

EDITORIAL COMMENTS

During the whole year of 1963 serious problems were still outstanding in the agricultural field. Although market organisations had already been established for cereals, fruit and vegetables, wine, pig-meat, eggs and poultry-meat at the beginning of 1962, Community regulations still had to be adopted in a number of important areas. At its meeting of May 9, 1963 the Council established a programme which it agreed to execute before January 1, 1964. Problems to be settled by the end of the year included the adoption of regulations for the organisation of the markets in rice, dairy products and beef and a mandate for the E.E.C. Commission in preparation for the forthcoming round of trade-negotiations in G.A.T.T. The interests of the member States in these matters were and are, however, divided. Thus a package-deal was required containing compromises on these issues in order to assure a relatively well-balanced attitude of the Community towards the outside world. In this connection it should be noted that the decisions on the agricultural regulations and the decision on the mandate for the E.E.C. Commission for the trade-negotiations are of a different nature. Whereas the former would constitute final decisions in the sense that they would establish market organisations for the products mentioned, the latter would still have to be affirmed by Council approval of the definitive outcome of the negotiations.

Although the Council decision of May 1963 already mentioned December 31, 1963, the French government persisted in stressing publicly the need for decisions on agricultural matters before the end of the year. The somewhat strange method of diplomacy between the governments of the Six, introduced by the press conference of General de Gaulle on January 14, 1963, was again employed by the French government when it announced that without a settlement of the agricultural problems the continuation after January 1, 1964 of the Community would serve no useful purpose.

On December 23, 1963 the Council of Ministers reached agreement on some major issues. In the field of agriculture the principles of the three regulations for establishing a single market for rice, dairy-products and beef were agreed upon, although the exact texts of these regulations have not yet been determined. The national systems of import duties and levies are thereby replaced by a uniform system of levies throughout the Community. Decisions have been taken as well on the attitude of the Community towards the negotiations in the Kennedy-round. With respect to industrial products the Commission's directive has been spelled out in some detail, especially as to what should be considered as "tariff-disparities". Also the principle of a 50 per cent linear tariff reduction on a majority of items has been

accepted. The directive is less specific on agricultural products. In fact it is limited to a declaration of intention by the Council that the future agricultural prices of the Community shall be fixed not only in accordance with the objectives of a common agricultural policy of Article 39 of the Treaty, but also bearing in mind the harmonious development of world trade (Article 110) and that the products of third countries should have a reasonable access to the Common Market.

No agreement has been reached on the Commission's proposal for single price-levels for wheat and other cereals, which must be regarded as a very ambitious step towards a common agricultural policy. Apart from the technical advantages and disadvantages which are currently discussed, two points deserve special attention. The first is the crucial role of the price-level for cereals in the determination of the general level of trade in all agricultural products with third countries. For this reason a decision on this price-level is essential if the Community is to make a constructive contribution to the forthcoming G.A.T.T. negotiations. The second deals with the growth of production inside the Community. As long as divergent price-levels for cereals may be maintained between the member countries, production of other products—the price of which is to a large extent determined by the price of cereals—is artificially stimulated. Egg production in Germany is an eloquent example. Egg imports from third countries fell by 48 per cent in 1962/1963 as compared with the previous year, and the corresponding figure in respect of imports from member States was 20 per cent. Thus the expansion of industries on the differential price-levels for basic materials may serve to endanger the prospects of establishing a unified market.

Apart from the agricultural regulations and the Commission's mandate for the Kennedy-round, the Council had to deal with vital aspects of the internal structure of the Communities.

The first legal steps in the agricultural sector that were taken in December, 1961, resulted in the organisation of markets being established in such a way as to confer substantial executive powers upon the Commission. The same system has been adopted in the regulations for the three remaining products. These executive powers will control not only internal and external Community trade, but also the substitution of national subsidies by subsidies from Community sources. Two draft regulations were presented to the Council to implement the decision to establish the European Orientation and Agricultural Guarantee Fund. This decision was already taken in Regulation No. 25, which was referred to by M. Olmi in his article in this Review, 1 C.M.L.Rev. 1963-4, p. 119. The new drafts emphasise the importance of this Fund. The first prescribes the objectives for which alloca-

tions from the Fund may be made (*Vide* European Parliament 1963-1964, Doc. 81. Rapporteur H. Vredeling). The second contains the administrative and budgetary rules for the Fund, based partly on Regulation No. 25 and partly on Article 209 of the Treaty (*Vide* E. P. 1963-1964, Doc. 82. Rapporteur H. Aigner).

As a result of these proposals, when implemented, the Commission will in the near future be provided with very substantial finances specifically ear-marked for the realisation of common agricultural aims. Such contributions come theoretically from sources which went hitherto to the member States as part of their incomes, and which were under the budgetary control of the national Parliaments. The Council of Ministers is now facing a vital issue on the point of democratic control. The European Parliament in its advisory opinion on these proposals of October 18, 1963 (O.G. pp. 2640/63 and 2649/63) incorporated an amendment requiring the Council to defer in respect of such budgeting to the wishes of the Parliament. The Council would only be at liberty to take a decision contrary to the recommendations of the Parliament by a unanimous vote. The Council postponed its decision on this point. This problem which contains delicate constitutional questions will be treated at the Council meeting of February 1964.

