹⁶. While, by and large, these complexities would not differ qualitatively from those relating to a Member State's *voluntary* withdrawal, their resolution would be even more complicated in the case of a Member State's expulsion, because of the risk of legal challenges by disgruntled natural persons, legal entities or even countries, objecting to the loss of the rights that they or their nationals may have acquired from membership of the EU and invoking their legitimate expectation of maintaining these in perpetuity as an obstacle to expulsion. The position has been cogently summarised as follows -

'participation in the European Union gives rise to a wide web of rights and obligations to citizens, companies and governments. To erase all those obligations at a stroke by expelling the member state would create huge confusion and penalise ordinary citizens

⁹⁶ For an account of the legal complexities of a Member State's expulsion see Herbst, p. 1757; and, in connection with expulsion from EMU, Thieffry, pp. 15-16; Proctor, p. 925; and Scott, pp. 218-225.

and ordinary businesses, who rely on their rights of residence and free movement, to name but two⁹⁷.

The *third* and perhaps most serious objection to the assertion or introduction of a collective right of expulsion from the EU or EMU is conceptually similar to one of the more potent objections to the existence of a unilateral right of withdrawal discussed in Part One of this paper. The extent to which asserting such a right would be legally possible must ultimately depend on whether, as a *sanction* or a *remedy*, expulsion and its rationale would be consistent with the *letter* and the *spirit* of the sanctions and remedies already provided for in the text of the treaties. On the compatibility of a collective right of expulsion with the *letter* of the treaties, a commentator has rightly argued that ‘the EC Treaty provides a set of remedies which can be invoked against the errant State, and there are no grounds for implying any additional remedies in the Treaty’⁹⁸. As discussed above, the *exhaustive* list of sanctions provided for in the treaties does *not* include a right to withdraw ‘in protest’ against a fellow Member State’s failure to comply with its treaty obligations; the same is true of expulsion, which is not catered for in the treaties, however serious or repeated a Member State’s non-compliance may be and however much its departure may be desired by its partners. On the compatibility of a right of expulsion with the *spirit* of the treaties, such a right would clearly be irreconcilable with the rationale of the existing body of sanctions for a Member State’s infringements of Community law. Even a cursory examination of the sanctions provided for in the treaties shows that their purpose is not to *punish* a Member State for failing to live up to the expectations of the other Member States, but to

⁹⁷ The Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Baroness Symons of Vernham Dean), Lords Hansard text for 28 April 1998 (180-428-05), Column 160.

⁹⁸ Proctor, p. 937; and Hill, pp. 352-353.

encourage it to comply with its treaty obligations⁹⁹. Since expulsion would put a Member State in a situation where it would no longer be able to comply with its obligations, however genuine its remorse for past mistakes and however firm its commitment never again to fail to meet its obligations, such a right would be at odds with the treaties, and in particular with the *conciliatory* rather than *punitive* nature of their sanctions for infringements of Community law. From this perspective, it is doubtful whether expulsion is conceivable, even as a measure of last resort, after all other means for turning round an errant Member State have been exhausted¹⁰⁰. This is because even so restrictive an application of a purported right of expulsion would not obscure the clear discrepancy between the *modest effects* of the treaty provisions for sanctions and the *radical effects* of expulsion or, *a fortiori*, the conflict with the requirement for unanimity in Article 48 TEU for decisions resulting in an amendment of the treaties.

Thus, not only is a collective right of expulsion not provided for in the text of the treaties, but, what is more, the legitimacy of its assertion or introduction would be highly questionable, both legally and conceptually. This main conclusion inevitably raises two further questions. Does the exclusion of a collective right of expulsion deprive the EU of the ultimate deterrent against a Member State's non-compliance, the existence of which would otherwise presumably ensure compliance? And, if so, would there not be a need to introduce such an explicit right in the treaties, so that the risk of a Member State failing to comply with its obligations is countered by the threat of its expulsion¹⁰¹? These questions hark back to the fundamental jurisprudential

⁹⁹ 'La Commission a, dès l'origine estimé que l'action en manquement avait pour finalité le rétablissement objectif de la légalité communautaire et que, dans cette perspective, la finalité de la nouvelle voie de droit de l'article 228 CE était d'aboutir à la disparition du manquement' (Gervasoni, p. 33).

