EDITORIAL COMMENTS

EC-EFTA Court?

There are enormous developments in Europe. In the East the iron curtain is tumbling down; in the West progress is being made towards 1992. Both developments affect the institutional structures of our continent. On the one side, we have Gorbachev addressing the Parliamentary Assembly of the Council of Europe; we see Polish, Hungarian and Russian observers enter the same Parliamentary Assembly and we notice the beginning of the will of some East European States to participate in Western European economic co-operation. On the other side, we encounter great efforts being made to forge a closer relationship between the Community and the EFTA countries. With 1992 approaching the EFTA countries feel a need for more than bilateral agreements and they seem to be willing to accept some stronger institutional structure of the EC-EFTA relationship, binding decisions and probably even rules which directly bind the citizens of the pariticipating States. A high-level steering group of EC and EFTA representatives have already met four times and drafted far-reaching proposals for institutionalised co-operation.

Both sides seem to agree that any form of detailed co-operation should be under judicial control. Some kind of court control seems to be essential, especially if there are to be rules affecting individuals. A proposal has been suggested to establish a special court for combined EC-EFTA rules, a court in which, apart from judges from the Community, judges from the EFTA Members would also participate. According to another proposal six EFTA judges should be appointed to the Court

of Justice whenever EC-EFTA matters are brought before it. In substance, this would also lead to a special court. Alongside the present Court of 13 judges, there would be a court of 19 judges, where majorities could be different and whose decisions, therefore, could deviate from the case-law of the Court of Justice.

It seems appropriate, even at this early stage, to warn against a new European supreme court. Our experience has shown the great value of a common legal order in which a court interprets the rules. "Community law is a separate legal order", the Court of Justice said in the *Van Gend en Loos* case. This separate legal order is of immense value for Europe. An important element of this legal order is that it is guided by one supreme court.

It is true that we have a second supreme court in the European Court of Human Rights, and even though the tasks of that court are clearly defined and sufficiently different from the tasks of the Court of Justice, there are areas of overlap. The Court of Justice encounters questions of human rights and the Human Rights institutions (for the time being the Commission of Human Rights rather than the Court) are occasionally faced with questions of Community law. Sometimes a case is brought to Strasbourg as well as to Luxembourg. The most recent example is an Irish applicant who was prohibited from providing Irish women with information on how to obtain an abortion in England. Is that prohibition an infringement of the right to freedom of information guaranteed by the European Convention on Human Rights? Or is it contrary to the free movement of services to advertise English medical "service" in Ireland?

Conflicts between the Court of Justice and the Court of Human Rights are unlikely. Both courts are prepared to accept the other's competence for a specialised field.

However, that will be different when a special EC-EFTA court would have the competence to decide what a measure of equivalent effect to a quantitative restriction of trade exactly means in EC-EFTA trade and where its definition would differ from the one of the Court of Justice. Or, when the EC-EFTA court would grant direct effect to rules which the Court of Justice would not consider directly effective. The tasks of those courts would be so close to one another that conflicts seem inevitable.

Does this mean that there should be no court superivising EC-EFTA arrangements? Fortunately, there is a better alternative.

The judges in European courts are independent individuals. They neither receive nor accept any instructions from governments. Both in the Court of Justice and the Court of Human Rights it frequently happens that judges vote and, in the internal deliberations, even plead against their own governments.

The Court of Justice does not use judges *ad hoc*. If the national judge of a Member State cannot participate in a case against that State he is not temporarily replaced by a fellow national (which is the case in the European Court of Human Rights). The sole sound reason why we need judges of each of the Member States is that European law should be founded on the legal systems of all Member States. We need national judges as experts on national laws, not for any political reasons. This also explains why we do not need more judges from larger than from smaller States.

The question then arises on what national laws European law must be founded. Under the European Convention on Human Rights each party to the Convention has one member in the European Commission of Human Rights. But for the Court of Human Rights a different system was chosen. In that court all Members of the Council of Europe have a national judge, irrespective of whether they are a party to the Human Rights Convention or not.[1] Thus, there was a French judge, and even for some time a French president, in the Human Rights Court during the period in which France was not a party to the Convention (1953-1973). The reason for this provision was that the founders of the Convention wanted the case-law of the Court to be founded on *all* legal systems of Western Europe and not exclusively on the laws of the States that happened to be a party to the Convention. Now that gradually all Member States of the Council of Europe have become parties to the Human Rights Convention the wisdom of this approach becomes clear. No State that entered at a later stage can maintain that its legal system carries less weight in the Court than other legal systems.

Transposing this experience to the Community and EFTA, the Court

1. For lack of experienced experts Liechtenstein has a Canadian judge.

of Justice should be expanded by the addition of some EFTA judges rather than creating a new court alongside it. The expanded Court should then handle all internal Community law cases as well as all cases under common EC-EFTA rules. It is also to be hoped that internal EFTA disputes could be brought before it. Thus, one single Western European legal order could be developed for the entire continent. Would it harm the Community to have non-citizens in its court? Probably not. As the judges are independent of their States and as competent Swiss, Swedish or Austrian lawyers must be available, an expansion may well enrich the Court. It would in any case facilitate its access to the general principles of the legal systems of a larger group of European States. A larger number of judges may harm the efficiency of the Court, but by permitting more cases to be handled in chambers this problem can be overcome. In any case, all possible objections are negligible when compared to the great risks of splitting the European legal order into two different legal orders; one for matters in which EFTA Members take part and the other for matters solely under the jurisdiction of the Community.