EDITORIAL COMMENTS

It is reassuring that the drive towards European integration did not come to a complete halt on January 14th of this year, and that there are to be regular talks between the Six and Britain within the framework of the Western European Union Ministerial Council. This concession, made somewhat grudgingly, indicates that there has inevitably been some degree of unfreezing of the situation. Although direct talks between the permanent representatives of the Six at Brussels with the British Ambassador would have been regarded as preferable in many quarters, it must be recognised that the British position is a somewhat anomalous one. Britain has applied to join the Community, but the negotiations have been adjourned, and it was understandable that she should not thereby be entitled to a position of especial favour.

The Council of Ministers at their July meeting proposed, and the British government have accepted, that there should be discussions at ministerial level within the Council of W.E.U. to discuss matters of common interest in regard to the future of Europe. It has been agreed that when economic questions are discussed the representatives from the E.E.C. Commission shall be present. Links at present exist of a formal nature between the British government and the High Authority and between the British government and the Euratom Commission. It is therefore satisfactory that this brings them into contact on an official basis with the Commission of the E.E.C.

The meetings in W.E.U. are to take place every three months, and there is to be no veto on matters to be put on the agenda. Procedure plays as important a part in international relations, as it has done in forming the substantive laws of our countries. It is impossible to prevent disputes arising, even between friends. The important thing is that when differences arise they may be dealt with in accordance with a procedure which has been previously established and accepted. It may be that conversations alone in these matters will not go far enough, but at any rate there will be some forum where problems may be discussed. The underlying purpose of these discussions, although not put forward officially, is to prevent any widening of the gap between the Community and Britain, and to keep open the way for the possibility of Britain's later entry into the Community.

Agriculture forms one of the major problems in this respect. For this reason the first contribution in this issue is devoted to a study of the E.E.C. legislation in this field. It has now been shown for the third time that agricultural products play an important role in the development of the trade in goods within the Community

and with third countries. The first time was at the occasion of the decision of May 12th, 1960 which accelerated the tempo of the Treaty. During the preparation of this decision agricultural products formed the most difficult hurdle to overcome. The second occasion was at the end of 1961 when a unanimous decision had to be taken on the move to the second stage of the transitional period. Lengthy nightly meetings of the Council of Ministers were required before the regulations which are now discussed by Mr. Olmi could be enacted. And now again, halfway through the second stage of the transitional period, agricultural products are of great topical interest. This time the issue is not the formal system of procedure which is laid down in the regulations. This system regulates which decisions are required for the free movement of goods in this sector and the procedure for arriving at them. This time the contents of these decisions is at stake. The future trade in these products with third countries depends on the eventual price-level in the Common Market and the price-level for cereals is here the key position.

Whether the E.E.C. will be inward looking or outward looking and whether it will offer a solution for the trade problems with the underdeveloped countries depends to a large extent on the decisions concerning the price-level of cereals. The Community cannot take a definite stand in the negotiations within the frame-work of G.A.T.T. as long as these decisions have not been taken. These negotiations are of prime importance for the future of world trade and it is to be hoped that some better feelings will be positively expressed in these negotiations.

As a result of the system of levies on various agricultural products within the E.E.C. there has been much ado recently about the restrictions on the importation of refrigerated chickens from the U.S.A. The problem is, that these imports—especially to the Federal Republic of Germany—have increased greatly since the entry into force of the Treaty. The measures whereby levies are imposed, however, are applied in accordance with the schedule which has been laid down in the agricultural regulations. This provides for levies to be imposed on agricultural products from third countries where the world market price is lower than the "sluice-gate-price" of the Community for the same products. Where the world market price increased by these levies is still lower than the "sluice-gate-price", an "extra amount" may be imposed. This system has obviously not taken into account the recently increased interest of exporters from third countries to the member States of the Common Market. It is therefore logical for the exporters to the E.E.C. and their representatives to object to this "extra-amount" and insist on special terms for their exports. On the other hand it is equally understandable that the E.E.C. prefers to find a solution *ad hoc* for this problem, and that it objects

to this application of the procedure laid down in the regulations as being considered as proof of the closed and protectionist character of the Community. It cannot be denied that the Council of Ministers would have strengthened the E.E.C. position considerably if it had accepted the Commission's proposal for a temporary solution of the dispute during its meeting on July 30, 1963.

