EDITORIAL COMMENTS

The British Suggestions concerning the Court of Justice

At its 537th session the Council of Ministers, composed of the Ministers of Justice, discussed a memorandum of the British Government to improve the participation of Member States in cases before the Court. In that memorandum the British Government stressed the importance of the judgments of the Court on two grounds: First, the judgments cover matters which are of great interest to the Member States, which govern their mutual relations and which are usually of national government concern. Secondly, in most cases the texts on which the Court rules cannot be easily changed. When a national supreme court gives an objectionable judgment, the legislature can overrule it by changing the relevant laws. In the Communities this is far more difficult. According to the British Government the Member States should be more closely involved in the Court's proceedings. For this purpose four suggestions were made:

(1) In the case of references under Article 177 the period of two months which is granted to Member States to make their observations should be extended. This period is too short for the necessary legal research and consultation between government departments.

(2) National courts do not always clearly formulate their questions when they request preliminary rulings. Therefore Member States may find it difficult to decide whether they should submit observations and, if so, on what issues. It would therefore be helpful if the Court of Justice would identify the real issues for decision at an early stage of the proceedings, preferably before the opportunity for written observations is closed and certainly before the oral stage.

(3) In preliminary proceedings the parties and the Member States have insufficient opportunity to contest each other's arguments. Before the Court of Justice the written, rather than the oral proceedings carry the greater weight, partly because of translation problems in the oral proceedings, partly because of the tradition of the Court. As all the written comments must be presented at the same time, the Member States have no opportunity to meet in their written submissions the arguments advanced by the parties, the Commission or by other Member States. Such an opportunity should be granted.

(4) In direct actions of individuals against Community Institutions the Governments may intervene, but that must be done in a formal way under Article 93 of the Rules of Procedure. And then one of the two parties must be supported. Member States should have a more adequate oppor-

tunity to present observations. They should have access to the pleadings in order to be able to decide whether to intervene and on what arguments. They should not be required to support either of the parties.

In the same session the Council of Ministers discussed measures to be taken in order to cope with the problems caused by the steady increase of cases brought before the Court of Justice. The number of 19 in 1957 rose to 37 in 1967, to 164 in 1977 and to 268 (of which 100 were joined cases) in 1978. The time is long past when a bottle of champagne could be opened when a new case was brought before the Court. The discussion was initiated by a memorandum of the Court itself. The Council agreed to several measures, such as the appointment of a second legal secretary to every judge and the creation of a special tribunal for staff cases. But it did not agree to an increase in the number of judges. During these debates the British delegation made a fifth suggestion:

(5) In the opinion of the British Government the work-load of the Court could be eased by bringing less cases before it. When the Community is extended to twelve Members there will be all the more reason to revise the tasks as originally given to a Court for six States. An important reduction in the number of cases could be achieved by providing that preliminary rulings should only be requested in cases of great general importance.

The Government probably wanted to return to an old British suggestion to restrict the right of requesting preliminary rulings to appellate courts.

The British suggestions have raised considerable opposition, in particular in the Netherlands. The leading newspaper *NRC Handelsblad* spoke of a "political attack on the Court" (issue of 10 October). In its leading article the same newspaper wrote more fatalistically that this was bound to happen. Now that the supranational forces in Europe have been lamed an attack had to come on the only institution which still supports the original conception of European Integration. One could not expect that integration would go on indefinitely in the legal field while in other fields opposition continuously grows. According to the Dutch newspapers the Netherlands' Minister of Justice was entirely right in forcefully objecting to the British proposals.

It seems unlikely that the British proposals are meant as an attack on the Court. They are probably intended to improve the functioning of the Court through better participation of the Member States. Nonetheless the spirit of the proposals to some extent justifies fervent Dutch reactions. According to a large part of Dutch public opinion the Communities are—or at least should be—supranational institutions which independently look after the interests of the citizens. In a way they constitute a safeguard against the ever increasing powers of the national governments. They may help by giving some counterweight against those governments. When

the Dutch authorities charged too much, van Gend and Loos could successfully invoke Community Law against them. Since then many other Dutchmen have used Community Law against their own Government. The British proposals, on the other hand, breathe the spirit of a close linkage between the Community and the national governments. In the British view the Community is not a new supranational authority but only a means for cooperation between national governments. In such a Community the national authorities should be heard as much as possible and should play a maximum role, also in Court proceedings. It is probably this general attitude more than the individual proposals which raised opposition.

Nonetheless the individual suggestions as well merit some comment.

