European Communities
Commission
Background Report

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ISEC/B40/78

May 22, 1978

SUPREMACY OF EUROPEAN COMMUNITY LAW

The relationship between EEC law and member states' legislation

Introduction

A number of cases which have recently been dealt with by the European Community's Court of Justice have revived the debate on the relationship between the law enacted unilaterally by member states and the law which they adopted by virtue of their membership of the Community. This analysis examines the position in the light of a recent case.

The recent judgment of the European Court in Italian Tax and Revenue Administration v Simmenthal (the Times, March 13th(1)) has once more reopened the debate of whether European Community Law automatically overrides subsequent inconsistent national legislation.

The facts of the particular case, as so many fundamental cases of the constitution of the European Communities, arose out of a fairly minor dispute. A meat importer claimed the return of about £380 that he had been required to pay to the Italian Revenue under an Italian Act of Parliament of 1970 as a health inspection charge on the importation into Italy from France of a consignment of beef. The Simmenthal company in 1976 claimed before the Pretore of Susa (a court with an equivalent jurisdiction to a County Court) that the Italian charge was unlawful under Community law and that because of the direct applicability of Community law he had a right to have the sums returned, a right which the Pretore was required by Community law to uphold.

The Pretore of Susa referred certain questions to the European Court under Article 177 of the EEC Treaty and a ruling was given by that Court on 15th December 1976 to the effect that the charges for health inspections of the type in question and the health inspections themselves were incompatible with Community law (2).

On receipt of the European Court's ruling the Pretore duly issued an injunction against the Italian Revenue, requiring it to repay the sums in

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(1) Case 106/77 Amministrazione dello Finanze dello Stato v Simmenthal Judgment 9th March 1978 (not yet reported)

(2) Case 35/76 Simmenthal v Amministrazione dello Finanze dello Stato 1976 E.C.R. 1871

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question. The Revenue, however, applied to the Pretore to withdraw his injunction on the ground that the Pretore had no jurisdiction to override an Italian Act of Parliament. So long as the Italian Statute remained in force it was the Pretore's duty to apply it.

The constitutional position in Italy

Italy's constitution bears some resemblance to the UK constitution. Treaties are not self-executing. In order for a treaty to become part of Italian municipal law there must be a statute transforming the treaty into municipal law, which is what happened in the case of the EEC Treaty. However, under the Italian constitution, as under the UK constitution, a later statute can always expressly or impliedly overrule an earlier statute: "Lex posterior derogat priori". In its judgment of March 7, 1964 the Constitutional Court declared that the only way to remedy a breach of International Law caused by the overruling of a provision of the EEC Treaty by a later statute would be for the Italian legislature to repeal its later inconsistent statute.

The Italian Constitutional Court in 1975, however, went some way to attenuate its previous rigid position. It held in an historic decision that a later statute which infringed directly applicable Community law would itself be declared unconstitutional by the Constitutional Court on a reference by the ordinary civil or criminal tribunal hearing a case in which the point arose.

Herein lies the major difference with the UK constitution. The Italian constitution provides for a special court the sole task of which is to rule on the compatibility with the Italian constitution of statutes (and subordinate legislation). Conversely the ordinary civil or criminal court is not competent to rule on the constitutionality of statutes. If it considers that a statute may be unconstitutional it must adjourn the case and refer the matter to the Constitutional Court.

The upshot is therefore that Italian constitutional law appears to recognise the supremacy of Community law but with the major reserve that only the Italian Constitutional Court can remedy situations of incompatibility.

This system does however have certain advantages: it means that when the Constitutional Court declares a statute to be unconstitutional that statute is immediately expunged from the Italian legal system. The ordinary judge then decides the case before him on the basis that the statute does not exist: it is to that extent retrospective. There is, however, one limitation on the retrospective effect of the declaration of unconstitutionality. Matters that have been definitively regulated under the statute cannot be called in question.

Compatibility of the Italian constitution with Community Law

The Pretore of Susa was therefore faced with a dilemma. On the one hand the European Court had told him that a Community regulation had prohibited with immediate and direct effect the levying of certain charges. On the other hand the Italian Constitutional Court claimed that only it could remove the offending legislation. The Pretore, to escape from the impasse, turned once more to the European Court, this time with a request to explain the meaning of direct applicability.