In the meantime the poultry-affair shows the extent to which the accent has shifted from the internal relations within the Six to the external relations of the Community with third countries. In this connection it should be noted that the decisions on the common commercial policy pursuant to Article 114 of the Treaty must be taken with unanimity prior to January 1, 1966. As long as there is agreement as to the objectives and the substance of the decisions which have to be taken, the unanimity rule guarantees that certain objections which must be respected are not swept aside too easily. If such an understanding on objectives and substance is lacking, the rule of unanimity may become an instrument of veto: the means whereby one member State can fruitfully resist the realisation of a Community objective which is desired by all the others. The E.E.C. Treaty contains several checks against such development. The most important has been referred to above: the fact that the rule of unanimity is greatly restricted from the beginning of the third stage. The controlling function of the European Parliament constitutes another counter balance. Recently the European Parliament, in its meeting of June 27, 1963 on the occasion of a discussion of the Furler report[1] has insisted in a resolution "to be kept abreast of the development of external relations more timely and more regularly than before". The publicity of parliamentary discussions gives a weapon as well to the European Commission against unilateral pressure of certain interest groups or of government-representatives. The Furler report insists on greater publicity in another respect as well. Where the European Parliament is consulted in connection with draft regulations, the text of the draft is usually only published after the parliamentary advice (i.c. the report of the competent parliamentary commission) has been published. As a result of this procedure public opinion and interested parties are not heard during the parliamentary debate.

This objection carries even more weight when the Treaty does not prescribe consultation with the European Parliament or where one of the executive Commissions may determine a regulation pursuant to authorisation by the Council of Ministers. A clear example of the latter case is the procedural regulation for the hearings before the Commission under Regulation No. 17. In view of the great importance

1. *The tasks and powers of the European Parliament*, E P doc. 1963-1964 no. 31, Political Commission.

which industry attaches to these procedural provisions, it is quite understandable that in this case Parliament expressed the desire in its resolution of June 27, 1963, "to be consulted on regulations enacted by the executive Commissions pursuant to authorisation of the Council of Ministers, when existing law is thereby extended or modified". In so far as is known such consultation has not taken place with respect to the procedural regulation.

In anticipation of this regulation[2], the Commission has already published two applications for negative clearance which are no doubt intended to serve as the first test cases.[3] The first case concerns a French company which has entered into an agreement with a Swiss firm granting it the sole selling agency of certain of its products in Switzerland. The Swiss firm undertook not to sell any competing products, and the French company entered into the reciprocal obligation not to permit any of its products to be sold by any other person on the concessionaire's territory. The second case concerns a French company which has granted to an English company in respect of certain territory outside the Community the right to manufacture under licence and sell certain of their hair preparations. There is an agreement not to make or sell any other similar products for a period of five years, and a restriction in respect of the use of trade marks. Both applicants contend that these agreements respectively do not have the object or result of preventing, restricting or distorting competition within the Common Market and that they are not liable to affect trade between the member States. Such material should provide interesting results from the Commission, and possibly the Court of Justice.

Ofmajor administrative importance might be the question put before the Council to postpone the date of January 1, 1964 in Article 7 of Regulation No. 17 This question concerns the time-limit within which certain agreements or decisions pursuant to Article 85 (1) must be notified to the Commission in case of application for an exemption of the prohibition in Article 85 (1) in respect of the past. It would not be unreasonable to avoid a second flood of notifications towards the end of 1963.

The British government has quite clearly indicated the importance it attaches to trading relations with the Community by its early application to become a member of the European Patent Convention. It has done so now in order that it may become entitled to a voice in the final formulation of the Convention. It has not concealed its disagreement with some of the provisions of the existing Draft. It has published the views of the expert Committee presided over by

2. *Official Gazette*, August 20, 1963.
3. *Official Gazette*, July 4, 1963.

Geoffrey Tookey, Q.C., which has stated that it would like to see introduced into the Convention the right of any State to use inventions in the public interest or for defence. This committee also considers that any person should have the right of applying for a European Patent, regardless of his nationality. It would like to see established branch offices of the European Patent Office where national patent offices now exist. It also feels that the question of patent infringement and the validity of the patent should be determined by the same tribunal. The Draft Convention represents a great technical advance towards commercial unity and it is to be hoped that the British, and any others that so wish will be admitted to the negotiations for the final Convention.

