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# LEGISLATION TO GIVE EFFECT TO COMMUNITY LAW

## Note by the Law Officers

1. We have been asked to advise upon the wording of the legislation that will be needed, if the United Kingdom joins the European Communities, in order that Community Law may be made effective within the United Kingdom.

2. Much detailed legislation will be necessary in order to bring existing United Kingdom statute law into line with the European treaties and all their consequences. The questions for our consideration are, however, more fundamental and far-reaching. For accession to the Communities will require the United Kingdom to become part of what the European Court has described as "a new legal order in international law" (Van Gend en Loos v. Nederlandse Tarifcommissie (1963) C.M.L.R. at p.129). It will, as Judge Pescatore of that Court has put it, "require a fundamental revision of some deep-rooted habits of political and legal thinking in Great Britain" (Brussels; February 1970).

3. No doubt it is such thinking which has prompted the suggestion that the necessary United Kingdom legislation will need to contain "a generalised formula", on the form of which we are now asked to advise. We are, however, of the opinion that the search for a "generalised formula" might conceal the

particular objectives that need to be achieved. There is, of course, no doubt that the framing of such legislation is of such constitutional and political importance that the Law Officers will need to be consulted at each stage of its preparation. The point is that our advice requires to be precisely focussed on the several distinct issues that arise.

The problems defined:

4. The effectiveness and acceptability of the legislation requires consideration from several (potentially conflicting) points of view, as follows:

(a) Constitutional and political acceptability at Westminster;

(b) Legal and political acceptability within the Communities;

(c) Legal and practical effectiveness in the United Kingdom and European courts, in the context of particular cases as they arise.

We have little doubt that the last of these three points of view will prove to be the most important. For if the legislation can be justified, during its passage through Parliament and in practice thereafter, in the context of particular cases, then it is most likely to pass the test of constitutional and political acceptability.

5. In this setting the principal objectives to be achieved are as follows:

(a) Certain provisions of Community Law and certain decisions of Community institutions in accordance therewith are intended to, and do, have direct internal effect within each member-State. This direct effectiveness of Community Law will need to be secured within the United Kingdom;

(b) Directly applicable Community Law is required to "prevail" or take precedence over any "incompatible" United Kingdom law;

(c) Community Law that is to "have direct internal effect" or "prevail" in the way described is developing and being extended by the Community institutions. Such "future" unidentified Community Law will have to be as effective within, and in relation to, the United Kingdom as the Community Law which already exists;

(d) Community Law will have to be made effective in the way described, in a manner that is consistent with our constitutional doctrine that the Queen in Parliament is the only source of statute law within the United Kingdom;

(e) Clear provision will have to be made for resolving any potential conflict between Community Law and the common law of England and Wales or the common law in Scotland, as that is upheld and interpreted by the courts of the United Kingdom.

Supremacy of Community Law:

6. The most crucial question that emerges from the foregoing list of objectives is whether any way can or should be found to provide for Community Law to prevail over laws made by, or under the authority of, Parliament. Is it, in other words, possible, or even desirable or necessary, to provide directly for the "supremacy" of Community Law?

7. This problem cannot present any difficulty for the European Court. For that Court will, by definition, proceed upon the basis that Community Law is supreme. No doubt, if the European Court were to rule that any United Kingdom Statute or other aspect of our municipal law (either presently existing or to be enacted in the future) were inconsistent with the Treaties, then steps would have to be taken to bring United Kingdom law into line. This problem is unlikely to arise at an early stage, for the initial legislation will seek to bring United Kingdom municipal law into line with the Treaties. It will thus seek to provide for the direct internal effect of Community Law. All this would have the effect of overriding municipal law that was in force when the initial legislation came into operation and would accord with the principle lex posterior derogat priori.

8. The problem of supremacy would, however, arise in acute form for any United Kingdom court which was required to consider an Act of Parliament which was enacted later than the initial treaty legislation, and which contained a provision that was inconsistent with Community Law.

9. No doubt a United Kingdom court in these circumstances, applying the ordinary canons of construction relating to statutes for the implementation of treaties, would lean strongly against inputing to Parliament the intention to legislate in breach of international obligations. But once a United Kingdom court had reached the conclusion that the intention of Parliament, as set out in the later statute, was to override Community Law, as derived from the initial

legislation, then the United Kingdom court would, in our opinion, give effect to the later Act.

