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GUEST EDITORIAL

Ethical and political responsibility of EU Commissioners

1. The first report of the Committee of Independent Experts has already been discussed in this *Review*, in the *Editorial Comments* of the April 1999 issue (hereafter "Editorial Comments").[1] According to the resolution of the European Parliament adopted on 14 January 1999, that report was "to examine the way in which the Commission detects and deals with fraud, mismanagement and nepotism ... [and] to report by 15 March on [the Committee's] assessment in the first instance on the College of Commissioners". As clarified in a statement of the Parliament's Conference of Presidents, the committee had more specifically, in its *first* report, "to establish to what the Commission, as a body, or Commissioners individually, bear specific responsibility". The findings of the committee in its first report were recalled in the *Editorial Comments* (at p. 269); the consequences for the EU institutions of the collective resignation of the Santer Commission on 16 March 1999 were also analysed therein.

As a former member of the (five person) committee – the committee regarded itself as being dissolved after the submission of its *second* report on 10 September 1999[2] – I have to exercise due restraint in discussing the findings of the first report.[3] This editorial will therefore be primarily informative, also since the reports are, I believe, sufficiently thought-provoking in and of themselves. Suffice it to say that I can fully subscribe to the opinions expressed in the *Editorial Comments*, particularly where they state that the failings of management found by the committee "must not be allowed to cast doubt on the central role which the institution itself (i.e. the Commission) is called upon to play in the constitutional order established by the European Treaties" (at p. 269). It is to be hoped, on the contrary, that the present Commission may draw some benefit from the recent events by improving its style of management, preferring openness to the "defensiveness which has char-

1. 36 CML Rev., 269–272.
2. The report is available at http://www.europarl.eu.int/experts/en/default.htm.
3. For a comment, nonetheless, see my contribution "Managing the European Union: for better or for worse?" lecture to be held in London on 7 April 2000 at the Millennium Conference "Britain in Europe: the coming together of the common law and the civil law."

acterized previous responses to criticism" (at p. 270). In its second report (277 pages long) – which, according to the aforementioned resolution of the Parliament, was to include "a fundamental review of Commission practices in the awarding of all financial contracts" – the committee has formulated 90 concrete recommendations[4] with respect to direct management (chapter 2), shared management (chapter 3), the control environment (chapter 4), fighting fraud and corruption (chapter 5),[5] matters relating to staff (chapter 6), and on the duty of "integrity, responsibility and accountability in European Political and Administrative Life" (chapter 7).

In the observations that follow, only the subjects treated in the last chapter of the second report, in conjunction with the considerations in the first report on standards of proper behaviour (points 1.5.1–1.5.4) and on the issue of responsibility (points 1.6.1–1.6.2 and 9.4.24 and 9.4.25), will be (briefly) touched on.

2. Chapter 7 of the second report tries to analyse the issues of responsibility and accountability by focusing on three subjects: (i) integrity and conduct in European public life assessing, with the help of the "Principles for managing in the Public Service" adopted by the Council of the OECD on 23 April 1998, the codes of conduct for members of the Commission, as prepared by the outgoing Commission, and rules of conduct for officials of the Commission (on, among other points, openness v. secretiveness and on whistle-blowing); (ii) relations between commissioners, departments and cabinets, dealing *inter alia* with the distinction between formulating policy and implementing policy, and, in that context, with collective responsibility in practice; (iii) accountability and political responsibility of the Commission in relation to the European Parliament and in relation to the Council.

In its first report, the committee emphasized that the responsibility of Commissioners that it was dealing with, concerns "ethical responsibility, that is responsibility for not behaving in accordance with proper standards in public life . . . Such responsibility must be distinguished from the political responsibility dealt with in Article 144 ([now 201] of the EC Treaty, which is to be determined by the European Parliament, and from the disciplinary responsibility of individual Commissioners dealt with in Article 160 [now 216] of the EC Treaty, which is to be determined by the Court of Justice,

4. See pp. 4–26 of Volume 1 of the second report.

5. The chapter recommends a three-stage introduction of a new legal framework for the prosecution and punishment of criminal offences affecting the financial interests of the European Communities, comprising in the last stage (to be agreed at the next IGC) the creation of a single indivisible European Prosecution Office (as also proposed in the *Corpus Juris* prepared by a study group under Prof. M. Delmas-Marty) in order to create the single "area of freedom, security and justice" foreseen by Art. 29 TEU.

on application of the Council or the Commission" (at point 1.6.2 of the first report).

