

What Haering vs. Hessischer Rundfunk Will Imply for the Legality of a Parallel Currency

[March 31, 2020 | On 15 June, as part of the Häring vs. Hessischer Rundfunk case, the European Court of Justice will rule on the conditions under which governments may restrict the use of the legal tender of the euro area. There is a lot at stake, not only for my campaign to obstruct the campaign to abolish cash, but also for the survival of the European Monetary Union.](#)

This may sound exaggerated, but I think it isn't. After all, the arguments against my case can be used to declare a national parallel currency legal.

Italy's last government coalition of 5-Stars and Lega was already on the verge of introducing so-called mini-BOTs as a parallel currency when it broke up. BOTs are government bonds denominated in euro. Mini-BOTs are government bonds in small denominations which look similar to banknotes and can be used like them.

What is the purpose of a national parallel currency?

Unlike normal currency areas, the individual countries of the European Monetary Union do not have their own central bank, which focuses on national concerns and on the financial needs of the government. Instead, the last 12 years have seen some bitter clashes between the European Central Bank (ECB) and some national governments. The ECB has regularly won. It has two very effective instruments of power. It can refuse to help governments whose bonds are under selling pressure and can even increase the selling pressure through verbal and other intervention. Then that government is threatened with bankruptcy.

Even more radically, and already used as a threat against the Irish and Greek governments, it can cut off the national banks from the money supply on which all banks depend. This will then lead to the collapse of the banking and payment system there.

That is why Yanis Varoufakis, the then Greek Finance Minister, was secretly working on a parallel currency during the conflict with the ECB. With such a parallel currency, which it can issue itself, a government can increase the circulation of money at home, which boosts the economy, and it can take the edge off any threats from the ECB.

What may be attractive for a disaffected national government could be the beginning of the end of monetary union. If parallel currencies became the norm, there would no longer be a single monetary policy and the ECB would be disempowered.

What does a parallel currency have to do with Haering vs. Hessischer Rundfunk?

For my alleged right to be able to pay my public broadcasters' fee in cash, I am invoking the status of euro notes and coins as legal tender in the monetary union. According to the prevailing view, this means that sovereign authorities may not refuse to accept them for the cancellation of monetary debts and that private parties may only refuse them if they have expressly or implicitly agreed on some other payment method beforehand.

In the ECB's view, it would be contrary to European law to design government bonds in such a way that they become a banknote substitute, as this would undermine the status of the euro as legal tender in the Monetary Union. The most relevant article of the EU Treaty (TFEU) is the same as the one I have been invoking in the proceedings before the German courts and the European Court of Justice (ECJ), namely Article 128, which

declares euro cash to be legal tender and gives the ECB the sole right to issue it.

If, for example, euro cash were to be partly replaced in Italy by mini-BOTs, its function as legal tender and anchor of the monetary system in Italy could be undermined.

According to our reasoning, the same is true if the function of legal tender is undermined by government agencies not accepting the legal tender or restricting its use for private transactions.

If the ECJ were to conclude that the latter is not in violation of European law, such a ruling could undermine the legal arguments against the issuance of parallel currencies.

To illustrate this, I will sketch a hypothetical ECJ decision that adopts arguments against our position, as they have been put forward by relevant parties in the course of the proceedings. For reasons of confidentiality, I will not attribute the arguments to individual governments or institutions. I will then show how, as an example, a future Italian government could invoke such an ECJ ruling in a dispute over mini-BOTs.

