THE TREATY OF ROME AND MONETARY POLICY IN THE EUROPEAN COMMUNITY

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I. INTRODUCTION

When one considers the extensive and often exacting obligations to which the signatory nations of the Treaty of Rome[1] bound themselves in 1957, the most remarkable feature of Articles 104 to 109 of the Treaty,[2] which relate to monetary policy and the balance of payments, is the very limited nature of the commitments they contain. Article 104 specifies the general duty of the Member State to "pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices". Responsibility in the domain of general economic policy thus remains with the Member State. Article 105 provides for a measure of co-operation between Member States "in order to facilitate the attainment of the objectives set out in Article 104". Apart from the institution of a Monetary Committee, however, which is delegated only an advisory status, the Treaty assigns the Community no direct role in the co-ordination process. With respect to rates of exchange for currencies, Article 107 requires no more than that the Member State treat the value of its currency as a matter of "common concern"; this latter notion is left undefined. These few provisions are virtually exhaustive of the Member State's obligations in affairs relating to monetary policy and the balance of payments. Even these very limited undertakings are qualified in several important respects by two broadly framed "safeguard" provisions, Articles 108 and 109, which permit the temporary suspension of Treaty obligations where a Member State is faced with balance of payments difficulties.

The lack of supranational authority in the field of external monetary policy poses a constant threat to the success of the Community venture. So long as national exchange rates are subject to unpredictable

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[1] Treaty Establishing the European Economic Community, 298 U.N.T.S. 11 (Rome, Mar. 25, 1957).

[2] Art. 106, devoted to the free circulation of payments, does not in any strict sense relate to questions of either monetary policy or balance of payments policy; an examination of its place within the Treaty system will not be included here.

alteration or fluctuation and Member States are free to follow independent practices in matters concerning fiscal, budgetary or monetary policy, the Community's notable accomplishments in such fields as competition, agriculture and tariff policy are likely to be continuously undermined by divergent trends in national economies. Further initiatives will be stifled and the economic and political stagnation into which the Community has recently lapsed will become endemic. The Community's declared objective of proceeding to the establishment of an Economic and Monetary Union (EMU)[3] renders acute the problem of the insufficiency of Community authority in the sphere of external monetary policy.

This paper is devoted to an examination of the operation and application of Articles 104 to 109 of the Treaty of Rome and their relation to the Community's task of creating an Economic and Monetary Union. Particular attention will be focussed on the consideration of some of the necessary juridical developments implied by the objective of EMU. The paper thus embraces two parts: first, an examination of the nature of the powers bestowed on the Community in the spheres of monetary policy and balance of payments and the limitations attached to them; secondly, a consideration of prospects for the development of arrangements concerning the operation of monetary policy within the EEC, with specific reference to some of the juridical problems associated with EMU.

II. ARTICLES 104 TO 109 AND THE OPERATION OF MONETARY AND BALANCE OF PAYMENTS POLICY

A. *Article 104: The General Obligation*

Equilibrium in the national balance of payments constitutes one of the necessary conditions for the proper functioning of the common market. Since a common market is based on the principle of complete internal freedom of movement for all factors and services, any prolonged imbalance in a member nation's payments represents a threat to the internal order of the entire market. Disequilibrium produces pressures for trade restrictions and these in turn frustrate the objective of achieving and maintaining a free flow of goods, persons, services and capital. The integrity of the national currency is closely linked to the

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[3] Final Communiqué of the Heads of State of Government (The Hague, Dec. 1 and 2, 1969). For the text, *see* COMPENDIUM OF COMMUNITY MONETARY TEXTS 13 (European Communities Monetary Committee, 1974). *See also* Resolution du Conseil et des Représentants des Gouvernements des Etats Membres du 22 mars 1971, concernant la réalisation par étapes de l'union économique et monétaire dans la Communauté, [1971] J.O. no. C 38/1, COMPENDIUM OF COMMUNITY MONETARY TEXTS at 33.

question of balance of payments and is no less essential to the good order of the market.

For this reason, Article 104 imposes a duty on each Member State to ensure that its balance of payments remains in equilibrium and its currency sound. Article 104 also requires Member States to seek internal equilibrium between employment and prices. While this requirement could be understood to form an obligation completely independent of the responsibility to preserve external balance, one cannot fail to observe that a high level of employment and stability in price levels are essential conditions for long-term equilibrium in the balance of payments. Seen in this light, the obligation to maintain internal balance may merely be a derivative one.

The weight of authority seems to favour this latter interpretation of Article 104 and to accord definite priority to the requirement of external equilibrium.[4] However the question of priorities is resolved, it now seems to be almost unanimously accepted that the provisions of Article 104 impose an obligation on Member States which is, in principle, enforceable under Articles 169 and 170 of the Treaty.[5] The specific

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[4] M. WAELBROECK, DROIT DES COMMUNAUTES EUROPEENNES no. 2266 (1969); M. DESSART , POUR UNE POLITIQUE MONETAIRE COMMUNE DANS LA C.E.E. 14-15 (1971); *see also* Maas, *The Powers of the European Community and the Achievement of the Economic and Monetary Union*, 9 C.M.L. REV. 2, at 11, n. 38 (1972), who seems to have reservations about this interpretation.

[5] WAELBROECK, *id.*; DESSART, *id.* at 15; P. KAPTEYN AND P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 64 (1973). For a contrary opinion, *see* Hahn, *Monetäre Integration—Illusion oder Realität?*, in WAHRUNGSPOLITIK IN DER EUROPAISCHE INTEGRATION 122 (1964).

Art. 169 provides that the Commission may bring before the Court of Justice a Member State which it considers to have failed to fulfill any of its obligations under the Treaty. Resort to this judicial remedy, however, may be had only after the Commission has received the Member State's observations and has delivered a "reasoned opinion" on the matter. Art.170 gives Member States a similar right of action against each other. Again, however, disputes between Member States concerning their Treaty obligations must first be brought before the Commission; the latter must hear both parties and deliver its opinion. Should this procedure not result in a settlement acceptable to both parties, or should the Commission fail to deliver an opinion within three months, the matter may be brought before the Court.

In some instances, obligations arising under the Treaty and under regulations, decisions and directives of Community institutions may also be enforceable at the suit of private individuals in national courts. In order to give rise to such a right of action a law must be of "direct application" within the municipal legal order and not merely constitute an obligation in international law. Determining which laws are of direct application is a complex issue to which the Court has addressed itself many times. It is now clear, however, that in order to be of direct application, a law must meet at least the following criteria: (i) the law must give rise to a clear and precise obligation (case 9/73, Schlüter v. Hauptzollamt Lörrach, [1973] E.C.R. 1135, at 1158, [1974] COMMON MARK. REP. (CCH) 9143, at 9143/16; case 41/74, Van Duyn v. Home Office, [1974] E.C.R. 1337, at 1347, [1975] 1 C.M.L.R. 1, at 15); (ii) the Member State must not be left any margin of discretion in the implementation of its obligation (case 28/67, Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderhorn, [1968] Rec. 211, at 230, [1968] E.C.R. 143, at 152, [1968] C.M.L.R. 187, at 217; Schlüter v. Hauptzollamt Lörrach, *id.* at 1158, [1974] COMMON MARK. REP. (CCH) at 9143/16; Van Duyn v. Home Office, *id.* at 1347, [1975] C.M.L.R. at 15—*i.e.*, the obligation must be "legally perfect": case 57/65, Alfons

content of such an obligation is, of course, difficult to define, but it would at least seem to require that each Member State have regard to the effects of its policies on the other Member States.

If we continue to presume that external equilibrium is the primary interest of the Community, two policies become of particular concern: exchange rate policy and monetary policy. These are the traditional devices utilized in the management of the balance of payments. It is the operation of these policies which forms the subject matter of the succeeding Articles 105 and 107. These Articles define the parameters of the reciprocal obligations imposed by Article 104.

B. *Article 105: Economic Co-ordination*

Article 105(1) stipulates that Member States shall "co-ordinate their economic policies" in order to "facilitate the attainment of the objectives set out in Article 104". Monetary policy is not identified as a special concern of this provision, but it can fairly be inferred that such is the case from what we have concluded concerning the priorities fixed by Article 104, and from the terms of Article 105. For, although the obligation to co-ordinate is expressed in general terms, particular mention is made of the desirability of establishing co-operation among the Community's central banks, the agents of domestic monetary policy. Furthermore, provision is made in Article 105(2) for the creation of a Monetary Committee "[i]n order to promote co-ordination of the policies of Member States in the monetary field to the full extent needed for the functioning of the common market". These are the only concrete proposals made for the establishment of economic co-ordination.

There is a good reason for the special interest focussed on monetary policy. Although the objectives of monetary policy can, of course, be as numerous as the economic objectives of the state, it is widely recognized that monetary policy can have an impact on external equilibrium which makes it particularly effective as an instrument for the management of the balance of payments.[6]

Whatever its specific objective, however, the obligation to co-ordinate which is imposed by Article 105(1) is a strictly limited one; in

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Lütticke GmbH v. Hauptzollamt Sarrelouis, [1966] Rec. 293, at 302, [1966] E.C.R. 205, at 210, [1971] C.M.L.R. 674, at 684); (iii) the obligation must be unconditional and not subject, in its execution or in its effects, to the taking of any measures by the institutions of the Community or by the Member State (*id.*). It would appear that arts. 104-09 do not meet these criteria and therefore that arts. 169 and 170 provide the only avenues of recourse available against a Member State that is in derogation of its obligations under these provisions. Any action must, therefore, be at the suit of either the Commission or a Member State. (In *Schlüter*, argument favouring the direct application of art. 107 was considered by the Court and rejected: *see* text at note 30 *et seq.*, *infra*.)

