Editorial

Directives – The Lost Opportunity for Sovereignty

Recent newspaper reports over the past two to three months have highlighted a perceived apprehension in the Member States as to the true role of Community law, particularly Directives, in the twelve countries of the European Communities. In August this year, the Foreign Secretary, Douglas Hurd, was reported to have asked Ministers in the British Cabinet to draw up lists of European Community legislation that "interfered unnecessarily" with British sovereignty.

While one might say that action is simply good grist to the political mill, particularly in the run-up to a UK Parliamentary vote on the Maastricht Bill, the issues that this action poses for the Community and the Member States, and particularly in respect of the completion of the internal market, cannot be ignored. On the thorny – and often mis-understood – issue of sovereignty, it should perhaps be pointed out to those who fear a "loss" of sovereignty to the Community that every action by the Community institutions is itself the result of the exercise of that "national sovereignty" so often proclaimed to be on the verge of disappearing.

It is perhaps trite to recall that each Member State voted to create and/or accede to the European Community. The changes to the Treaties establishing the Communities wrought by the Single European Act, especially the setting of the goal of the internal market, were only possible after each Member State had ratified and adopted the same through its national Parliament. Nor should it be forgotten that the majority of Community legislation is still adopted by the Member States in the Council of Ministers. From this point of view the sovereignty issue is itself a created problem.

On a more serious note, however, is the now often heard desire to "win back" areas of competence to the Member States. Areas which are reported as most in line here as far as the United Kingdom is concerned are animal welfare, food hygiene, the environment, workers' protection and the benefits system. These are stated to have been targeted because it is said that the United Kingdom has different traditions in this area and, in most cases, higher standards.

The danger of this sort of approach is that it runs the very real risk of allowing Member States to maintain barriers to the free circulation of, in particular, goods service and persons, the abolition of which barriers was supposed to be a principal impetus for the adoption of the Single European Act. The desire to re-assert "sovereignty" in any areas that would affect the attaining of the internal market – a "single area in which the free movement of goods, services and personnel is ensured" (see Art 8a EEC) – risks fragmenting that very market and making business in Europe that much more difficult. Community Directives are aimed at harmonising essentially divergent national rules and regulations that might otherwise affect the running of this market. In their implementation, they respect national legal systems, as the choice of form and method for implementation lies in the discretion of the Member States. The United Kingdom has a good track record on complying with its obligations in implementing Directives into national law. The failure of Member States to comply with their obligations here has been met, to some degree, by the jurisprudence of the European Court of Justice so that non-implemented Directives can still be relied upon before national courts, as in fact their substance would have been had they been implemented as required.

"Taking back" competence in areas where the Community might have acted by way of Directives would allow these differences in national laws to be maintained, and so complicate the question of free movement. To the extent that the Community has acted then the Member States may be precluded themselves from acting. One then has to deal with Community law, it is true, but at least there is one law to contend with, not up to twelve different laws.

This issue, however, raises a further more general problem. Leaving aside the question of whether there may be a political solution, some form of "subsidiarity" perhaps, whereby Community Institutions will not adopt legislation in particular areas, but will leave, within such areas of shared competence with the Member States, action to be taken in respect of such areas at the national level, there is still the fundamental question whether this will lead to any greater certainty for those who seek to do business within the European Community.

Where Member States "take back" into their exclusive domain areas of competence previously subject to Community involvement, is the underlying law of policy to be applied to be that of the national Parliament or that of the European Community? The text in the Maastricht Treaty on subsidiarity would appear to indicate that what should be applied would be, at least, the policy of the Community. If it is not, then the "gain" of "retrieved sovereignty" may have to be paid for with the pain that arises from the extra costs that differences in national provisions provoke.

In the face of such uncertainty, the role that Community Directives could and should be playing may seem all the more attractive. In the end, one may well ask if the question is not "how much can be 'taken back'?", but how strongly can the failure by a Member State to comply with its obligations be enforced against its institutions, and within its territory? The Maastricht Treaty would go some way to address this, in allowing the European Court of Justice to fine recalcitrant Member States for failing to comply with their Treaty obligations – an approach that the UK has endorsed. Since it is the Member States which drive the Community, to parody a saying, the question is not "How much can the Community do for the Member States?", but "what are the Member States going to do for the Community?", that is, themselves? Considered use of Directives is one way that the Member States can help the Community to help themselves.

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