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Conformity to the Rule of Law in  
the EU  
- the case of the Stability and Growth Pact

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# Summary

This paper provides a presentation of the rule of law in the EU with regard to the Stability and Growth Pact.

As there are different jurisprudential conceptions as to define law, the meaning of the rule of law is inexact. The concept is however generally understood to be an antithesis to the rule of men, which implies arbitrariness.

The Stability and Growth Pact is a legal instrument, adopted in accordance with the EC Treaty, aiming to assure sound public finances in the EMU Member States by providing for sanctions against countries with excessive budget deficits. In November 2003, the Council of ministers of economy and finance (hereinafter the Ecofin Council) decided not to impose sanctions against France and Germany although they had excessive budget deficits, a decision that was contrary to EC law. In a subsequent ruling by the European Court of Justice in July 2004, the Ecofin Council decisions were annulled.

This paper analyses the Ecofin Council's refusal to apply EC law and the subsequent ruling from the European Court of Justice by using two perspectives on the rule of law in the EU.

From a public international law perspective, which assumes that the EU consists of essentially sovereign states, the rule of law functions imperfectly in the Union. The reason is that law and state are intimately linked. The authority of law depends on the coercive means to enforce it. In this regard, the question of the authority of law depends on the body that controls the state. In classical legal theory this idea is expressed in terms of sovereignty and coercive powers. Since EU has no real sanction possibilities at its disposal, the authority of EC law is weak.

The reason the Ecofin Council refused to apply EC law is because the Stability and Growth Pact is an unfortunate legal instrument. It cannot be expected to work properly between essentially sovereign states, since its application is at the mercy of the very states it purports to control. From a public international law perspective, no criticism can be pointed towards the Member States for not implementing the Pact. Instead, criticism should be pointed towards the European Court of Justice that through its case law and different conception of the rule of law has extended its powers beyond what the Member States intended. The Ecofin Council decisions not to implement the Stability and Growth Pact is in this view explainable and even justifiable.

The other perspective this paper presents is a constitutional perspective, which involves a conception of law that is held by the European Court of

Justice. This view holds that the EU consists of not fully sovereign Member States and that it has several constitutional features. It assumes a rights-based conception of law that can be traced back to the constitutional theory of John Locke. The law of the constitution is in this view merely an expression and a consequence of natural rights. The function of law is to safeguard and promote these natural rights that exist independently of society. To break the law is, in Lockean terminology, comparable to rebellion. The task of the Court is to interpret a constitution, whose purpose is to uphold rights and not to create them. From this perspective, the Ecofin Council decisions constituted an unacceptable encroachment on EC law.

The provisions of the Stability and Growth Pact are specific and clear, and the Ecofin Council decisions concerned mere application of law, as opposed to interpretation. Nevertheless, the Ecofin Council decided contrary to EC law. This situation might be explained by the active role of the Court in developing EC law. The Court might have anticipated this situation by its creative case law through which it has developed the material scope of EC law beyond the intentions of the Member States. Despite this, the judgement of the Court that annulled the Ecofin Council decisions is likely to be followed. The alternative would lead to a constitutional crisis, which is not in the interest of the Member States. Thus in the trial of strength between the Member States and the EU, the Ecofin Council decisions were probably enough a statement of the power of the Member States.

# Preface

I would like to thank my supervisor Mr Ola Zetterquist for his guidance and support during the work with this paper.

Maria Henningson  
Lund, August 2004

# Abbreviations

The Court	Court of Justice of the European Communities
Ecofin Council	Council of Ministers of Economy and Finance
EEC	European Economic Community
EC Treaty	Treaty establishing the European Community
EDP	Excessive deficit procedure
EMU	European Economic and Monetary Union
EU	European Union
GDP	Gross domestic product
IGC	Intergovernmental Conference
SEA	Single European Act
SGP	Stability and Growth Pact
TEU	Treaty on the European Union (Maastricht Treaty)

# 1 Introduction

In November 2003, the Council of Ministers of Economy and Finance (hereinafter the Ecofin Council) voted on a recommendation from the Commission concerning the imposition of sanctions against France and Germany. The two countries had not complied with the rules laid down in the Stability and Growth Pact. The Pact is a legal instrument, adopted in accordance with the EC Treaty, aiming to assure sound public finances in the EMU Member States by providing for sanctions against countries with excessive budget deficits. Although the Ecofin Council agreed that the two countries had excessive budget deficits, it voted against the imposition of sanctions, and thus broke EC law.

These facts make concrete the jurisprudential problem of this paper, which is that of the rule of law. The concept dates back some 2000 years, but its exact meaning is disputed. However, it is clear that the European Union is founded on the principle of the rule of law.<sup>1</sup>

## 1.1 The basic questions

The aim of this paper is to provide a presentation of the rule of law in the EU with regard to the Stability and Growth Pact. It is already known that the Ecofin Council decisions of 25 November 2003 constituted a breach of EC law. On what grounds did the Ecofin Council break the law? Did it have a justification for doing so? These questions can be answered by looking further into the rule of law in the EU. What does it entail?

A jurisprudential discussion on the rule of law will have to involve a discussion of law as such. What is the nature of *law* in the rule of law? And more specifically, what is the nature of EC law? Where lies its authority and claim for obedience?

## 1.2 Method

Two alternative perspectives will be the tools to investigate the rule of law in the EU in the light of the Stability and Growth Pact. One is the public international law perspective, a view that holds that the EU is an international organization, albeit with peculiar institutions, made up of essentially sovereign states. The other perspective is the constitutionalist view, which holds that the EU has several features indicating a constitution. Each perspective will be applied and used as a tool for analysis of the recent developments of the Stability and Growth Pact. Both ancient and contemporary theorists will be referred to.

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<sup>1</sup> Article 6 TEU.



### **1.3 Material**

Research on the Stability and Growth Pact has been carried out using official publications and the Internet. Legal periodicals, academic dissertations and classical texts have been used to get a theoretical basis to the problem of the rule of law.

### **1.4 Delimitations**

When carrying out research for this paper, difficulties of delimitation arose. Perspectives and conceptions traditionally dealt with in political science turned out to be closely related to the problem at hand. One example is the concept of sovereignty, which cannot be ignored, and of which political science offers a plethora of theories. Nevertheless, my intention has been to explore the subject from a purely legal perspective.

Although this paper deals with fundamental questions, such as the authority of law, they are discussed in order to provide an explanation of the recent developments of the Stability and Growth Pact. The intention is not to deal with the EC legal order as a whole.

# 2 The Rule of Law and the EU

## 2.1 The rule of law as a constitutional principle

The rule of law evolved some 2000 years ago as an antithesis to the rule of men, which implies arbitrariness. The rule of law is often associated with the nineteenth-century legal theorist Albert Dicey who identified three characteristics of the concept. First, the rule of law means supremacy of law as opposed to the influence of arbitrary power. The consequence is that only a distinct breach of the law is punishable. Secondly, it means equality before the law. No man is above it, but rather is everyone subject to it. Lastly, it can be regarded a formula for expressing the fact that the law of the constitution is not the source, but the consequence of the rights of individuals. These rights are eg. the right to personal freedom, the right to freedom of discussion and the right of public meeting.<sup>2</sup>

Similar thoughts are found in the constitutional theory of John Locke, in which the rule of law has a pivotal place. The purpose of law is to eliminate arbitrariness and uncertainty. Indeed, “freedom of men under government, is to have a standing rule to live by”.<sup>3</sup> The rule of law implies rule of a specific kind of law. As argued Dicey 200 years later, there are natural rights such as self-government and autonomy, of which the law of the constitution is a consequence. They exist independently of society. Therefore, it is required that the law of the constitution promotes these natural rights.<sup>4</sup>

This requirement is linked to the authority of law. The fact that natural rights exist independently of society is the very reason why the law should be conformed to. The idea of law’s moral authority is old. The thirteenth-century British legal scholar Henry Bracton put it like this: “But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king [...] for there is no king where the will and not the law has dominion”.<sup>5</sup>

These views have been contrasted by writers who accord a different meaning to the rule of law. One such alternative definition is provided by the twentieth-century legal positivist Joseph Raz, who considers Dicey’s definition unfortunate.<sup>6</sup> Instead, according to Raz, the rule of law means only that people should obey the law and be ruled by it. For this to happen, the law needs to be such that people will be able to be guided by it. The law

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<sup>2</sup> Albert Dicey, *Introduction to the Study of the Law of the Constitution*, p. 202 f.

<sup>3</sup> John Locke, *Two Treatises, II*, p. 284, § 22.

<sup>4</sup> *Ibid.* p. 357, § 135.

<sup>5</sup> Henry Bracton, *De Legibus Et Consuetudinibus Angliae*, ch. VIII, p. 38 (39).

<sup>6</sup> “English writers have been mesmerized by Dicey’s unfortunate doctrine for too long”, Joseph Raz, ‘The Rule of Law and its Virtue’, *The Authority of Law, Essays on Law and Morality*, p. 218.

must be capable of being obeyed. These two aspects form the basic idea of the rule of law, from which certain other principles can be derived.<sup>7</sup>

The principles Raz derives from the concept seem to be first and foremost procedural in nature. Some of the principles are: all laws should be prospective, open and clear, they should be relatively stable, the making of particular laws should be guided by open, stable, clear, and general rules, the independence of the judiciary must be guaranteed, the principle of open and fair hearing and absence of bias must be observed, the courts should have review powers over the implementation of the other principles, the courts should be easily accessible and finally, the discretion of the crime-preventing agencies should not be allowed to pervert the law.<sup>8</sup>

The rule of law as opposed to the rule of men is, according to Raz, a tautology. A government is by definition a government authorized by law. Consequently governmental action not taken in accordance with law is not action by the government as a government.<sup>9</sup> A government that does not act within the limits of its powers breaches the principle of legality, to which the rule of law is related but not identical. The principle of legality means that authority must be exercised on the basis of law. The principle of legality does not, however, put any requirement as to the material content of the law. A law that explicitly gives government arbitrary powers is thus in conformity with the principle of legality.<sup>10</sup>

Raz suggests that the rule of law can only be understood if separating the professional and the layman sense of law. To a lawyer, any rule that meets the conditions of legal validity laid down in his or her legal system is law.<sup>11</sup> The layman sense of law is only a subclass of these rules. Law in the laymen sense of the word is a set of open, general and relatively stable rules. If this is the definition of law, then government by law as opposed to by men is not a tautology.<sup>12</sup>

A legal order has both general and particular laws. The principle of the rule of law requires that the making of particular rules is guided by general rules that are open and relatively stable in nature.<sup>13</sup>

But why, according to Raz, is Dicey's definition unfortunate? Raz draws attention to "the slippery slope leading to the identification of the rule of law with the rule of the good law".<sup>14</sup> Raz does acknowledge that believing

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<sup>7</sup> Joseph Raz, 'The Rule of Law and its Virtues', *The Authority of Law, Essays on Law and Morality*, p. 212 f.

<sup>8</sup> Ibid. p. 214 ff.

<sup>9</sup> Ibid. p. 212.

<sup>10</sup> Ola Zetterquist, *A Europe of the Member States or of the Citizens?*, p.121.

<sup>11</sup> Joseph Raz, 'The Rule of Law and its Virtue', *The Authority of Law, Essays on Law and Morality*, p. 213.

<sup>12</sup> Ibid. p. 213.

<sup>13</sup> Ibid. p. 213.

<sup>14</sup> Ibid. p. 227.

in the rule of law is to believe that good should triumph,<sup>15</sup> but this must not lead to confusing the concept with “equality, human rights of any kind or respect for persons or for the dignity of man”.<sup>16</sup>

By stripping the rule of law free from the rule of the good law, Raz defines a narrower rule of law. It is not, however, synonymous with the principle of legality. As seen, the rule of law requires that particular rules are made guided by general rules, which are open and relatively stable in nature.<sup>17</sup>

Another definition, closer to that of Raz than to that of Dicey, is provided by the British legal theorist Trevor Hartley. He proposes three requirements for the rule of law. First, the laws have to be expressed in the clearest and most precise way possible. Secondly, they should be interpreted objectively and thirdly, they should be obeyed and enforced.<sup>18</sup>

These conflicting views on the content of the rule of law have bearings to questions of the nature of law. Depending on how one defines the rule of law, different features can be attributed to the law itself. Indeed, in order to understand the principle of the rule of law, we will have to understand something about ‘law’ means. Where lies its authority? What legal sources can be used to interpret the law?

## 2.2 The rule of law in the EU

“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”<sup>19</sup>

Given the alternative definitions of the rule of law, the Treaty provision cited above needs further clarification. What does the European rule of law contain?