The Pretore asked the European Court in effect to explain the consequences of the direct applicability of a provision of Community law when such a provision was incompatible with a later national statute.

To this the European Court replied unambiguously that a national court properly hearing a case within its jurisdiction is under the obligation to apply Community law in full and to protect the rights that that law confers on individuals and in so doing it is entitled and obliged to refrain from applying any national provision which may be contrary to it, whether such provision is of an earlier or later date than the Community rule and without asking for or waiting for the elimination of the statute by the legislature or by any other constitutional procedure.

Effect of the judgment

On December 22, 1977 the Italian Constitutional Court, on a reference from Courts in Milan and Rome, declared the offending statute unconstitutional. It remains to be seen, therefore, whether the Pretore of Susa will rely on the judgment of the European Court or on the judgment of the Italian Constitutional Court.

Effect on English constitutional law

In this judgment the European Court has clarified still further its understanding of what happened constitutionally when a member State joined the Community. In its conception member States irrevocably pooled certain sovereign rights by transferring them to a new entity, the European Communities. In so doing each member State, legislature and executive, irrevocably lost the power to issue binding acts in the fields which were the subject of the transfer.

That the United Kingdom, on accession to the Communities, was under a legal obligation to effect such an irrevocable transfer cannot be doubted, the constitution of the European Communities as far as its sovereignty and the consequent "supremacy" of its law being clear from the European Court's earliest judgments under the EEC Treaty. The debate that continues in the United Kingdom centres on three interrelated issues: whether first, the UK Parliament was capable of making an irrevocable transfer of some of its sovereign powers, secondly whether Sections 2 and 3 of the European Communities Act 1972 were suited to that purpose, and thirdly whether the United Kingdom judiciary would in fact recognise that such a transfer had irrevocably taken place; "sovereign" and "irrevocable" in the sense that the United Kingdom Parliament could not in the eyes of the courts unilaterally recall the powers either expressly by repealing the European Communities Act or impliedly by purporting to enact legislation inconsistent with Community legislation.

The first issue has been the subject of academic controversy since at least the time of Dicey, but its practical solution must depend upon a practical answer to the third question by the judges. As far as the second issue of the debate is concerned, Section 2 of the European Communities Act 1972 requires the judiciary (amongst others) to recognise, make available, enforce, allow and follow rights conferred by the Treaties. Section 3, which is specifically addressed to the judiciary, amongst other things requires our judges to follow decisions of the European Court. The only provision which seems expressly to deal with the supremacy of Community law is contained in Subsection 2(4)(2) "any enactment passed or to be passed, other than one contained in this part of the Act, shall be construed and have effect subject to the foregoing provisions of this act".

This phrase is clearly designed to avoid any conflict between the Treaties (and Community legislation enacted thereunder) and earlier United Kingdom legislation. It also provides a rule of construction as to later domestic legislation: where possible it is to be interpreted so as not to conflict with the Treaties. It does not, however, answer the question of what is to happen if later domestic legislation (as in Italy) is inconsistent with the Treaty.

One view of the combined effect of Sections 2 and 3, in that they expressly incorporate the decisions of the European Court, is that the judiciary must recognise that sovereign powers have been transferred to the Communities and that the exercise of those powers within their jurisdiction by the Communities is by its nature inconsistent with the continued exercise of those powers by the national sovereign.

Will the United Kingdom judiciary accept and recognise that such a transfer has taken place? The UK and Commonwealth precedents, such as they are, relate to quite different situations, in particular the transfer of sovereign powers to former colonies. They do not help in solving the problem of what the UK judiciary is to do when faced with conflicting instructions from the Communities and from the UK Parliament. Never before have our courts been required at the same time to serve two masters.

One indication of how the problem might be regarded has been given in a British National Insurance case (re. a holiday in Ireland [1977] CMLR). The National Insurance Commissioner held that the Social Security Act 1975 was overriden by earlier Community Legislation. But how the superior courts in Britain will decide on the issue remains to be tested.

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