

EDITORIAL COMMENTS

Under the Porte there existed in Turkey a remarkable institution for the protection of European litigants. At a trial the European party was accompanied by the Dragoman (strictly speaking an interpreter) from his country's consulate. He assisted at the proceedings and had the function of official observer. When he thought the trial was not being prosecuted with the required fairness, he simply put on his hat and the trial had to cease; it was the sign that he retired from the proceedings and in his absence it could not continue. He did not need to explain his action but was sovereign in his decision to put on his hat.

Hesitating to draw any false comparison, one is nonetheless reminded of this strange institution by the situation in which the Luxembourg agreement-not-to-agree has put the Council of the Communities. But perhaps that is too legalistic an approach. Everybody concerned has expressed his satisfaction with the results and assures us, that the Communities are now able to continue their further development in the interest of all Europe. Prof. Hallstein is satisfied, Dr. Schroeder is satisfied, Mr. Luns is satisfied and, according to his latest press-conference, General de Gaulle is even very satisfied. At least his experience with the Common Market seems not to have him discouraged from trying a similar operation in N.A.T.O.

In this respect it is very revealing of the state of health of national sovereignty, that concept which has so repeatedly been declared moribund, that all the critics of the French attitude put their hopes not so much on external factors, such as what the President of the United States, or the British Prime Minister or the Council of N.A.T.O. could do, but on internal French developments, to wit the coming elections.

From November 25-27, 1965 the third congress of the *Fédération Internationale de Droit Européen* (F.I.D.E.) was held in Paris. The colloquy was subdivided into three "Commissions", each studying a subject of topical importance.

The first subject was devoted to the legal mechanisms pursuant to which the various categories of Community acts are implemented by legislative or executive authorities of the member States. The reports on this subject (Prof. Benedetto Conforti from Sienna University, Italy was *rapporteur général*) indicated more than anything else the direct impact of Community law on the day-to-day affairs of national governments. They proved that the time has passed when only theoretical discussions could be held on the relationship between Community law and national law *in abstracto*. In 1963 at the second congress in The Hague, the "self-executing" provisions of the Rome Treaty were in the foreground. In the meantime much Community legislation with interesting features has been enacted, not only re-

gulations, but also directives and decisions addressed to member States. It was only natural that this development should lead to questions being discussed on an essentially practical level: how is the new law implemented and applied in the member States and how can its effective functioning be secured?

In various reports it was rightly stated that regulations—according to Article 189 and 191 E.E.C. binding in every respect and directly applicable in each member State, as from the twentieth day following their publication in the Official Gazette of the European Communities—have in practice nevertheless contained provisions which need further implementation in the national spheres. This has happened in two ways. First because they may not be specific enough in their contents, thus requiring further detailed execution. Secondly, because they may contain elements of a directive which is addressed to member States only. The agricultural regulations are interesting examples of both of these possibilities, which are strictly speaking incompatible with the Treaty text. In this way the distinction between directly applicable regulations on the one hand and non-“self-executing” directives and decisions addressed to member States on the other becomes blurred. *Vice versa*, it was demonstrated that sometimes directives do contain very detailed obligations for the member States, thus leaving little or no freedom for variety in national implementation. It may be recalled that the French government in its memorandum for the Council meeting of January this year, expressed serious reservations on this point (*cf.* Editorial Comments in the previous issue, p. 283). It may occur that directives contain provisions which need no further execution and are phrased in such a way that they can be directly applicable (*e.g.* standstill-provisions). This aspect lead several congress participants to the conclusion that such clauses were self-executing and could be invoked by private parties before national courts, notwithstanding the fact that they are inserted in directives. Others, however, strongly objected to such reasoning.

Whether Community acts must be implemented by the legislative or by the executive branch of a particular country depends on its constitutional provisions and may thus vary from state to state. There is a strong tendency, however, to leave such implementation to the Executive, mainly on the ground that, since the state is bound in any event by the Community institutions as to the material aspects, a parliamentary sovereign vote has lost its significance.¹ Nevertheless the dangers implied in this method from a point of view of democratic control are obvious. On grounds of efficiency the method of a general enabling act is sometimes used, as appears, *e.g.* in the French law of December 14, 1964 authorizing the government to issue *ordonnances* to assure the execution of directives in the field of establishment and free supply of services.

