Der blaue Brief: A Case Study in the Nature of Law and Sanctions

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I. Introduction

[1] For a letter that never reached its intended recipient, the so-called \'blauer Brief\' (1) enjoyed a wide readership. The German media was for a fortnight fixated by the possibility that the Economics and Finance Ministers Council of the European Union (\'ECOFIN\') might send an official letter of reprimand to the government in Berlin on account of its growing budget deficit. The media coverage focused on the if, the when, and the should of the letter\'s possible dispatch and canvassed a range of opinions about them. What the coverage failed to consider, however, was the why: why such a warning letter had been set up as a sanctions mechanism for EU member states in the first place.

[2] The following article will examine the sanctions mechanism of the excessive deficit procedure of the Stability and Growth Pact. (2) Specifically, it will consider the nature of international coordination, surveillance, and sanctioning of national policymaking in light of the recent events. The article seeks thereby to highlight the underlying dynamics of such procedures and the effectiveness that may be reasonably expected to result from them. It begins with the question whether the excessive deficit procedure of the Stability and Growth Pact should be viewed more as a \'standard\' than as a \'rule\'. It examines the surrounding legal, political, and economic circumstances as militating in favour of or against approaching the blue letter as black letter. It then considers the compromise reached by ECOFIN on 12 February as a demonstration of the possibility that alternative, informal means can effectively encourage responsible behaviour among sovereign states. The article concludes that the way in which the Pact was applied should be viewed with some satisfaction.

II. A Background Theory of Legal Interpretation

[3] As previously applied to private law adjudication, the distinction between rules and standards (3) offers insight into the way in which legislation may be interpreted. The distinction is based on the empirical observation that no consensus exists on matters of statutory interpretation despite longstanding practice and innumerable attempts to agree upon one approach or another. This phenomenon is contemporary as well as historical; the same municipal court, and the even the same judge, have been known to adopt different approaches in different decisions. (4) Roughly speaking, interpretation of domestic legislation has oscillated markedly between two approaches, namely that which sees legal provisions as formally realizable rules and that which sees them as equitable standards.

[4] This oscillation has been convincingly characterized as evidence of an attempt to strike a satisfactory balance between the virtues and costs of rules and standards. (For example, rules promote certainty but lack precision; standards offer precision at the expense of certainty.) Their simultaneous attraction or repulsion may from this perspective be seen as a reflection of legitimate and contradictory aspects of the human personality. Neither approach - rules- or standards-oriented - should dominate interpretation and end the oscillation, if we are to be true to logic and human nature. This reasoning holds true not only generally but also in the case at hand, as will be explained below.

III. The Stability and Growth Pact

[5] The first attribute of the Economic and Monetary Union (\'EMU\') to be noted is its asymmetrical structure. Economic policy and monetary policy are treated distinctly in Title VII chapters 1 and 2, respectively, of the Treaty establishing the European Community (\'EC Treaty\'). Where monetary policy making is supranationalised and new institutions are created (i.e. the European System of Central Banks or \'ECSB\') by the EC Treaty, economic policy making is merely coordinated by means of existing institutions (such as ECOFIN). Put otherwise, in the former sphere of policy making, member states have maintained their competences over direct taxation, budget setting, and redistribution policy; in the latter sphere, they have ceded \"a central right of sovereignty\". (5) With this asymmetrical structure, Maastricht introduced in 1992 a \"monetary union without an economic union\". (6)

[6] The EMU\'s asymmetrical structure brings with it significant risks. It presumes, *inter alia*, that Member States will not conflict over budgetary measures and that national conditions will not markedly diverge but will continue to converge. Doubt was raised during negotiations about the wisdom of this presumption, but the drafters of the EC Treaty apparently \"assumed that the Single Market and the international markets would be sufficient to compel the correct national policies.\" (7) In the words of a leading observer, the EMU is a structure \"conceived for happy times\" in a \"general climate of understanding.\" (8) It seems ill-designed to bear the strain that could conceivably result from

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a crisis in economic integration. (9)

[7] The Stability and Growth Pact, signed at Amsterdam five years later, further institutionalised budgetary surveillance and provided a more clarified and rapid excessive deficit procedure. Notwithstanding these strengthening reforms, the Pact did not supranationalise national economic policy making. The controversial, political nature of such policy making presumably rendered agreement among Member States to supranationalise unattainable. Accordingly, the instruments of economic policy coordination remain weak. \"[T]he Pact in effect points to the need for what might be called \'fiscal centralization\' - a significant transfer of fiscal power from nation-states to a new central authority.\" It does not, however, definitively settle the constitutional issues concerning the distribution of power. (10)

[8] In the Pact, the EC has two interrelated multilateral surveillance processes at its disposal as economic policy instruments. Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies defines the procedures for presentation of Member States\' stability programmes and assessment mechanisms for the same. Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure specifies the sanctions to be applied to Member States with excessive deficits, application arrangements, deadlines, etc.. The two processes shall be examined in turn. Before that, however, the Pact shall be considered as a whole.

[9] The Pact is premised on the idea of \"sound government finances\" (Preamble 1 Regulation 1466/97, Preamble 2 Regulation 1467/97), in which the medium-term goal is budgetary positions of \"close to balance or in surplus\" (Preamble 2 Regulation 1466/97, Preamble 3 Regulation 1467/97). It is recognised that for the EMU to function properly, the convergence of economic and budgetary performances of euro-zone Member States must \"prove stable and durable\" (Preamble 8 Regulation 1467/97). Adherence to this objective is said to \"allow [Member States] to deal with normal cyclical fluctuations while keeping the government deficit within the 3% of GDP reference value\" (Preamble 4 Regulation 1466/97, Preamble 7 Regulation 1467/97). The preoccupation with the size of Member States\' deficits reflects the fear that otherwise countries sharing the currency would have an incentive to run up a large deficit, since the cost in higher interest rates and greater default risk would be borne collectively.

[10] In order to implement it \"in a strict and timely manner\", the Pact\'s processes are to comprise \"firm political guidelines\" (Preamble 2 Regulation 1466/97, Preamble 3 Regulation 1467/97). Both processes foresee an early warning system, under which ECOFIN is to alert a Member State at an early stage to the need to take the necessary budgetary corrective action in order to prevent a government deficit becoming excessive (Preamble 5 Regulation 1466/97). \"[P]articular attention should be given to significant divergences of budgetary positions from budgetary objectives of being close to balance or in surplus\" (Preamble 15 Regulation 1466/97). (11) Both processes prescribe timetables to ensure their effective and, particularly in the case of the excessive deficit procedure, expeditious implementation (Preamble 12 Regulation 1466/97 and Regulation 1467/97). Such legalistic provisions, clearly setting out and enforcing timetables, seek to avoid unwarranted delays at the expense of the EMU\'s proper functioning. Member States have declared themselves committed to achieving the goal of budgetary positions of \"close to balance or in surplus\" and to taking corrective action they deem necessary to meet their policy objectives \"whenever they have information indicating actual or expected significant divergence from the medium-term budgetary objective\" (Preamble 2 Regulation 1466/97, Preamble 3 Regulation 1467/97).

