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EDITORIAL COMMENTS

Quis custodiet the European Court of Justice?

The EC Court of Justice is under attack. That is not entirely new. Occasionally, Court decisions have been vehemently criticized. Old-timers will recall the acrimonious and anonymous (but from a well-known insider) comments on the ERTA judgment published in *Le Monde* of 27 April 1971. The thesis of Prof. Rasmussen, rather brillantly taken apart by Joseph Weiler in this Review,[1] formed a more frontal attack against the Court's "law-making". Sometimes, initiatives were taken in national Parliaments to block the incoming tide of European law through judicial activism. A colourful example was the bill, presented in the French *Assemblée Nationale* by the former Prime Minister of France, Michel Debré, sanctioning any member of the French judiciary who respected a particular decision of the EC Court of Justice, for misfeasance ("crime de forfaiture"). More serious, but equally abortive, was the amendment to the bill on the organization of the judiciary deposited in 1980 by the rapporteur Michel Aurillac, in order to preserve the immunity of legislative acts in the French courts against Community law. In general, however, one can say that the evolution of the Court's case law has met with a serene reception within the Member States: including its fundamental decisions on the direct effect and primacy of Community law. Of course, there has been opposition from a number of highest courts in some Member States such as France (*Conseil d'Etat*), Germany (*Bundesverfassungsgericht*, *Bundesfinanzhof*), Italy. But much of this resistance has disappeared, also because of the

1. 24 CML Rev. (1987), 555–589.

mutual trust generated by the ongoing, fruitful cooperation between the ECJ and the national courts.

New elements in the recent attacks against the Court are, first: that they originate from the highest political quarters of one of the larger Member States; second: that action is being suggested to curb the powers of the Court by restricting access to the preliminary procedure of Article 177 EEC; third: that, allegedly, allies are actively being looked for in other capitals to realize such a reform. The German Chancellor Kohl has publicly voiced the dissatisfaction of the German government with the evolution of the Court's case law.[2] The discontent seems to go back to a number of the Court's decisions in the social field which have displeased the German government, particularly the Ministry of Social Affairs.[3]

Of course, criticism of individual Court decisions is perfectly legitimate, also on a political level. Quite a different matter, however, is a more general attack on the functioning of the Court, its methods of interpretation and the manner in which it finds the law. The political level is not the most appropriate one for such a debate. Governments have much to lose and little to gain from an exercise that risks undermining the authority of the Court and puts into question its role in European integration. The authority of the Court largely depends on the persuasive character of its decisions and their motivation, but also on the perception by the national courts of its role and their acceptance of its case law. This is a delicate exercise in which the Court has succeeded fairly well up to now. National governments must think twice before taking steps that could disturb the balance. The survival of European integration and the continuity and solidity of the integration process, are intimately linked with the quality and strength of its legal order. That the Community can be qualified as a legal order, a Community of law, seeing its rules respected and justice done with regard to action both by

2. EG-Forum des Gemeinschaftsausschusses der Deutschen Gewerblichen Wirtschaft, 5 Oct. 1992.

3. See the Article by the german Minister for social affairs, Nobert Blum, "Die leise Übermacht", in *Der Spiegel*, 30 Nov. 1992 (102); Peter Clever, "Grundsätzliche Bemerkungen zur Rechtssprechung des EuGH", DAngVers 2/93 (72).

Community institutions and Member States, is largely due to the activism shown in this regard by the European Court. The result is the more impressive taking into account the relative weakness of the available instruments. The Community has no police force to get the European Court's decisions respected by and within Member States. The cooperation with national courts is fundamental. In criticizing the Court, which of course is not forbidden, national governments should be well aware of the delicacy of the system.

Now, turning to the suggestions made to reform the preliminary procedure. The idea seems to be to model the Article 177 EEC procedure along the lines of the procedure applying to the Brussels Convention on enforcement of judgments; that is, to delete the second section of Article 177 EEC and grant the power to refer only to national courts against whose decisions there is no judicial remedy under national law. The obvious objection to that is that it will make national procedures involving questions of Community law more lengthy and increase the costs of litigation. There is, however, a more fundamental objection to be made. Restricting in such a way access to the preliminary procedure will directly reduce the legal protection available to the Community citizen in the exercise of his Community law rights. Consequently, the credibility of the Community as a Community of law will be affected as well. The cooperation between the national court of whatever instance and the European Court is essential for the effective and uniform application of Community law as law of the land. The infringement procedure of Article 169 EEC does not provide the individual within a Member State with sufficient safeguards in this respect. It is the availability and interplay of both the Article 169 and Article 177 EEC procedures make it possible to secure the full and uniform application of the common rules within Member States.[4] That is a truism, since the Court, as early as 1963, stressed the important role of the vigilant citizen invoking his Community rights within the national court.[5] One could imagine the reactions within a Member State if the government, dissatisfied with judgments of the Supreme Court, were to propose a con-

