

## The European Court of Justice and the Stability and Growth Pact - Just the Beginning?

**Barbara Dutzler and Angelika Hable**

European Integration online Papers (EIoP) Vol. 9 (2005) N° 5;  
<http://eiop.or.at/eiop/texte/2005-005a.htm>

Date of publication in the  : 1.3.2005

| [Full text](#) | [Back to homepage](#) | [PDF](#) |  
 | [This paper's comments page](#) | [Send your comment! to this paper](#) |

### Keywords

European law, economic integration, stability and growth pact, economic policy, competences, institutions, law

### Abstract

The procedures launched against Germany and France due to their excessive deficits, again brought the attention of the media and broader public to the Stability and Growth Pact (SGP). The point of culmination was reached when the European Commission filed a claim against the Council (C-27/04) which in essence concerned the enforceability and, thus, the functioning of the SGP in the context of the required cooperation between the two Community institutions. The ruling of the European Court of Justice (ECJ), however, was comparably more reluctant. While concentrating on the concrete steps taken by the Council in the deficit procedures against Germany and France, it sidestepped key questions on the nature and the sequence of the procedure and the division of power between Council and Commission in the enforcement of national budgetary discipline. As a result, the extent to which the system of fiscal surveillance and economic policy coordination binds the Member States, as well as the institutions, remains unsettled. The same can be said regarding the interplay between the Council and Commission not only in the case at hand, but also in future excessive deficit procedures. Can the procedure be continued against the will of the Council? Can there ever be sanctions against the will of the Council? Does the SGP therefore effectively force the Member States to abide by the principle of fiscal discipline?

It is one thing to confirm the Council as the central actor and decision-maker in the deficit procedure; it is, however, another to remain silent on the limits of the Council's discretion. When the ECJ mentions the possibility of an action for failure to act, it acknowledges the shortcomings of the procedure in those cases where the Council is unwilling to decide. Nevertheless, the ruling opens additional loopholes for inaction by the Council. This might be fatal not only for the current decisive phase of the excessive deficit procedure against Germany and France, but also for the existence of the pact as such. With the case of Italy, where the Council failed to adopt the recommendation of the Commission to initiate the early warning procedure, the next conflict between Commission and Council is pending. With the adoption of its Communication of 3 September 2004, the Commission has meanwhile reignited the discussion on the reform of the SGP at the political level.

### Kurzfassung

Die Defizitverfahren gegen Deutschland und Frankreich rückten den SWP in den Blickpunkt des öffentlichen Interesses. Sie kulminierten in einer Klage der Europäischen Kommission gegen den Rat (C-27/04), die im Kern die Durchsetzbarkeit und somit das Funktionieren des Stabilitäts- und Wachstumspakts (SWP) vor dem Hintergrund des notwendigen Zusammenspiels der beiden Institutionen zum Inhalt hatte. Das Urteil des Gerichtshofes fiel vergleichsweise zögerlich aus. Während er sich auf die konkrete Vorgehensweise des Rates in den Defizitverfahren gegen Deutschland und Frankreich konzentrierte, wich er zentralen Fragen zum Verfahrensablauf und der Machtverteilung zwischen Rat und Kommission bei der Durchsetzung der staatlichen Haushaltsdisziplin aus. So bleibt das System der Überwachung der Staatshaushalte und der Koordination der Wirtschaftspolitiken in seiner Bindungswirkung unbestimmt. Ebenso ungeklärt

ist das Zusammenspiel von Rat und Kommission sowohl in den vorliegenden als auch künftigen Defizitverfahren. Kann das Verfahren gegen den Willen des Rates voranschreiten? Kann es jemals gegen den Willen des Rates zu Sanktionen kommen? Zwingt der SWP die Mitgliedstaaten somit wirksam zur Einhaltung der Haushaltsdisziplin?

Die Bestätigung des Rates als zentraler Akteur und Entscheidungsträger des Defizitverfahrens ist eine Sache; das gleichzeitige Schweigen zur Grenze des Ermessens des Rates aber eine andere. Mit dem Hinweis auf die Möglichkeit einer Untätigkeitsklage greift der Gerichtshof die Schwächen des Verfahrens im Falle der "Entscheidungsunwilligkeit" des Rates auf. Gleichzeitig öffnet das Urteil jedoch weitere Schlupflöcher für eine solche Untätigkeit, was nicht nur in der derzeitigen entscheidenden Phase der Defizitverfahren gegen Deutschland und Frankreich, sondern auch für die Existenz des Paktes als solchen fatal sein könnte. Mit dem Fall Italiens, wo der Rat einstimmig die Empfehlung der Kommission über die Einleitung des Frühwarnverfahrens nicht annahm, kündigt sich bereits der nächste Konflikt zwischen Kommission und Rat an. In der Zwischenzeit hat jedoch die Kommission durch ihre Mitteilung vom 3. September 2004 die Diskussion um die Reform des SWP wieder auf die europapolitische Bühne gehoben.

#### The authors

Dr. **Barbara Dutzler** MPA-Candidate, Kennedy School of Government, Harvard; email: [barbara\\_dutzler@ksg06.harvard.edu](mailto:barbara_dutzler@ksg06.harvard.edu); **Angelika Hable** Mag.iur., LL.M. (Brugge), [Europainstitut](#), [Wirtschaftsuniversität Wien](#); email: [angelika.hable@wu-wien.ac.at](mailto:angelika.hable@wu-wien.ac.at)

## The European Court of Justice and the Stability and Growth Pact - Just the Beginning? (\*)

**Barbara Dutzler and Angelika Hable**

European Integration online Papers (EIoP) Vol. 9 (2005) N° 5;  
<http://eiop.or.at/eiop/texte/2005-005a.htm>

Date of Publication in  : 1.3.2005

| [Abstract](#) | [Back to homepage](#) | [PDF](#) |  
 | [This paper's comments page](#) | [Send your comment! to this paper](#) |

### Contents:

- [1. Introduction](#)
- [2. The History – The Excessive Deficit Procedure against France and Germany](#)
  - [2.1. The Starting Point of the Procedures](#)
  - [2.2. The Council Recommendations on Art 104\(7\) and the Commission's Evaluation](#)
  - [2.3. The Moment of Truth – What the Council should have done according to the Commission](#)
  - [2.4. The Bone of Contention – What the Council effectively did on 25 November 2003](#)
- [3. Commission versus Council – The Judgment of the ECJ](#)
  - [3.1. Preliminary Analysis](#)
  - [3.2. The Failure to adopt the Recommendations](#)
  - [3.3. The Council's Conclusions](#)
    - [3.3.1. Admissibility of the Action – The Legal Nature of the Conclusions](#)
    - [3.3.2. Substance – The Annulment of the Council's Conclusions](#)
      - [3.3.2.1. The Court's Position on the Basics and the System of the SGP](#)
      - [3.3.2.2. The Positions of the Parties on the Excessive Deficit Procedure](#)
      - [3.3.2.3. Analysis – The Court's Statements regarding the Course of the Procedure](#)
      - [3.3.2.4. The Court's Substantive Analysis – The Legality of the Conclusions](#)
      - [3.3.2.5. The Positions of the Parties regarding the Conclusions](#)
      - [3.3.2.6. Analysis – The Court's Statements regarding the Institution's Substantive Powers of Discretion](#)
- [4. Summary and Prospects](#)
  - [4.1. Summary](#)
  - [4.2. Prospects: Options of the institutions in the procedures at hand](#)
- [References](#)

## 1. Introduction <sup>↑</sup>

Since Maastricht, the Member States and the Community are held to comply with the guiding principle of sound public finances (Art 4(3) EC). With the beginning of the third stage of economic and monetary union (EMU), they are to avoid excessive government deficits (Art 104(1) EC).<sup>(1)</sup> These obligations, as well as the rules on the economic policy coordination laid down in Art 99 EC, are concretised by the Stability and Growth Pact (SGP).

