

The case against

The upcoming presidential election in France, and the case against EU membership made by one of the candidates, have raised questions as to the member state's options in the event of an exit. But legal obstacles would make the process difficult

1 MINUTE READ

France's departure from the eurozone or the European Union is being touted as a possibility in the event one of the main candidates wins the upcoming presidential election.

But this politically-motivated decision faces some national constitutional challenges and could entail a revision of the EU treaties, both of which could be difficult to carry out in practice. The first scenario would mean a complex national legislative process, while the latter would rest on the unanimous approval of the member states, which the authors argue is a lengthy process with an uncertain outcome.

Despite the obvious uncertainty and risk of harm to national interests that would arise from France deciding to exit the eurozone or the EU (so-called Frexit), the possibility of a presidential candidate advancing to victory on the basis of this agenda cannot be discarded. However, the risk of such an agenda being actually implemented seems fairly low. In addition to the traditional legal challenges arising in connection with a currency redenomination (particularly if it entails a devaluation), a Frexit scenario would face significant obstacles as a matter of EU and French law.

Indeed, France presents certain key differences with recent precedents. As opposed to the 2011-2012 Greek situation, Frexit would not be triggered by economic conditions but by the political decision of a founding member state, threatening the continued existence of the euro and the EU. It is therefore unlikely to secure the required unanimous consent of the other EU members. As opposed to the UK, France has enshrined its participation in the EU and the eurozone in its constitution – as a result, any attempt to implement Frexit would likely also face constitutional challenges.

Obstacles to a eurozone exit under EU law

Pursuant to the EU treaties, EU member states that have adopted the euro (ie members of the European Monetary Union or eurozone) have transferred their prerogatives in the monetary domain to the European Central Bank and the eurosystem, with national central banks retaining certain limited powers.

The Treaty on the Functioning of the European Union (TFEU) provides that the EU shall have exclusive competence in the area of monetary policy for the member states whose currency is the euro. One could argue that these provisions apply only to member states whose currency is the euro, and do not in and of themselves prevent an exit from the eurozone and a transfer of monetary prerogatives back to the relevant member state. However, the EU treaties also provide that the adoption of the euro is irreversible.

A president wishing to implement a eurozone exit could seek to adopt a redenomination law by way of referendum, counting on the fact that the Constitutional Court would decline to review the compliance of such a law with the constitution

Protocol no. 10 annexed to the Maastricht Treaty states that:

‘the High Contracting Parties declare the irreversible character of the Community’s movement to the third stage of Economic and Monetary Union by signing the new Treaty provisions on the Economic and Monetary Union’.

Similarly, an EU member state rejoining the eurozone (and therefore terminating the derogation allowing it to be a member of the EU but not the eurozone) requires both unanimous consent of the other eurozone members and an irrevocable undertaking to adopt the euro.

Council regulation on the introduction of the euro of May 1998 provides that *‘as from 1 January 1999 the currency of the participating Member States shall be the euro’* and *‘the euro shall be substituted for the currency of each participating Member State at the conversion rate’*. At its meeting in December 1995, the European Council decided the irrevocable fixing of conversion rates among currencies of participating countries and against the euro.

It was also provided that:

‘new tradeable public debt – particularly debt coming to maturity after 1 January 2002 – will be issued in Euro by the participating Member States as from 1 January 1999. By 1 July 2002 at the latest, public debt denominated in the former national currencies will be redeemable only in the single currency.’

The fact that signatories of the EU treaties intended for the adoption of the euro to be irreversible is confirmed by the absence of any mechanism allowing a unilateral withdrawal from the eurozone.

In order to exit the eurozone, France would therefore need to initiate a revision of the EU treaties with a view to introducing either a general eurozone exit procedure, or a specific protocol governing the withdrawal of

France from the eurozone. However, any such revision would require the unanimous approval of the other member states, and would not become effective until ratification by all member states in accordance with their respective constitutional rules, which is a lengthy process with an uncertain outcome.

Should France seek to unilaterally withdraw from the euro, for instance by adopting a redenomination law prior to unanimous ratification of the proposed revision by the member states, it would be in breach of its undertakings under the EU treaties, which could result in the initiation of an infringement procedure against it by other member states or the European Commission. Pursuant to both EU and French case law, France could incur liability for any damages suffered by individuals or legal entities as a result of such breach.

Furthermore, any such redenomination law could be challenged before French courts for violation of EU law, which has precedence over French laws by virtue of the EU primacy principle. A determination by French courts – possibly preceded by a ruling from the European Court of Justice should the French courts elect to raise a prejudicial question – that the redenomination law violates EU law would result in the inapplicability of the relevant law, the annulment of any implementing decrees (including decrees providing for the issuance of redenominated sovereign bonds), the unenforceability of any redenominated contracts or claims, as well as damages claims.

Obstacles to a eurozone exit under French law

A redenomination law would also face significant obstacles as a matter of French law.

