EDITORIAL COMMENTS

Ex oriente lux . . .

Should any doubts still have been lingering in certain minds on the vital, indeed irreplaceable rôle of the Court of Justice in the institutional system of the European Community, then Opinion 1/76 of April 26, 1977 [1] will have surely banished them entirely. And this does not simply mean that the Court has, once again, although perhaps with even more vigour than usual, fulfilled its task of ensuring that the rule of law is respected in the application of the Treaty. Whilst the other Institutions and the Member States, forced to grapple with never-ending political and economic problems, often lose contact with the Treaties in the vain hope of achieving efficiency, the Court has, in this case, not only kept steadfastly to its course but has tried to rekindle faith in the construction of Europe by recalling the fundamental requirements which are at the basis of the European charters signed in 1951 and 1957.

Opinion 1/76 is particularly significant in this respect because, otherwise than with Opinion 1/75 [2], it was given in the complete absence of any real dispute between the Institutions and the Member States. It was not contested that the negotiations which the Commission had undertaken with Switzerland, with a view to concluding an Agreement on the setting-up of a European laying-up Fund for inland waterway vessels, were in full conformity with Council directives and had been approved by the Member States. Six of them had, moreover, participated *"ut singuli"* as parties eiter to the Mannheim Convention for the navigation of the Rhine or to the Convention on the Canalization of the Moselle.

Although the Court took advantage of the consultation to develop its jurisprudence, given in the *AETR* [3] and *Kramer* [4] cases, on the external powers of the Community, it is not this aspect which constitutes the most noteworthy part of its Opinion. Nonetheless, these developments will certainly give rise to detailed commentary, even if Community lawyers con only welcome the straightforward conclusion to which the Court has come. The Court has held that the powers of the Community to enter into obligations *vis-à-vis* third states can be implied from those Treaty provisions which give it competences internally on each occasion the participa-

1. O.J. 1977, C 107/4 (not yet published in case reports).
2. (1975) E.C.R. 1355; 13 C.M.L.Rev. 1976, 375.
3. (1971) E.C.R. 263.
4. (1976) E.C.R. 1279; see below, 339.

tion of the Community in the proposed international agreement is necessary to realise one of the Community objectives.

The question with which the Commission was particularly concerned and which led it, as soon as the agreement had been initialled, to request the Opinion of the Court on the compatibility of the Agreement with the EEC Treaty, according to Article 228 paragraph 1 second subparagraph, was certainly also of interest. The Commission wanted to know whether the Community (and Switzerland) was entitled to delegate decision-making and judicial powers to an independent organism, powers which, in the case of the Community, had already been delegated to it by the Member States. Drawing inspiration, after almost twenty years, from its well-known decision in *Meroni*,[5] the Court considered that, on the substance, there was no problem because "the provisions of the Statute define and limit the powers which the latter grants to the organs of the Fund so clearly and precisely that in this case they are only executive powers".[6] But it is not in connection with the specific question raised by the Commission that the Court embraces the subject of the on-going construction of Europe.

In our opinion the most illuminating part, and the part which would moreover, probably be picked up by the least observant reader, is that which forms the second section of the Opinion. Here the Court condemns something to which no-one really seems to have directed his attention, namely the changes which the system of the Agreement would introduce in the relationships between the Member States within the Institutions as originally set up. It is, furthermore, on this point that the Court decided that the Agreement was incompatible with the Treaty.

The parts which are concerned with the notions of "common action" and "requirements of unity and solidarity", implied in this sort of action, certainly merit a prominent place in any study of Community jurisprudence and should become engraved on the hearts of those Community politicians who are more and more tempted by a *"Europe à la carte"*.

More particularly the Court expressly declared incompatible with the idea of "common action" changes in the relations between the Member States which would result in, for example:

— a specific Member State becoming excluded, even voluntarily, from a common action,

— certain Member States having the power to take no part in a matter which comes within a common policy, and

5. (1958) *Recueil*, 9.
6. Grounds 16.

— special prerogatives being reserved to certain States in the decision-making procedures.

It is difficult to avoid the conclusion that in this way the Court of Justice has attempted to condemn those attempts which have been made, and continue to be made in the Community to create directories, *"Europe à deux vitesses"* or a piece-meal Europe.

It is, no doubt, salutary that the Institutions and the Member States should be reminded of these factors, sepecially at a time when the prospects of new Member States acceding to the Community will only reinforce these deviationist tendencies. But let us be quite clear on this: it is quite possible that the enlargement of the Community from nine to twelve Member States and at the same time the diversification of its economic structures could well lead to the solutions condemned by the Court in its Opinion 1/76. But then it must be realised that Europe would be changing the course laid down by the Treaty "fathers" and would thereby be giving up, at least for a long period, any moves towards re-inforcing the cohesion of the Member States with the Community.