The infamous SGP consists of two regulations and a resolution of the European Council<sup>(2)</sup> and was adopted primarily on German initiative.<sup>(3)</sup> In the medium term, the SGP is to ensure the second convergence criterion, the ‘sustainability of the government financial position [...] apparent from having achieved a government budgetary position without a deficit that is excessive’ (Art 121(1) EC). In a certain way, the SGP was also designed to act against fears that fiscal discipline would fade once the Member States had fulfilled the convergence criteria and been admitted to the third stage of EMU. The absence of a disciplining effect of the market in a monetary union increases the risk of all participants having to bear the consequences an unsound budgetary policy pursued by particular Member States, member states who also in turn then can profit from the advantages of the stability oriented policy pursued by the other participating states (free rider problem, spill-over effects). This was generally regarded as the driving concern of the ECB to push for the SGP, in order to guarantee its functional independence in the shaping and controlling of monetary policy.<sup>(4)</sup> The SGP thus aims at securing a sound financial management of national budgets, in order to safeguard the stability of the European monetary union and policy.<sup>(5)</sup> However, critical voices described the procedures for implementing these objectives as long winded and not very effective.<sup>(6)</sup> Not least the dependency on the political will of the Member States hampers the effective enforcement of the SGP, as they themselves may be subjected to the procedure and are thus not neutral to the process.<sup>(7)</sup> Since it was put in place, public discourse thus questions whether the SGP is a suitable means to discipline national budgetary policies. These doubts were confirmed by the deficit procedures against Germany and France.

On 25 November 2003, the Council<sup>(8)</sup> decided not to follow the recommendations of the Commission and not to proceed with the deficit procedures against Germany and France, but only to adopt “political conclusions”. At this point, both Member States had already gone through most steps of the multi-level procedure. The adoption of the proposed recommendations by the Council would have set the last step before imposing sanctions for the first time in the history of the pact; this, and not the differences regarding the scope and nature of the measures that Germany and France should take, was the main reason for the contested step taken by the Council. The “moment of truth” was reached.<sup>(9)</sup> When the Member States agreed to the binding sanctioning mechanisms of the SGP, they in principle showed the courage to be constrained, at least on paper. However, when it became clear that the sanctions might actually be employed for the first time, the majority in the Council shied away from such interference in national sovereignty. According to the Commission, the credibility and effective enforcement of the SGP was thereby put at risk. It is against this background that the crucial importance and the eagerness for the Court’s interpretation of the SGP should be understood.

This article gives an overview of the deficit procedures against Germany and France and comments on the ruling of the ECJ with a view to the different positions of the Council and Commission. On this basis, the last section outlines some hypotheses on the consequences of the ruling for the future excessive deficit procedures.

## **2. The History – The Excessive Deficit Procedure against France and Germany**

### **2.1. The Starting Point of the Procedures**

The excessive deficit procedure as laid down by Art 104 EC and Reg 1467/97 is shaped by the interplay between the Council and Commission. Primary law regulates the division of labour between the institutions, as well as the legal instruments in the respective steps of the procedure.

Reg 1467/97 clarifies and strengthens the rules contained in Art 104 EC by specifying the terminology, and sets out a rigorous course of action by imposing time limits. The procedure follows several, clearly delimited stages, each of them initiated by the Commission.

In order to monitor budgetary discipline, the Commission's first step is to report on the fulfilment of two criteria, taking the economic and budgetary situation of a country into account.<sup>(10)</sup> These criteria are the ratio of government deficit to gross domestic product (GDP) and the level of government debt relative to GDP. The reference values, which when exceeded trigger the deficit procedure, are specified in a protocol to the Treaty. Currently, the deficit allowance lies at 3% of GDP and the debt allowance at 60% of GDP.<sup>(11)</sup> For Germany, the Commission report was prepared on 19 November 2002, for France on 2 April 2003, shortly after the publication of the Commission's autumn and spring forecasts, respectively.<sup>(12)</sup> Within two weeks, the Economic and Financial Committee (EFC) formulated an opinion (Art 104(4) EC and Art 3(1) Reg 1467/97).

If the Commission considers that an excessive deficit in a Member State exists or may occur, it issues, in a second step, an opinion as well as a recommendation for decision to the Council (Art 104(5) EC, Art 3(2) Reg 1467/97). In practice, this occurs simultaneously, such as in the case of Germany on 8 January 2003 and on 2 May 2003 in the case of France, where the Commission recorded an excessive deficit for the year 2002.<sup>(13)</sup>

On the basis of this recommendation, the Council decides by qualified majority, where appropriate following observations of the Member State concerned, whether an excessive deficit exists (step three - Art 104(6) EC and Art 3(3) Reg 1467/97). If the Council states such an excessive deficit, which was the case for Germany on 21 January and for France on 3 June 2003<sup>(14)</sup>, it simultaneously issues a recommendation to the respective Member State. According to the relevant provisions, this recommendation will establish a deadline of four months at most for effective action to be taken by the Member State and, unless there are special circumstances, to complete the correction of the excessive deficit in the year following its identification (step 4 - Art 104(7) EC and Art 3(4) Reg 1467/97).

For the remainder of the proceedings, the Council recommendations pursuant to Art 104(7) EC constitute the benchmark and the frame of reference for Commission and Council to evaluate the Member States' endeavours for a deficit reduction. These recommendations were also the initial cause of the conflict between the Council and Commission.

## **2.2. The Council Recommendations on Art 104(7) and the Commission's Evaluation**



In the case of France, the Council recommendations on the basis of Art 104(7) established a deadline of 3 October 2003 for the taking of appropriate measures for a deficit reduction.<sup>(15)</sup> In particular, France was asked

- to achieve a deficit below 3% of the GDP in the year 2004, which would necessitate measures to reduce the cyclically-adjusted deficit by at least 0.5% of the GDP;
- to rectify the cyclically-adjusted deficit of 2003 and to prevent an excessive increase of the debt ratio;
- to implement a pension reform policy.

On 8 October 2003, the Commission observed that France had not taken effective action on the substance of the Council recommendation.<sup>(16)</sup> Particularly the Commission stated that

- in 2003, several marginal measures (0.03 % of the GDP) had been taken, but had not improved the cyclically-adjusted deficit;
- the budget for 2004, in fact, contained measures to the extent of 0.6 percentage points, but these were not sufficient, in order to go below the 3% benchmark;
- the debt quota had not been reduced.

