Chapter 13: Member States' Duties to the Community

Duties having constitutional effects

13-1 Under various provisions of the Treaty, Member States commit themselves to certain obligations having constitutional effects. These obligations fall under three headings:

- a general and overriding duty towards the Community,
- a duty to avoid discrimination on grounds of nationality and
- miscellaneous duties under specific provisions of the Treaty.

General and overriding duty

13-2 Member States are under a duty[1] to:

- take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations
  - arising out of the Treaty[2] or
  - resulting from action taken by the institutions of the Community[3];
- to facilitate the achievement of the Community's tasks[4]; and
- to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.[5]

13-3 In a variety of cases coming before the Court of Justice, the provision of the Treaty enshrining the Member States' general and overriding duty towards the Community has been invoked to secure compliance with primary and secondary legislation and to prevent national laws from running counter to the objectives of the Treaty. Often it suffices to cite a provision of the Treaty[6] or of a directive[7] to show that an obligation has been created. But, where a Member State frustrates the operation of a Treaty provision which does not impose a specific duty on the Member States, then the general and overriding duty may be invoked. For example, if a Member State acts in such a way as to thwart or undermine the provision under which restrictive conduct by undertakings is prohibited[8], it is the general duty which reinforces the prohibition.

> Although Article 85 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States' law or regulation, the fact nevertheless remains that Article 85 of the Treaty, in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.[9]

Discrimination

13-4 Member States are under a general obligation to avoid acts or measures involving discrimination on grounds of nationality. Under the Treaty, "any discrimination on grounds of nationality shall be prohibited". There are two explicit qualifications to this rule. The first is that the prohibited discrimination must be "within the scope of application of this Treaty", a phrase which the Court of Justice may interpret widely. In a case involving copyright protection[10], the defence argued strongly that copyright did not fall within the scope of application of the Treaty; but the

Court took the view that,

> like the other commercial and industrial property rights, the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community... Those rights, though governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application.

In that same judgment, the Court referred to a previous case, in which a British traveller in France had been criminally assaulted but had been refused compensation from the Commission responsible for making compensatory grants. Here again, the Court had interpreted the scope of application of the Treaty, for the purposes of the prohibition of discrimination, fairly widely. The French government had argued that the national law on criminal compensation did not create a barrier to free movement of persons. The Court demurred.

> That reasoning cannot be accepted. When Community law guarantees a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement.[11]

Although it is not expressly stated in the Treaty, "nationality" in this context refers to citizenship of a Member State and does not extend to citizenship of a non-member state.

13-5 As for the second qualification, this is that the rule operates without prejudice to any special provisions contained in the Treaty. An example of a special provision is to be found in the rules on freedom of movement for workers. Such freedom of movement entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.[12]

13-6 Discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, is covered by a provision of the Treaty; but this provision does not by itself impose a duty on Member States, since it is effective only if secondary legislation implements it.[13]

13-7 Just as the Treaty provision on the Member States' general duty to the Community[14] may complement or reinforce some other provision in the Treaty, so too may the Treaty provision on the prohibition of discrimination on grounds of nationality. For example, in a case involving a German collecting society, which had refused to conclude management agreements with foreign artists who did not have residence in Germany, the Court of Justice found that there was an abuse of a dominant position contrary to the rules on competition and that the abuse consisted of precisely the type of discrimination which the Treaty sought to prevent.[15]

13-8 To strengthen the general prohibition, the Treaty gives the Council power, acting in accordance with the cooperation procedure, to adopt specific rules designed to prohibit such discrimination.[16]

Specific duties under the Treaty

13-9 Throughout the Treaty, and particularly in Part Three ("Community Policies"), there are many references to the Member States' specific duties to the Community. Some of these are positive duties to take certain action: for example, Member States are required to encourage the exchange of young workers[17] and, within the framework of a common transport policy, to pursue the objectives of the transport provisions.[18] Some are negative, requiring the Member States to "refrain" from certain action: for example, they must refrain from introducing any new measure running counter to the provisions on state monopolies[19]; from making provisions having a preferential effect on international transport carriers[20]; from imposing, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products[21]; and from incurring excessive government deficits.[22] One duty is emphatically negative, providing that Member States "shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty" applying to public undertakings.[23] Some duties are imposed jointly on the Member States and the Community: for example, in respect of ensuring that the conditions necessary for the competitiveness of the Community's industry exist[24] and for the coordination of their research and technological development activities, so that national policies and Community policy are mutually consistent.[25] Some positive duties are expressed in the form of the Member States' declaration of "their readiness" to take certain action[26], though this is otiose wording in a Treaty, the whole of which reflects the Member States' readiness to carry out or refrain from certain actions.