[6] See Mundell, *The Appropriate Use of Monetary and Fiscal Policy for Internal and External Stability*, 9 I.M.F. STAFF PAPERS 70 (1962).

no way can it be understood to commit Member States to pursuing a common policy on economic questions in general, or on monetary problems in particular. The provisions requiring that Member States shall provide for "co-operation between their appropriate administrative departments and between their central banks" may well be exhaustive of their obligations under Article 105(1). In any event, the role of the Commission in economic co-ordination is limited in two important respects: first, it may submit only *recommendations* on how to achieve co-operation to the Council; secondly, it seems clear on the face of Article 105(1) that such recommendations are not intended to serve as a vehicle for the opinion of the Commission on the substantive content of policy. On the contrary, the Commission's recommendations must concern only the *means* by which the co-operation in question should be effected.

While the role of the Council is less clearly defined, it seems to follow from the fact that the Commission is responsible for offering to the Council its recommendations on how to achieve co-operation between the various official administrative bodies of the Member States, that the Council may make decisions on such matters notwithstanding the absence of any explicit grant of power in Article 105. In fact, the Council has purported on many occasions to exercise such a power of decision under Article 105 in establishing various committees not provided for by the Treaty and which are intended to serve as forums for high consultations between both national Community functionaries. The Medium-term Economic Policy Committee,[7] the Committee of Central Bank Governors,[8] and the Committee on Budgetary Policy[9] are prominent examples.[10]

The most important of the committees active in the sphere of monetary affairs is the Monetary Committee. Although the Monetary Committee performs essentially a co-ordinating and advisory function similar to that of these other committees, its field of activity is considerably broader. It is indicative of the Committee's status that it is one of only two committees on economic affairs which derives its existence directly from the Treaty.[11] In addition to the general tasks of reviewing, reporting and delivering opinions on the monetary, financial

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[7] Decision 64/247, [1964] J.O. 1031, [1963-64] O.J. Special Ed. 133.

[8] Decision 64/300, [1964] J.O. 1206, [1963-64] O.J. Special Ed. 141.

[9] Decision 64/229, [1964] J.O. 1205, [1963-64] O.J. Special Ed. 140.

[10] The Short-term Economic Policy Committee, The Medium-term Economic Policy Committee and the Committee on Budgetary Policy were merged by Council Decision 74/122, setting up an Economic Policy Committee: [1974] O.J. no. L 73. Perhaps significantly, the latter decision was taken under art. 145 of the Treaty, without reference to art. 105. Art. 145 explicitly empowers the Council to "ensure co-ordination of the general economic policies of the Member States" and "to take decisions". This Decision may suggest that there has been a re-appraisal of the Council's authority under art. 105, which might limit its capacity to take decisions in exclusive reliance on that provision.

[11] The other committee is the Economic and Social Committee: *see* arts. 193 *et seq*.

and payments operations of the Community which are given to it by Article 105(2), the Monetary Committee participates in all the activities of the Community touching upon monetary affairs. Consultation with the Monetary Committee is required before the Commission can authorize countervailing measures against a Member State which has altered its exchange rate.[12] Similarly, where Member States are seriously threatened by balance of payments difficulties, a programme of mutual assistance can be recommended to the Council by the Commission only after consultation with the Monetary Committee.[13] Where such assistance is not immediately offered and a Member State adopts protective measures, the Council, acting in consultation with the Monetary Committee and the Commission, may order the amendment, suspension or abolition of the protective measures.[14]

C. *Article 107: Exchange Rate Policy*

Although they represent a crucial economic link in the functioning of trade and investment within the Community, the rules governing the external monetary arrangements which provide the mechanism for the operation of the common market find no mention in the Treaty of Rome. The Bretton Woods Agreement of 1945, embodied in the Statute of the International Monetary Fund,[15] established the foundations of the post-war world monetary order. The Agreement instituted an international régime of fixed exchange rates alterable only in certain restrictive circumstances. This was the order which prevailed in 1958 when the common market was inaugurated, and to which all members of the Community adhered.[16] Evidently the signatory nations of the Treaty of Rome considered that the obligations arising from their adherence to the IMF comprised a satisfactory definition of their mutual obligations under the Treaty; they apparently envisaged no role for the new Community in the sphere of exchange rate management.[17] None of the principles of the prevailing monetary order were accorded official recognition by the

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[12] Art. 107(2).

[13] Art. 108(1).

[14] Art. 109(3).

[15] 2 U.N.T.S. 39 (Dec. 27, 1945).

[16] All the present members of the EEC had indicated their acceptance of the Bretton Woods Agreement by Jan. 1, 1958, when the Treaty of Rome entered into force among the six original signatory nations; Belgium, Luxembourg, the Netherlands, France and the United Kingdom had done so on Dec. 27, 1945, Denmark on Mar. 30, 1946, Italy on Mar. 27, 1947, Federal Republic of Germany on Aug. 14, 1952, and Ireland on Aug. 8, 1957.

[17] *Cf.* DESSART, *supra* note 4, at 14-15. At the time of their adhesion to the Treaty of Rome, the original six signatories were all members of the European Payments Union (for text of the agreement, *see* 156 BRITISH STATE PAPERS 883) and parties to the European Monetary Agreement (162 BRITISH STATE PAPERS 295), which was to enter into force on Dec. 29, 1958. The former provided facilities for the transferability of currencies and multilateral clearing. The EMA represented an attempt to move from a régime of simple transferability to full convertibility of currencies, thereby permitting the currencies

Treaty; nor was provision made for any unified Community representation before international monetary agencies.[18] All authority in the field of exchange rates was jealously guarded by the Member States.

Article 107, which is the only treaty provision relating directly to exchange rate policy, provides:

> 1. Each Member State shall treat its policy with regard to rates of exchange as a matter of common concern.
> 2. If a Member State makes an alteration in its rate of exchange which is inconsistent with the objectives set out in Article 104 and which seriously distorts conditions of competition, the Commission may, after consulting the Monetary Committee, authorise other Member States to take for a strictly limited period the necessary measures, the conditions and details of which it shall determine, in order to counter the consequences of such alteration.

It is difficult to imagine how such a provision could be more narrowly drawn. Not only does Article 107(1) retain for the Member State pre-eminent authority to determine the external value of its currency, it seems clear, on the principle that the general must give way to the specific, that the obligation to treat exchange rate policy as a matter of "common concern" removes matters relating to rates of exchange from the broader scope of the obligation contained in Article 105 to "co-ordinate economic policy". And as Dessart remarks, there is certainly nothing in Article 107(2), dealing with the countervailing measures available to states affected by parity changes, from which to extract any trace of a principle of monetary co-ordination.[19]

The Advocate-General confirmed this interpretation of Article 107 in his joint submission to the Court[20] in *Schlüter v. Hauptzollamt Lörrach*[21] and *Rewe Zentral AG v. Hauptzollamt Kehl*,[22] two recent cases which came before the European Court of Justice on references under Article 177.[23] There he observed:

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of participating States to be exchanged for any other currency or for gold. To this end a special fund was instituted to provide assistance to States facing balance of payments difficulties, and each State undertook to maintain its currency within stable margins through the purchase and sale of gold and American dollars. Neither the EPU nor the EMA imposed any other obligations with respect to the management of the national exchange rate.

[18] The rules governing the Monetary Committee (Statut du Comité Monétaire, [1958] J.O. 390), which were later adopted did, however, authorize the Committee to 'establish close co-operation" with the Managing Board of the EPU and the Board of Management of the EMA on questions of common interest. In 1964, Member States broadened their commitment to joint action in the sphere of international monetary relations, providng in effect that there should be obligatory advance consultations within the Monetary Committee in respect of any important decision or position taken by Member States: Council Decision 64/301, [1964] J.O. 1207, [1963-64] O.J. Special Ed. 143.

[19] DESSART, *supra* note 4, at 19.

[20] [1973] E.C.R. 1163, [1974] COMMON MARK. REP. (CCH) 9143/18.

[21] *Supra* note 4.

[22] [1973] E.C.R. 1175, [1974] COMMON MARK. REP. (CCH) 9143/25.

[23] Art. 177 empowers the Court of Justice to give preliminary rulings at the request of a court or a tribunal of a Member State on questions concerning the interpretation, *inter alia*, of the Treaty and acts of Community institutions.

> [A]s regards Article 107 of the EEC Treaty . . . no diminuation of the means of execution of currency policy . . . can be deduced from that Article. Anyhow no use can be made in this connection of paragraph 2 of the Article, which provides only for counter-measures on the part of the Community and in case of abuse and so only indicates an indirect limitation of the powers of Member States in relation to currency policy.[24]

The cases have done nothing to impair the authority of what is virtually an unrestricted right in law to alter the rate of exchange. In *Cie. d'approvisionnement de transport et de crédit S.A. v. Commission*, the European Court of Justice held that "[i]t is clear from Article 107 that it is for each Member State to decide upon any alteration in the rate of exchange of its currency under the conditions laid down by that provision."[25] The decisions in *Schlüter* and *Rewe Zentral* now affirm that a Member State is also competent, at least in some circumstances, to go one step further and allow its currency to float.

The two cases arose from similar fact situations. By a decision taken on December 15, 1964[26] the Council had instituted a new system of agricultural support payments whereby the prices of agricultural goods would be fixed in a common "unit of account" rather than in national currencies. The result was that, in 1971, when international exchange rates became destabilized and Community currencies began to float, certain inequities in the application of the common agricultural policy arose. The units of account used in the agricultural support system had been based on the old currency parities. Their value, therefore, did not change to reflect the new relative values of national currencies. Thus, in Germany, where the deutschemark had floated upwards, agricultural prices fell by a corresponding amount on the internal market in terms of the national currency. This situation undermined the agricultural price support system by permitting transactions with foreign producers at prices lower than intervention prices at prevailing rates of exchange. The Council's response was Regulation 974/71,[27] which attempted to harmonize prices and neutralize the effects of monetary developments on the agricultural sectors of Member States by introducing a system of monetary compensatory amounts (MCA's) on exports and imports.