The rule of law functions in the legal framework of the EU, which is a rather solid apparatus. The EU has five institutions carrying out tasks entrusted to them by the Treaty. These are: the European Parliament, the Council, the Commission, the Court of Justice and the Court of auditors. They shall act within the limits of the powers conferred to them by the Treaty.<sup>20</sup> Although the pattern of competences of the institutions has not been static,<sup>21</sup> the rule of law has been a guiding principle; the Treaty is agreed upon by all Member States, and the acts of the institutions are based on the rules laid down in the Treaty.

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<sup>15</sup> Ibid. p. 211.

<sup>16</sup> Ibid. p. 211.

<sup>17</sup> Ibid. p. 213.

<sup>18</sup> Trevor Hartley, *Constitutional Problems of the European Union*, p. 23.

<sup>19</sup> Article 6 TEU.

<sup>20</sup> Article 7 (1) EC Treaty.

<sup>21</sup> Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases, and Materials*, p. 49.

An exact definition of the rule of law in the EU is hard to find. It has been claimed that there is no uniform understanding of the concept in the Union.<sup>22</sup> Although a uniform definition of the rule of law might not be provided by the union as such, there is a clear tendency of a particular definition in one of its institutions, namely the Court.

### **2.2.1 The European Court of Justice and development of EC law**

The Court has to a large extent developed EC law. While being both creative and active, the Court has claimed that it upholds the rule of law. An example of this is the case *Les Verts*, where the Court stated that “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the questions whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”.<sup>23</sup>

The Court has on several occasions derived legal principles from the treaties. Although these principles are not in all cases evident from the wordings of the treaties, the Court has sometimes argued that the principles were inherent in the treaties all along. These legal principles are thus not black-letter law, but are found in other legal sources than in written documents.

What are these principles that the Court declared part of EC law? One example is the Supremacy clause in *Costa v. Enel*. The Court ruled that “by creating a Community of unlimited duration, having its own institutions, its own personality [...] and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights [...]”<sup>24</sup> The wording “transfer of powers” indicates a permanent power limitation, as opposed to delegation of powers which can be taken back at any time. EC law is thus, according to the Court, a constitutional system of law that in a hierarchical order is above the legal systems of the Member States.

Another example of EC law derived from the treaties by the Court is the case *Van Gend en Loos* and the principle of direct effect.<sup>25</sup> By this principle individuals get a possibility to impose obligations on a Member State if the Treaty provision in question is sufficiently precise and unconditional and if it can be fulfilled without the need of any further measures.

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<sup>22</sup> Dale Mineshima, ‘The Rule of Law and EU expansion’, *Liverpool Law Review*, 24: 73-87, 2002.

<sup>23</sup> Case 294/83 [1986] ECR 1339.

<sup>24</sup> Case 6/64 [1964] ECR 593.

<sup>25</sup> Case 26/62 [1963] ECR 1.

This principle was further extended in *Van Duyn v. Home office*<sup>26</sup> where the Court attributed direct effect to provisions of directives not yet implemented into the laws of the Member States. The Court has thus ruled supremacy of EC law and direct effect into a legal order where these principles once were absent.

Another legal principle the Court has derived concerns the division of competences between the Member States and the Community. The Court first formulated a principle of pre-emption in the ERTA case where the Court held that “once a Community common policy has been initiated, Community competence pre-empts Member State competence”.<sup>27</sup> In subsequent cases, the principle of pre-emption has been made more flexible and pragmatic. The principle of pre-emption differs from the Supremacy clause of EC law ruled in *Costa v. Enel* in that the latter is a guide when two existing norms regulating the same thing are in conflict, whereas pre-emption consists in determining whether there is a conflict between a national measure, be it in application or decision, and a rule of Community law.<sup>28</sup>

Some legal principles are considered so fundamental that they are comprised in EC law although no written law supports it. Protection of fundamental rights is one such principle. The EU does not have a ratified written bill of rights. But as a response to a ruling in 1967 of the German Constitutional Court<sup>29</sup> where the German ruling held that EC law has no lawful democratic basis since it has no protection of human rights, the Court read an unwritten bill of rights into EC law.<sup>30</sup> These rights were to be found by drawing inspiration from the Member States’ constitutional traditions and from international treaties. EC law today thus clearly confers rights to individuals.

In all federal systems, judicial review of legislation is an essential part of the judicial infra structures. The Treaty gives the Court competence in this area, but it lacks coercive powers to enforce its judgements.<sup>31</sup> In the case *Les Verts*,<sup>32</sup> the Court undertook judicial review despite the fact that it lacked formal competence to do so. The case was an action for annulment of an act of the European parliament brought by *Les Verts – Parti écologiste*, who invoked article 173 (now 230) EC Treaty. This article stated explicitly that it (only) permitted actions of the Council and the Commission. The Court nevertheless admitted the action claiming that actions intended to have

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<sup>26</sup> Case 41/74 [1974] ECR 1337.

<sup>27</sup> Case 22/70 [1971] ECR 263.

<sup>28</sup> Ola Wiklund, *EG-domstolens tolkningsutrymme*, p. 322.

<sup>29</sup> Bundesgerichtshof, order of 18 October 1967, in BVerGE, 1967, 223.

<sup>30</sup> *Nold v. Commission*, Case 4/73, [1974] ECR 491.

<sup>31</sup> Article 230 EC Treaty gives the Court competence to review Community legislation. Article 234 EC Treaty gives the Court competence to give preliminary rulings concerning the interpretation of the Treaty and interpretation and validity of acts of Community institutions.

<sup>32</sup> Case 294/83 [1986] ECR 1339.

effect vis-à-vis third parties could be admitted. In the opinion of the advocate general Mr Mancini is explained: “Article 173 does not provide for judicial review of the decisions of the Parliament. I none the less believe that such an interpretation would conflict with the general scheme of the treaties and I consider that there is sufficient support in the Court’s case-law and in academic works for the opposite view.” In order to give support to this view, Mancini comments another case in which “the obligation to observe the law takes precedence over the strict terms of the law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission”.<sup>33</sup>

From this statement and from the account above it is clear that, first, the Court has been very active in developing EC law, and secondly, that it uses more than only black-letter law as sources for interpreting the law. It seems that the Court’s definition of the rule of law is closer to the definitions of Dicey and Locke than to the definitions of Raz and Hartley. The law that the Court conforms to is either rules that it considers inherent in the treaties, or another, unwritten law, too fundamental to overlook, as was the case when protection for fundamental rights was ruled part of EC law. Despite the fact that some writers consider it a bit too creative, the Court itself has always been careful to have a reasoning in conformity with the rule of law.

## 2.3 The rule of law under strain

In recent years there have been examples of when, albeit to a lesser degree than the Ecofin Council decisions of 25 November 2003, the rule of law has not been conformed to and the law has either been ignored or has had a less important role.<sup>34</sup>

The appointment of the Prodi Commission is one such example.<sup>35</sup> When in 1999 the Santer Commission resigned, it remained in office until a new Commission could be appointed. The appointment of what was to become the Prodi Commission lacked formal support in at least two aspects. First, the appointment of a new President was made in April 1999 according to the rules in the Amsterdam Treaty.<sup>36</sup> This is all good, except that the Amsterdam Treaty did not enter into force until May 1<sup>st</sup> 1999. Secondly, when Parliament elects the Commission, this shall be done for a period of five years.<sup>37</sup> However, the old Commission was formally elected until 31 December 1999 although it resigned in March 1999. When in September 1999 the Parliament was to approve of the new Commission as a body, the new President Mr Prodi refused to serve if the Commission was not elected

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<sup>33</sup> Opinion of Mr Mancini, Case 294/83 [1986], ECR 1339, [1987] 2 CMLR 343.

<sup>34</sup> Joakim Nergelius, “De-legalize it” – On Current Tendencies in EC Constitutional Law’, *Yearbook of European Law*, 21, 2001-2002, p. 442.

<sup>35</sup> *Ibid.* p. 451.

<sup>36</sup> Article 214 EC Treaty.

<sup>37</sup> *Ibid.*

for five years and four months, i.e. until the date it would have been elected had not the old Commission resigned. Although these encroachments were not grave and to criticize them might be regarded as too formalistic an activity, it is interesting how both the Member States, the Commission and the Parliament by their actions showed that the treaties are not sacred.

Another example of a very relaxed attitude towards the law is the sanctions against Austria in 2000. In January that year the Member States decided to launch sanctions against Austria. The reason they were imposed was that Austria had a new government with a right-wing populist leader. Article 7 TEU should have been invoked but was not. This article can be activated when there is a “clear risk of serious breach” of the common values on which the EU is founded. No accusations of violations of these common values were presented. The sanctions thus lacked legality. They were decided by the other Member States and not by an EU institution. The sanctions were introduced, according to Nergelius, simply because the country had a new government.<sup>38</sup>

Another example which does not concern a breach of law, but rather a situation in which law has had a less important role, is the EU Charter on Fundamental Rights. The Charter was adopted by the European Council at the Nice Summit of 10 December 2000. The Charter is not legally binding, and a lot of the provisions of the Charter can be found in already existing EC law. The point Nergelius makes is that a lot of time and resources (the Charter had been prepared for a long time by a special committee of experts working on the drafting of the articles) were spent on a document that, legally speaking, is mere soft law. This, according to Nergelius, would not have happened five or more years ago, since intergovernmental decision-making with a lessened importance accorded to law is a new tendency.<sup>39</sup>

These are all examples of situations in which the law has not been followed or considered less important than political achievements. However, the most flagrant example of ignorance of the rule of law at EU level so far is the Ecofin Council’s refusal to implement the Stability and Growth Pact and impose sanctions on France and Germany for failing to comply with the provisions of the Pact.

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<sup>38</sup> Joakim Nergelius, ‘De-legalize it’ – On Current Tendencies in EC Constitutional Law, *Yearbook of European Law*, p. 453.

<sup>39</sup> *Ibid.* p. 455 f.



# 3 The Stability and Growth Pact

## 3.1 Background and aim

The idea of a single European currency dates back to 1970 and the Werner report<sup>40</sup> which proposed convergence between the currencies and economies of the six EEC countries.<sup>41</sup> Little happened during the following years, but the idea came closer to reality in 1986 when the Single European Act (SEA) was signed.<sup>42</sup> The SEA meant a step forward for the completion of the single market based on the free movement of goods, people and capital. The single market is one of the cornerstones of the European integration project and monetary stability is an essential feature of it. As long as devaluation of currencies is an option, unfair competitive advantages might result and lead to distortions in trade.

Since the Delors Committee Report<sup>43</sup> of 1988 the European economic and monetary union has been thought to materialize in three stages. The third and final stage involved the locking of exchange rates and the emergence of a single currency. For this to happen the Member States had to fulfil certain convergence criteria stated in the Maastricht Treaty.<sup>44</sup> These rules are general in nature. With the emergence of a single currency, specific rules for budgetary discipline and economic policy co-ordination were indispensable.

The Stability and Growth Pact<sup>45</sup> was agreed on in 1997 together with the Amsterdam Treaty. The Pact aims to assure sound public finances in the EMU Member States by providing for sanctions against countries with excessive budget deficits. Thus the legal gap resulting from the generally held convergence criteria in the Maastricht Treaty was filled, and specific rules for economic policy co-ordination aiming at safeguarding sound government finances were set.

## 3.2 Legal features of the Stability and Growth Pact

The Stability and Growth Pact consists of three elements, one resolution and two Council regulations.

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<sup>40</sup> Report to the Council and the Commission on the realisation by stages of economic and monetary union in the Community, Luxembourg 8 October 1970.

<sup>41</sup> Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

<sup>42</sup> Official Journal L 169, 29/06/1987.

<sup>43</sup> Report on Economic and Monetary Union in the European Community, 12 April 1989.

<sup>44</sup> Article 104 EC Treaty.

<sup>45</sup> Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997.

The political commitment is contained in a resolution<sup>46</sup> agreed by the Amsterdam European Council of 17 June 1997. All parties involved in the Pact, i.e. the Commission, the Council and all the Member States,<sup>47</sup> have agreed to this political commitment on the full and timely implementation of a budget surveillance process. The political commitment functions as a peer pressure on Member States failing to live up to its commitments, and thus it is not legally binding.

Preventive elements are contained in Council Regulation 1466/97,<sup>48</sup> which reinforces the multilateral surveillance of budget positions and the coordination of economic policies. It also foresees the submission by all Member States of stability and convergence programmes. All Member States are required to submit such a programme, even if not participating in the third stage of the EMU.<sup>49</sup>

For the purpose of this essay Council Regulation 1467/97<sup>50</sup> on speeding up and clarifying the implementation of the excessive deficit procedure (EDP) is of special interest. This regulation contains dissuasive elements and provides for sanctions against countries with excessive budget deficits. It also specifies a procedure for assessing an excessive government deficit in a euro-zone country. If a Member State fails to meet the agreements of the Stability and Growth Pact, all parties are bound to engage in the prompt implementation of the excessive deficit procedure. This procedure is enforced when a Member State is running a deficit on public expenditure over revenue of over 3 % of its GDP in any year. Additionally, governments may also not allow total government debt to exceed 60 % of GDP. In the event of a breach of the 3 % reference value, Member States are required to take immediate corrective action and, if necessary, allow for the imposition of sanctions.

