

EDITORIAL COMMENTS

On January 17th and 18th the French showed their cards. Or did they? The greatest shock for their partners must have been the moment when M. Couve, after having entertained his colleagues with the impossibilities of majority rule and the ten errors of the Commission, returned, at the end of the two days, with his calendar: it contained even more, as yet unannounced, demands, notably implying that he does not want to meet the Commission again in its present composition. In other words: the French "agree" to return to the Council as soon as its partners have given in to its wishes concerning the composition of a new Commission. The calendar was an unmistakable announcement that the Paris Government had not yet "*vidé son sac*", but thinks itself at liberty to return any time with new requirements. All the efforts not to treat the French like the returning prodigal had succeeded only too well: their attitude was more like that of the righteous innocent, come back to demand a reckoning from his oppressors, and prepared if necessary to lay down the law.

Should this attitude not be rebuffed, then the future of the Communities will be irreparably impaired. The Luxembourg talks are only justified if they provide an elementary basis for resuming the normal and legitimate collaboration between the Six. A continuance of the threat of Gallic explosions of ill humour would stifle all initiative and throttle the last remaining enthusiasm for the common goals. An ordinary international organisation, which remains at the mercy of any of its members, would hardly be capable of running and engineering the common market up to the standard that is the common usage of public administrations. The Luxembourg round must be concluded in such a way that all, even the French themselves, are convinced that the first "happening" has also been the last one for the time being, and that the Communities will not be regaled with a treat of "fireworks every month".

At the time this comment is published, the outcome of the prolongation on January 28th and 29th will be known (provided there are no further complications). It is to be hoped that it will constitute a clear indication, whether the common market is to go forward in the right direction or has to cease in its present form.

The two principal themes of the debate are indeed essential to the success of the common market.

It was known that Paris has its trepidations concerning majority rule and that up to a certain point these are shared by its partners. The provisions of Article 148 of the Treaty are of enormous importance because they entail the end of national sovereignty in the domain of the Common Market. No government conscious of its social and economic responsibilities can lightly accept those implications and no member of the Council should lightly call for application of that article to circumvent a minority.

But that is not in any case the purpose of this article. It is not meant to institute a regime, under which those who have the votes at any given time simply rule the Community. It has already been observed that the provision, to the effect that proposals of the Commission may be amended only by unanimous Council vote, ensures that the majority can only succeed where it finds the "defensor communitalis" on its side. But there is more yet.

Fundamentally the provisions about majority voting constitute the "deterrent" that guarantees a smooth working of the common machine. Already during the second stage of the transitional period governments arrived at agreement on delicate subjects because they were afraid of the implications of the third stage and wanted to profit from the unanimity rule, then prevailing, to get as many of their wishes as possible accepted and incorporated into the decisions. Ideally the majority rule should never be applied, but should inspire such a fear of being outvoted, as to make all the members of the Council endeavour to make themselves understood and to understand their partners even better than they have done up till now. In the light of these considerations, the Five were right in telling M. Couve that there is little risk of any hard-headed voting in the foreseeable future. It was easy for them to offer a common declaration, that the Council should always strive for unanimity. But that seems to be as far as they can possibly go. If they accepted the proposal that unanimity would be required in every case where a member declared that his vital interests were involved, they would have dismantled the "deterrent": Article 148 would have lost its usefulness precisely for those who wish to obtain as much unanimity as possible.

Such a proposal would also risk rendering the Council incapable of the resolution and the boldness it needs to perform adequately its functions under the Treaty. What is at the moment happening with the Kennedy Round is a demonstration *in se* of the dangers of the unanimity rule. It is not by accident that the Dutch find themselves among the most tenacious defenders of Article 148. In their own history they find the example of the Dutch Republic that was for more than two centuries fettered into inertia by an unanimity rule applying both in the Estates General and the seven provincial Estates. And the Germans may look back on similar experiences that have rendered their country for long periods an ineffective, irresolute and therefore uninteresting partner for others.

The first theme is more or less tied to the second one, the role of the Commission. If the majority rule is to be maintained, it is understandable that the governments want to protect themselves against surprises from the Commission. When the French asked for a better consultation of member-governments before the Commission presents its proposals, they found an open ear among their partners. While all technical details are subjected to endless consultation proceedings, the political content of the proposals is sometimes less carefully prepared. As long as the consultation remains no

more than a consultation, it is meet that under a majority rule the proposals should previously be discussed as carefully as possible and that the members of the Council should not be appraised of them by the press. But the more concessions are made on the application of Article 148, the less a cumbrous consultation procedure seems useful or necessary.

