CHAPTER V

EUROPEAN COMMUNITY LAW

A-MEANING AND SCOPE

European Community law consists of the rules of international law which govern treaties and international organizations, of the founding Treaties and Treaties to which the Communities are parties and the Annexes and Protocols attached to both kinds of treaties, of the rules generated by the Community institutions (including judgments of the European Court of Justice) and those portions of the muncipal laws of the Member states which they are bound to enact in the execution of their obligations. Its scope is circumscribed by the Treaties founding the Communities.

B- SOURCES OF COMMUNITY LAW

(a) The hierarchy of sources.

The system reveals a hierarchy of legal rules and in that respect the sources of Community law can be divided into primary and secondary sources. The distinction is important because the validity of the latter depends on the former.

Primary sources consist of the founding Treaties and their Annexes and Protocols which together with the subsequent amendments can be described as the "constitutional law" of the Community. They are, as we observed earlier, treaty-laws of a self executing character. Like modern constitutions the founding Treaties reveal a political and economic charter with a mild injection of a social charter.

Conventions between Member States[1], although of a character of international treaties are, in reality, internal Community rules negotiated within the scope of the EEC Treaty in order to secure for the benefit of the Community nationals the protection of rights, abolition of double taxation, mutual recognition of companies and reciprocal recognition and enforcement of judgments of municipal courts and arbitration

awards. However, little has been achieved in this field since only four conventions have been signed to date (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; on the Law Applicable to Contractual Obligations; on the Mutual Recognition of Companies and Bodies Corporate; on the Elimination of Double Taxation of Companies; and the European Patent for the Common Market Convention).

There is a variety of Community external treaties covering a wide range of relations. As we have observed earlier, these treaties bind the Member States and the Community but by themselves do not, in principle, create rights or obligations for individuals[2].

(b) Community Legislation

The core of secondary Community law is comprised in the legislation enacted by the Community legislative process in accordance with Art.189 of the EEC Treaty. That article distinguishes between obligatory acts (i.e. regulations, directives and decisions) and non-obligatory acts (i.e. recommendations and opinions). The latter are not binding but may provide guidance and stimulus to legislation. There is a terminological confusion between the founding Treaties but "general decisions" under the ECSC Treaty correspond to regulations, "individual decisions" are equivalent to decisions under the EEC and EAEC Treaties. "Recommendations" under the ECSC Treaty correspond to directives under the two other Treaties but "opinions" have the same meaning in all three Treatise. Bearing this in mind we shall take Article 189 for guidance.

In the opening paragraph Art.189 states that "in order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions". This statement identifies the Community legislator,lists the measures at his disposal and defines the scope of the legislation. Since it has to conform to the Treaty there is no doubt as to the hierarchically subordinate nature of the Community legislation. Conformity with the Treaty is the criterion of the validity and of the judicial control of the acts made by the Council and Commission.

(c) Regulations

Regulations have a general scope, are binding in their entirety and are directly applicable in all Member States[3]. They are an instrument of uniformity and, since they take effect immediately when they come into force (i.e. at the date of inception or 20 days after publication) they do not have to be transposed into national systems. They have a direct effect and where they create rights for individuals such rights are enforceable in national jurisdictions despite the lack of implementation[4]. The inefficiency of the national apparatus affords the Member State concerned no defence to an enforcement action [5].

(d) Directives

Directives are chiefly the instrument of harmonization of national laws. They are like commands issued to the member states telling them to achieve a certain objective (e.g. equal pay for equal work for men and women) but leaving them the choice of the method to achieve the prescribed result[6]. Unlike regulations directives have in principle no direct effect as far as the individuals are concerned. Such rights depend on implementation and the Member States have a duty to implement these by proper legislation. Therefore mere administrative implementation, e.g. by circulars which can be changed at any time by the national bureaucracy, will not suffice[7].

Individual rights may be created by those directives which expressly provide for such rights without further enactment[8]. However, even those directives which do not create subjective rights may provide a defence to prosecution under national law which is inconsistent with the directive and the time for implementation had expired[9]. Member States cannot rely, as against individuals, on their own failure to implement a directive[10].

(e) Decisions

The term"decision" is used to describe a variety of the acts of the institutions. However in the context of Article 189(4), a decision, unlike a regulation, is binding upon the addressee only but, unlike a directive "it is binding in its entirety" leaving no discretion in the manner in which it has to be carried out. It is addressed either to member states or to individuals or corporations. decisions are used chiefly for executive and administrative purposes though they too may have a legislative effect.