¹⁰⁰ This view has been supported by Hill, pp. 352-353, e.g., suggesting that 'if a member state were to ignore the European Court and continue to violate the Treaty for an extended period of time, the action probably would be treated as exclusion of the member state from the EEC'.

¹⁰¹ To pose these questions seriously would be to ignore the historical antecedents and the *sui generis* nature of the European unification project which, as a commentator has argued, 'in contrast to past attempts ... to unite Europe by force ... is based on the consent of the Member States' (Hartley, p. 193). It would

question of whether sanctions are an integral part of any rule of law (even if only implicitly) or whether valid rules of law can exist even in the absence of sanctions for their infringement. An account of the evolution of legal thinking on this matter, and, in particular, of Hart's challenge to Austin's positivist theory of the law as 'the command of the sovereign, backed up by sanctions'¹⁰², lies outside the scope of this paper. However, for those who subscribe to the view that legal rules and sanctions are independent of one another, neither the lack of a possibility of expulsion nor the absence of any other sanction for breaches of Community law obligations is an aberration that some may feel the need to guard against through the assertion of a collective right of expulsion, nor does the lack of sanctions diminish the binding effect of Community law. In any case, the sanctions already provided for in the treaties and the damaging publicity from a Commission decision to commence infringement proceedings against a non-compliant Member State or an ECJ ruling against it are potent enough, even without the legal possibility of the errant Member State's expulsion from the EU or EMU.

B Indirect avenues of expulsion?

If expulsion from the EU is not an option under the treaties, does that mean that leaving an obstructive Member State behind would be impossible? Are there no *indirect* avenues for achieving much the same result? In the following there is a brief examination of these possibilities and the likelihood of their application.

One possibility would involve the extensive use by the errant Member State's partners of the 'enhanced co-operation procedure'. The purpose of this procedure, which is set out in Articles

also gloss over the fact that Community law *does* provide for heavy sanctions against errant Member States (even if these do not go as far as to expel them).

¹⁰² See Austin and Hart. For a critical assessment of Hart's proposition that legal obligations can exist even without sanctions, see Priel, p. 404.

43 to 45 TEU (now replaced by Article 20 of the TEU), is to ensure the asymmetric participation of a group of no fewer than eight Member States in a Treaty-based cooperation mechanism capable of enhancing integration between the Member States that are willing and able to prosecute European unification to its logical conclusion¹⁰³. While promising, as the least ‘isolationist’ alternative for a recalcitrant Member State, and more advantageous than intergovernmental cooperation outside the EU, the enhanced cooperation procedure has its share of drawbacks. The most obvious of these are that: (i) enhanced cooperation has never been used since its introduction by the Treaty of Amsterdam¹⁰⁴; (ii) it is not available in all areas of EU policy-making and activities (with Common Foreign and Security Policy being excluded); and (iii) the substantive and procedural conditions provided for its use in the EU Treaty are fairly strict¹⁰⁵. If it were supplemented by additional measures including extra-EU treaties or other informal action, the enhanced cooperation procedure could represent a genuine alternative to the treaties’ decision-making mechanisms, helping marginalise more ‘minimalist’, less ‘integrationist’ or otherwise ‘uncooperative’ Member States.

An alternative and somewhat more radical possibility would be for the mainstream Member States to agree on a new, treaty-based partnership with ‘an independent institutional

¹⁰³ Article I-43 of the Convention was modified to become Article I-44, ‘Enhanced cooperation’ in the Constitutional Treaty. The Lisbon Treaty takes on its core contents, with modifications resulting from its new terminology and detailed voting provisions. The most significant change is the fixing of the minimum of nine participating Member States, regardless of future enlargements, in accordance with the Intergovernmental Conference 2007 Mandate.

¹⁰⁴ A House of Commons Research Paper attributes this to the enhanced cooperation procedure’s complexity and to doubts as to its justiciability, nevertheless leaving open the possibility that ‘the desire for such action has simply not arisen among a sufficient number of States’ (House of Commons, IGC 2000: Enhanced Co-operation, Research Paper 00/88, 21 November 2000, 8).

