Principles of Public Law

Andrew Le Sueur, LLB, Barrister
Reader in Laws, University College London
Javan Herberg, LLB, BCL, Barrister
Practising Barrister, Blackstone Chambers
Rosalind English, LLM, MA, Barrister

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EUROPEAN COMMUNITY LITIGATION

18.1 Introduction

In the modern UK constitution, the choices of public authorities are enabled and constrained by Community law in a wide range of policy areas (see above, 2.3 and Chapter 7). The importance of Community law has increased, is increasing and is unlikely to diminish. The UK Parliament (see above, 2.4.2 and Chapter 6), the devolved assemblies (see above, Chapter 2), government ministers and local authorities must work within the boundaries set by Community law. Any public official ought always to ask: 'Is what I propose to do, and the manner in which I intend to do it, compatible with Community law?' Judges and members of tribunals must also ask a similar question. Answers to these questions cannot, of course, be found simply by looking at national law, because national law itself may be incompatible with Community law. Where there is conflict, precedence must be given to the rules of Community law (see above, 7.9.1).

For individuals and businesses, Community law is now an essential aspect of their relationship to public authorities. The source of law under which a public authority in the UK claims to be acting may be the EC Treaty, a regulation or a directive (see above, 7.6). It is of constitutional importance that such claims be open to challenge in the courts. For individuals and businesses, there are few possibilities for bringing a direct action before the Court of Justice. Instead, the focus is on national courts and tribunals – which my, as we shall see, request a preliminary ruling from the Court of Justice on the correct interpretation of the Community law.

18.2 European Community law in national legal systems

The Court of Justice has observed that the European Community:

> ... is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty [Case 294/83 *Les Verts-Parti Ecologiste v European Parliament* (1986), para 23].

Most litigation involving Community law rights and obligations is dealt with by *national* courts and tribunals (Maher, I, 'National courts as European Community court' (1994) 14 LS 226). Having established the four basic building blocks in the relationship between national and Community law – primacy, direct effect, consistent interpretation and Member State liability –

the Court of Justice has been content to leave the design of litigation procedures and scope of remedies as a matter for each national legal system. Member States have not been required to create separate procedures or new forms of remedies for the enforcement of Community law (though inadequate procedures and remedies may be held to be in breach of Community law). Certainly, there is has been no need for any Member State to create special courts for Community law issues. On the contrary, the task of enforcing Community law is dispersed throughout national legal processes, from the lowest tribunal to the highest court. Each and every judge and tribunal member is under the same duty as all other office holders, to:

> ... take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty [Art 10 of the EC Treaty, discussed above, 7.8.1].

More specifically, national litigation systems must provide an 'effective remedy' for protecting Community law rights. If a national procedural rule or remedy fails to achieve this, it must be set aside by the national court whose task is hampered by it. Thus, in *R v Secretary of State for Transport ex p Factortame Ltd (No 2)* (1991), the House of Lords had to disapply the rule of English law that no interim relief suspending the operation of an Act of Parliament could be granted. European Community directives may include requirements on the the need for effective remedies. For instance, Art 6 of the Equal Treatment Directive 76/207 requires Member States to take the necessary measures to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. In the UK, the Sex Discrimination Act 1975 limited the compensation which an industrial tribunal could award a person who had been unfairly dismissed to £11,000. One industrial tribunal hearing such a claim correctly 'disapplied' the statutory limit, which had not been increased in line with inflation, believing that an *a priori* limit on damages could not be an effective remedy for breaches of the Directive (Case C-271/91 *Marshall v Southampton and South West Hampshire AHA (No 2)* (1994)). The government subsequently amended the Sex Discrimination Act to remove the cap on damages.

