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UK courts and EC law

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CHAPTER I

Setting the Scene

"The treaty is quite unlike any of the enactments to which we have become accustomed. [...] It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the treaty there are gaps and lacunae. These have to be filled in by the judges, or by regulations or directives. It is the European way. [...] Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. [...] No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. [...] They must divine the spirit of the treaty and gain inspiration from it. If they find a gap, they must fill it as best they can."

Setting the scene

Like any legal system, Community law has its unique features, and UK judges have often referred to the Community legal order as a new and very different legal order. This Chapter maps the contours of the European way UK courts have had to become accustomed to.

1.1 Union law or Community law?

In the aftermath of the Second World War, a number of bodies and institutions were set up with similar titles. Today, there are at least four fields of law often confusingly referred to as 'European Law': the law of the European Convention of Human Rights and Fundamental Freedoms; the law of the European Communities; the law of the European Union; and the law of the European Economic Area. In this work, the terms European law, European Community law, or Community law will be used interchangeably to refer exclusively to the law of the European Communities³, a subset of the law of the European Union. This is not to deny the importance of Union law as a rapidly developing field³, but for the purpose of this work only Community law is relevant, particularly because in the UK context Community law is exclusively defined by reference to the European Communities Treaty⁴.

1.1.1 The acceleration of history

From the date of entry into force of the EEC Treaty to the fall of the Berlin wall, the integration process was characterised by a definite slowness⁵ by comparison to the radical turnaround brought about by the end of the cold war system. Since then, in the words of Jacques Delors, there has been a clear 'acceleration of history'. Institutional reform is followed by more institutional reform that

triggers yet another need to reform the Treaties. More policies and competing objectives are added. This in turn affects the way in which the Community legal system evolves.

The Treaty of Maastricht provided for a future revision process which began in March 1996 and concluded with the signing of the Treaty of Amsterdam on 2 October 1997. The Treaty of Amsterdam entered into force on 1st May 1999. Amsterdam in turn provided for a future revision process and even provided a framework for this revision process in the Protocol on the institutions with the prospect of enlargement of the European Union, the famous "*Amsterdam leftovers*." At Nice, a new Treaty was agreed, to open the way to enlargement. The new Treaty, signed on 26 February 2001, entered into force on 1 February 2003.

Further changes will probably be made to the Treaties as a result of the Convention on the Future of Europe and of the Treaty on the Accession of 10 new Member States, which was signed on 16 April 2003 and will enter into force on 1 May 2004.

1.1.2 The Treaty on European Union

The Treaty of Maastricht or "Treaty on European Union" introduced a three-pillar structure. The three Communities remained in existence as components of the first pillar, the two inter-governmental Treaties provided on one hand for co-operation in the field of Common Foreign and Security policy (the second pillar), and on the other hand in the field of Justice and Home Affairs (the third pillar).

The Treaty on European Union also introduced "citizenship". This was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic project. This concern is also reflected in the removal of the word economic from the Community's name and by the introduction into the EC Treaty of a range of activities and policies transcending the field of economy⁶. It is now clear that citizenship carries with it important legal consequences. Individuals are not merely regarded as economic agents.

*"Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."*⁷

The Treaty of Amsterdam provided for a renumbering of EU and EC Treaty provisions; it 'communitarised'⁸ a part of the third pillar by inserting a new title on "Visas, Asylum, Immigration and other Policies relating to the free movement of persons in the EC Treaty". "Police and Judicial Co-operation in Criminal Matters" remained an intergovernmental matter to be dealt with using the intergovernmental method.

1.2 Primary sources

The sources of Community law are contained in the constitutive or "founding Treaties" establishing the three Communities; in the Treaties revising the founding Treaties, notably the Merger Treaty of 1965, the Budgetary Treaties, the Single European Act and the Treaty on European Union; in the Treaties of Accession (which provide for the accession of new Member States), and in protocols, conventions, and acts ancillary to the founding Treaties and the Treaties of Accession.

The Preambles to the Treaties have legal force; and disregarding them as mere 'Euro-waffle' would be unwise. The ECJ has in a number of landmark decisions made express reference to the Preamble when interpreting substantive provisions of the Treaty and deciding on their effect.

1.2.1 A Europe of bits and pieces¹⁰

Protocols deserve a special mention in the UK context. This is the case, not only because of the Protocol on Social Policy or the Protocol on EMU, which signalled the UK's determination to follow its own path, but also because the unity and coherence of the Community legal order is now more and more threatened by opt-outs, exceptions and derogations. This increased recognition for flexibility is now an established pattern in Community law. While the provisions on closer co-operation have not to date been used, it is clear that many of the assumptions about the need for uniform application of Community law are seriously in need of being thought through again. Certainly the ECJ in the *Tobacco Advertising* case¹¹ signalled that only *appreciable* distortions of competition could justify recourse to Treaty provisions designed to ensure the good functioning of the internal market. This is in stark contrast with the way in which the distortion of competition argument was used to justify the use of Community powers to legislate in the environmental field at a time when the Treaty lacked an environmental title.

1.2.2 International agreements.

A second category of primary sources of Community law comprises international agreements by which the European Union is bound. These consist of agreements with one or more third countries or international organisations, concluded either by the Community and the Member States together or by the Community itself in exercise of its external relations powers. These agreements include agreements such as GATT (which predates the foundation of the EEC), the Treaty establishing the European Economic Area (EEA), and "Association Agreements", notably the Lomé Convention with the African, Caribbean and Pacific (ACP) countries; and the "Europe Agreements" with some of the countries of Eastern Europe. On occasions, UK courts are faced with questions

regarding the effects of such agreements. In this way, in *Polydor*¹² the Court of Appeal asked the ECJ whether the Portuguese Association Agreement had the effect of allowing parallel imports from Portugal. More recently the High Court has sent a number of questions in relation to the effect of the EC-Poland, EC/Bulgaria, EC-Czech Republic Association Agreements. In *Głoszczuk*¹³, the ECJ was asked whether Article 44 of the EC-Poland Association Agreement conferred a right of establishment upon a Polish national whose presence within the territory of a Member State was unlawful under national immigration law. The UK courts have also helped to explain the relevance of the WTO to proceedings before national courts. Thus, where the Community intended to implement a particular obligation assumed in the context of the WTO, or where a Community measure refers expressly to the precise provisions of the WTO agreements, it is possible to challenge the validity of that Community measure in the light of the WTO rules¹⁴.

1.2.3 The general principles of law

The final category of primary sources is that of the General Principles of Law. These principles have been developed by the ECJ, as part of its general duty to ensure that the law is observed¹⁵. They derive from the constitutions of the Member States, or from international agreements, such as the European Convention on Human Rights and Fundamental Freedoms (ECHR), to which the Member States, but not the Community, are parties¹⁶. With regard to the ECHR, it must be borne in mind that the ECJ only finds inspiration from it, and that there is a real possibility of diverging interpretations between the Luxembourg and Strasbourg Courts¹⁷. However, if the ECJ takes any notice of the EU Charter of fundamental rights, then any divergences in the future can only mean a more extensive protection by the Luxembourg Court. Since the Charter specifically contains rights which corresponds to those that are guaranteed by the Convention for the protection of Human Rights and Fundamental Freedoms, then the meaning or scope of these rights must be the same as those laid down under the Convention unless Union law provides more extensive protection¹⁸.