[11] The Pact provides for enforcement largely through the so-called power of sunshine: the openness of its processes is intended to ensure that Member States comport themselves in conformity with its provisions. Not only are Member States\' stability programmes to be made public from the outset (Preamble 13 Regulation 1466/97), but an ECOFIN recommendation regarding persisent budgetary slippage may also be made public if the council so decides (Art. 6(3) Regulation 1466/97). Likewise, where ECOFIN has decided the existence of an excessive deficit and issued a private recommendation but the Member State concerned has taken no effective action in response, the recommendation may be issued again publicly (Art. 104(8) EC Treaty.) \"That way \'peer pressure\' induces policy coherence within the EC.\" (12)

[12] The economic policy guidelines process does not include any additional measures to induce Member States to take corrective action whenever significant divergence from the medium-term budgetary objective has occurred or threatens to occur. The excessive deficit procedure provides instead for sanctions in such cases, including the imposition of substantial fines, up to 0.5 per cent of the Member State\'s GDP. As one guide to EU policies puts it, however, the process is \"lengthy\", the decision making procedure \"cumbersome\", and the sanctions only \"semi-automatic\". (13) As such, sanctions are clearly intended to be imposed as a last resort to enforce the Pact. The lengthy nature of the process is perhaps illustrated most simply by the sheer number of provisions used to explain it. Art. 104 EC Treaty has 14 paragraphs and Regulation 1467/97, which lays down the detailed rules and definitions for the application of the same, requires 13 more articles. In an individual case, the process could conceivably include by the author\'s count as many as twelve separate steps. (14) The decision making procedure may be fairly described as cumbersome, since at most of the stages in the procedure a qualified majority (excluding the Member State

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concerned) is required before further action may be pursued. This is true of all decisions taken in ECOFIN (Arts. 104 (6) and (13) EC Treaty). The sanctions are semi-automatic in the sense that their imposition rests at the discretion of ECOFIN, from the initial decision as to the existence of an excessive deficit to the final decision to abrogate all outstanding sanctions. Although it is to act in keeping with a series of deadlines, in reference to prescribed definitions, and in consultation with other participants, ECOFIN is ultimately to proceed according to its own best judgment. Various provisions in the Pact make this ultimate discretion clear. (For example, as regards deadlines, the Council decision on the existence of an excessive deficit is to be taken \"within\" three months and the deadline established in a recommendation to complete action to correct an excessive deficit should be \"in the year following its identification \"unless there are special circumstances\" (Arts. 3(3) and (4) Regulation 1467/97). Similarly, the determination of whether a Member State\'s financial position has been afflicted by a \"severe economic downturn\" is ECOFIN\'s responsibility \"in its overall assessment\" (Art. 2(3) Regulation 1467/97): the defining values are for guidance sake. As regards other participants, Art. 104(10) EC Treaty explicitly denies the Commission and other Member States respectively, the right to bring an action under Arts. 226 and 227 alleging an infringement of a Treaty obligation under Arts. 104(1) to (9). Likewise, Art. 11 Regulation 1466/97 repeats - unnecessarily one would think, as it is already expressed in the provision itself - the proviso that ECOFIN shall carry out the overall assessment described in Art. 99(3) EC Treaty. The terms of Arts. 104(6) and (13) EC Treaty perhaps highlight this best: while ECOFIN is to act on a Commission recommendation, it is to take the decisions itself, by a qualified majority vote.) In the final analysis, the pressure that the Community can bring to bear on the Member States to avoid excessive deficits remains political. (15)

[13] The design of the sanctions mechanism has important consequences for its operation. First, the length of the process allows ECOFIN many opportunities to consider (or reconsider) its course of action (or non-action) in constant consultation with the Commission and the Member State concerned. The discretion accorded to ECOFIN at each stage allows for considerable political leeway in the Pact\'s application. ECOFIN may proceed according to what it thinks is politically rather than economically wisest. Moreover, as ECOFIN may ultimately act on its own best judgment, the processes put the Member State interests that it embodies before the general interest of the Community, as embodied by the Commission. The former may in fact be favoured at the expense of the latter. For its part, the decision making procedure may be seen as further encouraging a political, Member State-oriented dynamic: since voting in ECOFIN requires a qualified majority, proponents of particular policies must build coalitions with other Member States to secure their approval. (The Member State concerned, though unable to vote, is able to present its case and may be expected to be the most active lobbyist.) Lastly, the fact that unlike the majority of the other documentation, the minutes of ECOFIN meetings need not necessarily be placed in the public domain only serves to encourage manoeuvring \'behind the curtains\'. (16)

A. The Economic Policy Guidelines

[14] As set out in Art. 99(1) EC Treaty, the economic policy guidelines process requires Member States to regard their economic policies \"as a matter of common concern\" and coordinate them within ECOFIN. A broad policy framework is established by the European Council (a meeting of the heads of state or government and the European Commission President) in conjunction with ECOFIN, which in turn acts on the basis of a recommendation from the Economic and Financial Affairs Commissioner (Art. 99(2) EC Treaty). Per Arts. 3 and 4(1) Regulation 1466/97, euro-zone Member States are to present updated \'stability programmes\' annually, describing general government medium-term budgetary objectives and measures and their main economic assumptions and possible changes.

[15] ECOFIN is charged with examining the objectives and contents of the stability programmes to ascertain \"whether the budgetary objective provides for a safety margin to ensure the avoidance of an excessive deficit, whether the economic assumptions [...] are realistic and whether the measures [...] are sufficient\" to achieve the objective (Art. 5(1) Regulation 1466/97). It is furthermore to examine whether the contents of the stability programme \"facilitate the closer coordination of economic policies and whether the economic policies of the Member State are consistent with the broad economic policy guidelines\" (Art. 5(1) Regulation 1466/97). Where the objectives and contents might be strengthened, the Council shall [...] invite the Member State concerned to adjust its programme\" (Art. 5(2) Regulation 1466/97). ECOFIN is thereafter to monitor the implementation of the stability programmes on the basis of Commission reports, derived from information forwarded by Member States (Art. 99(3) EC Treaty, Art. 6(1) Regulation 1466/97). Particular attention is to be given to identifying \"actual or expected significant divergence of the budgetary position from the medium-term budgetary objective\" (Art. 6(1) Regulation 1466/97). If particular Member State policies are not consistent with the guidelines or risk jeopardising the proper functioning of the EMU, ECOFIN may - following a Commission recommendation and a qualified majority vote - single out the Member State for a communication proposing corrective action (Art. 99(4) EC Treaty). (Specifically, if significant divergence of the budgetary position is identified, ECOFIN is to address a recommendation to the Member State concerned to take the necessary adjustment measures, \"with a view to giving early warning in order to prevent the occurrence of an excessive deficit\". (Art. 6(2) Regulation 1466/97)) ECOFIN may - again following a Commission recommendation and a qualified majority vote - bring additional pressure to bear in the event of persistent budgetary slippage by

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publicising the recommendation (Art. 99(4) EC Treaty, Art. 6 Regulation 1466/97).

B. The Excessive Deficit Procedure

[16] The latter surveillance process, the excessive deficit procedure, foresees a monitoring by the Commission of a Member State\'s total outstanding public debt and its budget deficit (Art. 104(2) EC Treaty) in conjunction with the reinforced surveillance under Regulation 1466/97 (Preamble 14 Regulation 1467/97). Only under the extraordinary circumstances of a \"severe economic downturn\" or an \"unusual event\" beyond government control (Art. 2 Regulation 1467/97) are debt and deficit to exceed respective targets of 60% or 3% of GDP (Art. 104(2) EC Treaty, Art. 1 Protocol 5). By EC Treaty Member States have undertaken to avoid excessive government deficits (Art. 104(1) EC Treaty); by the related Regulation they have set up a deterrent to doing so (Preamble 1 Regulation 1467/97).