18.2.1 Preliminary references under Art 234

The work of national courts and tribunals is assisted and directed by the Court of Justice. Any national court or tribunal in the UK – from an industrial tribunal, a bench of lay magistrates, the High Court, up to the House of Lords – may seek guidance from the Court of Justice on how to decide a particular point of Community law. The preliminary reference procedure is governed by Art 234 of the EC Treaty (formerly Art 177 before the renumbering of the

Treaty provisions after the Amsterdam Treaty revision) and a *Practice Direction* issued by the Court of Justice (see [1997] All ER (EC) 1). It is through the preliminary ruling mechanism that many of the basic principles of Community law, including those of primacy and direct effect (see above, 7.9), have been established. Article 234 states (emphasis added):

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty
>
> (b) the validity and interpretation of acts of the institutions of the Community [...]
>
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before *any* court or tribunal of a Member State, that court or tribunal *may,* if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions *there is no judicial remedy* under national law, that court or tribunal *shall* bring the matter before the Court of Justice.

The national court or tribunal formulates the issues of Community law before it as abstract questions and it must also define the factual and legislative context in which they arise. The question has to be 'necessary' for the resolution of the case before the national court or tribunal. The Court of Justice will not accept references made merely to get an authoritative ruling on a point of hypothetical issue of Community law: Case C-104/79 *Foglia v Novello (No 1)* (1980) and Case C-244/80 *Foglia v Novello (No 2)* (1981). Nor will it hear matters which are entirely internal to a Member State; in other words, cases which involve no inter-State element to which Community law can attach: Case C-346/93 *Kleinwort Benson Ltd v City of Glasgow DC* (1996).

Some months after a reference has been made to the Court of Justice, the parties to the litigation – and often the government of the Member State concerned – may attend the court to make oral submissions. One of the Advocates General (see above, 7.5.5) then writes an opinion setting out his reasoned view as to how the Court of Justice ought to answer the questions posed. Some time later, the Luxembourg Court delivers its judgment, 90% of the time adopting the view favoured by the Advocate General. The whole process of seeking and receiving a preliminary ruling takes many months, sometimes several years. On an Art 234 reference, the function of the Court of Justice is to interpret and rule upon issues of Community law only, not to decide on the facts. Having received guidance from the Court of Justice, the national court or tribunal then resumes its determination of the litigation and applies the ruling of the Court of Justice to the particular facts of the dispute.

Article 234 states that any national court 'may refer' a question which is necessary. Every national court and tribunal, therefore, has a discretion whether to make an Art 234 reference; this discretion is not fettered in any way by that court's position in the judicial hierarchy or any ruling of a superior court on the point (Case C-166/73 *Rheinmühlen v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (1974). Article 234 also provides that, in certain circumstances, a court 'shall' make a reference. If a point of Community law arises in a hearing before a court of last instance (one from which there is no appeal), that court is under an obligation to refer the Community law question to the Court of Justice. This obligation has, however, become so hedged about with exceptions that it is no more certain now that litigants in a court of last instance will get their Community point referred to Luxembourg than it would have been if they had requested that this happen in a lower court. In Case C-283/81 *CILFIT Srl v Minister of Health* (1982), the Court of Justice held that courts and tribunals and courts of last instance had no need to seek a preliminary reference if:

(a) the question of EC law is irrelevant;

(b) the provision has already been interpreted by the Court of Justice; or

(c) the correct application is so obvious as to leave no scope for reasonable doubt.

The last two criteria, (b) and (c), are referred to as the *acte clair* doctrine, and they are strictly construed to prevent national courts evading their obligation to refer matters to Luxembourg because they think they know the answer. In particular, a decision not to refer on the basis of (c) will only be justified if the question has been assessed in the light of the specific characteristics of Community law, the particular difficulties to which this gives rise, and the risk of divergences in judicial decisions within the Community. There was, for example, no preliminary reference before or after the House of Lords declared in *R v Secretary of State for Employment ex p Equal Opportunities Commission* (1995) that provisions of an Act of Parliament were contrary to Community law. The condition set out in (b) acknowledges the emerging concept of precedent in Community law. This was not the original purpose of the Court of Justice, which was designed to exist in a horizontal relationship with national courts, issuing guidance on Community law, but not creating a body of case law which would be binding on them. The doctrine of precedent can only emerge from a hierarchical system of courts, with the Court of Justice at the top, laying down the most authoritative interpretation of Community law.

