1998

Reflections on the Papers Presented by Weiler, Goebel, and Meyers & Levie

George A. Bermann
Columbia Law School, gbermann@law.columbia.edu

COMMENT: REFLECTIONS ON THE PAPERS PRESENTED BY WEILER, GOEBEL, AND MEYERS & LEVIE

*George A. Bermann**

The preceding papers amply demonstrate that an important step in the progressive integration of the European Union can be a compelling one without being an easy one. The transition to economic and monetary union (EMU) in Europe is precisely such a step. In this brief comment, I hope merely to show that, however powerful may be the case for economic and monetary union, passage to it is both generating institutional misgivings and entailing what could be institutional mistakes.

1. The Economic Case for a Common Currency

I begin with the case for economic and monetary union, which I consider to be a very strong one indeed. Not many initiatives remain to be taken in the European Union that serve as many purposes lying so close to the heart of the European enterprise. In the first place, although one frequently reads that the "transaction costs" associated with multiple currencies have been exaggerated, the fact remains that those costs are not negligible and are in any event quite conspicuous. By definition, the more the single market succeeds, the more cross-border transactions there will be, with transaction costs commensurately increasing.

Secondly, however well or poorly they may be held in check, currency fluctuations generate a degree of uncertainty in economic transactions that a truly integrated economy cannot afford and would not tolerate. It is difficult to quantify the overall economic cost of this uncertainty, but it likewise cannot be inconsiderable. Then, too, the coexistence of relatively stronger and weaker national currencies is undesirable from the point of view of the "level playing field" (a consideration that lies at the very heart of the integration enterprise), if only because of the short-term trade advantages that accrue to the state having the weaker currency. Price discrimination is the inevitable, if unintended, consequence.

No less important is the effect of multiple currencies on market transparency. Quite obviously, this "cost" is no more easily quantifiable than any of the others that I have mentioned, but it too is real. Consumers are clearly dissuaded from purchasing in markets whose currencies they cannot readily evaluate, and

* Charles Keller Beekman Professor of Law, Columbia University School of Law. This Comment is based on a paper presented at the October 1997 symposium titled "The Euro: A New Single Currency for Europe?" sponsored by The Washington University School of Law and the European Studies Program at Washington University in St. Louis. The collected papers from the symposium are published in this special symposium issue of *The Columbia Journal of European Law*.

they may run the risk of acting inefficiently. I believe that traders too can be dissuaded from doing business in such markets and can thus be led to act inefficiently.

More generally, the more that currency recedes as a factor in the planning of economic transactions, the more market actors of all stripes can attend to other considerations—efficiency, quality, and regulatory superiority, for example—that deserve to be accounted for in such planning. In this respect, a single currency can promote the values of subsidiarity—values with which it is actually seldom seen as having a connection—since actors, if they are not systematically driven by currency considerations, will have easier and fuller access to the different regulatory regimes that subsidiarity allows to develop.

Significantly, none of the arguments I have advanced requires proof that a single currency—like a single passport, flag or national anthem—will strengthen the sense of a common European identity upon which closer political union may in turn be built. If dealing on a daily basis in the same currency with which other Europeans deal contributes to the strengthening of that identity, so much the better. But the case for a common currency does not depend on that.

This is not to suggest that the economic case for a common currency is a wholly and unreservedly positive one. Later papers in this colloquium will doubtless explore its economic risks, such as they are. Mention has already been made of the risk of "asymmetric economic shocks" which can be expected within an economic and monetary union when the underlying macroeconomic conditions are not in fact as closely aligned as they should be. As has been observed, the existence of a common currency excludes any possibility of national currency devaluation, the best-known country-specific remedial measure traditionally relied on in the face of such asymmetric shocks. All that means, however, is that an economic and monetary union must develop surrogate mechanisms for dealing with such shocks—if only in the form of systems of economic aid in favor of adversely affected regions.