If a Member State is found to be in serious breach of the agreement, the Commission can recommend that the Council take action against it. According to a Treaty provision,<sup>51</sup> Member States are protected against sanctions against them should the budget deficit be exceptional or temporary. Council Regulation 1467/97 provides guidelines for determining in what circumstances a budgetary deficit can be regarded as exceptional or temporary. Member States are protected against sanctions when a governmental deficit results “from an unusual event outside the control of the Member State concerned and which has a major impact on the financial

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<sup>46</sup> Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997.

<sup>47</sup> Point IV of Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997.

<sup>48</sup> Council Regulation 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

<sup>49</sup> Article 7 (1) Council Regulation 1466/97.

<sup>50</sup> Council Regulation 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.

<sup>51</sup> Article 104 (2) (a) EC Treaty.

position of the general government, or when resulting from a severe economic downturn”.<sup>52</sup>

Besides these features, the Ecofin Council has approved of a Code of Conduct on the content and format of the stability and convergence programmes.<sup>53</sup> This Code of Conduct is a tool of assistance for the Member States. It is basically a transformation of the essential elements of Council Regulation 1466/97 into guidelines to help the Member States draw up their programmes. It also aims at facilitating the examination of the programmes by the Commission, the Economic and Financial Committee and the Council.

### **3.3 Shortcomings of the Stability and Growth Pact**

The Stability and Growth Pact has certain shortcomings. Without entering into economic analyses, some of the criticism shall be accounted for. The surveillance and correction mechanism is subject to criticism. Although there is consensus about the need for specific rules in order to make the common currency work, there is no consensus as to what these rules should contain. Now that the Stability and Growth Pact contains specific rules, such as the reference value of 3 % budget deficit limit and a limit of 60 % for government debt, these gradations have been criticized for being applied too rigidly.<sup>54</sup>

Further on, it has been argued that there are no strong incentives to prevent Member States from deviating from the non-binding political commitment to strive for a balanced budget in the medium term.<sup>55</sup> It has also been argued that big countries may be less susceptible to peer pressure than smaller ones, since bigger countries are unlikely to lose their influence on EU policies anyway.<sup>56</sup> This would explain why large Member States are less likely to be constrained by the political commitment of the Stability and Growth Pact than smaller Member States.<sup>57</sup>

A more important reason for criticism is that the surveillance and correction mechanisms are dependent on action from the Ecofin Council on the Commission’s initiative. There is also a risk that such initiatives are not

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<sup>52</sup> Article 2 Council Regulation 1467/97.

<sup>53</sup> 10 July 2001.

<sup>54</sup> Seyad Sideek, ‘Reflections on the Stability and Growth Pact’, *Europarättslig tidskrift*, p. 134.

<sup>55</sup> J Haan, H Berger, D. Jansen, ‘The End of the Stability and Growth Pact?’ Research memorandum, De Nederlandsche Bank, November 2003, p. 37.

<sup>56</sup> *Ibid.* p. 17.

<sup>57</sup> *Ibid.* p. 37.

conducive to stability.<sup>58</sup> The institutional rules have been called “not at all satisfactory”.<sup>59</sup> A rather complex voting system gives only participating Member States a right to vote in areas concerning correction mechanisms of the Stability and Growth Pact.<sup>60</sup> This further suggests that the Council in its voting constitution might not always be conducive to stability, but have other considerations.

### 3.4 Failure to implement the Stability and Growth Pact

On a recommendation from the Commission, the Ecofin Council decided in January 2003 that excessive deficits existed in Germany.<sup>61</sup> The Council then adopted a recommendation that set a deadline for Germany for adoption of the measures recommended for correcting its excessive budget deficit.<sup>62</sup>

Concerning France, the Council adopted a recommendation giving France an early warning with proposed measures for preventing an excessive deficit.<sup>63</sup> France failed to take corrective measures why the Council in June 2003 decided that an excessive deficit existed. The Council then adopted a recommendation that set a deadline for France for adoption of the measures recommended for correcting its excessive budget deficit.<sup>64</sup>

When the deadlines had expired and no measures had been adopted by the two Member States, the Commission proposed that the Council adopt decisions establishing that the two member States had not taken adequate measures to reduce their deficits. The Commission also recommended that the Council take a decision to give the two Member States a concerned

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<sup>58</sup> Hugo Hahn, ‘The Stability and Growth Pact for European Monetary Union: Compliance with deficit limit as a constant legal duty’, *Common Market Law Review*, 35: 77-100, 1998, p. 89.

<sup>59</sup> B. Irlenbusch, U. Leopold-Wildburger, J. Schütze, M. Sutter, ‘Voting in EMU — An Experimental Study of Institutional Innovation and the Role of Communication in the Stability and Growth Pact’, *Journal of Common Market Studies*, vol. 41, no. 4, September 2003, pp. 645-664.

<sup>60</sup> Article 104 (9) EC Treaty.

<sup>61</sup> Council Decision 2003/89/EC of 21 January 2003 on the existence of an excessive deficit in Germany, Official Journal L 034, 11/02/2003 p. 16-17.

(accompanied by a Council recommendation on the measures to be taken by Germany to put an end to the excessive deficit situation, Bulletin EU 1/2-2003.)

<sup>62</sup> Council Recommendation of 26 June 2003 on the broad guidelines of the economic policies of the Member States and the Community. Official Journal L 195, 01/08/2003, p. 1-54.

<sup>63</sup> Council Recommendation 2003/90/EC of 21 January 2003 with a view to giving early warning to France in order to prevent the occurrence of an excessive deficit, Official Journal L 034, 11/02/2003, p. 18-19.

<sup>64</sup> Council Recommendation of 26 June 2003 on the broad guidelines of the economic policies of the Member States and the Community. Official Journal L 195, 01/08/2003, p. 1-54.

notice to take measures to reduce their deficits, i.e. to impose the excessive deficit procedure.<sup>65</sup>

On 25 November 2003 the Ecofin Council voted against the Commission's proposals.<sup>66</sup> This is in order, since the authority to impose sanctions is the Ecofin Council. Only Member States which participate in the third stage of the EMU and which fulfil the demands in the Stability and Growth Pact are allowed to take part in the decisions in this area.<sup>67</sup> The voting Member States did not constitute the qualified majority needed to adopt the Commission's proposals. The Council thus diverged from the Commission's recommendations to launch the excessive deficit procedure for France and Germany who had had a governmental deficit of more than 3%. The Council held the excessive deficit procedure in abeyance and instead adopted two recommendations that were modifications of recommendations previously adopted by the Council, this time stating that the two Member States should correct their deficits in the light of the commitments made by each of them. If this was not to be done within a certain time limit, the Ecofin Council stated that the excessive deficit procedure might be launched at a later stage.<sup>68</sup>

The Ecofin Council does have a possibility to reject the Commission's recommendations. Should its own evaluation of objective economic factors diverge from a recommendation, the Council can reject it, provided that it can clearly and unambiguously explain why there is no need to adopt the decisions based on the Commission's recommendations.<sup>69</sup> This was however not the case of the 25 November 2003 decisions. The Ecofin Council had confirmed the Commission's economic analysis. In such a situation the Ecofin Council has formally no margin as to the choice of legal instruments. Consequently it should have adopted the recommendations of the Commission. Instead, the ministers of the Ecofin Council deliberately chose an intergovernmental position, akin to that under public international law, meaning that the ministers of the Ecofin Council diverged from EC law.

In January 2004, the Commission brought the Ecofin Council before the Court.<sup>70</sup> According to the Commission, the Ecofin Council conclusions constituted a violation of the control mechanism laid down in the EC Treaty and the Stability and Growth Pact. Therefore the Commission challenged the Ecofin Council's decisions in Court. The Commission asked for annulment of the Ecofin Council's decisions to put the excessive deficit procedure in abeyance and secondly, it asked the Court for annulment of the

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<sup>65</sup> Recommendations for Council decisions in accordance with paragraphs 8 and 9 of Article 104 of the EC Treaty, of 18 November 2003, Bulletin EU 11-2003, point 1.3.7.

<sup>66</sup> Bulletin EU 11-2003, point 1.3.8.

<sup>67</sup> Article 104 (9) EC Treaty.

<sup>68</sup> European Council – Ecofin Meeting 25 November 2003, Implementation of the Stability and Growth Pact, 14492/1/03 REV 1 (en) (Presse 320) 15.

<sup>69</sup> Article 104 (12) EC Treaty.

<sup>70</sup> Case C-27/04 filed on 28 January 2004.

decisions on the two recommendations to France and Germany to correct their budget deficits.<sup>71</sup>

The only apparent legal grounds for the Commission to base its case on were procedural grounds.<sup>72</sup> Implicit reasons for bringing legal action before the Court might have been to clarify budgetary surveillance for the future, thus establishing legal clarity and predictability.<sup>73</sup>

### 3.5 Judgement in Case C-27/04

On 13 July 2004, the Court delivered its ruling after an expedited procedure.<sup>74</sup> The Court declared the action brought by the Commission inadmissible as far as it concerned the Council's failure to adopt decisions to give notice to Germany and France. The Court found that where there is no decision, there is no act that can be challenged. Therefore, this part of the action was inadmissible.<sup>75</sup>

The Court did however admit the second part of the Commission's action that concerned the decisions of the Council to put in abeyance the excessive deficit procedure and the decisions to modify recommendations that had previously been given by the Council to France and Germany. The Court annulled all of these decisions.<sup>76</sup>

The Court acknowledged that the Council has some discretion to take decisions, should it assess economic data differently than the Commission. This discretion does not, however, give the Council a right to depart from the rules in the Treaty or in regulation 1467/97.<sup>77</sup>

As far as the decisions to put the excessive deficit procedure in abeyance are concerned, the Court accepted that the procedure de facto may be held in abeyance, if the Council does not achieve the required majority for the proposal laid down by the Commission.

However, in the 25 November decisions, the Council did not only state that the procedure be held in abeyance, but by adopting recommendations that stated that the excessive deficit procedure be held in abeyance for the time being, and that the procedure might be initiated later, the Ecofin Council made conditional the circumstances in which abeyance would be granted.<sup>78</sup>

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<sup>71</sup> Judgement of the Court of Justice in Case C-27/04, Press release No 57/04.

<sup>72</sup> Seyad Sideek, 'Reflections on the Stability and Growth Pact', *Europarättslig tidskrift*, No. 2 2004, p. 133.

<sup>73</sup> *Ibid.* p. 132.

<sup>74</sup> Article 62 a of the Court's rules of procedure.

<sup>75</sup> Judgement of the Court of Justice in Case C-27/04, Press release No 57/04.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> The Ecofin decision reads as follows: "The Council agrees to hold the Excessive Deficit Procedure for France/Germany in abeyance for the time being. The Council stands ready to take a decision under Article 104(9), on the basis of the Commission Recommendation,

This, according to the Court, is not acceptable, since it restricts the Council's power to give notice on the basis of the Commission's earlier recommendations. If this was to be accepted, it would lead to a situation in which a decision to give notice would not be based on the recommendations of the Commission, but on unilateral commitments between states, since the Ecofin Council is made up of the ministers of economy and finance of the Member States. Thus the reason for annulment of the decisions on modified recommendations is that the decisions were not preceded by an initiative from the Commission, which has a right of initiative in the excessive deficit procedure.<sup>79</sup>

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should France/Germany fail to act in accordance with the commitments set out in the Conclusions [...]” European Council – Ecofin Meeting, 25 November 2003, para. 6.

<sup>79</sup> Judgement of the Court of Justice in Case C-27/04, Press release No 57/04.

# 4 Two perspectives on the Rule of Law in the EU

## 4.1 Introduction

In the previous chapter we saw how the Court judged the Ecofin Council decisions of 25 November 2003 to constitute a breach of EC law. The Council and the Commission held two opposing views and the Court judged in favour of the Commission. This chapter provides a presentation of the rule of law in the EU by providing a theoretical basis for understanding this tussle between the positions of the Council and the Commission. The positions of the Council, which squares well with a public international law perspective, and the Commission, which squares well with a constitutional perspective, will be dealt with respectively. The presentation builds on the assumption that the rule of law (to some extent) is conformed to either at EU level or at Member State level.

## 4.2 Public international law perspective

The public international law perspective has its roots in the international order that was established after the peace of Westphalia in 1648.<sup>80</sup> It builds on the assumption of two complementary frameworks of law. First there is constitutional law that governs the internal law of sovereign states, and secondly there is international law that governs relations between these states.