1.2.3.1 The EU Charter of Fundamental Rights.

At the European Council of Nice, the Charter of Fundamental Rights of the EU was solemnly proclaimed. The Charter is not legally binding¹⁹. The question of its legal status²⁰ is one of the issues the next IGC will have to address, although it might have some impact even before then. Thus, three Advocates General²¹ have already been referring to it given that "it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order"²². It has also been said that "in proceedings concerned

with the nature and scope of a FR the relevant statements of the Charter cannot be ignored. The Charter has clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context.” On the other hand, the ECJ has decided the cases without any reference to the document²³. One new development is apparent it is that: both the CFI and the ECJ are taking greater care in examining the case law of the Strasbourg Court.

The general principles of law as a source is a mixed bag. It includes fundamental rights proper, but also principles of “administrative justice” such as legal certainty and proportionality and principles “aligned with British concepts of natural justice”²⁴.

1.2.3.2 The relevance of the general principles of law in litigation

Primary sources take precedence over derived legislation. Accordingly, challenges to the validity of Community legislation in conflict with primary sources can be mounted before national courts. The general principles of law are a primary source of Community law and as such must be observed by the Community institutions whether they act in a legislative or executive capacity. As a result, general principles of law can be relied upon in litigation to question the validity of Community legislation, and executive action by the Commission can be challenged if it can be shown to be in breach of the general principles of law. Such challenges to the validity of Community action can take place in national courts, and as will be shown, there have been instances where the UK courts have been faced with such situations.

The primary function of national courts in relation to the general principles of law, relates to Member State actions. Where Member States act as agents of the Community, by applying Community law or administering Community policies, they, similarly, are constrained by the general principles of law²⁵. This is the case where Member States apply a Community Regulation or implement a Community Directive. Indeed the discretion left to Member States in relation to the choice of methods to meet the result laid down in a particular Community instrument can never include a discretion as to whether or not to respect the general of principles of law. Member States must also observe general principles of law when they are derogating from free movement provisions²⁶. The difficulties encountered by national courts and certainly by the UK ones in situations where the legality of national measures has been contested on the basis of a breach of the general principles of law consist in determining whether the national measures fall within the ambit of Community law in the first place.

As will be shown, the application of the general principles of law in the UK courts is fraught with inconsistencies, and the application of these principles seem to be establishing a new pocket of resistance for the courts in the UK²⁷. It is also worth highlighting the fact that as a source of Community law the general principles have given rise to different types of issues in domestic

courts. Thus, generally speaking, the general principles of law have been used in litigation before the UK courts as a vehicle to try and increase the standard of judicial protection of rights afforded under domestic law. This is in contrast with Germany, for example, where, for quite some time, the general principles of law were thought to bring about a challenge to the standard of protection of fundamental rights as guaranteed under the Basic Law.

1.3 Legislation enacted under the Treaty

The EC Treaty defines the powers of Community institutions and provides for the constitutional framework under which the body of Community legislation is being made. Legislation made under the Treaty consists of regulations, directives and decisions.

1.3.1 Regulations and the devolution dimension

Article 249 EC provides that "a regulation shall have general application. It is binding in its entirety and directly applicable in all the Member States". A regulation "being essentially of a legislative nature"²⁸ has general application in that it contains general and abstract provisions, and has legal effects extending to an indeterminate group of persons and to a multiplicity of circumstances described in general terms. Being binding in its entirety, a Member State is not entitled to apply the provisions of a regulation in an incomplete or selective manner and thus exclude those parts which it considers to be contrary to certain of its national interests²⁹. Regulations take effect, in all Member States, either 20 days after their publication in the Official Journal or at a later date specified in the text. In exceptional circumstances³⁰, a regulation may take effect retrospectively. In the criminal sphere, regulations cannot operate retroactively³¹. Whereas in theory, as soon as they come into force, regulations are "directly applicable in all the Member States"; and hence are supposed to be self-sufficient as legal instruments, in practice numerous regulations leave national authorities a certain amount of legislative discretion – sometimes on rather important matters. Regulations which require further action by the Member States are particularly frequent in the agricultural field, where they leave more and more margin of manoeuvre for the Member States. Whatever degree of intervention is needed, Member States must ensure that the Community nature of the Regulation is clear, and that its substance is in no way altered. Where the Community legislature leaves some discretion to a Member State, and where the constitutional arrangements of that Member State provide for implementation of Community obligations by devolved institutions, there does not appear to be any reason why each of the devolved institutions should not be entitled to exercise this discretion separately. Therefore, Scotland could implement Community obligations in devolved areas differently from the rest of the UK. In fact, differential imple-

mentation has already taken place³² and some of the support schemes under the CAP, in particular those related to the application of the Rural Development Regulation³³ have been implemented separately in the different parts of the UK.

Some questions remain and are as yet to be addressed in Community law. Let us consider the following scenario: in a Member State, devolved institutions make use of their power to implement the same Community obligations separately. If this power to implement the same Community instrument resulted in differential implementation and was challenged, as breaching *inter alia* the EC general principle of equal treatment, would devolution itself be seen as constituting an objective justification? Would the fact that different parts of the UK have devolved decision-making powers in areas occupied by Community law provide a justification for the difference in treatment resulting from the exercise by these different parts of their power to implement differently the same Community instrument? Would the ECJ consider that, in the matter of legislation the decisions of one legislative body cannot be a comparator with those of another legislative body? Would it say that the principle of equal treatment is not breached because conditions in each jurisdiction differ and the legislative response will reflect those differences?

With devolution, a number of new issues are being discussed, notably whether the power to take stricter measures under a Community Regulation is open only to the Member States or also to their constituents parts³⁴. Furthermore the courts in Scotland have been asked to consider whether it is possible for the same EC Regulation to be applied differently in different parts of the UK or whether this is contrary to the nature of the Regulation as a general measure. In the agricultural field there is also the added difficulty of whether or not this would be in breach of Article 34 (2) EC, a provision which excludes discrimination between producers or consumers within the Community.

1.3.2 Directives

A directive is binding on each Member State as to the result to be achieved within a prescribed period, but leaves the Member States the choice of form and methods for attaining the objectives set at Community level. The fact that the Community institutions lack legislative discipline also has consequences for Directives. In the same way that Regulations have on occasion stopped being self-sufficient legal instruments, the discretion Directives are supposed to leave to the Member States is on occasion severely curtailed by precise and detailed provisions. Even where Member States enjoy genuine discretion, this is closely supervised by the ECJ. The use of administrative practices, which by their nature may be changed according to the whim of the authorities and which lack appropriate publicity is not acceptable³⁵. The provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty³⁶. This requirement is difficult to fulfil when the directive itself is ambiguous.