2. Technical and Legal Aspects

While the papers in this panel do not dwell on the basic economic rationales for a common currency that I have just set out, they certainly demonstrate that the European Union has the legal and technical wherewithal for organizing the intended transition. However else it may be described, the timetable for transition that earlier speakers on this panel have described is technically and legally impressive. Having studied it, one cannot help concluding that, if there is sufficient economic convergence and political will, the operation will take place, and effectively. It is not surprising that, having in the past so frequently tackled what were considered to be intractable legislative problems (including the harmonization of quite disparate national laws), the institutions of the Union have shown themselves capable of devising solutions to such problems as the "rounding" of national currencies in the conversion process and ensuring the legal "continuity" of contracts.[1] In short, the economic case for moving to a common currency has its counterpart in the legal and technical feasibility of the move.

3. Beyond a Common Currency: The EMU

Even to begin appreciating the reasons for misgivings over what would appear to be an inexorable next step in European Union integration, one must appreciate that economic and monetary union means something more than a common currency—and that it is that "something more" that is proving to be problematic. Previous speakers have assumed, and subsequent speakers are likely to show, that introducing a common currency entails profound institutional changes for the European Union.

While there has been debate over the shape and, above all, the degree of political independence of the future European Central Bank (ECB), there has never been serious doubt that such an institution would have to be created and that it would have to enjoy considerable political independence. Moreover, that institution would have to exercise this independence over matters that have until now—notwithstanding the EC Treaty's traditional exhortations in favor of "coordinating" Member State policies—rested firmly in the hands of national political leadership. Despite their centrality to the well-being of the European economy (which after all is the central subject matter of the European Union), prevailing policies on interest rates, money supply, price stability, unemployment and government spending have, for all practical purposes, been Member State policies. As evidence of that, national political campaigns continued to be waged, and elections won and lost, on the basis of these issues, the unstated premise being that national political authorities would continue to be responsible for the relevant policies. When the Maastricht Treaty (and protocols) articulated the convergence criteria that national economies would have to meet in order to qualify for economic and monetary union,[2] it rudely shook this assumption.

4. Defining an Economic and Monetary Policy

Not many polities define an economic and monetary policy in their constitutive documents. But the European Union has done so, and it is easy to see why. In an economy as nationally and regionally differentiated as the EU, the constituent units are naturally averse to leaving macroeconomic policymaking to the unguided wisdom and discretion of distant macroeconomic architects. Even if those architects were not to be politically independent, it is hard to see how each individual state or region could expect them to be responsive predominantly to it.

---

[1] See Council Regulation 1103/97 of June 17, 1992, on certain provisions relating to the introduction of the euro ("Regulation 235"), 1997 O.J. (L 162)1.

[2] Treaty Establishing the European Community [EC Treaty], arts. 104c(2), 109j(1); Protocol to the Treaty on European Union [TEU] on the excessive deficit procedure; Protocol to the TEU on the convergence criteria referred to in Article 109j of the EC Treaty.

Economic and monetary policy is explicitly defined in the Treaty in terms of price stability,[3] and the convergence criteria (in particular, the prohibition on excessive government spending) and the control mechanisms contained in the subsequently adopted "Stability Pact"[4] strongly reinforce this definition. With such a definition, Europeans see that they are not merely heading toward a common currency (with its relatively manageable legal and technical implications), but toward a particular set of macroeconomic values whose realization may entail profound social and economic consequences for the Member State or region in which they live and in terms of which they continue to think. The tension is most obviously seen in the interplay between pursuing price stability (through restrictions on government spending), on the one hand, and addressing the problem of unemployment on the other (a problem acute enough to have caused the drafters of the 1997 Amsterdam Treaty to make employment the only new substantive chapter of the EC Treaty).[5] But economic and monetary policy is not limited to that.