(1) A time-limit of two months for comments on preliminary questions is very short indeed. But, on the other hand, the preliminary ruling is an interim measure in national court proceedings which necessarily causes unwanted delay. That delay should be as brief as possible. For the parties to the dispute, who have pleaded before the national court and who know the case, two months is sufficient. Most Member States have succeeded in organising their internal proceedings in such a way that comments can be given in time. Under pressure of time the British Government might be able to do the same. If not, a small extension would probably not cause great harm.

(2) The second suggestion causes more problems. Usually the Court will be able to discern clearly the questions involved only after it has received the written observations from the parties, the Commission and sometimes from Member States. If after that the Member States were to get a new opportunity to make written comments, this would indeed cause considerable delay. There are only very few cases in which the Court of Justice finally rules on a question which has not been clearly asked by the national court concerned. An example may be the *Simmenthal* case (Case 70/77 of 28 June 1978, (1978) E.C.R. 1453, considerations 57-68) in which the Court rules on Directives 64/433 and 64/432, though no question on those directives had been asked. Such cases are exceptional, however, and it may be doubted whether comments of Member Governments would be of sufficient importance to warrant a considerable delay. Perhaps it would be possible to allow the Court to give an interim ruling in which to state that further comments will be needed on affiliated questions and to grant the Member States and the Commission an additional time-limit of one or two months to provide such information. The Court should then be free to judge whether an extension of the time needed for the preliminary ruling is justified. It would be still easier to leave the problem to the Court itself. It will usually recognise the problem

and of its own motion ask the Member States for their comments, as it did in, *e.g.*, the *De Bloos* case (14/76 of 6 October 1976, (1976) E.C.R. 1501).

(3) In its third suggestion the British Government touches on a serious problem. Frequently preliminary rulings are asked for on the question whether Community Law permits a particular kind of national legislation. In fact these are questions on the legality of such national legislation. The parties in the dispute have ample opportunity to exchange arguments for and against such legality before their national court. For them it is sufficient to have one written and one oral opportunity to make observations to the Court of Justice. But for the Member State concerned the legality of its own legislation may be of the greatest importance, and it may not be involved at all in the domestic litigation. In the *Laughing Dolls* case (22/76 of 22 September 1976, (1976) E.C.R. 1371) a French importer sued an Italian exporter before an Italian court for payment of an import fine charged by the French authorities. The preliminary ruling asked for by the Italian court was of the greatest importance to the legality of the French import fine. The French Government received the case from the Court of Justice and had to prepare its defence within two months without having seen the argument of the Commission which considered the import fine to be illegal. In such cases better opportunities for the State concerned seem to be required. The Court of Justice is aware of this problem and indicated a possible solution in one of the *Simmenthal* cases when it held that it may "prove to be in the interest of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard" (Case 70/77 of 28 June 1978, (1978) E.C.R. 1453, consideration 10). This may be seen as an invitation to the national judiciaries to allow or, when they have such power, to invite the national authorities to intervene in cases where the legality of national acts is at stake. This is not always possible, nor may it be enough. It would, therefore, be proper to allow States whose national legislation is involved in preliminary questions to send in a second set of written comments within one month after the observations of the Commission and of the parties have been received.

(4) In their fourth suggestion the British Government clearly demonstrate their wish to see the Community as an inter-governmental activity. Others may wish to grant a similar right of access to the pleadings to the European Parliament. The suggestion has little merit. When individuals come directly to the Court of Justice they either challenge the validity of a Community act or they sue for damages. In neither of those cases is there much room for a position different from that of the parties, such as wished by the Government. When an act of the Council is at stake the Governments

know perfectly well what is involved and do not need access to the pleadings. When an act of the Commission is involved the pleadings may contain information, *e.g.* on the capacity of an undertaking to pay fines, which the parties do not want to reveal to their Governments and which the Governments do not need.

(5) Finally the British suggestion to limit the cases in which preliminary rulings can be requested. It may be appropriate to urge national courts to ask for preliminary rulings only in cases where they are really needed; it would be wrong to limit the right of requesting preliminary rulings to appellate courts. Over thirty preliminary rulings have been requested on the classification for the common customs tariff on products such as bulk caramel, chrome tanned skins, mechanically propelled locomotives, potteries, ice cream, mining machinery, imitation lard, artistic screen prints, children's picture books and copying paper. As far as the customs tariff is concerned, uniformity throughout the Community is essential. It may be that in Britain such questions are solved by the customs authorities which may consult the administration in Brussels, but in other Member States individuals may challenge the opinion of the customs authorities before a court and that court must decide. It would be an unacceptable burden on the parties to force them to bring an appeal before an appellate court in cases where the substantial decision is taken by the Court of Justice and where, therefore, the national court decision can equally well be taken at first instance.

Although some points in the British memorandum can lead to important improvements other points may need some further consideration. The Ministers of Justice have referred the Memorandum to the Committee of Permanent Representatives.