[17] If an excessive government deficit threatens or occurs, the procedure is intended to \"further their prompt correction\" (Preamble 1 Regulation 1467/97) by the application of semi-automatic sanctions and fines according to a prescribed timetable. The Commission is to prepare a report if the debt or deficit requirements are not fulfilled by a Member State or if, notwithstanding the fulfillment of the criteria, \"it is of the opinion that there is a risk of an excessive deficit\" (Art. 104(3) EC Treaty). (17) The Commission is subsequently to address an opinion on the same to ECOFIN (Art. 104(5) EC Treaty). ECOFIN decides by a qualified majority vote on the basis of the Commission\'s recommendation and any observations of the Member State concerned whether an \'excessive deficit\' in fact exists (Art. 104(6) EC Treaty). Where the existence of an excessive deficit is decided, ECOFIN is to issue a private recommendation to the Member State with a view to correcting it (Art. 104(7) EC Treaty), \"which [correction] should be completed in the year following its identification unless there are special circumstances\" (Art. 3(4) Regulation 1467/97). If there is no effective action in response from the Member State within a maximum of four months (Art. 3(4) Regulation 1467/97), the recommendation may be issued again publicly (Art. 104(8) EC Treaty.) Where the public recommendation has not been put into practice within one month (Art. 5 Regulation 1467/97), ECOFIN may give notice to the Member State to take \"measures for deficit reduction which is judged necessary by ECOFIN\" in order to remedy the situation (Art. 104(9) EC Treaty). As a last resort, ECOFIN may decide, a maximum of two months after giving notice, to impose sanctions (Art. 104(11) EC Treaty). The sanctions are intended to ensure that \"the excessive deficit procedure has a sufficient deterrent effect\" (Preamble 18 Regulation 1467/97) and are to be imposed in increasing severity (Preamble 18-21 Regulation 1467/97). First, the Member State concerned shall, as a rule, be required to make a non-interest bearing deposit with the EC until the deficit is rectified. The deposit is of a prescribed size, which is related to the size of the Member State\'s GDP and its deficit: it must at a minimum comprise 0.2% of GDP and must not even with additional deposits exceed 0.5% of GDP (Art. 12 Regulation 1467/97). (ECOFIN may decide per Art. 11 Regulation 1467/97 to supplement this deposit by requiring the Member State \"to publish additional information, to be specified by ECOFIN, before issuing bonds and securities\" or by \"invit[ing] the European Investment Bank to reconsider its lending policy towards the Member State\" (Art. 104(11) EC Treaty)). If the deposit does not induce correction of the excessive deficit in due time, the deposit is to be transformed into a non-reimbursable fine, again until the deficit is rectified (Arts. 14 and 15 Regulation 1467/97, Art. 104(12) EC Treaty).

IV. Application of the Pact to Germany\'s updated Stability Programme, 2001-2005

[18] On 12 February 2002, ECOFIN met in Brussels in order to, *inter alia*, examine the updated Stability Programme submitted by the German federal government for the years 2001-05 in the context of the Pact. (ECOFIN was thereby fulfilling its responsibility under Art. 5(3) Regulation 1466/97.) At the meeting, ECOFIN adopted an opinion on the Stability Programme and a statement on Germany\'s budgetary situation. (18) The Commission in reaction entered a statement into the meeting\'s minutes. The interest in these ostensibly mundane proceedings lies in the circumstances surrounding the proceedings and the divergent approaches of the participants to them. For the proceedings represented the first occasion in the Pact\'s history on which the Commission had issued an opinion and recommendation to ECOFIN in accordance with Arts. 104(5) and (6) EC Treaty. Specifically, the Commission had on 30 January 2002 addressed an opinion to ECOFIN that an excessive deficit might occur in Germany and had recommended that ECOFIN give an early warning to Germany in order to prevent the occurrence of an excessive deficit. It was now for ECOFIN per Art. 104(6) EC Treaty to have regard to the Commission\'s recommendation, to consider the observations that Germany wished to make, to render an overall assessment, and ultimately to decide by a qualified majority whether the risk of an excessive deficit existed. Where it decided that such a risk existed, ECOFIN would then make recommendations to Germany \"with a view to bringing that situation to an end within a given period\" (Art. 104(7) EC Treaty). (19)

A. A Possible Precedent

[19] Although the episode with the Blauer Brief represented the first time that the early-warning provisions of the excessive deficit procedure were invoked, it was not the first time that the economic situation in a Member State was

critically examined under the Pact. Almost exactly a year earlier, ECOFIN had been forced to apply the economic policy guidelines process and decide whether to formally reprimand Ireland for its inflation policy. Ireland\'s monthly inflation rate had been well over the euro-zone target of two per cent since late 1999, reaching at one point seven per cent. The government in Dublin, was, however, pursuing a budgetary policy of tax cuts and generous spending. (20) The Irish Finance Minister argued that the causes of the high inflation rate were external, specifically higher oil prices and the Euro\'s weakness, rather than government policy. He also argued that growth, the strongest in Europe, was already beginning to slow in line with U.S.. (21) Notwithstanding these arguments, ECOFIN decided that Ireland\'s expansionary budgetary policy threatened to undermine the Euro. The finance ministers on 12 February 2001 called on Ireland to \"take countervailing budgetary measures during the current fiscal year\", reasoning, in the words of the German deputy finance minister, that \"[e]ach member state has a responsibility for the stability of the single currency.\" (22) The Irish government reacted defiantly, saying that the reprimand would not prompt it to change course and that \"[m]ember states are entitled to decide their own national budgetary policies\". (23) The show of \'espirit communitaire\' by the finance ministers did not, however, extend so far as to approve a proposal from the Commission for stricter coordination of economic policy. The Commissioner for monetary affairs had proposed raising the profile of the consultative Euro-Group by requiring governments to discuss budgetary policy changes with one another before enacting them. Member States preferred to maintain, according to the Group\'s President, the \"informal character\" of their meetings. (24)

[20] Given the fact that the Irish economy contributes a tiny share to continental output, what most likely lay behind ECOFIN\'s decision was a desire to avoid setting a precedent that would make it difficult in future to reprimand bigger Member States, such as France and Italy, that were at the time running deficits. (25) If so, they were in retrospect only partially successful. No precedent against reprimanding Member States under the EMU\'s multilateral surveillance processes had been set, but no precedent in favour thereof had been set either: the episode with the Blauer Brief would a year later demonstrate that the question of how the Pact should be applied remained largely open. What the reprimanding of Ireland did establish was that Member States\' economic performance had not completely converged, that their commitment to coordinate economic policy was also lacking, and that the issue of economic union remained highly charged and highly political.

<u>B. Distant Rumbles</u>

[21] The differences of opinion on the application of the Pact persisted over the course of 2001. As the continent\'s economic growth slowed, they were increasingly aired regarding the Pact\'s application during downturns and not during booms, as in the Irish case. Last summer, for example, as Germany\'s fiscal position began to deteriorate sharply, the federal finance minister complained publicly about the constraints on Europe\'s fiscal policies in an economic downturn. He suggested that changes might be made to the Pact to allow Member States to respond effectively to economic downturns by fiscal easing, such as applying its reference values to levels of spending and not to budget deficits. Some other governments came out in support, proposing reform of the Pact so that it applies to cyclically adjusted deficits. The Commission refused, however, to consider any such changes: the Pact needed no reform. More than that, it declared that in Germany, as in Italy and France, the Pact must not only preclude any additional fiscal easing but also the operation of the fiscal \'automatic stabilisers\' of falling tax revenues and rising spending. Fiscal policy in the three Member States, it noted, was already not in order. (26) The European Central Bank (\'ECB\') joined the Commission in adding that it was crucial for the financial markets\' confidence in the Euro for Member States to uphold the commitments that they had made in the Pact. (27) That claim brought the argument back full circle: proponents of change to the Pact, or at least of an application adapted to reflect economic conditions different from those when it was originally drafted, contended that the rules made little sense.