Given that the basic principle for implementing EC Directives is that effect must be given to what they require, but that identifying the requirements of Community law is not always straightforward, the practice of annexing the text of the directive to the national provisions that are designed to implement them has become commonplace³⁷. This is in nobody's interests.

1.3.2.1 Directives lay down different types of obligations

The means of giving effect to the requirements laid down in directives obviously varies depending on the content and nature of directive. Some directives require Member States to set up procedures; others may impose obligations on Member States to provide information to the Community institutions or to notify them of a proposed course of action such as the introduction of new technical regulations. Some directives require Member States to grant exemption from VAT, others oblige them to introduce or modify substantive provisions governing legal relationships in the private sphere.

In practice, this means that directives raise before national courts a variety of issues. Sometimes UK courts will be asked to check that adequate procedures have been put in place which offer the guarantees required. On other occasions, they will be asked to substitute a legally perfect provision in a directive for a provision of national law, or to decide which effects to attach to the non respect of an obligation to notify standards or provide the relevant information. In yet further circumstances, UK courts will be asked to decide whether the sanctions attached to a failure to comply with the obligations as laid down the implementing legislation will secure proper compliance with the directive. The fact that there are different types of directives also means that issues such as whether, and in which circumstances, individuals may be recognised as having an interest in ensuring that Member States comply with these different directives, will vary.

1.3.2.3 Directives need national law

According to the text of Article 249 EC, the addressees of directives can only be the Member States. As far as individuals are concerned, this means that rights and obligations can only be brought into being by the national measures that implement the directives and not by the directives themselves. In other words, the Treaty provides that directives can only reach individuals through the medium of national legislation.

*"Wherever a directive is correctly implemented, its effect extends to individuals through the medium of the implementing measures adopted by the Member States concerned"*³⁸.

Where a directive is not implemented in national law, the rights and obligations therein are not readily available³⁹. Where it is implemented, Community law appears in the national legal systems “disguised” as national law. It follows that it is necessary to check whether or not there is a directive which covers the situation under consideration. When a UK statute or statutory instrument implements a Community directive, it is useful first of all to make sure that the Community directive has been properly implemented. If not, then it may be challenged, and what may have seemed like a simple plea of guilty or a fair dismissal might well become a plea of not guilty or a claim for unfair dismissal.

1.3.2.3 Implementation in practice

It is also important to appreciate that directives lay down two separate obligations for Member States. Alongside the obligation to implement the directive – sometimes referred to as ‘black-letter implementation’-, Member States have an obligation to ensure that the objective which the directive intends to achieve is actually met – ‘implementation in practice’. Community law requires Member States, and, insofar as they are organs of the States, their national courts and tribunals, to ensure the exercise of and effective control over compliance with the provisions of the directive and with the national legislation intended to put it into effect.⁴⁰ In other words, Member States must not only transpose directives properly, they must secure their effective application and enforcement. So for example, full implementation of Article 7 of the Package Travel Directive⁴¹ requires Member States to adopt, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from the time limit for implementation, they will be refunded money already paid and will be repatriated in the event of the organiser’s insolvency. Full implementation is not secured if the national legislature has done no more than adopt the necessary legal framework for requiring organisers by law to provide sufficient evidence of security⁴². From the foregoing it can be seen that much is expected of national courts in terms of ensuring the proper application of the obligations laid down in directives.

The Commission is proposing to include in proposals for new directives an obligation on Member States to include a “concordance table” with the communication of transposition measures (at national and/or regional or local level); whether this will make the task of national courts any easier is necessarily a matter of conjecture at this stage.

1.3.2.4 The pathology of non-compliance

Directives are not only sometimes implemented imperfectly, they are often implemented belatedly, or not at all.

*"It is central to the coherence and unity of the process of European construction that each Member State should fully and accurately transpose into national law the Community Directives addressed to it within the deadlines laid down therein."*⁴³

The Community is beset with a pathology of non-compliance, an acute problem in relation to directives, where poor or bad implementation at times constitutes the norm. This is true of the UK, where, despite a good record in relation to formal transposition, claims have been pursued successfully in order to secure the proper and effective application and enforcement of directives⁴⁴.

It is important to stress that enforcement of directives raises different sets of issues. UK courts may be called upon to play different roles, at different points in time⁴⁵, in ensuring that Member States comply with the obligations laid down in directives. In cases of alleged wrongful implementation, UK courts might need to refer the matter to the ECJ in order to ascertain the full extent of the Community requirement. In cases of established wrongful implementation, UK courts may be called to find the State liable⁴⁶. In the absence of implementing measures, i.e. without the medium of national law, the extent to which directives reach individuals, and the extent to which individuals can insist that UK courts ensure effective application of Community directives will vary. Questions will also arise, depending on factual circumstances as to the title and interest of individuals and other legal persons to challenge implementing legislation as having failed to achieve the required result. Flowing from this are issues of whether a potential litigant ought to challenge UK-wide implementing legislation in the English or Scottish courts where title and interest is viewed differently⁴⁷, or even whether courts in the UK should take a particular approach to title and interest where Community law arguments are raised before them, since an important Community law principle is that Community law is to be applied uniformly. The different techniques developed by the ECJ and available to individuals to enforce directives, and the various consequential duties on national courts in giving effect to directives will be considered in Chapters 3 and 4.

1.3.2.5 Improving the quality of EC Directives

There are now EU level procedures for regular reviews of the effectiveness and transposition of legislation. Individual directives in particular may have review dates written into them that will provide an opportunity for review of the problems and difficulties encountered when implementing or applying them. In certain specific fields individual initiatives are set up. Thus for example, EC legislation concerning the single market is being reviewed at EU level through the Simpler Legislation for the Internal Market (SLIM) Initiative. In the UK, Government Departments are invited to signpost difficulties encountered in the application of Community obligations to the Cabinet Office so that the UK Government may put forward the necessary proposals for amendments.

1.4 Soft law

In the Community, there are rules of conduct which although without legally binding force may nevertheless have important practical effects since they offer guidance as to the interpretation and scope of application of Community law. This 'soft law' takes a multitude of forms; from acts explicitly recognised by Article 249 EC, namely recommendations⁴⁸ and opinions as well as declarations, action programmes, communiqués, conclusions of European Council summits and resolutions of Community institutions. Other official documentation may assist. This includes notices, communications and other statements of policy issued by the Commission; as well as answers to parliamentary questions in the European Parliament⁴⁹. In the UK, reports such as those of the House of Lords Select Committee on the European Communities (now the European Union Committee) provide useful information as to new developments which can be expected, and as to the different issues surrounding the implementation of particular Community instruments, in so far as they outline the particular areas of domestic legislation which will have to be amended or consider whether or not new legislation will be required to give effect to the new Community obligations.

