

EDITORIAL COMMENTS

Safeguarding the Union's legal order?

“The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member-States but also their nationals. Independently of the legislation of Member-States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes on a clearly defined way upon individuals as well as upon the Member-States and upon the institutions of the Community.”¹

The arguments put forward by the Court in the early sixties are as cogent today as they were thirty years ago. The early sixties may be characterized as the heyday of the construction of the legal order of the Community. The nineties will no doubt in hindsight be viewed as the formative stage of a new European order in which the anchor is constituted by the European Union. Yet, many players in the decision-making process of the Union lack clear ideas as to the direction of the Union and the steps needed to achieve consolidation of the present *acquis communautaire* in a wholly new context.²

Yes, we do have the EEA agreement, although couched in an ex-

1. Case 26/62, *Van Gend en Loos*, [1963] ECR 1 at 12

2. Cf. “While Europe is in the gutter”, the leader in the *Economist* of 21 May 1994.

tremely complicated legal construction. Yes, we do want enlargement, certainly with Austria, Finland, Sweden and Norway. We also want to accommodate the aspirations of the Visegrad countries now tied to the Union in the newly welded Europa agreements. Finally, we are also convinced that something has to be done to achieve a stable relationship with Russia and the other European CIS countries.

Yet as soon as these broad political objectives are put in the form of concrete institutional arrangements, the Union finds itself in disarray and unable to work out rules. This was clearly demonstrated by the dispute about the votes needed for a qualified majority vote, resulting in the Ioannina compromise.³

In this context, it is extremely important that the Court continues to play its role optimally in the construction of the Union. Admittedly, this may not be the most appropriate time for making great strides forward as when the Court crafted such judgments as *van Gend & Loos* (quoted above), *Costa v. ENEL* and *Francovich*. It is therefore not surprising that the Court has in some recent judgments, *Schindler*, *Banks* and *Almelo*⁴, taken a rather cautious approach. These judgments all concern important questions of community law. In *Schindler*, the Court expanded the mandatory requirements of Article 59 EC to accommodate the desire of Member States to control lotteries. In *Banks*, the Court denied direct effect to the provisions of Article 65 and 66(7) ECSC Treaty, the equivalent of Articles 85(1) and 86 in the EC Treaty. In *Almelo*, the Court gave the national court minimal guidance in applying Article 90(2) to electricity contracts containing exclusive purchase clauses.

The common line in these judgments is that Member State powers are treated with great respect. This is most obvious in *Schindler*. In *Almelo*, the answer given to the national court will put it in a very difficult and

3. Cf. the Editorial Comment of the previous number of this Review, 31 CML Rev., 453–457.

4. Case C-275/92, *H.M. Customs and Excise v. Schindler*, judgment of 24 March 1994, nyr; Case C-128/92, *Banks v. British Coal Corporation*, judgment of 13 April 1994, nyr; and Case C-393/92, *Almelo v. IJsselmij*, judgment of 27 April 1994 nyr. These judgments will be annotated in subsequent issues of this Review. These cases follow on from the previous round of rather controversial cases, *Keck*, *Meng* and *Audi*, annotated in this and other numbers of the Review, and discussed in more detail in Reich, “The ‘November Revolution’ of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited“, 31 CML Rev. 459–492.

unenviable position, as it must determine the scope of the public service such as to require exemption from Article 85 and 86⁵. This judgment will also have an effect on the behaviour of governments and public utilities. The governments will feel less pressure to go along with the amended and much watered down proposals of the Commission concerning the internal market for electricity and gas.⁶ The denial of direct effect of Articles 65 and 66(7) in *Banks* will leave only the Commission to supervise agreements in the coal and steel sector which contravene these provisions.⁷ This could be seen to amount to a serious defect in the legal protection of private citizens. Moreover, agreements in those industries are not infrequently concluded at the instigation of governments, as is borne out by the facts of the *Banks* case.

