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THE ECONOMIC AND MONETARY UNION: A STANDARDS OR RULES-BASED INSTITUTION?

I. INTRODUCTION

Europe's introduction of the euro into the Economic and Monetary Union ("EMU") may represent the boldest economic achievement of the last century.¹ The magnitude of this venture, though economic in nature, also has vital significance in Europe's plan to become an ever-larger international political leader.² The euro zone consists of approximately two hundred ninety million people — a population comparable to that of the United States.³ The EMU also makes up more than 21% of the world Gross Domestic Product ("GDP").⁴ In 2000, the EMU was responsible for 14.7% and 13% of the world's exports and imports respectively.⁵ These statistics invite the assertion that the European Union ("EU") today shares several characteristics with other influential societies of the past⁶ that have successfully introduced new currencies. The EMU may very well be on a path for continued future success; however, despite the promising facts mentioned here, the EU still faces numerous challenges including, the task of continuously reevaluating the rules

1. Robert Mundell, *Making the Euro Work*, WALL ST. J., Apr. 30 1998, available at 1998 WL-WSJ 3492150 ("Throughout history the world economy has seen a succession of important currencies that have attained the status of international currencies...[T]hese currencies have been associated with great powers in their ascendancy. That was the case with the shekels, darics, drachmas, denarii, dinars, ducats, deniers, thalers, livres, pounds and dollars.").

2. THE EUROPEAN UNION: A GUIDE FOR AMERICANS ch. 3 (2002), at <http://www.eurunion.org/infores/euguide/euguide.pdf> (last visited Jan. 15, 2003) [hereinafter GUIDE].

3. *Id.*

4. *Id.*

5. *Id.*

6. Mundell, *supra* note 1. Common factors which contributed to the success of currencies in the past were: size of the transaction domain, a stable monetary policy, the power of the central state and the fallback value of the currency. *Id.* The author also lists the absence of arbitrary exchange restrictions as a factor, but discounts it as inapplicable in his discussion on the EU. *Id.*

which comprise the EMU. Even in the wake of the recent success of the euro, the EU may soon find that the very rules which form the EMU could result in harsh economic and political conflicts within the EU or worse yet — the eventual undoing of the EMU.⁷

This Note will consider the alternative implementation methods of the EMU policies by considering the Stability and Growth Pact — one rule which has recently forced the EU to face several difficult questions about its chosen methods of legislation. The discussion will focus on whether the EU should have taken a standard or rules-based approach in the creation of the new Stability and Growth Pact, as well as the future development and implementation of the Pact and other EMU laws. Part II will introduce the European Union and its governing bodies. Part III will outline the legislation, background and present status of the Stability and Growth Pact. Part IV will discuss the arguments for and against having a regime that is either standards or rules-based and go on to consider several theories which have further explored the standards and rules debate. Part V will attempt to classify the Pact as either a standard or a rule and discuss the two alternatives of jurisprudence with regard to implementing the requirements of the Pact. This Note will conclude by considering what lies in store for the EMU and whether a rules or standards-based approach will be the more suitable path to choose in future instances.

II. THE EUROPEAN UNION

The EU came into existence upon the implementation of the Maastricht Treaty on European Union in 1993.⁸ It is a treaty-based organization that directs economic and political cooperation among fifteen European nations, though the “fundamental” goal was to create an increasingly stronger union among the

7. Werner Van Lembergen & Margaret G. Wachenfeld, *Economic and Monetary Union in Europe: Legal Implications of the Arrival of the Single Currency*, 22 FORDHAM INT'L L.J. 1, 31 (1998).

8. GUIDE, *supra* note 2, at ch. 1. However, the process of integration began in the 1950s by six countries — Belgium, France, Germany, Italy, Luxembourg, and the Netherlands — as a post-war Western Europe took necessary steps in rebuilding its economy. *Id.* The six nations also pursued integration of both military and political resources. *Id.* Such efforts failed and unification, at the time, was continued on the economic front alone. *Id.*

nations of Europe.⁹ Through these efforts, the European Union has brought economic prosperity to Western Europe and helped bring stability to Central and Eastern Europe.¹⁰ In dealing with the monumental task of uniting Europe, the EU has five governing bodies: (1) European Commission (“Commission”); (2) Council of the European Union; (3) European Parliament; (4) European Court of Justice; and (5) European Court of Auditors.¹¹ Additionally, the EU also created the European Central Bank (ECB) following the establishment of the EMU.¹²

The Commission drives EU policy¹³ by proposing legislation, bearing administrative responsibilities, and ensuring that the treaties are properly implemented.¹⁴ It also holds investigative powers and can take legal action against persons, companies, or Member States that violate EU rules.¹⁵ The Commission consists of commissioners who act in the EU’s interest independently of the national governments, which make up the EU.¹⁶ The Council of the European Union, the EU’s legislative body, establishes EU laws based on proposals submitted by the Commission — the proposals and the subsequent laws must balance national and EU interests.¹⁷ The Council of the European Union consists of ministers from each Member State.¹⁸ Different ministers participate depending on the subject matter of a particular discussion.¹⁹ For example, the ministers of the Economic and Finance (“ECOFIN”) Council discuss economic and finan-

9. *Id.*

10. *Id.*

11. GUIDE, *supra* note 2, at ch. 2. Furthermore, a European Council consisting of the heads of state and government of each Member State along with the Commission president holds summits twice a year in order to provide strategy and political direction for the EU as a whole. *Id.*

12. *Id.* at ch. 3; Lembergen & Wachenfeld, *supra* note 7, at 9.

13. GUIDE, *supra* note 2, at ch. 2.

14. *Id.*; EUROPA: THE EUROPEAN UNION ON LINE, at http://europa.eu.int/eur-lex/en/about/pap/process_and_players3.html (last visited Jan. 15, 2003) [hereinafter EUROPA].

15. GUIDE, *supra* note 2, at ch. 2.

16. *Id.* In theory, the commissioners act in the interest of the EU alone, despite the fact that the governments of the Member States nominate them. *Id.*

17. *Id.*; EUROPA, *supra* note 14.

18. GUIDE, *supra* note 2, at ch. 2.

19. *Id.* See also EUROPA, *supra* note 14. The Council, the EU’s main decision-making body, is also referred to as the Council of Ministers. *Id.*

cial affairs.²⁰ The European Parliament can question both the Commission and the Council and has veto power over legislation enacted by the Council.²¹ The Parliament is the EU's public forum as it is comprised of six hundred twenty-six members elected in EU-wide elections for five-year terms.²² The European Court of Justice is the EU's "Supreme Court."²³ Lastly, the European Court of Auditors oversees the financial management of the EU budget.²⁴

Through these governing bodies, the EU initiated the process of establishing the "single market" of the EMU in 1990.²⁵ Though the introduction of the euro is the most noticeable result of the single market, it is actually the third (and final) stage of the transition into the EMU.²⁶ The first stage of the process, which began on July 1, 1990, consisted of lifting restrictions on the movement of capital across national borders within the EMU.²⁷ The second stage, which started in January 1994, concerned setting up the European Monetary Institute in Frankfurt, which set the stage for the ECB.²⁸

The ECB now assists in the management of the euro by implementing monetary policy for the whole EMU.²⁹ The ECB, also based in Frankfurt, took over the fiscal duties of setting the interest rates in Europe from the national central banks of the Member States on June 1, 1998.³⁰ The ECB, together with the

20. GUIDE, *supra* note 2, at ch. 2.

21. *Id.*; EUROPA, *supra* note 14.

22. GUIDE, *supra* note 2, at ch. 2. The number of seats is to increase to seven hundred thirty-two due to the Treaty of Nice to take effect in 2005. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at ch. 3.

26. GUIDE, *supra* note 2, at ch. 3 ("[T]he euro represents the consolidation of the European economic integration ... [T]he euro is a palpable reality and contributes to a broader sense of European identity.").

27. *Id.*

28. *Id.*

29. Lembergen & Wachenfeld, *supra* note 7, at 9; see also Mundell, *supra* note 1 ("A single currency implies a single policy."); GUIDE, *supra* note 2, at ch. 3, 7.

30. Dagmar Aalund, *Investing in Euroland: What's the Euro? And Other Common Asked Questions About the Planned Single Currency*, WALL ST. J., Sept. 28, 1998, available at 1998 WL-WSJ 18985895; see also Daniel Yergin & Joseph Stanislaw, *Now Comes the Hard Part: The New Europe Poses Enormous Challenges for the Welfare State, for Protected Companies and for Politi-*

national central banks of the Member States acting as agents to the ECB, will make up the European System of Central Banks (ESCB).³¹ The function of the ECB is vital to the stability of the EMU and the performance of the euro since, “no currency has ever survived as an important international currency with a sustained high rate of inflation.”³² Thus, the ECB’s sole responsibility is to keep prices stable.³³

However, the responsibility for the future of the euro does not totally fall upon the shoulders of the ECB. In order to ensure economic stability within the EU the Member States must also uphold certain fiscal standards. The nations must continue to practice economic discipline, or conflicts stemming from the stark economic differences among the many Member States will arise.³⁴ The European Union encourages this level of discipline through two mechanisms. First, the EU will refuse liability for the financial obligations of Member States, and, second, the Member States have agreed to the restrictions of the Stability and Growth Pact.³⁵

III. THE STABILITY AND GROWTH PACT

A. *The “Pact”*

The EU developed the Stability and Growth Pact in order to foster consistent economic policies and to ensure budget discipline throughout the EMU³⁶ by requiring each Member State to

cal Leaders, WALL ST. J., Sept. 28, 1998, available at 1998 WL-WSJ 18985958. The president of the Bundesbank’s Central Bank Council will sit on the governing board of the European Central Bank, as will the presidents of the national banks of the twelve Member States. *Id.*

31. Lembergen & Wachenfeld, *supra* note 7, at 9.

32. Mundell, *supra* note 1.

33. Aalund, *supra* note 30; see also Mundell, *supra* note 1 (“The ECB will have the same problems of monetary management as the Federal Reserve System in the U.S.”). *But see* Aalund, *supra* note 30 (“The ECB isn’t a duplicate of the U.S.’s Fed. One of the most important differences between the two is their mandates. Unlike the newly formed ECB, the Fed’s goal is to balance the objectives of price stability with those of employment and economic growth.”); see also Lembergen & Wachenfeld, *supra* note 7, at 9.

34. Lembergen & Wachenfeld, *supra* note 7, at 31.

35. *Id.*

36. *Id.*

keep its budget deficit at a minimal level.³⁷ The Stability and Growth Pact consists of one Resolution and two Regulations from the European Council.³⁸ The main component of the Pact, Council Resolution 97/C236/01 on the Stability and Growth Pact, requires that Member States keep their “medium term budgetary position close to balance or in surplus.”³⁹ More specifically, each Member State must keep fiscal deficits below 3% of GDP.⁴⁰ Failure to abide by this standard will trigger sanctions imposed by the EU.⁴¹ At first glance, it may seem that the Pact forces Member States to take action to correct their budgetary positions in case of an excessive deficit. However, the EU ultimately intended the Stability and Growth Pact to serve as a deterrent to induce Member States to avoid an excessive deficit in the first place.⁴²

Council Regulation 1466/97 of July 7, 1997 addresses the “strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies”⁴³ of Member States as contained in Article 103 of the EC Treaty.⁴⁴ The regulation improves the surveillance of the Member States’ economic and monetary positions by ensuring the flow of information from Member States to the Commission and Council.⁴⁵ Essentially, the regulation outlines the rules concerning the content, submission, examination, and monitoring of each

37. Council Resolution 97/C236/01 on the Stability and Growth Pact, 1997 O.J. (C236) 1.

38. RENEE SMITS, *THE EUROPEAN CENTRAL BANK* 86 (1997).

39. Tina Winther Frandsen, *The Stability and Growth Pact — Status in 2001*, DANMARKS NATIONALBANKEN, (2001), at [http://www.nationalbanken.dk/nb%5Cnb.nsf/alldocs/Smonetary_review_3quarter_01/\\$File/nb04.htm](http://www.nationalbanken.dk/nb%5Cnb.nsf/alldocs/Smonetary_review_3quarter_01/$File/nb04.htm).

40. *The Case for Co-operating — Economic Focus*, THE ECONOMIST, Aug. 24, 2002, available at 2002 WL 7247195 [hereinafter *The Case for Co-operating*].

41. Jan Meyers & Damien Levie, *The Introduction of the Euro: Overview of the Legal Framework and Selected Legal Issues*, 4 COLUM. J. EUR. L. 321, *8 (1998).