The decalogue of M. Couve began by noting that the collaboration of Council and Commission is the "*élément moteur*" of the Community. That nobody will deny, but it must be seen that when this truth is taken to imply the necessity for a novel arrangement of the relations with third countries, a more elaborate consultation, and further control of the finances and information activities of the Commission, the practical consequence may well be a supplanting of the Commission by the Committee of Permanent Representatives. In themselves these officials are no less honorable and capable than the members of the Commission, but they are bound by the instruction of their governments and they may be revoked "*ad nutum*". This means that the Committee will be even less able to adopt a common position than the Council itself, where the members as a rule have a larger discretion. The Commission would then find itself under a tutelage that never can be complete, because of the mass of work, but that will be all the more arbitrary for that very reason.

The complaints that the powers delegated to the Commission have not been restricted enough and that some of the "directives" seem to have infringed the Treaty limits imposed on this genus of Community acts, address themselves more to the Council itself than to the Commission. The five should be circumspect regarding any promises to be made on these points. If in the past some errors have been committed, that is good cause to study the proposals even better than has been done in the past—and, incidentally, several deviations, for example in the field of freedom of establishment, have been made precisely to satisfy French desires. There is no reason to adopt new rules, however, whereby the Council would tie its own hands. The Communities advance by trial and error and from time to time those errors are revealed. But it should be left at that.

We may conclude, then, that there is reason enough for serious consideration of the French complaints. They do indeed merit a detailed discussion. But in the meantime the French ministers should return to the Council and enable the life of the Communities to regain its impetus. If they sincerely want the Communities to flourish, it is the only possible course. If they are seeking a different destination, however, then it would be better for them to step out than to continue playing with the emergency brake.

The Community crisis has been felt throughout the whole of Europe, and not least among the E.F.T.A. countries. The European Free Trade Association has since its inception been in somewhat of a dilemma. Some of

its members, and in particular Britain, Denmark and Austria, were most interested in trade with the Community. For them E.F.T.A. was never anything other than a transitional phase on the way to an integrated Europe. Others, however, notably Sweden and Switzerland, saw E.F.T.A. as an end in itself and desired the integration of the Seven as a permanent feature. This latter could however only have a reality if the Kennedy Round series of negotiations were to produce effective results and bring the preferential groupings into a position where mutual trading becomes possible. Time, alas, is now running strongly against the G.A.T.T. negotiations as the American Trade Expansion Act will expire legally in mid-1967 and will do so effectively several months earlier. As it is unlikely that Congress will extend its time of application, the American government might find itself unable to conclude any agreement involving substantial tariff reductions.

The continuing uncertainty of the Kennedy Round has therefore helped to stimulate the integrationists in E.F.T.A. to enter into direct negotiation with the Community. At its top level meeting of the Council of Ministers in Vienna in May, 1965, it was resolved "to seek to ensure closer co-operation between E.F.T.A. and the E.E.C. and to pursue such policies as would promote to the greatest extent possible the growth of trade, the expansion of their economies, and the welfare of all the peoples of Western Europe." Such hopes as there were of bridgebuilding were abruptly shattered by the French government, and at the next Council of Ministers meeting in Copenhagen in October, 1965, a more cautious note was sounded. This meeting did however call for a "dialogue" to be started between the two trading blocs "at all possible levels", and there was mention of joint action being recommended in the field of industrial standards and patent law. On the internal front the countries of E.F.T.A. also made progress. The British surcharge, now reduced to 10 per cent. was still roundly condemned, though not with the same anger as before. Although the British government gave no assurances as to when this surcharge would be removed, there was general acceptance of the fact that it would have to end by December 31, 1966, for on that date all internal tariff barriers between the E.F.T.A. member countries must be eliminated.

With the general lowering of inter-E.F.T.A. tariff barriers some of the non-tariff obstacles have begun to appear. At the Copenhagen meeting criticism was made of the British export rebates which gave British exports preferential treatment over other countries' goods. It was proposed that this export rebate should not be given in favour of goods which receive E.F.T.A. area treatment. No final decision was taken on this, but discussions are continuing at an official level.