Notwithstanding contrary opinions, of which there will undoubtedly be quite a few, this cautious approach on the part of the Court may, as such, be respected. However, what is difficult to accept is the manner in which in these judgments are reasoned. All three judgments fail to provide clear arguments. Such a lack of reasoning is a real threat to the Union's legal order. In *Schindler* and *Banks*, at least, the national courts will have no difficulty in using the Court's judgment in order to arrive at a correct application of Community law in the national cases at hand. However, in subsequent national cases concerning similar issues in different factual contexts – and particularly when it comes to the weighing up of major but perhaps conflicting principles of Community law – the insufficient reasoning of the judgments fails to give the guidance necessary to enable those concerned to explain the law, to apply it and enforce it. It also leaves the legislature in the Member State in doubt as to the precise limits of national powers.

In its *Schindler* judgment, the Court fails to rebut clearly the Commission's argument that the national measures do not respect the principle of proportionality.⁸ Are we to understand that there are now man-

5. Cf. Hancher in her comment on case C-320/91, *Corbeau*, judgment of 19 May 1993 nyr, 31 CML Rev., 105 et seq.

6. O.J. 1994, C 123.

7. Optimists may note that the paucity of legal remedies will only be for a limited period of time as the ECSC Treaty expires in 2002.

8. Cf. paras. 55 and 61 of the judgment.

datory requirements of such overriding importance for public policy that they necessitate a large margin of discretion for the Member State and thereby do away with the principle of proportionality?

In the *Banks* case, the Court's judgment does not reflect any trace of certain of the Advocate General's convincing arguments, which he put as follows:

“Precisely as a result of that unity of the Community legal order, the Court has from the outset striven in countless cases to achieve the greatest possible coherence in interpreting the provisions of the EEC and ECSC Treaties: I need only refer to the order in *Camera Care* where, with regard to the division of tasks between the Commission and the Court regarding interim measures, the latter based itself on its order in *National Carbonising Company*, made in the context of the ECSC Treaty; the judgment in *Foto-Frost*, in which the Court sought a link with the ECSC Treaty in connection with the question of its jurisdiction under Article 177 of the EEC Treaty to declare a measure of a Community institution invalid; the judgment in *Busseni*, where the Court used the EEC Treaty as a basis for its jurisdiction to give a ruling on interpretation under Article 41 of the ECSC Treaty; the parallel which the Court drew in the *Francovich* judgment between Article 5 of the EEC Treaty and Article 86 of the ECSC Treaty in support of the view that there is an obligation on the part of the Member States to make reparation for loss or damage resulting from a breach of Community law; and, of particular relevance to this case, the unrestricted application by the Court in *Busseni* to recommendations within the meaning of the ECSC Treaty of its case law concerning the possibility that a directive which has not been transposed into national law may have direct effect.”⁹

The only argument which the Court gives for its denial to accord direct effect to the relevant ECSC provisions is the text of Article 65(4) second paragraph: “The High Authority shall have the sole jurisdiction, subject to the right to bring actions before the Court, to rule whether such agreement or decision is compatible with this Article.” It also cites Article 66(7) although this provision does not use the term “sole jurisdiction”.

9. See in particular para 25 of the Opinion of 27 Oct. 1993.

In the *Almelo* judgment, the gist of the problem lies in the absence of clear criteria to guide the national court and, of course, all those concerned. It seems a very long time, indeed, since the Court gave its *Pronuptia* judgment enabling the Commission to shape its policy for franchise agreements.¹⁰

There are additional arguments to urge the Court to provide clear and cogent reasoning. As a result of the entry into force of the EEA agreement and the Europa agreements, Community law will have to be applied in third countries. This is manifestly the intention of the EEA Treaty where Article 6 provides:

“Without prejudice to future developments of case law, the provisions of this agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.”

Further developments in the case law of the Court will also in effect apply to the EEA countries, via a rather complicated system involving the EEA Joint Committee, which “shall act so as to preserve the homogeneous interpretation of the Agreement”.¹¹ Similarly the relevant articles in the Europa agreements require the application of provisions equivalent to Articles 85, 86 and 90 as they are interpreted by the Court.

Lawyers in these countries need clear and unequivocal guidance just as the legal profession within the Community needed this in the formative stages of the EEC. The safeguarding of the Union’s legal order will therefore at the same time facilitate the application of Community law in third countries. The Court should demonstrate much more clearly that it also accepts the responsibility of guiding all those involved in administering the principles of Community law in other European States.

10. Case 161/84, [1986] ECR 353.

11. Art. 105(2) of the EEA Agreement.