

# Law School Tutors Lecture Series



## **Sport and the Law** **LECTURE FOUR : THE EUROPEAN COMMUNITY**

For

**THE FOUNDATION DEGREE  
at the University of Glamorgan**

by

**Corbett Haselgrove-Spurin**

**An NMA Approved  
Continuing Professional  
Development Training Program**

FIRST EDITION 2003

Published by **N**ationwide **M**ediation **A**cademy UK Ltd

## **The European (Economic) Community (EEC) and/or European Union (EU).**

### **General Introduction,**

The most important legal limitation on sovereignty of parliament to make law in the UK has come with the signing of the European Treaties and their incorporation into English Law by virtue of the **European Communities Act 1972** which has itself now been extended by the **Treaty on European Union 1993 (TEU)** at Maastricht. Note that the numbering of the articles of the Treaty of Rome were altered and the number of articles increased by the TEU.

### **The E.U. History, aims and functions**

The European Community was born in 1950 following the plans of R.Schuman the French Foreign minister to integrate coal & steel production to prevent the use of economic resources for military uses. The European Coal & Steel Community was founded in 1961 with 6 original members.

In 1957 the **Treaty of Rome** established the E.E.C. (now the E.C. or E.U.) to integrate the members' economies to create a single prosperous area, by abolishing restrictions on the freedom of movement of people goods and capital and the European Atomic Energy Community - Euratom - for the peaceful development of nuclear energy.

The U.K., Denmark & Ireland joined in 1973. Greece, Spain & Portugal joined in 1986, The Scandinavian Countries in 1995. A number of new members are currently in the middle of the entry process, though the application of Turkey is on hold until 2004. East Germany's integration into Western Europe increased the membership of the EC by 20m people overnight.

**Article 2 Treaty of Rome** - aimed to set up an economic community conducive to trade & stability.

**Article 3 Treaty of Rome** - dealt with the elimination of trade barriers.

**Article 85** forbids restrictive trade practices.

**Article 48(2) Treaty of Rome** discussed the freedom of movement of workers.

**Article 129 Treaty of Rome** established the European Investment Bank.

**The C.A.P. or Common Agricultural Policy** aims to ensure that all producers receive a fair price for goods whilst ensuring there are neither gluts nor famines in agricultural products due to changing agricultural methods and economic demand. Originally it was intended for the E.E.C. to establish a series of Policies but C.A.P. was the only one to materialize. The C.A.P. has posed the E.C. with major constitutional problems since it placed the E.C. with a governmental type role since it required the E.C. to deal with two diametrically opposed aims, that of promoting free trade and that of protecting vested interests. This perhaps explains why the experiment has not yet been extended to other areas since government requires more than a simple one goal mandate. The C.A.P. fits more neatly into the role of a governing European Parliament than the current E.U. organization.

In 1972, by Treaty, the British Government committed the U.K. to membership of the E.E.C. under a treaty of accession, followed by the **European Communities Act 1972** which came into force on 1.1.1973.

### **Institutions of the E. C.**

**The European Parliament** (arts 137-144) up to date has represented a talking shop and little else since it has had little power. Greater legislative power is now accorded to it in consequence of the Single European Act 1986 and the Treaty on European Union 1993.

**The European Court of Justice** (arts 164 - 188) makes judicial decisions. Members of the court are drawn from all member states. The European Commission and member states are answerable to the ECJ. The court structure has since been expanded by the Treaty of European Union.

**The European Commission** (arts 155 - 163) initiates policy and is the executive arm of the communities responsible for administration. The Commission can fine bodies for breach of Council Regulations in relation to Competition policy under Art 155.

**The Council of Ministers** (arts 145-154) a political body representing the interests of member States which has the power of veto over legislative measures. It is the principal decision making body and generates enforceable Council Regulations.

**The Court of Auditors** (art 188) examines the finances and expenditure of the other institutions of the E.C.

**Legal framework of the E.C.** The law of the E.C. comes in a variety of forms, treaties, regulations, directives and decisions of community organs such as the European Court of Justice.

**Article 100 Treaty of Rome** allows the Council of European Communities to issue directives to members states whose legislation is not in harmony with European Community legislation on a specific matter.