Meanwhile there are signs that the emotions aroused by the poultry question (the legal aspect of which is dealt with in this issue by Mr. Daleiden) have been calmed and some stabilisation of the situation is becoming apparent. After the adjudication made by the G.A.T.T. panel shortly before December 5, 1963, that the value of United States trade affected by the restrictions on poultry amounted to 26 m. dollars, the U.S. Special Representative for trade negotiations issued the announcement that the U.S. would suspend tariff concessions on a corresponding value of imports from the E.E.C.

The articles affected by this U.S. measure are brandy, motor trucks, dextrine (including soluble or chemically treated starches) and potato starch. The new rates of duty which come into effect on January 7, 1964, will apply to imports from any source although the original concession had been negotiated only with the member States of the Community. The Community share of these imports amounts to some 94 per cent. It was emphasised, however, that these concessions have not been withdrawn, but only suspended. They can therefore be reinstated if there is agreement to restore reasonable access for U.S. poultry to Community countries.

In the field of restrictive trade practices it is the Commission that is charged by Regulation No. 17 to take the decisions enforcing Articles 85 and 86 of the Treaty. The leading cases are to be chosen from the

35,000 agreements which are now notified under Articles 4 and 5 of Regulation No. 17. One would expect that in an important case the Commission take a formal decision and subsequently publish its opinion. It could omit from the publication all particularities of the individual agreement which did not belong to the principles of the decision, but only by publication could it ensure that all those concerned could take note of the elements of general interest involved. The same considerations apply when the Commission does not take a decision, but makes a recommendation for the ending of an infringement under Article 3 (3) of Regulation No. 17. Such a recommendation is not a binding act but it enables the parties to an agreement to take into account the points of view of the Commission and to modify their agreement accordingly. It goes almost without saying, that in the present uncertain situation with regard to the application of Articles 85 and 86, these points of view of the Commission are as important as a decision to all those who are interested. The question of publication, however, is much more delicate in the case of a recommendation than in the case of a decision. The latter is binding and produces its legal effect as soon as it reaches the addressee. The former is not binding and leaves the addressee complete freedom to accept or to reject it. Publication might easily be construed as a means of pressure on the parties to the agreement to follow the opinions expressed in the publication. From an announcement in the German *Frankfurter Allgemeine* of November 23, 1963, it may be surmised that the Commission did in fact issue a recommendation under Article 3 (3) of Regulation No. 17 with regard to an exclusive dealing agreement between a number of manufacturers in several member States and certain organisations of retailers in the Community. The recommendation apparently contained two objections against the agreement: namely, the obligation of the recognized retailers to buy the goods concerned only from the manufacturers, who were party to the agreement; and the obligation of the contracting manufacturers to deliver the same articles only to the recognized retailers.

Although the real significance of the objections can only be understood with full knowledge of all the aspects of the specific case and all the considerations brought forward by the parties and by the Commission, it is nevertheless important for all who are interested in the anti-trust provisions of the Community to take note of the emphasis which is placed by the Commission on the elimination of these specific restrictions on competition.

National administrative and judicial decisions contribute also to establish more detailed views with regard to the application of the rules of competition. With the decision of the Court of Justice of the European Communities in the Bosch Case (decision of April 6, 1962,

Case no. 13/61 reported in (1962) Recueil, Vol. VIII, 105) it was laid down that agreements which already existed on March 13, 1962 and which had been notified under Article 5 (1), were to be considered as "provisionally valid". The significance of this expression, however, is not very clear, in particular with respect to the question as to which authority is empowered to put an end to the provisional situation. In France this question seems to be answered in general in favour of the Commission, to the exclusion of the national judicial and administrative authorities. In Germany the answer has been to allow intervention by a national authority as well. The Bundeskartellamt considered the provisional validity as a "*schwebende Unwirksamkeit*"; and, consequently, it held an action before a German Court based on the invalidity of the agreement in question to be possible. In any case, it was of the opinion that the Bundesgerichtshof should ask a preliminary ruling of the Court of Justice of the European Communities to clarify the meaning of the expression used in the Bosch case.

Recently the decision of the Bundesgerichtshof of June 14, 1963 in the Electric Razors ("*Trockenrasierer*") case was published, and it became known that the Bundesgerichtshof regarded the expression "provisionally valid" as absolutely clear. It rejected the Bundeskartellamt's view of the need of a preliminary ruling on the interpretation of this expression. The provisional validity of the plaintiff's re-export prohibition was held to be applicable in this sense, that the plaintiff might invoke its validity, whilst the defendant could not rely on its invalidity. The question if and to what extent a decision of the Commission could modify the situation retroactively has not been answered by the Bundesgerichtshof in this case. It was intentionally left aside. Nevertheless the importance of the decision with respect to the application by national courts of the Community rules on competition will prove to be considerable. The practical advantage of notification under Article 5 of Regulation No. 17 has been thus more clearly demonstrated than by the European Court so far could have been done.