¹⁰⁵ These are that enhanced cooperation must not affect the *acquis communautaire* or the interests of the non-participating States, that it must only be used as a last resort, and that any action taken on the basis of Articles 43 to 45 TEU must be within the limits of EC competence and must not distort competition between Member States.

structure outside the framework of the “old EU” (effectively, a ‘new Union’) to be ‘worked out, approved and ratified solely by the states participating in this new entity’¹⁰⁶. While, on the face of it, this alternative might appear ingenious, it would not be ideal. One obvious disadvantage of ‘recreating’ the treaties with one member fewer is that the new ‘replacement’ treaty would exist in parallel with the existing treaties, even though these would be no more than empty shells¹⁰⁷. There would inevitably be appreciable scope for competition between the ‘old’ Union and the ‘new’, and the risk of a division within Europe as a result of their rivalry. Besides, the alternative of a new treaty being entered into after its signatories have renounced the existing treaties could only work if *all* mainstream Member States agreed to leave the errant Member State out of the EU. In all likelihood, such a decision would be thwarted not only by the threatened Member State but also by some of its more Euro-sceptic partners. Ultimately, the likelihood of a ‘new’ Union coming into being is fairly small, requiring ‘a massive political effort on the side of the participating states’¹⁰⁸ and entailing ‘yet another Treaty adventure, the outcome of which is totally unpredictable’¹⁰⁹.

Thus, marginalising a Member State, even if not formally expelling it, would not be impossible, but none of the avenues available for achieving it would be ideal. Persuading a Member State to withdraw, by making use of the proposed exit clause or resorting to the regular Treaty revision procedure, may be the better option.

¹⁰⁶ Emmanouilidis, p. 4.

¹⁰⁷ The adoption of a new treaty could not be accompanied by the termination of the existing treaties to which an errant Member State is a signatory: this could only be achieved by amending the treaties, following the Article 48 TEU procedure.

¹⁰⁸ Emmanouilidis, p. 4.

¹⁰⁹ Boudewijn and Emmanouilidis, p. 2.

3 Implications of a Member State's withdrawal or expulsion for its euro area participation and its use of the euro

Membership of the euro area presupposes membership of the EU and participation in ERMII for at least two years, followed by the candidate Member State's adoption of the euro after a unanimous decision of the Council¹¹⁰. In the unlikely event that a Member State withdraws voluntarily or is expelled from the EU, its NCB's membership of the European System of Central Banks (ESCB) and euro area participation would be terminated, with the departing Member State having to restore its old currency or adopt a new one¹¹¹. Restoring a Member State's old currency or adopting a new one would inevitably involve considerable risks and difficulties and entail substantial legal complications, including with regard to the validity and enforceability of outstanding re-denominated contracts between debtors in the withdrawing Member State and their creditors. Successfully resolving the issues arising would necessitate very close cooperation between the departing and the remaining Member States¹¹². While it may sound attractive, the idea of using the agreement with the Council provided for in the Lisbon Treaty exit clause for negotiating a departing Member State's continued participation in EMU (even temporarily) *after* that Member State has withdrawn from the EU¹¹³ is questionable, not least from a public policy perspective. Accepting this would postulate the withdrawing Member State's right to 'pick and choose' which of its treaty obligations it will continue to be bound by (in this case, its EMU obligations) and which it will be released from after its withdrawal from the EU. This would effectively encourage an *à la carte* approach to EU participation which, while conceptually not that far removed from the opt-out clauses that some Member States have negotiated from the EU

¹¹⁰ See Articles 121-123 EC.

¹¹¹ This is without prejudice to the possibility of 'euroisation' (see below, Part Three).

¹¹² See Proctor, pp. 924-937; Thieffry, pp. 15-17; and Scott, pp. 217-225.

¹¹³ Louis, p. 29, who argues that a Member State could stay in the euro area if, upon withdrawal, it enters into an agreement with the EU to retain the euro; and, implicitly, Proctor, at note 77.