### **Relationship between the EC and the UK**

The Council of Ministers and the Commission are empowered by the Treaties to make regulations having direct effect in the member states and to create individual rights and duties enforceable in national court.

Under **2(1) E.C.A. 1972**, directly applicable community law may be implemented in the U.K. automatically. By virtue of **s2(2) E.C.A. 1972** some legislation will have to be passed in conformity with community requirements. Although this will normally be in the form of delegated legislation it will have the status of community law. Furthermore under **s2(4) E.C.A. 1972** " ... any enactment passed or to be passed other than one contained in this part of this Act shall be construed and have effect subject to the foregoing provisions of this section."

The effect of these measures is very important. Subsequent cases such as **MacCarthys v Smith** [1981], **Garland v British Rail Engineering Ltd** [1982] and **Factortame** appear to have affirmed the supremacy of community law over domestic law in a pragmatic sense if not from the point of view of strict legal theory, though depending on one's point of view, even this may have been achieved already.

Parliament's law making power has been limited by Parliament giving to the Council of Ministers and the Commission power to legislate in some areas. It has also restricted the UK Parliament's right to pass certain types of legislation. Within the Council of Ministers a limited power of veto remains so that member states have the opportunity to prevent some legislation which is unacceptable to them.

By virtue of the **Single European Act 1986** which came into force on the 1st January 1993, the legislative powers of the European Parliament has been extended so that the power of veto over legislation in some, though not all areas is more limited.

Whilst domestic Parliaments retain autonomy regarding taxation matters, the E.C has the power to implement policy decisions of the Commission through the Council of Ministers - though the European Parliament must be consulted and can advise on such legislation. The power of veto gives the Council of Ministers a limited degree of control over the manner in which the measures are implemented (thereby returning power to the Ministers of the domestic states) but an increasing number of areas are now subject to majority voting procedures.

Problems regarding interpretation of what is and what is not within the scope of the enabling power diminish the power of the Council of Ministers to act against the new powers of the European Parliament.

The mandate for the power of the E.C comes from the Treaties of the E.C. as confirmed by the UK Government seeking the consent of parliament to sign Maastricht and similarly by the German Supreme Court's consent to the German Government signing the new Treaty. Theoretically, at least, the E.C. can only legislate on areas covered by the Treaties but the Commission can give a broad interpretation of what is covered and such an interpretation would be difficult for member states to challenge.

### **Incorporation of E.C. Law into the U.K. legal system**

**s1 E.C.A. 1972** States which treaties became incorporated into U.K. law on accession.

**s2(1) E.C.A. 1972** makes certain laws directly applicable in the U.K. These laws are the regulations, parts of the treaties and in certain circumstances E.C. directives and decisions of the European Court of Justice. A directive tends to be directed to a certain member of the E.C. The result are laws which impose duties and confer rights which are incorporated into the English Legal system without the sanction of parliament in Westminster, which can be enforced by the UK courts.

**2(4) E.C.A. 1972.** Any enactment by parliament which has been passed or which will be passed in the future shall have effect subject to the provisions of s2 E.C.A. 1972. Legislation will only be effective if it is not contradictory to directly applicable community law.

**s3(1) E.C.A. 1972.** For the purposes of all legal proceedings, any question as to the meaning or effect of any Treaties or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and if not referred to the European Court) be for determination as such in accordance with the principles laid down by the European Court.

**s3(2) E.C.A. 1972.** Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European court on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution.

**Article 177 Treaty on Rome** states that if the meaning of an article is uncertain it should be referred to the E.C.J for a preliminary ruling. See D.Lasok, Use and abuse of preliminary proceedings under art 177. p34 S.L.R. Autumn 1993.

De Smith states that "Potentially at least, the importation of Community law brings with it a constitutional innovation of the highest importance.

Some commentators originally thought that since the E.C. is largely an economic community only certain types of law would be affected by membership of the E.C. and that many other areas such as family law, succession etc would remain uniquely British. Is this still a valid view today in the light of the social policies being developed by the E.C. and the drive towards an integrated legal system ?

