

EDITORIAL COMMENTS

Inactivity of the Council: Implied power for the Commission

So far, fisheries have generally been a headache for the Community. Recently, they have given the Court of Justice the opportunity to recognise the existence of an important implicit power of the Commission: since conservation has become a matter of exclusive Community competence (1 January 1979), and in the absence of Council decisions laying down a policy, Member States can enact conservation measures only if the Commission does not formulate "objections, reservations or conditions".¹ Expressed more bluntly: the Commission has a power of veto.

The recognition of such a power of veto has a double effect. The first is obvious: it strengthens the Community vis-à-vis the Member States. The second relates to the balance of power between Community institutions: the position of the Commission as compared with the inactive Council is enhanced. The additional power of the Commission seems even more important if one takes into account the fact that it belongs to the area of management and control, i.e. that part of the Commission's responsibilities which is performed best (in any case with more success those tasks related to the right of initiative).

The elements of the problem which the Court of Justice had to decide were simple. If one concentrates on the main points, there were no more than three.

— First, the end of the transitional period laid down by article 102 of the Act of Accession on 31 December 1978; since then, "Member States are no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures... is a matter, as from that date, of Community Law" (nr 18 of the decision).

— Second, the competent institution, the Council has not yet adopted Community conservation measures.

— Third, it is not enough to freeze conservation measures as they existed on 31 December 1978; they have to be amended in the light of changing biological and technological facts.

The legal consequences flowing from these elements were in dispute. Two extreme positions were held by the British and the French government. According to the British view, the end of the transitional period did not affect the power of the Member States to adopt conservation

1. Court of Justice 5.5.1981—*Commission v. U.K.*, Case 804/79—not yet published.

measures, as long as the Council remained inactive. The French government on the contrary argued that Member States had lost this power; they were not allowed to amend existing conservation measures (which were simply maintained in the state in which they were on 31 December 1978).

The Court of Justice rejects these extreme views and approves the intermediate position of the Commission, according to which Member States can lay down conservation measures but only after approval by the Commission. The Court recognises the necessity to amend existing conservation measures. It rejects, however, the idea that the failure of the Council to decide could restore to the Member States the power and freedom to act unilaterally in this field. The Court held that "the conditions in which conservation measures may be adopted must be defined by means of all the available elements of law, even though fragmentary, and by having regard, for the remainder, to the *structural principles on which the Community is founded*. These principles require the Community to retain in all circumstances its capacity to comply with its responsibility, subject to the observance of the essential balances intended by the Treaty". The fragmentary elements of law are the proposals of the Commission, a Council decision of 25 June 1979 (so called "roll-over" decision) and the Council resolution of 3 November 1976 (the "Hague" resolution). The structural principles which the Court mentions flow from articles 5, 7 and 155 of the EEC Treaty. All these elements transform from 1 January 1979 the obligation "to seek approval" (Hague resolution) into "a duty not to lay down national conservation measures in spite of objections, reservations or conditions, which might be formulated by the Commission".

The recognition of the Commission's implied power of veto of exclusive Community competence, where the Council has been unable to act, could have important implications in other sectors. One sector appears immediately to mind: the common commercial policy, which is an exclusive Community competence since 1 January 1970. A careful analysis is necessary in order to establish whether the Fisheries decision of the Court affects traditional interpretations or not.

The Court's decision reinforces the Commission's position in yet another area, i.e. the common agricultural policy. Let us take a situation which occurs almost regularly in Spring: The regulations fixing the common prices may expire before the Council has been able to agree on new prices for the coming year. The normal remedy is to prolong the validity of the existing regulations. But what happens if the Council is not even able to take this decision? The Commission has always held that in such a situation it is its responsibility to take precautionary measures—in spite of the fact that the power to do so is not expressly attributed to it. In fact, such a situation arose in May 1980 when the Commission was obliged to fix

levies in certain sectors despite the failure of the Council to adopt the prices which form the necessary basis for this fixing.² Using the same reasoning, earlier in 1980 the Commission had continued to apply in the field of Monetary compensatory amounts a Regulation which had formally expired.³ After the judgment in the Fisheries case it would be astonishing if the Court did not recognize the existence of such a power.

In addition to these implications for other Community policies, it might be useful to mention three other aspects of the Court's decision.

The first relates to the procedure under which the problem was brought to the Court. Normally, important institutional issues are decided in preliminary rulings. In our case, it was put before the Court in an infringement action. This is a simple illustration of the growing importance of infringement procedures. The Commission has taken its responsibilities in this field more seriously; consequently, actions under article 169 of the EEC Treaty play a greater role in the work of the Court than hitherto.

The second remark concerns the attitude of the Court in the overall political context. In spite of the criticism directed against some of its judgments, the pessimis existing in Community circles and the fierce opposition expressed in certain quarters in Member States against European integration in general, the Court follows its path, defending the independence and the capacity of the Community to react and to progress.

This leads to the third and final point. The Fisheries decision proves that the institutional structure of the Community is far from rigid and inadapted to changing historical circumstances. On the contrary, this structure is astonishingly flexible—so flexible that it is capable of adjusting to one of the major distortions of the original institutional design: the practice of not voting in the Council. Let us be candid: the Fisheries case would not have arisen without the so called Luxembourg compromise.

2. O.J. 1980 L 136.

3. O.J. L 91 of 7.4.1980, p. 1.