1.5 Case law as a source of law

Lawyers in the UK are perfectly comfortable in recognising case law as an important source of law. As for the courts, they are instructed specifically to follow the case law of the ECJ. Section 3(1) of the European Communities Act 1972 expressly provides:

"that any question as to the meaning or effect of any of the Treaties and of Community legislation, must, if not referred to the European Court, be decided in accordance with the principles laid down by, and any relevant decisions of, the European Court."

Nevertheless, the extent to which the case law of the ECJ is a source of law deserves some attention. Equally the special features of the case law developed by the ECJ must be stressed.

1.5.1 ECJ decisions relevant and binding on the UK courts

A preliminary ruling under Article 234 EC is binding on the referring court, but what exactly is its broader effect on other courts in the same national legal system and on the domestic courts of other Member States? Community rules have to be interpreted so as to have the same effect in every Member State⁵⁰ and the function of Article 234 EC is to secure uniform application and interpreta-

tion. Therefore, preliminary rulings are designed to have a wider impact than just on the referring national court. The ECJ indicated in *Cilfit*⁵¹ that a reference does not have to be made in future cases in which the same question of interpretation arises again or to which the ruling is capable of applying, even by a court which would otherwise be obliged to refer. In *ICI*⁵², it was made clear that a declaration of invalidity of Community legislation may be relied upon by other national courts. In addition, the ECJ makes frequent reference to '*consistent and well established case law*'; and has attached important practical consequences to the existence of such a body of case law. In this way, characterisation of breaches of Community law for the purpose of establishing State liability has been made in the light of the earlier ECJ case law. In *Brasserie du Pêcheur*⁵³, the ECJ held⁵⁴ that the German Biersteuergesetz, prohibiting the marketing of beer containing ingredients other than water, hops, malt and yeast, as Bier, had been found to contravene Article 28 EC in 1987; furthermore that it could not be regarded as an excusable error, since the incompatibility of such rules was manifest in the light of earlier decisions of the Court, in particular *Cassis de Dijon* (1979)⁵⁵, and *Vinegar* (1981)⁵⁶. Therefore, '*consistent and well established case law*' ought to be studied with particular attention. At the same time, it must be remembered that there is no such thing as a doctrine of binding precedent as understood in the UK. The ECJ is not formally bound by previous rulings; although in practice, like any other court, it rarely departs from previous decisions. National courts are bound by a previous ruling of the ECJ⁵⁷ but no national court is precluded from making a reference if it wishes the ECJ to reconsider a previous ruling on the interpretation of a specific provision⁵⁸; and, on at least three occasions, the Court expressly overruled a previous decision⁵⁹.

1.5.2 Reading the case law of the ECJ

Judgments of the Court, collegiate decisions, are terse, cryptic and contain little indication of the reasoning on which they are based. The opinions of Advocates General are more akin to the style of legal writing of the UK bench. The Treaty provides that the task of an Advocate General is to "make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it". The usefulness of opinions is twofold. Where the ECJ departs from it, the opinion can be regarded as a dissenting opinion, and may be invoked as a persuasive authority in subsequent cases to try to convince the Court to reconsider previous rulings. Where the ECJ followed it, an opinion may be the best guide to the reasoning of the Court. "Although not binding upon the Court, they are a source of Community law."⁶⁰

Cases should not be read as making a clear-cut distinction between *ratio decidendi* and *obiter dicta*: "in each case, everything that is said in the text of the judgment expresses the will of the Court"⁶¹, and should therefore be taken notice of, a piece of advice especially relevant to preliminary rulings: "English

lawyers and English courts should beware of treating EC preliminary rulings on their facts as authorities for particular propositions and they should also be wary of distinguishing the cases on their facts⁶²." The operative part of a preliminary ruling is in limited terms since it specifically answers the precise questions referred by the national court, yet in such cases, the ECJ also develops general principles of interpretation. An illustration is provided by the case of *von Colson*⁶³. In the operative part of the judgment, the Court held "[...] it is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law[...]." In *Marshall II*, the Court of Appeal quoted this paragraph as authority to refuse to construe the Sex Discrimination Act 1975 in the light of the Directive. "The Act of course predated Directive 76/207 and was not enacted to give effect to the Directive". However, in the main body of the judgment, the ECJ had indicated that "[...] in applying the national law and *in particular* the provisions of a national law specifically introduced in order to implement Directive 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive..."⁶⁴ In other words, the duty imposed on national courts did not simply apply to the legislation specifically adopted to give effect to the directive, a point eventually clarified beyond doubt in *Marleasing*.⁶⁵

Case citation in the Court case law has been the subject of some academic analysis, which suggests that on occasion the status of previous decisions is obscured, which is a source of confusion for those who have the task of giving effect to Community law. Previous decisions are normally only cited by the Court in support of its argument; authorities pointing the other way are either rarely mentioned, sometimes departed from without explanation, or occasionally even presented by the Court as supporting the opposite line⁶⁶. It is difficult for the Court to be absolutely consistent, as it has to adapt to rapidly changing circumstances.

"The ECJ takes account of the intervening social and other changes and evolving standards ... in deciding how the law should be develop to meet changing needs and demands on it. ... The concern of the ECJ is to ensure that the law adapts itself to meet new problems⁶⁷."

Furthermore, it is clear that the Community legal order is dependent on national judges. It is they who must make the best use of the resources available in their national legal systems so as to ensure that both procedural and substantive rights granted by Community law can be vindicated. This means that on occasions national judges must also be prepared to make constructive efforts. In other words, there is a substantial interaction between the ECJ and national courts. In the same way that the ECJ influences the workings of national courts, national courts too influence the ways in which the ECJ develops its case law. The ECJ must ensure that it always keeps national courts on board, and that its "authority" is accepted by national courts, as formally the relationship is one between equals⁶⁸.

The ECJ has on occasion been under attack: there has been much talk about curbing its competence, although this did not amount to any Treaty amendments⁶⁹. Against this background, the task of the ECJ is a difficult one. It must ensure its authority is accepted as naturally as that of national supreme courts although it is not in any way in such a hierarchical position, an aspect often forgotten when the Court's case law is put to the rigorous test of academic scrutiny⁷⁰. The ECJ has further been criticised for not deciding questions referred under Article 234 EC in a manner which enables Community law to develop on the basis of intelligible and rational principles. However, the very division of function under Article 234 EC does not necessarily provide the best context in which to discharge such a function. Sometimes, national courts themselves seek a correct answer in a given case, thereby preventing the ECJ from making rulings of general significance, and rulings on very specific questions generate further and even more specific questions⁷¹ from which it is sometimes difficult to extrapolate a general rule that could be applied to different circumstances. This is a dimension which will be further explored throughout this work.

There are other unique features to the Community legal system, and the next paragraphs will describe those aspects specific to Community law which must be borne in mind by British judges when interpreting and applying Community law.

1.6 The notable features of the EC Treaty

It is a *framework treaty*, in that it merely provides general principles as guidelines for the attainment of Community objectives. The details are left to be worked out by the institutions at a later date, although the level of treatment given to the different subjects varies. Furthermore, whilst matters dealt with under the Treaty are wide-ranging, progress in some areas has been more satisfactory than in others. This uneven level of performance in terms of development of policies can also be traced through the enforcement of Community law, some aspects of Community law being enforced more effectively and efficiently than others.