#### **The E.C. attitude to the enforceability of Community Law**

Community doctrine as expressed by community organs is very clear - community law prevails over inconsistent national law. **Costa v E.N.E.L.** (1964) ECJ

All decisions of the E.C.J including those predating UK accession form part of the enforceable body of EC Law even in the UK by virtue of **s3(1) & (2) E.C.A.1972.**

Regarding the methods of interpretation of European Community Law see the article by Jens Rinze, p57 Bracton Law Journal 1994. The methods are the Literal approach; the systematic or contextual approach and the teleological or historical comparative approach, which is similar to the Mischief Rule in **Heydon's Case.**

**Article 177 Treaty of Rome.** Where a domestic court encounters difficulties in the interpretation of E.C. measures it can refer the matter to the E.C.J for a preliminary ruling on the meaning of the measure.

Member states albeit within limited spheres have restricted their sovereign rights and no appeal lies to provisions of internal law of any kind can prevail over this accession of authority. How limited are these spheres today ? Is the reverse now true, that member states retain only a limited number of sovereign rights, perhaps only in areas such as taxation ?

**Wilhelm v Bundeskartellamp** [1964]. One of many cases affirming **Costa v E.N.E.L.**

**s3 European Communities Act 1972.** Our courts are to accept as a binding authority the rulings and principles of the European Court.

All of the original six member countries have implemented devices which attempt to give primacy to E.C. Law and have introduced changes to their written constitutions, e.g. the Benelux countries.

#### **Conflicts between E.C. and U.K. Law**

What has been the reaction of the U.K. judiciary to Sovereignty of Parliament and to E.C. law that conflicts with U.K. statutes ? The courts have been faced with a dilemma. The judges have been unwilling to state in categorical terms that the U.K. Parliament is no longer sovereign. The judges see this as a political rather than a judicial issue.

Since the **E.C.A. 1972**, like any other Act of Parliament, can be repealed by any present or future Parliament, it is possible to view the effect of membership of the E.C. as being temporary or transient. Whilst the effect of the **E.C.A. 1972** is different from any other previous Act of Parliament, nonetheless, it is not permanent or irrevocable as demonstrated by the referendum.

The legality of the government in signing the Treaty of Rome and the competence of Parliament in passing the E.C.A. 1972 has been questioned in the courts on the basis that it is not legally possible to derogate from the Sovereignty of Parliament and is contrary to the Bill of Rights.

Obiter by Denning in **Felixstowe Dock & Railway Co & European Ferries v British Transport Dock Board** [1976] "It seems to me that once the bill is passed by Parliament and becomes a statute, that will dispose of all discussion about the treaty. These courts will then have to abide by the statute without regard to the treaty at all."

In **Blackburn v A.G.** [1971] Denning M.R. in the C.A. stated that '... in theory Mr.Blackburn is quite right in saying that no Parliament can bind another, and that any parliament can reverse what a previous Parliament has done ... nevertheless so far as this court is concerned, I think we will wait till that day comes.'

**McWhirter v A.G.** [1972] Denning M.R. again in the C.A. stated that, "even though the Treaty of Rome has been signed it had no effect, so far as these courts are concerned until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament."

Lords Denning, Kilmuir, Gardiner, Hailsham & Dilhorne have asserted that Sovereignty continues to exist. The 1972 E.C.A. can be repealed at any time.

Diplock - *The Common Market & the Common Law* (1972) 'If the Queen in Parliament was to make laws which were in conflict with this country's obligations under the Treaty of Rome, those laws and not the conflicting provisions of the Treaty would be given effect to as the domestic law of the U.K.'

Scarman LJ - *The Law of Establishment in the E.E.C.* (1973) 'The E.C.A. preserves of course the de jure sovereignty of Parliament. Community law has the force of law because Parliament says so ... the E.C.A. cannot be read as limiting the sovereignty of Parliament. No British court could, I suggest, go so far as to hold that Parliament today has limited the freedom of action of Parliament tomorrow without a constitutional reform that is in fact beyond the power of Parliament by statute to effect.'

Gardiner.L H.L.Deb 1967 'Under the British constitutional doctrine of Parliamentary sovereignty no Parliament can preclude its successors from changing the law .... there is in theory no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with community law ... '

The effect of E.C. legislation

- 1) on prior U. K. legislation ;
- 2) where there is a partial conflict between E.C. & subsequent U.K. legislation ;
- 3) where there is a direct conflict between E.C. & subsequent U.K. legislation ;
- 4) on subsequent delegated and subordinate U.K. legislation.