In the case of Germany, the Council in the recommendation under Art 104(7) EC set a deadline of 23 May 2003, in order to take effective action for deficit reduction.<sup>(17)</sup> In the face of the economic slowdown, the content of the recommendation was clearly more moderate:

- The deficit for 2003 only had to be reduced to 3% of the GDP by measures amounting to 1% of GDP in the case of a real growth rate of 1.5% (This limitation, however, did not apply to the consolidation measures of 0.5% due in the subsequent years).
- Moreover, the recommendation did not explicitly address Germany's obligation to correct the excessive deficit in 2004, except for a reference to Art 3.4 Reg 1467/97 in the recitals.

On 21 May 2003, the Commission submitted an unreleased analysis to the EFC, which confirmed the implementation of the requested measures of budgetary consolidation amounting to close to 1% of GDP. Consequently, the excessive deficit procedure was held in abeyance, as Germany was considered to have acted in compliance with the Council's Art 104(7)-recommendation (Art 9(1) Reg 1467/97 first indent). Yet, if subsequently action by the Member State concerned proves to be "inadequate", the Council is called on to immediately resume the procedure (Art 10(2) Reg 1467/97). From the Commission's point of view, this became necessary as of 18 November 2003.

In summary, the Commission found that France had not taken effective action and Germany had adopted inadequate measures to implement the Council's recommendations. The Commission therefore issued recommendations to the Council to advance with the proceedings and, in particular, to take action with respect to Art 104(8) or Art 104(9) EC respectively.<sup>(18)</sup>

### 2.3. The Moment of Truth – What the Council should have done according to the Commission <sup>↑</sup>

The Council decisions on the basis of the Commission's recommendations pursuant to Art 104(8) und (9) EC mark the beginning of the last steps of the excessive deficit procedure. Only the potential release of the Council's recommendations (Art 104(8)) and a notice to the Member States concerned to take the necessary measures within a specified time limit (Art 104(9) EC) precede the imposition of sanctions. "*Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public*" (Art 104(8) EC). In the proceedings against Germany and France, however, the respective recommendations had been published simultaneously with their adoption in the Council.<sup>(19)</sup> If and how the Council should determine the absence of effective measures remained unsettled. Treaty and secondary law both say nothing regarding the form of such a decision.

Art 104(9) EC stipulates that "*if a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.*" Art 5 Reg 1467/97 adds that this decision shall be taken "*within one month of the Council decision establishing that no effective action has been taken in accordance with Article 104c (8).*" It is also essential that Art 104(9) EC only applies to members of the euro area. The decision, therefore, is made with a qualified majority of two thirds of the euro area

countries, with the exception of the Member State concerned.

---

5

If finally a Member State also fails to comply with a Council decision taken in accordance with paragraph 9, the Council may decide to apply sanctions pursuant to Art 104(11) EC. Such a decision should, in accordance with Reg 1467/97, be taken no later than two months after the Council decision giving notice to the Member State concerned. Also in this case only euro area countries will participate in the decision-taking.(20) Reg 1467/97, thus, assumes an entire duration of the excessive deficit procedure of ten months. Art 11 Reg 1467/97 requires as a rule a non-interest-bearing deposit whenever the Council decides to impose sanctions.(21) If the excessive deficit has in the view of the Council not been corrected within two years after the decision requiring the deposit, the Council will convert the latter into a fine (Art 13 Reg 1467/97).

Pursuant to the Commission's recommendations, on 25 November 2003 the Council was thus called on to state the absence of effective or adequate measures and to give notice to Germany and France to take, within a specified time limit, the necessary measures for a deficit reduction. The first difficulties, however, arose in even allowing a vote on the Commission's recommendations. Only upon application of the Commission, which was supported by a majority of the Member States, did a vote on the four recommendations take place. However, the necessary majority for the adoption of the Council decisions could not be achieved for either of the deliberations.(22) Essential for this failure was the mutual backing of the accused and prospective deficit delinquents. With a view to the insufficient consolidation efforts of Germany and France, the Council was thus confronted with the challenge to find an alternative *modus operandi*.

#### **2.4. The Bone of Contention – What the Council effectively did on 25 November 2003** ↑

As the Council asserted during the oral proceedings before the ECJ, in the run-up to the vote on 25 November 2003 several delegations had requested the adoption of new Council recommendations on the basis of Art 104(7) EC. This claim was lodged particularly with a view to the efforts made by Germany and France to reduce their deficits. It was furthermore held to be necessary, as the significant deterioration of the economic situation had rendered the original recommendations obsolete. The Council, however, did not feel empowered to adopt a new recommendation in the absence of a preceding recommendation from the Commission.(23) The only possibility to avoid silence on the part of the Council and to preserve the credibility of the Stability and Growth Pact was seen in the adoption of the political conclusions. As the Council argued during the proceedings, the conclusions had enabled it to indicate to each of the two Member States concerned what they had to do in order to remedy their excessive deficit situation, while recording the change in the economic situation and the measures taken and commitments made by them.(24) Moreover, the conclusions made clear that the excessive deficit procedures had not been brought to a close, but were simply held in abeyance and manifested the Council's preparedness *to act, in the future, under Article 104 (9) EC should the Member States concerned not comply with their commitments*.(25)

The essential change in the conclusions in comparison to the Council's recommendation under Art 104(7) EC was the one year extension of the Member States' deadline until 2005. This change corresponds to the Commission's recommendations. In addition, the other commitments that were undertaken by Germany and France in the conclusions only marginally deviated from the Commission's recommendations. Both Member States should achieve a deficit below 3% of GDP by 2005 at the latest, implement the consolidation measures necessary to this point in 2004, and reduce the deficit by 0.8% of GDP in the case of France instead of 1% as proposed by the Commission and by 0.6% instead of 0.8% in the case of Germany.(26) The Council adopted the conclusions in

accordance with the voting procedures applicable for a decision under Art 104(9) EC, i.e. by excluding the non-euro area member countries.<sup>(27)</sup>

---

6

In a statement in the Council's minutes of the meeting, the Commission voiced its concern about the Council's way of proceeding, and particularly its departure from the spirit and rules of the SGP. Consequently, the Commission reserved the right to examine the implications of the Council conclusions and decide on possible subsequent actions. By lodging a claim against the Council on 27 January 2004, the Commission submitted the issue for review to the European Court of Justice.

### **3. Commission versus Council – The Judgment of the ECJ<sup>↑</sup>**

#### **3.1. Preliminary Analysis**

The extraordinary significance of the proceedings became apparent when the Court sat in plenum and was highly active in questioning the Parties' legal representatives. The substance of the questions showed an appreciation by the Court of both positions. This is also reflected in the Court's judgment which may be legitimately described as "Solomonic" or at the very least as politically pragmatic. In a legally accurate manner, the Court focused on the plaintiff's claim, but did not engage in passing a leading decision on the SGP. As a result, the legal effects of the pact on Member States and institutions in particular, as well as the obligations of the Council for ensuring its effective implementation remain unsettled.