Treaty or, more recently, from the Lisbon Treaty, would pose a qualitatively different and arguably intolerable challenge to the EU's integrity and sustainability. Moreover, even if it were accepted that it *is* possible for a voluntarily withdrawing Member State to negotiate its stay in EMU, it would be difficult to envisage any such agreement allowing a departing Member State that is *expelled* by its EU partners to stay in EMU. The potential for unequal treatment, depending on the *manner* of a Member State's departure (in particular whether the departing Member State withdraws voluntarily or is expelled) favours the conclusion that withdrawal from the EU without a parallel, negotiated withdrawal from EMU would be inconceivable. The fact that the requirements for joining the EU (the Copenhagen criteria) differ from those applicable to euro area accession (the Maastricht convergence criteria) is of no relevance. EMU is a sub-set of the EU, which is why the Statute of the European System of Central Banks and of the European Central Bank - lying at the heart of the ESCB and the Eurosystem - is annexed as a Protocol to the EC Treaty. For this reason, a Member State's exit from the EU would *automatically* posit its exit from EMU.

Whilst a Member State's exit from the EU would, therefore, entail its exit from the euro area, this does not necessarily mean that the euro could no longer circulate in its territory. Indeed, a distinction should be made between a Member State's euro area participation, in an *institutional* sense, and the circulation of the euro in its territory. Institutionally, a former Member State's NCB could no longer form part of the euro area (i.e. it could not participate in the governance structure and decision-making bodies of the ESCB), at least not without an amendment to the EC Treaty and the Statute of the ESCB. Whether or not a former Member State could continue using the euro is a different, more controversial question, harking back to the 'euroisation' debate¹¹⁴ (especially if the Member State concerned proposes to use only the euro, which it would obtain

¹¹⁴ 'Euroisation' is defined as the official and total substitution of a national currency by the euro, *outside* the framework of the Treaty for the formal adoption of the euro by EU Member States. For an account of the economic justification and policy implications of euroisation, see Winkler.

from the market)¹¹⁵. There are two distinct ‘euroisation’ possibilities, the *unilateral* and the *consensual* one. The EU’s views on *unilateral* euroisation by a candidate country for accession to the EU, which would no doubt also apply to Member States with a derogation, have been made public and are summarised in the following excerpt from a 2001 Commission paper:

‘Any unilateral adoption of the single currency by means of “euroisation” would run counter the underlying economic reasoning of EMU in the Treaty, which foresees the eventual adoption of the euro as the endpoint of a structured convergence process within a multilateral framework. Therefore, unilateral “euroisation” would not be a way to circumvent the stages foreseen by the Treaty for the adoption of the euro.’¹¹⁶

As for the unilateral adoption of the euro by *third* countries (as a former Member State would be after its exit from the EU and EMU) there does not appear to be a clearly formulated Commission position, despite the fact that there are several examples of third countries or entities which, even though not having the status of acceding countries, have unilaterally adopted the euro. What is clear is that third countries cannot unilaterally adopt the euro *formally*, since the EC Treaty includes no procedure for the Council to approve the adoption of the euro by third countries.

¹¹⁵ A parallel circulation scenario, involving the use of the single currency, on the one hand, and the departing Member State’s restored or new national currency, on the other, would be less controversial, as the risks for the euro associated with euroisation (especially unilateral) would be less acute. For an account of these risks, whether in terms of the possible constraints on the issuer’s monetary policy or in terms of the pressures to accommodate the special needs of the countries which have adopted the issuer’s currency, see Cohen.

¹¹⁶ EC DGII, ‘Enlargement Argumentaire’, Enlargement Papers No 5, 2001, p. 21. This statement reflects an evolution of the Commission’s position as expressed in an earlier note where it stated that ‘[C]andidate countries cannot adopt unilaterally the currency of another area’ (European Commission, ‘Exchange Rate Strategies for EU Candidate Countries’, 22 August, 2000 ECFIN/521/2000, Brussels). The Commission’s position has been subject to criticism, some of it not unwarranted (see, e.g., Nuti, pp. 438-440; and Bratkowski and Rostowski, pp. 466-467).

While former EMU participating Member States would no longer have a domestic currency that they could, strictly speaking, euroise unilaterally, the Commission's and the ECB's¹¹⁷ position on unilateral euroisation by acceding countries suggests that the EU's policy stance would almost certainly be negative, also in their case¹¹⁸.