#### 1) **E.C. legislation & prior U.K. Legislation.**

Under **s1 & s2 E.C.A. 1972** all prior E.C. legislation enclosed in the Treaties, prior directives and decisions of the European Court of Justice became the most recent addition to the Law of the U.K. By the doctrines of express and implied repeal, as expressed in the **Ellen St Case**, that body of extant E.E.C. Law took precedence over existing U.K. law. Since the **E.C.A. 1972** is not entrenched this element of the **E.C.A. 1972** involves no threat to the doctrine of sovereignty of Parliament.

Where an E.C. Law is passed after the 1st January 1973 which conflicts with existing Acts of Parliament an enabling mechanism is required so that the E.C. measure is automatically made part of UK law without further Parliamentary action. This is achieved by **s2(1) E.C.A. 1972** which states that "All such rights, powers, liabilities, obligations and restrictions from *time to time* created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law and be enforced, allowed and followed accordingly; and the expression 'enforceable Community rights' and similar expressions shall be read as referring to one to which this subsection applies."

**s2(2) ECA 1972**, subject to limitations under schedule 2 in relation to tax and criminal offences, enables Orders in Council and Statutory Instruments to be passed to implement European Community directives. **s2(4) E.C.A. 1972** applies **s2(1-3)** provisions to O in Cs and S.I.s made under **s(2)** in that they must be construed and given effect to subject to the provisions of **s2(3)**. It is difficult to know exactly what if anything this section achieves. Denning stated in **Bulmer v Bolinger** [1974] that "the treaty is like an incoming tide ... Parliament has decreed that the Treaty is henceforth to be part of our law. It is equal in force to any statute .... We must speak and think of Community law, of Community rights and obligations and we must give effect to them." Denning further stated in **Applications de Gaz** [1974] that "In any transaction which contains an European element we must look to the treaty ... for the treaty is part of our law. It is equal in force to any statute and it must be applied by our courts."

The European Law scrutinizing committee in the House of Lords has the job of identifying prior UK statutes that conflict with new E.C. laws. Ideally, such Acts can then be amended or repealed some time immediately before the new E.C. provision comes into force. If they fail to identify a conflict then since the new E.C. provision 'shall be

given effect to' under **s2(1) E.C.A. 1972**, presumably the contradictory prior U.K. measure must not be given effect to. As under implied repeal the prior Act of Parliament must be impliedly repealed.

## 2) Partial conflict between E.C. legislation and subsequent U.K. legislation.

The major constitutional problem, centres around the ability of Parliament to pass legislation that conflicts with E.C. Law. If there is a conflict between later U.K. legislation and earlier E.C. law the courts have to choose which provision to follow. Clearly, the E.C. view expressed in **Costa v E.N.E.L.** is that E.C. provisions must take precedence. The attitude of the U.K. courts has not up till now been so unequivocal. There are three possible approaches that the courts might adopt.

- a). If the courts apply the doctrines of express or implied repeal exemplified by **Ellen St v M.H & Vauxhall Estates v L.C.** then the later U.K. provision must prevail.

Denning, by contrast, stated in **Coombes Holdings v Shields** [1978] that 'If such a tribunal should find any ambiguity in the statutes or any inconsistency with community law, then it should resolve it by giving primacy to community law.'

- b). The exact meaning of **s2 E.C.A. 1972** has been open to interpretation. One view is that the section accords primacy to E.C. Law in all circumstances where there is a conflict. This is reinforced by the view that **s2(4) E.C.A. 1972** effectively places a restriction on the competence of Parliament to legislate contrary to E.C. measures.

If it does so, then the U.K. measure in so far as it conflicts with E.C. measures, is of no effect whatsoever. (Alternatively as in point 4 below it is argued this bar only concerns delegated legislation implemented to enforce E.C. directives which are not directly applicable). **s2(4) E.C.A. 1972** is very badly drafted. Its meaning is far from clear.

