Chapter 24: Constitutional aspects of the Financial, General and Final Provisions

Introduction

24-1 This chapter covers:
- the financial (budgetary) provisions,
- miscellaneous legal provisions,
- additional rights and obligations of Member States,
- relations between the Communities and non-member states and organisations and
- transitional or superseded provisions.

The financial (budgetary) provisions

24-2 From a constitutional point of view the provisions of the Treaty on financial and budgetary control are incomplete, inasmuch as the Treaty does not cover revenue derived from external sources. It provides for revenue from what are inappropriately named the Community's "own resources",[1] which are mainly revenues from customs duties and levies on agricultural products and a share of each Member State's collection of Value Added Tax.[2] But in addition to its own resources, the Community is financed by contributions from Member States based on a proportion of their gross national product; and this is a political, rather than a legal, arrangement, at least at the European Community level. That is to say, a Member State which defaulted on its contribution would run into political difficulties with the other Member States but would not be in breach of the European Community's constitutional law.

24-3 As for the Community's expenditure, this is governed by complex rules designed to maintain a balance between the power and influence of the Council and European Parliament. It is for the Commission to draft a preliminary budget, after which the Council and European Parliament go through a process of discussion and amendment, comparable in complexity to the co-decision procedure for legislation.[3] When the procedure has been completed, the President of the European Parliament declares that the budget has been finally adopted.[4] However, the European Parliament, acting by a majority of its members and two-thirds of the votes cast, may, if there are important reasons, reject the draft budget and ask for a new draft to be submitted to it.[5]

24-4 One of the financial provisions having a constitutional bearing on legislation is the duty placed on the Commission, in the interests of maintaining budgetary discipline, not to make any proposal for a Community act, or alter its proposals, or adopt any implementing measure, which is likely to have appreciable implications for the budget without providing the assurance that that proposal or that measure is capable of being financed within the limit of the Community's own resources.[6]

24-5 Most of the other financial provisions are subsidiary to the main budgetary provisions. There are rules on
- the items to be shown in the budget[7],
- appropriations in the budget[8],

- the procedure to be followed if the budget has not yet been voted[9],
- the implementation of the budget[10],
- matters of currency[11],
- the making of Financial Regulations[12] and
- Member States' action to counter fraud.[13]

Miscellaneous legal provisions

24-6 Under the Treaty, the Community has legal personality.[14] In each of the Member States, the Community enjoys the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community is represented by the Commission.[15]

24-7 New provisions of the Treaty give the Council the power and duty to adopt measures for the production of statistics where necessary for the performance of the activities of the Community. The Council must act in accordance with the co-decision procedure.[16] The production of Community statistics must conform with impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality; and it must not entail excessive burdens on economic operators.[17] Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data apply to the institutions and bodies set up by, or on the basis of, the Treaty.[18]

24-8 Contractual liabilities of the Community are governed by the law applicable to the contracts in question.[19] In the case of non-contractual liability, the Community is required, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants, as well as by the European Central Bank or by its servants, in the performance of their duties.[20] The personal liability of its servants towards the Community are governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.[21] The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community are required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.[22] In the territories of the Member States the Community enjoys such privileges and immunities as are necessary for the performance of its tasks.[23]

24-9 Within the limits and under conditions laid down by the Council in accordance with the provisions of this Treaty, the Commission may collect any information and carry out any checks required for the performance of the tasks entrusted to it.[24]

24-10 One of the miscellaneous legal provisions of the Treaty goes hand-in-hand with one of the Protocols to the Treaty. Where the Institutions of the Community are officially located - the "seat" of the Institutions - is a matter to be determined by common accord of the Governments of the Member States.[25] But these locations are now specified in a Protocol.[26]

24-11 Rules governing the languages of the institutions of the Community are, without prejudice to the provisions contained in the Rules of Procedure of the Court of Justice, determined by the Council, acting unanimously.[27] The rules were laid down in the first Council Regulation to be made after the Treaty came into force and specified that each of the Member States' languages should be used.[28] The Regulation has been amended by the successive Treaties of Accession; and the current list of eleven official languages of the Community is as follows:

Danish (Denmark)
Dutch (The Netherlands; Belgium)
English (The United Kingdom, Ireland)
Finnish (Finland)
French (France, Belgium, Luxembourg)
German (Germany, Austria, Belgium, Luxembourg)
Greek (Greece)
Italian (Italy)
Portuguese (Portugal)
Spanish (Spain)
Swedish (Sweden)

Irish, Basque, Welsh, Gaelic and Letzerburgesch are not official languages. In terms of constitutional importance, the absence of a single official language, or at most three, as in Switzerland, may be regarded as a hindrance to legal and political integration.