Progress was also made on the question of drawback, whereby the member countries are entitled to refund customs duties on goods being exported to other members which nevertheless enjoy area treatment. It was decided (by a simple majority) in the Council of Ministers that after the end of

1966 it will not be possible for E.F.T.A. exporters both to claim drawback from their own governments and to receive the benefits of duty-free entry into another tariff country. A resolution was also passed in restrictive practices and some study has been made of the problem of establishment.

The Copenhagen resolution for a dialogue with the Six was welcomed by the Five at the meeting of Western European Union held last November at The Hague. Since then Mr. Michael Stewart has come forward with a clear preference for the machinery of the E.E.C. rather than that of E.F.T.A. For these and other reasons it is satisfactory to note that the attitude of Britain, even among the leading members of its government, is noticeably changing and this fact is creating a new situation in Europe. It is not surprising that the Foreign Secretary has expressed a preference for the procedures of the E.E.C., for it is only when these have been brought into play that any advance towards European progress has ever been dramatic. It is to be emphasised that British opinion is now fully on the side of Community methods, and the British public will not assist de Gaulle in the emasculation of the Commission and the establishment of a "*Europe des patries*". It would indeed be tragic if Mr. Wilson were to succumb to the blandishments of the General and take his side against the remaining Five. As long as the Five remain firm in defence of the Community spirit Britain must do nothing to destroy it. Only if the Five judge it timely for Britain to negotiate on any modifications of the Rome Treaty should the British government agree to become involved. The signs are however that the Five are keeping their heads down while the bombardment blows over the top. Age, and also the *ballotage*, focusses attention not so much on de Gaulle as *après* de Gaulle.

The congress of the *Union internationale des avocats*, held last September at Arnhem (Holland) furnished another proof that the practical effects of the Communities make themselves increasingly felt among continental lawyers. Two of the principal subjects discussed were the mechanism of Article 177 E.E.C. and, secondly, the legal protection of private persons under the judicial system of the treaties.

The excellent reports by the *rapporteur général*, Maître Arendt from the Luxembourg bar, and the national rapporteur,¹ as well as the general discussion, demonstrated that in the E.E.C.-structure Article 177 constitutes a "*disposition charnière*". The Treaty leaves the application of various rules and of many regulations and decisions adopted by the European authorities in the hands of national administrative authorities: insofar as these rules, regulations and decisions are "self-executing", litigation on the effect of Community law will normally come up before the national (administrative) courts, on the grounds either that the national application in-

1. All rapports have been published in the July/August issues of *Sociaal Economische Wetgeving* 1965, pp. 385-516.

fringes Community law or that it is based on Community acts which are themselves invalid. In practice the national courts might very well prove to be the line-infantry in the European system of judicial review.

Although it may be doubted whether the authors of the Treaty anticipated this consequence of Article 189 E.E.C., it seems to be a logical conclusion of the Treaty provisions and the result is in more than one respect to be welcomed. The litigant—who wants to obtain his European due—is able to address himself to the usual tribunals according to well-known procedures and rulings are invested with all the authority of the established courts. In this way European law will for practical purposes be absorbed into the national legal systems and become thoroughly amalgamated with them.

It is not to be wondered that in the company of lawyers, which the Arnhem congress constitutes, this approach was cordially accepted. One might nevertheless have had a sneaking doubt whether it would have received a similar reception at, for example, *l'Union internationale des magistrats*. It would be no less than human if the national magistrates eyed the baby, which the Treaty had thus deposited on their lap, with a decided suspicion. Their docket is already overcrowded and many of them will feel themselves insufficiently informed and equipped to give the infant child the care and the interest it needs. Some who were quite content to leave its nursing to that strange and novel addition to the legal profession, the Luxembourg Court of Justice, will think themselves ill used when part of their already overmuch divided attention is claimed by arguments based on Community law; they may sometimes treat such arguments accordingly. Other judges, those, who are perhaps afraid that the European evolution could well deprive them of the most important issues and convert their courts into judicial backwaters, will probably react in the opposite direction. Even so, it will take time to familiarize the national courts with the consequences of integration and to get them to adopt the new and speedily growing body of European law as part of their own "*lex fori*".