[22] And so proceeded the debate throughout the fall. While Member States expressed dissatisfaction with the Pact, the Commission stressed the importance of economic coordination and urged them to take action beyond the Pact to strengthen the euro-zone. The Commission president, for example, called on Member States to agree to \"a code of conduct\" for national budgetary and economic policies to reassure the public and financial markets that there was \"an effective mechanism for managing the economy\" alongside the ECB. Specifically, he envisioned a code that would \"set out the principles underlying the member states\' economic policies\" and that would provide \"criteria for deploying various economic policy instruments to increase capacity for growth and respond to unforeseen events that may affect the union as whole, or individual countries.\" (28) For its part, the ECB showed a more relaxed attitude to the Pact in view of the severe economic slowdown that began to take effect in the fall. The ECB unofficially declared itself willing to let euro-zone governments postpone their targets for achieving budget stability if the continent\'s economy failed to rebound in 2002. The Pact, it was said, would need to be interpreted more flexibly. (29)

<u>C. Storm - but also Zwang?</u>

[23] Despite the fact that the differences of opinion on the application of the Pact were long evident - as were Germany\'s mounting economic difficulties -, when the crisis finally broke early this year, its resolution was a matter

for intense, continent-wide speculation. In mid-December, the German finance minister publicly warned that his deficit would approach the three per cent limit set in the Pact. He added that Germany would probably be unable to balance its budget by 2004, the Pact\'s target date, but rather by 2006, if global conditions continued to deteriorate. (30) The reactions were immediate, strong, and starkly contrasting. On one side of the debate many Member States lined up. \"No sooner had Mr. Eichel raised the warning in Germany than other nations sought some wiggle room for their own heavy debt and deficit burdens.\" (The Italian government called on other Member States to consider loosening the budgetary rules by, for example, revising the Pact\'s deadlines. The Portuguese government welcomed the possibility that Germany might delay balancing its budget for two years.) (31) It became clear that Berlin had two options were the German budgetary situation to so persist: either the government would have to adjust the numbers in the balance sheet to contain the deficit or it would have to hope that other Member States would not take notice of any violation. Euro-authorities lined up on the other side of the debate, dead set against either means of evading the requirements of the Pact. Accouting ruses and backsliding, they argued, would create unwanted precedents that would weaken enforcement of the Pact. \"Let me emphasize the word \'strict\'\", commented one ECB official. \"No re-interpretation, no second readings, no flexibility should be allowed in this domain.\" (32) It should be noted that none of the participants in this debate proposed scrapping the Pact. While some observers urged getting rid of it altogether, (33) neither Member States nor euro-authorities could envision agreement within the foreseeable future on an alternative means of coordinating economic policy making. The debate among participants centred rather on how the Pact should be interpreted and applied.

[24] With the lines more or less so drawn, the debate played itself out at each stage of the excessive deficit procedure process. The German government sought prior to their issuance to block the Commission opinion and recommendation. National officials apparently agreed with their European counterparts\' concern about the size of the German deficit and about the need to respect the Pact, but they would not countenance all the conceivable means of addressing the situation. (34) In the event, rather than a straightforward warning as Berlin would have preferred, Brussels chose to issue an opinion and a recommendation on 30 January 2002. (35)

[25] The Commission did not accuse Germany of having caused the deficit by irresponsible fiscal policies: it recognised that it was largely the result of forces beyond Berlin\'s control. (Above all, the economic slowdown had impacted federal and state government revenues negatively.) The Commission feared that the euro-area\'s largest economy might exceed the 3% deficit reference value later this year. In 2001, the German government had forecast a deficit of 1.5% of GDP, but the actual deficit came in at 2.6%. This year, the Commission forecasts a deficit of 2.7%, but that assumes that the German economy grows by 0.75%. If the assumption were to prove similarly optimistic, the 3% reference value would be easily exceeded. (36) Given these worrisome developments, the Commission felt obligated to act. The responsible Commissioner declared that it was not possible for the euro-authorities to do anything other than follow the \"clear rules\" of the Pact (37) and more that the \"Pact\'s credibility is at stake\". Another senior Commission official went further: if ECOFIN does not let the Commission warn Germany, \"that will be the end of the stability and growth Pact.\" (38) The Commission believed that its prescribed duty under Art. 6 of Regulation was activate the early-warning system and to present such opinions and recommendations. The Finnish finance minister expressed a similar sentiment: \"if in this instance no early warning should be applied, I ask myself when.\" The facts, he said, were unambiguous. (39) In short, the Commission apparently thought a public row - with all consequent controversy and damage - preferable to \'turning a blind eye\' to an alleged violation of the Pact. (40)

[26] On 1 February 2002, during a newspaper interview, the German chancellor speculated that there must be \"other reasons, and not economic ones\" for the Commission\'s having issued the opinion and recommendation. (41) The government\'s chief spokesman elaborated that a reprimand of Germany was not justified on strictly economic criteria, since the prerequisite for a Blauer Brief was an indication of clear policy mistakes on the government\'s part, which was not possible in the present case. The higher-than-planned German deficits - which were still below the reference value - were solely the result of cyclical economic developments. (42) In an apparent reference to his earlier comments, the German chancellor added that he believed formal contractual agreements \"were important\" and \"had to be complied with.\" (43) Implied, however, was that the German government had not fallen afoul of any such agreements.

[27] The German government came under heavy criticism domestically for its reaction to the Commission\'s action, and not only from the opposition. The government\'s junior coalition partner, Alliance 90/The Greens, said that Germany should accept the recommendation. Said the partner\'s budgetary spokesman: \"[a]s Germans, we should show enough humility and acknowledge the reprimand.\" This was necessary, he continued, since \"we are perilously close to the 3 percent deficit mark.\" (44) Even politicians from the governing Social Democrats argued that the chancellor\'s indirect criticism of the Commission had caused far more damage than the acceptance - however reluctant - of an early warning would have. (45) And all that, others added, so as to gain a presumed short-term partisan advantage in an election year. (46)

[28] At the supranational level, French officials apparently sought to mediate between Brussels and Berlin. They said

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that while the Commission must defend the Pact\'s criteria, a warning letter from the Commission to Germany that did not offer policy recommendations to remedy the budgetary situation was of doubtful effectiveness. (47) For their part, officials in the German finance ministry apparently sought to find a compromise solution that would play down the significance of the disagreement and would allow all participants to save face. Officials claimed that they had proposed such solutions some time ago but that the Commission gave the impression that it was not interested in a compromise prior to issuing its warning. (48) The Commission was certainly little interested in finding a compromise solution thereafter: despite the urging of larger Member States such as Britain and Spain as well as France, the Commission refused to reconsider its decision. Said a Commission spokesman, for example: \"[t]he Commission stands by its analysis of the budget situation and the early warning is still on the table.\" (49) The Commission feared setting a damaging precedent were the Pact\'s provisions to be applied loosely, as there are no other formal euro-processes to coordinate economic policy among Member States. The spokesman continued: \"[t]he early warning procedure can be used again in the future if and when similar cases arise.\" (50)

[29] In light of Brussels\' refusal to reconsider its decision, Berlin launched a vigorous lobbying campaign to convince other Member States to resist such an unprecedented censure at the coming ECOFIN meeting. Berlin\'s efforts found a positive response in some capitals. Governments there also harboured for various reasons reservations about an all-too-strict interpretation of the Pact. (51) The German lobbying, however, met resistance in many smaller Member States, who objected to its attempts to exert influence. (52) Their governments could be described as preferring the rule of law to diplomacy (or less generously put, power politics) in multilateral arrangements. They had subscribed to the rules themselves by maintaining budget discipline. The Commission, the non-partisan representative of the general interest of the Community and natural ally of smaller Member States, had issued a warning recommendation. Now that a dispute had erupted, observance of the rules would facilitate a fairer resolution than reliance on parties\' own resources, especially when those resources were unevenly held. Given its own experience under the Pact, Ireland had reason to be especially incensed at the notion that bigger Member States might be treated differently than smaller. Where the previous year the bigger Member States such as Britain had insisted upon the principles behind the Pact in censuring Ireland for its inflation policy, this year they appeared to take a more lenient approach to the German budgetary situation and the Pact. (53) Indeed, Ireland could well have argued that given its greater economic weight in the euro-zone, Germany should be judged more severely. (54)

[30] In the buildup to the climactic ECOFIN meeting, many EU diplomats sought to avoid a controversy and negative vote on 12 February in order to limit the fallout from the whole episode. They feared that such an outcome would reduce the authority of the Commission and of some smaller Member States, who supported a strict interpretation of the Pact. (55) The trick was to avoid the reprimand of Germany (and Portugal) but at the same to ensure the credibility of the Pact. According to contemporary press reports, the British government took a leading role in the discussions on euro policy. The Chancellor of the Exchequer argued that the Pact did not need to be changed, just interpreted differently. Specifically, he stated that the Pact\'s wording was flexible enough to allow for cyclically adjusted deficits of greater than 3% of GDP, for a Member State\'s overall debt level relative to the EU reference value to be taken into account, and for the cause of the budgetary deficit - i.e. ordinary spending or investment in public services - to be considered. (56) In short, Britain argued for more latitude in the Pact\'s application so as to allow Member States more latitude to deal with economic slowdowns.