The applicants in *Schlüter* and *Rewe Zentral* were engaged in the import of agricultural produce into Germany. The respondent customs bureaus had, in conformity with Regulation 974/71 and its successors, levied a special duty in the form of an MCA on the produce in question as it entered Germany. The effect was to reduce the disparity between internal and external prices in the commodities which had been caused

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[24] *Supra* note 20, at 1170-71, [1974] COMMON MARK. REP. (CCH) at 9143/24.
[25] Joined cases 9 and 11/71, [1972] Rec. 391, at 407, [1972] E.C.R. 391, at 406.
[26] *See* [1965, no. 2] BULLETIN E.E.C. 8.
[27] [1971] J.O. no. L 106/1, [1971] I O.J. Special Ed. 257.

by currency movements and to render the trade less profitable. The applicants challenged the validity of Regulation 974/71,[28] and, in the alternative, challenged the right of a Member State to float its currency.

In response to the applicants' second submission, the Advocate-General urged the Court to recognize the freedom of Member States to float their currencies, arguing that "even if floating of exchange rates can hardly be reconciled in the long term with the EEC Treaty, a complete prohibition in case of an abnormal situation cannot be deduced from Article 107."[29] While the Court expressed its apprehensions about the repercussions floating currencies might have on the achievement of a customs union and, subsequently, an economic union, it observed that the obligations imposed by Article 107 were limited to treating the rate of exchange as a matter of "common concern". It is significant, however, that the Court declined to hold that it was within the prerogative of a Member State to decide unilaterally to float its currency. The Court instead disposed of the applicants' contention on the much narrower ground that Article 107 creates obligations only between Member States and that it therefore was not open to a private party to seek to enforce these obligations directly—at least so long as the procedures for the co-ordination of economic policy and the resolution of payments imbalances envisaged by Article 3(g) were not in effect.[30] The Court thus left open the question of whether a Member State might successfully challenge a unilateral decision by another Member State to float its currency on the ground that the latter had breached its obligation to treat exchange rate policy as a matter of "common concern". It is, in any event, unlikely that such an action would ever be brought. The words of Article 107 lean heavily toward exonerating an alleged offender. Furthermore, it is questionable whether any Member State would be prepared to initiate an action which, if successful, would establish a precedent with such serious repercussions for the management of its own exchange rate policy.

It is not surprising that the commentators agree that Article 107 constitutes one of the crucial weak points of the Treaty,[31] a conclusion which has been amply borne out by recent developments. The Commission has long regarded the existing division of responsibilities on the matter of exchange rates as unsatisfactory. It has consistently argued

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[28] For a more detailed examination of the argument on this contention, *see* text at note 93 *et seq.*, *infra*.

[29] *Supra* note 20, at 1171, [1974] COMMON MARK. REP. (CCH) at 9143/24.

[30] *Schlüter*, *supra* note 5, at 1160-61, [1974] COMMON MARK. REP. (CCH) at 9143/16-17; *Rewe Zentral*, *supra* note 22, at 1194, [1974] COMMON MARK. REP. (CCH) at 9145.

[31] DESSART, *supra* note 4, at 19; KAPTEYN AND VERLOREN VAN THEMAAT, *supra* note 5, at 286; WAELBROECK, *supra* note 4, at no. 2279, and the numerous authorities cited therein.

for a more rigid pattern of Community exchange rates[32] and for a transfer of authority over monetary affairs to Community institutions.[33] The concerns of the Community have been clearly expressed by Raymond Barre, former Vice-President of the EEC Commission for Economic and Financial Affairs:

> The stability of exchange rates is in fact a necessary condition of the functioning of the Common Market and the creation of an economic and monetary union. It is not required only by the rules of the common agricultural policy. It is a factor in the security of transactions, the optimal orientation of capital movements, and the development of intra-community investments. It greatly encourages the efforts made for the convergence of economic policies. It assures the credibility of the Community venture.[34]

It is only relatively recently, however, that the problem of exchange rate policy has achieved any prominence. Despite the sometimes adverse implications for the Community's common policies which have resulted from unilateral alterations in currency alignments, the EEC did not greatly suffer from the lack of a common approach to exchange rate questions, so long as generally stable monetary conditions prevailed internationally. Thus the devaluation of the French franc in 1958 and 1969, and the revaluation of the Dutch florin in 1961 and of the deutschemark in 1961 and 1969 were accepted with relative equanimity by the Community.[35] During this period, the Member States imposed only relatively minor restraints upon their freedom to conduct independent policies with respect to the external value of their currencies. In May of 1964, the Council agreed to a system of procedures for compulsory consultations prior to exchange rate changes[36] and to refer questions of common interest on international monetary relations to the

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[32] *See, e.g.*, Memorandum of the Commission on the Action Programme of the Community for the Second Stage (Brussels, Oct. 24, 1962) at 128; Communication of the Commission to the Council on the Elaboration of an Economic and Monetary Union, [1970, no. 5] BULLETIN C.E. at 6 (Brussels, Mar. 4); Communication de la Commission au Conseil—Organisation des relations monétaires et financiers au sein de la Communauté, [1972, no. 1] BULLETIN C.E. 26 (Brussels, Jan. 12). In this regard it is interesting to note that the Résolution du Conseil et des Représentants des Gouvernements of Mar. 22, 1971 directed that, with respect to the ongoing talks on international monetary reform, the Community "ne devra pas se prévaloir dans les relations de changes entre pays membres de dispositions éventuelles permettant un assouplissement du système international des changes": *supra* note 3, at 2.

[33] *See, e.g.*, Commission Memorandum and Proposal to the Council on the Establishment by Stages of Economic and Monetary Union, [1970] J.O. no. C 140, [1970, no. 11] BULLETIN C.E. 14 (Brussels, Oct. 30). The first proposals for a monetary union came from the Commission as early as October, 1964: *see* Balassa, *Monetary Integration in the European Common Market*, in EUROPE AND THE EVOLUTION OF THE MONETARY SYSTEM 95 (A. Swoboda ed. 1973).

[34] Address before l'Institut suisse de recherches internationales, Zurich, July 5, 1971 (*cited in* Balassa, *id.* at 112).

[35] The concern of the Community did, however, become more marked following the currency re-alignments of 1969, which greatly complicated the operation of the agricultural price mechanism.

[36] Council Decision 64/301, [1964] J.O. 1207, [1963-64] O.J. Special Ed. 143.

Monetary Committee for discussion. An additional commitment with respect to currency values was implicit in the agreement of December 15, 1964[37] (which saw the fixing of agricultural prices in terms of units of account), since stable exchange rates would be crucial to the scheme's operation. Commentators saw this series of measures as strengthening the pressures toward greater monetary co-ordination.[38] The Monetary Committee, too, hailed these meagre concessions on the part of Member States as further steps in the progressive integration of the Members' economies which were making the modification of parities increasingly more difficult and unlikely.[39]

The unstable nature of the Community's exchange rate régime became strikingly evident in August of 1971, when President Nixon suspended the convertibility of gold under the pressure of escalating balance of payments problems.[40] The dollar was devalued in December and again in the following February, and ultimately was allowed to float. The impact of this chain of events on the international monetary order was tremendous. The American actions wreaked havoc with European exchange rate patterns. It was only in April of 1972, with the institution of the so-called "snake-in-the-tunnel", that some semblance of monetary order within the Community was restored. The workings of this system merit some attention in view of the light they shed on the management of currency relations within the Community.

The immediate reaction of the world's trading nations to the American initiatives of August 15, 1971 had been to attempt to revise the system of fixed international rates of exchange which had dominated the post-war world. The Smithsonian Agreement of December 18, 1971 established new parities for the world's major currencies and permitted each currency to fluctuate up to 2.25 per cent around its central rate.[41]

This arrangement threatened to perpetuate, and indeed aggravate, a feature of the international monetary system which had already been

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[37] *See supra* note 26.

[38] *See, e.g.*, WAELBROECK, *supra* note 4, at no. 2281.

[39] 7e Rapport annuel, [1965] J.O. 639.

[40] *See* the President's Address to the Nation, Aug. 15, 1971 (*reprinted in* 9 ATLANTIC COMMUNITY Q. 520 (1971)). The United States ironically attributed much of the responsibility for its balance of payments problem to the EEC, and particularly to its discriminatory trading policies and to the operation of its common agricultural policy: *see* P. PETERSON, THE UNITED STATES IN THE CHANGING WORLD ECONOMY 21 ("The Peterson Report", Dec. 1971), and COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 211-14 ("The Williams Report", July 1971).

[41] The Smithsonian Agreement was an "interim" arrangement concluded among the Group of Ten Nations. The terms of the Agreement were in derogation of the members' obligations under art. IV, s. 4(a) of the Statute of the International Monetary Fund, a problem which was circumvented by an understanding concluded with the IMF that members using central rates and/or wider margins would be deemed to be in compliance with the Statute: *see* E. B. Decision No. 3463—(71/126) (Dec. 18, 1971), in [1976, no. 8] SELECTED DECISIONS OF THE I.M.F. 14.

heavily criticized within the Community. Before 1971, according to the terms of the European Monetary Agreement, Community currencies had been allowed to fluctuate up to 1.5 per cent against their parity with the dollar. But because the dollar was the sole currency used in central bank interventions to preserve these rates, in practice the spread between the strongest and weakest currency could attain 3 per cent (up to twice the variation permitted between any single Community currency and the dollar). Taking into account the possibility of fluctuations, the total variation between an EEC currency moving from the upper to the lower limits of its value and a second EEC currency moving in the opposite direction could reach 6 per cent. This arrangement was both politically and economically unacceptable within the common market. Politically, the anomalous position of the dollar attracted resentment. On the economic plane there was concern that the wide fluctuations permitted between Community currencies would frustrate plans for economic and monetary union.[42] In 1970, the Werner Report[43] had advocated that Community central banks act in concert, through interventions in Community currencies, so as to limit variations in exchange rates to margins narrower than those in effect with respect to the dollar.

