Chapter 23: Constitutional aspects of Economic and Monetary Union

Introduction

23-1 It is not the purpose of this chapter to describe in detail the procedures and criteria for the establishment of economic and monetary union, but rather to identify the principal characteristics of the relevant provisions from a purely constitutional point of view. For this purpose a brief description of the scheme is necessary. Essentially, it comprises a general move towards a much closer integration of the economies and economic policies of the Member States and a specific move towards the creation of a single currency. Many of the provisions of the Treaty are concerned with the time-table for these developments: that is, with the first, second and third or final stages for achieving economic and monetary union; and, inasmuch as many of the dates have been passed, it follows that many of the provisions are of little current interest.[1] There are, for example, references in these provisions to the European Monetary Institute; but this body is now *functus officio*.[2] Thus, even a comprehensive description of the scheme for Economic and monetary union would need to be selective about the provisions of the Treaty which are still relevant and valid. A constitutional review of the provisions is even more selective.

23-2 In the Treaty, the twenty-seven articles and seven protocols on economic and monetary union[3] provide for:
- general commitments by the Member States in the field of economic policy[4],
- obligations in specific economic sectors[5],
- the creation of institutional arrangements for implementing economic and monetary policy[6],
- the criteria for acceptance in economic and monetary union[7],
- the time-table for implementation of the arrangements[8],
- the exceptions from the arrangements.[9]

23-3 From a constitutional point of view, the scheme outlined above raises three points of special interest:
- the constitutional implications of closer economic integration,
- the constitutional significance of inequality between the Member States and
- the constitutional consequences of shifting economic responsibilities to new bodies.

The constitutional implications of closer economic integration

23-4 On the face of it, the provisions of the Treaty on economic and monetary union suggest that what is mainly involved is a number of technical changes in the financial and banking sector, coupled with the creation of a single currency. To the man in the street, the main - perhaps the only - obvious manifestation of these provisions will be the appearance of new banknotes and coins; and, to the extent that these facilitate trading, as well as personal money transactions, especially across national borders within the European Union, they are likely and deserve to be warmly welcomed. However, the constitutional implications of a single currency and of the closer economic integration which the creation of the single currency both facilitates and helps to implement are far-reaching. If the European Union is to achieve the status of a distinct and substantial political entity, it needs to

have an integrated economy and not a collection of separate and disparate economies. By the same token, Member States have to surrender much of their control over their national economies if they are to play a genuine part in the creation of economic and monetary union. The extent of this surrender is illustrated in many of the economic and monetary provisions of the Treaty. If, for example, a Member State "persists in failing to put into practice the recommendations of the Council" on budgetary deficit, "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 to remedy the situation".[10] Again, Member States may issue coins only if the volume of the issue is approved by the European Central Bank.[11] Member States have to ensure that their national legislation is compatible with the Statute of the European System of Central Banks[12]; and they may negotiate in international bodies and conclude international agreements only where these negotiations and agreements are "without prejudice to Community competence and Community agreements as regards economic and monetary union".[13] Given the premises on which the scheme of economic and monetary union is based, these are reasonable and necessary obligations. But their constitutional importance cannot be too strongly emphasised.

23-5 Closer integration is accompanied by, and to a large extent dependent on, drastic rules for the structure of the new currency system and the surveillance of the economic conditions on which the system is based. Thus, secondary legislation provides that the value of the Euro, the new currency unit, has to be pegged against the currency of each Member State participating in the third stage of economic and monetary union from 1 January 1999 until the date on which national currencies are superseded; that is, no later than 30 June 2002.[14] It provides also for continuing surveillance by the Commission and Council of each participating state's annual budget and overall economic performance[15] and for the procedure under which the Council may determine that a Member State has developed an excessive annual deficit and may set swingeing penalties for a Member State's failure to take adequate corrective action.[16] Council measures are supplemented by the powers exercised directly under the Treaties, or through delegation, by the European Central Bank, which may set minimum reserves for financial institutions and penalise non-compliance.[17] Constitutionally, these measures suggest a substantial degree of subordination of national economic and monetary policies to the requirements of the central authorities.

The constitutional significance of inequality between the Member States

23-6 Since the earliest days of the European Communities it has been an article of faith, and to some extent a matter of law, that the Communities should develop in a "harmonious" way and that rules imposed at Community level should apply equally to all parts of the Communities.[18] The very exceptions to this principle, such as the special rules applicable to Berlin before the unification of Germany, underline the principle itself.[19] The common market and the internal market subsist on the assumption that there should be no internal barriers, which means that there must be an alignment of policies and a harmonisation of laws.[20] The prohibition of discrimination between nationals of the Member States would be undermined if there were a kind of institutionalised discrimination at the Member State level.[21] There was in short no place for the adoption of differentiated or discriminatory rules to apply to individual Member States or groups of Member States.