D. ECOFIN Meeting of 12 February 2002

[31] In the event, the EU\'s finance ministers did not vote on the Commission\'s recommendation that Germany (and Portugal) be officially warned that their deficits risked becoming excessive. The Spanish chairman of the meeting decided not to call a vote after the two Member States\' governments agreed to make formal pledges to stay within the 3% reference value. While the participants expressed themselves satisfied with this outcome, many observers were highly critical. The former, including the German finance minister, said that the outcome marked \"the end of an unproductive debate over procedures\" and would \"strengthen\" the Pact. The Austrian finance minister argued that as Germany had committed itself to improve, the outcome could not be considered a violation of the Pact. Even the responsible Commissioner seemed satisfied: \"[c]redibility has clearly been maintained.\" (57) The latter spoke of the compromise as having badly damaged the Pact, \"the decisive instrument for safeguarding budgetary discipline in a united Europe\", in its first real test. The finance ministers had acted on behalf of their governments and not Europe. The preference for parochial interests over the common good that they displayed would have, it was predicted, devastating consequences for public trust in the euro and the EU generally. For the moral would be drawn that the Pact\'s sanctions would henceforth only be applied when the Member State concerned agrees to them; that EU rules do not apply to all Member States equally; and that the calls from national capitals to intensify integration by strengthening European institutions are hypocritical. (58)

[32] A closer look at what exactly was agreed upon at the ECOFIN meeting reveals a more complicated dynamic at work. First, though Germany did escape the formal warning prescribed under the Pact, it received a critical opinion about its budgetary situation and committed in a separate statement to several demanding policy measures. Both

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documents were placed in the public domain. The alternative reprimand was arguably sharper in tone and in content than the early warning that the German government lobbied against. The early warning had been cautiously drafted by the Commission for \"fear of setting an overbearing precedent.\" (59) It consisted of two paragraphs in addition to a routine preamble and was characterised by bureaucratic language. (\"The German government should closely monitor budgetary developments at all levels of government in 2002. Any measures likely to lead to a further deterioration in the government deficit should be avoided.\" (60)) The opinion faulted Berlin for its failure to implement greater economic reform, especially of the labour market and social security and benefit systems (\"[s]ound public finances should be supported by the decisive implementation of structural reforms geared at improving growth potential of Germany\"); characterized the economy as \"remain[ing] highly vulnerable to external shocks\"; and urged the government to ensure strict budgetary implementation at all levels, describing the mechanism recently agreed with the regional authorities to ensure compliance with the fiscal targets as \"insufficient\". (61) Moreover, the government pledged in the statement that the budget deficit would not breach the 3% reference value this year; that any unexpected revenues would be used to reduce the deficit; that it would bring the budget to balance or \"close to balance\" by 2004 rather 2006 after all; and that it would take unspecified \"discretionary measures\" if necessary (i.e. possibly cutting spending or raising taxes) to meet its pledges -- and all this in an election year. (62)

[33] Second, both ECOFIN and the Commission entered statements in support of the excessive deficit procedure into the meeting\'s minutes. ECOFIN stated that it considered the early-warning mechanism \"an essential part\" of the Pact. The Commission, it continued, \"had thereby acted in accordance\" with the Pact\'s provisions in issuing the recommendation. In light of the commitments by the German government, however, ECOFIN considered that it had \"effectively responded to the concerns expressed in the Commission recommendation\" and closed the procedure. (63) For its part, the Commission \"welcome[d]\" the commitments of Germany (and Portugal), which, it said \"respond to the substance of the concerns in the Commission Recommendation.\" It reiterated that the early-warning mechanism is an \"essential part\" of the Pact and that it would in future use the mechanism in order to prevent the occurrence of an excessive deficit if and when Member States\' budgetary positions diverge significantly. (64) The responsible Commissioner reported that the ministers said that he had been correct to propose the warnings, even if ECOFIN did not ultimately agree with the Commission\'s recommendation. The procedure was justified because it demonstrated that \"budgetary policies can be steered in a transparent way.\" (65) He believed it was worthwhile proposing such warnings even if ECOFIN overturned them. (66) Looking ahead, he added intransigently that his interpretation of the Pact would be \"the same tomorrow as today and yesterday.\" (67)

E. Dead Letter?

[34] Given the circumstances described above, it may make more sense to view the excessive deficit procedure as an indirect sanctions mechanism. The attention that the possible reprimand had garnered before the ECOFIN meeting and the outcome of the meeting itself suggest that the principle of fiscal discipline in the euro-zone was respected after all. Although this may not have been the procedure prescribed in the Pact, the ad-hoc means may have proven itself as effective if not more so.

[35] By the time that ECOFIN convened to decide whether the risk of an excessive deficit existed in Germany, it was arguable that its conclusion had become with the march of events moot. (68) Luxembourg\'s prime minister reportedly said that there was \"no need\" to send Berlin the \'blauer Brief\'. (69) An early warning was superfluous. So much attention had been given to Germany\'s budgetary situation that the government and the Pact had already received their due. Specifically, \"[s]ources in Brussels said that the Commission had achieved its aim, namely to admonish Germany.\" (70) This much may be seen in the reaction of the would-be addressee. One German government official admitted \"[t]he announcement that a warning letter could be on its way is not helpful.\" (71) The responsible Commissioner said that the Commission\'s intention had never been to humiliate Germany. It had intended to ensure that Germany\'s budget deficit remained within acceptable levels. (72) And that it seems to have done so by means of the onerous restrictions on future spending to which the German government agreed. As one independent economist observed, \"[t]here\'s no way out for them [the Germans] now. They\'ll have to do these things, or risk looking like bad Europeans.\" (73) In sum, the public debate generated by the question of whether the letter would and should be sent and that the onerous commitments that the German government made to avoid it have, if not strengthened the Pact by its operation, firmly established it as an effective deterrent.

V. Conclusion

[36] Perhaps one newspaper headline about the ECOFIN meeting captured the general reaction to its outcome best: \"Promises, promises, fudge, fudge\". (74) The decision of the finance ministers not to send the \'Blauer Brief\' to Germany on account of its deficit smacked to many observers of a legal defeat. Rather than follow the Commission\'s (and the ECB\'s) strict application of the Pact, ECOFIN \"bent the rules\": it accepted commitments from the German government to improve its budgetary situation instead of giving it an early warning as recommended by the European

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authorities. Advocates of a strict application of the Pact warned of long-term damage to the EMU, and in particular to the euro. ECOFIN\'s decision had allegedly created a harmful precedent that will be followed by other Member States in future. In contrast, advocates of a flexible application reacted favourably to the compromise, describing it as a realistic reaction to a change in economic conditions. The Pact\'s fiscal constraints, they argued, should not be applied mechanistically during economic slowdowns at the expense of measures to encourage growth. Rather than a legal defeat, the outcome represented accordingly a political triumph: the governments of the European Union had again emphasized the primacy of politics in the affairs of the euro zone and the ECB. (75)

[37] Amid the controversy surrounding the decision, the Pact itself, which had triggered the whole process, was rather lost sight of. Its terms were not so much interpreted as presumed for the sake of the observer\'s argument. (76) As the examination above demonstrated, the excessive deficit procedure is something less than a legal instrument. Its emphasis lies on prevention, peer pressure, and politics. Above all, its signatories can apply it as they see fit; the Pact\'s creators and subjects are one in the same. Pace one of the Pact\'s drafters, the German government did not demand \"illegal action\" from ECOFIN in seeking to avoid an early warning being issued. (77) Instead, the German government successfully and legitimately argued that the circumstances were not appropriate for the procedure to be utilized.

