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EDITORIAL COMMENTS

Taking stock: 1992 and beyond

To some, 1992 may appear to have been something of an *annus horribilis*. The uncertainty about the fate of the Maastricht Treaty on European Union, the difficulties with the reform of the CAP and the squabbles over the GATT negotiations, the need to postpone the coming into force of the EEA Treaty because of the negative referendum vote of the Swiss people, and the fight over the allocation of financial resources needed to enable the Community to meet future challenges and "to match its ambitions" (Delors II package), all this seems to justify the conclusion that the Community is in bad shape and the future looks bleak.

Of course, there is also another way of looking at things. The difficulties encountered in making new steps on the road to European Union are caused, at least in part, by the fact that the internal market has been nearly completed. This in itself is a tremendous achievement and a condition for further integration and cooperation (EMU, EPU). Without the success of the timely adaptation of the bulk of the proposals for legislation to remove physical, technical and fiscal barriers, the Community could not even begin to think about mapping out an approach for common policies in areas such as economic and social cohesion, foreign affairs, the social dimension. Progress toward a single currency would be excluded.

Nine tenths of the Commission's proposals have now been adopted. Their transposition and implementation by the Member States is gathering pace. In its Seventh Report on the implementation of the

White Paper of 1985[1] the Commission takes stock of the significant progress that was made during the final year of the Internal Market Programme and which concerned notably the opening up of public procurement in the services sector, the mutual recognition of diplomas, certain technical harmonization measures and the liberalization of transport and insurance services.

However, there is no call for Euro-smugness. Decisions have not yet been taken in a number of areas which are by no means of secondary importance. This is particularly the case in the area of the removal of frontier controls on individuals. As the Commission observes in its Seventh Report, there is nothing to suggest that all controls of persons will be abolished by the end of 1992. Existing administrative structures at frontiers must be abolished so as to comply with Article 8a. This provision defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty". In order to make sure that crossing a frontier no longer gives rise to controls, a number of intergovernmental measures have been drafted. However, there are delays in the ratification procedure of the Dublin Convention of 15 June 1990 determining the State responsible for examining asylum applications. The Draft Convention on the crossing of the external frontiers, the ratification of which is absolutely essential for abolishing controls at internal borders, has been ready for signing since June 1991 but remains blocked because of the dispute between Spain and the United Kingdom over Gibraltar.

In this connection, it is interesting to note that the Commission, in a Communication of 8 May 1992[2] to the Council and the Parliament, expressed its determination to ensure that Article 8a takes full effect. In its Seventh Report it reaffirms its interpretation of Article 8a. In its view this provision establishes a clear and precise obligation that allows no margin of discretion. This is the language to denote direct effect of Community provisions. Consequently, as of 1 January 1993 national courts could be called upon by private individuals to

1. Com (92) 383 final, 2 Sept. 1992.
2. Sec (92) 877 final.

enforce the principle that crossing a frontier may no longer in itself give rise to a control. It may ultimately fall to be decided by the Court of Justice whether the Commission's interpretation of Article 8a is consistent with the declaration on Article 8a which was appended to the Single European Act ("Setting the date of 31 December 1992 does not create an automatic legal effect").[3]

The Commission, in its report, has not failed to emphasize the need for establishing priorities and lines of action regarding the manner in which the internal market must be administered. The conclusions which it will adopt in this regard in the near future are likely to reflect a number of recommendations presented by the high-level think-tank chaired by Mr. Sutherland, former member of the Commission. In view of the importance of the findings of this study group, it seems worthwhile to devote the remainder of these Editorial comments to a review of some of the problems discussed in the Group's Report.[4]

The Report examines the issues which need to be resolved to enable the internal market to be administered fairly and effectively, under three headings: *communication, judicial matters*, and *administrative partnership*. With regard to the *first* point, the basic message is that much more needs to be done to tell market subjects what to expect and what to do if they encounter problems. Public reaction to the Maastricht Treaty has demonstrated that effective communication is essential for further progress in the Community. If consumers do not trust the quality of goods from other Member States, because they have no confidence in the "mutual recognition" approach, or if companies are sceptical about the effectiveness of the new rules for throwing public procurement open to Community-wide competition, they will not be able to enjoy the advantages of a large frontier-free market, and market fragmentation will persist. Therefore, the Group recommends action to improve both the quality and the efficiency of communication with the

3. See for this H.G. Schermers, "The effect of the date of 31 December 1992", 28 CML Rev. (1991), 275–289; A.G. Toth, "The legal status of the declarations annexed to the Single European Act", 23 CML Rev. (1986), 803–812.

4. *The Internal Market after 1992. Meeting the Challenge*. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market (October 1992).

public, and the quality and transparency of the Community's legislative process and of the rules produced. The Commission should set up a Strategy for improving the provision of information, but it will be up to the Member States above all to increase awareness and understanding by consumers and economic operators of Community measures. Much has been done in this area, but if Community law is to be understood and enforced in the same way as law of a purely domestic origin, the public must have easy access to material setting out and explaining Community rules which affect their legal position.

Public confidence should be boosted also by remedying a number of shortcomings of Community decision-making. Thus, the Commission will have to make public, at the earliest possible stage, its intention to propose new legislation. It must also make available background analyses, arrange hearings and, in general, maintain a systematic and effective dialogue with market subjects and with European organizations and associations whose views are representative of the views held by groups throughout the Member States (trade and professional organizations, consumer bureaus and other non-profit groups etc.).

