

EDITORIAL COMMENTS

Guardian of the Treaties

This year, on 4 December 1987, marks the thirty-fifth anniversary of the constitution of the Court of Justice of the European Coal and Steel Community, which has since developed into the Court of Justice as we now know it.¹ We feel that this is an appropriate moment to reflect on the difficulties the Court has faced and continues to face in its role as guardian of the Community Treaties.

From its earliest years, the Court was responsible for a quiet revolution. It developed doctrines concerning the new legal order constituted by the Community, the precedence of Community law and the direct effect and direct applicability of Community law, thereby forging a novel legal system. Rightly, the Court was hailed as a unique judicial institution, and, moreover, was perceived to be perhaps the most effective of the Community Institutions.²

At the same time, however, difficulties became apparent as regards the acceptance of the Court's judgments by national courts and by the Gov-

1. The Court was constituted with effect from 4 December 1952 by decision of the Representatives of the Governments of the Member States of 1 and 2 December 1952 (J.O. 10 February 1953, p. 16). Four of the original judges and both advocates general of the ECSC Court subsequently became members of the single Court of Justice of the three Communities which took the place of the ECSC Court in accordance with Article 4 of the 1957 Convention on certain Institutions common to the European Communities.

2. See Editorial Comments, "A Different Sort of Balance Sheet", 19 CML Rev. (1982), 3-4.

ernments of Member States. As regards the first, as is well known, judgments of national courts such as those of the French *Conseil d'Etat* in the *Cohn-Bendit* case³ and of the German *Bundesfinanzhof* of 16 July 1981 on the interpretation of the Sixth VAT Directive⁴ seriously challenged the unity of Community law as interpreted by the Court and created uncertainty as to its uniform application.

As regards Government compliance, it has become increasingly evident that the effect of rulings by the Court is threatened when Member States ignore their obligations under Article 171 of the Treaty and do not take the necessary measures to comply with decisions in cases brought under Article 169.⁵ In this respect, one may question whether the sheer volume of Article 169 cases brought before the Court by the Commission does not in fact diminish the impact on a Member State of a Court ruling that it has failed to fulfil its Treaty obligations.

The picture is not of course as black as we have just painted it. Recent rulings by the Italian Constitutional Courts⁶ and the German *Bundesverfassungsgericht*⁷ have shown a commendable acceptance of the Court's interpretation of Community law, and of the place of the Court in the judicial process. Likewise, failure by Member States to fulfil their obligations under Article 171 is comparatively rare. Indeed, if one takes into account the vast body of law being produced by the Community legislator, the compliance pattern by Member States is fairly reassuring.

As regards the present difficulties facing the Court, recent comment has focused on the question of the extent to which the Court may adopt a dynamic interpretation of Community law while still ensuring compliance with its judgments. Rasmussen, for example, maintains that the

3. (1980) 1 CMLR 543.

4. (1980) 1 CMLR 527.

5. See note by Schermers on Case 281/83, *Commission v. Italy*, [1985] E.C.R. 3397 and Case 131/84, *Commission v. Italy*, judgment of 6 November 1985, not yet reported, 23 CML Rev. (1986), 441. See also judgments of 5 November 1986 and 12 February 1987 in Cases 160/85 and 69/86 respectively, *Commission v. Italy*. At the time of writing, seven cases based on a violation of Article 171 of the Treaty were pending before the Court. Two further cases had been withdrawn.

6. See, for example, *S.p.a. Granital v. Amministrazione dello Stato*, judgment of 8 June 1984, with note by Gaja, 21 CML Rev. (1984), 756.

7. *Re the application of Wünsche Handelsgesellschaft*, (1987) 3 CMLR 225 (noted by Bebr in this issue) and *Kloppenburg*, judgment of 8 April 1987, not yet published.

Court has transgressed the acceptable limits of activist judicial policy-making.⁸ On the other hand, other observers consider that the Court has become cautious and judicially conservative, and is unwilling to exercise the role which it had formerly exercised of filling policy-making gaps left by the legislator. This school of thought suggests that "a small but growing number of cases in which its rulings have been disregarded has made the Court reluctant to demand that EC members do things they aren't politically ready to do".⁹

Such conflicting commentary shows that the Court's current case-law cannot easily be categorised. However, more importantly, it also suggests that a necessary balance is being struck between judicial activism and restraint. The dilemma is one which concerns every court with powers of judicial review.¹⁰

What of the future? One of the most important developments for the Community legal system is undoubtedly the possibility of the creation of a court of first instance provided by Articles 4, 11 and 26 of the Single European Act. It is to be hoped that the Council will respond swiftly if the Court of Justice requests the creation of such a court.

The provision of a court of first instance is essential if the Court of Justice is not to become increasingly overburdened. Already, the delays in the procedure before the Court resulting from its increasingly heavy case-load serve to discourage national courts from making preliminary rulings. Likewise, violations which are the subject of Article 169 actions continue until final judgment is handed down, in some cases, more than two years after a case is brought before the Court. The attribution to a court of first instance of "certain classes of action or proceeding brought by natural or legal persons" in accordance with the provisions of the Single Act (one thinks in particular of staff cases and proceedings involving findings of fact, such as competition) would reduce the burden on the Court and leave it free to concentrate on its primary role, which

8. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, Dordrecht, 1986).

9. See *Wall St. J.*, European Edition, 13 October 1987, p. 1.

10. See, for example, Shapiro and Hobbs, *The Politics of Constitutional Law* (Winthrop, Mass. 1974).

it has accomplished so well in the past thirty-five years, that of ensuring that, in the interpretation and application of the Treaties, the law is observed.