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Historical Fact Sheet No 2

Why no Treaty limiting EU powers can ever be relied on

As the British Government prepares to ratify the revived Constitution without its promised referendum, claiming its “red lines” will “protect” UK interests, a leading barrister describes the role of the European Court of Justice in expanding the powers of the EU

By Martin Howe QC

What is the key feature that makes the Treaty of Rome different in kind from every other international Treaty to which this country belongs, and quite possibly makes it unique in the world? To this question, a lawyer can give only one answer: the key feature is Community law - a system of law that penetrates inside the member states and takes precedence over national laws in the domestic courts of the member states.

Many treaties bind states with rules at the international or external level - but it is this internal penetration which marks out the Treaty of Rome as different from other treaties. In fact, this internal penetration is a classic characteristic, not of international treaties, but of the internal constitutional arrangements of federal states. And like a federal state, the European Union has its own supreme court, the European Court of Justice, which has the ultimate power of decision over both the content and the scope of Community law.

Profound Changes

This court is not a neutral or impartial interpreter of the rules. The perspective of looking back over 50 years allows us to see clearly how profoundly the Treaty of Rome has been changed from what it was in 1957. I am not speaking here of the many changes to its text which have been made by successive amending treaties such as the Single European Act, Maastricht or Nice. I am

talking of the profound changes in the effective content of the Treaty which have occurred as a result of a process of so-called “interpretation” of the Treaty by the Court.

The key point that Treaty articles have direct effect inside the member states is nowhere stated in the Treaty, but was decided by the European Court in the Van Gend en Loos case in 1963. It said:

“The Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. ... the Community constitutes a new legal order in international law for whose benefit the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals”.

Sovereign Rights

Shortly afterwards in 1964 in the Costa v. ENEL case, the Court ruled that Community law over-rides conflicting national laws:

“The transfer by the States from their domestic legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights ...”.

By 1970, in Internationale Handelsgesellschaft, the European

Court had declared its view that Community law should take precedence even over the constitutional laws of the Member States - including basic entrenched laws guaranteeing fundamental rights.

In the 1987 Foto-Frost case, the European Court ruled that national courts had no power to question the validity of Community measures and reserved that power exclusively to itself, even though there is nothing in the Treaty or in general principles of international law which would require states to recognise the validity of acts which are outside the powers conferred by the Treaty.

During the early period of the common market, free market economists would have approved of the court’s activism in the field of free movement of goods. But this activism became a poisoned chalice, since the Court made clear that it regarded a European free market not as an end in itself, but simply a means to a greater end.

Concrete Progress

The court spelled out its thinking in 1992 in the European Economic Area Agreement Case:

“An international treaty is to be interpreted not only on the basis of its wording, but in the light of its objectives. ... The Rome Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary

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union. Article 1 of the Single European Act makes it clear that the objective of all the Community treaties is to contribute together to making concrete progress towards European unity. It follows from the foregoing that the provisions of the Rome Treaty on free movement and competition, far from being an end in themselves, **are only means for attaining those objectives.** ... As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, **in ever wider fields**, and the subjects of which comprise not only the member States but also their nationals [emphasis added].”

In the last sentence, the important change in wording from the 1963 Van Gend case should be noted. By 1992, “limited fields” had become “ever wider fields”, reflecting the Court’s endorsement of the doctrine that there can only ever be a one-way transfer of powers from the member states to the centre.

The Court has also expanded the powers of the Community over the external relations of the member states. It developed a doctrine of implied external competence - that the Community has power to make external agreements relating to fields over which it has acquired internal competence. Furthermore, under this doctrine, the member states lose their own powers to conclude international agreements relating to areas of policy over which the Community has attained an internal competence.

Under this doctrine, in 2002 the Bermuda Agreement between the UK and the US relating to trans-Atlantic air transport was struck down. British Airways at the time welcomed the fact that such arrangements would in future be negotiated by the EU rather than bilaterally. In 2007 British Airways had cause to regret its earlier stance when the EU negotiated an agreement with the US on our behalf which failed to protect our national interests.

Whilst the Court has liberalised the internal market, it has often used its growing powers over the external trade

of the member states in a way which inhibits the liberalisation of trade across the external borders of the EC.

In the 1998 Silhouette case, it interpreted the Trade Marks Directive as requiring member states to prohibit so-called “parallel imports” of genuine trade marked goods from non-member states when the proprietor of the mark has not consented to the marketing of his goods within the Community. This enables trade mark proprietors to prevent the importation of their own genuine goods into the EC from other countries where they have placed them on the market (e.g. the USA), so enabling them to charge consumers within the EC a higher price than in other markets.

Similarly, in the field of regulations and technical standards, the Court has ruled in the 1999 Agrochemicals case that the UK is prohibited by Community law from licensing “parallel imports” from non-EC countries, even though the products are identical to agrochemicals licensed inside the EC and made by the same manufacturer.

The economic rationale of this “fortress Europe” mentality is baffling, and it cuts against our global trade obligations under the WTO Agreement on Technical Barriers to Trade.

Onward Progress

Where the onward progress of European integration has been blocked by national vetoes, the Court has been willing to re-interpret the Treaty to make up for the lack of progress on the legislative front. In a whole series of recent tax cases, the Court has invoked the general clauses of the Treaty on non-discrimination to strike down national tax legislation. An important example is the 2002 Lankhorst-Hohorst case on tax credits on payments by a subsidiary to its parent in another member state. What is significant is that the Court departed from its earlier cases which had decided that such arrangements were compatible with the Treaty.

The Treaty had not changed, but its meaning, according to the Court, had. Thus, the effective harmonisation of

direct taxes proceeds step by step at the hands of the Court despite the UK’s theoretical veto on this area under the Treaty.

More recently in the 2005 environmental protection case, the Court decided that the EC can, under its first-pillar supranational law-making powers, specify and impose criminal offences and penalties in the very wide fields where the EC has an existing competence. The remarkable thing about this decision is that, if it is right, the EEC had these powers over criminal law from the day the Treaty of Rome was signed on 25th March 1957.

Yet if this had been suggested to those who signed the Treaty in 1957, or to those who signed Britain’s accession treaty in 1972, they would have laughed.

We see, with the perspective of 50 years, how powerful has been the effect of the rolling process of re-interpretation of the Treaty of Rome carried out by the Court over that period.

What conclusion should we draw from this?

If we believe that it is right to halt or reverse the ongoing process of the transfer of powers from the UK to the European institutions, then we should recognise a simple point.

We saw how the so-called Social Chapter opt-out negotiated at Maastricht was rapidly undermined by the abuse of health and safety powers under the Treaty to by-pass the UK’s veto on the Working Time Directive. This abuse of the Treaty was of course sanctioned by the Court.

If we remain subject to Community law, and to the European Court’s interpretation of the Treaties, no agreement or treaty defining or limiting the powers of Europe can be safely relied upon - simply because it will be re-interpreted by the Court, over time, to expand those powers again.

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