It is of no use to weigh the advantages and disadvantages of the Treaty solution. It ought to be accepted that the integration process may revolutionize the judicial process as much as it does the public administration establishment. The only alternative would have been to concentrate all litigation concerning the application of Common Market rules by the national administrations in Luxembourg. As it will not always be easy to determine in what proposition a national administrative decision has applied or ought to have applied domestic and Community law endless jurisdictional conflicts would arise—to name only one obstacle. It is much better that the primary jurisdiction stay with the national judge, who, in so far as points of Community law are involved, can or must address himself to Luxembourg for a preliminary ruling. This, the least cumbersome solution, is in accordance with the general balance of Community and national powers—that is to say: cooperation between national and Community authorities for

the common goal, with a coordinating function allocated to the Community institution, whose predominance is predicated on the obligatory but non-enforceable loyalty of the national authorities.

The judicial implementation of the Common Market suffers from a weakness similar to that discernible in its other institutional arrangements. The division of functions between the Community Court and the municipal courts presupposes that the national judge will be sufficiently conversant with Community law to know when and what preliminary questions he should submit. If he fails to do so or if he errs in his choice as to which provisions or rules are pertinent to the case before him and refers the wrong article or regulation, the hands of the Court are more or less tied; it is thereby rendered unable to exercise its appropriate task under Article 177.

This difficulty was noted at the Arnhem congress and as remedy was suggested the introduction of an appeal to the Court of Justice against the decisions of municipal courts on the exclusive ground of non-application or wrongful application of Article 177. The remedy would certainly be effective, but it could upset the jurisdictional balance between the Community and the member States. It was rightly observed that this would constitute a decisive step in the federal direction, in however limited a respect, by making the rulings of municipal courts reviewable by the Court of Justice. It may be wondered whether this is the most propitious moment for considering such a suggestion; on the other hand, it seems desirable to study every means to make the adopted system work. For the time being the sole avenue open is to provide intensive information to the national judiciary about Community law.

The Congress section at Arnhem that studied the legal protection of private persons limited itself primarily to the effects of Article 173 E.E.C. This provision allows the member States to appeal any act of the Council and Commission other than recommendations or opinions. The right of appeal of natural and legal persons is, however, restricted to the decisions addressed to them and those, which, although promulgated as regulations or decisions addressed to another person, are of direct and individual concern to them. The Court of Justice considers this formula to be more restrictive than the formula of Article 33 E.C.S.C., which admits an appeal by enterprises against all individual decisions that concern them (Consolidated cases 16 and 17/62, *Confédération nat. des producteurs de fruits et légumes e.a. v. Conseil de la C.E.E.*, Dec. 14, 1962, *Rec. VIII*, p. 917, 1 C.M.L. Rev. 1963-4, p. 210). Signore Nicola Catalano, the *rapporteur général* of this section opposed this view in a very ably argued report² and in a sustained discussion relied upon the argument that the adjectives "directly" and "individually" in fact add nothing to the term "concerned", but

2. "Les voies de recours ouvertes aux personnes physiques, ou morales contre les actes non réglementaires de la Commission C.E.E.", *Sociaal Economische Wetgeving*, Sept. 1965, pp. 525-566.

only make explicit what every lawyer understands this last term already to include in and of itself. It is to be regretted, that the opposing view did not really come to grips with this position, because Catalano admitted that the cases hitherto decided³ had presented situations, where admissibility was in his view at the least very doubtful. A clear case in which this divergency in views could have lead to clearly different conclusions not having yet been decided, we shall have to await for the developments before we are able to judge the practical interest of this approach.

Even if it be correct that Article 173 E.E.C. is not more restrictive than Article 33 E.C.S.C., the incidence of these provisions will not be the same because the organisational structure of the two Communities is so different. Where the E.C.S.C. relies upon the system of *Gemeinschaftsunmittelbare Verwaltung* (direct administration by the Community authorities), which brings the enterprises concerned into immediate contact with the Coal and Steel Institutions, the E.E.C. functions in accordance with other principles. Its regulations and rules may either address themselves directly to all public and private persons concerned or result in *Reflex-wirkungen* for the private persons; but, apart from anti-trust matters most E.E.C. decisions will be directed to member States and only indirectly concern private persons. By the time the national measures taken in execution of these decisions come to affect the entrepreneur and eventually give rise to a controversy in which he has a legitimate "concern", the period open for appeal may already have elapsed. In that situation the better remedy could well be an appeal to the competent national courts against the national measures, accompanied by a request for a preliminary ruling from the Court of Justice on the validity of the underlying Community decisions. This procedure demonstrates the close connection between the application of the two articles concerned: it would be very useful to study Articles 173 and 177 as the basis of a coherent system of legal protection.