Disciplinary responsibility is one aspect of *legal* responsibility, that is responsibility determined by a court of law on the basis of binding legal rules. Other aspects of legal responsibility are obviously criminal responsibility which, in the EU, is a matter for the national criminal courts to determine and civil (non-contractual) liability, dealt with in Article 288(2) (ex 215(2)) EC.[6] *Political* responsibility is about responsibility to be determined by political organs, thus for members of the EU Commission by the Parliament and the President of the Commission. They are expected to do that on the basis of (ethical) rules of conduct on proper behaviour in public life which are not necessarily legally binding, but are regarded by the organ determining political responsibility as deserving the imposition of a political sanction. One set of rules of conduct to be observed by the holders of public office, *in casu* the members of the Commission, relates to the duty of transparancy towards the citizens in general and to the duty of accountability towards the directly elected Parliament, i.e. the duty for commissioners to be open towards Parliament "regarding policies, decisions and actions of [themselves and] their departments, and to refuse information only, and exceptionally, when disclosure is definitely not in the public interest . . . It also implies that the policies, decisions or actions are explained, motivated and argued before the Parliament", if necessary through officials acting under the direction and political responsibility of "their" commissioner (point 7.14.5 of the second report).

Ethical responsibility, then, is concerned with the rules of good behaviour in public life. As said, those rules are not laid down in legally binding rules, although the latter may often be the expression of the former and may also contain legal notions with an open texture which, if need be, will be fleshed out with the help of ethical rules. Such ethical rules will often be embodied in codes of conduct, preferably prepared by an outside organism, such as the Principles adopted by the OECD Council (referred to above), or the Seven principles of public life set out by the UK Nolan (now Neill) Committee, to which the first report (at 1.5.4) and the second report (at 7.4.1) refer. Such codes of conduct are designed to provide an ethical reference point for officials and holders of a public mandate. In its second report, the committee recommends setting up, by interinstitutional agreement, a committee of Standards of Public Life for the EU. This would prepare, and supervise,

6. That Article deals with the non-contractual liability of Community institutions and their servants. It provides in its 3rd para that the personal liability of *servants* towards the Community shall be governed by the provisions laid down in Staff regulations on conditions of employment. Nothing is said therein about the personal liability of *members* of the Institutions, such as the members of the Commission.

general standards applicable to all members, officials and servants of the Community institutions and bodies, whilst *specific* codes of conduct would then be drawn up by each institution concerned, complementarily with the general standards (at points 7.7.1–7.7.5 of the second report). Such general standards should therefore also be applicable to members, officials and servants of the Parliament. For, indeed, "in order for Parliament to exercise (its) role, it should apply the same high standards to itself that it expects of those over whom it exercises supervision" (at point 7.14.17).

3. The relation between ethical responsibility, as laid down for instance in codes of conduct containing standards for public life, and political responsibility, as determined by political bodies, is obviously very close. That is so, because the proper behaviour of holders of high offices, in particular, is not regulated, at least not in the first place, by legal rules; therefore the political bodies which are to judge the behaviour of holders of public mandate must resort to written or unwritten rules that are regarded to be the benchmark of proper conduct in public life.

Such standards of public life turn around the concepts of integrity and discretion, independence, openness and accountability, good management and leadership (cf. point 1.5.4 of the first report). Whereas the first two relate to personal behaviour, the next three relate to functional behaviour and the last two to managerial behaviour. With regard to members of the Commission, some of these concepts are set out in Article 213 (ex 157) EC, where it is stated that: "The members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instruction from any government or from any other body" and further that they will behave, also after their term of office, "with integrity and discretion" (Art. 213(2)).