In essence, the Court had to deal with two claims by the Commission: It should annul, first, the decisions of the Council not to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC. Second, the Court should annul the Council's conclusions in so far as they involve the decision to hold the excessive deficit procedure in abeyance, the recourse to an instrument not envisaged by the Treaty, and the modification of the recommendations decided on by the Council under Article 104(7) EC. In the Council's opinion, the action of the Commission was inadmissible, or should, alternatively, be dismissed (para 22 and 23). The Court shared the Council's perception and declared the action inadmissible to the extent that it concerned the failure of the Council to adopt the recommendations. In turn, it followed the Commission's claim and annulled the Council's conclusions in its essential elements.

#### **3.2. The Failure to adopt the Recommendations<sup>↑</sup>**

At the outset, the Court stated that the Council decisions referred to in Art 104(8) and (9) EC can exist only if adopted by the required majority. If a majority is not achieved within the Council, no decision can be taken for the purpose of those provisions. As the Court emphasised, there is no *provision of Community law prescribing a period on the expiry of which an implied decision under Article 104(8) or (9) EC is deemed to arise and establishing the content of that decision* (para 32). The expiry of the deadlines in Reg 1467/97, moreover, does not result in the lapse of the Council's power to adopt the acts recommended by the Commission. This would otherwise contradict the objective of the deadlines established in that regulation to ensure expeditious and effective implementation of the excessive deficit procedure. On this basis, the Court concluded that failure by the Council to adopt the acts recommended cannot be regarded as giving rise to acts open to challenge for the purposes of Art 230 EC. In this regard, the action was thus deemed inadmissible (para 36).



This conclusion of the ECJ essentially corresponds to the Council's view that no legal act existed that might have constituted a basis for review under Art 230 EC. In the opinion of the Council, the Commission might at most have brought an action for failure to act in accordance with Art 232 EC. Yet, according to the Council, it was no coincidence that the Commission had not decided to strike this path. Given the legal requirements of Art 232 EC and the structure of the procedure of Art 104 EC, such action would not have had any chances of success. According to the wording of Art 104(8) and (9) EC, the Council was not liable to act, nor was it required to act in compliance with Art 232 para 2 EC. Furthermore, the Council argued that it could not be accused of having failed to act, as the voting on the basis of the Commission's recommendations had in fact taken place; yet in both cases, the decisions could not be adopted without the required majority.

In the judgment, the Court simply recalls the possibility of taking such an action for failure to act, if the Council does not adopt formal instruments recommended by the Commission without, however, addressing the Council's arguments in detail. The ECJ moreover emphasises that the Commission can only have recourse to the remedy provided for by Art 232 EC, *in compliance with the conditions prescribed therein*" (para 35). Formally, the ECJ thus satisfies the general requirement for effective legal protection. In substance, however, the mere reference to Art 232 EC is unsatisfactory as, in line with the Council's reasoning(28), the prospects of success of such an action are uncertain.

### 3.3. The Council's Conclusions <sup>↑</sup>

#### 3.3.1. Admissibility of the Action – The Legal Nature of the Conclusions <sup>↑</sup>

The legal nature of the conclusions was already disputed between Commission and Council. For the Commission, the adoption of the conclusions signified recourse to a legal instrument that was not foreseen in the Treaties and contained legally binding decisions. This applied, in the Commission's view, particularly to those parts of the conclusions that held the procedure in abeyance and changed the recommendations previously adopted by the Council under Art 104 (7) EC. In the Council's view, the conclusions are merely of a political nature and in no aspect legally binding. They would only serve to record the state of the proceedings after the failure to adopt the decisions and would only bind the Council itself in its further proceedings.

The Court, following its settled case law states that an action for annulment must be available in the case of all measures adopted by the institutions, *whatever their nature or form, which are intended to have legal effects* (para 44). The focus of the Court's findings is thus to establish whether the conclusions produced such effects. In this regard, particularly para 6 of the conclusions is at the centre of the Court's attention. This paragraph stipulates that the Council agrees to hold the excessive deficit procedure in abeyance for the time being and declares itself ready to take a decision under Art 104(9) EC if [...] the Member States concerned were not complying with the commitments which it had entered into, set out in the conclusions (para 46).

The Court notes that the decisions to hold the ongoing excessive deficit procedure in abeyance are thus conditional on compliance with the commitments made by the Member States concerned. It also remarks that the commitments were unilateral, made by the Member States outside the framework of the recommendations previously decided upon under Art 104(7) EC (para 48). Consequently, according to the Court, the Council *renders any decision to be taken under Art 104(9) EC conditional on an assessment which will no longer have the content of the recommendations adopted under Art 104(7) EC as its frame of reference, but the unilateral commitments of the Member States concerned* (para 48).

In conformity with the Commission, the Court regards this as modifying the recommendations previously adopted under Art 104(7) EC, particularly inasmuch as it puts back the deadline for bringing the government deficit below the ceiling of 3% of GDP and, consequently, alters the extent of the consolidation measures sought (para 49). As the conclusions, at the least in these regards, are intended to have legal effects, the action of the Commission is thus held to be admissible.

### **3.3.2. Substance – the Annulment of the Council’s Conclusions** ↑

#### **3.3.2.1. The Court’s Position on the Basics and the System of the SGP**

When analysing the substance of the annulment action, the Court underlines in particular the broad logic and the objective of the excessive deficit procedure (paras 68-73). In the light of the central concern to observe budgetary discipline, the Court emphasises that the underlying rules *are to be given an interpretation which ensures that that they are fully effective* (para 74). Accordingly, the Court also states that Reg 1467/97 lays down a strict framework of deadlines to be met in the course of an excessive deficit procedure, *in order to ensure its expeditious and effective implementation* (para 78). The responsibility for making the Member States observe budgetary discipline essentially lies with the Council. According to the Court, the Council has discretion and may *“in particular on the basis of a different assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member States concerned, modify the measures recommended by the Commission, by the majority required for adoption of the measures”* (para 80). The Court bases this finding particularly on the fact *that Commission recommendations and not proposals within the meaning of Art 250 EC are placed before the Council* (para 80). Nevertheless, in the Court’s view, the Council cannot break free from the rules laid down by Art 104 EC and those which it set for itself in Reg 1467/97 (para 81). In this regard, the Council could not *“have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at given stage or which would be adopted in conditions different from those required by the applicable provisions”* (para 81).

With these findings, the Court touches upon core questions of the procedure, namely concerning the relation between Art 104 EC and Reg 1467/97, the structure and course of the excessive deficit procedure, as well as the rights and obligations of the institutions in the SGP. The significance of all these questions is particularly rooted in the fact that they inextricably link procedural aspects with the institutions’ discretionary powers as regards the content. The answers to these questions would consequently also determine the institutional balance of powers in the SGP.

#### **3.3.2.2. The Positions of the Parties on the Excessive Deficit Procedure** ↑

In conformance with the importance of the issue, the positions of the Parties were predictably controversial. The Council emphasised its broad procedural and substantive discretion. With reference to the hierarchy of norms in Community law, the Council pointed out that Reg 1467/97 as an act of secondary law could in no event modify the provisions of Art 104 EC. The wording of Art 104(8) and (9) EC, which states “may [...] make public” and “may [...] decide” respectively, would clarify that, on the basis of primary law, the Council was empowered but not obliged to act. This authority would allow the Council on the one hand, to discard the Commission’s recommendations under Art 104(7) EC. On the other hand, the Council’s margin of discretion also included the possibility for an independent, political evaluation of the measures adopted or envisaged by the Member States.