- c). Alternatively, it has been suggested that the section merely creates a new presumption for the interpretation of statutes with an European element, to the effect that unless Parliament clearly indicates to the contrary, then the courts should presume that Parliament does not intend to legislate contrary to the principles of E.C. law and should therefore provide an interpretation which is compatible with European Law. The problem then is, 'To what extent should the courts strain the use of language to produce an interpretation which fulfils those objectives ?'

**Pickstone v Freemans** [1988] and **Lister v Forth Dock** [1989] suggest that besides the Literal, Golden and Mischief Rules there is a new rule of interpretation specifically designed to permit the perversion of the natural sense of words to accord with E.E.C. measures.

Diplock in **Garland v British Rail Engineering** stated that '**s2(4) of the '72 Act** has created a new principle of construction or of interpretation: the words of a statute passed after a Community treaty must be construed so as to carry out the treaty obligations and the interpretation must not be inconsistent with the treaty obligations.'

E.C. measures must, according to **s3(1) E.C.A. 1972**, be interpreted within the spirit of the E.C. and can be referred to the E.C.J. for interpretation so that all members accord them the same meaning and effect. So the courts cannot strain the meaning of E.E.C. measures to accord with U.K. measures.

## 3) Direct conflict between E.E.C. and subsequent U.K. legislation.

**McCarthy v Smith** [1979] The courts must give effect to directly applicable law. However, if parliament expressly demonstrates that it intends to legislate contrary to community law then the courts must give effect to the statute.

**Garland v B.R.E.** Diplock wondered, obiter, whether the courts could ever apply an interpretation inconsistent with community law, however wide a departure from the prima facie meaning of the language, without an express statement which showed that parliament intended to legislate in breach of a treaty obligation.

In **Factortame v S.S.T.** [1989] the Divisional Court granted interim relief by suspending the provisions of the **M.S.A. 1988** pending the outcome of an application to the E.C.J. for clarification as to the meaning of certain of the articles of the Treaty of Rome. The House of Lords overruled the suspension, held that the **M.S.A. 1988** was in force but that it must be interpreted in accordance with E.C. provisions.

Following a reference under **Art 177 Treaty of Rome** to the E.C.J. which held that U.K. courts must suspend U.K. legislation which contradicted E.C. provisions and provide interim relief for losses suffered from application of the domestic provisions, the House of Lords in **Factortame No2** suspended the application of the offending sections under interim relief powers granted by Art 186 Treaty of Rome.

Parliament amended the offending section of the **Merchant Shipping Act 1988** by SI 1989 No2006, so the UK Court did not have to pronounce on the actual validity of a UK statute in conflict with E.C. provisions - thus postponing a ratio decidendi on the issue.

In **EC Commission ex Pte Spain v the UK & Ireland** [1991] the ECJ stated categorically that if a UK provision is in conflict with EC provisions the UK Act of Parliament should be totally suspended. It held that the UK was in breach of law by passing the **M.S.A. 1988** which discriminated against the ability of non British EC citizens to register a vessel on the British shipping register.

The intention of Parliament to protect local fisheries could have been achieved under EC quota regulations by the UK ministry of fisheries by refusing to grant a fishing licence to fishermen who did not have a direct economic link with the fishing port in question. Therefore the aims of the **M.S.A. 1988** were legitimate - but the method of achieving those aims was not.

**R v Secretary of State for Employment, ex parte Equal Opportunities Commission** [1994] 2 WLR 409. It appears that the correct way to proceed regarding a potential conflict between UK and EC law is to apply to the Divisional Court Q.D.B. High Court for judicial review of Primary UK legislation. The court will then determine whether or not there is a conflict. If the court finds a conflict it makes a declaration accordingly. It is then incumbent on the UK Government to introduce amending legislation. In the meantime, following the lead in **Marleasing** and **Francovich** persons who have suffered loss due to the failure of the UK to introduce amending legislation can apply to the ECJ for compensation.

This method throws the problem of suspending Acts of Parliament back onto Parliament and avoids the need for UK the courts to act as a constitutional court and disapply an act of parliament.

#### 4) **Subsequent delegated and subordinate U.K. legislation.**

It has been suggested that **s2(2)** & consequently **s2(4) E.C.A. 1972** deal primarily with delegated legislation, made by national legislatures to implement directives of the organs of the E.E.C. Subordinate legislation which conflicts with E.C. measures may be declared void.