42. Roger J. Goebel, *European Economic and Monetary Union: Will the EMU Ever Fly*, 4 COLUM. J. EUR. L. 249, *39 (1998).

43. Lembergen & Wachenfeld, *supra* note 7, at 31–32; Meyers & Levie, *supra* note 41, at *8; Goebel, *supra* note 42, at *38.

44. Lembergen & Wachenfeld, *supra* note 7, at 32; SMITS, *supra* note 38, at 87.

45. Goebel, *supra* note 38, at *42.

Member States' "stability program."⁴⁶ The regulation requires that each Member State's stability program contain: "(1) medium-term targets for its public finances (which should include a budgetary position 'close to balance or in surplus'); (2) the underlying economic assumptions and the sensitivity of the projected budgetary and debt positions to changes in such assumptions; and (3) budgetary and other economic policy measures for achieving those targets."⁴⁷ The ECOFIN Council will review each Member State's stability program,⁴⁸ thereby providing the EU with an opportunity for early detection of significant deviations from medium-term targets.⁴⁹ Such deviations could lead to excessive budget deficits for Member States which, in turn, could eventually upset continued price stability within the EMU.⁵⁰ The regulation provides the ECOFIN Council with the opportunity to issue early warnings when it detects any such divergences.⁵¹

The second regulation, Council Regulation 1467/97 of July 7, 1997, concerns "speeding up and clarifying the implementation of the excessive deficit procedure"⁵² as contained in Article 104C of the EC Treaty.⁵³ The regulation provides a clear method for proposing and implementing prompt corrective actions within a year of the reporting of the excessive deficit.⁵⁴ Upon reviewing the economic position of a Member State, the European Com-

46. Lembergen & Wachenfeld, *supra* note 7, at 32. Member States not participating in the EMU must submit "convergence programs" which are similar to stability programs and subject to similar review by the EU. *Id.*

47. Meyers & Levie, *supra* note 41, at *8 (citing Council Regulation 1466/97 of 7 July 1997 Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 1997 O.J. (L209) 1); SMITS, *supra* note 38, at 87.

48. Goebel, *supra* note 42, at *38; SMITS, *supra* note 38, at 87.

49. Meyers & Levie, *supra* note 41, at *8; *see* SMITS, *supra* note 38, at 87 ("[The council] can either endorse [the program] or make a recommendation that the program should be strengthened.")

50. Lembergen & Wachenfeld, *supra* note 7, at 32.

51. Meyers & Levie, *supra* note 41, at *8.

52. *Id.* (citing Council Regulation 1467/97 of 7 July 1997 Speeding Up and Clarifying the Implementation of Excessive Deficit Procedure, 1997 O.J. (L209) 6); SMITS, *supra* note 38, at 88.

53. Lembergen & Wachenfeld, *supra* note 7, at 32; SMITS, *supra* note 38, at 88.

54. Lembergen & Wachenfeld, *supra* note 7, at 32; Goebel *supra* note 42, at *39; Meyers & Levie, *supra* note 41, at *8; SMITS, *supra* note 38, at 88.

mission will report to the Council of Ministers if an excessive budget deficit exists.⁵⁵ The Council of Ministers will then make prompt recommendations for corrective measures to the Member State⁵⁶ with deadlines for implementing these proposals.⁵⁷ If the Member State fails to take timely and adequate corrective action, the Council may impose sanctions.⁵⁸ Sanctions would require that the Member State make an initial non-interest bearing deposit of .2 to .5% of GDP and a variable component of 10% of the excess deficit.⁵⁹ Until the Member State adequately corrects its budgetary position, it must make yearly deposits equal to 10% of the excess deficit over the 3% reference value from the preceding year.⁶⁰ The deposits shall, as a rule, be forfeited and converted into a non-recoverable fine, if the Council decides that the excess deficit has not been corrected within two years.⁶¹ The Council, however, may excuse an excessive deficit, if one occurs as a result of a “severe economic downturn.”⁶²

55. Lembergen & Wachenfeld, *supra* note 7, at 32.

56. Goebel, *supra* note 42, at *39.

57. Lembergen & Wachenfeld, *supra* note 7, at 32; *see also Catch 2002 — Strains on the EU's Stability Pact*, THE ECONOMIST, Sept. 21, 2002, available at 2002 WL 7247543 [hereinafter *Catch 2002*]; SMITS, *supra* note 38, at 88 (“Within four months of its decision that an excessive deficit exists, the Council would decide whether effective action had been taken to remedy the situation ... The period of time between the reporting date and the decision to impose sanctions is not to exceed ten months.”).

58. Lembergen & Wachenfeld, *supra* note 7, at 32; Goebel, *supra* note 42, at *39.

59. Meyers & Levie, *supra* note 41, at *8; *see also Catch 2002, supra* note 57; SMITS, *supra* note 38, at 89.

60. Meyers & Levie, *supra* note 41, at *8; SMITS, *supra* note 38, at 89 n.304.

61. Goebel, *supra* note 42, at *39; Meyers & Levie, *supra* note 41, at *8; *see also Catch 2002, supra* note 57; SMITS, *supra* note 38, at 89 n.304.

62. Meyers & Levie, *supra* note 41, at *8. A severe economic downturn is defined as a Member State experiencing an “annual fall of real GDP of at least 2%,” or if the Member State provides evidence that an annual reduction in GDP of less than 2% is “nonetheless sufficiently exceptional in character.” Goebel, *supra* note 42, at *8. It has been agreed that Member States should not invoke this last clause unless sufficiently severe cases occur during a drop of real GDP of .75% or more. Meyers & Levie, *supra* note 41, at *8.

B. The History of the Pact

The German Minister of Finance initially proposed the Stability and Growth Pact in 1995.⁶³ During the preparations of the European Commission and the European Monetary Institute, which took place between 1995 and 1997, in anticipation of the EMU, German representatives fought for strict standards requiring Member States to maintain budget discipline upon joining the monetary union and to keep their respective deficits low.⁶⁴

The Germans believed that monetary stability could not be achieved without rigid spending discipline.⁶⁵ Germany feared that weak budgetary rules,⁶⁶ combined with the historic liberal fiscal policies of several of their fellow Member States, would severely impact the value of the euro.⁶⁷ Germany reasoned that weak budgetary rules would tempt Member States to borrow and spend at the expense of the other Member States thereby increasing interest rates, sparking inflation and undermining the new EMU currency.⁶⁸ Moreover, default by a Member State

63. Goebel, *supra* note 42, at *63 n.265; *see also* SMITS, *supra* note 38, at 84.

64. Goebel, *supra* note 42, at *38.

65. Matthias Herdegen, *Global Economy, Lean Budgets, and Public Needs*, 53 SMU L. REV. 543, 550 (2000) (“This discipline is the most important component of solidarity within the ‘compound’ or the European Union.”); *see also* *A Survey of EMU: Maastricht Follies*, THE ECONOMIST, Apr. 11 1998, available at 1998 WL 8884807 [hereinafter *Maastricht Follies*] (“Excessive public borrowing always weakens a currency.”).

66. SMITS, *supra* note 38, at 84; James Graff, *Loosening the Ties That Bind: Europe’s Big Economies Can’t Keep Their Deficits Down, So Brussels is Changing the Rules*, TIME INTL, Oct. 7, 2002, at 56.

67. *Could the Euro’s Nuclear Option Ever be Used? — How Credible are the Rules for the Euro?*, THE ECONOMIST, Feb. 2, 2002, available at 2002 WL 7245002 [hereinafter *Rules for the Euro*]; *see also* *Catch 2002*, *supra* note 57 (“The idea of the pact is to prevent governments running loose fiscal policies at the expense of other euro-area countries.”); Christopher Rhoads et al., *Germany: Economic Has-Been? — Once Europe’s Growth Center, Nation Finds Stagnation in Norm*, WALL ST. J., Sept. 20, 2002, available at 2002 WL-WSJ 3406672.

68. *Maastricht Follies*, *supra* note 65; *see also* *Gambling on the Euro: Europe’s Monetary Union is Neither Bound to Succeed Nor Doomed to Fail. Leadership, Circumstances and Luck Will Combine to Decide Its Fate*, THE ECONOMIST, Jan. 2, 1999, available at 1999 WL 7361239 [hereinafter *Gambling on the Euro*] (“The concern was that chronic overborrowers would become even more fiscally irresponsible once they had adopted the euro, because

could result in a political catastrophe for the EMU in terms of the credibility of the euro.⁶⁹ Members would have the luxury of setting fiscal policy with the mindset of “when the chips are down the union will act as lender of last resort,” which would further reduce the need for fiscal adjustment.⁷⁰ The Germans felt that this “free rider” problem brought with it the probability of both a reduction of currency and default in the monetary union making additional centralized control essential.⁷¹

Of course, not everyone felt the same way. For example, many other Member States pushed for a more liberal resolution to the issue of inflation and stability within the EMU.⁷² Representatives of several Member States were fearful that since they would no longer have independent monetary or exchange-rate policies leaving their countries with only fiscal policy as one of a few ways to counter a recession.⁷³ The Pact interferes with a Member State’s automatic stabilizers.⁷⁴ Due to the re-

they would no longer face the financial-market sanction of higher interest rates and (in the end) a depreciating currency.”); *Trust or Mistrust Thy Euro Neighbour?*, THE ECONOMIST, July 21, 2001, available at 2001 WL 7319878 [hereinafter *Trust or Mistrust*].

69. Mundell, *supra* note 1.

70. *Id.*; see also *Trust or Mistrust*, *supra* note 68. One additional consideration was the possibility of a trend starting and three or four countries running a lax fiscal policy as opposed to one or two obviously aggregating the problem. *Id.*

71. Mundell, *supra* note 1 (“...hence, the Stability and Growth Pact”); see also *Gambling on the Euro*, *supra* note 68 (“Moreover this overborrowing would henceforth be at least partly at the expense of Germany and the other euro countries, because they would bear some of the cost of default, if it came to that.”).

72. Goebel, *supra* note 42, at *38. France was the strongest proponent for a more liberal “Pact.” *Id.* See also Jennie James, *We’re Off to See the Wizard: Critics Say the European Central Bank Should Use Its Powers to Lift Europe Out of Its Slump. The Bank Says That’s Not Its Job. Who’s Behind the Curtain, Anyway?*, TIME INTL, Oct. 7, 2002, at 58 (“The U.S. Federal Reserve doesn’t have an inflation target, which gives it leeway in pursuing its dual mandate of price stability and maximum employment.”). The Fed’s reported unofficial goal of inflation is below 3%, while the ECB’s is 2% — inherited from Germany’s Bundesbank. *Id.*

73. *Maastricht Follies*, *supra* note 65; see also *Gambling on the Euro*, *supra* note 68 (“In the meantime it rules out counter-cyclical fiscal policy or the sort that will often be necessary, and for which there is no longer any plausible national substitute.”).

74. *Maastricht Follies*, *supra* note 65. See *Re-engineering the Euro*, THE ECONOMIST, Oct. 19, 2002, available at 2002 WL 7247884. Built-in or “auto-

quirement that their deficits do not exceed 3% of GDP, as tax revenues decline and deficits naturally increase during a recession, the Pact forces the governments of Member States to tighten spending when government spending is most needed.⁷⁵

Members also saw the need for a less strict agreement for reasons somewhat removed from the Pact itself. Since the Maastricht treaty provides that the ECB cannot bail out Member States, the market would attach a risk premium to lending to a heavily indebted government.⁷⁶ Third parties would hesitate before lending to those governments with high debt creating a market effect that would most likely serve as an incentive to national governments to keep their debts lower in order to remain competitive with their neighbors for foreign investments.⁷⁷ Additionally, these members pointed out that the theory behind the EMU was that the “balance-of-payments among its members will be automatic” as it is between regions within a single country.⁷⁸ A government whose country has an excessive budgetary deficit will begin to spend less money in order to reduce its deficit.⁷⁹ While these events take place in one country, a government whose country is in a period of recession will spend more money, invariably raising its deficit and thereby creating a balancing effect.⁸⁰ The situation, many European nations feel, reduces the need for further centralized control.⁸¹

The debate on the Pact resulted in a compromise. As outlined above, the compromise called for extensive surveillance on the fiscal conditions of Member States in order to foresee serious budgetary problems and a range of possible sanctions to be im-

matic” fiscal stabilizers include the automatic decline in taxes and increases in welfare benefits during a recession. *Id.*

75. *Re-engineering the Euro*, *supra* note 74.

76. *Gambling on the Euro*, *supra* note 68; *Europe’s Adventure Begins*, THE ECONOMIST, Jan. 2, 1999, available at 1999 WL 7361264.