(f) Judgments of the ECJ

Strictly speaking, judgments of the ECJ are not formal sources of Community law. However, they command not only universal respect but also a law-making effect in so far as the Court through authoritative interpretation, fills the gaps in the system and, through legal integration, works towards the political and economic integration within the Community.

In theory, the judgments of the ECJ rank no higher than res judicata but, in pactice, they have become recognized as precedents, albeit, of a persuasive character. In the British system, following the Common Law tradition, they are binding [11]. Whilst no Member State has gone that far the convicition is gaining momentum that the national judiciaries ought to pay due attention to the previous rulings of the ECJ in similar cases which are relevant to cases in hand. Certainly, the preliminary rulings on points of Community law should have effect erga omnes not only in view of the common interest in the rulings but also in view of the procedure which enables the Member States and the Commission to intervene in such cases. However, there is no Community rule in this respect and the matter is left to the Member States.

A new member state inherits, as it were, within the acquis communautaire the Community corpus juris including the jurisprudence of the Community Court.

(g) Implementation of Community Law

When discussing constitutional issues[12] we have stated the position of the founding Treaties in the member states and Turkey. It remains now to consider the implementation and enforcement of the Community law as a whole system.

The founding Treaties do not provide any rules for their implementation. However, in view of their nature, there must be full and complete implementation without any conditions or reservations. Where necessary, the national constitution has to be amended to become "monist.

By virtue of the Treaty and the Act of Accession, new members negotiate a package deal, the effect of which is that after the transition period they are in exactly the same position as the existing member states. The transition period serves to ease the new

member into the system and to enable it to complete the acquis communautaire. The package deal imports volumes of Community legislation which takes effect immediately unless delayed by transitory provisions. Here again, the Community does not prescribe any specific method of implementation, i.e. the incorporation of Community legislation into the national system.

In the United Kingdom, a single Act of Parliament completed the task at once by providing for the constitutional adjustments in the body of the Act and listing the repealed or amended British law in the Schedule to the Act. This implementing measure provided for a wholesale reception of the existing Community law and laid down rules for the implementation of future Community legislation.

The distinction between "directly applicable" and "non-directly applicable" Community rules is vital for their implementation in the national systems. The former are, in the British system, effective immediately when they come into force. These are the so-called "enforceable Community rights" which, by virtue of s.2(1) of the European Communities Act, are enforceable in the courts of the United Kingdom. However, under the British system, like in the other member states[13], the national Parliament exercises a certain degree of surveillance over the Community legislative process. In each of the two houses of the British Parliament there is a scrutiny committee which examines and comments upon the proposed legislation. Their reports are transmitted to the government which can take up a position in the Council of Ministers. In this way a degree of vigilance and democratic control is exercised over the Community process.

In the case of Community secondary legislation which is not directly applicable (i.e. EEC directives and ECSC recommendations), two methods of implementation are used in the British system, i.e. statutes and delegated legislation[14]. Thus, depending on the type of law, Community directives are implemented either by Acts of Parliament (e.g. company law) or by statutory instruments (e.g. food regulations)which are a species of government legislation enacted within the scope of action delegated by the European Communities Act and under supervision of the legislature.

The British system is efficient and it seems to be working well. It also satisfies democratic criteria since it gives authority to the executive whilst retaining a degree of parliamentray control. If Turkey joins the Community she will have to develop methods of implementing Community legislation and, in this respect, the experience of the existing member states may afford a model to study.

(h) Enforcement of Community Law

At the Community level Community law is enforced by the Commission and the Community Judiciary i.e. the ECJ and the Court of First Instance. We have already noted the enforcement procedure at the hands of the Commission[15] and the functions of the Community courts[16].

The enforcement of the Community law by the Community judiciary is achieved by direct and indirect means. In the former category fall the various direct actions, in the latter the references for preliminary rulings dealt with by the ECJ but not the Court of First Instance.

With regard to direct actions the member states have to submit to the jurisdiction of the ECJ[17]. They also have to remain vigilant and, where necessary take action to ensure that legality in the Community is observed[18].This is a matter of Treaty obligations and in this respect each member state operates according to its own internal procedure in which the government legal service plays a vital part.

With regard to indirect enforcement of Community law the Treaties give the right and in some cases impose the duty to request preliminary rulings on points of Community law. This power, derived from the Treaties, is granted directly to the judiciaries of the member states and, therefore, does not depend upon the will or discretion of the member states[19]. However the member states must devise a machinery for this purpose and their court procedures must not hinder the exercise of this power by their courts[20].