18.2.2 Challenging Community law in national courts

Most applications for judicial review, and other litigation in the UK raising issues of Community law, seek to challenge the *implementation* of Community law by the Member State – for example, whether an Act of Parliament or

statutory instrument conforms to Community law, whether a licence was withdrawn or planning permission granted, and so on. In some cases, however, an applicant may want to argue in a judicial review that a decision of a governmental body in the UK is unlawful because the *Community* directive or regulation it was seeking to follow is itself invalid. One such case is *R v Secretary of State for Health ex p Imperial Tobacco Ltd* (1999), in which cigarette manufacturers applied for judicial review seeking an order preventing the UK Government taking steps to implement into national law a directive restricting cigarette advertising which, the applicants argued, was unlawful. A national court has no power to declare a Community instrument unlawful (Case C-314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* (1988)). This would be inconsistent with the principle of the primacy of Community law (see above, 7.9.1), and it would also threaten the uniform application of Community law throughout all Member States. If this situation arises, the national court is therefore required to make an Art 234 preliminary reference to the Court of Justice, which will make an binding determination on the issue.

18.3 Direct proceedings before the Court of Justice

As we have just noted, it is national courts and tribunals, occasionally assisted by the Art 234 reference procedure, which shoulder the main burden of enforcing and applying Community law in the Member States. In some circumstances, however, the Court of Justice and the Court of First Instance (see above, 7.5.5) have jurisdiction to deal with legal actions made directly to them when it is alleged that a Community institution (rather than a Member State) has acted unlawfully. There are three main procedures for direct actions:

(a) actions for annulment under Art 230 (formerly Art 173);

(b) proceedings by the Commission to enforce compliance with Community law under Art 226 (formerly Art 169); and

(c) claims for compensation against Community institutions under Art 288 (formerly Art 215(1)).

We now look at each of these in turn. It is the Court of First Instance, not the Court of Justice, which usually has jurisdiction to hear direct actions brought by individuals and businesses against Community institutions.

18.3.1 Annulment actions

Just as the system of judicial review at a national level is necessary to ensure that government bodies remain within the boundaries of their powers, it is equally important to ensure that the institutions of the European Community itself, particularly the Council and the Commission, do not stray beyond the limits of their powers under the treaties in reaching decisions or making

directives and regulations. Actions of the Community may be annulled by the Court of Justice under Art 230 if the Community institution:

(a) lacks competence (does not have the legal authority to carry out the act);

(b) infringes an essential procedural requirement (for example, failure to consult the European Parliament before passing an Act under the co-decision procedure, or failure to give sufficient reasons for the measure under Art 253 (formerly Art 190));

(c) has infringed a rule of law derived not only from the treaty, but from the general principles of law approved by the Court of Justice, such as equality, legal certainty or proportionality; or

(d) has adopted a measure with the main purpose of achieving an end other than that stated in the preamble (abuse of power).

Annulment proceedings may be brought by one Community institution against another: for example, the European Parliament sought to annul a regulation made by the Council of Ministers on transport of waste: Case C-187/93 *European Parliament v Council* (1995). Member States may also bring annulment actions – for example, the UK unsuccessfully argued that a Commission had acted unlawfully in making regulations banning the export of live cattle and beef products (Case C-108/96 *UK v Commission* (1998)) and against the Council of Ministers for adopting the Working Time Directive (Case C-84/98 *UK v Council* (1996)).

It is very difficult indeed for individuals and companies to apply for annulment. In no circumstances are such applicants permitted to challenge the validity of a directive (only Member States and Community institutions may do so). Individuals and companies may, however, institute annulment proceedings 'against a decision addressed to that person'. In this context, a 'decision' means a formal legal instrument – distinct from EC regulations or directives – addressed to a particular named person or Member State (see Art 249 of the EC Treaty). Such decisions are often issued by the Commission in carrying out its administrative functions (see above, 8.2.5), especially in the fields of competition and common agricultural policy. Unlike EC regulations (see above, 7.6.1), decisions are not intended to be legislative in character; they are binding only on the person (which may be a Member State) to whom they are addressed.