77. *Gambling on the Euro*, *supra* note 68; see also Mundell, *supra* note 1 (“A monetary union removes a major source of macroeconomic instability by barring central bank financing of fiscal deficits. [As] governments will no longer be able to run up large public debts and force the central bank to inflate their burden away, it [is a move toward] fiscal prudence.”).

78. Mundell, *supra* note 1.

79. *Id.*

80. *Id.*

81. *Id.*

plemented should budgetary deficits exceed prescribed limits.⁸² Though the Pact is strict, Members now have the opportunity to implement corrective measures thereby preempting the need for such sanctions.⁸³ The Pact also shelters the EU from short-term internal political pressures and fortifies the independence of the ECB.⁸⁴ However, the real tests on the viability of the Pact and the strength of the EMU prompted by social and economic expectations of the participating governments and their people seem to be at the EU's doorstep.⁸⁵

C. The European Union Under the Pact

The novelty of the Pact understandably spurred uncertainty as to how strictly the European Commission would construe the rules embodying the Pact. Also uncertain was whether or not the Commission would require any Member State to pay a fine, should it fail to meet its obligations under the pact. These uncertainties gave rise to speculation that countries could allow their budget deficits to exceed 3%, if they agreed to compensate for the lapse during a later (more prosperous) economic period.⁸⁶ However, in the latter part of 2001, in the midst of a global economic slowdown, the Commission issued a pronouncement which quelled much of the speculation of the Member States, as it provided insight into how strictly the Commission would construe the provisions of the Pact.⁸⁷ The Commission warned the eleven countries, then part of the euro zone, not to allow their budget deficits to exceed 3%.⁸⁸ The director general of the Commission's Economic and Financial Affairs directorate, at the time, further stated that the Commission would take a hard stance against Member States that did not abide by the budgetary restrictions of the Pact.⁸⁹

True to the statements of the Commission and the director general of the Economic and Financial Affairs directorate, in

82. Goebel, *supra* note 42, at *38.

83. *Id.*

84. Herdegen, *supra* note 65, at 554.

85. *Id.*

86. David I. Oyama, *EU Warns Countries Not to Exceed Limits on Budget Deficits*, WALL ST. J., Nov. 29, 2001, available at 2001 WL-WSJ 29679248.

87. *Id.*

88. *Id.*

89. *Id.*

January 2002, in the midst of much concern over the future credibility of the euro,⁹⁰ the European Commission issued a report in which both Germany and Portugal received admonishments for their growing deficits. The deficits at the time were 2.7% and 2.2% GDP respectively.⁹¹ The commissioner responsible for monetary and economic affairs reported that several Member States had not met their targets as outlined in their budgetary plans required by the Stability and Growth Pact.⁹² The Commission asked for more control by Member States over government spending and pointed to Germany and Portugal because their deficits were dangerously approaching the 3% GDP limit.⁹³ The European Union finance ministers issued formal warnings to the two nations upon the recommendation of the European Commission.⁹⁴

On February 12, 2002, the European Union's finance ministers declined to issue a further formal warning against Germany in exchange for the government's commitments to take unspecified "discretionary measures" in order to bring its budget "close to balance" by 2004.⁹⁵ The compromise accomplished two goals by allowing Germany's chancellor to preserve his integrity while also protecting the financial discipline of the euro zone.⁹⁶ Although the European Central Bank Chief, Wim Duisenberg said, "the compromise worked in the end," the decision may have represented a setback for the European Commission in terms of its authority under the Pact.⁹⁷ The Pact pro-

90. Brandon Mitchener, *EU Commission Warns Countries on Big Deficits*, WALL ST. J., Jan. 31, 2002, available at 2002 WL-WSJ 3384521. At the time, the euro had fallen about 15% against the dollar since its inception in 1999. *Id.*

91. Michael R. Sesit, *In the Euro Zone, Sectors Now Have More Effect Than Borders*, WALL ST. J., Feb. 1, 2002, available at 2002 WL-WSJ 3384681.

92. Mitchener, *supra* note 89.

93. *Id.*

94. Sesit, *supra* note 91. The Commission did not want global confidence in the euro to weaken (initially Germany's fear) with the perception that slower economic times would invariably intensify government spending. Mitchener, *supra* note 90.

95. Paul Hofheinz & Christopher Rhoads, *EU and Germany Reach Deal on Deficit*, WALL ST. J., Feb. 13, 2002, available at 2002 WL-WSJ 3385880. The "discretionary measures" would possibly include cuts in spending or higher taxes. *Id.*

96. *Id.*

97. *Id.*

vides that the Commission may recommend that the Council of the European Union issue warnings to Member States when their budget deficits approach 3% GDP — only in this instance, the recommendation went unheeded.⁹⁸ Furthermore, the Bundesbank Vice President Juergen Stark said the European Union's decision against issuing a warning to Germany may have hurt Europe's "budget credibility" — an opinion to which Bank of America's then current chief economist for Europe agreed.⁹⁹

Later in the year, another Member State's financial activity drew similar concerns from the rest of the EU. The French government, in hopes of inciting an economic growth spurt, cut income taxes by 5%.¹⁰⁰ The concern was that the move would further hinder France from keeping its budget deficit below the 3% ceiling, since their deficit had been growing at a rapid rate and was projected to reach 3.2%.¹⁰¹ The French managed a small diversion from the negative attention by stating that they could still keep their deficits below the 3% limit of the Pact through surpluses in local authority finances and other areas.¹⁰²

By August 2002, Germany's deficit was at 2.8%¹⁰³ and by September Germany announced that its budget was 3.5%¹⁰⁴ in the first half of the year and was ever closer to breaching the limits of the Pact. Similarly, Portugal admitted to a budgetary deficit of over 4%, and concern for France and Italy's budget deficits

98. *Id.*

99. Paul Hofheinz & Christopher Rhoads, *EU Cuts Estimate of Annual Growth to a Paltry 0.9%: Recovery is Not Expected to Begin Until Early 2003; U.S. Exports Could Be Hit*, WALL ST. J., Sept. 9, 2002, available at 2002 WL-WSJ 3405460; see also *Rules for the Euro*, *supra* note 67. If the EU governments' finance ministers reject the Commission's recommendation that Germany should be formally warned, "the whole stability pact would begin to unravel." *Id.*

100. David I. Oyama, *French Budget Relies on Growth, Includes Tax Cut*, WALL ST. J., July 11, 2002, available at 2002 WL-WSJ 3400314.

101. *Id.*

102. *Id.*

103. *The Case for Co-operating*, *supra* note 40.

104. Hofheinz & Rhoads, *supra* note 99. Germany's budget was 3.7% in the second half of 2001 which means the country's deficit was, in fact, over the limit for a twelve-month period. *Id.* However, a reprimand and fines occur only when the 3% limit is violated for a full fiscal year. *Id.*

grew as well.¹⁰⁵ By the end of September, the four countries, — which include the three largest economies in Europe — were off their budgetary targets.¹⁰⁶ Although the European Commission acknowledged that the region's economic downturn played a role in the countries' budgetary woes, the Commission also blamed the countries' "lack of fiscal prudence" during better economic times.¹⁰⁷ Sirkka Hamalainen, a member of the ECB's executive board, asserted that "governments didn't realize or didn't accept fully, that during the good times it's very important to build buffers."¹⁰⁸

Despite the ongoing finger pointing, in light of the probability that an economic recovery would not begin at least until the following year,¹⁰⁹ and due to the state of the budgets of these four countries, the European Commission agreed to extend the deadline of having budgets "close to balance" by 2004 to 2006.¹¹⁰ Still, adding to the surprise of many doubters (including several economists) Wim Duisenberg insisted that current interest

105. *The Case for Co-operating*, *supra* note 40. Concern for France's budget grows despite the French Prime Minister's assurance that his country's budget deficit would not exceed the 3% limit. Hofheinz & Rhoads, *supra* note 99. Italy, the third largest economy in the EMU, had also been causing concern throughout the year due to its large deficits. *Germany Breaks With Debt Policy: A Wall Street Journal News Roundup*, WALL ST. J., Oct. 15, 2002, available at 2002 WL-WSJ 3408813.

106. *Room for Improvement — Europe's Economies — Is the Spate of Elections in Europe this Year Going to Alter the Region's Economic Prospects?*, THE ECONOMIST, Mar. 16, 2002, available at 2002 WL 7245476.

107. David I. Oyama, *EU Commission to Extend Target On Budget Deficits*, WALL ST. J., Sept. 25, 2002, available at 2002 WL-WS 3406974 [hereinafter Oyama, *Commission to Extend Target*]. Germany, France and Italy are also blamed for continuing protectionist practices for domestic industries thereby applying "yesterday's remedies to current problems." *Re-engineering the Euro*, *supra* note 74. Some say these giants should note their smaller brothers who have enjoyed faster economic growth while still successfully abiding by the Pact's budgetary requirements — all while practicing policies of liberalization, opened economies, reformed labor markets and welcomed competition. *Id.*

108. James, *supra* note 72.

109. Hofheinz & Rhoads, *supra* note 99. The European Commission also cut its forecast for euro-area economic growth for the year by half a percentage point to 0.9%. *Id.*

110. James, *supra* note 72; Oyama, *Commission to Extend Target*, *supra* note 107; *Catch 2002*, *supra* note 57. Governments of the European Union are supposed to have their budgets in balance by 2004 as a condition under the Stability and Growth Pact. *Id.*

rates (established by the ECB) would promote price stability over time.¹¹¹ It seemed the Pact that aimed to protect the large economies from the small economies is now protecting the smaller countries from the larger countries with past records of stability.¹¹² The events lend evidence to the claim that the Pact had indeed gone “awry.”¹¹³

Clearly the Pact needs reform.¹¹⁴ Though Germany had initially feared the effects of excessive inflation on the euro, recession now plagues the EMU.¹¹⁵ It seems that the Pact, written to combat inflation, has worsened the economic slowdowns in Germany, Portugal, France and Italy.¹¹⁶ Interest rates were higher than if monetary policy had been set by each country on its own, and, as a result, the economies were squeezed.¹¹⁷ The Pact forces governments to tighten fiscal policy at precisely the time when spending is needed the most.¹¹⁸ For these reasons, the voices of skeptics of the Pact could again be heard chiding the strict budgetary requirements.¹¹⁹ A UBS Warburg economist in London has referred to the Pact as a “busted flush.”¹²⁰ The European Commission’s very own president has been quoted as calling the Pact “stupid,” and some economists have

111. James, *supra* note 72.

112. Graff, *supra* note 66. Representatives from smaller countries have gone as far as to claim that the Pact has created a “two-class” system with the larger states not having to abide by the same budgetary restrictions as the smaller states. *Id.* The fact that Portugal has undergone formal sanctioning does nothing to quell the vehement nature which exists throughout several other members in the EMU since Portugal is understandably considered one of the “smaller” guys. *Id.*

113. *Id.*

114. *Re-engineering the Euro*, *supra* note 74.

115. *Double-dip in Germany? — Europe’s Slowing Economies*, THE ECONOMIST, Aug. 24, 2002, available at 2002 WL 7247193.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Re-engineering the Euro*, *supra* note 74; Hofheinz & Rhoads, *supra* note 99. At the time, economists proposed allowing budget deficits to exceed the 3% limit and instead to focus on the “structural deficit” which is “based on spending policies unaffected by economic changes.” *Id.* Others suggest removing budgetary restrictions and replacing them with “a commitment to keep official borrowing within agreed limits.” *Id.* Many economists had gone as far as to suggest that Europe would be better off without the pact and the sooner it is gone the better. *Rules for the Euro*, *supra* note 67.

120. Graff, *supra* note 66.

supported the view that “rules that force countries to cut spending, even as their economies slow, are indeed stupid, if not positively dangerous.”¹²¹ The German author of the Pact, however, still touts the agreement as a good thing for the EMU.¹²² Though the question whether the Pact has actually been harmful or helpful to the EMU thus far still lingers, the far more important question is how much and what type of reform is needed to provide the EMU with a better tool for the future.

IV. STANDARDS VS. RULES

The existence of rules and standards within a legal system and the distinctions in the methods of jurisprudence that each provide has been the subject of debate by legal theorists for several decades.¹²³ The obvious difference in the employment of either rules or standards by a rule-making body is that rules

121. *Reforming the EU's Stability Pact?*, THE ECONOMIST, Oct. 26, 2002, available at 2002 WL 7247925.