The power to request preliminary rulings became part of the laws of the United Kingdom by virtue of S.2(1) of theEuropean Communities Act which specifically refers to "remedies and procedures" provided for, by or under the Treaties. Accordingly rules have been made for the various courts for the exercise of their powers and bearing in mind that independent courts exercise the sovereign power of the state, the system seems to be working well.

However the bulk of Community law is interpreted and applied by national administrative authorities and courts as an integral part of the national systems. Indeed, unlike e.g. in the U.S. where federal law is administered by the federal authorities and federal courts, there are no Community agencies to do so at the national level. This causes problems arising from the relationship between Community law and national

law. In the absence of Treaty provisions in this respect it fell to the ECJ to define the principles which govern the relationship between the two systems. These principles, i.e. autonomy, direct applicability and supremacy of Community law can be traced back to the Van Gend [21] Case where the ECJ explained the nature of the EEC Treaty and its effect upon the customs law of a member state.

The autonomy of Community law means that it is quite independent of the legislation passed by the member states[22] and has to be interpreted and applied uniformly throughout the Community. Where the two systems overlap (e.g. in the field of competition) the national authorities have to apply Community law to the extent to which it overlaps with national law but are free to apply national law in areas which are not covered by Community law[23].

We have already noted that, depending on their nature, Community law rules are either directly applicable or non-directly applicable. Case law suggests that in order to be directly applicable the provision of Community law must impose on the member state clear and precise obligation; it must be unconditional, i.e. not accompanied by any reservation or derogation and the application of the Community rule must not be conditional upon any subsequent legislation whether of the Community institutions or of the member states[24]. Directly applicable rules ought to be applied by national courts without reference for preliminary rulings even if in conflict with national law[25]. This principle, if necessary, has to be embodied in the national constitution[26].

The principle of supremacy deduced by the EC not much from the provisions of the founding Treaties as from the Constitutions of the member states and the federal concept of the Community is closely linked with the principle of direct applicability. It was first mentioned in the Van Gend Case[27] to solve the conflict between the Treaty and national law and became established in Costa v ENEL[28]. The principle is so important that it has to be applied even "if it is alleged that the basic rights by the national constitution were violated"[29]. If Community law could not prevail over a conflicting national rule the very existence of the Community would be at risk.

Without mentioning supremacy or any other equivalent term the British Parliament has solved the problem in a subtle way. As we have noted the European Communities Act gave present and future Community law legal force in the United Kingdom and created the concept of enforceable Community rights. Since the doctrine of supremacy is part of Community law section 2(1) of the Act makes that principle part of the United Kingdom law. The effectiveness of that principle is guaranteed by two further provisions. Firstly section 2(4) provides that, subject only to limitations

specified in Schedule 2 to the Act, "any enactment passed or to be passed shall be construed and have effect subject to the foregoing provisions of this section"; in other words, subject to the principle of supremacy of Community law which is an enforceable Community right. Secondly, section 3(1) of the Act provides that:

For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or to the validity, meaning or effect of anyCommunity instrument,shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court)".

This is an important provision since the principle of supremacy has been developed by the ECJ. By obliging the Courts to follow the jurisprudence of the ECJ the British legislator shifted the problem of supremacy from the legislature to the courts. Instead of prohibiting Parliament to enact conflicting legislation the Act denies effectiveness to such legislation to the extent that it is inconsistent with Community law.

The issues raised in this chapter are likely to affect Turkey as follows[29a];

C-COMMUNITY PRECEDENTS

Turkey is a Civil Law country where, unlike in the Common law countries, the doctrine of stare decisis whereby lower courts have to follow the judgments of higher courts (i.e. precedents) in similar cases does not apply. However they have discretion in taking previous decisions into consideration. The only exception to this rule is the binding force of the judgments of the General Board of the Supreme Court of Appeals made for the purpose of reconciling contradicting opinions on the same point of law expressed in the decisions of the various panels or in different decisions of the same panel of the Supreme Court of Appeals.

In cases revealing gaps in the law, Art.1 of the Civil Code enables the judges to act as if they were legislators. However, they do not legislate in the ordinary sense of the word though they perform a creative function quoad casum.

Thus Turkish judges are well placed to appreciate the importance of the case law emanating from the Court of Justice of the European Communities though, like their Civil Law colleagues in the EC, they would consider the Community precedents as

having merely a persuasive authority. They will, no doubt, fall in line with the judges of the Civil Law countries who, without being formally bound by the stare decisis doctrine, tend increasingly to follow the Community percedents especially those laid down in references under art.177 of the EEC Treaty. A great deal of judicial time can be saved in that way as recommended by the ECJ. This is a practical result of the acquis communautaire (which includes the EC case law) and of the convergence of the national legal systems in the EC.