During the oral proceedings, the Commission principally acknowledged the Council's discretionary powers. In the Commission's view, however, this discretion was limited when the objective of the Treaties was endangered. This concerned the observance of the budgetary discipline particularly, which was guaranteed by the structure of the procedure. Thereby, the Commission seemed to point to the fact that merely indicative deadlines and a facultative sequence of the procedural steps might result in the sanctions foreseen in the SGP being randomly circumvented and thereby render the objectives of the SGP unachievable.

Thus, the Commission argued in the statement of the claim that the deadlines established in Reg 1467/97 were principally binding. The Council was, moreover, obliged to adopt a decision pursuant to Art 104(8) EC, if it established that there had been no effective action in response to its recommendations pursuant to Art 104(7) EC. The Commission emphasised the automatism of the procedure also in the sense that a decision of the Council pursuant to para 8 was a prerequisite for a measure on the basis of para 9.

### 3.3.2.3. Analysis – The Court's Statements regarding the Course of the Procedure

Despite the fundamental questions raised by the Parties, the Court's judgment on these issues is relatively short. Regarding the sequence of the procedure, it only contains the statement that the Council "*cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97*" (para 81). By this, however, the Court said nothing concerning the relationship between Art 104 EC and Reg 1467/97 or the contradiction between these two legal instruments, or on the structure of the proceedings and the automatism claimed by the Commission. Also the fact that the Council is prevented from having *recourse to an alternative procedure* (para 81) only implies that the Council is obliged to use the legal instruments envisaged in the different stages of the proceeding. By this, the Council is, for example, prevented from adopting conclusions instead of decisions. The Court, however, does not comment on the diverging positions regarding the course of the procedure. The only, albeit not very helpful, statement is made in the context of the Court's analysis on the substance of the conclusions. The Court explicitly asserts that it will not express its view *as to whether, pursuant to Article 104(9) EC, the Council could be required to adopt a decision where the Member State persists in failing to put into practice its recommendations under Article 104(7) EC* (para 90). This would be *a question which the Court is not called upon to answer in the present proceedings* (para 90). Even where this statement, in essence, concerns the limits of the Council's discretion, and thus its substantive powers, it touches at the same time upon procedural aspects. If the Council is not even obliged to give notice to a Member State that "*persists in failing to put in practice its recommendations under Art 104(7) EC*, an automatism of the procedure is out of question. If one follows, in turn, the "mechanistic" understanding of the Commission, would this result in depriving the Council of its discretion to decide on the basis of Art 104(9) EC?

As the Court refuses to adjudicate on these questions, it remains unsettled as to whether or not the course of the procedure is mandatory and only allows the gradual proceeding towards the adoption of sanctions. Other passages of the judgment only contain implicit statements on this matter: For example, following the interpretation of the ECJ, the objective of the excessive deficit procedure is to "*encourage and, if necessary, compel the Member State concerned to reduce a deficit which might be identified* (para 70). Likewise, the Court emphasises the significance of Reg 1467/97 which "*lays down a strict framework of deadlines to be met in the course of the excessive deficit procedure, in order [...] to ensure expeditious and effective implementation of the procedure*" (para 78). These passages might point to a commitment of the institutions to the strict procedural system established by Reg 1467/97.

Also the Court's reference to the action for failure to act (para 35) might support this understanding. In fact, following the requirements of Art 232 EC, the Commission could only have recourse to this remedy, if there was, in the first place, an obligation on the Council to act pursuant to Art 104(9) EC.

The judgment, however, does not contain any clear-cut statements on the issue. As a result, the relationship between Art 104 EC and Reg 1467/97 that was addressed by the Council also remains unsettled. The Court's dilemma between the strict rules of the Regulation and the broad discretion pursuant to primary law becomes particularly apparent in the sections of the judgment that relate to the deadlines. In the Court's understanding, these shall not have such an effect as to result in the lapse of the Council's power to adopt the acts recommended by the Commission (para 33). Yet, at the same time, they shall bind the Council inasmuch as the expeditious and effective implementation of the excessive deficit procedure needs to be ensured (paras 33 and 78). This conclusion indeed confirms the significance of the Regulation for determining the procedural deadlines; whether and to what extent it binds the Council, however, is left to the vague formula of an 'expeditious and effective implementation of the excessive deficit procedure'.

It must, however, be conceded that, from a strictly legal point of view, a response to all these issues raised by the Parties was effectively not necessary to answer the claim. The Court could, therefore, legitimately focus on the question of whether or not the conclusions or parts of them had to be annulled.

#### 3.3.2.4. The Court's Substantive Analysis – The Legality of the Conclusions

In a first step, the Court states that principally neither Art 104 EC, nor Regulation 1467/97 foresee any other situations in which the excessive deficit procedure may be held in abeyance, other than in the case of a Member State acting in compliance with a recommendation or notice of the Council (para 83 – 85). Nevertheless, the Court also acknowledges that a procedure may *de facto* be held in abeyance if the Council does not succeed in adopting a decision because the required majority is not achieved (paras 86 and 90). By this, the Court principally followed the Council's assertion that an abeyance of the procedure might automatically occur, without a formal or binding decision. In contrast, the Commission alleged that Art 9 of Reg 1467/97 conclusively governed the abeyance of the procedure.

Similarly as in its review of legality, however, the Court notes that the Council went beyond simply recording a *de facto* abeyance. As set out above<sup>(29)</sup>, rendering the abeyance of the procedure conditional on compliance with the unilateral commitments made by the Member States in the conclusions would unlawfully restrict the Council's discretionary powers. Such decision, which alters the frame of reference for the assessment of the measures taken or envisaged by the Member States, would infringe Art 104 EC and Art 9 Reg 1467/97. For the Court, the frame of reference thus continues to be the Council's recommendations pursuant to Art 104(7) EC. To subsequently modify these recommendations would presuppose a fresh Commission recommendation under its right of initiative (paras 91 and 92). Yet, as the Court underscores, "*the Council's conclusions were not preceded by Commission recommendations seeking the adoption on the basis of Art 104(7) EC of Council recommendations different from those adopted previously*" (para 94). The Court thus seems to have few doubts that the Council indeed intended to modify its Art 104(7)-recommendations by way of the conclusions. This is also confirmed by the Court's assertion that the conclusions were unlawfully adopted in accordance with the voting rules prescribed for a Council recommendation under Art 104(9) EC, with thus only Member States of the euro area taking part in the vote. The ECJ concludes that the decision to adopt the Council recommendations contained in the conclusions is contrary to Article 104(7) and (13) EC, and annuls the conclusions, in so far as they hold the

excessive deficit procedure in abeyance and modify the recommendations previously adopted by the Council under Article 104(7) EC.