122. Graff, *supra* note 66. Germany's Finance Minister, Theo Waigel — often considered the godfather of the Stability Pact — who pushed for an agreement explicitly outlining deficit limits, retorts, “only because of [the Pact] has a culture of stability emerged in Europe.” *Id.* He believes that the Pact has forced European governments to pay strict attention to keeping their budgets balanced and without it the EMU would be much worse off. *Id.*

123. Ronald Dworkin initially developed his “interpretive theory of law” in *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), as an alternative to the theory of legal positivism, a system of rules which H.L.A. Hart set forth in *THE CONCEPT OF LAW* (1961). Though Hart's positivism viewed law as consisting of only rules and, if no rule is available for a particular situation, judicial discretion, Dworkin's response provided that the law really had both rules and more general principles (standards) at its disposal as dispute solving resources. Brian Bix asserts:

[W]hile there are reasons to conclude that Dworkin had overstated the differences between his view of the law and that of H.L.A. Hart, and also that he made out the line between rules and principles to be clearer than it (sometimes) is in practice, what remains is the insight that a purely rule-based approach to the nature of law or the nature of judicial reasoning would be problematic.

BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 8, 82 (2d ed. 1999); *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Although the CLS analysis between rules and standards often questions the very existence of a distinction of the two forms, for purposes of this paper, the discussion assumes that a viable distinction does exist.

are more specifically stated than standards.¹²⁴ The difference in specificity between rules and standards effects the degree by which a decision-making body may employ its own discretion during the decision process. In theory, a rule, which commonly represents an underlying policy,¹²⁵ should eliminate the need for judicial discretion in the decision-making process. Conversely, a standard allows the decision-making body to employ its own discretion in formulating its decision in order to achieve the underlying policies. The use of either standards or rules by a legislative body can result in various legal outcomes depending on the amount of discretion the decision-making body is at liberty to use.

Removing the use of discretion from the decision-making equation eliminates the opportunity for politics or biases to creep into the process. The absence of discretion also allows a greater level of predictability within the legal system. However, the removal of discretion can tie the hands of a decision-making body, leading to a result that is often over- or under-inclusive. Discretion can provide the judge with the latitude of applying the particular facts of a situation, thereby following the “spirit” of the standard and ensuring that justice is served. This section will explore these and other pros and cons of the varying levels of discretion which exist through the use of rules versus standards.

A. Rules

A rule is an attempt by a rule-making body to restate an underlying policy in “concrete terms.”¹²⁶ One accepted definition of a rule is as follows:

124. See THEODORE M. BENDITT, *LAW AS RULE AND PRINCIPLE: PROBLEMS OF LEGAL PHILOSOPHY* 74 (1978). A common example of a rule is: “The maximum speed limit is 55 miles an hour,” whereas a standard is: “No one shall be permitted to profit from his own fraud, or to take advantage of his own wrong.” *Id.* See also EVA H. HANKS ET AL., *ELEMENTS OF LAW* 486–88 (1994) (quoting Dworkin, *supra* note 123). Another example of a standard is: “Drivers may travel ‘no faster than is reasonable.’” Russell B. Korobkin, *Behavior Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).

125. Although the terms principles and policies represent two distinct ideas, the difference is not pertinent to this paper; “policies” will be used to stand for the underlying motivations behind the promulgation of rules.

126. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 103 (2001); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC*

A legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.¹²⁷

The attractiveness provided by the use of rules stems from their automatic nature,¹²⁸ which allows for a high level of predictability. A common example of a rule is contained in New York’s per se law addressing the socially undesirable behavior of driving while intoxicated. In New York, a person is prohibited from driving when that person’s blood consists of .10% of alcohol (or higher).¹²⁹ As in the above stated definition, when a situation arises which calls for a legal determination based on a particular rule, a judge merely recognizes certain “triggering facts” — in this case a Blood Alcohol Content (BAC) of .10% — and applies the appropriate rule for that particular situation in order to find the desired outcome. In theory, there is no inser-

PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 139 (1994) (“The most precise form of authoritative general direction may conveniently be called a rule, although this term is often used much more broadly to signify a legal proposition of any kind.”). For purposes of this paper, the term “rule” will be used to connote a specific legal directive as opposed to a more “general” standard.

127. HANKS ET AL., *supra* note 124, at 45; *see also* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

128. HART, JR. & SACKS, *supra* note 126, at 139 (“In the narrow and technical sense in which the term is here used, a rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events — that is, determinations of fact.”); *see also* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15 (1987); ALEXANDER & SHERWIN, *supra* note 126, at 158 (“A rule is formal and mechanical.”).

129. N.Y. VEHICLE AND TRAFFIC LAW § 1192(2) (1996) (“Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person’s blood as shown by chemical analysis of such person’s blood, breath, urine or saliva.”).

tion by the judge of his own beliefs,¹³⁰ and no risk of distortion of the rule or its background policies.¹³¹ There exists much predictability in such a process, since the judge need only analyze the facts, read the rule, and apply it.¹³²

This high level of predictability benefits parties and players throughout the legal process. First, rulemakers have greater certainty that decisionmakers and members of society will consistently interpret the rules which they promulgate thereby better serving the policies of the society.¹³³ Greater predictability results in a more consistent legal system. Second, the use of rules affords decisionmakers the luxury of avoiding the political pressure and controversies that would otherwise arise from the voice of skeptics,¹³⁴ since the simplicity and clarity of the rule's application decreases the opportunity to second-guess the decisionmaker. Furthermore, although a particular outcome may not be the desired result of the judge's constituents or serve his own political views, he will not be at liberty to impose his discretion beyond applying the particular rule to a set of facts.¹³⁵ He thereby avoids the temptation of serving interests other

130. Sullivan, *supra* note 127, at 58 ("Rules force decisionmakers to dismiss personal and political biases when deciding a matter thereby allowing the rule itself as applied to the facts to determine the outcome.").

131. ALEXANDER & SHERWIN, *supra* note 126, at 103 ("Rules work by restating moral principles in concrete terms, so as to reduce the uncertainty, error, and controversy that result when individuals follow their own unconstrained moral judgment.").

132. Sullivan, *supra* note 127, at 62. Professor Kathleen M. Sullivan refers to this mechanical nature of rules which affords much predictability within the legal system as the "Fairness of Formal Equality." *Id.* She goes on to say, "Rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties' particular attractive or unattractive qualities into the decision-making calculus." *Id.*

133. Louis Kaplow, *Rules Versus Standards*, 42 DUKE L.J. 577, 588 (1992).

134. Whether or not it is a desired result to have decisionmakers totally unanswerable for the results of their decisions and to allow them to "wash their hands" of an outcome is mentioned further in this section. One view on this matter is that the judge may be inclined to "throw her hands up" after applying a rule that does not necessarily promote the policies of the society in a particular instance because the judge may feel she has no recourse in seeing that justice is done. Such an approach renders the judge virtually ineffective in promoting justice. This often leads to over- or under-inclusiveness.

135. HANKS ET AL., *supra* note 124, at 486 ("If the rule is valid, and if the facts set forth by the rule arise, then the outcome presented by the rule must stand.").

than the policies of society. Lastly, members of society can foresee the repercussions of their actions as well as the outcome of a legal decision almost as easily as they can read the rule itself. Since members can easily determine what behavior is acceptable and unacceptable they will begin to have more trust and reliance in their legal system.¹³⁶ Moreover, the predictability of the rule affords them the opportunity to plan their activities accordingly which allows the society to become more progressive.¹³⁷ Thus, at first glance, the predictability made possible by the use of rules has several desirable results.

There are, however, drawbacks to the use of rules. The main problem with having a system of rules, which concerns most legal theorists, is the result of over- and under-inclusiveness.¹³⁸ The general nature of rules allows similar treatment of dissimilar people or, conversely, dissimilar treatment of like cases.¹³⁹ The outcome that often arises is one that the rule-maker did not foresee or want.¹⁴⁰ For example, a strict rule will sometimes

136. KELMAN, *supra* note 128, at 41 (“Rules [] are designated to permit little discretion; they ensure that people will perceive that they are treated uniformly.”).

137. Korobkin, *supra* note 124, at 25. See also RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 220 (2001); Sullivan, *supra* note 127, at 123 n.259 (citing Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10–11, 19–21 (1984) (“If a party knows that judges will not intervene to save her after the consequences of her choices become apparent, she will plan more carefully and greater productivity will result.”)).

138. POSNER, *supra* note 137, at 220. Over- and under-inclusiveness refers to the “imperfect fit between the rule and circumstances, resulting in some outcomes that are erroneous from the standpoint of the substantive principle undergirding the rule.” *Id.* KELMAN, *supra* note 128, at 40. “Rules are bad because they are under-inclusive as to purpose, over-inclusive as to purpose, or both.” See also Korobkin, *supra* note 124, at 36 (“[W]hatever the underlying policy goal of the legal pronouncement, rules will often permit some undesirable conduct and prohibit some desirable conduct.”); Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma and The Line Item Veto*, 44 VILL. L. REV. 189, 199 (1999).

139. Sullivan, *supra* note 127, at 62. See also Bell, *supra* note 138, at 200 n.51.

140. KELMAN, *supra* note 128, at 15. Alexander & Sherwin offer an example of under-inclusiveness and over-inclusiveness that explains the problem well. ALEXANDER & SHERWIN, *supra* note 126, at 103. Say the rule, “No talking in the library,” is established in order to promote study. The rule does not forbid leaf blowers in the courtyard no matter how much they disrupt studying in the library, because they are not “in the library.” They are in the courtyard.

fail to stop behavior which the law aims to prevent, because one particular detail of a given situation is not contemplated by the rule. Consider the rule of operating a motor vehicle while intoxicated. Suppose a bicyclist is riding a bicycle on public roads with a BAC above .10%. Such behavior can very well expose innocent people as well as the bicyclist to danger. However, the behavior is not covered under the law dealing with motor vehicles because a bicycle is man-powered.¹⁴¹ This detail will prevent law enforcement officials from prohibiting the type of behavior, which contradicts the underlying policy behind the rule — keeping citizens free from danger on public roadways. On the other hand, innocent persons may find that a rule does cover their behavior even though the underlying policy behind the rule does not target such behavior. Conversely, consider someone who is driving faster than fifty-five miles per hour in order to get his wife who is in labor or his child who is seriously hurt to a hospital. Although he is “speeding” as defined in the law, it is doubtful that the rulemakers intended to curtail such behavior — at least not to such an extreme extent.¹⁴²

There are other drawbacks to the use of rules. First, in providing legal direction, rulemakers cannot realistically conceive every set of circumstances which require a rule.¹⁴³ In a rule

Nor does the rule allow three people, who are the only people in the library, to have an open study session within the library reading area. They are still “talking in the library.” *Id.*

141. The scenario is an example of dissimilar treatment of like cases. Sullivan, *supra* note 127.

142. This is an example of similar treatment of dissimilar people.

143. Korobkin, *supra* note 124, at 36 (“[B]y their very nature, that is, because rules are specified *ex ante*, even complex rules will sometimes fail to take account of all factual variations that might arise *ex post*, which might be relevant to optimal tailoring of legal boundaries.”); Bell, *supra* note 138, at 199 (“[R]ules either cover situations or people that do not pose the harm that the rule is intended to prevent, or they do not cover situations or people that the statute is intended to reach.”). H.L.A. HART, *THE CONCEPT OF LAW* 127 (1961) (“Sometimes the sphere to be legally controlled is recognized from the start as one in which the features of individual cases will vary so much....that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance.”). In fact, any promulgation of a successful rule is a considerable achievement for a legislature. See HART, JR. & SACKS, *supra* note 126, at 139 (“When a legal proposition functions successfully as a rule without the necessity of further elaboration, [] some rather remarkable things have happened. The [] situation bringing the rule into play has been accurately foreseen, and public policy with respect to it

based system, for every particular set of circumstances, a rule will either exist or it will not.¹⁴⁴ If a rule does not exist, or it does not cover the particular circumstances close enough to apply a “cookie-cutter” answer, the judge must still come to a decision.¹⁴⁵ This acknowledgement leads to the reality that a judge will invariably either “squeeze” a set of facts into a rule or use discretion to come to a decision, thereby leaving holes in the desired “mechanical” aspect of a system of rules.¹⁴⁶ Second, the very fact that a judge may “wash [his] hands” of the results of applying a rule which a rule-making body has promulgated, without ever having contemplated the particular parties in question nor the accompanying set of facts, is an unsavory result in any sophisticated system of law. The judge undoubtedly has the best perception of whether an act needs punishment and which parties are innocent despite the outcome prescribed by the rule. A strict rule will often curtail the decision maker’s authority to see justice through. Third, members of society who are knowledgeable of the law may promote their own interests by skirting the line on the side of what is in fact legal but not necessarily in the interests of society.¹⁴⁷ Though not a violation of the rule, the results do not promote the “spirit” of the law.¹⁴⁸ Lastly, members who know and understand the law may also

fully determined in advance.”). Korobkin also makes the point that rulemakers may not even possess the capacity to make highly effective rules. Korobkin, *supra*, note 124, at 59 n.43 (citing Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 97–98 (1983) (“Selecting the optimally precise form for a given rule would seem to require qualities beyond the reach of many administrators: selfless concern for the public good, consistent goals, comprehensive vision, and accurate foresight. Real policymakers, by contrast, are ordinary mortals burdened with incomplete knowledge, imperfect vision, and selfish desires.”)).