[38] At the supernational level, this type of constraint that the Pact now represents may be all that should be reasonably expected. Fiscal policy is an especially controversial and political policy field and with responsibility for monetary policy already transferred to the ECB, that Member States would jealously guard their prerogative in this policy field is understandable. \"No doubt the euro would have a smoother ride, and the people of the euro zone a more prosperous one, if EU countries all pursued best practice in fiscal policy.\" (78) It appears, however, that the limits of inter-governmental cooperation have here been reached for the foreseeable future.

[39] The sanctions mechanism of the Pact should not be equated with those found elsewhere in the EU Treaties (such as regarding illegal state subsidies); Community Law and the European Union should be regarded as unique in this respect, atypical of international organization. The sanctions mechanism is more comparable to those found generally in international law as the latter are premised on a recognition of national sovereignty. Like the Pact, international law is a horizontal legal system, lacking a supreme authority and a differentiation of the three basic functions of law-making, law determination, and law enforcement. (79) It is true that under regional international law strict discipline can be exercised by organisations over their members. The excessive deficit procedure, however, expressly excludes the possibility of the Court of Justice of the European Union assuming jurisdiction over member states that are accused of breaking the rules of Community law. Instead, the peers of the Member State concerned are entrusted with the power to decide whether to impose sanctions. Being a political rather than a judicial body, ECOFIN, like the UN Security Council or General Assembly, may base its decisions on political considerations, with little concern for the legal rights and wrongs of the matter at hand. That \"sanctions work less effectively in international law than in national law\" or, for that matter regional international law generally, \"does not mean that international law as a whole works less effectively than national law - only that it works in a different way.\" (80) Power politics played a large role in determining the outcome of the ECOFIN meeting as did the size and importance of the Member State concerned, but so did the Pact itself. It played a large role in structuring the debate over Germany\'s budgetary situation and in determining the compromise solution that was agreed upon. Given the frequency of references to the Pact by all participants throughout the proceedings, it would be fair to say that events unfolded in its shadow of its provisions. For those observers accustomed to systems of law based on principles of \"command, obedience, and enforcement\", (81) the way in which the excessive deficit procedure operated - i.e. peer pressure, politiking, and promises - may be incomprehensible or unsatisfactory. Careful consideration of the outcome of the ECOFIN meeting should give critics pause before denouncing the Pact as \"toothless\" and its disciplinary process as \"a knife without a blade\". (82) Germany has undertaken to strictly observe its obligations under the Pact. If the rationale of a deterrent is prevent a person from acting in a certain way through fear of the consequences, the procedure proved itself effective.

VI. Postscript

[40] As noted, the German government pledged to ECOFIN that it would through agreements with regional authorities make every effort to ensure that its budgetary commitments would be met (83), since the Laender (states) have caused more of the general government deficit\'s increase. The federal government is responsible for the states\' debts for the purposes of the Pact\'s calculations, but it lacks the constitutional authority to require states to balance their budgets. Discussions have accordingly begun over joint, voluntary measures through which the federal government could secure promises of regional restraint. These possible measures have acquired the redolent moniker \'national stability pact\'.

[41] The terms of any national stability pact must be carefully thought through, especially the procedure to be applied

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if a particular state were not able or willing to abide by its commitment. (84) Lessons might usefully be drawn from the experience with the supranational pact in the design of the national sanctions mechanism: \"the recent debate about Germany has shown just how much a threatening letter can actually accomplish on its own.\" (85)

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(1) The \'blauer Brief\' or blue letter is so-called in reference to the letter that German schools used to send to the parents of students in danger of failing.

(2) The Stability and Growth Pact (\'The Pact\') consists of Council Regulation (EC) No 1467/97 of 7.7.97., Council Regulation (EC) No 1466/97 of 7.7.97., and of the Resolution of the European Council of 17.6.97.. The former Regulation entered into force on 1 January 1999; the latter on 1 July 1998.

(3) D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L.REV. 1685 (1976).

(4) The way in which tax legislation in Canada and the United Kingdom has been variously interpreted offers a clear example of such oscillation. (See S.W. Bowman, *Interpretation of Tax Legislation: The Evolution of Purposive Analysis*, 43 CAN. TAX J. 1167 (1995).

(5) A. v. Bogdandy, *The Euro is Forcing the Realization of Political Union - and Perhaps a New Community*, 14 G.L.J., para. 5 (2001), www.germanlawjournal.com.

(6) Ibid. at para. 6.

(7) Ibid. Another observer draws a comparison to the United States: it has managed to successfully combine a common currency and uniform interest rates (i.e. a supraregional monetary policy) with different regional economic conditions by virtue of the mobility of its workforce and the tax-and-spend powers of the federal government. As he notes curtly, \"[c]learly, neither of these conditions obtains in Europe today\". (L. Siedentop, DEMOCRACY IN EUROPE, p. 103 (2000)). Perhaps coincidentally or perhaps consequently, the Commission announced plans the day after ECOFIN\'s meeting to encourage workers to circulate within the Community more freely. The EU is seeking to facilitate the creation of a cross-border labor market similar to that in the U.S. (INTERNATIONAL HERALD TRIBUNE, 13 February 2002, p. 1; INTERNATIONAL HERALD TRIBUNE, 14 February 2002, p. 13.)

(8) J.-V. Louis, as quoted in Bogdandy at para. 6.

(9) The historical experience suggests caution in prognosticating the success of the EMU. Many unsuccessful attempts have previously been made to control the diverse political forces in the Member States that influence national economic and financial management within a stable, lasting Community framework. (T. Oppermann, EUROPARECHT (2nd. ed.), C.H. Beck: Munich, 1999, p. 354.) Moreover, as one newspaper editorial observed, \"had the pact been in operation over the past 15 years, both France and Germany would have been liable to pay fines on at least three occasions apiece.\" (ECONOMIST, 25 August 2001, p. 13.) Another described the terms of the stability pact as \"ambitious, if not idealistic\", when viewed in light of historic government spending. (INTERNATIONAL HERALD TRIBUNE, 20 December 2001, p. 1.).

(10) Siedentop, p. 104.

(11) In examining and monitoring Member States\' policies and performance, ECOFIN is to \"take into account the relevant cyclical and structural characteristics of the economy of each Member State\" (Preamble 14 Regulation 1466/97). Likewise, where the Commission prepares a report in accordance with Art. 104(3), it is to take into account all \"relevant factors\" (Preamble 11 Regulation 1467/97).

(12) G. Gloecker et al., GUIDE TO EU POLICIES, Blackstone: London, 1998, p.283.

(13) Ibid., p. 283, 284, 289.

(14) These steps, in what another observer described as a \"complicated\" surveillance process (Oppermann, p. 357), may include: the forwarding of information by the Member State concerned to the Commission regarding economic developments; adoption of Commission report; formulation of Economic and Financial Committee opinion; Commission opinion and recommendation to ECOFIN; ECOFIN recommendation to Member State; Council publication of recommendation; Council notice to Member State; Council imposition of sanctions; Council intensification of sanctions; Council abrogation of some sanctions; Council abrogation of all outstanding sanctions; and all at stages, the possibility of the excessive deficit procedure being temporarily held in abeyance. The imposition

of fines on fiscally irresponsible Member States has been described in the press as \"the nuclear option\". (See, for example, *Could the Euro\'s Nuclear Option ever be used?*, ECONOMIST, 2 February 2002, p. 27.) This description - with a bit of journalistic licence - fits the unthinkability of fines that could run into the billions of euros. It also in its extreme language speaks to the nature of the measure as a last resort, when all else has failed.

(15) Oppermann, p. 357.

(16) The ECOFIN opinions from the 12.2.2. meeting were deliberately placed in the public domain. (Minutes of the 2407th Council Meeting - ECOFIN - Brussels, 12 February 2002, p. 6. Available on line at: http://europa.eu.int/comm/press_room/index.htm; hereinafter \"Minutes\".)

