

EDITORIAL COMMENTS

Failure to act

Failure to act is one of the situations against which the EEC Treaty provides for a remedy, though the article concerned was never considered as one of the more important articles of the Treaty. Up to 1 January 1985 EEC Article 175 was invoked before the Court only 29 times.¹

In recent months there have been three failures to act which deserve mention, though only one of them has led to a court action in the sense of Article 175. The three failures are each of a different nature. The first failure concerned the price of wheat where action was not only legally required but also factually necessary for the Common Market to continue. The second failure, on transport policy, was a legal obligation to act, but the factual necessity was not immediate. The third failure, on institutional reform, was the case where action is factually necessary but there is no obligation to act.

(1) An important failure was the inability of the Council to adopt a common price for wheat due to the German refusal to accept a decrease acceptable to the other Member States. This failure inevitably leads to a delay in the adoption of the necessary reforms to the Common Agricultural Policy, which again has serious repercussion on the budget and on relations with third parties, in particular with the USA. The fact that the largest and strongest defendant of an effective institutional framework proved not strong enough to resist internal pressure does not augur well for the internal functioning of the Community. The common front of those fighting for majority rule and refusing to accept the so-called "Luxembourg Agreement" was damaged.

Nevertheless the actual effect of the Council's failure to act is still unclear. The Community needs some price for wheat. The Commission therefore stepped in and, as a kind of emergency measure, fixed the price of wheat at the level acceptable to the other nine Member States. The

1. Eighteenth General Report (1984), p. 345.

Council took notice of this emergency measure, but apparently it cannot overrule the Commission. This creates an interesting precedent which may not be detrimental to the Community. There is a weakening of the "Luxembourg Agreement" if the veto of a Member State can in fact be overruled by the Commission, basing itself on the position of the majority even though, because of abstentions, there was no majority decision. This precedent demonstrates that in some cases where action is essential for the continuation for the Common Market, a failure to act has become virtually impossible. The failure of the institution obliged to act compels another institution to step in.

(2) The second failure to act which recently received attention is the Council's failure to create a Common Transport Policy. Again, other institutions stepped in. The European Parliament brought this failure before the Court of Justice, which decided on 22 May 1985, that the absence of a Common Transport Policy does not necessarily create a failure which is justiciable by the Court, especially as the European Parliament had not indicated what measures the Council should have taken.² The Court nevertheless ruled that the failure was justiciable on the basis that the Council had failed to establish freedom of services in the field of transportation. That failure was a violation of the EEC Treaty. This decision, which will be discussed in a later issue, has the effect that the Council is now legally required to take the necessary measures to comply with the judgment of the Court. One may expect that the Court will have to take further decisions in preliminary rulings if this is not done within a reasonable period of time. It can only be hoped that the legal requirement will carry sufficient weight to spur the Council into action. For the sake of the Community legal order both the Commission and the European Parliament are under a strong moral duty to exert all possible pressure in order to help the Council to reach a reasonable solution in this difficult, but very important field of Community legislation.

(3) The third recent failure to act is the most deplorable one, the failure to reach agreement on majority voting required before the accession of Spain and Portugal. Inaction is a way of decision-making. It is a choice for the *status quo* in preference to other alternatives. Often, when no reasonable alternative can be found, the *status quo* may be the

2. Case no. 13/83.

best choice. This is not always true, however. Sometimes a situation requires a change of the rules. The present inaction means that many developments in Europe will come to a standstill. No new stimulus will be given to our industry. We will drop even further behind Japan and the United States. The dangerous tendency will continue that even our own large multinational companies prefer to invest elsewhere. We do not only need to restore confidence in European industrial development, but we also need to do that quickly.

Europe represents a number of unique achievements, particularly in the humanitarian field. The gap between rich and poor is smaller than almost anywhere else, slum areas are fewer in number, human rights are well protected. These European achievements must be defended. They need their economic basis. In the long run we will not succeed in keeping, let alone further developing, our social structure, our protection of the weak in our society, if we lack a sound economic system. For that system to flourish it is necessary to have a greater amount of unity in Europe. The European leaders carry the heavy responsibility of creating the conditions for building this unity. We are almost at the point when the choice for the *status quo* is worse than almost any other alternative. Many of the solutions proposed for further European integration show great shortcomings, but still they may be better than sticking to the *status quo*. Movement in itself is an integrating factor. The development of plans and the achievement of changes will stimulate further thinking, further cooperation and confidence of those concerned. However dim the future looks, we must hope that our governments will somehow succeed in saving Europe. Even a split Europe of two speeds is better than no Europe at all.

The necessity of action is as great as in the case of the wheat prices and the Common Transport Policy, but the requirements are insufficiently precise for the Commission to act alone or for the Court to order action. The Governments must act by themselves.

When in the early days of European integration a proposal was made for free trade in agricultural products, Belgian agricultural specialists told Paul Henri Spaak that the adoption of that proposal would be fatal for the Belgian tomato-production. Spaak is reputed to have replied: "To hell with tomatoes, I want European integration". It is that spirit which fails and which Europe badly needs.