144. BENDITT, *supra* note 124, at 74. Rules act in an “all or nothing fashion.” *Id.*

145. KELMAN, *supra* note 128, at 44.

146. *Id.* (“Rules inevitably have gaps and conflicts.”).

147. Korobkin, *supra* note 124, at 59 n.37 (citing Kennedy, *supra* note 123, at 1773 (“Rules inform bad men exactly what they can get away with.”)); Bell, *supra* note 138, at 200 (“Precise rules allow evasion.”); *see also* KELMAN, *supra* note 128, at 41 (“Rules are bad because they enable a person to ‘walk the line,’ to use the rules to his own advantage, counterpurposely.”).

148. KELMAN, *supra* note 128, at 41 (“[U]njust outcomes will occur more often because people will actively attempt to arrange their affairs so that they are favored by the rules.”).

find it in their best interest to use their superior knowledge to take advantage of members who may not have either as high a level of understanding of the law and are therefore at a disadvantage in society.

B. Standards

A standard is a general directive that requires behavior in conformance with a society's well-known principles or policies. A standard requires a decision-making body to determine whether an action conforms to the standard's criteria.¹⁴⁹ The following is one accepted definition of a standard:

A legal directive is "standard"-like when it tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule — the more facts one may take into account, the more likely that some of them will be different the next time.¹⁵⁰

149. Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POLY 101 (1997).

150. HANKS ET AL., *supra* note 124, at 45; Sullivan, *supra* note 127, at 58. *See also* HART, JR. & SACKS, *supra* note 126, at 139 ("A standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience."). Roscoe Pound calls attention to three characteristics of legal standards:

- 1) They all involve a certain moral judgment upon conduct. It is to be "fair," or "conscientious," or "reasonable," or "prudent," or "diligent."
- 2) They do not call for exact legal knowledge exactly applied, but for common sense about common things or trained intuition about things outside of everyone's experience.
- 3) They are not formulated absolutely and given an exact content, either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand.

The use of standards, therefore, unlike a rule, allows a judge to use his or her discretion during the decision-making process.¹⁵¹ The benefit is that the law no longer requires the judge to force a particular rule into a set of facts whether or not the outcome is the desired result of the underlying policy.¹⁵² An example of a standard is the New York law which prohibits people from driving “in an intoxicated condition.”¹⁵³ Pursuant to this law, the judge may consider all of the relevant facts surrounding the situation in question (even beyond BAC) and make a determination according to the appropriate societal standard.¹⁵⁴ Due to this use of discretion, standards are much more flexible than rules¹⁵⁵ allowing judges to treat like cases alike¹⁵⁶ and conversely, no longer forcing similar treatment of dissimilar people. Advocates who view the use of discretion as an acceptable

ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 118 (1922); Kennedy, *supra* note 123, at 1688 (providing examples of standards: good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness).

151. Sullivan, *supra* note 127, at 66. Professor Sullivan describes the process as “Fairness as Substantive Justice.” *Id.*

152. HANKS ET AL., *supra* note 124, at 486 (asserting that standards do not “set out legal consequences that follow automatically when the conditions provided are met.”); HART, JR. & SACKS, *supra* note 126, at 140 (“Unlike a rule, the application of a standard requires [] more than a determination [of mere] events. It requires a comparison of the quality or tendency of what happened in the particular instance with what is believed to be the quality or tendency of happenings in like situations.”). The process to determine whether a driver has driven “no faster than is reasonable” entails the adjudicator investigating “the range of relevant driving conditions and apply[ing] the background principle of reasonableness to the situation.” Korobkin, *supra* note 124, at 23.

153. N.Y. VEHICLE AND TRAFFIC LAW § 1192(3) (1996) (“Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.”).

154. HANKS ET AL., *supra* note 124, at 486 (“[A standard] states a reason that argues in one direction, but does not necessitate a particular decision. ... [The] principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.”). See also BIX, *supra* note 123, at 81; J.G. RIDDALL, JURISPRUDENCE 95 (1991).

155. BIX, *supra* note 123, at 81 (“In contrast to rules, [standards] do not act in an all-or-nothing fashion: that is, they can apply to a case without being dispositive.”); ALEXANDER & SHERWIN, *supra* note 126, at 158 (proposing that standards “are flexible, context-sensitive legal norms that require evaluative judgments in their application”).

156. Sullivan, *supra* note 127, at 66.

method of judicial decision-making, see the application of standards as providing a greater opportunity to promote justice.¹⁵⁷

There are other benefits to the application of standards and the increased use of discretion. First, the acceptance of judicial discretion and the flexibility that comes with it also allow the rule-making body to rely more on the ability of the decision-making body to make just decisions. This, in turn, relieves the rule-making body from the task of developing an intricate body of rules *ex ante* — before the behavior takes place — to fit countless sets of possible circumstances.¹⁵⁸ The task of addressing the countless varying situations falls on the decision-making body who must now interpret some common sense societal standard *post ante* — after the behavior takes place — and apply it to a particular set of facts. Under the driving “in an intoxicated condition” standard, the decisionmaker may look toward imposing penalties against those drivers whose BAC was not above .10%, but nevertheless placed people’s lives in danger while operating a motor vehicle after drinking alcohol.¹⁵⁹ Second, standards provide the desired result of requiring a decisionmaker to accept his responsibility and his decisions.¹⁶⁰ Standards negate the possibility of the decisionmaker “washing his hands” of the result because “there was nothing he could do.” With standards, the decisionmaker faces much more pressure to consider all the circumstances. In short, standards “af-

157. Korobkin, *supra* note 124, at 37 (“If standards are applied precisely, no desirable behavior will be sanctioned and no undesirable behavior will avoid sanction.”). Of course, there is an underlying contradiction in the arguments for the use of a rule or standard when considering discretion. Proponents of rules do not want discretion playing a role in the decision-making process. Proponents of discretion see it as a necessity in the process. The discrepancy is resolved by understanding that the bias towards a rule or standard lies in whether the person believes discretion is a good thing or an evil thing.

158. HART, JR. & SACKS, *supra* note 126, at 140 (“Even more obviously than the [] rule, the standard involves a postponement of decision until the matter can be judged from the perspective of the point of application. Indeed, [it] avoids [] the imprisonment of general judgment in any precise verbal formula.”).

159. The decisionmaker can promote a society’s underlying policies to the extent that the rulemakers originally intended. In this case, the judge can provide safety to those people using public streets even though an intoxicated driver may not have exceeded the legal limit for BAC.

160. Sullivan, *supra* note 127, at 67.

firm rather than deny...[the] responsibility” of *decisionmakers*¹⁶¹ to promote justice through their use of discretion.

Although the use of standards and the addition of judicial discretion bring a decrease in predictability, such a situation may promote desired results in terms of members of society following a general policy itself. People will not know the exact line between what is legal and what is illegal,¹⁶² due both to the addition of judicial discretion and the vague nature of standards themselves.¹⁶³ They will not be able to intentionally keep their actions narrowly within the confines of a rule in order to further their own interests.¹⁶⁴ They will therefore have to act according to the intended purpose of the standard or risk acting in a manner which a judge may interpret as unacceptable under their society’s standards. Also, people will no longer possess the tools to exploit the less informed.¹⁶⁵ Everyone must act within the confines of the standard that their society deems appropriate, instead of one party having the advantage of knowledge of a line clearly defined by law.

However, the lack of clarity surrounding standards may, of course, lead to undesirable behavior. Some people may fail to act in a cautious manner and stray too far into the gray area of the standard which leads to illegal behavior.¹⁶⁶ Also, rulemakers may find that persons who wish to conform to the standards of their society and behave in a legal manner may be unable to interpret exactly what those standards are.¹⁶⁷ Unintentional

161. *Id.* (quoting Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986)).

162. HART, JR. & SACKS, *supra* note 126, at 140. The meaning of standards such as “reckless,” “generally fair and equitable,” and “due care” depends upon the feeling for the particular type of situation of the individual standard-applier. Different appliers may apply them differently. The standard thus represents a much looser form of control than the rule. *Id.*

163. ALEXANDER & SHERWIN, *supra* note 126, at 29. Standards “contain vague or controversial moral or evaluative terms in their formulations. Persons attempting to conform to standards must be able to resolve for themselves the application of these vague or controversial moral and evaluative terms.” *Id.*

164. Korobkin, *supra* note 124, at 26.

165. Sullivan, *supra* note 127, at 66.

166. Korobkin, *supra* note 124, at 37.

167. ALEXANDER & SHERWIN, *supra* note 126, at 29 (“The standards do not improve their ability to determine what they need to determine.”); KELMAN,

illegal behavior would become a problem or legal behavior may be foreborn.¹⁶⁸ As a result of the lack of clarity, people may also have less ability to plan their actions¹⁶⁹ due to fear of breaking the law. The lack of clarity would, in effect, force people to act in an overly cautious manner by curtailing their behavior¹⁷⁰ thereby stunting the growth of society. Caused by a lack of clarity within the law, these are obviously not the desired results of an effective legal system.¹⁷¹

Finally, the decrease in the clarity of the laws which embody the legal system can also result in a threat to the application of justice itself.¹⁷² With the decreased clarity of the law, judges would have a greater opportunity to inject their own biases or politics into the decision-making process. The judge's decisions may change on a case-by-case basis, pursuant to the judge's whim¹⁷³ through a manipulation of the law, thereby resulting in the dissimilar treatment of similar people.¹⁷⁴ Furthermore, even if a judge's own biases do not effect the decision-making process, the politics of the society may prove to be a compelling force

supra note 128, at 43 (“Standards are bad because they give people no clear warning about the consequences of their behavior.”).

168. Korobkin, *supra* note 124, at 37; *see also id.* at 59 n.41 (citing Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155, 164–67 (1999) (“Montana’s ‘reasonable and prudent’ speeding law increased unreasonable and imprudent driving because of lack of clarity.”)). If parties require a higher authority to interpret standards because they cannot resolve for themselves the applications of the moral principles that they subscribe to, then the parties will not be helped by these standards. ALEXANDER & SHERWIN, *supra* note 126, at 29.

169. KELMAN, *supra* note 128, at 43.

170. Korobkin, *supra* note 124, at 38; Sullivan, *supra* note 127, at 123 n.257 (citing *Baggett v. Billitt*, 377 U.S. 360, 372 (1964) (“Those...sensitive to the perils posed by ... indefinite language, avoid the risk...only by restricting their conduct to that which is unquestionably safe.”)).

171. Korobkin, *supra* note 124, at 33 (“If precisely drawn law encourages socially desirable behavior and discourages socially undesirable behavior.”).

172. POSNER, *supra* note 137, at 220 (“[Uncertainty] may invite judicial corruption, whether financial or political, by making it difficult for outsiders to determine whether a judicial decision is in accordance with the law.”); *see also* KELMAN, *supra* note 128, at 41 (“Standards are bad because they are subject to arbitrary and /or prejudicial enforcement.”).

173. Korobkin, *supra* note 124, at 38; *see also* KELMAN, *supra* note 128, at 62 (discussing the fear of a judges whim, “A reliance on standards is premised on the hope of moral dialogue and ultimate consensus.”).

174. Bell, *supra* note 138, at 201.

upon the judge's interpretation and application of the standard. Surmounting political pressure, either from those in power who put the judge on the bench or even from constituents, may force the judge to make a decision one way or another whether or not that choice is the just one. In such a situation, whether or not discretion allows justice to prevail becomes a formidable question.