The Community Treaty lays down the foundations of the most comprehensive existing framework for international co-operation. Furthermore, the process of integration is a dynamic one. If the powers attributed to the Community are defined in sectoral terms, such as agriculture, transport, environment, health and safety and consumer protection, these powers have to be understood in functional terms, i.e. by reference to the objectives⁷² to be achieved. In the progress towards the realisation of these objectives, the Community influences national substantive policy areas. This means that Community law can limit national autonomy even in spheres not formally transferred to the Community⁷³ when national policies act as a barrier to integration or threaten the achievement of one of the objectives of the Community, as will be illustrated through case law. So, the dynamic character of integration has implications for the Communi-

ty's legal order. All general provisions of Community law, and in particular the provisions of the Treaty, must be interpreted in an evolutionary way⁷⁴, a technique which, at first, surprised English judges:

*"The European Court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the treaties as changing to match their growth"*⁷⁵.

The UK courts now seem better accustomed to the ECJ "dynamic role appropriate to the construction of a living constitution"⁷⁶, and to the needs for different interpretation techniques⁷⁷.

A Scottish judge in the Court of Session expressed in a similar fashion a willingness to apply the law as it is now in a modern age: "Scots law must not be seen to be timid or conservative where our Treaty obligations are at issue"⁷⁸. This comment was made in connection with the implementation of Directive 653/86/EEC. In the case the Scottish judge was also prepared to take stock of the fact that "the old well loved and established rules of contractual interpretation may well have to give way to a bigger picture which is the 'European dimension'". In this case the word 'termination' was interpreted in a "purposive way that will protect all commercial agents, otherwise the Treaty objectives in the Community will not be attained".

1.6.1 A law of solidarity

Today, if not the reasons themselves, the implications of the reasons for setting up the Community seem forgotten. But to create the conditions for peaceful coexistence implied that membership of the Community carried with it acceptance of a duty of solidarity, and also acceptance that integration was meant to bring about interdependence. This meant that the obligations undertaken by the Member States are not just to each other; they are obligations to the Community.

*"The Member States have undertaken certain far-reaching obligations not simply on a reciprocal basis, but primarily towards the new collectivity they set up"*⁷⁹

This duty of solidarity provides the background to the enforcement of Community rules. As the ECJ had to remind the UK:

"in permitting Member States to profit from the advantages of the Community, the Treaty imposes on them the obligation to respect its rules. For a State unilaterally to break, according to its conception of national interest, the equilibrium between

*advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order.*⁸⁰

Moreover, in the Community, under no circumstances may a Member State unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law⁸¹. The Community does not tolerate retaliation by one Member State as an acceptable response to breach by other Member States of their Community obligations.

The provisions of the EC Treaty must be interpreted according to the general objectives set out in Article 2 EC. In order to determine the overall purpose of regulations and directives, the ECJ will have regard to the legal basis as set out in the preamble. Certain Treaty provisions, such as the principle of non discrimination or the free movement of goods, have been regarded by the ECJ as fundamental to the aims of the Community. However, with Maastricht, but particularly so with Amsterdam, the nature of the jurisdiction of the ECJ may have to change, as directly competing objectives are brought within the Treaty framework, and since the four freedoms have lost their characteristics as the foundations. It is not possible to ascertain how long this process will take.

At present, the general rule is that the scope of a prohibition laid down in a Treaty provision is to be interpreted broadly; conversely, the scope of the power to derogate from these provisions is subject to judicial control and is strictly and narrowly construed⁸².

1.6.2 The Autonomy of Community Law

Another distinctive feature of Community law is attributable to the language dimension. In the Community legal order, the language dimension goes far beyond "the inherent features of language which create difficulties for lawyers"⁸³. The Treaty exists in 12, Community legislation in 11, *equally authentic* language versions, and both contain many legal terms which are unfamiliar to most lawyers, including British ones. Thus, such a central concept as the *acquis communautaire*⁸⁴ is so elusive that, in many Treaty versions, it cannot be rendered in any language other than French⁸⁵. Other legal terms may be familiar to British judges, yet they have a different meaning in the legal orders of each Member State, and more importantly another, autonomous, meaning in Community law.

The autonomy of Community law with regard to national legal systems, a principle originally designed as a defensive mechanism to protect the identity of Community law from the incursions of national laws⁸⁶, has led the ECJ to construct a Community meaning for many Community concepts. The Commu-

nity interpretation attached to these concepts is also based on the need to ensure the uniform application of Community law. 'Public policy'⁸⁷, 'worker', 'court or tribunal' constitute such illustrations of Community concepts independent from domestic definitions. As the Court explained in *Cilfit*⁸⁸,

"it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even when the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

Such an exercise was carried out by the Court of Session⁸⁹ which made a comprehensive comparative survey of the different language versions of the Directive on Commercial agents, of the French case law in the area and a German Tax guide in order to construct a Community meaning for the concept of 'termination of contract'. It then applied this Community meaning instead of its received understanding of termination under general contract law.

1.6.3 Other features of Community law

Then, there is the nature of Community law. The opacity and ambiguity of Community law has been cited by Lord Templeman as both its strength and its difficulty⁹⁰. The Community Treaty is a framework Treaty and the legislation made under the Treaty is often of poor quality, "patently ambiguous or even self-contradictory"⁹¹, reflecting in part the political difficulties surrounding its adoption. The quality of Community drafting is the subject of renewed significant attention in the Community institutions, and amongst other steps⁹², guidelines against which Community legislation must be measured have been adopted⁹³. Community legislation needs to be worded clearly, consistently and unambiguously, following uniform presentation and legal drafting, so that it will be easier to implement by national authorities and easier to understand for economic operators and the general public⁹⁴. Doubts have been expressed as to whether any significant improvement can ever take place.

*"The quality problem of Community legislation is above all a matter of substance. Its imperfection is strongly related to the subject matter of the rules and the particularities of the Community's institutional structures"*⁹⁵.

To date, the various calls that have been made have had little impact. For some this is simply due to the fact that what the Community really needs is a proper legislative policy⁹⁶. Yet, and despite the fact that the issue has been coming up with great regularity on the agendas of the recent IGCs, it does not appear to have been satisfactorily addressed. A closely related issue is that of hierarchy of norms or classification of Community acts, which has received the full attention of a specific Convention working group.

From the perspective of national courts, the poor quality of Community legislation, is further compounded by the fact that the issue of subsequent application of, and compliance with the rules is generally not addressed by the Community legislature, and arises only if and when the rules have to be enforced⁹⁷.