1. See already in this sense Sohier and Megret, “Le rôle de l'Exécutif national et du Législateur national dans la mise en oeuvre du droit communautaire” in *Droit Communautaire et Droit National*, Semaine de Bruges 1965, p. 107 et seq.

Special attention was paid to the question of judicial control of national implementing measures. Infringements on such measures by subsequent laws could certainly be dealt with by way of Articles 169 or 170 E.E.C., but it remained doubtful which internal procedural guarantees would be available.

The difficulty was noted that laws implementing Community provisions have the same status in constitutional law as other national laws. As expected, solutions proposed to solve this problem varied, but there was agreement at the Paris congress on the point that derogation from Community law—even though exceptional—should not be possible if that law is to function effectively. Prior consultation with Community institutions by member States before legislative or administrative action was to be taken—as already prescribed by Articles 93, 102 and 111 E.E.C.—was considered very useful but not an adequate substitute for direct judicial remedies.

The second commission at the Paris meeting, under the chairmanship of M. Roger Houin gave special attention to the first draft proposal of the E.E.C. Commission on company law which was presented to the Council in February 1964. The commission specifically approved the fact that Articles 10 and 11 of the draft, dealing with the capacity of the company's organs to enter into contracts, provided safeguards both for the shareholders and for third parties, and were thus seen to fall clearly within Article 54 (3) of the Rome Treaty.

The commission expressed the view that where information coming from the company conflicted with that sent by it to the central registry, the latter should prevail. Should this information contain errors, such errors could not be relied upon against third parties acting in good faith, whether the error was the fault of the company or the public official responsible for its publication. There was also a hardening of the general view in favour of the German position, for it was resolved that a company should be bound by all the acts of any of its organs save only where the general law expressly reserved certain powers to specific organs of the company. Furthermore, the company should not be able to challenge a contract with a third party on the ground that it was *ultra vires* the objects of the company, unless this was to the actual knowledge of the third party concerned. Similar resolutions were passed for cases where the company required more than one person to act on behalf of the company.

There was also considerable enthusiasm shown for the share company of European type, which has now been taken up by the E.E.C. Commission at the request of the French, largely in order to facilitate mergers within the Community that might keep out foreign capital. To this end the Commission is proposing further harmonisation of taxation, particularly in regard to the tax on capital assets payable on a merger between two or more concerns, and it is understood that a draft for a European company is being prepared.

The third commission dealt with the non-contractual liability of Euratom. Unanimity existed in this commission on the desirability of an early ratification of the conventions of Paris (1960) and Brussels (1963) on the civil liability arising out of the exploitation of nuclear installations. Already at the present stage the principles contained in these conventions should prevail. In this connection the hope was expressed that the existing divergencies in the two texts would be eliminated, notably on the question of the financial limitations to be put on the liability of the operators of nuclear installations. The discussion was mainly centered on the delicate interpretation problems of Article 188 para. 2 Euratom. This provision states that the non-contractual liability of the Community shall be governed by the general principles common to the laws of the member States. The first controversy concerning this article touches upon the question whether the Court of Justice of the European Communities is solely competent in actions instituted against Euratom. According to one interpretation a positive answer is here required in view of the text of Article 151 Euratom, which stipulates that the Court shall be competent to hear cases relating to compensation for any damage caused under Article 188 para. 2. Others consider the competence of the Court restricted to cases where Euratom has acted as a public body, but excluded where it has acted as an industrial entrepreneur or as research institution. It is clear that the latter view would deprive the Court's competence of much of its significance. The second dispute concerned the meaning of the term "general principles common to the law of the member States": are these the principles embodied in the Paris and Brussels conventions to which all Six states are parties or is it a reference to the general principles of tort law as they exist? Both questions were referred to further study.