An issue which has proven to be a delicate one for a great number of members of the former Commission is that the committee has considered that the responsibility of commissioners will not only be engaged on the basis of their own personal, functional or managerial conduct, but that their responsibility may also be engaged *collectively* in connection with decisions taken by the Commission as a body, or where the Commission as a whole fails to react to mismanagement on the part of a colleague of which it is aware, or reasonably could have been aware (point 7.10.1 of the second report). And, indeed, in its first report the committee had identified some instances where the Commission as a body had omitted to take appropriate action in the face of failed management on the part of one commissioner, and of which the Commission as a body was informed. In its second report, the committee recommended that such collective responsibility should be better defined,

and it gave indications as to how, in its view, this should operate in practice (point 7.10.2). In this context, recommendations are formulated regarding the role of cabinets (point 7.12), which should be no other than emanations of the commissioner, and act under his/her explicit instructions (point 7.12.1).

4. With regard to the *political* responsibility of commissioners, individually or collectively, the committee's second report identified three problem areas: (i) the extent of political responsibility; (ii) the nature of the political consequences, or sanctions, to be imposed, individually or collectively; and (iii) the political organ called upon to determine the responsibility, and to impose the sanction (point 7.14.15 of the second report).

In respect of the first issue the committee expressed the opinion that the political responsibility of commissioners must cover the whole range of competences (and activities) for which they are responsible (including "outsourced" activities, an instrument which should be used more cautiously in the future: see chapter 2, at 2.3 of the second report) and must relate namely to "their own personal, managerial and operational shortcomings in the exercise of their high office as well as important shortcomings in the functioning of their departments, even when the blame for these cannot be laid upon them personally" (at point 7.14.9). As to the two other issues regarding the enforcement of political responsibility, two distinct levels were distinguished: *first*, the collective responsibility of the Commission, under its President, which is a matter for the Parliament to decide in accordance with the current Treaty provisions, i.e. Article 201 (ex 144) EC granting the right to Parliament to adopt a motion of censure, in which case the Commission must resign as a body; and *second*, the individual responsibility of commissioners which should be enforced through a significant strengthening of the hand of the Commission President (point 7.14.26). In that regard, the President should have a constitutionally free hand to dismiss or reshuffle the members of the Commission: "The exact nature of the action would be for him/her to decide. It cannot be excluded that the Parliament may itself express views on the suitability or otherwise of certain individuals to exercise a political mandate in the Commission, but it must remain for the President alone to establish what, if any, action should be taken in respect of that individual . . . He/she will be answerable to the Parliament for any such action (or inaction)" (ibid.).

More specifically in respect of *accountability*, the committee recommends "that the new Commission . . . give(s) the widest interpretation possible to its duty of accountability towards Parliament and that any member of the Commission who knowingly misleads Parliament, or omits to correct at the earliest opportunity any inadvertent error in information given to Parliament, will be expected to offer his/her resignation" (point 7.14.14).

5. Let me, at the end of this brief overview, formulate some observations by way of conclusion. First, the responsibility which the committee found in examining a limited number of files should not be seen as an indication that fraud, mismanagement and nepotism are undermining the work of the Commission. Actually, no fraud was discovered on the part of Commissioners and only one straightforward case of nepotism was established. Mismanagement was found in some instances; mainly, however, in one file, where it was also found that the Commission as a body bore responsibility as of a certain moment in time, and that Parliament had been misled when it had to decide on the successor programme. Second, although the committee noticed in general a lack of openness, and also a lack of shared responsibility for matters outside one's own sphere of competence, the committee was nevertheless able, in its contacts with the administration in view of preparing its second report, to appreciate "the abilities of many civil servants, their spirit of public service and their sincere desire to improve the system" (point 8.4 of the second report). Third, whilst it is certain that the European Parliament has been strengthened as a result of the crisis,[7] it is to be hoped that the Commission as an institution may grow in moral strength, provided that the new Commission as a body pursues a new style of openness and a strong feeling for collective responsibility.

One last comment. It will be obvious that many of the issues touched upon in the first and the second report, some of which have been mentioned herein, raise constitutional questions which the legal orders of the Member States have in common. This is therefore an area where comparative research would be particularly helpful in uncovering common principles, which would in turn help in designing constitutional rules for the European Union – with account being taken, of course, of the peculiarities of the Union's legal order. The committee has tried as far as possible to base its assessments on such common principles, both in the first and (especially) the second report.

W. van Gerven

7. For an overview of the European Parliament's increased competences after the Amsterdam Treaty, see the *Editorial comments* in the June 1999 issue of this *Review*, at 515–520.