**s2(4)** has been understood by various commentators in two different ways. **Firstly** as 'Statutory Instruments or Orders in Council that may be made under subsection **2(2)** include any provision that an Act of Parliament could make, excluding the imposition of tax and criminal offences and all such delegated legislation is 'any such enactment passed or to be passed' shall be subject to the **s2(1)** limitation that E.C. Law must be given effect to so impliedly preventing such delegated legislation from derogating from E.C. Law. or

**Secondly** as 'Statutory instruments etc and any enactment passed or to be passed (By Act of Parliament) shall be construed and given effect to subject to the **s3(1)** limitation that E.C. Law must be given effect to.

#### **Failure to comply with directives**

The EC initially had problems with member states failing to incorporate directives into their domestic legislation. The EC has now adopted the practice of specifying a date by which the directive must be incorporated.

In **Marleasing v La Comercial Internacional de Alimentation S.A.** 1990 it was confirmed that under **Art 189(3)**, where a member state has failed to implement a directive or has done so ineptly, nonetheless the national court must interpret the national law in line with the EC directive after the expiry date of time to implement has passed. This questions the validity of **Duke v Reliance** and prior cases where in the absence of or in the presence of inept UK legislation on a subject the court refused to engage in purposive constructions which did not accord with the meaning of the written words of the UK statutes. The court stated that where the failure to implement an EC directive resulted in a private individual / company suffering loss of a benefit which the directive would have afforded to that person the Domestic State must pay compensation through the ECJ to the individual. This forces compliance regarding Directives creating private interests. Maastricht reinforces this development by forcing compliance by way of fines even where no private interest arises.

#### **Individual rights and Conflict between UK legislation and EC legal provisions.**

**Case 152/84 Marshall (No 1)** at the time there was compulsory retirement for women at 60 and men at 65 by virtue of **s6(4) Sex Discrimination Act 1975**. Marshall claimed that under **Art 5 Equal Treatment Directive 76/207** she had been discriminated against unfairly. The ECJ agreed. Subsequently the British government raised the compulsory retirement age of women to 65. Not all women were pleased with the result of her action.

**Marshall v Southampton A.H.A. No2 1993.** Marshall claimed compensation. **s65(2) S.D.A. 1975** again limited compensation to a maximum of £6,250. The ECJ held that the full loss must be awarded and the statutory limitation must be removed since it prevented the plaintiff from receiving under **Case 14/83 Von Colson**, 'an adequate remedy' as required by **Art 6 of the Equal Treatment Directive**.

**Francovich v Italy**\_[1991] ECR I-5357 Case 6/90 & 9/90. If domestic law fails to comply with EC provisions thereby causing loss or damage to an individual the member state is obliged to make good those losses caused by breach of Community Law provided three conditions exist. The directive must have intended to confer a right or benefit on the individual. The individual must directly have suffered such a loss (indirect losses may occur when an opportunity to make a profit is lost because of state inaction) and the directive must be sufficiently clear so that definition of rights and conditions is not dependent on the legislative formula eventually adopted by the domestic state.

**Dori v Recreb** 1994. This provides an example of an unsuccessful attempt to recover damages from the Italian Government for a failure to implement consumer credit legislation. If implemented borrowers would have been allowed 7 days in which to cancel credit agreements made away from the premises of the lender. Dori agreed to take an English Language Course and borrow money to pay for it. She cancelled the course a few days later. The college sold the debt to Recreb a debt collecting agency who successfully sued Dori for the money. Dori's defence, that she had a right to cancel failed because Italy had not implemented the directive. Dori then claimed the money back off the Italian Government. Her claim failed because the E.C.J held that the terms of the directive were not sufficiently clear for **Marleasing / Francovitch** type liability to apply.

**Brasserie du Pêcheur v Germany : R v S.S. ex p Factortame**\_C46/93 & C48/93. Neither Germany nor the U.K has an adequate judicial mechanism for paying compensation to individuals for successful **Marleasing** type claims. The German and UK governments respectively have admitted liability for preventing the import of French Beer into Germany and Spanish Fishermen to operate fishing vessels out of the U.K. in breach of Art 30 T.E.U. The references concerned the assessment of compensation especially in the area of pure economic loss. The Judge-Rapporteur's report indicated the Commission's submissions were likely to be accepted viz, the measures of assessment of compensation that apply to E.C. Institutions could be used by the ECJ in the absence of an adequate system in the respective domestic legal systems.