A hypothetical ECJ decision

The European Court of Justice decides:

- *Governments of the Member States have the authority to impose legal restrictions on the use of cash, provided that these restrictions are in pursuit of a legitimate public interest objective and are proportionate.*
- *The requirement of a legitimate public interest objective is to be interpreted broadly and includes the regulation of public finances and the efficiency of public administration.*
- *Restrictions on the use of cash for specific purposes do not conflict with the legal tender status of euro cash under Article 128 TFEU.*

The reasons

- *The circulation of the euro as legal tender can take place by indirect means, by transferring bank balances in euro which the recipient can then exchange for euro banknotes. For this reason, the exclusion of cash payments does not lead to a loss of confidence in the value and usability of euro banknotes as a means of payment.*
- *A creditor may refuse to discharge to accept euro cash if another method of payment has previously been agreed. National legislation may replace this agreement by requiring the use of means of payment other than cash in certain cases, provided that these means of payment are denominated in euro.*
- *The obligation to accept cash is a secondary aspect of the status of legal tender. It is only relevant if the debtor offers to repay the debt with cash. However, national legislation may prohibit the debtor from using cash for the repayment of a monetary debt. In this case, the obligation to accept cash for the creditor loses its relevance.*
- *Recital 19 of Regulation 974/98 on the introduction of the euro states that 'limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available'. The decisive factor for admissibility is that payment can still be made in euros so that the function of the euro as a currency is not impaired.*
- *The Union's exclusive competence for monetary policy does not prevent Member States from adopting rules on means of payment within the framework of their own competences, for example for the organization and functioning of public administration., if they pursue a legitimate public interest objective and respect the principle of proportionality.*

- *The rules on payment of the broadcasting fee are not rules in the field of monetary policy but rules on a parafiscal charge. There is an alternative method of payment in euros, namely with bank deposits in euros. If there is an exemption rule for specially justified cases of cash use, the non-acceptance of cash as a rule is proportionate and in conformity with European law.*
- *The question of whether payments have to be done in cash or with non-cash means of payment is not an issue of monetary policy, because monetary law does not contain any provisions on the use of currency in legal transactions. Member State regulations which determine which payment methods are permitted in specific cases fall within their legislative competence and do not interfere with the tasks of the Union institutions in the area of monetary policy.*
- *Article 133 TFEU, which allows the Union to take measures aimed at the unity and integrity of the euro as a currency, aims only at rules ensuring that the euro can be used in economic transactions with the same value throughout the monetary area. This applies only to regulations of the kind which aim, for example, to protect euro banknotes and coins against confusion or counterfeiting. The question of cash or non-cash payment is irrelevant in this context as long as payment is made in euros.*

How to defend Mini-BOTs before the ECJ

Let us now see, given this hypothetical ECJ decision, how a government might make use of it to defend a parallel currency. By way of example, let's suppose a future Italian government plans, as a precautionary measure, to establish an alternative means of payment so that it can fall back on it in the event of a dispute with the ECB.

Let's suppose, it introduces a modest amount of mini-BOTs, interest-free government bonds with a maturity of, for example, 30 years, in the form of physical pieces with nominal values of between EUR 5 and EUR 200. They are not imposed on anyone. They will be auctioned off, similar to normal government bonds. To ensure that the auction price is as close as possible to the face value, the holder is entitled to exchange them for euro cash at any time at a bank at the expense of the Treasury, or to use them for payments to the State.

The European Central Bank sees the substance of its monopoly on issuing the legal tender undermined and intervenes with the EU Commission, which initiates infringement proceedings against the Italian government.

In order to defend itself in the proceedings before the European Court of Justice, the Italian government could invoke the above hypothetical judgment of the ECJ in the case of Häring v. Hessischer Rundfunk as follows:

According to a decision of the European Court of Justice of 15 June 2020,

- *the circulation of the euro as legal tender can be effected by indirect means like transferring bank balances in euro which the recipient may exchange for euro banknotes. Like banknotes, mini-BOTs can be exchanged for euro cash by the recipient at any time. The circulation of the euro as legal tender is therefore not disturbed by the issuance of Mini-Bots.*
- *Article 133 TFEU, which allows the Union to take measures aimed at the unity and integrity of the euro as a currency concerns only regulations of the kind which aim, for example, to protect euro banknotes and coins against confusion or counterfeiting. The question of cash or non-cash payment is irrelevant for the currency unit as long as payment is made in euros. It is thus also irrelevant to the currency unit whether payment is made in cash or mini-BOTs. One euro remains one euro throughout the currency area. The issue of mini-BOTs therefore does not disturb the uniformity and integrity of the euro as a currency.*