Under the French constitution, matters relating to currency are within the competence of the legislator. As a result, the replacement of the euro by a new French currency could not be adopted by way of governmental decrees or orders but would require a legislative act, amending article L. 111-1 of the French Monetary Code (pursuant to which *‘the currency of France is the euro’*). It would also require, more broadly, an overhaul of the rules setting forth the powers and responsibilities of the national central bank, organising the issuance of new coins and notes, and implementing denomination and redenomination of contracts and claims in the new currency, and in particular setting the territorial, temporal and material scope of contracts and claims that would be redenominated as well as providing for any transitional dual-currency regime.

First, the adoption of such a legislative act would require a parliamentary majority, although this requirement could be bypassed by having the redenomination law adopted pursuant to a referendum under article 11 of the constitution.

Second, the principle according to which France is a party to the EU treaties (including the treaties relating to the eurozone) is enshrined in article 88-1 of the constitution, which provides that:

‘the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.’

Although the Constitutional Court has traditionally declined to review compliance of French laws with international treaties, a redenomination law would arguably violate not only the EU treaties but the principle of France’s participation in the EU and the eurozone. The Constitutional Court could therefore strike down the redenomination law as contrary to article 88-1, either upfront or in the context of a dispute brought before French courts.

In accordance with article 89 of the Constitution, any revision of article 88-1 of the constitution would require a majority vote by each of the National Assembly and the Senate (as well as ratification either by referendum or by a three-fifths majority of Congress).

A majority vote in favour of a eurozone exit in both the National Assembly and the

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Senate seems extremely difficult to achieve politically in the context of the current electoral system. It provides for a two-round run-off system for the election of members of the National Assembly (favouring the two major parties), and an electoral college consisting of representatives from each department, region and municipalities for the election of members of the Senate. If a revision was sought without France having obtained the unanimous consent of other EU member states, such a favorable vote in the national parliament would result in France being in breach of its obligations under the EU treaties.

The question is then whether a referendum under article 11 of the constitution would allow the president to bypass parliament, not only with respect to the adoption of the redenomination law, but also with respect to the amendment of article 88-1 of the constitution.

The Constitutional Court has traditionally declined to review the constitutionality of laws adopted by way of referendum, on the basis that it is not within its remit to second guess the expression of national sovereignty. It did so most famously in 1962 when it refused to strike down a law providing for the direct election of the president by the people and the elimination of the electoral college, which had been adopted by way of a referendum introduced at the initiative of President Charles De Gaulle.

It cannot be excluded that a president wishing to implement a eurozone exit would seek to adopt a redenomination law by way of referendum, counting on the fact that the

Constitutional Court would apply the 1962 precedent and therefore decline to review the compliance of such a law with article 88-1 and article 89 of the constitution. However, several obstacles would still exist.

Firstly, article 11 of the constitution requires the referendum to be submitted by the president based upon a bill proposed either by the prime minister or by a joint motion of the National Assembly and the Senate. Should the president's party not have a majority in the National Assembly, it is likely that the prime minister (who is appointed by the President but requires a vote of confidence – and can be dismissed – by a simple majority in the National Assembly) would be a member of a party other than that of the president, as has happened several times in the past decades (so-called *cobabitation*), in which case it is unlikely that a referendum would be triggered.

Secondly, the Constitutional Court is entrusted, pursuant to article 60 of the constitution, with the task of '*ensuring the proper conduct of referendum proceedings*'. While it has declined to review the outcome of referenda, the Constitutional Court has accepted to review preparatory acts to a referendum, including, in 2000, a presidential decree deciding to submit a proposed constitutional amendment to the referendum procedure. The Constitutional Court would therefore likely agree to review compliance with the constitution – and in particular with the principle of France's participation in the EU and the eurozone as set forth in article 88-1 of the constitution and with the requirement of a parliamentary majority for any constitutional

revision under article 89 of the constitution – of any decision to trigger a referendum with respect to a eurozone exit.

The article 50 route

It has been suggested that France could trigger a unilateral exit from the eurozone through the procedure for withdrawal from the EU under article 50 TFEU and then re-accede to the EU, using an opt-out clause with regard to its participation in the eurozone (in a similar way to the clause used by the UK and Denmark under the Maastricht Treaty).

This option seems unrealistic insofar as France's re-accession would be subject to unanimous approval of the European Council and the approval of the European Parliament, and ratification by all EU member states. The re-accession request could be rejected by EU member states, and as a result France, having simply wished to leave the eurozone, would end up leaving the EU altogether.

The French government could take this risk and trigger a full EU exit under article 50 of the TFEU, similar to the Brexit process launched by UK Prime Minister Theresa May on March 29 2017. As opposed to a eurozone exit, this process would not require the unanimous consent of the EU member states, thereby avoiding the above-mentioned EU law obstacles. However, any decision to withdraw from the EU would face French constitutional challenges similar to those described above with respect to a withdrawal from the eurozone.

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