---

11

### 3.3.2.5. The Positions of the Parties regarding the Conclusions [↑](#)

In these passages, the ECJ touches upon the crucial question of the institutions' substantive scope of discretion, also in relation to their legal acts previously adopted during the procedure. One aspect of this question is the Council's discretion to modify the Commission recommendations (Para 80). As the Commission's recommendations are not proposals in the sense of Art 250 EC, the Council may, according to the ECJ, depart from them, in particular on the basis of a different assessment of the economic data. The ECJ, however, does not settle the case of a concordant economic analysis of the Council and Commission, as submitted by the Commission in the excessive deficit procedures at hand. The Commission identified in points 1 and 4 of the Council's conclusions essentially its own recommendations pursuant to Art 104(9) EC. It thus asserted that the Council had confirmed its economic analysis according to which additional measures to address the excessive deficit of the Member States concerned were necessary. In those circumstances the Council could amend the Commission's recommendations as to the measures to be taken and of the timetable to be met. To this extent, the discretion of the Council remained broad. In contrast, according to the Commission, the Council had no margin as to the choice of the legal instruments. For this reason, it should have adopted the legally binding act for the reduction of the Member States' deficits, as provided for by Art 104(9) EC, and not assumed an abeyance of the procedures.<sup>(30)</sup> Otherwise, the functioning of the surveillance system and the objectives of the Treaty, as a whole, would be compromised.

The Council rejected this line of argument in the oral proceeding in several regards. First, it contested that its economic analysis concurred with that of the Commission. This would be evident from the extent and impact of the measures taken or projected by the Member States. Second, its discretion not only contained an independent economic assessment, but also an independent political evaluation of the proposed consolidation measures. Such an economic and political discretion would be in conformity with the Treaty and the institutional balance of power foreseen by the excessive deficit procedure. The Commission's interpretation, however, in the view of the Council presumed an automatism which the Treaty by no means provided for, thereby limiting the prerogatives of the Council in an inadmissible way. Following this logic would result in the Council being obliged, without exemption, to adopt the recommendations of the Commission, without leaving the Council any room for manoeuvre.<sup>(31)</sup>

### 3.3.2.6. Analysis – The Court's Statements regarding the Institution's Substantive Powers of Discretion [↑](#)

The ECJ remains virtually silent also on these arguments between the institutions. By emphasising that the Council may, *in particular* differ in its assessment of the relevant economic data (para 80), the ECJ seems to admit further room for appreciation, which might include also political discretion. Yet, the ECJ skipped the purported acceptance of the Commission's economic analysis by the Council. This could, amongst other reasons, be attributed to the fact that for an evaluation of this issue, a discussion of the substantial aspects of the procedure would have been required. Based on the present lawsuit, this would not, however, have been possible. As suggested in Paras 35 and 90, the Commission would have had to file an action for failure to act. It is not totally understandable why the Commission did not bring in such an action in the present case, as an alternative option.<sup>(32)</sup>

As a consequence of the ECJ's silence on these aspects, the substantial limits of the Council's discretion also remain undetermined. Thereby, a second aspect concerning the scope of discretion is touched upon, namely whether the Council may depart from its previous recommendations and thereby create a new frame of reference. From a mere procedural perspective, the ECJ resolves this question by ruling that an existing Council recommendation may only be altered on a Commission initiative. Yet, whether the Council is bound by the substance of its own previous recommendations pursuant to Art 104(7) EC or whether it could, in an extreme example, even effectively reverse them, remains unresolved. The ECJ thereby does not clarify, if and to what extent the objectives of the SGP determine the frame of reference for the evaluation of the national measures.<sup>(33)</sup>

Can the frame of reference be exclusively a Council recommendation, detached from the requirements imposed on it by Reg 1467/97? Or does not the objective of Art 104 EC in connection with the obligation of Art 3(4) Reg to correct an excessive deficit within one year determine the content of a recommendation? And in a further step, does this objective not bind the Member States directly anyway? For the case at hand this means *in concreto*: Is the Council allowed/required to give notice to a Member State only if the Member State took no or no effective action contrary to the recommendations under Art 104(7) EC? Or is the Council allowed/required to give notice to a Member State even if the latter has implemented all measures envisaged by the recommendation, but nevertheless failed to achieve the objectives of the Treaty and of Reg 1467/97? And would, in case of such an insufficient recommendation under Art 104(7) EC, the Commission not be required to recommend to the Council the adoption of a new recommendation? The ECJ, with a view to the Commission's position as initiator of the procedure, recalled that the Council could not subsequently modify previously adopted recommendations under Art 104(7) EC *without a fresh recommendation from the Commission* (Para 92). Reversely, this wording suggests that the Council could surely alter its recommendation if the Commission submitted a *fresh recommendation*. Does the ECJ thereby imply the discretion of the Commission to cyclically repeat the stages of the excessive deficit procedure instead of proceeding in a more linear way towards the adoption of sanctions?<sup>(34)</sup> And if so, would this be admissible only in the case of an insufficient Council recommendation?

Against this background, it must further be asked whether the Member State must itself bear the responsibility for the achievement of the SGP objectives, if this necessitated measures exceeding the Council recommendation under Art 104(7) EC?<sup>(35)</sup> This point is motivated by the special position of the SGP in the European Economic Policy (EEP). According to the current delimitation of competences, the EEP, in contrast to the Monetary Policy, predominantly lies in the competence of the Member States. It is mainly in the form of non-binding instruments that the "matter of common concern", as the EC Treaty puts it, is to be coordinated in the Council. However, by agreeing to the SGP and its objectives, procedure and sanctions, the Member States accepted further obligations. By taking on the responsibility to maintain budgetary discipline, they constrained their national budgetary autonomy. One might even say that they gave up some of their national sovereignty in support of maintaining stability in EMU. Consequently, it might be argued that besides the roles of Commission and Council in the surveillance of budgetary discipline, the Member States themselves are responsible for employing appropriate measures in order to effectively achieve a deficit reduction?<sup>(36)</sup>

If the ECJ's line of argument may be interpreted in this sense (para 90), it could only address all these substantial questions under an action for failure to act in a comparable – or subsequent? – proceeding. Nevertheless, to leave us hoping for a further conflict between the actors that will allow us to get more answers from the ECJ would be an absurd result of a judgment from which such clarification was expected in the first instance.

## 4. Summary and Prospects

### 4.1. Summary

On the whole, we find that the ECJ in its judgement concentrates on the Commission's questions. The ECJ is wary of establishing the nature of the SGP and its aptitude for enforcing strict budgetary discipline more than to the extent necessary. The judgement clarifies the following:

- if the necessary majority for adopting a decision is not achieved, no decision is taken (Para 31f);
- expiry of the deadlines does not preclude the Council from adopting the acts recommended by the Commission (Para 33);
- nevertheless, the deadlines are intended to ensure expeditious and effective implementation of the excessive deficit procedure (Para 33 and 78);
- in principle, the Commission could have recourse to an action for failure to act if the Council does not adopt formal instruments recommended by it (Para 35);
- if necessary, the objective of the excessive deficit procedure is to compel the Member State concerned to reduce a deficit (Para 70);
- the rules of the SGP are to be given an interpretation which ensures that they are fully effective (Para 74);
- the Commission in each stage of the procedure has a right of initiative (Para 79);
- responsibility for making the Member States observe budgetary discipline lies essentially with the Council (Para 76); it has the discretion, in particular to modify the measures recommended by the and the timetable (Para 80);
- nevertheless, the Council is bound by the framework of the SGP to the extent that in the respective stages it must have recourse to the envisaged measures (Para 81);
- a *de facto* abeyance can result from the inability of the Council to adopt a Commission recommendation (Para 90); and
- due to the right of initiative of the Commission, the Council cannot modify its recommendations under Art 104(7) without fresh recommendations (Para 92 and 94).

