

The Rule of Law and Stability in the Eurozone?

From the Board

Article 104, para. 1 of the EC Treaty provides that the ‘Member States shall avoid excessive government deficits’. It is the task of the Commission to monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline. If the Commission considers that an excessive deficit in a Member State exists or may occur, the Commission shall address an opinion to the Council (Article 104, para. 5). The Council shall, acting by a qualified majority on a recommendation from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists (Article 104, para. 6). Where the existence of an excessive deficit is decided, the Council shall make recommendations to the Member State concerned with a view to bringing that situation to an end within a given period (Article 104, para. 7). If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time-limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation. In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State (Article 104, para. 9).

Further rules on the ‘excessive deficit procedure’ are provided for by Council Regulation (EC) No 1467/97 of 7 July (OJ 1997 L 209, p. 6).

An excessive deficit procedure was initiated in relation to Germany in November 2002 and in relation to France in April 2003. In both instances the Council, applying Article 104, para. 6, decided, on a recommendation from the Commission, that an excessive deficit existed in the Member States concerned. The Council recommended both the German and French Governments to bring that deficit to an end as rapidly as possible, by implementing various measures. In October/November 2003, the Commission wanted further action to be taken. It recommended that the Council give France notice, in particular, to put an end to its excessive deficit situation by 2005 at the latest and to achieve in 2004 an annual reduction in the cyclically-adjusted budget deficit equal to 1 per cent of its GDP. In relation to Germany, it recommended the Council to give that Member State notice, in particular, to put an end to its excessive deficit situation by 2005 at the latest and to achieve in 2004 an annual reduction in the cyclically-adjusted balance of 0.8 per cent of GDP. At its meeting of 25 November 2003, the Council took votes on the

Commission recommendations. Since the required majority was not achieved, the decisions were not adopted. However, on the same day the Council adopted essentially similar 'conclusions' with regard to each of the two Member States concerned. In paragraph 3, the Council 'welcomes the public commitment by [the Member State concerned] to implement all the necessary measures to ensure that the deficit will be below 3 per cent of GDP in 2005 at the latest'. In paragraph 4, the Council makes recommendations for the Member State concerned 'in the light of the Commission Recommendation and the commitments made by [that Member State]'. The recommendations concern, in particular, the annual deficit reduction for 2004 and 2005 and continuing to seek to achieve budgetary consolidation after 2005. The Council also recommends that the Member State concerned 'put an end to the present excessive deficit situation as rapidly as possible and at the latest by 2005'. Paragraphs 5 and 6 are worded as follows:

'5. In the light of the recommendations and the commitments by [the Member State concerned] set out above, the Council decided not to act, at this point in time, on the basis of the Commission Recommendation for a Council decision under Article 104(9).

6. The Council agrees to hold the Excessive Deficit Procedure for [the Member State concerned] in abeyance for the time being. The Council stands ready to take a decision under Article 104(9), on the basis of the Commission Recommendation, should [the Member State concerned] fail to act in accordance with the commitments set out in these conclusions as it would emerge from the assessment based on paragraph 7 below.'

The Commission was 'not amused' in particular with respect to the Council decision to hold the excessive deficit procedure for the time being and went to Court. Central argument: the Council's 'conclusions' are measures whose main legal effect is to free the Council and the Member States concerned from the binding legal framework formed by Article 104 EC and Regulation No 1467/97, replacing it with new guidelines governing assessment of the conditions for applying Article 104(9) EC and a new framework for monitoring the excessive deficits of the Member States concerned. The Council on the other hand, submitted that its conclusions are texts of a political nature and not acts entailing legal effects and that the conclusions do not in any way prejudice the Commission's rights and powers: Their sole aim and effect is to record the situation reached in the ongoing excessive deficit procedures after the Council had considered the matter and not adopted the Commission's recommendations.

The Court could not and did not dodge the question: is the excessive deficit procedure essentially political or not? After a careful analysis of Article 104 EC, the Court concluded that 'for each of the stages of the procedure

where the matter is placed before the Council there is a corresponding measure which the Commission recommends that the Council adopt'. Each stage involves consideration by the Council as to whether the Member State has complied with its obligations under Article 104 EC and, in particular, those resulting from the recommendations and decisions previously adopted by the Council. As the Commission acknowledges, the Council has discretion. Commission recommendations, and not proposals within the meaning of Article 250 EC, are placed before it, and it may, in particular on the basis of a different assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned, modify the measure recommended by the Commission, by the majority required for adoption of that measure. Nevertheless, it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those, which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example, in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions.

Discretion: yes, but 'the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97'. Another victory for the Rule of Law.

J.H.J., August 2004