10. The question is whether this conclusion can be avoided by the inclusion of an appropriate "formula" in the initial legislation. Two forms of formula are suggested: either that Community Law should prevail over any inconsistent municipal law or that there should be a general enactment of the Treaties and all the consequences flowing from them.

11. We are in no doubt, as a matter of strict law, that even if such a provision were to be enacted with the intention of providing for the supremacy of Community Law, the United Kingdom courts would not regard it as effective to prevent or invalidate subsequent United Kingdom legislation that was inconsistent with it. Lord Sankey (in the British Coal Corporation case (1935) A.C. 500, 520) expressed the same view about the effectiveness of the Statute of Westminster, although he explained, in that context, that the possible repeal of the Statute was "a matter of theory with no relation to realities".

12. It has, however, been suggested that, although it is beyond question that the doctrines of parliamentary sovereignty require that Parliament can expressly repeal earlier legislation purporting to be unrepealable, implied repeals can be prevented by a statute expressly rejecting such a possibility. We cannot accept this view. In our opinion the statements in Ellen Street Estates Ltd., v. Minister of Health (1934) 1 K.B. on this matter correctly state the doctrines of our law. Any provision of either of the kinds suggested to the effect that Community Law should prevail over municipal law are therefore most unlikely to have the effect of preventing either express or implied repeals, at least in the immediately foreseeable future.

13. More for the sake of completeness than because we regard it as a possibly acceptable proposal, we take note of the suggestion that the supremacy of Community Law could be secured (notwithstanding the "difficulties" arising from the doctrine of parliamentary sovereignty) if the initial treaty legislation was "entrenched" by the imposition of some new and specially devised procedural requirements for its amendment or repeal. Although we can see some force in the (so far) academic arguments that have been advanced to suggest that such procedural entrenching is possible, it is in our opinion far from clear that the Courts would strike down as "invalid" a conflicting subsequent Act of Parliament that had not been passed in accordance with the procedural requirements. There is moreover the even more important consideration that to create such a precedent for the entrenchment of laws in the United Kingdom

would be a fundamental innovation in our system going far beyond the immediate problem. In view of these objections we think it unnecessary to examine this course further in the present context.

Direct internal effect of Community Law

14. No difficulty arises from the notion that Parliament should, in the initial legislation, give the force of law to the provisions of the Treaties (and consequent instruments) which are already in operation. It is intended to bring the United Kingdom statute book into line with the Treaties, or to take power so to do.

15. Nor will any difficulty arise from any future obligation to revise or amend United Kingdom statute law so as to keep it in line with developments in Community Law. Parliamentary authority can be exercised or acquired for this purpose.

16. But it must be stressed that Community Law, as envisaged in the Treaties and as developed subsequently, extends further than this. The United Kingdom's obligations go beyond ensuring that legislation is in conformity with Community Law and refraining from enacting any inconsistent laws.

17. The point about the "self-enforcing" nature of Community Law, as this concept has been developed within the Community, is that certain provisions of Community Law should have direct internal effect within the member-States - and without the necessity for any intervening action on the part of the member-State concerned to secure the validity or effectiveness of the Community Law.

18. Moreover, such provisions of self-enforcing Community Law are not solely of a legislative character. Nor do they apply to or affect Governments or institutions alone. For the European Court has held (in the Van Gend en Loos case, supra, at p.129) that: "Community Law ... not only imposes obligations on individuals but also confers on them legal rights. The latter arise not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly defined manner, by the Treaty on individuals as well as on member-States and the Community institutions."

19. We have spelt this out at some length in order that there should be no doubt about what is meant by the phrase "direct internal effect of Community Law". It involves securing:

(a) That future legislative action by the Community institutions will take effect directly within

the United Kingdom without the necessity for any further approval or intervention by Parliament;

(b) That future decisions by the Community institutions about the rights, obligations and breaches of duty by individuals or organisations within the scope of Community Law, will be directly valid and effective within the United Kingdom. Although the enforcement of such decisions would often be effected through agencies in the United Kingdom, their validity would not require any intervention by Parliament or by any other United Kingdom authority.