1.7 The UK courts and the challenge of interpretation

An illustration of some of the troubles encountered by UK courts in enforcing Community rules is provided by the line of case law where the limits of Article 28 EC were tested in the context of Sunday trading⁹⁸ and Sunday Employment legislation. In *Torfaen*⁹⁹, the ECJ held that the prohibition laid down in Article 28 EC did not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects of such rules on Community trade did not exceed "the effects intrinsic to rules of that kind", and further that "the question whether the effects of specific national rules do in fact remain within that limit is a question for the national court". As a result, courts in England & Wales took divergent approaches¹⁰⁰. When answering references from other national courts¹⁰¹ raising comparable issues¹⁰², the ECJ decided itself on the proportionality issue. This caused "consternation"¹⁰³ and partly motivated the decision of the House of Lords to make a further preliminary reference¹⁰⁴. The reference yielded a clear response by the ECJ, which undertook itself to assess whether the *Shops Act 1950* was proportionate to the legitimate aim of socio-economic policy that it pursued.

The ECJ does not always take it upon itself to adjudicate on the proportionality of national measures. The tests of objective necessity and proportionality, have had to be applied in a variety of situations involving Community law arguments, well before UK judges were invited to do so in other types of situations. In this way, Community law has encouraged UK judges to learn new judicial techniques. They have had to make difficult value judgments, and sometimes even have had to rethink their role, and their position *vis a vis* the legislature.

*"The fact that the European Court has said a particular question is one for decision by the national court does not endow that court with quasi-legislative powers. It must confine itself within the area of judicial intervention required by the Treaty and not trespass on questions which are for democratic decision in Parliament."*¹⁰⁵

In the context of equal pay and equal treatment issues, and in relation to indirect discrimination, judges have to decide how to establish whether a rule has a disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 141 EC. This involves deciding whether the statistics available are valid and can be taken into account, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant¹⁰⁶. Judges also have to decide what to do if the statistics available are irrelevant or insufficient. More importantly, judges have to verify whether the statistics available to them indicate that a considerably smaller percentage of women than men are able to fulfil the requirement imposed by that measure, given that to date the ECJ has yet to elaborate a guiding principle as to what is to be regarded as considerable. The ECJ only indicated that statistics whereby 77.4% of men and 68.9% of women fulfilled a condition do not appear to show that a *considerably* smaller percentage of women than men is able to fulfil the requirement imposed by a disputed rule¹⁰⁷.

Assessing proportionality also means that, on occasion, UK judges also have to make a value judgement as to what constitutes a legitimate aim of social policy and whether the disputed rule, as a means to its achievement, is capable of advancing that aim. This in turn will mean that judges in the UK have to be prepared to accept the kind of evidence which is commonplace in the ECJ, albeit still unfamiliar to them. They will have to gather evidence about the parliamentary history of a particular piece of legislation and the social and economic impact of the measure.

The case of *Seymour-Smith*¹⁰⁸ provides another illustration of the challenges for UK judges. In an application for judicial review of the Unfair Dismissal (Variation of Qualifying Period) Order 1985¹⁰⁹, the House of Lords had to determine (i) the legal test for establishing whether the Order had a disparate effect between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 141 EC, (ii) the legal conditions for establishing whether the Order was objectively justified¹¹⁰. In particular they had to ascertain what material is needed to adduce in support of the grounds for justification.

1.8 Conclusion

This Chapter showed how Community law because of its specific features, so different from UK law and in many ways alien to British judges, can present definite challenges for UK courts. In spite of this, as will be seen throughout this work, there are clear indications that UK courts have in fact embraced the challenge and that they have generally been willing to rely on Community techniques and methods of interpretation. Still, there remain instances where it is difficult to ascertain the precise content of Community requirements. Even when those can be ascertained, the UK courts might feel they need additional

guidance, or even legitimisation. Fortunately, Article 234 EC provides for a possibility of dialogue between the UK courts and the ECJ.

Endnotes

- ¹ *Bulmer v. Bollinger* [1974] 2 CMLR 91 per Lord Denning.
- ² The European Coal and Steel Community (ECSC), the European Community (EC) and the European Atomic Energy Community (EURATOM).
- ³ With the Tampere summit an ambitious programme was agreed which defined the content and the priorities of the "area of freedom, security and justice" and a number of framework decisions have since been proposed, but by and large most instruments have been adopted under Title IV of the EC Treaty.
- ⁴ The European Communities Act 1972 (as amended) continues, post Nice, to draw a distinction between EC and EU law. Section 1 (2) only gives effect to the law contained and arising under the "Community Treaties", and therefore continues to exclude Title V and Title VI of the TEU, or as they are commonly known the second and third pillars. Accordingly the domestic effect of Title V, TEU and anything done under it does not flow from the ECA, but is dependent on further specific enactment – but Article 61 EC *communautarises* most measures which would be taken under Title VI TEU.
- ⁵ With the exception of the first fundamental reform following the entry into force of the SEA in 1987.
- ⁶ Case C-274/96 *Criminal proceedings against H.O. Bickel* [1998] ECR I-7637, Opinion of Advocate General Jacobs at point 23.
- ⁷ Case C-184/99, *Rudy Grzelczyk and Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 31.
- ⁸ But only to a certain extent given that different rules applies to this title, this is the case of the decision-making process as well as the jurisdiction of the ECJ.
- ⁹ As did the then Prime Minister John Major, *The Times*, 3 November 1992.
- ¹⁰ D. Curtin, "A Europe of Bits and Pieces" (1993) 30 CMLRev 17.
- ¹¹ Case-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419.
- ¹² *Polydor Ltd v. Harlequin Record Shops Ltd and Simons Record Ltd* [1980] 2 CMLR 413; and also Case 270/80 [1982] ECR 329.
- ¹³ Case C-63/99 *R v. Secretary of State for the Home Department*, ex parte (1) *Wieslaw Gloszczuck* (2) *Elzbieta Gloszczuck* [2001] ECR I-6369.
- ¹⁴ Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569.
- ¹⁵ Article 220 EC.
- ¹⁶ Opinion 2/94 [1996] ECR I-1759.
- ¹⁷ R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention of Human Rights in Strasbourg and Luxembourg" in R. Lawson & M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe* (The Hague: Kluwer, 1994) p. 219 at 252.
- ¹⁸ See Article 52 (3) of the EU Charter of Fundamental Rights.
- ¹⁹ For a general discussion on the Charter see K. Feus (ed) *The EU Charter of Fundamental Rights: Text and Commentaries* (Federal Trust 2000) and T. Eicke 'The European Charter of Fundamental Rights: Unique Opportunity or Unwelcome Distraction' [2000] EHRLR 280.
- ²⁰ The Commission adopted a Communication on its legal nature COM (2000) 644, and a Communication on its application SEC (2001) 380/3, where it has stated that it would make compliance with the rights contained in the Charter the touchstone for its action". As the Commission announced in this Communication, the preamble of legislative proposals which have a specific link with fundamental rights contain a formal statement of compatibility with the Charter, which has not been removed either by the Council or the EP during the legislative process, so that it may be said that those institutions are endorsing the Commission's approach.