### 4.2.1 The EU under public international law

In the post-war period, international law was strongly connected to international politics. International relations were indeed *inter-national* in that the primary actors on the international arena were sovereign states. In political science this theory is known as the realist school.<sup>81</sup> In legal theory this perspective is known as public international law. The methodological approach to law is a rather pragmatic one.<sup>82</sup> Law is conceived in political terms and there is a focus on power as the only real force determinant in the reality of international life.

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<sup>80</sup> Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker, *Sovereignty in Transition*, p. 9.

<sup>81</sup> John Baylis, Steve Smith, *The Globalization of World Politics*, p. 109.

<sup>82</sup> Janneke Nijman, 'Sovereignty and Personality: A Process of Inclusion' in Gerard Kreijen, *Sate, Sovereignty and International Governance*, p. 115.



From a public international law perspective, the EU consists of essentially sovereign states. Since no real sanction possibilities are at its disposal, the EU is a regular international organization that has peculiar institutions. Since the Member States are essentially sovereign, the EU is “below” the Member States. Consequently EC law is below national constitutional law. The term *sui generis* is commonly used to describe EC law, meaning that EC law is a separate system of law, but never independent from the Member States.<sup>83</sup>

The term *sui generis* has been criticized by Derrick Wyatt, who claims that there is nothing genuinely new about EC law.<sup>84</sup> EC law is not a separate system of law or a new legal order. The Court has contrasted the EEC Treaty with ordinary international treaties and claimed that it creates its own legal system, but Wyatt rejects this view. He calls for a distinction between the Court’s description of the Community system and the actual consequences ascribed by it to Community law. The actual consequences of EC law do not differ much from those of international law; also traditional treaties impose duties on the signatory parties<sup>85</sup> and grant direct effect to its provisions, albeit that the principle of direct effect is often side-stepped.<sup>86</sup>

The EU does however differ from international law in that it has peculiar institutions. The Court is a very peculiar institution indeed viewed from a public international law perspective. How does an international organization made up of essentially sovereign states square with a Court that gives rulings that are binding upon these states?

In the early days of the Court, its tasks were limited to help Member States to interpret Community law, while the courts of the Member States applied it. There was no intention to establish a European Supreme Court which would be above the Member States’ own courts.<sup>87</sup>

It is with these arguments in mind that we shall investigate what the rule of law entails from a public international law perspective.

#### **4.2.2 Requirements of the rule of law under public international law**

As accounted for in chapter two, the meaning of the rule of law is inexact. We shall now return to the definition proposed by Hartley, because it is a definition that squares well with a public international law view. To Hartley, the rule of law means first that the laws have to be expressed in the clearest and most precise way possible. Secondly, they should be interpreted

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<sup>83</sup> Literally meaning: “of its own gender/genus” or unique in its characteristics.

<sup>84</sup> Derrick Wyatt, ‘New Legal Order, or Old?’, *European Law Review*, 1982.

<sup>85</sup> *Ibid.* p. 152.

<sup>86</sup> *Ibid.* p. 154.

<sup>87</sup> Ola Zetterquist, *A Europe of the Member States or of the Citizens?*, p. 28.

objectively and thirdly, they should be obeyed and enforced.<sup>88</sup> According to Hartley, all of these requirements are problematic in the EU. He argues that the Court on several occasions has encroached the rule of law in this shape.

#### **4.2.2.1 Objective interpretation of the law**

Hartley criticizes the Court for deriving legal principles from the treaties and claiming that they were inherent in them all along, although these principles might not be evident from the wordings of the treaties.

In public international law there is a fundamental principle that says that although international law is binding upon the contracting parties, the application and effect of international law by domestic courts is governed by domestic constitutional law.<sup>89</sup> In the *Van Gend en Loos* case,<sup>90</sup> the Court ruled in spite of this principle by saying that Community law decides when Community law is directly effective in a Member State. The reason this is problematic is that the treaties do not deal with the question whether Community law is directly effective or not. From the omission of such a provision, Hartley draws the conclusion that the Member States did not intend to diverge from the universally accepted principle at the time, namely that the effect of international law will depend on a rule of domestic law. Had the Member States intended the Treaty to have direct effect, one could expect an express inclusion, especially since regulations (as opposed to the Treaty itself) are explicitly directly applicable.<sup>91</sup> The conclusion of Hartley's argument is that the Court's ruling in the *Van Gend en Loos* case was contrary to what the Member States intended, and therefore it was also contrary to the treaties themselves and thus to the rule of law.<sup>92</sup>

As we saw in chapter 2, the Court has ruled in the *Van Duyn v. Home Office*<sup>93</sup> that also directives can be directly effective as a matter of Community law. One argument put forward by the Court was that not to give it direct effect in the Member States would be incompatible with its binding effect. Hartley considers this argument wrong. As stated above, before the *Van Gend en Loos* case, no international instrument was directly effective as a matter of international law, but rather as a matter of domestic law. Thus binding effect and direct effect are separate features where the former is capable of existing independently of the latter. Another argument put forward by the Court was that the practical effectiveness of directives would be greater if they were directly effective. Hartley points out that this is a reasoning about what the law ought to be rather than about what it is. As with the *Van Gend en Loos* case, the Court's judgement in *Van Duyn v.*

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<sup>88</sup> Trevor Hartley, *Constitutional Problems of the European Union*, p. 23.

<sup>89</sup> *Ibid.* p. 25.

<sup>90</sup> Case 26/62 [1963] ECR 1.

<sup>91</sup> Article 249 EC Treaty.

<sup>92</sup> Trevor Hartley, *Constitutional Problems of the European Union*, p. 24.

<sup>93</sup> Case 41/74, [1974] ECR 1337.

Home Office is contrary to the intentions of the authors of the treaties and therefore to the treaties themselves.<sup>94</sup>

A similar, normative argument about what the law ought to be, has been put forward in other cases<sup>95</sup> and is as follows. If the Court does not declare a provision to have direct effect, Member States can benefit from their own wrongdoing. This is not good, but a full (but not necessarily desirable) conformity to the rule of law under public international law implies, by definition, that such consideration be omitted. Conformity to the rule of law implies that a Treaty provision without explicit direct effect has to remain without direct effect until the law is changed, i.e. by a Treaty amendment. Conformity to a strict rule of law thus requires other means to prevent Member States from benefiting from their own wrongdoing.

Judicial review of legislation is an essential part of the judicial infra structure in a federation. The Treaty gives the Court competence to “review the legality of acts [...] of the Council, of the Commission other than recommendations or opinions”<sup>96</sup>. In the Chernobyl case,<sup>97</sup> the Court extended its competences concerning this article by accepting proceedings to annul Community acts brought by the Parliament, something it earlier had denied.<sup>98</sup> The Court clearly recognized the absence of a provision in the Treaty that gives the Court the right to admit proceedings brought by the Parliament, nevertheless it did accept it.

Hartley explains these tendencies by saying that the Court often deals with what the law ought to be rather than what it is. The Court’s rulings sometimes have a legislative character. This character is especially apparent when the Court applies the so called Defrenne doctrine which states that rulings apply only to rights and obligations based on facts that have arisen after the Court’s judgement. Hartley points out that such a doctrine can be justified only if the Court’s rulings are legislative rather than declaratory. If the Court stated what the law always had been, there would be no need to restrict its validity to the future.<sup>99</sup>

These examples show that the Court often fails to interpret the law objectively. According to Hartley, there is no evidence that the Member States and their courts accept the treaties with the meaning accorded to them by the Court. He calls such an assumption a reality deficit.<sup>100</sup>

Critical opinions about the Court can be found elsewhere too. The Danish jurist Hjalte Rasmussen has claimed that the Court has had a particular idea

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<sup>94</sup> Trevor Hartley, *Constitutional Problems of the European Union*, p. 27.

<sup>95</sup> Eg. *Ratti* Case 148/78, [1979] ECR 1629, (para. 22 of the judgement).

<sup>96</sup> Article 230 EC Treaty.

<sup>97</sup> *European Parliament v. Council* Case C-70/88 [1990] ECR I-2041.

<sup>98</sup> *European Parliament v. Council (Comitology)* Case 302/87 [1988] ECR 5615.

<sup>99</sup> Trevor Hartley, *Constitutional Problems of the European Union*, p. 41.

<sup>100</sup> *Ibid.* p. 181.

of the Community irrespectively of others who might have had different ideas. This discrepancy poses a serious legitimacy problem to the Court.<sup>101</sup>

#### **4.2.2.2 Obedience and enforcement**

The rule of law also requires that the laws are obeyed and enforced. EC law has few enforcement instruments although there are enforcement procedures in the Treaty aimed at situations when a Member State has breached Community law.<sup>102</sup> Hartley claims that Community law does not apply evenly in all the Member States. He shows statistically how British agricultural produce will encounter more obstacles in France than French produce will in Britain and how a Danish company will encounter more illegitimate barriers in Italy than would an Italian company in Denmark. The Court has introduced a right of action for damages in national courts as an attempt to solve the problem. The problem remains in so far as it is for the national courts to apply the law, while EC law lays down general principles.

#### **4.2.2.3 Clarity and precision**

Another requirement for the rule of law is that the laws are expressed in the clearest and most precise way possible. There are many features of EC law that make this requirement difficult to fulfil.

Laws often prohibit or stipulate a certain conduct or act. But in any legal system there are also rules that aim at the *result* of a certain conduct. Such rules may lead to uncertainty since the result of an act cannot always be estimated with certainty. In EC law such rules are particularly numerous and important. One example of such a rule is article 28 EC Treaty that prohibit quantitative restrictions on imports and “all measures having equivalent effect”. The Court has interpreted this as prohibiting all trading rules which “are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade”.<sup>103</sup> Although much is written about the interpretation of this, there is still uncertainty as to what it means.

Another aspect of Hartley’s criticism of the rule of law in the EU is deliberate uncertainty. This occurs when terms are used precisely because they are uncertain. When an agreement cannot be reached, a term may be used that could mean either what the one party wants it to mean or what the other wants. Thus an agreement is reached on a wording on whose semantic meaning there is no agreement. This is undesirable because it requires the Court to adopt a quasi-legislative role.<sup>104</sup>

Member States sometimes enter into secret agreements when Community legislation is before the Council. These agreements specify how the legislation is to be interpreted and applied. One can trace the opinion of

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<sup>101</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*, p.14.

<sup>102</sup> Articles 226-228 EC Treaty.

<sup>103</sup> Procureur du Roi v. Dassonville Case 8/74 [1974] ECR 837 (para. 5 of the judgement).

<sup>104</sup> Trevor Hartley, *Constitutional problems of the European Union*, p. 73.

Hartley, which is that it is unfortunate that secret agreements, which are poorly compatible with clarity and precision, affect the way in which Member States interpret and apply Community legislation.<sup>105</sup>

From a Member State perspective, these examples show that the rule of law functions imperfectly in the EU. The Court fails to interpret the law objectively, enforcement of EC law is not even amongst the Member States and EC law is often unclear and imprecise. Why then should EC law be conformed to? Might these shortcomings of conformity to the rule of law not be sufficient an explanation why the ministers of the Ecofin Council departed from EC law when adopting the decisions of 25 November 2003? The core problem concerns sovereignty and ultimate power. Therefore, these concepts will be investigated.

### **4.2.3 A question of sovereignty**

From a public international law perspective, the problem of the rule of law in the EU is intimately linked to the question of sovereignty. How is that? One's view on sovereignty will inevitably affect the discussion on the rule of law in the EU. If, for example, one considers the Member States still fully sovereign, the consequences are that any decision, be it according to or contrary to EC law, can justifiably be agreed upon as long as the Member States are unanimous or they have unanimously decided to use qualified majority voting in the future.<sup>106</sup> If, on the other hand, one holds the view that the Member States have transferred some of their sovereignty to the EU, a justification for a decision contrary to EC law cannot be made as easily. This is why we need to explore the notion of sovereignty in more detail.

#### **4.2.3.1 A Hobbesian state**

The arguments put forward by Hartley have roots in older legal philosophy, namely that of Thomas Hobbes. Law and state are intimately connected in his theory on sovereignty. The point of departure for this theory is the state of nature where man finds himself before society exists. Although the state of nature is a state of freedom and equality in the sense that no individual rules, these two are of little value since the lack of a common superior leads to permanent insecurity. In fact the state of nature is a state of war in which there are no laws. Men will fight because of scarcity of resources and because of vanity, that we demand to be esteemed.<sup>107</sup>

In order to gain security and protection, men will consent to exit the state of nature and enter into political society, i.e. the state. Thus the state contract is set up. By it, each individual transfers part of his freedom to the state which

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<sup>105</sup> Ibid. p. 74.

<sup>106</sup> The Ecofin Council decisions of 25 November 2003 was agreed on with qualified majority.

<sup>107</sup> Thomas Hobbes, *Leviathan*, ch. XIII, p. 88.

gives protection in return. Man is now bound by the will of the state, and law functions in the state as a restriction of natural liberty.