All of the concerns expressed about the state of affairs existing before 1971 were enhanced by the proposals contained in the Smithsonian Agreement enlarging margins of fluctuation from 1.5 per cent to 2.25 per cent. The Commission reported to the Council that:

> l'élargissement des marges de fluctuation désormais autorisé sur le plan international souleverait de notables difficultés s'il était appliqué aux relations de change intracommunautaires. Au cas où, en effet, les pays de la Communauté adopteraient des marges de fluctuation de plus ou moins 2,25% a l'égard de toutes les monnaies y compris celles de leurs partenaires de la Communauté, la variation des rapports de change entre deux monnaies de la Communauté pourrait atteindre 9% si les interventions des Banques centrales sur le marché des changes continuaient à se faire par l'intermédiaire du dollar. Une telle situation consacrerait le rôle central du dollar dans les relations monetaires intracommunautaires. De surcroît elle affecterait les conditions de la concurrence dans les échanges de produits industriels et de services, désorganiserait le fonctionnement du Marché commun agricole et ferait obstacle à la convergence des politiques économiques que requierent le fonctionnement équilibré de la Communauté aussi bien que la réalisation progressive d'une union économique et monetaire.[44]

The Council and the representatives of the Member States' governments subsequently adopted a resolution calling on the central banks to intervene on their respective exchange markets in order to limit the

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[42] *See, e.g.*, 13th Annual Report of the Monetary Committee, [1972] O.J. no. C 75.

[43] Rapport au Conseil et à la Commission concernant la réalisation par étapes de l'union économique et monétaire dans la Communauté, [1970] J.O. no. C 136 [hereinafter cited as the WERNER REPORT].

[44] Organisation des relations monétaires et financiers au sein de la Communauté, *supra* note 32, at 2.

maximum possible discrepancy between Member currencies to 2.25 per cent, while still complying with the terms of the Smithsonian Agreement.[45] On April 24, 1972 the governors of the central banks implemented such a plan: the Basle Agreement on the narrowing of intra-Community exchange rate margins, which introduced the so-called "snake-in-the-tunnel".[46] Community currencies, while still permitted to vary up to 4.5 per cent in relation to the dollar, would now be limited to a fluctuation of only 2.25 per cent in relation to each other.

The future of the snake was almost immediately imperilled by the departure of the British and Irish pounds two months after its establishment. Denmark suspended implementation for several months in 1972, Italy abandoned the snake in February 1973, and France was absent from January 1974 until July 1975 and is now absent again.[47]

By a Council decision of March 11, 1973,[48] taken in response to the American devaluation in the preceding February, the 4.5 per cent limit on variations against the dollar was lifted—the snake was set free from the confines of the tunnel. The situation prevailing at the time of writing, then, is that while all Community currencies continue to float freely against the dollar, five of the nine currencies (the deutschemark, the Danish krone, the Dutch florin, and the Belgian and Luxembourg francs) abide by the agreement of April 24, 1972 on the narrowing of intra-Community exchange rate margins.

Consistent with previous external arrangements, the Basle Agreement was not an exclusively intra-Community agreement: Norway and Sweden were also parties to the original proposals and the Norwegian and Swedish crowns remain within the snake. The Austrian schilling was also informally associated for a time. Nonetheless, the active participation of Community institutions in the elaboration and operation of the agreement marks a significant departure from previous practice, which saw the virtual exclusion of Community activity in this sphere. Although lack of enabling powers within the Treaty of Rome necessarily precluded either the Council or the governors of the central banks from acting exclusively within the forum of Community organizations in creating the new exchange rate mechanism,[49] the snake has

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[45] [1972] O.J. no. C 38.

[46] For the text of the Basle Agreement, *see* COMPENDIUM OF COMMUNITY MONETARY TEXTS, *supra* note 3, at 60. The technical details of the snake arrangement are described in Bulletin de la Banque Nationale de Belgique, July/Aug. 1972, at xi *et seq.*, and Oct. 1973, at iii *et seq.*

[47] For a full chronicle of these events see the following annual reports of the Monetary Committee: 14th Annual Report, [1973] O.J. no. C 94, paras. 3-4; 15th Annual Report, [1974] O.J. no. C 123, paras. 1-9; 16th Annual Report, [1975] O.J. no. C 174, paras. 4-14; 17th Annual Report, [1976] O.J. no. C 132, para. 3. *See also* THE ECONOMIST, Mar. 20, 1976, at 69.

[48] *See* Press Communiqué of EEC Council of Finance Ministers, Brussels, Mar. 12, 1973, [1973] I.M.F. SURVEY 88.

[49] The Resolution of Mar. 22, 1972 (*supra* note 45) was a joint declaration of the

since its inception virtually assumed the identity of a Community institution. The Monetary Committee closely supervises its operation[50] and decisions relating to the management of the snake are increasingly being taken within the Council of Ministers.[51]

One of the most important developments stemming from recent monetary disturbances has been the growth in the Community facilities for the co-ordination of external monetary policy. On April 3, 1973 the Council, invoking its special authority under Article 235,[52] voted to establish a European Monetary Co-operation Fund (EMCF),[53] to which it delegated responsibilities for:

> — the concerted action necessary for the proper functioning of the community exchange system;
> — the multilateralization of positions resulting from interventions by Central Banks in Community currencies and the multilateralization of intra-Community settlements;
> — the administration of the very short-term financing provided for by the Agreement between the Central Banks of the enlarged Community of April 10 1972 and of the short-term monetary support provided for in the Agreement between the Central Banks of the Community of February 9 1970 . . . and the regroupment of these mechanisms in a renewed mechanism.[54]

It is clearly the Commission's hope that the Fund will become the progenitor of a European "High Authority" on monetary affairs. It has already put forward proposals to expand the responsibilities of the Fund to include "arranging, continuing and prior consultation on" matters of internal and external monetary policy of the Member States.[55]

Notwithstanding recent advances, such as the creation of the snake or the EMCF, efforts to integrate the management of exchange rate policy into the fabric of the Community will continue to encounter the formidable juridical barrier posed by the lack of enabling powers in Article 107. Until such time as this situation is rectified, action in the monetary sphere will of necessity remain *ad hoc* and dependent either on the peculiar procedural requirements under the "supplementary powers" provision, Article 235, or on the treaty-like arrangements arising from negotiations conducted at the highest political level and outside the Community forum.

Council and the Heads of Government and thus evaded the difficulties inherent in the Treaty. Similarly, when the governors of the central banks concluded the agreement of Apr. 24, 1972, they were acting in their capacity as representatives of their respective countries and not as members of the Committee of Central Bank Governors.

[50] *See* the Committee's Annual Reports, *supra* note 47.

[51] *See, e.g., supra* note 48. *See also* the important observations and recommendations contained in EUROPEAN UNION—REPORT BY MR. LEO TINDEMANS TO THE EUROPEAN COUNCIL, Supp. 1/76, BULLETIN OF THE E.C. 21 *et seq.* (1975).

[52] The nature of the powers arising under art. 235 is discussed *infra*.

[53] Regulation 907/73, [1973] O.J. no. L 89/2.

[54] *Id.* at no. L 89/3.

[55] Proposal for a Council Regulation amending Council Regulation (EEC) no. 907/73 of Apr. 3, 1973 establishing a European Monetary Co-operation Fund, [1975] O.J. no. C 44/1, art. 4.

D. *Articles 108 and 109: The Safeguard Clauses*

Articles 108 and 109, containing the most important of the so-called "safeguard" provisions of the Treaty, provide possible alternatives to changes in the rate of exchange for Member States facing balance of payments problems. Because the scope of the measures envisaged by these Articles is unrestricted, they have been said to "form a permanent threat to the common market as a whole".[56] In fact, although an attempt to establish a series of graduated responses to problems of varying severity is apparent in the construction of Articles 108 and 109, Member States have, in practice, placed almost exclusive reliance on those measures in direct derogation of their Treaty obligations.

Article 108 sets forth the following procedural steps. Paragraph (1) provides that the Commission shall investigate and make recommendations concerning the circumstances of Member States having difficulties maintaining or achieving external equilibrium. The Commission is specifically instructed to take such action where the interests of the Community are at stake. If a Member State has exhausted the possibilities for corrective action open to it under Article 104, then the Commission is authorized, acting in consultation with the Monetary Committee, to recommend to the Council the granting of measures of mutual assistance under Article 108(2).

There are no provisions detailing the nature or character of the measures of mutual assistance which the Council, acting by a qualified majority, may grant, although Article 108(2) does give some indication of the scope of the measures contemplated. These include:

> a) a concerted approach to or within any other international organisations to which the Member States may have recourse;
> b) measures needed to avoid deflection of trade where the State which is in difficulties maintains or reintroduces quantitative restrictions against third countries;
> c) the granting of limited credits by other Member States, subject to their agreement.

The measures are not exhaustive. When France faced balance of payments difficulties in 1968 the Council, invoking Article 108(2), promised to stabilize interest rates, to ease access to the capital markets of Member States for the raising of investment loans, and to extend aid from the Social Fund.[57]

Clearly, though, the types of measures anticipated by Article 108(2) are quite limited in their scope and content. Since they rely on the willingness of the Member State to introduce them, they infringe none of the prerogatives of the State; Article 108(2) does not endorse any form of independent corrective action on the part of Community institutions.

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[56] KAPTEYN AND VERLOREN VAN THEMAAT, *supra* note 5, at 230.

[57] Directive 68/310, [1968] J.O. no. L 189/3; *see also* KAPTEYN AND VERLOREN VAN THEMAAT, *id.* at 231.

Article 108(3) provides for further procedures in cases where the Council declines to introduce the recommended measures for mutual assistance, or the recommended measures prove insufficient to remedy the problems toward which they were directed. In such cases the Commission is instructed to authorize the Member State to take protective measures, "the conditions and details of which the Commission shall determine".[58] Paragraph (3) further provides that such directions are subject to amendment or revocation by the Council acting by a qualified majority.