Individual applicants may also bring annulment proceedings 'against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. This means that if the Commission or the Council has laid down a rule in an EC regulation (rather than a decision) which has a 'direct and individual' impact on an identifiable person, that person may take annulment proceedings against the regulation if there are grounds for arguing that it is unlawful. The Court of Justice thus looks at the substance of the measure, and if it decides that it has

been passed to control the activities of one or more identifiable companies, such as a particular producer of sparkling wine (Case C-309/89 *Cordoniu v Council* (1994)), that company may have standing to seek an annulment.

Annulment proceedings must generally be begun within two months of the publication of the measure which is challenged. This is a very short time period, even in comparison to that for applications for judicial review in the High Court (see above, 17.3).

18.3.2 Enforcement proceedings by the Commission

One of the functions of the Commission (see above, 7.5.1), 'in order to ensure the proper functioning and development of the common market' is to 'ensure that the provisions of [the] Treaty and the measures taken by the institutions pursuant to it are applied' (Art 211 of the EC Treaty). Article 226 gives teeth to this:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

A Member State may also bring enforcement proceedings against another Member State (Art 227). The court has power to direct that the Member State in default of its obligations take action and, if this is not done within the time limit stipulated by the court, then the court 'may impose a lump sum or penalty payment on it' (Art 228).

18.3.3 Tortious claims against the Community

As we have noted, Member States may be liable to pay damages for loss suffered by people as a result of their breach of Community law (see above, 7.9.4). The institutions of the Community itself may also be liable. Article 288 of the EC Treaty (formerly Art 215(2)) provides that:

> In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

There are no *locus standi* conditions; anyone can sue the Community institutions provided they establish one of the following: negligent acts by servants of the Community; operational failures in administration; adoption of illegal acts having legal effect. As in English law, there is a high threshold for liability for legislative acts. The rationale for this is that the exercise of

legislative functions should not be hindered by the prospect of damages actions. While it is proper that unlawful legislative measures should be annulled in judicial review proceedings, the imposition of damages should be limited to cases where there has been bad faith or improper motive or, in the words of the Court of Justice, there has been a 'sufficiently serious' breach of a 'superior rule of law' for the protection of the individual. Advocate General Tesauro observed, in Case C-46/93 *Brasserie du Pêcheur SA v Germany* (1996), that, by 1995, only eight actions for damages against Community institutions had been successful.

EUROPEAN COMMUNITY LITIGATION

National courts and tribunals hear most cases in which a litigant argues that a rule of Community law has been breached, or a duty under Community law has not been fulfilled. Rules of Community law may bind individuals, businesses and (the focus of this chapter) public authorities. To ensure consistency in the application of Community law throughout the Member States, the Court of Justice has created four general rules:

(a) any rule of Community law has primacy over inconsistent rules of national law;

(b) in certain circumstances, provisions in the EC Treaty, directives and regulations may have 'direct effect' and be relied upon as creating rights enforceable in national courts;

(c) national legislation is to be interpreted in a manner consistent with Community law;

(d) Member States who breach rules of Community law may be liable to pay damages to people who suffer loss as a result.

The Court of Justice operates in two main ways:

(a) at the request of national courts and tribunals, it issues guidance on the correct interpretation of Community law. The procedure for referring a question to the Court of Justice for a 'preliminary ruling' is established by Art 234 of the EC Treaty. In some situations, it is mandatory for a national court or tribunal to seek a preliminary ruling. One such circumstance is where a litigant seeks to argue that a Community measure (such as a directive or regulation) itself breaches Community law;

(b) the Court of Justice also has jurisdiction to hear some types of case directly:

- actions for the annulment of decisions and legislation of the Community. Proceedings are brought by Member States against the Community, and by institutions of the Community against each other. Stringent rules of standing have prevented individuals and businesses using annulment actions, except in rare cases;
- enforcement actions, mostly brought by the Commission, to compel Member States to comply with their obligations under Community law. The Court of Justice has power to impose financial penalties;
- actions for compensation against Community institutions. Very few are successful.

PART D

CIVIL LIBERTIES AND HUMAN RIGHTS