(17) The report issued by the Commission per Art. 104(3) EC Treaty is first subject to analysis by the Economic and Financial Committee, which shall formulate an opinion (Art. 104(4) EC Treaty). The Commission is to take fully into account this analysis when in turn addressing an opinion and recommendation to ECOFIN in accordance with Art. 104(5) and (6) EC Treaty (Art. 3(2) Regulation 1467/97). The Economic and Financial Committee was proposed by the French \"to be a political counterweight to the independent ECB [European Central Bank], a formal \'Stability and Growth Council\' or \'gouvernement economique\'\" (Gloecker, p. 284.). In the event, the Committee, nicknamed the Euro-Group, was given a limited mandate, namely to carry out miscellaneous supervisory, advisory, and preparatory tasks on behalf the Commission and ECOFIN (Art. 114(2) EC Treaty); it is \"without real teeth\". (Ibid.) The Committee seems to have played no more than a formal role in the formulation of the ECOFIN opinion on Germany\'s updated Stability Programme, judging by the way in which the Committee is mentioned - or rather not mentioned - in the official press release from the ECOFIN Meeting of 12.2.2.. (See in particular the preamble and footnote 4 of the same.)

(18) ECOFIN was also forced to decide on the budgetary situation of Portugal in keeping with early-warning mechanism. In light of the relative unimportance of that Member State\'s economy - and therefore of any judgment on its government\'s policies - to the euro-zone, the Portuguese case did not garner much attention (and will be given little here) in comparison to the German. Indeed, ECOFIN\'s decision on the German budgetary situation likely determined its decision on the Portuguese. \"[T]he ministers could hardly be seen bashing a poorish small country while sparing a richer big one.\" (ECONOMIST, 16 February 2002, p. 31.)

(19) It is ironic, as newspaper reports never failed to point out, that it was Germany that faced a reprimand as it was Germany that had insisted on the Pact in the first place. The German government had wanted to ensure that their national tradition of monetary prudence would not be threatened by a currency union with Mediterranean countries, which had a reputation for weak currencies, inflation, and fiscal irresponsibility. The German government had also been traditionally opposed to the French idea of \'gouvernement economique\', a euro-zone economic government, which would serve as a political counterweight to the independent ECB and Commission. It is true that Germany\'s recent insistence on a flexible approach to the Pact and on the prerogative of ECOFIN to decide on its application represent dramatic changes in policy. There is nothing more than irony, however, in this turn of events - above all no policy prescriptions. The Pact\'s historical development should not be allowed to determine its future application. The hitherto strongest advocates of fiscal discipline now find themselves in budgetary difficulty essentially through no fault of their own and understandably seek a looser interpretation of the Pact. (As J.M. Keynes famously replied to a critic who accused him of intellectual inconsistency, \"when the facts change, I change my opinion. What do you do, Sir?\") Reference to the origins of the Pact are worthwhile only in so far as they highlight the fact that the sanctions mechanism of the excessive deficit procedure represents a political compromise that at French insistence fell short of the self-triggering, automatic mechanism that the German government sought. (DIE WELT, 5 February 2002, p. 9.)

(20) INTERNATIONAL HERALD TRIBUNE, 19 January 2001, no page citation at hand.

(21) INTERNATIONAL HERALD TRIBUNE, 13 February 2001, p. 11.

(22) As quoted in Ibid..

(23) As quoted in Ibid..

(24) As quoted in Ibid..

(25) ECONOMIST, 21 July 2001, p. 23.

(26) ECONOMIST, 25 August 2001, p. 13 and 60. The newspaper argued that the failure to let automatic stabilisers take effect smacked of \"1930s-style self-flagellation.\" It would worsen rather than alleviate the economic downturn.

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(27) ECONOMIST, 21 July 2001, p. 23.

(28) As quoted in FINANCIAL TIMES, 13 November 2001, p. 8.

(29) FINANCIAL TIMES, 22 November 2001, p. 1. The ECB officials quoted said that Member State governments should nonetheless continue to adhere to the goal of achieving fiscal balance over the medium term and to comply with the requirement that deficits not exceed three per cent.

(30) INTERNATIONAL HERALD TRIBUNE, 20 December 2001, p. 1.

(31) Ibid..

(32) As quoted in Ibid..

(33) See, for example, ECONOMIST, 25 August 2001, p. 13 and 60.

(34) FINANCIAL TIMES, 29 January 2002, p. 1.

(35) Portugal, whose projected deficit is lower than Germany\'s at 1.8% of GDP, received a critique of government fiscal policies as well as an early warning from the Commission. The Portuguese government was accused of having behaved irresponsibly by pursuing expansionary policies.

(36) ECONOMIST, 2 February 2002, p. 27.

(37) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 5 February 2002, p. 1.

(38) As quoted in ECONOMIST, 2 February 2002, p. 27. \"Credibility\" said the Commissioner elsewhere, \"means that one keeps one\'s promises and observes the rules, especially in trying times.\" (As quoted in DIE WELT, 8 February 2002, p. 4.)

(39) As quoted in DIE WELT, 6 February 2002, p. 5.

(40) Again this assumes to some extent what is to be proven: it assumes namely that the Pact is worth upholding. As one newspaper put it, however, \"[s]ome economists think that the pact was always a stupid idea: the sooner Europe is shot of it the better.\" (ECONOMIST, 2 February 2002, p. 27.) The problems that would allegedly result from one Member State\'s lack of fiscal discipline in the context of collective responsibility - i.e. higher interest rates and greater default risk - are from this point of view vacuous. Financial markets could hold a spendthrift Member State responsible for their debts without affecting the euro-zone\'s fortunes as a whole: markets could charge the Member State a risk premium for their lending and default risk remains with the Member State issuer per Art. 103 EC Treaty. Critics of the Pact argue furthermore that Member State governments have by means of the \'straitjacket\' lost their ability to manage their economy according to national conditions and preferences: e.g. to boost the economy at the expense of widening the deficit in times of economic slowdown.
Other observers consider these economic critiques too theoretical: the Pact exists (and will in the absence of realistic alternatives be around for the foreseeable future). They investigate instead its effects on government policy making. Political economists believe that the 3% deficit reference value \"has become a powerful excuse not to engage in tax cuts\", as hoped by its drafters, \"but potentially a temporary source of deficits.\" (WALL STREET JOURNAL, 13 February 2002, p. A6.) It can also be used to support demands on the ECB to lower interest rates, \"when governments feel that interest rates are too high, slowing growth and raising the government\'s borrowing costs\" (Ibid..)
Other critics take a functional approach. They point out that it makes little sense to penalize a Member State for an excessive deficit by imposing additional debt upon it through the fines sanction. In the alternative, they note the historical tendency of many of the Member States who would sit in judgment to spend more than they collect in taxes themselves and conclude that \"there\'s good reason to doubt the trigger would ever be pulled.\" (Ibid..)
A final group adopts the most pragmatic perspective on the Pact. What is important is the public expectations engendered by the Pact, and in particular the effect it has on the euro\'s credibility in the financial markets. Opinion on the merits of the Pact is, however, divided here as well. Queried one observer about the euro\'s recent drop against the US dollar, \"is this really what is moving markets at the moment? [... E]ven if traders were interested in Germany\'s deficit, this would be a minor factor compared to the main driver of exchange rates: potential returns. [... T]he variable is not new debt but the country\'s overall growth prospects.\" (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 7 February 2002, p. 5.)

(41) As quoted in INTERNATIONAL HERALD TRIBUNE, 2 February 2002, p. 1.

(42) As quoted in DIE WELT, 5 February 2002, p. 11.

(43) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 5 February 2002, p. 1.

(44) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 7 February 2002, p. 1.)

(45) DIE WELT, 7 February 2002, p. 5.