In contrast, from a political point of view, it is regrettable that the Court did not address material differences of interpretation between the institutions. Most of the questions raised in the course of this article arise, in the last instance, because the ECJ excluded the overarching subject of the institutional balance of powers as well as of the nature of economic policy coordination. This pertains in particular to questions concerning the procedural sequence (automatism), the procedural and material limits of Council's and Commission's discretion and the resulting interaction between these institutions, as well as the factual obligations of the Member States under the SGP.

Yet, these are exactly the questions that will determine the future fate of the pact. The missing answers affect the case at hand insofar as the institutions pursuant to Art 233 EC are required to take the measures necessary to comply with the judgement of the Court. Therefore, finally, we present their options to proceed in the present deficit procedures and thus the impact of the judgement on the enforceability of the SGP.

## 4.2. Prospects: Options of the institutions in the procedures at hand

With the annulment of the Council conclusions, the Council recommendations under Art 104(7) of 21 January and 3 June 2003 are still the “frame of reference” for evaluating the budgetary measures of Germany and France. Also still applicable are the Commission recommendations for the Council decisions under Art 104(8) und (9) EC, on which the Council has already once taken an unsuccessful vote. Accordingly, one option of the Commission could be to resubmit these, or fresh, recommendations. The Court’s request that the Council’s “*inability [...] could be remedied at any time*” should result in a reinforced effort to achieve the necessary majority. Yet, the risk persists that the voting will fail again due to the prevailing preference in the Council not to proceed with the excessive deficit procedure.

Therefore, the favoured option of the Council would certainly be a fresh Commission recommendation under Art 104(7) EC. The judgement seems to allow for Commission discretion in this regard (Para 91, 92). Yet, it is doubtful whether the Commission as advocate of a strict procedural sequence will proceed in such a way. The Commission’s choice between both stages of the procedure is thus decisive: With a recommendation under Art 104(7) EC, the Commission in a negotiation process with the Council could achieve a satisfying result, for all parties as well as with a view to the objectives of the SGP. At the same time, however, the Commission risks its credibility against the background of its previous line of argumentation. With a recommendation under Art 104(8) or (9) EC, the Commission would abide by its position to push the excessive deficit procedure ahead in order to implement the SGP. Thereby, however, it risks it again being rejected by the Council, if the majority of the Member States wishes to avoid giving notice to the deficit delinquents.

In this case, provided that the Commission maintained the position which it had defended during the proceedings, we would reach a point that is highly interesting with regard to the Court’s line of arguments:

The ECJ accepted that the procedure could be *de facto* held in abeyance if the necessary majority could not be achieved. In this case, it would again be up to the Commission to advance with the procedure. If the Commission, due to the economic and factual circumstances of the case, assumed an obligation on the Council to adopt its recommendations, it could ultimately bring in an action for failure to act. In contrast, if the Commission was in doubt about the prospects for the success of such an action, or if the economic situation and the actions of the Member States were ambiguous, the Commission could wait and see. At the latest, with the expiry of the deadline set out in the Council recommendation under Art 104(7) EC (end of 2004), it would become clear from the (then available) “actual data” on the level of the excessive deficit that Germany or France did not correct their excessive deficit within this deadline. In this case, Art 10(3) Reg 1467/97 could be interpreted as implying an obligation on the Council to give notice, when evaluating the data *ex post*. If the Council does not end the “period of abeyance”, this argument could at least be brought forward in an action for failure to act.

The Council in its reaction to the judgement announced its intention to closely examine the implications of the Court’s decision, in cooperation with the Commission.<sup>(37)</sup> Also, the Commission announced its readiness to resolve the budgetary problems of Germany and France in cooperation with the Council.<sup>(38)</sup> This apparent harmony, which arguably is also reflected in the recent Communication of the Commission on the reform of the SGP<sup>(39)</sup>, inspires confidence – yet only on a first glance.



For in the face of so many unanswered questions, in particular regarding the obligations of the Council in the excessive deficit procedure, the efficient interplay between Council and Commission continues to be essential. The fact is that despite the involvement of the ECJ, the weakest spot of the SGP, namely its vulnerability in the crossfire of political influences, could not be cleared up, particularly due to lack of a reform of primary law in the course of the constitutional debate. Also in the future, it seems, the SGP will thus remain as disputed as before.

---

## References <sup>↑</sup>

*Allsopp, C./Artis, M.J.* (2003), The assessment: EMU four years on, Oxford Review of Economic Policy 1-29, 2003.

*Antenbrink F./de Haan J.* (2004), Economic Governance in the European Union: Fiscal Policy Discipline versus Flexibility, CMLRev. 40, 1075-1106, 2004.

*Bandilla C.* (2000), Art 104 EGV, in: *Grabitz/Hilf* (Eds.), Das Recht der Europäischen Union, EL 13.

*Beetsma, R.* (2001), Does EMU need a Stability Pact? in *Brunila et al.* (Eds.), The Stability and Growth Pact, 23-52, Basingstoke 2001.

*Begg I.* (2003), Hard and soft economic coordination under EMU: Problems, Paradoxes and Prospects, Working Paper Series 103, LSE/Harvard, Centre for European Studies, 2003; <http://www.ces.fas.harvard.edu/publications/BeggHardEMU.pdf>.

*Geelhoed, L.A.* (2003), Het Stabilitéitspact, zin en onzin, SEW 42-49, 2003.

*Gros D. /Thygesen N.*, (1998), European Monetary Integration, New York 1998.

*Häde U.*, Art 4 EGV, in: *Calliess/Ruffert* (Eds.), Kommentar zu EUV und EGV, 2002.

*Hattenberger D.* (2000), Art 104, in: *Schwarze* (Eds.), EU-Kommentar, Baden-Baden 2000.

*Kronow C.* (2002), Der Stabilitäts- und Wachstumspakt, Ein Rechtsrahmen für Stabilität in der Wirtschafts- und Währungsunion, Baden-Baden 2002.

*Louis, J.V.* (2004), The Economic and Monetary Union: Law and Institutions, CMLRev. 41, 575-608, 2004.

*Palm, U.* (2004), Der Bruch des Stabilitäts- und Wachstumspakts, Heft 3/2004 EuZW, 71-75.

*Schorkopf* (2000), Die Untätigkeit des Rates der EU im Gesetzgebungsverfahren, EuR Heft 3, 365-379, 2004.

*Streinz, R./Ohler, C./Herrmann, C.* (2004), Totgesagte leben länger – oder doch nicht?, Der Stabilitäts- und Wachstumspakt nach dem Beschluss des Rates vom 25.11.2003 über das Ruhen der

Defizitverfahren gegen Frankreich und Deutschland, NJW 22, 1553-1616, 2004.