This proved to be correct and both Germany and the UK were eventually ordered to assess and then pay compensation. Both countries were also fined for breach of EC law. Exactly why is far from clear. The ECJ judgement is full of contradictions and inconsistencies, so it would be difficult to predict how to apply the judgements in future cases.

#### **Direct Effect and Indirect Effect : Treaty Obligations, Regulations and Directives**

Treaty Obligations and European Union Regulations are immediately binding sources of law in the United Kingdom and all other member states of the Community.

European Union Directives differ in that they provide a requirement that by a certain date (the pass by date) member states should introduce domestic legislation that complies with the spirit of the directive. In the event that a member state fails to implement such legislation, the ECJ will compensate any individual intended to benefit from the directive, who has directly suffered loss as a result of the failure of that state to introduce the required legislation.

It should be noted that the directive provides a minimum standard. The state can provide it follows the spirit of the directive introduce even more stringent legislation, provided it does not place outsiders in a less favourable position than its own citizens and does not have an equivalent or quantitative, even if unintended, effect of restricting the free movement of goods or persons. The UK sadly has a record of being over zealous to the detriment of British interests.

## European Terminology

**Subsidiarity** : See Art 3b. In areas outside the exclusive competence of the E.C. the community should only act to achieve community objectives where the proposed actions of the member state would be less effective than action by the Community. Community actions should not go beyond that necessary to achieve treaty objectives.

The activities of the community include the list in Art 3 but note that this is not stated to be exhaustive. Presumably anything not in the list is not governed by the exclusive competence of the Community and therefore is subject to art 3b subsidiarity, but that Art3 (a)-(t) measures are not subject to subsidiarity.

Or alternatively does exclusiveness attach to any action including things not in Art 3 (a)-(t) done to achieve the tasks set out in Art 2. Or does it refer to the Objectives of the Union set out in Art B ? What is the test by which to judge that a measure could be better achieved by community action ?

What does art 3b achieve ? If it is judged that a member state can achieve and does achieve an objective just as well community action then the community need not act. No legal action could be mounted to challenge the community action since no one would be prejudiced by the community action. If the member state fails to achieve the objective the community is justified in acting in any case.

Does the notion of subsidiarity water down the first sentence of art 3b 'The community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.' which implies that action outside these powers and objectives is ultra vires the community ? or is the rest of the article superfluous ?

**Uniformity** : The notion that member state's laws through out the community have the same effect.

**Harmonisation** : The process of amending the laws of member states to ensure that they are in harmony with European Law.

**Vertical Effect** of European Law and in particular directives. The effect is vertical, from the top down, i.e. from the E.C. to the Domestic State and then in turn to the individual.

**Horizontal Effect** of European Law, branching out laterally to afford rights between individuals.

Regulations are directly applicable as law so the effect is that they apply to everyone. Regulations can automatically give rights to individuals against the state or impose duties on the individual to the state, and can impose rights and obligations between individuals, in the criminal and in the civil sphere.

Directives cannot impose tax or establish new criminal offences if introduced in the form of delegated legislation in the UK. Otherwise, the effect of a directive, once implemented can be horizontal in that it can give individuals rights and impose liabilities in respect of other individuals.

However, there is no horizontal effect regarding rights of action in respect of directives that have not been implemented by the domestic state. The government under **Marleasing** can be made to compensate the individual the loss of a right which the individual would have enjoyed had the directive been implemented – i.e. vertical effect, but the individual cannot sue the other individual horizontally.

### How far back can a cause of action be backdated ?

Treaty obligations date back to the time the Treaty was ratified. So any claim under Art 30 T.U in UK can date back to as far as 1.1.1972.

Regulation obligations date back to the time the regulation is passed by the E.C. Directives date back to the earliest of either the actual date of domestic enactment or to the pass by date set by the E.C. Horizontal effect and the right to sue a private individual only runs from domestic enactment but the vertical action against a government for loss of right runs from the pass by date.

**Hierarchy of the Courts : National (UK) : EC and International.**