C. Theories Applying the Rules vs. Standards Debate

1. Crystals and Mud

Property law has always had a basis of clearly defined and well-known doctrines, or rules.¹⁷⁵ However, these rules often find themselves transformed into less distinct rules, or even standards, through exceptions and other forms of judicial discretion.¹⁷⁶ Therefore, just as is common in other areas of law, within property law at any given time we will find both rules and standards. In her presentation of the structural and practical differences between rules and standards in property law Professor Carol M. Rose argues:

rules (crystals) will better order arms-length transactions among players in the marketplace, whereas standards (mud) will better order transactions among players known to each other through repeat or customary interchange. In other words, [the theory calls for] individualism (rules or crystals) for the market [and] altruism (standards or mud) for the mercantile family or clan.¹⁷⁷

As stated above, the result of the differences between rules and standards is that the use of each of these legal directives becomes advantageous in markedly distinct scenarios. Rules are better suited in a marketplace setting where parties do not deal with each other regularly and may not ever deal with each other again. In that instance, the advantage is the availability

175. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

176. *Id.* at 578. In fact, it is a circular process which continues with legislatures shoring up the now "muddied" rules with new more precise rules — and the process continues. *Id.*

177. Sullivan, *supra* note 127, at 123 n.283 (discussing Rose, *supra* note 175).

of clear guidelines that allow people to protect themselves from the trickery of others. Standards are seen as a better fit in a family or clan-like group. In such an organization, parties that deal with each other on a regular basis, thereby building relationships, can take advantage of more fluid guidelines by which to interact. People develop a sense of whom they can trust, and therefore take business or social risks, and whom they cannot trust, and therefore either choose to not deal with the other party at all or deal under a heightened sense of cautiousness.

2. Vices and Virtues

Professor Pierre J. Schlag identifies what he refers to as “perhaps the most common understanding of the rules v. standards dialectic,” which are the virtues and vices that come with selecting either a rule or standard as a form of legal order.¹⁷⁸ When certainty, uniformity, stability, and security are required, rules are more prudent; when flexibility, individualization, open-endedness, and dynamism are important, standards are thought to be the more suitable choice.¹⁷⁹ The determining factor when deciding whether to implement rules or standards becomes which of these competing virtues are most desirable for a particular circumstance.¹⁸⁰

Professor Schlag also lists the objectives that a legal directive can serve: deterrence, allocation, communication, delegation, and inducement.¹⁸¹ When attempting to promote these possible objectives by creating a particular law, however, the entity crafting the legal directive should not ignore competing objectives which are often also desired.¹⁸² To state two, the competing objective of delegation is control; that of deterrence is empowerment.¹⁸³ So, for example, when a legal directive is promulgated to promote delegation, the rule-making body must be mindful of not relinquishing all control, thereby foiling any sense of a hierarchal system. Likewise, when a directive is

178. Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985).

179. *Id.*

180. *Id.* at 401.

181. *Id.*

182. *Id.* at 402.

183. Schlag, *supra* note 178, at 402.

promulgated to deter behavior, the rule-making body must also allow members of the society enough freedom to act, so that growth continues and the society is not stifled.

3. Costs

a. Frequency of Occurrence

The decision behind the promulgation of rules and standards also presents several economic questions. Promulgating rules is often more costly *ex ante* than standards, whereas standards are more costly to apply *ex post*.¹⁸⁴ Rules require information and discussion in order to determine what conduct is permissible.¹⁸⁵ Standards require decisionmakers to undertake a determination of the legal issues as well as the facts.¹⁸⁶ Thus, the decision to utilize rules or standards often depends on the resources needed to effectuate each.

Professor Lisa Kaplow asserts that the answer to the question of whether to promulgate rules for a particular set of circumstances or to allow standards to provide the direction to a society and its legal decision-making body often lies in a determination of the frequency of the occurrence.¹⁸⁷ When conduct is frequent, it is prudent to formulate a rule to provide direction on the acceptable kind of conduct. The cost of the promulgating such a rule is justified since it will save resources in the long run due to the repetitiveness of the adjudicating process.¹⁸⁸ When conduct is infrequent, allowing a judge to apply a standard to an uncommon situation is often the more economic and therefore the more appropriate approach. Society will apply fewer resources to those particular circumstances in the aggre-

184. Kaplow, *supra* note 133, at 557.

185. *Id.* at 559; Korobkin, *supra* note 124, at 32.

186. Kaplow, *supra* note 133, at 559; Korobkin, *supra* note 124, at 32.

187. Kaplow, *supra* note 133, at 621 (“The central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct.”).

188. Korobkin, *supra* note 124, at 33 (“In such circumstances, the cost of matching a set of facts to a legal consequence is borne only once, when the rule is promulgated, and the cost is then amortized over a large number of transactions.”).

gate,¹⁸⁹ because devising the standard will require few resources and the infrequency of the conduct will ensure that the costs of applying the standard do not become excessive. Once the rule-making body decides whether the conduct in question occurs frequently, it can then decide to utilize a rule or rely on a standard.¹⁹⁰

b. Homogeneity and Behavior Deterred

Closely related to the question of the frequency that a conflict will arise and the cost of promulgating legal directives is the characteristic of homogeneity. When factual circumstances are homogeneous, rules tend to work well, because a single line denoting acceptable and unacceptable behavior addresses many situations well and will work in its intended manner more often than not.¹⁹¹ However, when events are heterogeneous with numerous factors leading up to a particular behavior, rules will often have over- and under-inclusive results exposing the shortcomings and unfairness of a rigid legal system.¹⁹² Thus standards are often more appropriate when dealing with varying sets of circumstances, because a standard allows a decision-maker to keep in mind many more factors when deciding a matter.

V. THE RULES AND STANDARDS DEBATE APPLIED TO THE STABILITY AND GROWTH PACT

As stated, the purpose of this Note is to offer some insight on the EMU by asking the question of which legal form, either rule or standard, would most likely provide a stable (and prosper-

189. *Id.* ("Standards will be relatively desirable when a type of dispute arises infrequently, because the larger initial investment in rule promulgation will be amortized over fewer disputes, and, conversely case-by-case analysis of the problem will not result in an excessive duplication of effort.").

190. Cost may not be the EU's primary concern of whether to promulgate rules or standards. It may not even be a concern of the EU at all. However, like the analogy highlighting the differences of a mercantile and a clan, taking the frequency of an occurrence into consideration also provides helpful insights for the EU relating to the implementation of rules and standards.

191. Korobkin, *supra* note 124, at 37.

192. Bell, *supra* note 138, at 226 n.47 (noting REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 49-50 (1975) ("Universal enforcement of rigid rules can lead to anarchic and disruptive results.")).

ous) future for the EMU. The Stability and Growth Pact, the vehicle for the analysis of rules and standards, places several requirements on the subscribing Member States. This Note will determine whether the provisions in our example, the Stability and Growth Pact, are rules or standards. The Note will initially consider each legal directive individually; though, it will later concentrate on the most relevant provisions of the Pact in continuing the analysis of the pros and cons of each provision. In considering the rules versus standards debate as applied to the Stability and Growth Pact this Note will offer conclusions as to which may better serve the goals of the EMU.

A. The Stability and Growth Pact – Rule or Standard

The section of the Pact describing the sanctions that the ECOFIN Council will impose is the Pact's most standard-like section. The sanctions require that the Member States make an initial non-interest bearing deposit of .2 to .5% of the country's GDP.¹⁹³ The Pact does not mention exactly what criteria the ECOFIN Council will use to determine whether a Member State will pay .2% or .5% or some variable in between. Most likely, the Council will consider the severity of the violation (how far the Member States budget exceeds the 3% budgetary limit) and the surrounding circumstances of the violation in terms of the economic situation within the country. This sequence of events exemplifies the definition of a standard in that the decisionmaker will be able to consider all applicable facts¹⁹⁴ when deciding the party's fate.

The central element of the Stability and Growth Pact generally requires members to keep their budgets "close to balance or in surplus." This wording allows for wide interpretation. Within the first three years of the Pact's existence, the requirement has been interpreted to mean that Member States should "avoid excessive budget deficit during a cyclical downturn." The directive seems standard-like in that it would avoid over- and under-inclusiveness by allowing more discretion than would a rule.¹⁹⁵ In this case, European Commission should be

193. Meyers & Levie, *supra* note 41, at *8.

194. HANKS ET AL., *supra* note 124, at 486–88.

195. *Id.*

able to consider all applicable facts¹⁹⁶ when considering a Member State's budgetary position. However, the directive becomes more rule-like as one considers the requirements which underlie the "excessive budget deficit" standard. In order for Member States to "avoid an excessive budget" they must keep their budget deficits below the 3% limit for a given year. The limit has developed into a prerequisite for a members budget to be "close to balance or in surplus."¹⁹⁷ This strictly interpreted limit leads to the conclusion that the directive is actually more rule-like upon its application.

Council Regulation 1466/97 dealing with the surveillance of the budgetary positions and the economic policies¹⁹⁸ of Member States is most certainly rule-like in its nature. A legal directive is rule-like when it binds a decisionmaker to respond to a case in a determinate way due to the presence of surrounding triggering facts.¹⁹⁹ This Regulation is a rule in that it carefully delineates the requirements for submitting each member's stability program. As stated previously, the Regulation outlines the rules concerning the content, submission, examination, and monitoring of those programs.²⁰⁰ The Regulation leaves little question to how a Member State must report its financial performance and plans and what should be included in them. If Member States do not follow the prescribed method of reporting, the ECOFIN Counsel could easily find a violation by quickly referring to these rules.

Council Regulation 1467/97 concerning the speed and clarification of the implementation of the excessive deficit procedure is also rule-like in nature. As previously mentioned, the regulation provides a clear method for prompt corrective actions by the ECOFIN Council within a carefully pre-determined timetable.²⁰¹ The regulation outlines the times by which the Council must submit recommendations to a Member State as well as periods by which the Member State's government must act upon those recommendations. Again, should the Member State not follow the recommendations by the Council in a sufficient or

196. *Id.*

197. Frandsen, *supra* note 39.

198. Lembergen & Wachenfeld, *supra* note 7, at 31–32.

199. HANKS ET AL., *supra* note 124, at 486–88.

200. Lembergen & Wachenfeld, *supra* note 7, at 32.

201. *Id.*

timely manner, the violation will easily reveal itself against the backdrop of these clearly defined rules.

B. Should the Pact Consist of Rules or Standards?

For purposes of the analysis on whether standards or rules are more suitable to the EMU, this Note will concentrate on the more substantive requirements of the Stability and Growth Pact concerning the deficit limit provision (a rule) and the sanctioning provision (a standard).²⁰² These provisions deal with a Member State's financial performance under the Pact and the Council's required response, respectively.

1. Keeping Budget Deficits Close to Balance

As mentioned previously, Professor Goebel has identified the objective of the Pact as deterrence.²⁰³ As shown by applying Professor Schlag's "vices and virtues" theory to Professor Goebel's view, if the "virtue" of deterrence is the goal, legislatures should act cautiously in order to sufficiently provide members of their society with the freedom to continue to act productively. Legislatures should not stop socially or economically desirable conduct. While they must not deter certain conduct, they must do so in a way that empowers the parties within their domain to perform other desired conduct.

The Pact will surely deter Member States from allowing budget deficits from growing excessively. The reason for keeping budget deficits lower is to bring stability and credibility to the newly introduced euro.²⁰⁴ To the prudent mind, rules seem to be the answer for a legal system which requires certainty, stability, and security. Rules provide the clarity needed for sta-

202. The two regulations supporting the Council Resolution outlining the budgetary limits are more procedural than substantive in nature in that they outline the reporting requirements of the Member State and the time constraints of both the ECOFIN Council and the Member States. They provide the European Commission and the ECOFIN Council great oversight as to a country's financial performance. They also provide clear and executable goals both for the Member States in relation to the reporting process under the Pact as well as for the Council in proposing corrections in case of a violation. Thus, although procedural in nature, the regulations are surely important in regard to the Pact's effectiveness and overall success.

203. Goebel, *supra* note 42, at *4.

204. Mundell, *supra* note 1.

bility, which is undoubtedly a large (likely the underlying) reason why the EU decided to promulgate such clear rules for the Pact.²⁰⁵

However, the EU will most certainly have to take other factors into consideration. This is a European Monetary "Union," which now consists of twelve different nations with twelve very different economies, cultures and governments.²⁰⁶ According to Professor Schlag, the EU should allow for some degree of flexibility and individualization so that the economies of the Member States and the European economy do not stagnate while boasting the euro. Therefore, open-endedness and dynamism should also play a part in the EMU's legal order. While keeping the euro stable by deterring excessive deficits, the Pact should also provide for empowerment in order to allow the governments to accept some level of risk and the ability to maneuver within their economies in order to spur growth.²⁰⁷

According to the current limit on budget deficits under the Pact, Member States will most likely try to keep their deficits well below 3% in order not to receive a warning from the ECOFIN Counsel as Germany did early this year when its budget deficit was at 2.7%.²⁰⁸ But this type of deterrence, in fact, may stifle economies when they have opportunities to grow or further hinder them when they have come upon times of recession as we see occurring in Germany today. If this is the effect that the Pact has, it is lacking the type of empowerment Professor Schlag calls for in his analysis.²⁰⁹ The EU could grant

205. Lembergen & Wachenfeld, *supra* note 7, at 31.

206. Christopher Rhoads, *EU Panel's Solbes Says Fines Won't Be Automatic For Breaking 3% GDP Rule*, WALL ST. J. EUR., Jul. 25, 2003, available at 2003 WL-WSJE 59766557. GUIDE, *supra* note 2, at ch. 1 ("On January 1, 2001, Greece joined this group after meeting the Maastricht 'convergence criteria.'").