The English Restrictive Practices Court on October 4, 1965, condemned an agreement by the Finance Houses Association as being contrary to the public interest. This agreement which has been in operation since 1957 established a "Motor Vehicle Code" which was to be applied whenever cash was advanced for the hire purchase of motor cars. Under its terms the agreement, to which most of the leading hire purchase companies in the United Kingdom belonged, laid down maximum rates of interest which could be charged. This was 9½ per cent for new cars, 11 per cent for used cars less than three years old, and 13 per cent for older cars. These were flat rates on the whole of the advance; and the true rate of interest was

3. Cases 25/62, *Plaumann v. Commission*, July 15, 1963, *Rec. IX*, p. 197, 1 C.M.L.Rev. 1963-4, pp. 353-354, 1/64, *Glucoseries réunies v. Commission*, July 2, 1964, *Rec. X*, p. 811, 3 C.M.L.Rev. 1965-6, p. 231-232 and 40/64, *Sgarlata a.o. v. Commission*, April 1, 1965, *Rec. XI*, p. 279, 3 C.M.L.Rev. 1965-6, pp. 91-92.

approximately double. The Code also provided that the hirer should pay a minimum deposit of 20 per cent of the hire purchase price and repay the balance of the price within three years, such provisions being however also required by statute. The most controversial provision however was a requirement that the motor car dealer who introduced the purchaser should be paid by the finance house a maximum commission of 20 per cent of the money advanced.

The Restrictive Practices Court thought it a little surprising that commission should be payable at all, in view of the fact that hire purchase facilities were essential to enable the dealers to sell motor cars to the public. The argument for the finance houses was that the agreement regulated the interest rates which would otherwise rise, and also controlled the rate of commission which in the period between 1958 and 1960 (when the finance houses were engaging in a price war) reached 40 per cent. The Court however considered that any rise in commission in present circumstances was not likely to go beyond a total of 25 per cent, a rise which would not involve a greater increase in monthly payments by the hirer than 2s.6d. Nor would a one per cent increase in the rate of interest make any appreciable difference to a buyer who was not rate conscious. Those that were would "shop around", or else arrange with a finance house directly. The Court accordingly held that the agreement conferred no specific or substantial benefit on the public as purchasers of motor cars and the restrictions in the Code were accordingly declared to be contrary to the public interest.

This decision is interesting as it shows the confidence of the Court in reaching a "value judgment" of an economic kind in assessing the probable fluctuation of commission if the agreement were cancelled.

On December 27th the Italian *Corte Costituzionale* pronounced its judgment on the preliminary question sent up by the Turin tribunal concerning the San Michele/High Authority case. The facts of this case were as follows: in 1962 the High Authority of the Coal and Steel Community imposed pecuniary sanctions on several Italian enterprises that had omitted to furnish the information required pursuant to Article 47 of the Treaty. After having opposed these decisions without success before the Court of Justice in Luxembourg, they instituted appeals against the execution of the sanctions by the High Authority before the various Italian courts, in whose jurisdiction the execution was to take place. They argued that the ratification of the E.C.S.C. Treaty was contrary to the constitution because it deprived Italian citizens of the protection afforded by their own national judiciary and subjected them to the jurisdiction of the Community authorities. The execution was therefore deemed *ultra vires*. Four tribunals refused this defense, but the Turin tribunal considered it not quite without foundation and submitted the constitutional question to the Constitutional Court.

In its opinion, the Court stressed, in terms that remind one of the utterance

of the European Court, the existence of two distinct juridical systems: the national system and the Community system, each competent in its own field, so that there is no contradiction between the Treaty and Articles 102 and 113 of the Italian Constitution.

Relying on the right of the individual to adequate judicial protection and review, the Court states that the Community system of law assures this right in a quite satisfactory way although its system is slightly different from the national one. The Court recognizes that the exclusive competence of the Community Court to stay the execution of acts originating with the Community Institutions is perfectly legitimate, because the national authorities have also to respect the limits of the system to which they belong.

This ruling is very satisfactory from the point of view of European law. We must nevertheless observe, on the one hand, that the problem of the resolution of conflicts between the two legal systems has not been solved and, on the other hand, that the declaration that the Community system is satisfactory on the point involved could imply that the Italian judge reserves his power to review the sufficiency of Community remedies.