- ²¹ Case C-173/99 *BECTU v. Secretary of State for Trade & Industry* [2001] ECR I-4881; Cases C-122 & 125/99P *Dv. Council* [2001] ECR I-4319; Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd v. The Scottish Ministers*, judgment of 10/07/2003, n.y.r.
- ²² Advocate General Mischo in Joined Cases C-20/00 and C-64/00 *op. cit.* at para. 126.
- ²³ By contrast the CFI has made reference to the Charter, e.g. T-112/98 *Mannesmannrohren-Werke v. Commission* [2001] ECR II-729, T-54/99 *Max-Mobil v. Commission* [2002] ECR II-313, T-177/01 *Jego-Quere v. Commission* [2002] ECR II-2365.
- ²⁴ *Edward & Lane op. cit.* 65.
- ²⁵ Case C-2/93 *R v. MAAF ex parte Bostock* [1994] ECR I-955.
- ²⁶ Case C-260/89 *ERT v. DEP* [1991] ECR I-2925.
- ²⁷ These points are discussed in detail in Chapter 2.
- ²⁸ Cases 16 & 17/62 *Confédération Nationale des Producteurs des Fruits et Légumes v. EEC Council* [1962] ECR 471.
- ²⁹ Case 128/78 *Commission v. UK* [1979] ECR 419, 428-429.
- ³⁰ Case 108/81 *Amylum v. Council* [1982] ECR 3107.
- ³¹ Case 63/83 *R v. Kirk* [1984] ECR 2689.
- ³² Even before devolution.
- ³³ Regulation 1259/99, OJ 1999 L160/113.
- ³⁴ *Procurator Fiscal v. James Robert Sinclair*, unreported, see the Scottish Courts website.
- ³⁵ Case 160/82 *Commission v. Netherlands* [1982] ECR 4637, para. 4.
- ³⁶ Case C-59/89 *Commission v. Germany* [1991] ECR I-2607, para. 24.
- ³⁷ The "Guidance to Better European Regulation" issued by the Cabinet Office outlines the two broad conceptual approaches to implementing provisions of Community law – *copy-out and elaboration*. *Copy-out* is exactly as the name suggests: the implementing legislation simply adopts the same, or very similar, language as the Directive itself. It is also possible to cross-refer to the Directive provision. *Elaboration* means coming down on one side or the other of choosing a particular meaning, although where elaboration is adopted it is important to apply Community law principles of interpretation, and in particular the underlying objective of the legislation. It also sets out the definitions of *gold-plating* and *double banking*. *Gold-Plating* is when implementation goes beyond the minimum necessary to comply with a Directive. This can be done by extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the Directive; by taking a decision not to take full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or by providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed (for example, as a result of picking up the existing criminal sanctions in that area). *Double-Banking* is when European legislation covers the same ground as existing domestic legislation, though possibly in different ways and to a varying extent..
- ³⁸ Case 8/81 *Becker* [1982] ECR 53, para. 19.
- ³⁹ UK courts have duties in relation to Directives whether or not they are implemented in national law. Indeed the ECJ has indicated that individuals are able to derive remedies from the existence of Directives although they might not be implemented, or implemented wrongly or belatedly. See further Chapters 4 and 5 and see S. Prechal, *Directives in European Community Law: A Study on EC Directives and their Enforcement by National Courts* (OUP, 1995).
- ⁴⁰ Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651 para. 13.

- ⁴¹ Council Directive 90/314 on package travel, package holidays and package tours; OJ 1990, L158/59.
- ⁴² C-178/94 *Dillenkofer v. Federal Republic of Germany* [1996] ECR I-4845.
- ⁴³ Maastricht Treaty, TEU, Final Act, Part III: Declarations, Declaration No 19 "Declaration on the Implementation of Community Law".
- ⁴⁴ See Chapter 4.
- ⁴⁵ Compare Case C-129/96 *Inter-Environnement Wallonie ASBL and Région Wallonne* [1997] ECR I-7411 and Case C-230/97. *Criminal proceedings against Ibiyinka Awoyemi*, [1998] ECR I-6781, with Case 148/78 *Ratti* [1979] ECR 1629.
- ⁴⁶ See the chapter on State liability.
- ⁴⁷ C. Himsworth, "No Standing Still on Standing" Chapter 9 of Leyland & Woods (eds) *Administrative law Facing the Future* (Blackstone 1997), pp. 200-220 at 206-208.
- ⁴⁸ Case C-322/88 *Grimaldi v. Fonds des Maladies Professionnelles* [1989] ECR 4407.
- ⁴⁹ In *Three Rivers DC v. Bank of England* [1997] 3 CMLR 429 Clarke J. had even regard to an opinion delivered by the Economic and Social Committee.
- ⁵⁰ Case C-46/93 & C-48/93 [1996] ECR I-1029.
- ⁵¹ Case 283/81 [1982] ECR 3415.
- ⁵² Case 66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR 1191.
- ⁵³ Case C-46/93 & C-48/93 [1996] ECR I-1029.
- ⁵⁴ Para. 59.
- ⁵⁵ Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
- ⁵⁶ Case 193/80 *Commission v. Italy* [1981] ECR 3019.
- ⁵⁷ See *Perkins* where the High Court considered itself bound by *Grant*, judgment of 13th July 1998 unreported.
- ⁵⁸ The English courts have sent no less than 4 references on the Sunday trading legislation Case 145/88 *Torfaen Borough Council v. B&Q plc* [1989] ECR 3851, Case 306/88 *Rochdale Borough Council v. B&Q plc* [1989] ECR 6457, Case C-304/90 *Reading Borough Council v. Payless DIY* [1992] ECR I-6493; Case C-169/91 *Stoke on Trent v. B & Q plc* [1992] ECR I-6635 whilst the French Case C-312/89 *Conforama* [1991] ECR I-997 and Belgian courts Case C-339/89 *Marchandise* [1992] ECR I-6635 sent questions raising the same issues.
- ⁵⁹ C-10/89 *SA CNL-Sucal NV v. HAG GF AG (Hag II)* [1990] ECR I-3711, Case C-267-8/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097, Case C-394/96 *Brown v. Rentokil* [1998] ECR I-4185.
- ⁶⁰ *Edward & Lane op. cit.* p. 31.
- ⁶¹ Case 9/61 *Netherlands v. High Authority* [1962] ECR 213, A.G. Roemer at 242 Case 112/76 *Manzoni v. FROM* [1977] ECR 1647, 1661-1663.
- ⁶² J. Shaw, "European Community judicial method: its application to Sex Discrimination Law" (1990) 19 ILJ 228 at 243.
- ⁶³ Case 14/83 *von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.
- ⁶⁴ Para. 26, emphasis added.
- ⁶⁵ Case 106/89 *Marleasing v. La Comercial Internacional de Alimentación* [1990] ECR I-435.
- ⁶⁶ A. Arnall, "Owning up to fallibility: precedent and the Court of Justice" (1993) 30 CMLRev pp. 247-266, and the "The European Union and its Court of Justice" (Oxford, OUP, 1999).
- ⁶⁷ *Lightman J R v. Secretary of State for Defence ex parte Perkins* [1997] 3 CMLR 310.

