Editorial

The Maastricht Treaty and the Use of Protocols

Following the difficulties in Ireland recently in the disturbing case of the 14-year-old girl who wished to have an abortion after she became pregnant as a result of rape, a number of issues involving the interaction between Community law and national law have been highlighted. In the event, the Irish Supreme Court resolved the particular case on grounds solely limited to rights available under Irish constitutional law. It held that the right to life of the unborn as guaranteed in Article 40.3.3 of the Constitution was subject to certain rights to life of the mother and that, since it had been proved that there was a real probability that the mother would commit suicide if forced to go through with the pregnancy, in this case abortion would be permissible even if the termination took place within Ireland. However, the Supreme Court also held that, irrespective of EC law, there was a general constitutional right to travel abroad which could not be interfered with even though the traveller might be threatening to commit a crime while abroad.

The difficulties in regard to EC law, however, arise not through the decision of the Supreme Court, but through the imposition by the Irish Government of a special protocol in the Maastricht Treaty before this case arose which declared that EC law would not preclude the operation of Article 40.3.3 of the Irish Constitution. Paradoxically, it is this protocol which is now being threatened by some in Ireland to turn the forthcoming referendum in Ireland on the Maastricht Treaty into a referendum on abortion.

It is reported today (12 March) that the Irish Government may propose an amendment to this protocol to read; "Ireland pledges not to use Article 40.3.3 to restrict the right of its citizens to travel abroad". This would be submitted to the Council of Foreign Ministers for their approval. The intended effect of these protocols is, of course, to limit the effectiveness of Article 59 EEC, a directly effective provision on freedom to provide services.

A similar protocol in the Maastricht Treaty seeks to limit the effects of the *Barber* judgment in relation to contracted out pensions. Again, a protocol is being used as a vehicle for limiting the effects of a directly effective provision of the EEC Treaty (in this case Article 119).

The use of protocols to treaties in this way must be a matter for some concern. Apart from anything else, it raises some questions of the legality of the protocols themselves, in particular, as to whether they have any effect in international law. But, is it not dangerous to permit the Member States to limit the effects of EC law guaranteed through pre-existing treaties in cases where they are unhappy with the consequences of individual judgments of the Court of Justice? The Community is based on the rule of law, but the danger here is that the use of the law might be corrupted. There are sufficient provisions in the Treaty and in the jurisprudence of the Court to protect national interests where that it compatible with the wider interests of the Community. The use of protocols in this way should be resisted.

Conor Quigley

April Issue

The April issue of the EBLR will be a special issue devoted to financial services.

Among those writing for the issue are Sir Leon Brittan, Jean-Bernard Thomas, Dr Volker Triebel, Michael Reynolds and Professor Lars Pehrson. The guest editor for the issue is Peter Farmery.