13-10 In two other ways specific duties may be created, imposing obligations on Member States towards the Community. The first of these concerns the duties imposed under directives. However, directives can be adopted only on the basis of a provision of the Treaty; it is, therefore, ultimately on the basis of the Treaty that any such duty has legal force.[27]

13-11 Similarly, specific duties may in effect be created as the result of judgments of the Court of Justice. For example, although the provisions of the Treaty on state aids do not expressly require the repayment of illegally paid state aid, the case-law has established that the recovery of aid illegally paid to an enterprise is a duty of the Member State which has made the payment.[28] Here again, the duty is derivative: it is a necessary concomitant of the Treaty provisions prohibiting illegal state aids.[29]

Summary

13-12 Constitutionally, the existence of these various obligations may give the impression that the Member States have surrendered powers to the Community.[30] This is not, however, necessarily the case. Treaties are more in the nature of contracts between states, unless they are manifestly designed to create new states or confederations of states. How far Member States have transferred their powers to the Community can be judged only by looking at the Member States' domestic law and the manner in which Community law is recognised and enforced in each Member State's legal system.[31]

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1. Article 10 (formerly 5), EC Treaty.

2. That is, primary legislation.

3. That is, secondary legislation; particularly Directives (see note 13-10 below).

4. These are set out in Article 2, EC Treaty.

5. As to the objectives of the Treaty, see chapter 12 above.

6. For example, under Article 21(2) (formerly 37(2)), EC Treaty, Member States are obliged to "refrain from introducing any new measure ... which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States".

7. Directives addressed to all the Member States normally have a provision to the effect that "the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than [specified date]". (See, for example, Article 16 of Council Directive EEC/104/89, which contains the standard wording.)

8. Article 81 (formerly 85), EC Treaty.

9. Case C-35/96, *Commission of the European Communities v Italian Republic*, paragraph 53, and the first paragraph of the Court's ruling.

10. In Case C-362/92, *Phil Collins v Imtrat Handels GmbH*. See in particular paragraph 22, quoted in the text below.

11. Case 186/87, *Cowan v Tresor Public.*

12. Article 39(2) (formerly 48(2)), EC Treaty. For an interesting illustration of the way in which this provision may operate, see Case C-415/93, *Union Royale Belge des Societes de Football v Bosman*.

13. Article 13 (formerly Article 6a), EC Treaty. The "appropriate action" contemplated in this Article requires a unanimous decision by the Council. Council Directive EC/43/00 implements the principle of equal treatment of persons irrespective of racial or ethnic origin.

14. Article 10 (formerly 5), EC Treaty; see paragraph 13-2 above.

15. Case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzerschten v Commission*.

16. Article 12 (formerly 6), second paragraph, EC Treaty.

17. Article 41 (formerly 50), EC Treaty.

18. Article 70 (formerly 74), EC Treaty.

19. Article 31(2) (formerly 37(2)), EC Treaty.

20. Article 72 (formerly 76), EC Treaty.

21. Article 90 (formerly 95), first paragraph, EC Treaty.

22. Article 104(1) (previously 104(c)(1)), EC Treaty.

23. Article 86(1) (formerly 90(1)), EC Treaty.

24. Article 157 (formerly 130), EC Treaty.

25. Article 165 (formerly 130h), EC Treaty. Constitutionally, it is arguable that Community policy and national policies are not separate concepts. The Article should perhaps have spoken of the manner in which the policies were executed.

26. For example, under Article 53 (formerly 64), EC Treaty.

27. Thus, harmonisation directives usually have as their legal basis Articles 94 or 95 (formerly 100 or 100a), EC Treaty.

28. See, for example, Cases 303/88, *Italy v Commission*, and 349/93, *Commission v Italy.*

29. Article 93(2), EC Treaty. See also Chapter 12 above on necessary or implied powers.

30. Some early judgments of the Court of Justice leant towards this view but would not be worded in similar fashion today. See, for example, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen.*

31. This is discussed further in Chapter 25 below.