In contrast to the extended procedures outlined under Article 108, Article 109(1) vests Member States with a pre-emptive right to initiate immediate protective measures in cases where a "sudden crisis" in the balance of payments occurs. The operation of this provision is subject to certain conditions discussed below.

Notwithstanding the Member State's right to introduce protective measures without prior approval from Community authorities, the Council retains a broad power of review over such actions. Article 109(3) provides that, after seeking the advice of the Commission and the Monetary Committee, the Council may, by a qualified majority, direct the State concerned to "amend, suspend or abolish" any protective measures it has introduced.

Article 108 gives implicit recognition to a certain hierarchy of procedures, beginning with consultation and ascending, according to the persistance or gravity of the problems encountered, to measures of protection which effectively suspend the operation of the common market in that sector for their duration. It is obviously anticipated that these more serious difficulties will be the exceptional circumstance. *A fortiori*, it is the clear intent of the Treaty that the overriding powers accorded to the Member State under Article 109 will be resorted to sparingly, and only in situations requiring instant reaction. However, on the three occasions on which the safeguard provisions of the Treaty have been invoked, procedures almost the reverse of those anticipated by Articles 108 and 109 have been followed. The pattern adopted by France in 1968, and subsequently followed by Italy in 1974 and the United Kingdom in 1975, was to move unilaterally under the "crisis" provisions of Article 109 in introducing protective measures, and to seek retrospective approval of these actions from the Commission under Article 108(3). In all cases, official sanction was granted without undue

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[58] In fact, in cases where the Commission has determined that measures of mutual assistance would constitute an inappropriate response, it has not hesitated to by-pass the lengthy consultative procedures set out in art. 108 and to authorize directly the adoption of protective measures by the Member State concerned: *see* Decisions 74/287 and 75/487, *infra* note 59.

delay and the original measures were authorized with little or no variation.[59]

Even if this pattern of events reflects certain exigencies of modern political decision-making which cannot be rectified by procedural norms, it is clear that the deficiencies in the mutual assistance measures available under Article 108(2) represent a structural weakness in the safeguard provisions which encourages exclusive reliance on Article 109(1). Article 108(2) is inadequate in at least two respects: the policy instruments it offers to the Member State are insufficient aids to the restoration of equilibrium in all but the mildest cases of imbalance; and more significantly, Article 108(2) precludes the Community from acting directly against the aggravating conditions.[60]

Council Decision 71/143 of March 22, 1971 represents an attempt to alleviate some of these problems by instituting a mechanism for medium-term financial aid sponsored by the Member States.[61] In fact, this scheme, while setting out to remedy the deficiencies of Article 108(2), highlights its basic weaknesses. While Article 108(2) provides for finacial aid to Member States, it contemplates only the provision of

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[59] Decision 68/301, [1968] J.O. no. L 178/15 (France); Decision 74/287, [1974] O.J. no. L 152/18 (Italy); Decision 75/487, [1975] O.J. no. L 211/29 (U.K.). For a summary of the events surrounding the decision to authorize France to take protective measures under art. 108(3), *see* THE ECONOMIST, July 27, 1968, at 67. With respect to the decision relating to the Italian balance of payments crisis, *see* THE ECONOMIST, May 4, 1974, at 71, and May 11, 1974, at 61-65. The decision authorizing the U.K. to take protective measures arose from a somewhat unique fact situation. Under art. 124 of the Act of Accession, the U.K. had been permitted to defer the liberalization of controls on direct investments in other Member States by U.K. residents until Jan. 1, 1975, and to maintain controls on capital transactions of a personal nature until July 1, 1977. These dates passed without controls being lifted. The U.K. advised the Commission of its inability to meet its obligations under art. 124 and invoked art. 109(1) of the Treaty. It was in these circumstances that Decision 75/487 was adopted. Although the U.K. was suffering from a serious balance of payments deficit at the time, these difficulties had hardly arisen in the "sudden" manner contemplated by art. 109(1) and it is highly questionable whether resort to that provision was therefore justifiable (*see* text and note at 72, *infra*). Indeed, the character of the U.K.'s troubles, which involved a progressive worsening of the balance of payments over a lengthy period of time, would seem to have made the case a classic example of the situation which art. 108(2), permitting the granting of measures of mutual assistance, was designed to meet. Timely resort to art. 108(2) might well have obviated the need for reliance on art. 109(1).

[60] The inadequacy of art. 108(2) is amply illustrated by experience to date. For example, when the Italian lira came under pressure in 1964, the Italian government turned to the IMF and the U.S. for assistance instead of seeking mutual aid under art. 108(2). In all three instances where art. 109(1) has been invoked (*see id.*) the Commission, in conformity with art. 108(3), has availed itself of the opportunity to offer recommendations concerning measures of mutual assistance to the Council. Such measures failed to ease France's plight in 1968, however, and the Council declined to adopt the Commission's recommendations for measures of mutual assistance when Italy and the U.K. later encountered balance of payments difficulties (*see* the preambles to the Decisions authorizing protective measures, *id.*). Although Italy did later adopt measures of mutual assistance in the form of a medium-term loan (*see* Council Directive 74/637, [1974] O.J. no. L 341/51), she was compelled to revert to protective measures within eighteen months (*see* Commission Decision 76/446, [1976] O.J. no. L 120/30).

[61] [1971] J.O. no. L 73/15, [1971] I O.J. Special Ed. 177.

internally generated assistance.[62] Furthermore, no authority for the creation of a permanent Community-directed mechanism can be found in Article 108. As a result, the Council was forced to resort to other sources of power within the Treaty—specifically, Article 103—in inaugurating the aid plan. But as we shall see below, it is open to doubt whether Article 103 can provide the necessary authority for such a scheme.

A second programme,[63] instituted in the wake of the oil crisis, authorized the Commission to raise capital from external sources in order to meet balance of payments problems. Article 235, the "implied powers" provision, was invoked as authority for these measures. Subject to the reservations expressed below regarding the scope of the powers inherent in Article 235, this mechanism may have succeeded in meeting the inadequacies of Article 108(2) and thereby helped restore the pattern of procedures contemplated by Articles 108 and 109.

Certain other difficulties concerning the application of the safeguard clauses arise from paragraph (3) of Article 108. It is unclear from the language of this provision whether the Commission may ever decline to authorize the introduction of protective measures by a Member State when the requirements of Article 108 are otherwise met. Paragraph (3) provides simply that "the Commission shall authorize the State which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine." Power to deny approval for protective measures, which is withheld by the imperative character of the phrase "shall authorize", appears to be largely restored to the Commission by virtue of the power vested in it to regulate the content of those measures. What is the precise scope of the Commission's authority under Article 108(3)?

In the *Rediscount Rate Case*,[64] the European Court of Justice was called upon to address itself to this question. In that case France was accused, *inter alia*, of maintaining export incentives, in the form of a preferential rediscount rate, which exceeded the scope of the measures authorized by the Commission. France had in fact initiated the measures in question prior to securing the sanction of the Commission. Although the Commission had agreed to authorize them retrospectively in light of the circumstances existing in France in 1968, certain conditions were attached to their subsequent operation. Specifically, the Commission required that the preferential rate not vary more than a certain percentage from the central rate and that the use of the device be terminated completely by a given date.[65] The French government failed

[62] Art. 108(2)(c) provides for "the granting of limited credits *by other Member States*" (emphasis added).

[63] Council Regulation 397/75, [1975] O.J. no. L 46/1.

[64] Joined cases 6 and 11/69, Commission v. République française, [1969] Rec. 523, [1969] E.C.R. 523, [1970] C.M.L.R. 43.

[65] Decision 68/301, [1968] J.O. no. L 173/15.

to observe these conditions. The Commission initiated an action under Article 169, alleging that France was in breach of its Treaty obligations.

In its defence, the French government argued, *inter alia*, that the Commission had acted *ultra vires* in purporting to authorize France's action, that monetary affairs were within the exclusive competence of the Member State by virtue of Article 104, and that the sole obligation of the Member State was to co-ordinate its monetary policy by virtue of Article 105. The Court held:

> que les articles 108, paragraphe 3, et 109, paragraphe 3 confèrent aux institutions communautaires des pouvoirs d'autorisation ou d'intervention qui seraient sans objets s'il était loisible aux Etats membres, sous prétexte que leur action relève de la seule politique monétaire, de déroger unilatéralement, et en dehors du contrôle de ces institutions, aux obligations derivant pour eux des dispositions du traité.[66]

The Commission thus exercises a broad discretionary power in the supervision of protective measures. This authority apparently includes not only the right to regulate their mode of operation, but the power to require their termination. The opinion of the Court also suggests that, in the type of circumstances which give rise to reliance on Article 108(3), the Commission may assume some measure of authority over areas, such as monetary policy, which otherwise fall within the exclusive province of the Member State under the Treaty.[67]

The *Rediscount Rate Case* suggests that, apart from the Council's right to "amend, suspend or abolish" protective measures, and the Commission's wide ranging power to regulate the conditions of their operation, there exists a third possible protection against illegitimate resort to Article 109(1). That provision, as noted above, stipulates certain conditions which must be met before the exceptional powers it permits may be invoked. First, there must be a *sudden crisis* in the balance of payments; mere difficulties, or the existence of a threatening situation, will not of themselves suffice as grounds for invoking this provision. Second, a decision in conformity with Article 108(2) must not have been "immediately" adopted. Third, the protective measures taken must be limited so as to cause the least possible disturbance in the functioning of the common market, and must not in any case be wider than is strictly necessary. Finally, the Commission and the other Member States must be informed of the measures taken no later than their entry into force.[68]

In the *Rediscount Rate Case*, the Commission challenged whether, on the facts of the case, all of the basic conditions required for the

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[66] *Supra* note 64, at 540, [1969] E.C.R. at 539, [1970] C.M.L.R. at 65,71.

[67] *See also* the submissions of the Advocate-General on these questions: *id.* at 554, [1969] E.C.R. at 552, [1970] C.M.L.R. at 56-57.