23-7 However, the provisions of the Treaty on economic and monetary union create three classes of Member State:

- those qualifying at the beginning of the third stage for adoption of the single currency[22],
- those which do not qualify ("Member States with a derogation")[23] and
- those which have not agreed to proceed to the third stage.[24]

The separation of these three classes of Member State has the effect of creating differences between laws of fundamental importance to the European Union in individual states or groups of states. To the extent that currency differences within the Union will continue to exist, the provisions on economic and monetary union will actually create barriers between the Member States: one set of barriers will be replaced by another. Constitutionally, this development is inconsistent with the trend of previous legal and economic development within the Community.

The constitutional consequences of shifting economic responsibilities to new bodies

23-8 In view of the powers and duties conferred on the new bodies created for the purpose of implementing economic and monetary union, and especially those conferred on the European Central Bank, there is a perceptible shift in the balance of constitutional powers within the European Union. The European Central Bank has power, not only to make regulations and take decisions having binding legal effects, but also to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.[25] More broadly, the European System of Central Banks and the European Central Bank have extensive powers over the direction of economic policy.[26] The Economic and Financial Committee[27] may also be expected to wield considerable influence. All these are non-elected bodies; and they are not answerable to the Member States, except indirectly through the Council.[28] It follows that, constitutionally, decisions on economic and monetary matters are likely to move further from the field of democratic control and from individual Member States' influence.

1. The first stage ended on 31 December, 1993; and the second stage began on 1 January 1994: Article 116(1) (formerly 109e(1)) EC Treaty. The third stage began on 1 January 1999: Article 121(4) (formerly 109j(4)), EC Treaty. The "rapid introduction" of the single currency thereafter was a matter for decision by the Council: Article 123(4) (formerly 109l(4)), EC Treaty. For a recent and topical example of the Council's use of its legislative powers under this Article, see Council Regulation EC/1338/01, laying down measures necessary for the protection of the euro against counterfeiting.

2. Article 123(2) (formerly 109l(2)), EC Treaty.

3. Articles 98 to 124 (formerly 102a to 109m), EC Treaty, and Protocols 18 to 21, and 24 to 26, annexed to the EC Treaty.

4. For example, in Articles 98, 99, 100(2), 102(1) and 103(1) (formerly 102a, 103, 103a(2), 104a(1) and 104b(1)), EC Treaty.

5. For example, in Article 104 (formerly 104c), EC Treaty, and Protocol 20, EC Treaty (excessive government deficits).

6. Articles 112 to 115 (formerly 109a to 109d), EC Treaty, and Protocol 18, EC Treaty (European System of Central Banks and European Central Bank); also, Article 114(2) (formerly 109c(2)), EC Treaty (Economic and Financial Committee).

7. Article 121 (formerly 109j), EC Treaty, and Protocol 21, EC Treaty. The criteria relate to price stability, absence of an excessive government deficit, observance of normal fluctuation margins in exchange rates and convergence of interest rates.

8. See, in particular, Article 121(4) (formerly 109j(4)), EC Treaty.

9. These exceptions are sometimes known as "opt-outs": they apply to the United Kingdom and Denmark: Protocols 25 and 26 respectively, EC Treaty.

10. Article 104(9) (formerly 104c(9)), EC Treaty.

11. Article 106(2) (formerly 105a(2)), EC Treaty.

12. Article 109 (formerly 108), EC Treaty.

13. Article 111(5) (formerly 109(5)), EC Treaty.

14. Council Regulation EC/974/98.

15. Council Regulation EC/1466/97.

16. Council Regulation EC/1467/97.

17. Council Regulation EC/2531/98.

18. See, for example, the fifth recital and Article 2, EC Treaty. "Harmonious development" in the fifth recital does appear to be limited to "cohesion"; and "harmonious and balanced development" in Article 2 appears to be limited to economic activities. But both cohesion and economic activities are at the heart of the Community's objectives.

19. For example, in Article 87(2)(c) (formerly 92(2)(c)), EC Treaty.

20. See, in particular, Article 14 (formerly 7a), second paragraph, EC Treaty.

21. Article 12 (formerly 6), first paragraph, EC Treaty.

22. Article 121 (formerly 109j), EC Treaty.

23. Article 122 (formerly 109k), EC Treaty.

24. Protocols 25 and 26, EC Treaty.

25. Article 110 (formerly 108a), EC Treaty.

26. Articles 105 to 111 (formerly 109), EC Treaty.

27. Set up under Article 114(2) (formerly 109c(2)), EC Treaty.

28. Even then, there is a constitutional oddity, in that the President of the European Central Bank is invited to participate in Council meetings when the Council discusses matters relating to the objectives and tasks of the European System of Central Banks: Article 113(2) (formerly 109b(2)), EC Treaty.