While a former Member State's unilateral euroisation would thus be highly controversial, this need not be true of a consensual euroisation. Indeed, Article 111(3) EC (now, Article 219 of the TFEU) provides for the possibility of concluding monetary agreements with States or international organisations, such as those entered into with Monaco, San Marino and the Vatican, upon the fulfilment of specific requirements such as cooperation against counterfeiting. Naturally, while consensual euroisation might be a possibility in *some* cases (following a Member State's voluntary withdrawal from the EU and EMU with the consent of its fellow Member States and following an amendment of the treaties) this need not necessarily be so in other cases (where a Member State has been *expelled* from the EU and EMU)¹¹⁹.

¹¹⁷ The ECB's position on unilateral euroisation is summarised in the following statement: 'the ECB ... would neither encourage nor facilitate such a move. Countries which unilaterally introduce the euro would do so in their responsibility and at their own risk, without committing the EU or the ECB. The ECB would thus pursue a policy of non-engagement and non-support towards these countries' (J. Stark, 'The adoption of the euro: principles, procedures and criteria', Speech delivered to the Icelandic Chamber of Commerce, Reykjavik, 13 February 2008, available at <http://www.ecb.int/press/key/date/2008/html/sp080213.en.html>).

In the case of non-EU EEA Member States, the EEA Treaty provides for mandatory 'monetary cooperation', which is understood as prohibiting unilateral euroisation by non-EU EEA Member States. Prior agreement with the EU would be required.

¹¹⁸ 'From the point of view of equal treatment, it would be difficult to conceive that the EU would be more open towards euroisation by non-candidate countries than by candidate countries or Member States with a derogation' (ibid.).

¹¹⁹ Assuming, of course, that such expulsion is legally possible.

Concluding remarks

Europe has moved forward by overcoming a succession of crises. The recent ratification of the Lisbon Treaty is proof of its success at overcoming major constitutional crises, such as Ireland's rejection of the Lisbon Treaty; there is nothing to suggest that it will not also rise to the challenges thrown up by the ongoing financial crisis, without losing either its sense of direction or any of its Members. The Irish ratification of the Lisbon Treaty on 4 October 2009, followed by the Polish and Czech Presidents' ratifications of the Treaty on 10 October and 3 November 2009, respectively, breathed new life into the European integration process, providing the EU with a fresh opportunity to deepen its integration with a greater sense of urgency and renewed energy. However, the importance of a workable consensus on the issues examined in this paper cannot be overstated if unconstructive ambiguities and prejudicial grey areas are to be avoided and if the measures intended to emphasise the voluntary nature of the Member States' commitment to EU's objectives are not to be an obstacle to them. One of the main conclusions of this analysis is that, whatever the merits of the recently enacted exit clause (and there are no doubt some), its precise *meaning* and its *consequences* should be thought through carefully if it is to bring more clarity to the possibility of and the conditions subject to which Member States may be able to walk away from the Union¹²⁰.

Finally, if changes to the EU's composition, whether by voluntary withdrawal or expulsion (or by the accession of new Member States), are not to lead to crises that are prejudicial to the EU's progress towards further integration, the treaty revision procedure in Article 48 TEU should be overhauled, despite the recent conclusion of the ratification process of the Lisbon

¹²⁰ In a sense, some lack of legal certainty is desirable. As suggested above, if expulsion is impossible this may deprive Member States of an incentive to comply with their obligations. The hitherto silence of the treaties on the issues of withdrawal and expulsion may therefore be preferable to clarity.

Treaty¹²¹. A simplified treaty revision procedure¹²² would do away with the need to introduce a separate exit clause or a right of collective expulsion from the EU and, equally importantly, with the need to overcome crises similar to those triggered by the non-ratification of Treaty amendments or by the vetoing of EU accession requests.

¹²¹ The Lisbon Treaty rules for amending the treaties refine the current treaty provisions, replacing Article 48 TEU with a new Article 48 which distinguishes between an ordinary revision procedure (requiring a Convention) and two simplified revision procedures (for the revision of some of the less sensitive parts of the treaties).

¹²² It has been suggested that such a procedure might involve an EU-wide referendum (see Emmanouilidis, p. 7). The advisability of a referendum is highly questionable, considering the grave political implications of such a step for the stability of the Union and its impact on the future relations between an expelled Member State and its former partners.

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