D-JUDGMENTS AGAINST MEMBER STATES

As stated above there is no physical execution against the member states but there is a Treaty obligation (EEC art.171) to carry out such judgments.

Turkey is a state governed by law and there is no reason to doubt that the state would faithfully carry out its obligations. In practice the obligation contained in the judgment of the ECJ for which the state is responsible will be carried out by the respective government department or the Parliament as far as legislation is concerned.

E-JUDGMENTS AND DECISIONS AGAINST PRIVATE PARTIES

Articles 187 and 192 of the EEC Treaty, 44 and 92 of the ECSC Treaty and 59 and 164 of the EAEC Treaty impose a direct obligation upon the member states to enforce the judgments of the ECJ and decisions of the Council of Ministers and of the Commission of a pecuniary nature against individuals and corporations and indicate the procedure in this respect. Thus enforcement is governed by the rules of civil procedure in force in the state in whose territory the judgment or decision is to be carried out. Each state designates the national authority for this purpose and communicates its decision to the Commission and the ECJ as well as the Arbitration Committee set up under art.18 of the EAEC Treaty. The said authority will execute the judgments and decisions automatically without any formality except verification of their authenticity. There is, in this procedure, no room for the order of exequatur in the classical sense which implies discretion or the compliance with national law.

There can be no appeal in national courts against the executive order which can be suspended only by a decision of the ECJ. However national courts have jurisdiction over complaints that the enforement is being carried out in an irregular manner, i.e. in breach of the national procedure.

The Treaties put into the same category the judgments of the ECJ and administrative decisions of the Council (e.g. imposing definitive dumping duties) or of the Commission (e.g. imposing penalties in order to enforce the rules of competition)and provide that the verification of all these measures is in the hands of one national authority designated by each member state for the purpose.

If Turkey joins the EC she will have to designate an enforcement agency, dispense with any other formalities except verification and execute the judgments of the ECJ and the decisions of the Council and the Commission as if they were judgments of a "higher court". Since the ECJ has no criminal jurisdiction and the pecuniary obligations imposed by the Council or the Commission are regarded as merely "economic sanctions" enforcement is a matter of Civil Law and Civil Procedure. Since the enforcement procedure is governed by national rules the Turkish law of Execution and Bankruptcy law will have to be extended to enable the state to carry out its obligations.

It is clear that the rules of Private International Law do not apply in this context since they are concerned with the jurisdiction and enforcement of national judgments, i.e. judgments of courts of other countries. In the EC the matter is subject to the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters which Turkey will have to accept as part of the acquis communautaire and amend the Private International Law of Procedure as appropriate.

F- REFERENCES FOR PRELIMINARY RULINGS

The relevant provisions of the EC Treaties (especially art.177 of the EEC Treaty) are addressed directly to the judiciaries of the member states. They provide a machinery for interpretation of EC law relevant to the case before the national judge. Since there is no appeal from national courts to the ECJ the references for preliminary rulings constitute a kind of bridge between the two systems. The ECJ is in a position of authority because it alone has the exclusive power of judicial review of Community law (art.173 of the EEC Treaty). Since the member states are in duty bound to to everything that is necessary to attain the objectives of the Treaty they must, by implication, facilitate the process of reference and refrain from creating procedural obstacles in this field.

The procedure follows in principle art.100 of the German Federal Constitution which enables state courts to refer their problems to the Federal Courts without going through the normal appellate procedures.

Turkish judges are familiar with the settlement of preliminary questions before proceeding to the judgment but only in rare cases involving a constitutional issue they are able to refer the matter to the Constitutional Court for a ruling on that issue. Thus they are unable to unload their burden on a higher court in ordinary cases. There is a certain analogy in this respect to references for a preliminary ruling under article 177 of the EEC Treaty in the context of EC Law. It seems, therefore, that it may not be necessary to amend or extend the rules of procedure in this respect but merely adapt the process to the practice in the EC.

Apart from the procedure judges and lawyers should acquire appropriate skills so as to avoid making references in cases where they should not have been made. A study of the ECJ case law and of the practice in the member states would be instructive. As regards the mechanism of the reference the courts will have to work out their own practice. The British system appears worthy of consideration for its efficacy and simplicity. Accordingly under the Court Rules forms are provided for each type of the court.