The sovereign is not a party to the contract. Therefore there can be no obligation imposed on the sovereign, who is above the constitution. It is of crucial importance that the sovereign has a sword. By his superior strength, he can protect individuals from violence from other individuals. Indeed, without executive powers, there can be no law.

Curiously enough, Hobbes was indifferent as to whether sovereignty is exercised in one or many institutions.<sup>108</sup> What matters is the possibility to identify one ultimate and supreme power. The importance of this comes in clearer light if one considers the very purpose of entering into political society, namely avoiding the dreaded anarchy of the state of nature and reaching unity.

Divided sovereignty is therefore considered a contradiction in terms. Nothing that has supreme power can coexist with a rival supreme power. Given that divided sovereignty is not possible, there are two possible ways of viewing the EU from a Hobbesian perspective. Either the Member States are sovereign or the Union is. If holding the former view, the Member States have, while keeping their sovereignty, delegated some powers to the EU institutions. The fact that EU institutions undisputedly issue laws and impose sanctions on Member States does not change the position of the Member States. A different legal system is valid on a sovereign territory only if the sovereign accepts it.

If Member States are fully sovereign themselves, it follows that the relationship between Member States is, in the Hobbesian sense, a state of nature. Although there are obvious problems with claiming that the Member States in the EU today act as did the individuals in the state of nature, one can perhaps trace a few analogies. The Member States might be considered to be driven by their own interests and of a will to maximize their own strength. The Ecofin Council decisions of 25 November 2003 are an example of this.

Secondly, one could argue that the EU is the sovereign. The most apparent problem with this argument however is the Union's lack of executive powers. The sovereign has no sword and thus no means to uphold the social contract. Although one could claim that the EU has some executive powers in the field of commercial competition law, this is not a sword potent enough to consider the EU as a sovereign in the Hobbesian sense.

Thus one must conclude that, from a Hobbesian perspective, the Member States are sovereign. The EU cannot make a plausible claim to sovereignty and the Member States will ultimately act in accordance with their national interests.

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<sup>108</sup> Thomas Hobbes, *De Cive*, X § 16.

#### **4.2.3.2 Sovereignty and democracy**

To bring Hobbes into a contemporary discussion on the Stability and Growth Pact might seem a little far-fetched. The question about the rule of law in the EU relates perhaps very little to the Hobbesian sword. But if we for a moment contemplate on the relationship between sovereignty and democracy, Hobbes' theory might be useful a tool for analysis of the Stability and Growth Pact. In an attempt to interchange the concepts of sovereignty and democracy, similarities will show.

Law and state are intimately connected in Hobbes' theory. The state is controlled by the sovereign who has the power to impose sanctions. The state (and a sovereign to control it) are essential for the very existence of law and thus for the rule of law. A contemporary argument of the same kind would translate into a question of democracy. If we keep assuming that the state and someone to control it are essential features for the existence of law, who controls the state in our time?

In states based on democracy, parliaments represent the people. The body actually controlling that state is therefore, strictly speaking, the people voting on the day of elections.

From a democracy perspective, the reason conformity to the rule of law in the EU fails in the way Hartley describes it, is that it is not the European people that control the EU. Although elections to the European Parliament are direct, there is no European political arena. By that is meant that the European citizens vote in response to the political situation in their Member State, not in response to the political situation in the EU. The European parliament is not responsible for their actions before the European citizens in the same way as national parliaments are. If from a Hobbesian sovereignty perspective there is no sword, there is from a modern democracy perspective no legitimacy, since European peoples do not have a sense of being one common demos and thus there is no common body to control the EU.

#### **4.2.3.3 Conformity to the rule of law in two authorities?**

So far, it seems that the rule of law is first and foremost conformed to at Member State level. Is there no way we can conceive of an order in which the rule of law is conformed to in two different legal systems? Is it not possible to imagine the Member States obeying EC law and their own internal legal orders without one being supreme over the other? The question at hand is whether it is possible to argue in a theoretically sound way that the rule of law can be conformed to in both the Member States and in the EU. Once again, this question is intimately linked to the question of sovereignty, and more specifically to whether sovereignty can be divided.

One famous theory on divided sovereignty is that of Jeremy Bentham. His theory on constitution differs from that of his predecessors. Rather than

being based on a formal social contract, power stems from the habits of people.<sup>109</sup> The sovereign is simply the person(s) habitually obeyed. To what extent the sovereign will be obeyed, and thus his practical limit, depends on the “juncture for resistance”<sup>110</sup> which is a sort of utility calculus or cost-benefit analysis that each individual makes.

Bentham conceived of no natural rights and identified law with power. Thus there can be no limit *per se* to the power of the sovereign. The exception to this is where there is an express convention by which the legislative power limits itself.<sup>111</sup> Another body or assembly can be sovereign in the area where the legislative power has limited itself. In this way, the sovereign does not have to be one body or one assembly and divided sovereignty is conceivable.<sup>112</sup> “All that is necessary is, that this sort of acts [the acts taken away from the sovereign’s power by an express convention- *my addition*] be in its description distinguishable from every other”.<sup>113</sup>

Is Bentham’s theory a convincing model for the EU? It might be possible to argue that divided sovereignty is currently exercised in the EU. The basis of EU competence is the principle of conferred powers.<sup>114</sup> In the grey zone between specific areas of competence and the areas excluded of EU competence, the principle of implied powers<sup>115</sup> allows the Council to “fill in the gaps”. By these two principles, the Treaty states in what areas the European institutions have competence. The Treaty might therefore be considered an express convention. By signing the Treaty the Member States have limited their sovereignty in order to share it with the EU.

As to the question of the extent of obedience, articles 2-4 EC Treaty mark out the specific subject areas of competence and will thus determine to what extent EC law will be obeyed. In Benthamite language, these articles represent the juncture for resistance. In theory, the Member States are prepared to show limited resistance within these areas. If the EU legislates outside the areas listed in articles 2-4 EC Treaty, the Member States will reach the juncture for resistance and will not obey. The extent of sovereignty of the EU will be decided by the utility calculus of the Member States, much in the same way as the utility calculus of the persons in the Benthamite State.

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<sup>109</sup> Jeremy Bentham, *A Fragment on Government*, ch. IV, p. 101, § 35.

<sup>110</sup> “when, according to the best calculation he is able to make, the probable mischiefs of resistance appear less to him than the probable mischiefs of submission” Jeremy Bentham, *A Fragment on Government*, ch. IV, p. 96, § 21.

<sup>111</sup> Jeremy Bentham, *A Fragment on Government*, ch. IV, p. 101, § 34.

<sup>112</sup> Bentham reaches this conclusion from empirical observations and exemplifies with the German Empire, the Dutch Provinces and the Swiss Cantons, Jeremy Bentham, *A Fragment on Government*, ch. IV, p. 101, § 34.

<sup>113</sup> *Ibid.* p. 102, § 35.

<sup>114</sup> Article 5 § 1 EC Treaty.

<sup>115</sup> Article 308 EC Treaty.



A prerequisite for divided sovereignty is that different areas of competence are distinguishable. The areas listed in article 3 EC Treaty are general in nature and subject to inevitable interpretation. This leads to a problem of delimitation. What if the Community has a different view from a Member State on the areas that fall within article 3 EC Treaty? A Member State can bring a case before the Court, which is not likely, since the principle of implied powers under article 308 EC Treaty requires unanimity.<sup>116</sup> If Germany, for example, considers the legal act in question outside the scope of Community competence, it simply will have no legal value in Germany.<sup>117</sup>

At this point, we will encounter an obstacle applying Bentham's theory as a model for the EU. Why? It does not provide any suggestions as to the normative implications of such Member State refusal. Other theories seem to have more of a normative underpinning; if such an action is legally legitimate, we are in the areas of Hartley's argumentation. If it is legally illegitimate, we move towards a constitutionalist's argumentation. Bentham has no opinion. This makes it complicated to evaluate the practical importance of his theory as a model for the EU today. If we can do without the legal reasoning about the implications of such Member State refusal is a question I have not been able to answer.

#### **4.2.4 The Stability and Growth Pact as a false constitutional measure**

From a public international law perspective, the rule of law in EC law works imperfectly. The failure to implement the Stability and Growth pact is in this light logical, explainable and perhaps even justifiable.

The Stability and Growth Pact is basically an unfortunate legal instrument. The reasons for it can be explained in terms of sovereignty and democracy. In terms of sovereignty, its unfortunate fate lies in its lack of sanctions. Since divided sovereignty turned out to be a poorly convincing model for the EU, we must ask for sanction possibilities at EU *or* at Member State level. The Stability and Growth Pact does of course contain provisions that make sanctions possible. But the Court stated in its judgement<sup>118</sup> that the excessive deficit procedure de facto may be held in abeyance, should the Council assess the economic situation differently, and should it therefore not reach the required majority to adopt the Commission's proposals. Such an outcome would be beyond the competence of the Court to change. We must therefore think of the lack of sanctions on a bigger scale, at the EU level in large, where sanction possibilities are poor and to some extent subject to the mercy of the Member States. A sovereign without the possibility to sanction

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<sup>116</sup> One occasion on which it is more likely to happen is when there has been a change of government in a Member State.

<sup>117</sup> Brunner v. The European Union Treaty [1994] 1 CMLR 57.

<sup>118</sup> Judgement of the Court of Justice in Case C-27/04, Press release No 57/04.

has no real power and cannot function properly.<sup>119</sup> Indeed, there can be no rule of law without the possibility of coercive means to enforce it.<sup>120</sup>

In terms of democracy, the answer to the failure of the Stability and Growth Pact lies in the lack of legitimacy. Why would the French and the German ministers (although they were not allowed to vote) voluntarily want to let their countries be subjected to sanctions, when the people of those countries obviously have not asked for it? And might perhaps their fellow voting ministers have felt empathy, i.e. thought that next time it could be them, when deciding to let France and Germany be let off the excessive deficit procedure?

Common for both explanations is that the Stability and Growth Pact is unfortunate as such, since such a legal instrument cannot be expected to work properly between essentially sovereign states. Its application is essentially at the mercy of the very states it purports to control.

But are the rules of the pact not binding? And does the rule of law not have a place in international also under the public international law perspective? Yes, the rules are binding and the rule of law is fundamental also in international law. But, we must recall the criticism of the development of EC law presented in this chapter. First, the Court is not an objective interpreter of EC law in the eyes of the Member States. The Court has itself encroached EC law by stipulating principles that go beyond what the Member States once intended. The EU started by means of a traditional multilateral treaty. Secondly, although the rule of law has a place in international law also under the public international perspective, it is light-weighted. Conformity to the rule of law depends on the internal legal orders of the contracting parties. From a Hobbesian perspective, the rule of law is subjected to the higher value of power. Thus international treaties need to be obeyed only when they are to one's own advantage. There is always a possibility to breach an agreement should its application decrease one's power. The breakdown of the Stability and Growth Pact is therefore not so much a defeat as a health sign that something that was already from the beginning a bad idea now failed.

One point needs to be clarified. The criticism here is not pointed towards the Member States for not following the rules they once agreed to. On the contrary, the Member States did only what one could expect. Instead, the problem at core is the Court and its interpretation of the rule of law. The Court should be criticized for extending its competences without the approval of the Member States.

The Ecofin Council decisions of 25 November 2003 not to implement the Stability and Growth Pact might be regarded a just way of ignoring an illegitimate legal system. Although the judgement of the Court implies the

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<sup>119</sup> Thomas Hobbes, *Leviathan*, ch. XLVI, p.471.

<sup>120</sup> *Ibid.*

opposite, namely that there is a European rule of law that has to be conformed to, the critique presented earlier suggests that the judgement will not be of great importance. The Council actually decided against the Commission, not in conformity with a European rule of law. With power and democracy as the main forces determinant in EC law and in the decisions of the Ecofin Council, the judgement of the Court tells us only few things about the actual role of a European rule of law. Thus from a public international law perspective, conformity to the rule of law is there, but at Member State level. The ministers of the Ecofin Council are obliged to follow their state laws because they have a responsibility towards the electors. Thus there is indeed a role for the rule of law, and it is actually conformed to, but at Member State level. Therefore, the Stability and Growth Pact is an unfortunate legal instrument, and certainly not a constitutional one.

### 4.3 A Constitutional perspective

An alternative to the public international law perspective is the constitutional perspective. This view accords a different meaning and role to the rule of law in the EU. As has been accounted for, the constitutional perspective is the view of the Court. In order to understand the theoretical foundations of the Court's development of EC law, we need to further investigate constitutional theory.

#### 4.3.1 Constitutional theory

A dictionary definition of a constitution proposes: “The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers [...]”.<sup>121</sup> From this definition reads that the constitution is the law of a nation or a state. Indeed traditionally, states are the only entities thought capable of having a constitution. There are exceptions to this. Canon law, which is the law of the Catholic Church, does not derive its claim for obedience from a state. Its authority is not linked to the state of the Vatican. Similarly, when discussing the rule of law in the EU from a constitutional perspective, we shall not dwell on theories emphasizing the link between states and constitutions, but rather examine alternative views on the relationship which suggest that the concepts are separable.