4. See case C-106/90 etc., *Emerald Meats*, judgment of 20 Jan. 1993, nyr.
5. Case 26/62, *Van Gend en Loos*, [1963] ECR 10.

stitutional reform to curtail its powers. "Mit Kanonen nach Spatzen schiessen", could be a German reaction. The near absence of political protest, now that the Community is involved, demonstrates the fragility of its legal order. All the more reason to beware.

It seems that Bonn has reconsidered the issue. Nevertheless there are at least two reasons to take the threat seriously. First, Member States have already shown with the Barber Protocol to the Maastricht Treaty that they are prepared, if they deem fit, to interfere with the administration of justice by the European Court. How could one qualify otherwise this "Diktat" of the interpretation to be given to the *Barber* judgment in a situation, where further questions by national courts on the same interpretation were still *sub judice*? Member States as "Herren der Verträge".

Indeed, if one compares the Barber Protocol with the firm refusal of the European Court, in Opinion 1/91 on the European Economic Area Agreement, to see its constitutional powers affected, even if hallmarked by a formal Treaty amendment accompanying the conclusion of the EEA Treaty,[6] one gets the feeling of living in two different worlds.

The second reason to remain vigilant is that the near future will present the Member States with at least two occasions for further Treaty amendments. The conclusion of the accession treaties with the four EFTA States is envisaged for 1994. Subsequently, there is the rendez-vous of 1996 which the Member States have agreed amongst themselves, and fixed in the Maastricht Treaty, for a new intergovernmental conference on European Union. An institutional reform, going beyond a mere technical adaptation to accommodate four new Member States, is not on the agenda for the rendez-vous of 1994, as far as the European Council is concerned. The European Parliament might hold different views and make its necessary consent, a power it lacks under the Treaty amendment procedure of Article 236 EEC (and Article N of the Treaty on European Union), dependent on a more ambitious institutional reform. Whatever the outcome will be, the institutional de-

6. Opinion 1/91 of 14 Dec. 1991, [1991] ECR I-6084 at 6112, para 72; annotated by H.G. Schermers at 29 CML Rev., 991.

bate, including the position of the Court, is already opened now.

It cannot be excluded that Member States might use these occasions to relaunch ideas as discussed above. An obvious excuse to legitimate the operation would be to say that the Court, overburdened as it is particularly by preliminary procedures, should be helped by a reform of that procedure.

Could anything be done to prevent this? Not really, but it might help if the Court itself were to contribute to the debate. The Court could submit, as it did in 1974 in the debate at that time on European Union, a report to present its own vision on necessary reforms. Such a report could examine the existing problems of overburdening taking into account a further increase of cases subsequent to the accession of new Member States, analyse the causes and suggest possible solutions. The latter could consist of adaptations of internal Court procedures, a further attribution of jurisdiction to the Court of First instance, and/or a reform of the existing procedures, including restrictions to the possibilities of appeal. This is not the place to enter into that debate, which has been opened some time ago by Jacqué and Weiler[7] and produced already quite a number of useful ideas.[8] The important thing is that the Court itself takes a stand. That might help to preserve the essentials of the actual system and prevent Member States from deciding during an intergovernmental conference *à l'improviste* ill-advised amendments to the existing procedures. In submitting its own, well-considered suggestions for reform the Court could win allies amongst both Member States and the other institutions, such as the European Parliament and the Commission, which have their role to play in a possible Treaty amendment procedure.

Indeed, quis custodiet? As far as the subject in question is concerned, the first answer might well be: custodies ipsos!

7. Jean-Paul Jacqué and Joseph Weiler, "On the road to European union – A new judicial architecture: An agenda for the intergovernmental conference", 27 CML Rev. (1990), 185.

8. T. Koopmans, "The future of the Court of Justice of the European Communities". 11 Yearbook of European Law 1991 at 15.