These forms are filled and signed by the judge who, assisted by lawyers on both sides of the dispute, will draft questions which are to be answered by the ECJ. The court's registrar will transmit the form to the registrar of the ECJ and, when the ECJ returns its ruling upon the questions put before it, the court will resume the proceedings and proceed to judgment.

G-REPRESENTATION OF TURKEY IN THE EC

Turkey, though not a member of the EC, is at present represented at a high level by her ambassador to the EC. This is a matter of reciprocity in International Law and, correspondingly, the EC is represented in Ankara. If Turkey joins the Community the rules of International Law will be replaced by the rules of Community law.

As noted earlier the ambassadors of the member states (as the so-called COREPER) perform an important function in the decision-making process of the EC. In

the event of Turkey joining the Community the Turkish ambassador will take place on equal terms with his EC colleagues at the table of the COREPER.

H-REPRESENTATION OF TURKEY IN JUDICIAL PROCEEDINGS

It is normal practice for a state, as a legal person, to be party to legal proceedings either at home or in international adjudications. In the latter situation it is the state in its corporate capacity which is the party to the proceedings and not its government departments or municipalities. However the state may be represented by a minister or ministry or simply by government lawyers acting on behalf of the said ministry or the goverment generally.

According to art.39 of the Hukuk Usulü Muhakemeleri Kanunu (Civil Procedures Act) legal persons participate in proceedings before Turkish courts through their authorized organs who act as their statutory representatives. Such organs are empowered to carry out all the legal transactions listed in Art.35 of the Avukatlık Kanunu (Barristers' Act) even if they are not barristers. However if such an organ chooses to brief a procurator to represent it in court, the procurator must be a barrister. These rules apply to the Turkish Republic. Thus the ministries which are parties to, and participate in, the proceedings are, in practice,represented by lawyers employed by the state on a permanent basis as civil servants.

As a member state of the EC Turkey will be entitled to challenge the acts of the Community and defend her position before the ECJ. In the Community practice, which follows art.42 of the Statute of the International Court of Justice, member states are represented by their agents appointed for a particular case. These agents may be assisted by advisers and lawyers. Each country follows its own method. Thus a government may use its civil servants as agents and advocates in court or brief barristers from private practice for the purpose. In the British system government lawyers are often assisted by barristers from private practice. It follows that nothing needs to be done in Turkish law to enable the state to be represented before the ECJ. The present rules are sufficient.

NOTES:

1 See EEC Art.220

2 See p.14

3 Art.189 (2)

4 See e.g.Case 93/71:Orsolina Leonesio v. Italian Ministry of Agriculture(1972) ECR 287

5 See e.g. 39/72: EC Commission v Italy (1973) ECR 101 following Case 93/71

6 Art.189(3)

7 Case 239/85: EC Commission v Italy, Re Toxic and Dangerous Waste (1988)ICMLR 248)

8 See Case 29/84: EC Commission v Germany, Re Nursing Directive(1986) 3CMLR 579

9 See Case 148/78:Pubblico Ministero v Ratti (1979)ECR 1629

10 See Cases C-6/90 and C-9/90:Francovich and Others v Italian Republic, The Times, 20 November 1991

11 See European Communities Act 1972, s.3(2).

12 Supra Chapter 2 A and B

13 See Lasok and Bridge, op.cit.Ch.10

14 European Communities Act, s.2(2)

15 See p. 56-57

16 See p. 58

17 See p. 41-42

18 See e.g. Case 68/86:United Kingdom v EC Council, Re Battery Hens (1988)2CMLR 364

19 See Case 166/73:Rheinmühlen-Düsseldorf v EVGF (1974) ECR 33

20 Ibid at 47

21 Case 32/84 (1985) ECR 779

22 Case 28/67:Mölkerei Zentrale v HZA Paderborn (1968)ECR 143

23 Case 14/68:Walt Wilhelm v Bundeskartellamt (1969)ECR 1

24 Advocate-General Mayras in Case 41/74; VanDuyn v Home Office (1974) ECR 1337

25 Case 106/77:Amministrazione Delle Finanze v Simmenthal SpA (1978) ECR 629

26 See e.g. the British system

27 Supra, Case 106/77

28 Case 6/64, (1964) ECR 585

29 Case 11/70:Internationale Handelsgesellschaft v EVGF(1970)ECR 1125

29a Murat Yörüng, Nuray Ekşi, İlhan Yılmaz

30 See Case 283/81, CILFIT Srl v Minister for Health (1982) ECR 3415