[68] *See* the submissions of the Commission to the Court in case 27/74, Demag AG v. Finanzamt Duisburg-Süd, [1974] E.C.R. 1037, at 1044, [1975] COMMON MARK. REP. (CCH) 7308, at 7313.

application of Article 109(1) had existed. The Commission led evidence concerning the state of the French foreign currency reserves and transactions during the period of the alleged crisis, and invited the Court to conclude that recourse to Article 109(1) had been unjustified in the circumstances.[69]

The Advocate-General maintained that, since the provision invoked by the French government was in derogation of normal Treaty obligations, the criteria for its application must be strict and that the onus must fall on the party seeking to rely on it to establish the existence of the necessary conditions.[70]

The Court did not pronounce definitively on the issue of whether it was open to a litigant to challenge directly the existence of the crisis conditions envisaged by Article 109(1). The Court reasoned that:

> en cas d'urgence, et lorsqu'une décision du Conseil au titre de l'article 108, paragraphe 2, n'intervient pas immédiatement, l'article 109 permet, à titre conservatoire, une action unilatérale de l'Etat membre et laisse à ce dernier l'appréciation des circonstances qui rendent cette action nécessaire; . . .
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> . . . [C]ependant, s'agissant de mesures dérogatoires de nature à provoquer des troubles dans le fonctionnement du marché commun, elles sont à la fois exceptionelles et conservatoires et, dès lors, de caractère provisoire dans l'attente du contrôle aussi rapide que possible de leur bien-fondé et d'une a tion éventuelle au titre des articles 108 et 109.[71]

It appears to follow from the Court's characterization of Articles 108 and 109 that, notwithstanding the undoubted element of discretion which a Member State exercises under these provisions, their application is limited to certain objective conditions. Since measures adopted under Article 109(1) disrupt the operation of the common market, resort to that provision must be justifiable in the circumstances. Article 109 thus imposes certain positive obligations on Member States, the observance of which becomes in principle enforceable under Articles 169 and 170.[72]

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[69] *Supra* note 64, at 532, [1969] E.C.R. at 531-32.

[70] *Id.* at 558, [1969] E.C.R. at 555, [1970] C.M.L.R. at 61-62.

[71] *Id.* at 541-42, [1969] E.C.R. at 541, [1970] C.M.L.R. at 60, 72-73.

[72] The issue of whether a litigant may challenge directly the existence of the crisis conditions envisaged by art. 109(1) arose again more recently in Demag AG v. Finanzamt Duisburg-Süd, *supra* note 68. In that case, which came before the Court on a request for a preliminary ruling under art. 177, the Court was asked to advise whether the German government had the authority to impose a tax which the applicant alleged to be in violation of art. 12 of the Treaty, relating to the elimination of customs duties. The Court was also asked whether, in the event that the impugned measure was held to violate art. 12, the tax might be upheld as an exercise of the German government's authority under art. 109(1). The applicant charged that no "sudden crisis" within the meaning of that provision had existed at the relevant time. The Court, having decided that the tax was a valid exercise under art. 12, was not required to address itself to the argument concerning art. 109(1) and refrained from doing so. It is of interest, however, that the German government recognized the obligation incumbent on it to ensure that the conditions stipulated by art. 109 existed before the protective measures permitted by that provision were adopted: *see* the *Demag* case at 1043, [1975] COMMON MARK. REP. (CCH) at 7312-13.

III. Economic and Monetary Union and the Treaty of Rome

The Report of the Werner Committee[73] laid out the first fundamental proposals for the realization of complete economic and monetary integration within the Community. Briefly, Werner recommended the adoption of a plan which, by progressive steps, would transfer to the Community level a large measure of authority over principal elements of economic and monetary policy: cyclical policy, regional policy, fiscal policy, interest rates, money supply, *etc*. A necessary component of this plan, according to Werner, would be the total and irreversible convertibility of the currencies of the Member States, the elimination of margins of fluctuation, the permanent fixing of parities and the introduction of total freedom for capital movements. In effect, then, monetary union calls for the adoption of a single currency.[74]

For the first stage, several measures directly affecting monetary affairs were proposed: full obligatory advance consultations on all matters relating to monetary policy; regular meetings among central bank officials; an enhanced role for the Committee of Central Bank Governors, who should assume increasing responsibility for the coordination of monetary policy; the progressive narrowing of the limits of fluctuation of Community exchange rates through concerted Community action against the dollar, preferably by intervention in Community currencies; and the rapid harmonization of the instruments of monetary policy.[75] By the Resolution of the Council and of the Representatives and Heads of Government of March 22, 1971[76] the Community endorsed the conclusions of the Werner Committee and set out proposals for the attainment of the objectives of the first stage.

A less propitious moment for the launching of such a venture could hardly have been found. Within weeks of the March resolution, the entire international monetary system was in complete disarray. The period since that date has been one of unprecedented difficulty and frustration for the Community. We have witnessed not only the almost total evaporation of the original political resolve which is essential to the attainment of EMU, but growing disagreement as to the nature of the technical arrangements which that objective implies. Moreover, confusion and instability continue to characterize the operations of the international economic and monetary system, widening the rifts between the economies of Member States.

In an effort to salvage what could be saved from the present situation and establish some workable goals for the Community, Leo

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[73] Werner Report, *supra* note 43.
[74] *Id.* at 13.
[75] *Id.* at 10-11.
[76] *Supra* note 3.

Tindemans has recommended the adoption of what might loosely be called a two-tiered approach to union.[77] According to this scheme, those States which remain able to progress will "forge ahead" with plans for the integration of their economies on a regional basis; the more troubled members of the Community will receive a temporary dispensation from their obligations with respect to EMU, but will remain committed to that goal and bound to take such steps toward it as they can.[78] Tindemans thus reaffirms the basic approach of the Werner Report.

What remains unclear, even at this late date (nine years after the Community first formally proclaimed its intention to proceed toward the creation of an economic and monetary union), is what sort of progress toward that goal may be made on the basis of the existing Treaty. Both the Werner Report and the subsequent resolution of March 22, 1971 apparently assumed that no amendments would be necessary to implement the programme of the first stage. Such a conclusion would seem for the most part sound. As plans are laid for more far-reaching proposals, however, it is necessary to evaluate the scope of the provisions of the current Treaty. As our examination of the experiences of the Community during the past few years will indicate, there has been a tendency to overestimate the degree of unification which can be realized without recourse to the amending formula of Article 236.

The existing instruments of economic policy are weak. Articles 2, 3(h), 5, 6, 100, 103 and 235 provide the substance of the Community's authority over management of the integration process; each is discussed below. As we hope to indicate, further progress toward EMU on the basis of these provisions will be fraught with difficulties. The conclusion which emerges is that the Treaty, as it is currently structured, provides an inadequate juridical framework for the advancement of EMU. A basic reassessment of the provisions contained in Articles 104 to 109 will be required before this state of affairs can be remedied, and the prospect of Treaty amendment will have to be squarely faced.

A. *Articles 2, 3, 5, 6 and 100*

Article 2 sets out the objectives of the Community. These include "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability [and] an accelerated raising of the standard of living". Two means are specified for the realization of these objectives: the establishment of a common market and the progressive approximation of the economic policies of Member States. From this latter power is derived the Community's principal authority for the advancement of economic and monetary integration.

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[77] *Supra* note 51.
[78] *Id.* at 20-21.

While Article 2 attaches no priority to either of these means, Article 3 provides a more detailed enumeration of some of the specific instruments by which the Community's objectives are to be implemented. Here the emphasis is clearly placed on the achievement of a régime of undistorted and effective competition.[79] Article 3 speaks of the elimination of customs duties and quantitative restrictions, the establishment of a common tariff, and the abolition of obstacles to the free movement of the factors of production. All of the requisite powers for the realization of a common market are thus provided. In contrast, the instruments provided for the co-ordination of economic policy are very limited. While recognition is given to the need for common policies in the spheres of agriculture, transport and commerce, the Community is vested with no effective general powers that would permit the initiation of compulsory measures relating to the approximation of economic policy. Article 3(g) appears to be exhaustive of the Community's authority in this respect. That provision calls for "the application of procedures by which the economic policies of Member States can be co-ordinated and disequilibria in their balance of payments remedied". Primary responsibility for co-ordination thus lies with the Member States. The role of the institutions of the Community is limited to the development of the appropriate procedures.[80] The inadequacy of Community authority in this sphere has proven a major stumbling-block to the advancement of the integration process.[81]

The obligation of Member States to co-ordinate their economic policies finds expression in Articles 6 and 105 of the Treaty. The former requires that "Member States shall, in close co-operation with the institutions of the Community, co-ordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty". The wording of this provision is clearly broad enough to engage the entire range of policies implied by EMU. Curiously, Article 105, while imposing a similar obligation to co-ordinate, limits its scope to facilitating the "attainment of the objectives set out in Article 104". Article 104 is concerned with the much narrower problem of the achievement and maintenance of domestic internal and external economic equilibrium. To the extent that the policies implied by this goal diverge from those called for by EMU, Article 6 would appear to be in potential conflict with Article 105. Whether this problem will attain any practical significance remains to be seen, but it may provide an escape for a Member State reluctant to shoulder its obligation to advance integration.

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[79] KAPTEYN AND VERLOREN VAN THEMAAT, *supra* note 5, at 55.

[80] *Cf.* art. 105 and the discussion of that provision, *supra*.

[81] This has been no more evident than in the succession of monetary crises which commenced in the autumn of 1969, and during which, it has been said, the Member States frequently lost sight of their obligation to co-operate closely with the institutions of the Community: KAPTEYN AND VERLOREN VAN THEMAAT, *supra* note 5, at 60.