20. It is clear that this will represent an important constitutional innovation. Even so, we are of the opinion that it is within the power of Parliament to give legal effect within this country to laws made or decisions taken by an international body. This view is in line with that which has so far prevailed in this field, although, in our opinion, with less explicit acknowledgment of exactly what was involved. This is no doubt because the full scope and effectiveness of Community Law is only now becoming plain.

21. In view of these considerations, we conclude that the initial Act of Parliament can, and should, legislate in direct terms to give direct internal effect to Community Law. This is a matter of great importance upon which there must be clarity. We do not consider that it would be right to leave it to be implied from some broader, or more general, proposition.

22. The initial legislation could not prescribe by reference to specified instruments or decisions issued by the Community institutions, the particular provisions of Community Law that would be rendered effective in this way. This is because future provisions of Community Law having direct internal effect could not be clearly identified in advance. The extent to which the Treaties and instruments have direct internal effect is not static but depends upon the continuously developing jurisprudence of the European Court.

23. It would not be right, or indeed possible, for us at this stage to suggest the precise way, as a matter of draftsmanship, of achieving the result which we advise. We suspect that it will need, on analysis, to be the consequence of a number of complementary provisions, designed to make Community Law effective as part of a new and separate legal order. We are clear that this will have to be done, if possible, in such a way as to exclude the possibility of United Kingdom courts pronouncing upon the validity of any particular provision, whether legislative or executive, of Community Law. Any such question must, under the Treaties, be for the European Court.

24. This means that the legislation should not identify the powers of the European institutions as in any way akin to powers delegated by the United Kingdom Parliament. For it would not beconsistent with Community Law for the United Kingsom courts to claim power to pronounce on whether or not a Community ruling was or was not ultra vires.

25. This is, in our opinion, an important illustration of the problem identified in paragraph 5(e) above - the need to provide for the resolution of any conflict between Community Law and the "common law" of the United Kingdom.

26. Another illustration of this possibility of conflict can be provided if one considers the possibility of an application to the English courts, for example, for an order of certiorari to set aside a decision by a Community Institution on the grounds that there was no jurisdiction to arrive at such a decision or that the decision revealed an error of law on its face.

27. Plainly the concept of the supremacy of Community Law would require such an application to be struck out. But the difficulty of ensuring such a result can be seen from the extent to which Parliament has so far failed to secure that any decision-making power is "judge-proof", In Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147, for example, the House of Lords was not deterred by a provision to the effect that a decision by the Foreign Compensation Commission "shall not be called in question in any court of law". Lord Wilberforce observed (at page 207) that "Although, in theory perhaps, it may be possible for Parliament to set up a tribunal which has full and autonomous powers of operation, that has, so far, not been done in this country".

28. This is, in our opinion, another good illustration of the absolute necessity to make plain provision in the initial legislation for the direct internal effectiveness of Community Law.

29. It may perhaps be hoped that United Kingdom courts would lean against any Anisminic type decision in respect of, for example, a ruling by the European Commission, because of their desire to reach a decision that was in accord with the United Kingdom's international obligations. But this hope does not in any way diminish the importance of ensuring that the initial legislation provides for such matters expressly, and that it contains as many indicia as possible of Parliament's intention that the European treaties are intended to have a pervasive effect upon the interpretation and application of the legislation by United Kingdom courts.

The "generalised formula":

30. The view which we have just expressed about the need for securing the pervasive effect of the Treaties bring us back, in effect, to reconsider the question of whether either of the generalised formulae suggested (see paragraph 10 above) is in fact required in the initial legislation.

31. It has been suggested that such a formula might be desirable for three reasons: first, in order to "import" the whole Community legal system; secondly, to lay the foundation upon which the United Kingdom courts may develop new jurisprudence under which Community Law may "prevail" over inconsistent municipal law; and thirdly in order to demonstrate to the Communities that the United Kingdom was accepting the European jurisprudence.

32. It can be argued that Parliament, in passing legislation for joining the Community, would have accepted the Treaties and their consequences (including the rule, well established in Community jurisprudence, that Community Law has supremacy). In can, on this basis, be suggested that it would be appropriate for the initial legislation to include provisions which reflect Parliament's intention to ensure this consequence.