207. Schlag, *supra* note 178, at 402.

208. Sesit, *supra* note 91.

209. However, the costs in question deal with whether or not the deterring of behavior by an over-inclusive rule will be a great loss to society. There may always exist the situation where deterrence of certain behavior is not a dire consequence. See Sullivan, *supra* note 127, at 63 ("A utilitarian argument for rules reflects the judgment that the gains they elicit from the 'industrious and rational' will exceed the losses from the antisocial exploitation of bright lines."); Kennedy, *supra* note 123, at 1689 ("If we adopt a rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of 'free will' directly to the facts of each case.").

the Member States of the EMU the empowerment needed to run their complex economies by either promulgating a less strict rule (for example, a 4 or 5 percent budget deficit ceiling) or possibly a “reasonableness”²¹⁰ standard.

Professor Rose’s “crystals and mud” analysis of rules and standards seems to lead the EU down a similar path towards more standard-like directives. Rose asserts that rules are more suited to a market setting where parties do not deal with each other regularly, while standards are a better fit in a family or clan-like group where parties do deal with each other on a regular basis.²¹¹ There are obviously differences between property law, to which Professor Rose applied the rules vs. standards debate, and international monetary law, which governs the EMU. However, recognizing the different dynamics, which exist within the “marketplace” and the “clan,” as presented by Professor Rose, poses interesting insights into the analysis of the EU and its Pact. To say that the Members States of EU have had differences in the past is an understatement; however, the Members are undoubtedly not “strangers” in any sense of the word. To the contrary, they more closely represent members of a “mercantile family” or “clan,” and the EU (once referred to as the European “Community”) surely embodies the “customary” interchange, which exists within such entities — especially on an economic level. The purpose behind forming the EU was to create a customs union where barriers to trade were eliminated thus producing a region where cross-border trade is commonplace.²¹² Though there have been political differences the nations which make up the EU and people who live within those nations deal with their continental neighbors on a regular basis (be it for business or social purposes) and have done so for centuries. Due to the effect of globalization on the world economy, if the EU desires to continue to have a leadership role on the global stage, its members must continue to turn to each other and provide market share and other financial

210. Pound, *supra* note 150.

211. Sullivan, *supra* note 127, at 123 n.283.

212. THE EUROPEAN UNION: A GUIDE FOR AMERICANS ch. 1 (2002), at <http://www.eurunion.org/infores/euguide/euguide.pdf> (last visited Jan. 15, 2003) [hereinafter GUIDE].

support to their neighbors.²¹³ This reliance on each other is a fact of the EU's existence today, and it is unlikely to change in the near or distant future.

The fact that the European continent is a region built inherently on international relationships, which the formation of the EU has strengthened, leads to an additional point under Professor Rose's theory. Of course a Member State may, in fair dealing, try to get the "best deal" for itself from these "family" type circumstances. However, in drawing an analogy to a marketplace setting, it is unlikely that one nation will intentionally "scheme" to break an EU treatise and run away with the "loot," as the situation may occur in a marketplace. Rather, due to proximity and practicality the Member State will have to remain within the "family" of states and most likely make reparations to the other members for its violations. The most likely scenario is that a Member State would not risk alienation from its neighboring states by deliberately or even negligently breaking an EU law, because the next day, that Member State would still have to turn to its fellow members for the same market share and financial support. The risk of alienation from its neighbors is great and likely to pose serious consequences to consider before undertaking such actions. Therefore, Member States, as part of a larger economic family, should not need the added protection that rules afford.

213. Although the goal of the Pact is to promote economic stability within the region (as well as to bring stability to the euro) the ultimate goal is to achieve prominence on the world economic stage. The EU wants the euro to become an international currency. Europeans want foreign investors to invest in their countries. Of course, such interchanges can no longer be likened to a "family" relationship. The continuance and growth of the euro by foreigners as well as foreign investment within the EU surely represent more closely the situation present in a marketplace setting where parties are dealing at arms-length with each other, possibly never to deal with each other again (at least for a long time). Such a scenario seems to call for the use of rules in order to ensure fair dealing on both sides of the transaction. Nevertheless, the situation does not affect the interaction between the members of the EU. The World Trade Organization promulgates international trade laws to be followed by its members in order to promote fair dealing. However, the EU still has the responsibility of prescribing laws within its borders in order to regulate the economic performance of its own Member States, and in so doing, it has the luxury of implementing standards due to their interdependent relations with each other.

Under Professor Rose's description of the "crystals and mud" theory, it seems that the best form of legislation for such a close-knit organization is the standard.²¹⁴ A mud, or a standards-based regime takes into consideration ongoing interaction between parties over time (as is present in the EU) more than a rules-based regime. Crystals or rules as the medium for contact between strangers are "hardhearted and mean spirited [in that] they glorify the attitude of self-centeredness and 'me first.'" ²¹⁵ To the contrary, Member States must work together over time in order to complement and assist one another in building each other's economies. While one nation is in recession another may be in a state of inflation. In another three or four years, the tide may turn and the Members may find themselves on the opposite side of the scale looking at the very problems that its neighbor had just faced. The situation should allow Member States greater ability to deal with each other's shortcomings together.

The imprudence of initially attempting to devise a rule *ex ante* for eleven (or more) nations with different and changing economies offers further support for the use of standards in the EMU. A rule promulgated *ex ante* would lead to less cooperative dialogue between nations, more finger pointing, as well as more nations looking out for themselves.²¹⁶ Considering that the very point of establishing the EU was to foster a climate of cooperation, it is evident that finger pointing is not the goal of the Pact. A "reasonable budget deficit" in light of a Member State's economic situation may have been a more manageable solution and, in fact, a solution tailored more to an organization whose members rely so heavily on each other. Thus, Member State's lasting relationships and future common goals could allow them to follow a standards-based regime without getting into a spitting contest. In fact, a standard-like directive may promote

214. KELMAN, *supra* note 128, at 16 ("The rule form is said to express the substantive ideals of those committed to self-reliance and individualism.... The willingness to resort to the standard form is said to correspond to the embrace of substantive altruism.").

215. Rose, *supra* note 175, at 605.

216. *Id.* at 607 ("To adopt a rhetoric of crystal rules, then, seems to be a way of denying the necessary dialog character of human interactions and acting as if we can compel human behavior by a perfect specification of unchanging rights and obligations.").

even greater cooperation between Member States as an outgrowth of the need to work together and understand each others' economic circumstances — or else risk failure.²¹⁷ As continued application of standards often leads to clearly defined directives, the EU could eventually set more stringent rules that are proven suitable to its Members' needs once the ECOFIN Counsel and the Member States have tested the viability of the stability programs and the standards underlying the Pact. Therefore, the crystals and mud theory lends to the idea that the EU should have relied more heavily on standards for the substantive parts of the Pact.

However, looking at the situation through a costs and frequency analysis leads to quite contrary views. As long as the Stability and Growth Pact aims to regulate the Member States within the EMU, the task of balancing budgets will always be a concern of nations within the EU. Moreover, as long as the EMU is a functioning institution, the ECOFIN Counsel will continuously be evaluating at least twelve stability programs (and three convergence programs for the non-participating EU countries). The rule approach will allow the Counsel to evaluate each Member State each year without having to establish new law each time a unique situation arises. It must merely monitor the budgets in order to determine whether or not a nation has kept its budget close to balance and begin the sanctioning process when the facts tell them otherwise.²¹⁸ In this regard the EU was correct in promulgating the Pact as a specifically delineated rule.

When considering the costs of promulgating a rule or a standard, however, the EU should also have taken into account the homogeneity factor, as well as the differences of the nations comprising the EMU. The EU has already witnessed several of its Members States flirting with violations of the 3% budget deficit limit and there will undoubtedly be more. For example, Portugal has already broken the 3% budget deficit limit and Germany is coming dangerously close to doing the same. With so many different business practices and economic systems

217. See KELMAN, *supra* note 128, at 62 (“A reliance on standards is premised on the hope of moral dialogue and ultimate consensus.”).

218. Furthermore, they can do all of this without allowing politics or national biases to interfere with the evaluation process.

within the EMU, the chances are low that even two states which break the deficit limit will do so for exactly the same reasons. Thus, taking the complex factors of politics, culture, and even economics into account the Member States of the EMU are indeed not homogeneous. Some of these nations which fail to keep their budget deficits below 3% GDP may surely deserve to pay sanctions for frivolous spending and relying on their neighbors, while other Members may not deserve to pay sanctions upon consideration of their underlying economic circumstances. This rule-like provision may very well call for the imposition of sanctions in an over-inclusive and undeserved manner.

This point leads us to some of the basic reasons behind employing a rule or standard, which the EU most likely considered as well. First, as the budget deficit provision of the Pact is a rule, it is also predictable. As we have seen with Portugal and Germany, the European Commission can easily determine when a Member State is not abiding by the pact and not keeping its budget close to balance because their deficits are close to 3% GDP. When Portugal and Germany received their initial warnings about their budgetary performance, there was little talk about politics or biases from the ECOFIN Counsel. As it stands, the Pact leaves little room for politics or biases. Lastly, since the two nations knew that they had exceeded the budgetary limits, they could not be surprised about receiving the warnings. Moreover, Portugal and Germany have not been able to keep their deficits below 3% GDP, but other Member States, knowing exactly what the limit is, have been able to keep their budgets low by planning accordingly.

As long as Member States plan to (and do) keep their budgets well below the 3% ceiling, the rule will seem effective. However, when members begin breaching the 3% ceiling, which is the present state of affairs, the Pact virtually ties the hands of the European Commission and the ECOFIN Counsel, for it leaves little discretion to its decisionmakers. The two bodies will not have the liberty to look into the underlying circumstances in order to determine the reasons for the spending. Once the Member State has breached the 3% ceiling, the Commission and the Counsel will have to abide by the process prescribed by the Pact and require the nation to pay sanctions or render the Pact insignificant. The preciseness of the rule may also lead to less than desirable behavior on the part of the

members of the EMU. Member States may begin to “plan” to keep their budgets below 3% limit — just not so far below the limit. If many members begin to flirt with the 3% ceiling simultaneously, the consequences could prove drastic for the EMU. Nations may begin to feel that a warning is harmless as long as they do not venture into the realm where sanctions are imposed. Conversely, a nation that is struggling to keep its economy afloat will find that a mere warning is of small consequences. If a nation is struggling and on the verge of a major recession, the nation’s political and economic leader will have to make a choice between allowing their economy to slide further into recession or complying with the Pact and facing large sanctions.

Requiring Member States to abide by a standard such as “reasonable budget deficit” would help to avoid this situation. The Commission and Counsel would be able to look at the nation’s stability program and use discretion to determine whether the problem emerged through the lack of frugality within the nation’s decisionmakers or through unavoidable economic cycles. The EU could avoid over- and under-inclusiveness much more readily. The two bodies would no longer have to allow the “similar treatment of dissimilar [nations].”²¹⁹ Furthermore, there would be no clear line for Member States to skirt. Member States would have to act within the “spirit” of the Pact. Nations would not have to keep their budgets “close to balance” merely by keeping their deficits below 3% GDP. The Commission and Counsel would have the tools and the authority to determine whether a nation is clearly abusing its right to keep a deficit when that nation has no dire need to keep a deficit, whether or not the nation is below the 3% limit.

The lack of a definitive interpretation of the Pact, however, could very well lead to the problems of uncertainty described in Part IV. Nations could delve into the gray area of what is a “reasonable budget deficit” and try to show that they do in fact have a reasonable deficit given their country’s circumstances. Such a situation could lead to a heated dialogue between Member States and the EU possibly causing ever increasing political consequences. Other members, without clearer guidance, would lose the ability to make sufficient economic plans for the fu-

219. Sullivan, *supra* note 127, at 62.

ture. Nations would tend to be even more cautious with their budgets than they would have with a clearly defined deficit ceiling. This would stunt productivity and harm the economy. Lastly, the European Commission and the ECOFIN Counsel may also begin making decisions based on political pressure or personal biases.