A distinction can be made between thin and thick constitutions.<sup>122</sup> The former involves the laws that establish and regulate the main organs of

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<sup>121</sup> Black's Law Dictionary, 5<sup>th</sup> edition. 1979.

<sup>122</sup> Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in Larry Alexander, *Constitutionalism - Philosophical Foundations*, p. 153.

government, their constitution and powers. The latter involves, according to Joseph Raz, seven features. A constitution has to be constitutive which means that it has to define the main organs and the different branches of government. A constitution is also meant to be a stable framework for political and legal institutions. Normally it is enshrined in one or a few written documents. Furthermore, it shall be superior law and justiciable in the sense that it has to contain judicial procedures whereby compatibility of laws and other acts can be tested and can be declared invalid. The constitution also needs to be entrenched in the people and express a common ideology.<sup>123</sup>

Constitutional theory is however not only descriptive. The constitution has a dual character of being both positive and normative.<sup>124</sup> It is partly a description of how a society is constituted and partly a normative proposition of how things ought to be. Recalling Dicey's definition of the rule of law as an expression of the fact that the constitution is not the source, but the consequence of the rights of individuals<sup>125</sup> helps to clarify the normative aspect of a constitution. Its normative aspect involves requirements as to the material content of law, i.e. to uphold and promote individual rights. Applied to the EU, this means that it is a Community not only of States but also of peoples and persons. This idea of the law and ideal of the Community owes to Bracton and to Locke, but it is also heir to Enlightenment liberalism.<sup>126</sup>

Enlightenment liberalism has at least two ideas that can be found also in contemporary Community ideals. These are first the privileging of the individual and secondly the reduced importance of nationality as the principal referent for human intercourse. National barriers were seen as artificial and should be transcended.<sup>127</sup> Both these ideas can be found in the EU today. The former idea can be traced to the fact that not only Member States but also individuals can be subjects of Community law. Importance of the latter feature is found in the principle of non-discrimination on grounds of nationality<sup>128</sup> and in the European citizenship that was introduced by the Maastricht agreement in 1992. The European citizenship is a symbolic sign that essential relations are to be defined despite citizenship.<sup>129</sup>

It is this rights-based reasoning that best explains the Court's case-law. It is common also in other legal cultures, and has been expressed by the Supreme Court of the United States: "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials

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<sup>123</sup> Ibid. p. 153.

<sup>124</sup> Ibid. p. 156.

<sup>125</sup> Albert Dicey, *Introduction to the Study of the Law of the Constitution*, p. 202 f.

<sup>126</sup> Joseph Weiler, *The Constitution of Europe*, p. 252.

<sup>127</sup> Ibid. p. 255.

<sup>128</sup> Article 12 EC Treaty.

<sup>129</sup> Joseph Weiler, *The Constitution of Europe*, p. 252.

governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just and end in itself'.<sup>130</sup>

#### 4.3.1.1 A Lockean constitution

Theoretical basis for the Court's reasoning can be found in the theory of John Locke. We shall now investigate his theory further in order to put the rulings of the Court in clearer light.

The crucial point of difference between Hobbes and Locke is that in Locke's state of nature (his theory also begins with a state of nature, albeit a less dark one) there are natural rights that are independent of the state to be valid, such as the right to self-ownership. The state of nature is defined as the absence of a common legislator and a common judge.<sup>131</sup> It is a state of equality since we are all rational humans that feel and think.

Why then do we need a common legislator and a common judge? With the voluntary consent of all men, men enter into society by the social contract.<sup>132</sup> The purpose of entering into society is to safeguard the rights we already have and to promote self-government and autonomy of individuals. Societal power is limited and can neither go beyond what each and everyone delegated when consenting to the contract of society, nor any further than to safeguard the natural rights.<sup>133</sup>

One such natural right is the right to property. Its exact meaning is disputed, but it involves the right of ownership as such and of objects with which one has blended one's work.<sup>134</sup> The right to property is derived from the right to self-government; without property, man is dependent on other men for his survival.<sup>135</sup>

Oppression in the sense wrongful use of power is worse than anarchy in the sense absence of power. This explains why Locke's theory does not involve a sovereign. Instead, law is fundamental and tolerance a cornerstone of the Lockean constitution.

The nature of law lies in "law as reason". The very purpose of getting out of the state of nature is to get rid of arbitrary power. Man is free when not under the arbitrary will of someone.<sup>136</sup> Thus law creates freedom. The fundamental criteria of right to access to an impartial judge should be seen in this light.

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<sup>130</sup> New York v. United States, 488 U.S. 1041 (1992).

<sup>131</sup> John Locke, *Two Treatises*, II, p. 280 § 19.

<sup>132</sup> *Ibid.* p. 346 § 119.

<sup>133</sup> *Ibid.* p. 357 § 135.

<sup>134</sup> *Ibid.* p. 288 § 27.

<sup>135</sup> See John Simmons, *The Lockean Theory of Rights*, p. 274.

<sup>136</sup> Foreword by Peter Laslett to John Locke, *Two Treatises*.

Since certain rights are natural in that they are independent of the state, and the purpose of a constitution is to safeguard and protect these rights, it is indeed difficult to conceive of a constitution that is not based on the rule of law. The rule of law is thus paramount for the very existence of the constitution. Since the law finds its authority in natural rights rather than in state power, breaking the law is comparable to rebellion. The *pacta sunt servanda* principle is fundamental (as it is in contract law to this day). To break the law is to damage the legal order as a whole.

### 4.3.2 A question of constitution-making in the EU

If Locke's rights-based constitution is to be applied to the EU today, it was not there when the Community was founded, but it has been a process of change, of constitution-making.

The active development of EC law by the Court is sometimes referred to as constitutionalisation.<sup>137</sup> By this is meant the tendency to reduce the differences between treaties and constitutions. A traditional multilateral treaty involves a presumption that states do not lose their sovereignty.<sup>138</sup> Instead, its application depends on domestic law. A treaty does not safeguard the fundamental rights of the individuals affected by its application.<sup>139</sup> By constitutionalising the treaties, the Court has created a constitutional framework for a structure similar to a federal system.<sup>140</sup> The Court itself has a constitutional view of EC law.<sup>141</sup> It has contrasted the EEC Treaty with "ordinary international treaties".<sup>142</sup>

This view has implications on the role of the rule of law. One example is the principle of direct effect first ruled in *Costa v. Enel*.<sup>143</sup> Judge Pierre Pescatore has called it an "infant disease" of Community law.<sup>144</sup> An infant disease is mild and when it disappears it gives immunity for life. Direct effect should not have had to be ruled into Community law. His point is that direct effect should be considered the normal condition of any rule of law,<sup>145</sup> since effectiveness is the very soul of legal rules.<sup>146</sup>

Legal integration, which to a large extent is the result of the Court's case law, has been an important aspect of European integration. Joseph Weiler has described the first 30 years, i.e. 1957-1985 of the EU as the foundational

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<sup>137</sup> Frederico Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review* 26, 1989.

<sup>138</sup> *Ibid.* p. 595.

<sup>139</sup> *Ibid.* p. 596.

<sup>140</sup> *Ibid.* p. 596.

<sup>141</sup> Neil Walker, *Sovereignty in Transition*, p. ix.

<sup>142</sup> Derrick Wyatt, 'New Legal Order or Old?', *European Law Review*, 1982.

<sup>143</sup> Case 6/64 [1964] ECR 593.

<sup>144</sup> Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', *European Law Review*, June 1983.

<sup>145</sup> *Ibid.* p. 155.

<sup>146</sup> *Ibid.* p. 177.

period in which legal integration was strong.<sup>147</sup> During this time the foundations of a federal Europe were laid. Weiler talks about a “constitutional revolution”.<sup>148</sup> At the same time political integration was weak. Thus from a political point of view, the period has been described as a nadir in the history of European integration.<sup>149</sup>

From the early 70’s, Weiler has identified a new period in which law played a different role. This intermediary period from 1973 to the mid-1980’s was characterized on the political level by stagnation of political integration and on the legal level by mutation of jurisdiction and competences.<sup>150</sup> An erosion of limits to Community competences took place and a new principle for division of power between Member States and the Community was set up. In the early years of the Community, enumerated powers, although general in nature, functioned as an important restraint on Community material jurisdiction.<sup>151</sup> The idea behind such enumeration is to preserve the original distribution of legislative powers. From the mid 70’s, this constraint disappeared.<sup>152</sup> One reason this happened was a more frequent use of Article 235 (308) EC Treaty.<sup>153</sup> This Article gives the Community competence to act (if necessary) in order to attain an objective of the Community, should the Treaty not provide the Community with necessary powers to act. It should not be used to expand the jurisdiction of the Community.<sup>154</sup> However, in the years following the Paris Summit of 1972, Community institutions made a more frequent use and also a wider reading of Article 235 (now 308) EC Treaty.<sup>155</sup>

Other constitutional elements of EC law are the treaties that set up institutions with legislative power, and the Court as the common judge. The two are at the core of the Lockean social contract and indeed what differentiates the state of nature from society. So do we have a European social contract?

Formally it all seems very well. As has been discussed, the Court has taken an active role in the constitution-making process. There is a lot to suggest that the authority of the rule of law, according to the Court, is found in a Lockean way of reasoning about the goal of protecting fundamental rights. As has been discussed, there are legal principles in EC law considered so fundamental that they are comprised in the system although no written law supports it. These legal principles are reminiscent of Locke’s natural rights.

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<sup>147</sup> Joseph Weiler, ‘The Transformation of Europe’, *Yale Law Journal* 1991, p 2403.

<sup>148</sup> *Ibid.* p. 2453.

<sup>149</sup> *Ibid.* p. 2431.

<sup>150</sup> *Ibid.* p. 2453.

<sup>151</sup> Articles 2 and 3 EC Treaty.

<sup>152</sup> Joseph Weiler, ‘The Transformation of Europe’, *Yale Law Journal* 1991, p. 2435.

<sup>153</sup> *Ibid.* p. 2445.

<sup>154</sup> *Ibid.* p. 2444.

<sup>155</sup> *Ibid.* p. 2445.

In practice, the question of a European social contract is more problematic. Access to the common judge is severely restricted. Direct action for individuals before the Court can be either an action for annulment or a plea of illegality which can only be done together with an action for annulment and is indeed rare.<sup>156</sup> The criteria for direct action, which have been given an extremely narrow interpretation, require individuals to be directly and individually concerned.<sup>157</sup> The explanation why that is so can be traced back to the early days of the Community. These treaty provisions were designed from a public international law perspective, meaning that the Community consisted of fully sovereign Member States. From that perspective, the need for individual procedural rights in the Community are understandably minute.

A third way to access the common judge is before the national court by the preliminary ruling mechanism.<sup>158</sup> Up until recently, it was the national court, and not the individual, that decided whether it is necessary or not to ask the Court for a preliminary ruling. With the Köbler case, the Court opened up for the possibility of state damages to individuals when a Member State that considers a matter to be of national character has not asked the Court for a preliminary ruling.<sup>159</sup> The Köbler case thus indicates the preposterousness that EC law remedies only work to the extent that national courts give it effect. Although access to the common judge is, and particularly has been, restricted, the Köbler case suggests a new tendency of better access to the common judge.

However, direct action of individuals before the Court is still rare. Although the EU has a common legislator and a common judge, these problems show that if there is a European social contract, it is an imperfect one. Since there is merely an imperfect constitution in the EU today, consequently conformity to the rule of law is imperfect too.<sup>160</sup>

#### **4.3.2.1 A Draft Treaty establishing a Constitution for Europe**

On an account of constitutional features of the EU today, one cannot leave out the Draft Treaty establishing a Constitution for Europe.

After the failure of an overall agreement at the Intergovernmental Conference (IGC) in December 2003, a conclusion was reached at the IGC of 17-18 June 2004 and the Draft Treaty establishing a Constitution for Europe was signed.

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<sup>156</sup> Article 230 and 241 EC Treaty respectively.

<sup>157</sup> Plaumann & co. v. Commission, Case 25/62 [1963] ECR 95.

<sup>158</sup> Article 234 EC Treaty.

<sup>159</sup> Case C-224/01 [2001] Official Journal 212/18.

<sup>160</sup> On a side-track for the purpose of this essay is the Lockean concept of trust, what we today call the democratic deficit. To Locke, this is a basic concept of the democratic principle. It involves direct channels between the rulers and the ruled. In the EU today, characterised by indirect representation, trust is weak.