Mini-BOTs are being developed into a parallel currency

In our scenario, the Italian government, after an initial success before the ECJ, comes into conflict with the EU-Commission and the ECB over the public finances shattered by the Corona crisis, because it does not want to make drastic cutbacks to expenditure to reduce debt, as required. In order to alleviate the pressure from collapsing bond prices and from the ECB, the government decides to settle its bills in the future partly in the form of mini-BOTs and to accept payments to public bodies only in the form of mini-BOTs, as a rule.

The ECB intervenes again with the Commission, which initiates infringement proceedings. The Italian government might again invoke the (hypothetical) ECJ decision of 15 June by arguing:

- *The Union's exclusive competence for monetary policy does not prevent Member States from adopting rules on means of payment within the framework of their own competences, such as those relating to the organization and functioning of public administration., if they pursue a legitimate public interest objective and respect the principle of proportionality. The payment of invoices with mini-BOTs denominated in euro, which can be exchanged for euro banknotes at any time, is such a rule on means of payment which serves the above purposes.*
- *The payment of invoices by the state and the settlement of tax debts and other charges with mini-BOTs is not a regulation in the field of monetary policy but a regulation on state charges and state procurement. Payment is made in euros. Since there are exceptions for particularly justified cases of the use of other means of payment, the non-acceptance of cash or bank book money as a rule is proportionate and in conformity with European law.*
- *The question of whether cash or non-cash payments are made is not relevant for monetary policy, as monetary law does not contain any provisions on the use of currency in legal transactions. The same applies to the question of whether payment is made in cash or mini-BOTs. Member States' rules which determine which payment methods are permitted in specific cases fall within their legislative competence and do not interfere with the tasks of the Union institutions in the field of monetary policy.*
- *A creditor may refuse to discharge a monetary debt by handing over euro cash if another method of discharge has previously been agreed on a voluntary basis. The national legislator may replace this agreement by requiring the use of means of payment other than cash in certain cases, provided that these means of payment are denominated in euro. Thus, the legislator may prescribe the use of mini-BOTs instead of cash or bank money.*

Concluding remarks

Ironically, the majority of the arguments used here in the legal defence of a parallel currency come from governments and institutions that cannot be accused of wanting to promote parallel currencies. I assume that in their eagerness to get rid of cash, they have not given enough thought to the possible repercussions.

It is particularly noteworthy that everyone seems to agree that this ominous recital 19 of the 1998 euro changeover regulation is an empowerment for national governments to introduce new limits on the use of the legal tender, even though this argument is very shaky. Recital 19 talks about 'established' limits, in other words limits which have been introduced before the changeover and which may be maintained. It does not talk about limits which might be introduced later. It states as a condition that other "legal means for the settlement of monetary debts" are available. The legally undefined term "legal means" can mean two things: Either any means of payment that is not prohibited. This could be anything and is therefore not a meaningful interpretation. Or, what is meant is legal tender in another form. That would be a sensible interpretation, particularly in the context of this regulation. Pre-existing limits on the number of coins that have to be accepted as payment would then remain legal, because there are also larger coins and notes as alternatives which are also legal tender. Similarly, rules can remain in force whereby it is not obligatory to accept a very large banknote for a small bill, because there are smaller notes and coins as alternatives which are legal tender.

Money and more

Blog by Norbert Häring

<https://norberthaering.de>

I would like to prove this point by taking advantage of the general right to inspect the archives of the ECB and the European Commission. But the ECB turned me down with the claim that documents on the origin and purpose of recital 19 do not exist in the ECB's archives, but only in those of the Commission and the Council. The EU Commission told me that it too had nothing and that I would have to turn to the EU Council to obtain them. I am still waiting for the Council's answer, I fear until after the hearing.

[German version](#)

[Dossier on the court case Haering vs. Hessischer Rundfunk](#)