Obviously, the pros and cons of using standards or rules are extremely intertwined and difficult to divide. Perhaps the best way to answer the rules or standards question is to consider some of the recent developments of the Pact. Given that the Pact is already three years old and has been through several of its own cycles of “ups” and “downs,” the luxury of hindsight exists. On September 9, 2002, the German government stated that its country would honor its budgetary promises and comply with the Pact.²²⁰ At the same time, the French Prime Minister claimed that there was growth in his country’s economy which would allow the government to keep its deficit below the 3% limit.²²¹ If these promises had become reality, even in the face of hard economic times and surmounting political pressure, praise would have fallen upon the authors of the Pact for their foresight and conviction in sticking by their rule. In his book, *A Guide to Critical Legal Studies*,²²² Professor Mark Kelman asserts a point that is of particular interest in light of those recent budgetary promises by members of the EMU. In a section titled, “General Arguments for Rules and for Standards,” Professor Kelman states that if legislatures promulgate rules in order to promote a certain type of behavior (or to deter another type of behavior), members of society will eventually conform to the rule and act in the prescribed manner. In this situation, rules, as Professor Kelman expresses, are “dynamically stabilizing.”²²³ Members may initially “toe the line” set by the rule or even vio-

220. Hofheinz & Rhoads, *supra* note 99.

221. Juston Jones, *France Issues Warning on Growth*, WALL ST. J., Sept. 9, 2002, available at 2002 WL-WSJ 3405489.

222. KELMAN, *supra* note 128.

223. KELMAN, *supra* note 128, at 44 (“If decision makers are willing to put up with disquieting results in particular cases, people will gradually learn to comply with the rules.”). Professor Kelman also reveals that some consider rules “dynamically destabilizing” when people begin to “walk the line” and when the rules grow to accommodate exceptions. *Id.* In these instances, rules fail to promote a society’s policies, either because they are so clear, or because they become difficult to interpret. *Id.*

late the rule to see how serious the rule will be enforced and interpreted. In this instance the theory is based on how firmly the factions interpreting and enforcing the rule stand. Once the legislature promulgates the rule, even an austere rule, if the rule is both enforced and interpreted strictly, in time, the members of the society will follow the rule.²²⁴ In turn, people will learn to comply with the rules rather than break the law,²²⁵ thereby eventually achieving the policy makers' intended result. If the EU stands by the Pact and its Members subsequently abide by its strict provisions Professor Kelman's theory will certainly prove to be a formula for success — at least with the Stability and Growth Pact.²²⁶

However, the promises that the Members States make and whether they can perform according to those promises are entirely different. In fact, when Germany made its pronouncement that its deficit was 3.5%, analysts argued that it was improbable that Germany could bounce back from its recent economic downturn and recover enough to ensure that its budget deficit would remain above 3% GDP for the year.²²⁷ Moreover, on September 25, 2002, the European Commission announced that it would allow the EU's 15 Member States until 2006 to bring their budgets closer to balance.²²⁸ The decision came as a result of the likelihood that France, Germany, Italy, and Portugal will each not meet their budget-deficit commitments as promised.²²⁹

Despite the empty promises of the Member States, their inability to meet the requirements of the Pact clearly shows that the initial rule lacked the flexibility required for the complexity of the EU's goal and the diversity of the EU itself. First, if a rule-making body finds itself needing to promulgate another new rule because the initial rule was not sufficient, the situa-

224. *Id.*

225. *Id.*

226. It is unlikely that every country in the EMU will have a balanced budget despite the recent economic forecasts. However, eight out of the eleven are sure to have a balanced budget which shows that the provisions are realistic and can be followed. Oyama, *Commission to Extend Target*, *supra* note 107.

227. Hofheinz & Rhoads, *supra* note 99 ("To assume that the economy will improve enough in the second half to bring the deficit in line is unrealistic.").

228. James, *supra* note 72; Oyama, *Commission to Extend Target*, *supra* note 107.

229. *Id.*

tion negates any cost benefit and efficiency reasons that the rule-making body relied upon when it decided what type of directive to promulgate in the first place. Second, the benefits of predictability, avoidance of political pressure, and the ability to plan are also curtailed. Although the decision to establish a new date to achieve a balance budget seemed necessary in order to help several members of the EMU, it is not difficult to see why the other Member States who have been able to abide by their plans to keep their budget deficits below 3% GDP and meet the initial balanced budget date in 2004 are wondering why they were working so hard to comply with this agreement.²³⁰ Those countries which remain in compliance are understandably upset, which means that not only will the situation lead to questions about the “stability” of the EMU, but it will cause internal political conflict as well. Still, the main point to be taken could simply be that the EU should not have tried to promulgate a strict rule to undertake such a new and enormous venture.²³¹

2. Imposing Sanctions

Lastly, the fact that the EU imported more flexibility into the provision of the Stability and Growth Pact dealing with sanctions, shows that it recognized the need to establish a standard-like directive for such an unpredictable situation. Of course, any possibility of sanctions which a Member State may have to sustain will prove to be a substantial burden especially to a nation who is hurt economically. However, the flexibility provided by the 2%–5% range of the sanction provision, can remove some of the sting caused by the harshness of an inflexible rule.²³² As stated earlier, factors which allow the ECOFIN Counsel to de-

230. Graff, *supra* note 66. Finance Ministers from those countries “that have crimped and clawed to get their budgets in line” were not pleased to put it politely. *Id.*

231. *Reforming the EU's Stability Pact?*, *supra* note 121.

The fact is [] that there never has been a currency union between sovereign nations on this scale before, so no one can be certain what kind of fiscal rules will work best. ‘Learning by doing’ is an excellent idea in a kindergarten. But it is a slightly alarming was of running the European economy.

Id.

232. Though it may not be enough flexibility.

termine the severity of the violation will most likely weigh in the final decision of how large to make the sanctions. Like a judge who is sentencing a defendant, the Counsel will undoubtedly consider many factors when applying the punishment. The standard allows those sanctions to be levied in a measured degree and affords the EU the latitude to deal with the economic differences between member states. As the provision is a standard-like directive, promulgated to deal with numerous situations, it should prove to be an effective provision of the Pact in deterring large deficits.

VI. CONCLUSION

Ultimately, the main priority of the EU in employing the Stability and Growth Pact is the *stability* of the euro. As rules are often necessary to provide government interests their proper force, the EU may have been correct to utilize rules to seek their objectives. With the use of standards and more fact-specific decisions, the likelihood increases that the decision-maker would have found (possibly valid) sympathetic reasons for growing deficits that outweigh the EU's long-term interests, thereby creating political pressures. The EU surely considered these very implications when formulating the rule-like provisions of the Pact. However, the reality is that a diverse group of nations is trying for the first time to conduct its economic affairs under one currency and one economy after several hundreds of years of acting under separate currencies and economies. Although a rule may have seemed to be the correct solution when considering the desired result, the underlying circumstances in the case of the EMU may not allow for the successful implementation of such a "rule."

Paul de Grauwe, an economics professor and prior candidate to join European Central Bank, has long held that "a rigid system of target numbers was a poor way to guide budgetary policy."²³³ Some economists have proposed that the EU allow its members to exceed the 3% deficit when the economic situation

233. Graff, *supra* note 66. Mr. de Grauwe had been quoted as asking, "Why should people believe that 3% is some magic number?...No other country has such a rule." *Id.* De Grauwe also sums up the present effect of the Pact in that although it is a defensive mechanism meant to guard against inflations, it is a dangerous tool in time of deflation. *Id.*

in their countries calls for such measures by the government.²³⁴ These economists suggest that the EU focus instead on the “structural deficit, which is based on spending policies unaffected by economic changes.”²³⁵ That way, the ECOFIN Counsel can judge the Member State based on the prudence of a government’s management of its economy and not on the economic situation which the government finds itself. Others have proposed raising the deficit limit from 3 to 5% GDP.²³⁶ Still others have gone as far as to say the EU should eliminate the deficit limit and replace it with a “commitment to keep official borrowing within agreed limits.”²³⁷ The answer to whether or not the EU decides to transform the Pact into a more flexible standard-based law²³⁸ lies a few years away, because the EU cannot amend the Pact until 2005.²³⁹ Abandoning the rules now would only risk international mockery.²⁴⁰

In promulgating the Stability and Growth Pact, the EU may have given too much weight to the opinion of its international partners. The concern was that if the Pact was too flexible, the world would take neither the EMU nor the euro seriously. The EU may have been looking more outwardly than it should have, when its initial focus should have been to devise an internal solution. The EU should not have worried about the world’s initial opinion of the euro and of the Pact. No other entity coerced the EU into this undertaking. The Member States themselves chose to form the EMU. The EU flourished due to the success of open trading. However, the EU as a whole knew its only recourse to remain relevant in the global marketplace was for its members to turn again to each other in order to form an

234. Hofheinz & Rhoads, *supra* note 99.

235. *Id.*

236. *Reforming the EU's Stability Pact?*, *supra* note 121.

237. Hofheinz & Rhoads, *supra* note 99.

238. *Re-engineering the Euro*, *supra* note 74 (“At the very least, the stability pact should be redefined in terms of the fiscal balance adjusted over the economic cycle. That would give governments more room to respond to a slump.”).

239. *Restoring Europe's Smile*, THE ECONOMIST, Oct. 26, 2002, available at 2002 WL 7247929 (“Europe will rub along with the pact and semi-comply, destroying many jobs, albeit not as many as strict obedience would destroy.”).

240. *Id.*

ever tighter economic relationship.²⁴¹ In doing so, the members should have based their goal of establishing a new currency on that relationship, while recognizing their differences to devise a standard-based regime which could deal with those differences while effectively stabilizing the euro. Instead, it seems the EU was attempting to back itself into a good situation. It was trying to capture the world's confidence in the EMU and the euro by promulgating a strict Pact.²⁴² It should have devised a more workable standard that would have ensured the continued economic stability of the region while the Member States worked together in order to achieve that stability.²⁴³ Such a result would have undoubtedly captured the world's confidence.

Still, the root cause behind the strictness of the Pact and the fear of instability was the ongoing distrust that the members of the EU have for each other and their inability to lay their differences aside.²⁴⁴ It is ironic that the Pact is, itself, supposed to be a "political totem."²⁴⁵ It aims to show the rest of the world that the nations of the EMU will not cheat on one another.²⁴⁶ The result, however, has led to what the EU has been trying to avoid all along — a mockery. This group of nations mutually and amicably decided to form an economic union to preserve and promote their own economic future. That some Member States which fought so hard for a tighter union would not trust their neighbors (as well as the EU's own abilities to govern) enough to allow a standard-based regime to compensate for ob-

241. That relationship thus far has been an economic relationship. However, even the initial motive behind creating an economic relationship and therefore interdependence in Europe developed shortly after World War II to prevent war between European nations. Looking towards the future, the limits (or possibilities) for further political unification within the EU lie only in the present ambitions of each Member States representatives. "A common foreign policy... is a cherished goal." *Id.*

242. *Re-engineering the Euro*, *supra* note 74 ("The central charge increasingly made against the euro and all its works is that the institutions and policy instruments agreed upon in Maastricht a decade ago were all intended to bear down upon an inflationary threat that no longer exists.").

243. Though the use of standards would generally lead to some degree of uncertainty, this does not necessarily mean that a lack of stability will inevitably follow.

244. *Reforming the EU's Stability Pact?*, *supra* note 121.

245. *Id.*

246. *Id.*

vicious and unavoidable economic differences is itself a puzzling notion.

In short, in devising the Stability and Growth Pact, the EU should have relied on its own ability to perform as a “Union” instead of promulgating a rule in order to force its members to conform with the requirements of the EMU. The differences between the Member States, which comprise the EMU, make it difficult to devise one rule that will suit eleven or more nations. Of course the rules and standards debate will lead a legal theorist (and maybe an economic strategist) down many paths that will arguably provide a similar number of pros and cons for each side. Furthermore, competing theories discussing the rules and standards debate, from the standpoint of costs to the standpoint of deterrence, lead to varying results. However, the fact remains that when considering the advantages and disadvantages of using rules or standards, the EU should do so while remembering that it has the luxury of the ongoing relationships which its members have built with each other over many years²⁴⁷ as well as mutual reliance (which each state has chosen to promote) on each other’s economies. In promulgating internal directives for the members of the EMU, these nations may want to consider the use of a more flexible standard,²⁴⁸ and the reliance on their long-term relationships, before they turn to more rigid rules. That way, not only will the EU win the confidence of the world in its endeavors such as the establishment of the euro, but it will also command the world’s admiration in its ability to work together.

*Paul Libretta**

247. *Restoring Europe’s Smile*, *supra* note 239 (“Politics will still be messy, [but] politics should be messy.”).

248. *Id.* (“A strong, explicit and enforceable principle of subsidiarity is the core of the constitution we would like to see.”).

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