24-12 Detailed provisions of the Treaty govern the definition of the territorial jurisdiction of the Community, with particular reference to

- the individual Member States[29];
- special areas such as the Faroe Islands, the Channels Islands[30] and the Isle of Man and the Aland Islands[31];
- the European territories for whose external relations a Member State is responsible[32];
- French overseas departments, the Azores, Madeira and the Canary Islands[33]; and
- the overseas countries and territories - mostly, former colonies, - listed in Annex II to the Treaty or having special relations with the United Kingdom.[34]

24-13 None of the provisions of the Treaty affects the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel. Nor do the provisions of the Treaty derogate from those of the Treaty establishing the European Atomic Energy Community.[35] The provisions of this Treaty do not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty.[36]

24-14 Oddly placed among the miscellaneous legal provisions at the end of the Treaty is one of the most important legislative powers in the whole of the European Union's constitution. This is the provision that, if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not

provided the necessary powers, the Council has the power and duty, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take the appropriate measures.[37] Some far-reaching legislation has been adopted on the legal basis of this provision, used either by itself [38] or in conjunction with other legislative powers.[39] The provision may be used for the purposes of harmonisation, where these are incidental to the main object of the measure.[40]

> In the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure.[41]

24-15 In a provision which is technically superfluous, it is stated that the protocols annexed to the Treaty by common accord of the Member States form an integral part thereof[42]; and, in a provision which is matched by a corresponding provision in the Treaty on European Union and has already been discussed[43], it is stated that the Treaty is concluded for an unlimited period.[44]

Additional rights and obligations of Member States

24-16 Among their other obligations under the Treaty, Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.[45] They also undertake, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals;
- the abolition of double taxation within the Community;
- the mutual recognition of companies or firms[46], the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries; and
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.[47]

One other obligation on the Member States is to accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms[48] without prejudice to the application of the other provisions of this Treaty.[49]

24-17 One of the provisions of the Treaty which has given rise to much argument in the Courts, almost entirely without success, is to the effect that the Treaty in no way prejudices the rules in Member States governing the system of property ownership.[50] It has been resorted to in countless cases involving intellectual property.[51] The purpose of the provision may, however, have been to protect the interests of those Member States who wished to ensure that the Treaty did not jeopardise their political policy of nationalisation of property.[52]

24-18 No Member State is obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; and any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material, though such measures must not adversely affect the conditions of competition in the common market regarding products which are

not intended for specifically military purposes.[53] A closely related provision is that Member States are required to consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.[54] However, if measures taken in the circumstances referred to above have the effect of distorting the conditions of competition in the common market, the Commission, together with the State concerned, examines how these measures can be adjusted to the rules laid down in the Treaty; but, notwithstanding this requirment, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for above, and the Court of Justice is required to give its ruling *in camera*.[55]

24-19 Rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the Treaty. To the extent that such agreements are not compatible with the Treaty, the Member State or States concerned must take all appropriate steps to eliminate the incompatibilities established. Member States are required, where necessary, to help each other to this end and, where appropriate, to adopt a common attitude. In applying the agreements referred to above, Member States must take into account the fact that the advantages accorded under the Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.[56] In a case in which one of the issues was the extent to which Member States which are signatories to the Berne Convention for the protection of Lierary and Artistic Works, the Court of Justice said:

> Next, so far as the United Kingdom and Ireland are concerned, it is true that they were already parties to the Convention when they acceded to the Community and that Article [234] of the Treaty therefore applies to that Convention, in accordance with Article 5 of the Act of Accession. It is, however, settled case-law that the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations if, as in the present case, the rights of non-member countries are not involved.[57]