- 68 See further Chapter 3.
- 69 By contrast with the UK memorandum to the 1996 IGC, the Amsterdam Treaty even expanded the European Court's jurisdiction.
- 70 C.W.A. Timmermans in *Compliance with Judgments of International Courts* (Kluwer 1996) at pp. 118-119.
- 71 The opinion of Advocate General Jacobs in Case C-338/95 *Wiener S.I. GmbH v. Hauptzollamt Emmerich*, [1997] ECR I-6495, point. 42.
- 72 Article 2 EC.
- 73 See e.g. linguistic policies in C. Boch, "Language protection and Free Trade: The Triumph of the *Homo McDonaldus*?" (1998) 4 *European Public Law* 379.
- 74 Case 283/81 *Cilfit v. Ministry of Health* [1982] ECR 3415.
- 75 Lord Diplock in *R v. Henn and Darby* - [1981] AC 850, emphasis added.
- 76 Lightman LJ *R v. Secretary of State for Defence* ex parte *Perkins* [1997] 3 CMLR 310 at 328.
- 77 *Ibid.*
- 78 *Frape v. Emreco International Ltd* [2002] SLT 371 at 377.
- 79 Donner (1974) 11 CMLRev 127 at 128.
- 80 Case 128/78 *Commission v. UK* [1979] ECR 419, para. 12 (emphasis added); see also Case 39/72 EC *Commission v. Italy* [1973] ECR 101 at 116.
- 81 Case C-5/94 *R v. MAAF* ex parte *Lomas* [1996] ECR I-2553 para. 20.
- 82 Case C-328/91 *Secretary of State for Social Security v. Thomas* [1993] ECR I-1247, para. 8.
- 83 W.A. Wilson, *Introductory Essays on Scots law*.
- 84 The body of Community law, principles and judicial decision built over the years, see Gialdino, "Some reflections on the *Acquis Communautaire*" (1995) 32 CMLRev 1089, also M. Howe, *Europe and the Constitution after Maastricht* (Nelson & Pollard 1993) at p. 65.
- 85 Boch & Lane, "European Community law au Pays du Tartan", in *Scots law into the 21st Century*, H. MacQueen (ed), Green/Sweet and Maxwell 1996, pp. 253-264.
- 86 *The relationship between Community law and national law*, R. Kovar in "Thirty years of Community law" (Luxembourg 1983) at p. 110.
- 87 Case 41/74 *van Duyn* [1974] ECR 1350 para. 18.
- 88 Case 283/81 *CILFIT v. Ministero della Sanità* [1982] ECR 3415 at 3430, emphasis added.
- 89 *Frape v. Emreco International Ltd* [2002] SLT 371.
- 90 *Duke v. GEC Reliance Ltd* [1988] AC 618 at 641.
- 91 Warner, "EC legislation: the view from Luxembourg" (1982) *Statute Law Review* 134 at 138.
- 92 For example the publication by the Commission of annual "Better Law Making" reports. These reports are in response to the requests made by the European Council of December 1992 and subsequent European Councils, to the Interinstitutional Agreement of 29/10/1993 on the application of the principle of subsidiarity (Bull. EC 10-1993, p. 128) and to Article 9 of the protocol on the application of the principles of subsidiarity and proportionality. After the first reports of 1993 (COM (93)545) and 1994 (COM(94)533), which were limited to subsidiarity, the Commission decided that the scope should be extended to include all action aimed at improving legislation in the broad sense ("Better lawmaking"). This approach was welcomed by the European Council. Since then, "Better lawmaking" reports have been submitted every year. See for 1995 (CSE(95)580), 1996(CSE(96)7), 1997 (COM(97)626) and 1998 (COM(98)715) for 1999 COM (1999) 562, for 2000 COM (2000) 772 and for 2001 COM (2001) 728.

- ⁹³ European Council, 1992 Edinburgh Summit and subsequent resolution on the quality of drafting OJ 1993, C166/1; see also T. Burns, "Law Reform in the European Community" (1996) 16 YEL 243, and in June 2002 the Action Plan on Simplifying and Improving the regulatory environment COM (2002) 278.
- ⁹⁴ COM (98) 345 Legislate Less to Act Better: the facts.
- ⁹⁵ R. Barents, "The quality of Community legislation: some observations on EC legislation in the agricultural sector" (1994) 1 Maastricht Journal of Comparative law 101 at 114, see also A.E. Kellermann "The Quality of Community legislation drafting in Curtin & Heukels, *op. cit.* at 251.
- ⁹⁶ E. de Wilde, "Deficient European Legislation is in Nobody's interest" (2000) 2 European Journal of law Reform 293.
- ⁹⁷ C.Boch, "Rules to enforce the rules: Subsidiarity v. Uniformity in the implementation of the Single European Market Policy." In: *The Evolution of Rules for a Single European Market*, Part II: Rules Democracy and the Environment" D. Mayes (ed) (Office for Official Publications of the European Communities Luxembourg 1995).
- ⁹⁸ Section 47 of the English & Welsh *Shops Act* 1950.
- ⁹⁹ Case 145/88 *Torfaen Borough Council v. B & Q plc* [1989] ECR 3851.
- ¹⁰⁰ *Torfaen v. B & Q* [1990] 3 CMLR 455 (East Gwent Magistrates); *B & Q v. Shrewsbury & Atcham B.C.* [1990] 3 C.M.L.R. 535 (Shrewsbury Crown Court) An unsurprising result given that it involved weighing the interests pursued by the Sunday Trading rules against the Community interests in ensuring the free movement of goods.
- ¹⁰¹ Case C-312/92 *CGT v. Conforama* [1991] ECR I-997; Case C-332/89 *André Marchandise* [1991] ECR I-1027.
- ¹⁰² Legislation prohibiting employment on Sunday.
- ¹⁰³ Arnall *op. cit.*
- ¹⁰⁴ Case C-169/91 *City of Stoke-on-Trent v. B & Q*, which was joined by others: Case 306/88 *Rochdale B.C. v. Anders*, Case 304/90 *Reading B.C. v. Payless DIY* [1993] C.M.L.R. 426 (part 905); [1993] 1 All ER 481; and answered in one single judgment.
- ¹⁰⁵ Hofmann J in *Stoke on Trent City Council v. B & Q* [1990] 3 CMLR 31.
- ¹⁰⁶ See Case C-127/92 *Enderby* [1993] ECR I-5535, para. 17.
- ¹⁰⁷ Case C-167/97 *R. v. Secretary of State for Employment*, ex parte *Seymour-Smith and Perez* [1999] ECR I-623, para. 64.
- ¹⁰⁸ Case C-167/97 *R. v. Secretary of State for Employment*, ex parte *Seymour-Smith and Perez* [1999] ECR I-623.
- ¹⁰⁹ S.I. 1985 No 782 which amended Section 54 of the Employment Protection (Consolidation) Act 1978.
- ¹¹⁰ Given that unlike direct discrimination, indirect discrimination may be justified.