A similar problem is inherent in Articles 3(h) and 100 of the Treaty. These provisions empower the Community to pursue the approximation of the laws, regulations and administrative acts of the Member States. This authority is extended only so far as is "required for the proper functioning of the common market".[82] The powers available to the Community under this provision thus fall considerably short of those necessary for the attainment of EMU.[83]

It is clear that the Treaty imposes no general obligation on Member States, apart from that contained in Article 6, upon which to found an obligation to co-operate toward the achievement of EMU. Article 5, which prescribes the general duties of the Member States under the Treaty, is clearly insufficient in this regard. That provision requires: first, that Member States must take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty; second, that Member States must facilitate the achievement of the Community's tasks as defined in Article 2; and third, that they must abstain from measures which could jeopardize the attainment of the Community's objectives.

While Article 5 might at first appear broad enough to embrace the obligations associated with the attainment of EMU, it has been held that the precise content of the obligations imposed by Article 5 "depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme".[84] It follows that none of the specific provisions of the Treaty may be modified in view of the obligations imposed by Article 5.[85] The obligations contained in Article 5 remain subject to the rights retained by Member States with respect to the management of their economic and monetary policy under Articles 104 to 109.

B. *Article 103*

In recent years, considerable reliance has been place on the operation of the Community's conjunctural policy as a means of enhancing the facilities for the co-ordination of economic and monetary policy. Article 103 sets out the elements of the Community's authority in this sphere.

The very vagueness of the concept of conjunctural policy makes it a supple device for Community intervention in monetary affairs. Nowhere

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[82] Art. 3(h). Compare the words of art. 100, which limits Community authority under that provision to such acts as "directly affect the establishment or functioning of the common market".

[83] Arts. 3(h) and 100 would not, for instance, allow measures relating to the integration of Community capital markets.

[84] Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH, [1971] Rec. 487, at 499, [1971] E.C.R. 487, at 499, [1971] C.M.L.R. 631, at 656.

[85] *See* the submission of the Advocate-General in *Schlüter* and *Rewe Zentral*, *supra* note 20, at 1171, [1974] COMMON MARK. REP. (CCH) at 9143/24.

in the Treaty is conjunctural policy defined. Waelbroeck, however, offers the following formula:

> On entend par politique de conjuncture l'ensemble des mesures prises par l'Etat en vue d'attenuer les mouvements cycliques qui se manifestent dans les économies modernes. La Politique de conjuncture est une politique à court terme. Elle ne vise pas à modifier le cadre dans lequel s'exerce l'activité économique ni à agir sur les structures économiques, mais à lutter contre des phénomènes—inflation, recession—de nature passagère et recurrente.[86]

Article 103, according to this view, concerns itself primarily with the same objectives as do Articles 104 to 109, that is, the achievement of the internal and external equilibrium conditions posited by Article 104. The emphasis of conjunctural policy, however, is on the maintenance of these conditions in the short term, whereas Articles 104 to 109 must be understood to be concerned primarily with medium and longer-term policies.[87]

The distinction is an important one, for the procedures designed to ensure the co-ordination of policies under Articles 103 and 104 to 109 are substantially different. Article 105(2), as we have seen, provides for the establishment of a Monetary Committee with "advisory status"; Article 105(1) requires only that Member States co-ordinate their economic policy. These arrangements respect the high degree of independence that Member States retain in the area of balance of payments and exchange rate policy under Articles 104, 107 and 109(1).

Article 103, on the other hand, permits independent regulatory action on the part of Community institutions in matters relating to conjunctural policy. While Article 103(1) requires that Member States consult with the Commission on proposed measures affecting conjunctural policy, 103(2) and 103(3) do not provide, on a reciprocal basis, for similar consultations between the Commission and Member States before the former can propose specific action to the Council or before the Council can act. Furthermore, although the Council is limited to issuing directives by the terms of Article 103(3), it is now clear that the words of 103(2) authorize the Council to make binding regulations where these receive unanimous assent.[88]

It is significant, then, that recent developments have evidenced a trend toward broadening the scope of Article 103, particularly at the

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[86] WAELBROECK, *supra* note 4, at no. 2264.

[87] Nonetheless, there is considerable potential overlap between the fields of application of art. 103 on the one hand, and arts. 104 to 109 on the other. While we examine below efforts made to extend the range of art. 103 to problems of general equilibrium and general economic policy, it should be kept in mind that arts. 104 to 109, conversely, permit a variety of short-term measures, sectoral, national or Community-wide in scope, by Community authorities.

[88] Case 5/73, Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof, [1973] E.C.R. 1091, at 1109-10, [1974] COMMON MARK. REP. (CCH) 9140, at 9141/12-13; *see also* the submissions of the Advocate-General at 1125-26, [1974] COMMON MARK. REP. (CCH) at 9141/22-23.

expense of Articles 104 to 109. The result has been increasing Community intrusion into a sphere heretofore considered to lie within the exclusive domain of the Member States; the integrity of the procedures outlined in Articles 104 to 109 has been compromised in favour of enhanced Community authority in the sphere of balance of payments and monetary policy. Numerous Council regulations, decisions and directives, based specifically on Article 103, testify to this trend.[89]

There can be little doubt that these measures, so diverse in their objectives and with such serious ramifications for the operation of monetary policy within the Community, attach a significance to conjunctural policy which goes far beyond the contemplation of Article 103 as it had been interpreted by commentators such as Waelbroeck. Maas reflects the current understanding of Article 103 implicit in these Council initiatives when he observes that Article 103:

> may serve with equal propriety as a basis for action in the field of prices and wages and expenditure in the private and the public sector, as well as in the field of money creation and the credit system. The fact that Article 104 has been placed after Article 103 may easily give rise to the misconception that cyclical policy on the one hand and the equilibrium of the balance of payments and the policy regarding the rates of exchange on the other hand are not so closely connected that they must be considered as a whole.[90]

At the same time, however, Maas confides that at least one of these measures, Council Decision 71/141,[91] concerning the co-ordination of short-term economic policy, bestows a scope on Article 103 that few people would have considered possible when the Treaty was signed.[92]

The extent of the Council's authority under Article 103 did not arise for judicial consideration until 1973, when a series of suits was initiated challenging the validity of Regulation 974/71, which instituted the system of monetary compensatory amounts. The facts from which two of these cases, *Schlüter* and *Rewe Zentral*, arose are outlined above.[93] In *Schlüter* the applicant argued, *inter alia*, that Article 3(g) of the Treaty, which provides that the Community apply procedures "by which the

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[89] *See, e.g.*, Regulation 974/71, [1971] J.O. no. L 106/1, [1971] I O.J. Special Ed. 257, instituting the system of monetary compensatory amounts; Decison 71/141, [1971] J.O. no. L 73/12, [1971] I O.J. Special Ed. 174 (Mar. 22), strengthening the co-ordination of short-term economic policies through a system of tri-annual economic guidelines; Decision 71/143, [1971] J.O. no. L 73/15, [1971] I O.J. Special Ed. 177 (Mar. 22), instituting a mechanism for medium-term financial aid between Member States, and empowering the Council to allocate credits to those States in need of assistance under art. 108 and to determine the economic policy conditions by which the recipient country must abide (renewed by Decision 74/785, [1975] O.J. no. L 330/50); Decision 74/120, [1974] O.J. no. L 63/16 (Feb. 18), on the attainment of a high degree of convergence of the economic policies of the Member States; Directive 74/121, [1974] O.J. no. L 63/19 (Feb. 18), on stability, growth and full employment in the Community.

[90] Maas, *supra* note 4, at 8.

[91] [1971] J.O. no. L 73/12, [1971] I O.J. Special Ed. 174.

[92] Maas, *supra* note 4, at 7.

[93] *See* text at note 20 *et seq.*, *supra*.

economic policies of Member States *can be co-ordinated*",[94] acted so as to severely limit the scope of operations which could be undertaken by the Community by virtue of Article 103. (The applicant was apparently relying on the holding of the Court in *Italy v. Council and Commission*[95] to the effect that Part III of the Treaty, which includes Articles 85 to 130, was designed to put into operation the provisions of Article 3 and must therefore be considered in conjunction with that Article.)

The Advocate-General's reply to this contention is of interest. Herr Roemer expressed the opinion that the Treaty distinguished measures relating to economic policy and conjunctural policy. Presumably, then, Article 103 was not affected by the restrictions implied by Article 3(g). Furthermore, said the Advocate-General, conjunctural policy could entirely justify measures extending even widely into the national domain without jeopardizing the principle contained in Article 3(g). According to this view, the Council has broad powers under Article 103 to intervene in monetary affairs.[96]

In the conclusions he submitted a few weeks earlier in the case of *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*,[97] Herr Roemer had elaborated on his conception of the function of conjunctural policy. Not only was Article 103 unaffected by any restrictions suggested by Article 3(g), he argued, Articles 104 to 109 could pose no barrier either: "[C]onjunctural policy, precisely because it must be regarded as a constituent part of general economic policy, can encompass *all* economic fields and seen in this light there is . . . no cause for excluding from this field measures having the character of monetary policy."[98] The Advocate-General went on to conclude his submissions concerning Article 103 with the observation that, so long as the purpose in question was a legitimate subject of conjunctural policy, "Article 103 can be used independent [*sic*] of other Treaty provisions and parallel to them."[99] Thus, in a case where changes in the rate of exchange threatened to swell agricultural intervention operations to an unmanageable size, reduce prices and agricultural income, and lead to unfavourable repercussions for the entire economy, such a purpose could be demonstrated and a regulation such as 974/71 was justified.

Although the Court in *Balkan* and *Schlüter* upheld the levy of monetary compensatory amounts as a legitimate exercise of conjunctural policy, it added important qualifications to the Advocate-General's interpretation of Article 103. In both cases the Court stressed the

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[94] *See* the conclusions of the Advocate-General, *supra* note 20, at 1164, [1974] COMMON MARK. REP. (CCH) at 9143/19.

[95] Case 32/65, [1966] Rec. 563, [1966] E.C.R. 389, [1969] C.M.L.R. 39.