24-20 Under a new provision, the consequences of suspension of a Member State's voting rights, envisaged under the Treaty on European Union[58], are carried over into the Treaty establishing the European Community.[59]

Relations between the Communities and non-member states and organisations

24-21 Where the Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, it is for the Commission to make recommendations to the Council. The Council then authorises the Commission to open the necessary negotiations. The

Commission conducts these negotiations in consultation with special committees appointed by the Council to help it in this task and within the framework of such directives as the Council may issue to it. The conclusion of the agreements is decided on by the Council, acting by a qualified majority on a proposal from the Commission. As a general rule, to which there are exceptions, the Council concludes agreements only after consulting the European Parliament. The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty[60]; and, where the opinion of the Court of Justice is adverse, the agreement may come into force only after amendment of the Treaty. Agreements concluded under the foregoing conditions are binding on the institutions of the Community and on Member States.[61]

24-22 In addition to the powers referred to in the preceding paragraph, the Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.[62]

24-23 Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council is required to take the necessary urgent measures, acting by a qualified majority on a proposal from the Commission.[63]

24-24 It is the duty of the Commission
- to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies and
- to maintain such relations as are appropriate with all international organisations.[64]

It is the task of the Community
- to establish all appropriate forms of cooperation with the Council of Europe[65] and
- to establish close cooperation with the Organisation for Economic Cooperation and Development.[66]

Transitional or superseded provisions

24-25 Other provisions of the Treaty which were temporary, transitional or superseded by provisions of the Treaty on European Union are no longer in force.[67] The provisions on ratification and deposit remain in force; and a provision extending the languages of authenticity of the deposited copies of the Treaty has been introduced, so that the eleven official languages referred to above, together with Irish, are authentic,.[68] Thus there is a difference between the "official" languages and the "authentic" languages.

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1. Article 269 (formerly 201), EC Treaty. It is for the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to lay down provisions relating to the system of own resources. See also note 2 below.

2. Council Decisions EEC/243/70, as amended, EEC/376/88 and EC/728/94; and Council Regulation EC/1150/00, implementing the latter Decision.

3. Article 272 (formerly 203)), EC Treaty. This is the longest Article in the Treaty.

4. Article 272(7) (formerly 203(7)), EC Treaty.

5. Article 272(8) (formerly 203(8)), EC Treaty.

6. Article 270 (formerly 201a), EC Treaty.

7. Article 268 (formerly 199), EC Treaty.

8. Article 271 (formerly 202), EC Treaty.

9. Article 273 (formerly 204), EC Treaty.

10. Articles 274 to 276 (formerly 205, 205a and 206), EC Treaty.

11. Articles 277 and 278 (formerly 207 and 208), EC Treaty.

12. Article 279 (formerly 209), EC Treaty. The Regulations specify in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts.

13. Article 280 (formerly 209a), EC Treaty.

14. Article 281 (formerly 210), EC Treaty.

15. Article 282 (formerly 211), EC Treaty.

16. Article 285(1) (formerly 213a(1)), EC Treaty. The power conferred on the Council is without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank.

17. Article 285(2) (formerly 213a(2)), EC Treaty.

18. Article 286(1) (formerly Article 213b(1)), EC Treaty. Under Article 286(2), the Council, acting in accordance with the co-decision procedure, was required to establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and to adopt any other relevant provisions as appropriate.

19. Article 288 (formerly 215), first paragraph.

20. Article 288 (formerly 215), second paragraph. See also Case C-352/98, *Laboratoires*

Pharmaceutique Bergaderm SA in liquidation and Jean-Jacques Goupil v Commission.

21. Article 288 (formerly 215), EC Treaty, third paragraph. Staff Regulations and Conditions of Employment are made by the Council under Article 283 (formerly 212), EC Treaty.

22. Article 287 (formerly 214), EC Treaty. This requirement is particularly important in competition cases: see, for example, Article 20, Council Regulation 17/62.

23. Article 291 (formerly 218), EC Treaty. That is, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Communities. (The same applies to the European Central Bank and the European Investment Bank.)

24. Article 284 (formerly 213), EC Treaty. An example is to be found in Article 11 of Council Regulation 17/62 (though the legal basis of that Regulation is Article 87, EC Treaty).