Another method to narrow the gap between public opinion and the Community legislative process could consist of a serious effort to improve the quality and transparency of Community legislation. Community acts are often perceived to be unclear and unduly complex. Many difficulties arise from the fact that Community legislative acts are revised, adapted or amended by several succeeding acts which amend them but do not replace them. Those who need to know the law must sometimes themselves piece together a complete up-to-date legal text, by painstakingly pickingly over a great many legal instruments. This is bound to lead to disenchantment.

The Group recommends a systematic and sustained effort to accelerate the *legislative consolidation* of Community law. This sort of work is slow. Contrary to "declaratory" codification, where the Commission produces informal texts of the original act with later amendments inserted at the appropriate points, legislative codification is far more delicate an operation. It aims to produce a single authoritative text which combines the initial text and all subsequent amendments. Currently, consolidation proposals are being discussed in respect of 85

Community directives (of these, 38 directives concern agricultural tractors). These 85 instruments must be replaced by 13 new directives. But most directives have been adopted on the basis of laborious political compromises, and Member States are not easily persuaded to let the process of consolidation upset these compromises. Another complicating factor is that there are frequent contradictions and anomalies which stem from inconsistencies between successive legal instruments, and also from different linguistic versions of the same text. These difficulties are compounded by the fact that the freedom which directives leave to the Member States as regards the manner of implementation is also likely to add to the lack of transparency. In this respect the Group suggests that where progress over several years has enabled a satisfactory degree of approximation to be achieved, such directives should be converted into directly applicable rules (regulations).

As a final point in relation to the quality of Community law, the report notes that the fierce pace at which the 1992 programme of legislation has been executed has caused contradictions and inconsistencies between Community measures. The European institutions need to give the highest priority to the removal of this type of shortcomings because they present serious obstacles to proper implementation and application of the rules by national authorities.

As to the *second* point, the Sutherland Report shows concern over the effectiveness of the system of judicial protection in the Community. From external contributions the Group concludes that there is an urgent need for more information and better advice for those who seek legal redress in connection with rights claimed under Community law. The Commission and the Member States should do more to give market subjects guidance on questions such as whether a complaint falls within the scope of Community law, whether legal redress must be obtained through the national courts or through the Court of Justice, when to submit problems to national administrations and when (and how) to approach the Commission directly, whether non-judicial mechanisms, e.g. ombudsmen or consumer guarantee schemes, could afford adequate redress and so on.

The Report rightly points to the widely differing rules in the Member States governing access to the courts. The requirements and procedures

for bringing actions before the domestic judicial organs present an impressive range of variations, e.g. with respect to time limits for instuting proceedings and *locus standi* for groups such as consumers' associations. The provision of legal aid (exemption or reimbursement of legal fees) depends on the fulfilment of very different conditions of eligibility and Member States sometimes exclude nationals from other countries from the benefit of their legal aid arrangements. Though Member States must make sure that the addressees of Community rights and obligations can effectively enjoy legal protection of their rights (''l'effet utile de l'effet direct''), at present legal remedies are not always available and where they are available it is doubtful whether they are always effective. It is well-known that the slowness of procedures in certain Member States is likely to discourage recourse to the courts. Sometimes the domestic courts have only limited powers to make orders for interim measures against an alleged infringement. The *Francovich* case obliges Member States to compensate claimants for damages caused to them by infringements of Community law imputable to the Member States. However, the success of an individual's action for damages is contingent on the workings of domestic rules of procedure. These rules are generally very demanding in the standard of proof they require and in many cases such rules may deprive the principle of tortious liability of public organs of its effect.

Obviously, these problems must soon be addressed by the Community. The suggestions of the Sutherland Group include the adoption of interpretative statements by the Commission, e.g. on the implications of the *Francovich* judgment and the adoption of ''remedies directives'' prescribing the types of redress that must be open to persons affected by breaches of the law, and the establishment in every Member State of a ''mediator'' who could take up cases against national authorities on his own initiative or on application of an interested party. The latter possibility would appear particularly useful in cases where complainants tend to refrain from bringing actions against the authorities for fear of subsequent retaliation at the hands of such authorities, e.g. in the field of aid-granting or public procurement (''Don't bite the hand that feeds you'').

On the *third* point the Group recommends a number of operational

guidelines on which administrative co-operation must be based. The key to progress is to further develop the "partnership" between the Commission and the Member States which is designed to help Member States apply Community law and to help the Commission to supervise its overall effectiveness and to solve problems. What is needed is rapid agreement on information-sharing, pooling of expertise and establishment of case-handling procedures.

At the Edinburgh European Council meeting of 11 and 12 December 1992, the Commission was expected to present its ideas about what it intends to do with these various suggestions. An in-depth discussion of these issues could not take place on that occasion. However, the challenge must be met and it must be met soon.

Note

It has come to our attention, following the annotation by Schermers of Opinion 1/91 and Opinion 1/92, published in 29 CML Rev., 991-1010, that some phrases could be taken to imply a criticism of the competence of the translating services or of the legal secretaries of the Court. We would like to take this opportunity of explaining that no criticism of the translating services was intended.