To put the matter differently, if, as I have suggested above, the introduction of a common currency does no violence to the values of subsidiarity (and possibly even promotes them), the same simply cannot be said of the introduction of a centrally determined economic and monetary policy. The tension might be relieved by reducing somewhat the ECB's political independence, but, for the reasons indicated above, it simply cannot be eliminated. The fact remains that, for perfectly understandable reasons, Europe faces not only a common currency, but a defined economic and monetary policy that has now been inscribed in the Treaty and related instruments. Furthermore, this policy agenda will be pursued by an institution whose political accountability cannot possibly be made commensurate with the importance its policies will have for the diverse economies within Europe. While the EC Treaty has always been an economic constitution, its working principles have traditionally been cast in terms of free movement and nondiscrimination, not in terms of particular substantive conception of economic wisdom.

5. The Prospect of Sanctions

Among the ironies to be observed is that, while the European Community law system has never been one to energetically sanction a Member State's non-compliance with its legal obligations, the new monetary and economic policy to

---

[3] EC Treaty, art. 105(1) states that "The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2."

[4] Through the "Stability Pact," the Member States agreed on a surveillance procedure for monitoring their progress toward compliance with the convergence criteria, (see supra note 2, at 5), and a system for implementing the TEU's excessive deficit procedure, including sanctions. See infra, notes 6-7 and accompanying text.

[5] Treaty of Amsterdam, amending the Treaty on European Union, the European Community and other related documents, Oct. 2, 1997 (not yet ratified), adding to the EC Treaty a new Title VIa (arts. 109n-109s) on employment, 1997 O.J. (C 340).

which I have just referred stands to be seriously enforced. It is only through the Maastricht Treaty that Article 171 of the EC Treaty was amended to introduce the prospect of imposing sanctions on Member States. Even then, sanctions can only be imposed by the European Court of Justice (upon application by the Commission), and only if the Court finds a Member State to have inexcusably failed to comply with a prior ruling of the Court finding the state in inexcusable breach of a European Community law obligation. This provision has yet to be applied.

Yet, acting pursuant to Articles 103 and 104c of the EC Treaty, the Council has now enacted a pair of regulations instituting a "multilateral surveillance procedure"[6] and implementing the Treaty's "excessive deficit procedure,"[7] which promise to impose serious sanctions: mandatory non-interest-bearing deposits of currency by offending Member States and eventually outright Member State fines. It is not surprising that the drafters of the Amsterdam Treaty considered it advisable at the same time also to introduce a system of sanctions against Member States (and, upon their accession, future Member States) for "serious and persistent breach" of such principles as "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."[8]

6. "Ins" and "Outs"

Given the heightened stakes of economic and monetary union, the EU now also faces the prospect of a system of "ins" and "outs" on a grand scale. The assumption up until now has been that those Member States that remained "outside" a given regime—be it the Social Protocol, the common foreign and security policy, or the Schengen Agreement—had chosen to do so. In the EMU context, while much attention has been paid to Britain's, Denmark's and, more recently, Sweden's decisions to place themselves provisionally among the "outs," they too largely chose to remain outside the monetary union. The fact remains, however, that the EMU has obvious prospects for involuntary outsiders, not only among current Member States (such as Greece), but also among prospective new members. To a large extent, whether they lie outside the EMU lies outside their control, and may do so for an extended period of time. So automatic and preordained is this species of non-membership, and so serious are its consequences, that it should not even be considered in the same breath as the cautious and elaborate provisions on "enhanced cooperation" that the drafters at Amsterdam devised for inclusion in the EC Treaty and the TEU.[9]

---

[6] Council Regulation 1466/97 of July 7, 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, 1997 O.J. (L 209) 1.

[7] Council Regulation 1467/97 of July 7, 1997, on speeding up and clarifying the implementation of the excessive deficit procedure, 1997 O.J (L 209) 6.

[8] Treaty of Amsterdam, adding a new Article F.1 to the TEU.

[9] Treaty of Amsterdam, adding a new Article 5.1 to the EC Treaty and new Articles K.15 through K.17 to the TEU.

* * *

I have sought in these remarks to show that there is no simple relationship between the economic logic of a step on the road to integration and the institutional consequences of taking it. That a clearly sound (albeit complicated) step may have dramatic institutional consequences does not of course mean that the step should not be taken—far from it. It suggests only that those consequences need to be considered at the time the step is fashioned.