25. Article 289 (formerly 216), EC Treaty.

26. Protocol 8 on the location of the seats of the Institutions. See chapter 15.

27. Article 290 (formerly 217), EC Treaty.

28. Council Regulation 1/58

29. Article 299(1) (formerly 227(1)), EC Treaty.

30. For a case in which the Court examined the special position of Jersey, one of the Channel Islands, see Case C-171/96, *Roque v Lieutenant-Governor of Jersey*.

31. Article 299(5) (formerly 227(5)), EC Treaty.

32. Article 299(4) (formerly 227(4)), EC Treaty.

33. Article 299(2) (formerly 227(2)), EC Treaty.

34. Article 299(3) (formerly 227(3)), EC Treaty.

35. Article 305 (formerly 232), EC Treaty.

36. Article 306 (formerly 233), EC Treaty. This is a reference to “Benelux”, which antedated the EC Treaty.

37. Article 308 (formerly 235), EC Treaty. As to the “necessary power”, see Case 45/86, *Commission v Council*, and Case C-268/94, *Portugal v Council*.

38. As in Council Regulation EC/40/94.

39. As in Council Regulation EEC/4064/89, where it was used in conjunction with Article 87, EC Treaty.

40. Otherwise, Article 95 (formerly100a) must be used. "Recourse to Article 100a is not justified where the measure to be adopted has only the incidental effect of harmonising market conditions within the Community": Case C-209/97, *Commission and European Parliament v Council*. See also Case C-70/88, *European Parliament v Council*, and Case C-155/91, *Commission v Council*.

41. Case C-22/96, *European Parliament and Commission v Council*, paragraph 23.

42. Article 311 (formerly 239), EC Treaty.

43. Article 51 (formerly Q), EU Treaty; see paragraph 9-8 above.

44. Article 312 (formerly 240), EC Treaty.

45. Article 292 (formerly 219), EC Treaty.

46. Within the meaning of the second paragraph of Article 39 (formerly 48), EC Treaty.

47. Article 293 (formerly 220), EC Treaty. Although the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters was adopted in 1968 and has given rise to much case-law, it does not cover the whole of the ground envisaged in this Article.

48. That is, within the meaning of Article 39 (formerly 48), EC Treaty.

49. Article 294 (formerly 221), EC Treaty.

50. Article 295 (formerly 222), EC Treaty.

51. From Case 24/67, *Parke, Davis v Probel*, on.

52. The Minutes of the meetings in 1956 and 1957, at which this provision was originally drafted, are not altogether revealing.

53. Article 296 (formerly 223), EC Treaty.

54. Article 297 (formerly 224), EC Treaty.

55. Article 298 (formerly 225), EC Treaty.

56. Article 307 (formerly 234), EC Treaty.

57. Case C-241/91, *RTE et al v Commission of the European Communities.* The Court cited the judgment in Case 286/86, *Ministere Public v Deserbais,* paragraph 18.

58. Article 7 (formerly F.1), EU Treaty. See Chapter 4.

59. Article 309 (formerly 236), EC Treaty.

60. See, for example, Opinion 1/78, *International Agreement on Natural Rubber*.

61. Article 300 (formerly 228), EC Treaty.

62. Article 310 (formerly 238), EC Treaty.

63. Article 301 (formerly 228a), EC Treaty. For an example of the interaction of provisions of the EC Treaty and EU Treaty respectively, see Council Regulation EC/1264/94 prohibiting the satisfying of certain claims by the authorities in Haiti. The Regulation is based on Article 301, EC Treaty, as well as on a "common position" defined on the basis of Article 12 (formerly J.2), EU Treaty, in Council Decision CFSP/315/94.

64. Article 302 (formerly 229), EC Treaty.

65. Article 303 (formerly 230), EC Treaty.

66. Article 304 (formerly 231), EC Treaty, under which the details have to be determined "by common accord".

67. Articles 241 to 246 of the earlier version of the EC Treaty have all been repealed under Article 6(80) of the Treaty amending the Treaty on European Union.

68. Articles 313 and 314 (formerly 247 and 248), EC Treaty. For the reference to the official languages, see paragraph 24-11 above.