Materially, one of the main features of the Draft Treaty establishing a Constitution for Europe is that the Parliament extends its competences by dealing with more questions. The veto system is abandoned in favour of majority voting in several new areas.<sup>161</sup> The Parliament's power is further increased by more areas in which a co-decision procedure is the general rule. The Parliament is eg. now co-legislator together with the Council.<sup>162</sup> The Draft Treaty establishing a Constitution for Europe also comprises a charter on fundamental rights of the Union.<sup>163</sup>

After signing the new legal document, each Member State must ratify the document in accordance with its national constitutional requirements.<sup>164</sup> As for today, it is clear that Denmark, Ireland, Belgium, the UK and France will hold referendums. Holland, Luxembourg and Spain will most likely also hold referendums.

Concerning ratification, the rules are clear: the IGC is a means of the heads of state and government of the Member States to negotiate or amend the EU treaties. To change a treaty requires unanimity. Unless the Draft Treaty establishing a Constitution for Europe is ratified by each Member State, it will not enter into force.<sup>165</sup>

Although the Draft Treaty establishing a Constitution for Europe is not yet in force and there are many obstacles before it will be, such as several countries opting for a referendum for its adoption, the Draft Treaty establishing a Constitution for Europe is both symbolically and legally important. Symbolically, it is a sign that conformity to the rule of law at EU level is important. Legally it serves as a codification of supremacy of EC law.

The inclusion of a charter on fundamental rights in the Draft Treaty establishing a Constitution for Europe indicates what the European rule of law comprises. It is in line with the rule of law as it is defined by the Court. The inclusion of the charter implies that the rule of law is a fundamental constitutional principle and that the source of the authority of law is protection of fundamental rights rather than power.

### **4.3.3 Constitutional pluralism**

The constitutionalist view assumes that the EU has a constitution. But, few would object, so do the Member States. Constitutional pluralism holds the view that states are no longer the sole locus of constitutional authority. It is thus an alternative to the traditional dichotomy of sovereignty and non-

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<sup>161</sup> Eg. Article III-328 Draft Treaty establishing a Constitution for Europe, which gives the Council the right to unanimously decide to take decisions by qualified majority.

<sup>162</sup> Article 19 EU Constitution.

<sup>163</sup> Part II EU Constitution.

<sup>164</sup> Article 48 TEU.

<sup>165</sup> Ibid.

sovereignty in public international law. The relationship between states and non-states are viewed heterarchically rather than hierarchically.<sup>166</sup> This view has both an explanatory dimension and a normative dimension. The explanatory dimension holds that we can only understand the European constitutional configuration by accounting for multiple levels of constitutional discourse.

More precisely how this understanding is going to come about is not all together clear. It is a challenge to conceive of the rule of law in a non-state polity, such as the EU.<sup>167</sup> We are faced with a “problem of translation”.<sup>168</sup> The vocabulary used in constitutional analysis up until now has been developed in the context of a state.<sup>169</sup>

#### **4.3.3.1 Law as institutional normative order**

One theorist who has developed a legal model of constitutional pluralism is Neil McCormick. His theory of law as institutional normative order opens up for ways to overcome the “problem of translation” referred to above. The state is one institutional normative order that can have a constitution, but it is not the only one.<sup>170</sup>

McCormick suggests the emergence and development of an EU beyond sovereignty, a post-sovereign European Commonwealth characterized by ideas of subsidiarity and different forms and levels of governments rather than competition for sovereignty.<sup>171</sup>

By labelling EC law as an institutional normative order, McCormick provides an explanation to the nature of EC law. The normative aspect of EC law is the principle of *pacta sunt servanda*. Law is binding upon the contracting parties. This principle is common to all international law.<sup>172</sup>

The institutional aspect of EC law refers to its institutionalized character. EC law is binding also because it has institutions that carry out tasks in accordance with the powers conferred to them.<sup>173</sup> These institutions issue legislation and deliver judgements. What about the Member States and their constitutions? Will their legal orders not clash with EC law? In order to manage this problem, McCormick calls for revision of basic concepts such as that of sovereignty, since traditionally, it is analysed in a state context.

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<sup>166</sup> Neil Walker, ‘Late Sovereignty in the European Union’ in Walker, Neil, *Sovereignty in Transition*, p. 4.

<sup>167</sup> *Ibid.* p. 4.

<sup>168</sup> Joseph Weiler, *The Constitution of Europe*, p. 270.

<sup>169</sup> Neil Walker, ‘Late Sovereignty in the European Union’ in Walker, Neil, *Sovereignty in Transition*, p. 4.

<sup>170</sup> Neil McCormick, *Questioning Sovereignty*, p. 15.

<sup>171</sup> *Ibid.* p. 95.

<sup>172</sup> *Ibid.* p. 138.

<sup>173</sup> *Ibid.* p. 138.

Consequently, McCormick has redefined old concepts of sovereignty and constitution. This opens up for alternative views on the role of a European rule of law.

From a constitutional pluralism perspective, neither the Member States nor the Union is fully sovereign. But McCormick does not consider it inevitable that when sovereignty is lost in one area (the Member States) it be gained in another (the Union).<sup>174</sup> His model is thus not a variation of divided sovereignty, which assumes that sovereignty is a zero-sum game.

McCormick elaborates with old and new definitions of sovereignty. First, there is the old idea that sovereignty can be legal or political. Legal sovereignty is “the power of law-making unrestricted by any legal limit”.<sup>175</sup> Power without restriction is a key feature of this and the bodies enjoying it are the law-making institutions. Political sovereignty is defined as follows: “that body is politically sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state”.<sup>176</sup> It concerns political power unrestrained by higher political power. Both kinds are territorial in character and are not subject to limitation by higher or co-ordinate power.

None of them exist in an absolute form in the EU. EC law binds Member States, but only within certain areas. Similarly, political sovereignty is not enjoyed by only the Member States or the EU.

Secondly, McCormick introduces a distinction between external and internal sovereignty. This is what will allow us to conceive of a division or limitation of sovereignty.<sup>177</sup> External sovereignty can be understood as “a state (with the totality of legal or political powers within it) which is not subject to superior political power or legal authority in respect of its territory”, whatever its distribution of internal legal or political sovereignty.<sup>178</sup> Whereas sovereignty is defined as power not subject to limitation by higher or co-ordinate power held independently over some territory, the answer to the question whether it exists in a given area will depend on the perspective. Is it internal or external? If the territory in question is the EU rather than a state, it can be held that sovereignty does not exist on an internal level, but might do so on an external level.

It is difficult to see the practical relevance of this theory. To claim that the EU is sovereign towards the rest of the world is problematic. First, (perhaps due to a lack of imagination) it is indeed difficult to conceive of sovereignty apart from the state. If we look beyond the EU for a moment, can we conceive of an international organization that is sovereign towards non-participating parties? Is eg. the UN sovereign in relation to the (very few)

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<sup>174</sup> Ibid. p. 126.

<sup>175</sup> As defined by Albert Dicey, quoted by Neil McCormick, p. 127.

<sup>176</sup> Ibid.

<sup>177</sup> Neil McCormick, *Questioning Sovereignty*, p. 126.

<sup>178</sup> Ibid. p. 129.

states that are not members? The UN surely has an influence on these states, but that influence is not identical to sovereignty.<sup>179</sup> Is perhaps the external sovereignty of the EU linked to its institutional character? Although the EU has institutions, it lacks the very instrument most commonly linked to sovereignty, namely coercive powers and sanction possibilities.

Secondly, it is problematic to claim that the EU has external sovereignty because there are several examples of when the EU has not acted in unison towards the rest of the world. One example is the US war on Iraq, where the Member States took very different action indeed, from actual participation in the war to fierce political resistance.

There are other features of a post-sovereign EU than revision of the concept of sovereignty. One model of a post-sovereign EU is “pluralism under international law”. The basic idea is that international law is the ground of validity of both Member State law and EC law, thus none being a sub-system of the other. This idea originates from Hans Kelsen,<sup>180</sup> and McCormick applies it on the EU. Hans Kelsen’s idea of legal monism involves one basic norm, the *Grundnorm*, to which all legal rules can be traced back. Applied on the EU, the basic norm, or *Grundnorm*, of international law, to which all other rules in EC law and Member State law can be traced back, is *pacta sunt servanda*. Therefore pluralism under international law leads to pluralistic and interacting relationships between EC law and the legal orders of the Member States, since no legal system is above the other.<sup>181</sup>

Can different institutional systems operate without serious mutual conflict in areas of overlap? In this condition of pluralism, there is a risk of constitutional conflict. Indeed the problems of insecurity at the heart of human nature, such as described by Hobbes, are real problems. But constitutional conflict is not inevitable. McCormick’s opinion is that the Hobbesian problems can be dealt with without strong central authorities. The outcome of any potential collision between legal orders will depend on the wisdom with which the problem is approached, and on the theoretical resources available to the problem-solvers.<sup>182</sup>

In what ways do McCormick’s theories serve as an explanation of the recent developments of the Stability and Growth Pact? Firstly, the EMU and the Stability and Growth Pact concern internal European affairs. It is a question of internal sovereignty. As far as the old distinction between legal and political sovereignty is concerned, the recent developments of the Stability and Growth Pact seem to be, from an EU perspective, an example of legal sovereignty, but where political sovereignty falls short. The provisions

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<sup>179</sup> McCormick does not claim that the UN is sovereign; the example is just an attempt to conceive of external sovereignty.

<sup>180</sup> See Hans Kelsen, *The Pure Theory of Law*, p. 328 ff.

<sup>181</sup> Neil McCormick, *Questioning Sovereignty*, p. 117.

<sup>182</sup> *Ibid.* p. 121.

regulating the excessive deficit procedure are legally binding, and there was no legal reason why they should not be implemented. Despite this, the Ecofin Council chose not to implement the laws as foreseen, but rather to take a political decision, which from an EU perspective is an example of lack of political sovereignty.

#### **4.3.4 The Stability and Growth Pact as a constitutional measure**

The EU is founded on the principle of the rule of law.<sup>183</sup> The provisions of the Stability and Growth Pact are adopted in conformity with the rule of law, since they are in accordance with the Treaty. The Stability and Growth Pact is thus EC law. Law, all can agree, should be obeyed. But the reason it should be obeyed, and thus the consequences of disobeying, are different from a constitutional perspective than from a public international law perspective.

The Ecofin Council decisions of 25 November 2003 were illegal because they departed from rules laid down in the Stability and Growth Pact which in turn have been agreed on in accordance with the Treaty. But this is, as we now know, not the whole story.

Although no exact definition of the rule of law is provided by the EU as such, this paper's account of constitutional aspects of the EU seem to imply that a specific definition can be attributed to the concept. Indeed, the fate of the Stability and Growth Pact suggests a specific definition as shown both in the reasoning of the Commission when challenging the Ecofin Council before the Court, and in the subsequent ruling of the Court.

Given the theoretical background of constitutional theory, there is no room to diverge from the rules, other than illegal ways. The rules are legally binding and to break them constitutes, according to Locke, an irreparable damage to the legal order as a whole. The reason this is so is found in the function of law, which is to safeguard and promote natural rights that exist independently of society. Consequently, the rule of law is a virtue because the function of law is to promote and safeguard individual rights. The Community is a Community not only of states but of peoples.

But what does Locke and the Stability and Growth pact have in common? Perhaps not much, but the theory of the former can be used as a tool of analysis to explain the fate of the later. Since law is rights-based, the Ecofin Council decisions of 25 November 2003 encroached on a natural individual right, namely the right to property. The purpose of law is not to protect states, as the Ecofin Council did, but to protect individuals. By not imposing the lawful sanctions on Germany and France, but instead adopt a tooth-less recommendation not initiated, as it should have been, by the Commission,

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<sup>183</sup> Article 6 TEU.

the Ecofin Council violated the rights of the people of the other Member States participating in the Euro. Their right to property should not be jeopardized as a result of the Ecofin Council's urge to protect two of the larger Member States of the Union.

Should one consider the application of the Lockean right to property on the Stability and Growth Pact a little far-fetched, this does not change the fact that the rule of law of the constitution should be conformed to. The very purpose of the law is to avoid political considerations and the arbitrariness that follows (the excessive deficit procedure of the Stability and Growth Pact has successfully been imposed on smaller Member States). The United States Supreme Courts has expressed it like this: "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day".<sup>184</sup>

The decision of the Commission to bring the Council before the Court and the subsequent judgement of the Court are in line with this reasoning. When Member States in this case, i.e. the ministers of the Ecofin Council, trade-off rights against other interests, it is the very purpose of the Court to uphold these rights. The authority of the Stability and Growth Pact lies also in its packaging, i.e. it being a legal instrument adopted in accordance with the Treaty. To break the rules of it is therefore an unacceptable encroachment on the rule of law.

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<sup>184</sup> New York v. United States, (91-543), 488 U.S. 1041 (1992).