(46) See, for example, the argument of one newspaper editorialist. The chancellor \"wants a show of force so that he can run his election campaign as a man able to stand up to the \'bureaucrats in Brussels\' rather than as a scolded schoolboy. That is why he is picking a fight with the European Commission\". (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 7 February 2002, p. 1.)

(47) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 8 February 2002, p. 1. Apparently this French opinion was widely shared among Member State governments. The finance ministers anguished about whether their German counterpart, whom they all rate highly, really deserved to be admonished. (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 6 February 2002, p. 2.) In this context, the responsible Commissioner did not help his cause by going out of his way to tout the German as a model finance minister. (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 7 February 2002, p. 5.)

(48) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 7 February 2002, p. 1.

(49) As quoted in INTERNATIONAL HERALD TRIBUNE, 9 February 2002, p. 1.

(50) Ibid..

(51) DIE WELT, 6 February 2002, p. 8. For example, French officials explained that an early-warning would make no sense because until now the German finance minister\'s policies had been correct. (DIE WELT, 6 February 2002, p. 5.) Observers speculated that France was fearful of the Commission gaining too much power over the Member State governments should it be able to effect its will. France was also said to be expecting a quid-pro-quo from Germany in the form of Germany\'s support for its candidate to replace to the outgoing ECB president.

(52) Ibid.. In the event, Austria, Belgium, Finland, and the Netherlands sided with the Commission\'s recommendation. (ECONOMIST, 16 February 2002., p. 31.)

(53) DIE ZEIT, 7 February 2002, p. 6. See also DIE WELT, 12 February 2002, p. 11.

(54) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 11 February 2002, p. 1. (editorial) \"If Berlin continues to treat breaches of the rules as trifles [and] to subject the Commission and its partners to political blackmail [...] the grand experiment that is the euro will fail.\" It is true that the German chancellor thought of the Community in terms of \'Animal Farm\', where some Member States are more equal than others. Someone who did so much good did not deserve to be reprimanded. He argued that \"a cow that gives good milk must also be stroked.\" Germany was too often exploited by the Community, as the contributor of the greater share of the EU budget, as the financial backer for enlargement, as the engine of economic reform for it to be treated as a delinquent. (As quoted in DIE WELT, 11 February 2002, p. 5.) The German foreign minister added that Germany was too big and too important for the EU to be so treated: it would not be \"right\". (As quoted in INTERNATIONAL HERALD TRIBUNE, 13 February 2002, p. 1.) Such arguments may have had some influence on Brussels. A fortnight after the ECOFIN meeting, the Commission announced that the contribution that Germany would be required to make to the EU 2002 budget would be reduced. The Euro 2.3 billion lesser contribution was considered to be a \"first step in the right direction\" to keep Germany from exceeding the deficit reference value, said the Budget Commissioner. (As quoted in FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 28 February 2002, p. 1.)

(55) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 11 February 2002, p. 1. (lead article)

(56) INTERNATIONAL HERALD TRIBUNE, 12 February 2002, p. 11.

(57) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 13 February 2002, p. 1. (lead article)

(58) See, for example, FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 13 February 2002, p. 1. (editorial)

(59) INTERNATIONAL HERALD TRIBUNE, 12 February 2002, p. 1.

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(60) As quoted in Ibid.

(61) Minutes, p. 7, 8.

(62) Whether Germany will be able to meet the balanced budget target of 2004 has been a matter of intense speculation and calculation in the meeting\'s aftermath. (See, for example, INTERNATIONAL HERALD TRIBUNE, 13 February 2002, p. 14.) At a minimum, all observers seem to agree that the government has set itself an ambitious target.

(63) Minutes, p. 8, 9.
(64) Ibid., p. 29.

(65) INTERNATIONAL HERALD TRIBUNE, 13 February 2002, p. 1.

(66) As quoted in Ibid.

(67) As quoted in ECONOMIST, 16 February 2002, p. 31. The same newspaper predicted that the issue of the Pact\'s application would come up again because the Pact \"has not been dismantled and it has not been improved very much either.\" When the issue does, \"the recent muddle will [...] be repeated.\" (ECONOMIST, 16 February 2002, p. 12.) EU Enlargement may be the trigger to the Pact\'s reform. The economies of the applicant states continue to differ significantly from those of existing Member States. As such, the Pact may be difficult to apply without greater flexibility in interpretation after the applicant states adopt the common currency. (INTERNATIONAL HERALD TRIBUNE, 12 February 2002, p. 11.) Other observers argue that the prospect of increasing divergence should be occasion to strengthen the EU\'s ties, its rules and their enforcers. \"An enlarged Europe simply will not be viable unless it has strong institutions - above all a Commission - whose authority is binding and cannot be challenged.\" (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 15 February 2002, p. 1.)

(68) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 6 February 2002, p. 2.

(69) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 11 February 2002, p. 1.

(70) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 7 February 2002, p. 1.

(71) Ibid.

(72) WALL STREET JOURNAL EUROPE, 13 February 2002, p. A1. It should not be dismissed out of hand that there were political calculations at work in the Commission\'s behaviour, if not against the German government qua Social Democratic Party-Alliance90/The Greens coalition then qua Member State representative. The Commission may well have initially made a technical determination based solely on economic criteria in deciding that Germany risked an excessive deficit. Thereafter, it seems highly likely that the Commission took such a strong, uncompromising stance in drafting the letter and then refusing to reconsider its recommendation in order to establish a precedent not only in favour of the euro\'s credibility and the central bank\'s independence (INTERNATIONAL HERALD TRIBUNE, 13 February 2002, p. 1), but also in favour of the Commission itself. As one newspaper observed, it was of course inconceivable that any Member State would ever really be subjected to such a humiliation under the Pact, especially to its fines. Political considerations would dictate that \"[s]omehow a way would have to be found to get Germany off the hook.\" (ECONOMIST, 2 February 2002, p. 27.)

(73) D. Gros, Center for European Policy, as quoted in WALL STREET JOURNAL EUROPE, 13 February 2002, p. A1. The capital markets have yet to pass definitive judgment on Germany\'s budgetary position, though the blauer Brief brought the issue into sharp focus. The rating agencies are waiting to see how the situation develops before deciding whether to impose their own sanctions - namely a downgrade of the federal German government\'s debt from its top credit rating. (FINANCIAL TIMES, 6 March 2002, p. 2.) As many emerging countries have learned, the rating agencies\' sanctions can constitute severe punishment.

(74) ECONOMIST, 16 February 2002, p. 31.

(75) For a selection of such opinions, see, for example, INTERNATIONAL HERALD TRIBUNE, 13 February 2002, p. 14.

(76) See, for example, \"Euro-zone purists say [...] it is no longer clear just how binding the once iron-clad framework will be in the future.\" Ibid.

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(77) T. Waigel, DIE WELT, February 2002, p. 12.

(78) WALL STREET JOURNAL EUROPE, 13 February 2002, p. A6.

(79) FRANKFURTER ALLGEMEINE ZEITUNG, 19 November 2001, p. 8.

(80) P. Malanczuk, Akehurst, Modern Introduction to International Law (7th. ed.), Routledge: London/New York, 1997, p. 5.

(81) Ibid., p. 6.

(82) WALL STREET JOURNAL EUROPE, 13 February 2002, p. A6; DIE WELT, 5 February 2002, p. 9.

(83) Minutes, p. 8.

(84) As the arrangements now stand, coordination between the different levels of government is affected through a financial planning committee composed of representatives from each. It meets twice a year to discuss budgetary policy and is allowed to render policy recommendations. The committee\'s recommendations are not binding on the governments and fiscally irresponsible governments suffer no consequences for their non-observance, not even public warning. (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 12 February 2002, p. 5.) As ECOFIN sharply observed, \"the mechanism enshrined therein [in the Budget Principles Act] is not yet sufficient to guarantee compliance with mutually agreed objectives by all levels of government.\" (Minutes, p. 7.)

(85) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 12 February 2002, p. 5.

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