[96] *Supra* note 20, at 1164, [1974] COMMON MARK. REP. (CCH) at 9143/19.

[97] *Supra* note 88.

[98] *Id.* at 1122, [1974] COMMON MARK. REP. (CCH) at 9141/19.

[99] *Id.* at 1123, [1974] COMMON MARK. REP. (CCH) at 9141/20.

temporary nature of Regulation 974/71 and the urgent circumstances under which it was introduced.[100] It was unmistakably implied that Article 103 would not have been sufficient to sustain a programme such as that envisaged by Regulation 974/71 on a long-term basis, or in the absence of such conditions. The Council had in the meantime, however, found different authority for the measures in question and had issued Regulation 2746/72[101] to replace 974/71.

The decisions in *Balkan* and *Schlüter* severely circumscribe the activities that the Council may undertake by virtue of Article 103. The legal status of the Council decisions of March 22, 1971[102] and the directive and decision of February 18, 1974,[103] which were once thought to mark notable steps toward monetary unification, must now be regarded as in some doubt. Since these acts would not appear to give rise to any directly enforceable rights, they are probably not open to challenge by private persons.[104] In the meantime, however, it seems that Community authorities have become reluctant to rely any further on Article 103. For example, the Council decision of March 22, 1971 creating the medium-term financial aid mechanism[105] was purportedly passed in reliance on Article 103. Although this decision was renewed under the same authority on December 18, 1975[106]—essentially, it would seem, to permit the continuation of the outstanding loan to Italy[107]—the Council has recently created two new devices designed to provide facilities for mutual financial support;[108] both measures rely on Article

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[100] *Schlüter*, *supra* note 5, at 1152-53, [1974] COMMON MARK. REP. (CCH) at 9143/13; *Balkan*, *id.* at 1108-09, [1974] COMMON MARK. REP. (CCH) 9141/12.

[101] [1972] J.O. no. L 291/148, [1972] O.J. Special Ed. (28-30 Dec.) 64.

[102] *Supra* note 89.

[103] *Id.*

[104] On the question of the direct applicability of decisions and directives, *see* case 25/62, Plaumann & Co. v. Commission, [1963] Rec. 199, at 213-14, [1963] E.C.R. 95, at 98-99; case 9/70, Grad v. Finanzamt Traunstein, [1970] Rec. 825, at 838-40, [1970] E.C.R. 825, at 837-39, [1971] C.M.L.R. 1, at 23-24 (decision and directive); Van Duyn v. Home Office, *supra* note 5, at 1348-50, [1975] 1 C.M.L.R. at 15-16 (directive). *See also* the discussion in KAPTEYN AND VERLOREN VAN THEMAAT, *supra* note 5, at 115-17.

[105] [1971] J.O. no. L 73/15, [1971] I O.J. Special Ed. 177.

[106] *See supra* note 89 (Council Decision 75/785, [1975] O.J. no. L 330/50).

[107] Council Directive 74/637, [1974] O.J. no. L 341/51, *as amended by* Council Directive 75/784, [1975] O.J. no. L 330/48.

[108] *See* Council Regulation 397/75, [1975] O.J. no. L 46/1, concerning Community loans and Council Regulation 1172/76, [1976] O.J. no. L 131/7, setting up a financial mechanism.

Regulation 397/75 permits the raising of funds outside the Community for lending to Member States suffering balance of payments difficulties due to the increase in the price of petroleum products. The average period for which funds may be borrowed may be no less than five years. Regulation 1172/76 creates a financial mechanism designed to meet the specific problems of Member States facing economic difficulties who bear a disproportionate part of the Community budget. The Regulation permits the extension of payments of up to 250 million units of account, or 3% of the Member State's annual financial contribution to the budget, whichever is greater.

The combined effect of these two devices is to greatly extend the range of medium and short-term financial assistance available and consequently, it would seem, to reduce

235. Since all three instruments are directed specifically toward the alleviation of problems encountered in the process of convergence, the invocation of Article 235 in these two recent instances is noteworthy. The new measures, in fact, explicitly acknowledge the fact that, apart from Article 235, the Treaty makes no provision for the taking of such actions.

C. *Article 235*

If the problems encountered in the application of Article 103 could simply be circumvented by resorting to Article 235, the prospects for monetary union would remain largely unaffected. The Treaty, however, reveals three immediate difficulties with such a course of action. Article 235 provides:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

First, the powers deriving from Article 235 may not be as wide as suggested by some of the Council decisions based upon it. Article 235 confers no powers which exist independently from other provisions of the Treaty. It embodies, rather, a "principle of effectiveness" which sanctions the exercise of only such powers which, if otherwise denied to the Community, would frustrate the operation of some explicitly or impliedly recognized powers. The principle in fact derives from:

> une règle d'interprétation généralement admise tant en droit international qu'en droit national et selon laquelle les normes établies par un traité international ou par une loi impliquent les normes sans lesquelles les premières n'auraient pas de sens ou ne permettraient pas une application raisonable et utile.[109]

The second difficulty arises from the limited scope of Article 235. Although the provision is ostensibly designed to ensure that the powers of the Community are adequate for the attainment of its objectives, the grant of authority is qualified by the phrase "in the course of the operation of the common market". Thus, insofar as the powers required for the attainment of EMU are not coincident with

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the need for reliance on the medium-term financial mechanism created under Regulation 71/143, on Mar. 22, 1971, *supra* note 89. Assistance under this arrangement takes the form of a loan from two to five years' duration, raised according to an established quota among Member States. The recent Community loans to Ireland and Italy (Council Decison 76/322, [1976] O.J. no. L 77/12) were raised under Regulation 397/75. Regulation 1172/76 was adopted as a direct result of the United Kingdom's "renegotiation" of terms of Accession, which took place at the meetings of the Heads of Government in Paris in Dec., 1974 and in Dublin in Mar., 1975.

[109] Case 8/55, Fédération Charbonnière de la Belgique v. Haute Authorité de la C.E.C.A., [1956] Rec. 201, at 305.

those required for the effective operation of the common market, the Council is deprived of an instrument important to its ability to faithfully discharge the obligation, incumbent on it under Article 145, to ensure that the objectives set out in the Treaty are attained.[110]

Finally, the procedures prescribed by Article 235 are significantly more cumbersome than those of Article 103(2). Not only is the Assembly required to participate, but Article 235 contains no provision corresponding to Article 103(3) which would permit the Council to act by qualified majority in issuing directives to give effect to measures already determined. Arguably, Article 145 does not bestow such a power either. The result would seem to be that all measures, not just regulations or decisions, would require unanimity.

IV. CONCLUSION

Monetary co-operation is a crucial component in the integration of the national economies which comprise the European Community. Because it denies the Community any effective participation in this sphere of the Member States' economies, the Treaty of Rome, as it is currently framed, can be regarded as representing no more than an interim measure in the realization of the objective of European Economic and Monetary Union. The preceding examination of the Treaty has shown that the restricted authority granted to the Community in matters relating to balance of payments policy and monetary affairs under Articles 104 to 109 is further hampered by lack of an effective co-ordinating power.

While deficiencies in Community powers in the field of monetary affairs represent a considerable barrier to the achievement of EMU, the survival of existing Community programmes has also been put in jeopardy. Prevailing monetary conditions have had adverse effects to which the Community has been unable to respond effectively. The process of economic integration is being seriously hampered by unsettled rates of exchange. Attempts, for example, to further the liberalization of capital movements have been frustrated and many of the achievements of the common price policy instituted as part of the common agricultural policy have been nullified, despite the introduction of special levies in the form of monetary compensatory amounts.[111]

If the reluctance of the Member States to surrender control over instruments as vital to their national sovereignty as monetary and

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[110] For a contrary view, *see* Marenco, *Les conditions de l'application de l'article 235 du traité C.E.E.*, [1970] REVUE DU MARCHE COMMUN 147, at 149-50.

[111] DeMan, *The Economic and Monetary Union after Four Years: Results and Prospects*, 12 C.M.L. REV. 193, at 195 (1975).

exchange rate policy was perhaps understandable in 1957, there is a paradox inherent in their continued adherence to such an attitude. It has become evident that as the process of economic integration progresses, the economic and monetary problems within individual states are increasing, and manifest themselves in Community-wide imbalances. In such circumstances, the utility of the unco-ordinated use of national policy instruments becomes strictly circumscribed. Furthermore, it must be realized that many of the disequilibria now being experienced within the EEC must be seen and treated not so much as obstacles to the process of integration, but as the consequences of it.[112] It would be absurd for Member States to continue to express commitment to the ideals of economic integration while at the same time refusing to recognize the necessity for concerted action toward the resolution of the transitional problems this process itself generates.

The answer to the problems currently facing the Community do not lie simply in the concentration of more power in Community hands or in the designation of new fields of joint endeavour. The realization of existing Community goals, as well as the attainments of the new ones implicit in the concept of EMU, will depend on a fresh division of competencies, not solely between the Community and Member States but between the institutions of the Community themselves. The transfer of authority over monetary policy must be pursued in conjunction with complementary action in the sphere of the harmonization of economic policy. A sound Community monetary policy assumes joint management of exchange rate policy and this is in turn inconceivable so long as Member States are free to pursue sharply divergent policies in their domestic economies.[113]

Numerous proposals have been put forward for the introduction of the required alteration in the economic constitution of the Community. What remains lacking is a generally accepted legal formula for the creation of such an order and the political will to implement it. Unilateral attempts on the part of the Commission to advance the integration process through reliance on the provisions of the existing Treaty have proven unworkable. It now falls to the Member States to create the structures and devise the new division of responsibilities required for the realization of the goals they have set themselves and which have become increasingly important to their own prosperity.

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[112] Wortmann, *A Comment on European Monetary Integration*, in EUROPE AND THE EVOLUTION OF THE INTERNATIONAL MONETARY SYSTEM, *supra* note 33, at 130.

[113] KAPTEYN AND VERLOREN VAN THEMAAT, *supra* note 5, at 11.