---

## Endnotes <sup>↑</sup>

(\*) A German version of this article was published in integration 4/04 ("Das Urteil des Europäischen Gerichtshofes zum Stabilitäts- und Wachstumspakt – eine Klarstellung?"); the authors wish to thank Prof. Stefan Griller for his comments and suggestions.

(1) The United Kingdom is only obliged to endeavour to avoid an excessive deficit, as long as it does not take part in the last stage of EMU due to its special right guaranteed in protocol 25 from 1992.

(2) Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 1997 L 209, p. 6), Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 1997 L 209, p.1), Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact (Amsterdam).

(3) Due to the wide margins provided by primary law, the large number of participants in EMU, the historic aversion of the German population against inflation and the "Maastricht-judgement" of the German Constitutional Court which called for stability (*Kronow* (2002) 36ff).

(4) Compare the economic discussion for instance in Gros/Thygesen (1998) 326ff or Beetsma (2001) 28f.

(5) *Häde* in Callies/Ruffert, Art 104 EC, Paras 2-3.

(6) Compare, for example Begg (2003), Allsopp/Artis (2003), Geelhoed (2003).

(7) See *Antenbrink/de Haan* (2003) 1094 on the weaknesses of the incentives built in the Pact.

(8) "Council" in the context of this article means "Council in the composition of the economic and finance ministers (ECOFIN)".

(9) *Louis* (2004) 577.

(10) If the ratio has declined substantially and continuously and has reached a value close to the reference value, or if the excess was only exceptional (possibly because of a fall in GDP between 0.75 and 2%) and temporal, and the deficit remains close to the reference value, a deficit above 3% is also not regarded as excessive (Art 104(1) and Art 2(1) and 2 Reg 1467/97). Also the debt level can exceed the reference value if the ratio is sufficiently diminishing and approaching the reference value at a sufficient pace. Reg 1467/97 on speeding up and clarifying the implementation of the EDP, however, is only geared towards exceeding the deficit value. The level of debt as trigger for an EDP so far has not been considered by the secondary legislator.

(11) Detailed rules and definitions for the application of the said protocol are contained in Council Reg (EC) Nr. 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure (OJ L 332/7), last modified by Commission Reg (EC) Nr. 351/2002. It must be noted that the Commission in spite of the fulfilment of both criteria might see the risk of an excessive deficit and prepare a report (Art 104(3) EC). This is not an early warning, as for this the legal basis is Art 99(4) EC; there is no connection with the procedure for an existing excessive deficit.

- (12) Compare the Commission's press release IP/02/175 and IP/03/471.
- (13) IP/03/12 and IP/03/640.
- (14) OJ L 34 of 11 Feb 2003 as well as OJ L 165 of 3 July 2003.
- (15) Minutes of the 2513th Council meeting of 3 June 2003 (9844/03).
- (16) IP/03/1355.
- (17) Minutes of the 2480th Council meeting of 21 January 2003 (5506/03).
- (18) In the case of France, the Commission issued a recommendation for a Council decision pursuant to Art 104(8) EC on 8 October 2003 and, pursuant to Art 104(9) EC on 21 October 2003 (IP/03/1420); in the case of Germany, both recommendations were adopted on 18 November 2003 (IP/03/1560).
- (19) Compare the minutes of the Council of 21 January and 3 June 2003.
- (20) An expedited procedure shall be used in the case of a deliberately planned deficit. (Art 7 VO 1467/97).
- (21) The Council may, however, decide to supplement this deposit by an obligation on the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities, or respectively to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned (Art 11 Reg 1467/97 and Art 104 Abs 11 EC).
- (22) The following Member States voted in favour of the adoption of a Council decision pursuant to Art 104(8): Belgium, Denmark, Greece, Spain, the Netherlands, Austria, Finland and Sweden; for the adoption of a Council decision pursuant to Art 104(9) were Belgium, Greece, Spain, the Netherlands, Austria, Finland; compare the minutes of the 2546<sup>th</sup> Council meeting of 25 November 2003 (14492/03).
- (23) Compare the legal opinion of the Council's legal service in an analysis on the further proceeding in the excessive deficit procedure following the Council's recommendation on the basis of Art 104(7) (14181/03).
- (24) Judgment of the ECJ of 13 July 2004, C-27/04 (not yet in the European Court Reports), para 59ff.
- (25) Para 6 of the conclusions; compare the minutes of the Council meeting of 25 November 2003.
- (26) Para 4 of the conclusions.
- (27) This decision was relatively narrow, as the blocking minority of 21 votes was almost reached. Austria, Spain, Finland and the Netherlands, which together made up 20 votes, voted against the resolutions.
- (28) Compare *Schorkopf* (2000) 374ff on the requirements for admissibility and substantiation of the claim.
- (29) See above under 3.3.1.

(30) Press release of the Commission, 13 January 04, 4 (IP/04/35). From a procedural point of view, thereby the Commission points to the duty of the Council to adopt recommendations under Art 104 (9) EC and the automatism of the procedure.

(31) Thereby, the Council in particular rejects the Commission's view on the rigid procedural sequence between para 8 and 9 of Art 104 EC. It would be incumbent on the Council to decide for itself whether to take a decision under para 8 or not.

(32) Even if in the logic of the Commission the actions of the Council are binding, but illegal, decisions, which thus must be contested by an action for annulment, it should have, at least subsidiary, filed an action for annulment (see also *Streinz/Ohler/Herrmann* (2004) 1556).

(33) According to Häde in Callies/Ruffert, an interpretation guided by the aim of stability prohibits the use of political considerations of convenience instead of economic arguments. The same would have to be applied to scopes of discretion and assessment. They should be used only in such a way to serve the goal of price stability (*Häde* (2002), para 3 to Art 104).

(34) See Doc 14181/03 of 30 Oct 2003, in which (also) the Council Legal Service approved such an exemption of the procedure foreseen in Art 104 EC only in exceptional circumstances and only on a recommendation of the Commission.

(35) See e.g. *Streinz/Ohler/Herrmann* (2004) 1557, according to whom the Council would have to take the endeavour of the Member State into account, precisely if changing economic conditions rendered them "ineffective". Thereby, the authors point to the evident discrepancy that a measure typically proves effective only *ex-post*, if the deficit has been corrected; Art 3(4) Reg 1467/97 however, according to the prevailing view in the institutions, requires an *ex ante* analysis if the Council recommendations were implemented.

(36) In Palm's view, Art 10 Reg 1467/97 requires an *ex post* analysis, so that the Member States themselves are fully liable for the effectiveness of their budgetary measures (*Palm* (2004) 73). See also Bandilla in Grabitz/Hilf and Hattenberger in Schwarze, who refer to the principle of subsidiarity, *Bandilla* (2000), Rz 26; *Hattenberger* (2000), Rz 33 zu Art 104.

(37) Press release of the ECOFIN-ministers, 13 July 2004, at <http://ue.eu.int> .

(38) IP/04/897, 13 July 2004.

(39) Communication from the Commission to the Council and the European Parliament, Strengthening economic governance and clarifying the implementation of the Stability and Growth Pact Brussels, 3.9.2004, COM(2004) 581 final.