# 5 Analysis

## 5.1 Conceptual variations explaining the failure of the Stability and Growth Pact

The Ecofin Council decisions of 25 November 2003 constituted a breach of EC law, which the Court confirmed in its ruling. Council Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure of the Stability and Growth Pact is “hard law”, i.e. a legal instrument adopted in accordance with the Treaty. Although the Stability and Growth Pact has shortcomings in both economic and legal terms concerning its aptness to achieve the goals of sound public finances, there should have been no ambiguity as to the regulation’s binding effect. However suitable or unsuitable the rules of the Stability and Growth Pact are to achieve its aim of stability and growth, the question at core remains. To depart from the rules that all parties once agreed upon and considered necessary for the achievement of the single currency is problematic, no matter how apt the rules actually are.

This paper has shown that different conceptions as to *what* the rule of law is can explain why the Ecofin Council decided the way it did, why the Commission brought the Ecofin Council before the Court, and why the Court ruled the way it did.

Although it has been argued that there is no uniform definition of the rule of law in the EU, this paper has shown that the Court by its case law ascribes a rather specific definition to the concept. According to the Court, law has its claim for obedience in natural rights. Although perhaps not all EU institutions would go as far as to define the rule of law in the like manner, the Draft Treaty establishing a Constitution for Europe suggests that the Court’s stand to a large extent can be found in the EU as such as well. The inclusion of a charter on human rights in the Draft Treaty establishing a Constitution for Europe supports a Lockean rights-based point of departure for a discussion on the nature of law. Indeed, the European rule of law is in many ways synonymous to the constitutional view.

Thus from the Court’s point of view, the material content of the rule of law is rather extensive. The Court has upheld the rule of law by arguing in two alternative ways. Either it has derived legal principles that were inherent in the treaties, such as when the principle of direct effect was introduced, or it has ruled new legal principles into EC law as was the case when protection for fundamental rights was first introduced. There was no written document that implied that the Member States had agreed protection for fundamental rights part of EC law. The Court nevertheless ruled it into the EC legal body. The reasoning of the Court is that there can be another law, with a

higher authority than written EC law, which must be acknowledged and taken into account.

The Court's reasoning assumes that the authority of law is to be found in morality. There is a higher value than power or the will of the majority. This is why the Court does not only consider black-letter law part of the legal sources available when interpreting law. The Court interprets a constitution whose purpose is to uphold rights and not to create them, rather than a charter of an international organization, which can only be stretched as far as the contracting states want it to.

It is this kind of reasoning that led Pescatore to argue that the principle of direct effect is an infant disease of Community law. Direct effect is the normal condition of any rule, since effectiveness is the very soul of legal rules. From this reasoning the rule of law seems to be synonymous with the constitutionalist view. The two are at least completely inseparable.

From a public international law perspective, it is conceivable that Hartley is right in his criticism when he argues that the Court has extended its competences beyond what the Member States intended. The point to be made here is that under the constitutional view, this does not necessarily matter. The dual character of Supranationalism is not problematic from this stand. Weak political integration is not an obstacle here. On the contrary, it squares well with strong legal integration. The purpose of law, from the Court's point of view, is to safeguard rights. Has this safeguarding not been provided for through explicit legislation, the Court must uphold these rights by using other legal sources in order to conform to the rule of law. In that sense, the will of the majority is irrelevant.

The theory of Locke has been used to clarify the Court's definition of the rule of law. If applying Locke's theory on the Stability and Growth Pact, the Ecofin Council decisions of 25 November 2003 can be said to have violated the right to property. The right to property extends to objects with which man has blended his labour. Considering that money can be substituted for any service or good capable of being bought, the right to a good standing of one's currency concerns all people handling money, i.e. everyone. The Ecofin Council decisions of 25 November 2003 not to impose sanctions on Germany and France possibly led the two Member States to lessen their incentive to assure sound public finances. The result of such an attitude is a jeopardization of the right to property of the people of the other EMU Member States. In Lockean terminology, magistrates (the Ecofin Council ministers) that violate natural rights are no more than thieves or robbers!

However, this is just as one would expect. In the Lockean constitution, the function of law is to uphold and promote individual rights and this function is exercised by the common legislator and the impartial judge. The Ecofin Council is not an impartial judge to decide whether to impose sanctions on fellow Member States. To judge in areas that affect oneself constitute a challenge and it is incompatible with the notion of an impartial judge. The



fact that only participating Member States that fulfil the obligations, and not the whole Ecofin Council, are allowed to vote in this area further supports the argument that the problem of the Stability and Growth Pact is not so much the Pact itself as its unfortunate procedural provisions. The Stability and Growth Pact has, in this regard, unacceptable shortcomings.

If one ancient theory to fit the Court's reasoning is that of Locke, the Council's equivalent can be found in theories such as those of Hobbes and Bentham.

Why should the rule of law be conformed to in Hobbes' theory? To Hobbes, law and state were intimately connected. This follows by definition from his assumption that in the state of nature, in which man found himself before society existed, there is no law. Thus without a state, there can be no law. The state is ruled by the sovereign who, by his superior strength, upholds the law and protects individuals from violence from other individuals. The law should be obeyed and conformed to because there is a threat of sanctions. The authority of law is thus more pragmatic than in the theory of Locke.

It is clear that this kind of definition clashes with that of the Court which sometimes has considered natural rights more important than written law. From a Hobbesian perspective there is no such thing as natural rights, but only state power with executive powers that function as an essential basis from which law can exist and provide for people to live in society.

As has been pointed out earlier, a contemporary perspective on the question of the authority of law with starting-point in the theory of Hobbes will have to involve a discussion on democracy. If one Hobbesian prerequisite for the existence of law remains, namely the state, we need to find out who controls that state in order to find the authority of law. In his theory, it was the sovereign. Today, in the Member States, it is the people. It is to this people that the Ecofin Council is responsible. If the ministers of the Council are responsible only to this people, then their decision not to implement the excessive deficit procedure is understandable and even justifiable.

If the authority of law is a question linked to the state and a question about who controls it, then the Ecofin Council decisions of 25 November 2003 can be explained in terms of the theory of Bentham. He elaborated a theory about multiple authorities or divided sovereignty. In his view, power stems from the habit of obedience. There are no natural rights, and law and power are intimately connected. Consequently, the sovereign has no limit *per se*. The exception is when there has been an express convention by which the legislative power limits itself, as has been the case for all Member States when entering the EU. Concerning the Stability and Growth Pact the Member States have made an express convention when adopting it. The consequences are that in the area of monetary policy, the Member States participating in the third stage of the EMU have limited their own legislative

powers. By the express convention they have let the EU be sovereign in this area.

Apart from when there is an express convention, the sovereign is simply the person(s) habitually obeyed. As has been shown, the practical limits to the sovereign's power depends on the "juncture for resistance" which is the cost-benefit analysis that each individual makes.

Translated into modern EU affairs, it means that the Court's rulings are binding as long as the Member States accept its rulings. More specifically, the Ecofin Council decisions of 25 November 2003 can very well be seen as the juncture for resistance. In Benthamite language, each voting minister of the Council made a utility calculus as to the good of obeying the law, i.e. implementing the Stability and Growth Pact, and a qualified majority of the ministers found that it was not worth it. Theoretically, if following the Benthamite model, the Member States should have been prepared to show limited resistance in the monetary policy area, since they all have agreed to the rules of the Stability and Growth Pact. Once there has been an express convention, obedience should be expected in that area. It seems that the Member States reached their juncture for resistance although they had once agreed to the rules. As accounted for earlier, Bentham's theory is void of normative implications of such disobedience.

A theory that is not void of the normative is that of McCormick. To what extent is his theory on the EU as an institutional normative order an apt model to analyse the recent developments of the Stability and Growth Pact?

The situation at the Ecofin Council meeting on 25 November 2003 is a flagrant example of constitutional conflict, flagrant because the Ecofin Council was not faced with questions of interpretation. The question at hand was not whether certain natural rights were derivable or not from written law. If arguing from a rights-based perspective, the right to property is safeguarded by the wording of the provisions of the Stability and Growth Pact. Had it only been implemented properly, there would be no violation of individual rights. The question at hand was thus not a question of interpretation, but instead a question of mere application.

McCormick suggests that situations of constitutional conflict can be successfully dealt with if approached with wisdom and with theoretical resources. The Ecofin Council had agreed that excessive budget deficits existed in both France and Germany. All Member States have agreed to the specific rules of the Pact, yet the voting Member States voted contrary to EC law. Thus McCormick's theory seems to be poorly applicable as an explanation to the failure of the Stability and Growth Pact. All that can be said, to use McCormick's terminology, is that the ministers of the Ecofin Council did not possess of the wisdom and theoretical resources needed to solve the constitutional conflict at the 25 November 2003 meeting.

However, the theory of Bentham helps us to label the circumstances of the Ecofin decisions of 25 November 2003, and the theory of Hobbes helps us to explain why it could happen by translating his sovereignty concept as a prerequisite for law into the contemporary democracy concept.

Although this democracy explanation is satisfying, questions arise about the underlying reasons for the Ecofin Council's rebellion, to use a word of Locke. Why did the Council decide, at this point, that it had had enough?

### **5.1.1 Underlying reasons**

The questions at the Ecofin Council meeting of 25 November 2003 proved to be a constitutional conflict. Although the rules to be applied were specific and had once unanimously been agreed upon, the Ecofin Council refused to apply them. The problem was thus not one of interpretation, but the mere application of black-letter law. The ministers of the Ecofin Council showed that it is the constitutions of their respective Member States that apply before EC law.

Was this an isolated case? Examples have been presented when EC law has been either ignored or less conformed to, such as the appointment of the Prodi Commission, the sanctions against Austria in 2000 and the EU Charter on Fundamental Rights. This kind of informal decisional intergovernmentalism is, as Nergelius has pointed out, indeed a tendency within the Union. The Ecofin Council decisions of 25 November 2003 is a continuation of the tendency that Nergelius has pointed out. The Ecofin Council decisions of 25 November 2003 do, however, constitute a qualitative change in that the rule of law was so explicitly ignored. Whether this severe kind of ignorance of the rule of law is a new tendency is difficult to say, since the Ecofin Council decisions of 25 November 2003 are qualitatively different from the other examples of a more relaxed attitude towards EC law.

Is there a reason why did this qualitatively different breach of EC law took place now? In order to answer this question, the criticism of EC law provided by Hartley shall be recalled. In his view, the rule of law has long been problematic in the EU. His point is that the function and success of EC law is at the mercy of the Member States. In fact, it could be argued that the Court has anticipated the Ecofin Council's breach of EC law by repeatedly giving rulings that materially go beyond what the Member States have agreed to. As Rasmussen has pointed out, the Court has had its own idea, irrespectively of the idea of others, of what the Community should be about. This poses a legitimacy problem to the Court. Despite this, the Member States have most often silently accepted the rulings of the Court. But if there would be a serious trial of strength, the Member States would come out as winners. The Ecofin Council decisions of 25 November 2003 were a sort of trial of strength, in which the Member States clearly made a statement of their strength. Perhaps public finance and currency issues are especially

sensitive issues to politicians, since growth and economy are important aspects of political life, and more specifically, of elections. This would suggest why such a constitutional trial of strength took place in the Ecofin Council. Now that the Member States managed to make a statement of their strength, does it mean the Stability and Growth Pact is dead?

### **5.1.2 Possible implications**

Before drawing any hasty conclusions, we shall recall that the Court did annul the decisions of the Ecofin Council to put in abeyance the excessive deficit procedure and it also annulled the decisions to modify recommendations to France and Germany previously issued by the Council.

The ruling of the Court was predictable in the sense that it upheld the rule of law and clarified the conditions in which the excessive deficit procedure de facto may be held in abeyance, i.e. when the Ecofin Council does not reach a majority for the Commission's proposal. This can only happen when the Council has made an assessment of the economic situation in the Member State concerned that differs from that of the Commission. By ruling in favour of the Commission and correcting the Ecofin Council, the Court has, not surprisingly, confirmed the rule of law which protects us from "concentrating power in one location as an expedient solution to the crisis of the day" to use the words of the US Supreme Court.<sup>185</sup>

Disobedience of the Court's ruling would mean a constitutional crisis in the EU. This is however unlikely to occur. First, the Court probably has enough authority in the Member States. Although in theory its reasoning is independent of democracy, since with a rights-based outlook on law, the rule of law can be conformed to irrespectively of democracy, its gradual development of EC law suggests that democracy is not irrelevant. On the contrary, the Court has been sensitive to Member State-reception of its rulings. Secondly, a constitutional crisis is unlikely to occur also from a Member State perspective. Although the Member States perhaps could come out as winners, it is not necessarily in their interest to do so. Probably, the Ecofin Council decisions were enough a statement of their strength. Therefore, the Stability and Growth Pact is not dead.

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<sup>185</sup> New York v. United States, (91-543), 488 U.S. 1041 (1992).

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