

מהפסיקה של בית הדין של הקהילה האירופית:

DIRECT EFFECT

TREATY ARTICLES

Regulations are a 'directly applicable' source of rights and obligations in national courts, no less than national legislation (see Joined Cases 16 and 17/62 *Confédération Nationale*, above, p. 71). The European Court decided in an early case that Treaty articles, too, may be of direct effect.

Case 26/62 NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen
[1963] ECR 1; [1963] CMLR 105

Van Gend en Loos engaged in the business of importing chemical products to the Netherlands. On 9 September 1960 they imported to that country from the Federal Republic of Germany a quantity of ureaformaldehyde. A Dutch law of 16 December 1959, passed in order to give effect to a Benelux agreement of 25 July 1958, imposed an *ad valorem* duty of eight per cent in the case of ureaformaldehyde. By Article 12 of the EEC Treaty, however, Member States had undertaken to refrain from introducing between themselves any new customs duties on imports, and from increasing those that they already applied in their trade with each other. That Treaty entered into force between the Netherlands and the Federal Republic of Germany on 1 January 1958, and Van Gend contended that on that date the duty exigible under Dutch law on the product in question was three per cent. Van Gend therefore objected to paying the additional five per cent. The matter came before the Tariefcommissie, Amsterdam, which

requested makes it necessary to examine them as a part of the Chapter in which they occur. This Chapter deals with the 'elimination of quantitative restrictions between Member States'. The object of the reference in Article 37(2) to 'the principles laid down in paragraph (1)' is thus to prevent the establishment of any new 'discrimination regarding the conditions under which goods are procured and marketed... between nationals of Member States'. Having specified the objective in this way, Article 37(1) sets out the ways in which this objective might be thwarted in order to prohibit them.

Thus, by the reference in Article 37(2), any new monopolies or bodies specified in Article 37(1) are prohibited in so far as they tend to introduce new cases of discrimination regarding the conditions under which goods are procured and marketed. It is therefore a matter for the court dealing with the main action first to examine whether this objective is being hampered, that is whether any new discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed results from the disputed measure itself or will be the consequence thereof.

There remain to be considered the means envisaged by Article 37(1). It does not prohibit the creation of any State monopolies but merely those of a 'commercial character' and then only in so far as they tend to introduce the cases of discrimination referred to. To fall under this prohibition the State monopolies and bodies in question must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade.

It is a matter for the court dealing with the main action to assess in each case whether the economic activity under review relates to such a product which, by virtue of its nature and the technical or international conditions to which it is subject, is capable of playing an effective part in imports or exports between nationals of the Member States.

Exactly one year later the Italian Constitutional Court rejected Mr Costa's allegations of constitutional irregularity: [1964] 3 CMLR 425. The giudice conciliatore then decided that the law of 1962 and the subsequent decrees had no legal effect, as a result of Article 37 of the EEC Treaty, as interpreted by the European Court: [1968] CMLR 267 at 278. (His judgment goes further than the European Court's ruling, however, for whereas the European Court pointed out that Article 37(2) of the EEC Treaty prohibits the creation of new monopolies in so far as they tend to introduce new cases of 'discrimination' regarding the 'supply of goods', the giudice conciliatore ignored those two limitations. For this reason the giudice's final judgment is not generally accepted as reliable.)

EEC law prevails in those areas in which it applies, i.e. those areas in which the Member States have ceded sovereignty. In some areas defined by the Treaty it is beyond doubt that sovereignty has been ceded, but the European Court of Justice has not confined the supremacy of European law to areas in which the Treaty makes express provision. Rather it has held that the Member States have ceded sovereignty to the Communities by necessary implication whenever they have adopted a common policy to regulate a given matter.

measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of the Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93(3), 223, 224 and 225). Applications by Member States for authority to derogate from the Treaty are subject to a special authorisation procedure (for example Articles 8(4), 17(4), 25, 26, 73, the third subparagraph of Article 93(2), and 226) which would lose their purpose if the Member States could renounce their obligation by means of ordinary law.

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify by means of a legislative measure which could prevail over Community law.

It follows from all these observations that *the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise...

The Interpretation of Article 37

Article 37(1) provides that Member States shall progressively adjust any 'State monopolies of a commercial character' so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. By Article 37(2), the Member States are under an obligation to refrain from introducing any new measure which is contrary to the principles laid down in Article 37(1).

Thus, Member States have undertaken a dual obligation: in the first place, an active one to adjust State monopolies; in the second place, a passive one to avoid any new measures. The interpretation requested is of the second obligation together with any aspects of the first necessary for this interpretation.

Article 37(2) contains an absolute prohibition: not an obligation to do something but an obligation to refrain from doing something. This obligation is not accompanied by any reservation which might make its implementation subject to any positive act of national law. This prohibition is essentially one which is capable of producing direct effects on the legal relations between Member States and their nationals.

Such a clearly expressed prohibition which came into force with the Treaty throughout the Community, and so became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it creates individual rights which national courts must protect. By reason of the complexity of the wording and the fact that Articles 37(1) and 37(2) overlap, the interpretation

Case 6/64 Flaminio Costa v ENEL

[1964] ECR 585; 10 *Recueil* (1964) 1141; [1964] 3 CMLR 425

By a law of 1962 and by subsequent decrees the Italian Republic nationalised the electricity industry and created the defendant company, Ente Nazionale per l'Energia Elettrica (ENEL), to which assets of private Italian electricity companies were transferred. Mr Costa, a lawyer, received a bill for 1950 lire (then about £1 or \$2.80) from ENEL for electricity supplied to him by Edison Volta, one of the private companies affected by the nationalisation, and one in which Mr Costa was a shareholder. Mr Costa applied to the Milanese Giudice Conciliatore (local judge) for a declaration that he was not obliged to pay the sum. He alleged first that the law of 1962 infringed the Italian Constitution and secondly that it infringed certain provisions of the EEC Treaty including Article 37 (which deals with the progressive adjustment of State monopolies). At Mr Costa's request the giudice conciliatore referred the matter to the Court of Justice of the European Communities requesting an interpretation of the EEC Treaty and particularly of Article 37. The Italian Government intervened, objecting that the application for a ruling on the Treaty was absolutely inadmissible. The Government argued that a national court cannot refer a question to the Court of Justice of the European Communities when, for the purpose of deciding a dispute, it has only to apply a domestic law and not a provision of the Treaty. The Court ruled otherwise.

The Court

The Italian Government submits that the request of the Giudice Conciliatore is 'absolutely inadmissible', inasmuch as a national court which is obliged to apply a national law cannot avail itself of Article 177.

By contrast with ordinary international treaties, the Treaty has created its own legal systems which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions, which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent

cases involving distribution agreements, the Commission has tended to argue in favour of such an interpretation of Article 85(1); and if that argument were upheld it would follow that a relevant agreement with redeeming features could only be preserved by means of the Commission's grant of an exemption under Article 85(3). The Court's case-law suggests, however, that Article 85(1) must be read subject to a 'rule of reason': an agreement which does not have as its *object* the prevention, restriction or distortion of competition is unlawful only if its *effects* are sufficiently deleterious, having regard to all the circumstances including the market shares of the parties, the existence or absence of a network of similar agreements and the acceptance or prohibition of parallel trading.