Although decisions by national Courts applying Community law will to an increasing extent influence the law of the Communities, the judgments of the Court of Justice of the European Community remain for the time being the most important source of the case law of the Communities. Shortly after the section Case Law in this issue was concluded four judgments were rendered by the Court which deserve attention. In its judgment of July 4, 1963 (case no. 24/62) the Court annulled the decision of the European Commission whereby it had granted the Federal Republic of Germany only a small tariff quota on wine, destined for French brandy (Brennwein). This case concerned the application of Article 25, paragraph 3 of the Treaty. The Federal Republic put forward the argument that the Commission was bound to permit the tariff quota which was requested, as soon as it had determined that no serious disturbance in the market of the product concerned would result therefrom. Pursuant to this Article read in conjunction with the general Articles 2, 3, 9 and 29, the Court held that the Commission had a greater discretionary power. On the other hand it demanded more careful reasons for the refusal than those which the Commission thought sufficient. Apparently the Court attaches much importance to Article 190 of the Treaty, as is clear from the following observation from its judgment: "By obliging the Commission to give reasons for its decisions, Article 190 not merely imposes a formal duty, but serves to give to the parties the opportunity to establish their rights, to the Court the means to assert its control, and to the member States, as well as to every interested citizen, information as to the conditions under which the Commission applied the Treaty."

In the future it is very likely that private persons as well will invoke this very general statement on Article 190. In its judgment of July 15, 1963 *(Federal Republic of Germany* v. *Commission)* in which the German government requested the annulment of a refusal by the Commission to grant a special tariff quota for oranges (case no. 34/62), the Court

gave a further explanation of its extensive interpretation of Article 25, paragraph 3 on a specific point (the meaning of "products concerned").

The reasons given for decisions play an equally important role where the Court controls the application of Article 226 of the Treaty by the Commission. On its complaint against the authority granted by the Commission to the French government to take protective measures against the import of cheap refrigerators from Italy (case no. 13/63), the Italian government had complained *inter alia* that the decision was not sufficiently reasoned. The Commission should not have limited itself to comparing the prices for the wholesale trade, but should have compared as well the prices charged to the consumers. The Court refused to admit this complaint in its judgment of July 17th, 1963: "It was necessary to compare the prices between the French product and the Italian product on the arrival of the latter on French territory, *i.e.*, at the time when these two products came into the same market at the same commercial stage." Again, this consideration is of general importance to all whose interests may be affected by application of Article 226.

The last judgment of this group deals with the important question to what extent private enterprises may invoke the jurisdiction of the Court against a refusal of the Commission to apply escape clauses such as under Articles 226 or 25, paragraph 3 with respect to a member State. The case concerned the complaint by Plaumann and Co. from Hamburg against the refusal by the Commission to grant a temporary suspension to the Federal Republic on the import duties on tangerines and fresh clementines (case no. 25/62). The Court, in its judgment of July 15th, 1963, first examined the question whether Article 173, paragraph 2 of the Treaty admitted this appeal. It refused to admit the claim of the Commission that an appeal by a private person against a decision which is not directed to him is only admissible where such decision is directed to another private person. The Commission's thesis was supported by the words "directed to another person" in Article 173, paragraph 2. The Court, however, was of the opinion that this interpretation was too restricted in scope: "The wording and the grammatical construction of the aforesaid provision require the widest possible interpretation, . . . the provisions of the Treaty concerning the rights of action of parties may not be restrictively interpreted; . . . the silence of the Treaty does not entitle a limitation in this respect to be presumed." Equally untenable was the statement of the Commission, that the decision, although in the form of a decision, was nevertheless a measure of a general nature according to its tenor. The Court on the other hand, pointed to Articles 189 and 191 of the Treaty. The attacked measure is a decision "if the act in question concerns certain defined citizens."

Nevertheless the appeal was not deemed to be admissible since the

decision was not of individual concern to the plaintiff- "and is thus not of a kind to bring him in respect of the decision challenged into a category analogous to that of an addressee." In this statement the Court has formulated a criterion which may prove in the future to be of great importance in respect to the admissibility of individual appeals.