33. We have explained our plain opinion that such a provision could, as a matter of strict law, be rendered ineffective at any time by a later Act of Parliament. Even so, it might be argued that the legislation ought to contain such a provision, which would reflect the major constitutional nature of the change that was taking place. It might further be suggested that such a provision could be justified in the same way as Dicey justified the "unrepealable" provisions of the Treaty of Union with Scotland, as amounting to a warning that the Act "cannot be changed without grave danger to the constituion of the country." The Statue of Westminster and the Government of Ireland Act could no doubt be justified in similar terms.

34. Insofar as such a provision, in either of the forms suggested, sought in terms to confer supremacy on Community Law, we do not consider that it could be justified to Parliament. It would necessarily have to be acknowledged that it was ineffective. And it would raise in a most acute form, and to no purpose, the delicate question of surrender of sovereignty. Nor could it be justified (as could, for example, the Statute of Westminster) as representing something which commanded universal assent, and which ought, therefore, to be embodied in our "constitution". On the contrary, it would probably serve only to highlight what Lord President Cooper described (in MacCormick v. Lord Advocate (1953) Session Cases 396, 412) as "the conflict between academic logic and political reality".

35. Nor do we consider that any such generalised formula is necessary for the purpose of enabling the United Kingdom courts to develop a jurisprudence that would be consistent with the supremacy of Community Law. Moreover, the kind of provision which should be made for "importing" the Community legal system should not depend upon any generalised concept. It should depend instead upon the precise provisions that would be needed to ensure that the United Kingdom courts rendered that system effective within the United Kingdom to the full extent that this can be achieved within our constitutional framework. An approach of this kind, that concentrated on the procedural "nuts and bolts" of the initial legislation, would, in our opinion, have the advantage of combining legal effectiveness with the minimum of political provocation in the form of the initial legislation.

36. Provided effective statutory provision was thus made in terms of the particular results required, we do not consider, in light of the advice which we have received, that it would be necessary to go further than this in order to ensure that the necessary United Kingdom legislation was legally and politically acceptable within the Communities.

37. In terms of securing the effectiveness of the legislation, in the sense to which we have referred, it is our present opinion that it would be essential (and indeed customary) for the Treaties to be recited (or specifically referred to by way of Preamble) in the initial legislation. Although any such possible Preamble could, of course, be referred to for the purpose of interpreting the initial legislation in United Kingdom courts, its precise wording would, we suggest, be of as much political as legal significance.

38. There are substantial legal arguments for ensuring that the Treaties are so dealt with in the drafting of the legislation as to ensure that they are effective in our municipal courts. The necessity for this is well illustrated by the refusal of the Lord President (in MacCormick's Case, supra, at pp. 310-11) to pay any regard to the Commonwealth Agreement which led to the passage of the Royal Titles Act, 1953. "This agreement," he said, "is not scheduled or otherwise detailed, the only reference to it being in the vague words of the preamble of the Act, which are entirely lacking in specification".

39. There are, moreover, powerful reasons why such basic provisions, that would amount in effect to a new body of "Federal" statute law, should be presented (and readily available to the citizen and his advisers) as authoritatively as if they were set out in the Statute book. We can, however, appreciate some of the practical arguments against achieving this result

by scheduling the treaties to the initial legislation. And we should wish to consider further with the draftsman how far such scheduling would be necessary from a strictly legal point of view.

40. Meantime, we are of the opinion that possible ways of making the Treaties (and other Community legislation) available in due form and with due authority should be carefully considered. This should make it possible for the final form of the initial legislation to be decided upon the basis of our further consideration of the legal questions involved.

41. With all these considerations in mind, we have reached the conclusion that nothing in the way of any generalised formula, is needed, or indeed desirable, from the point of view of United Kingdom municipal law. The important consideration, in our opinion, is that the initial legislation should deal, as it would have to do, with the particular practical provisions for giving effect to the Treaties. Thus it would need, for example:

(a) To give direct internal effect to Community Law, in the way that we have described;

(b) To define the relationship between United Kingdom Courts and the European Court, for the purposes of Article 177 of the European Economic Community Treaty (which enables the European Court to give rulings on questions referred by municipal courts as to the interpretation of the Treaty or the validity or interpretation of acts of Community institutions);

(c) To incorporate the Treaties (and consequent Community legislation) in United Kingdom municipal law, in the way that we have described.

42. Consideration would also have to be given by the draftsman to the need for some interpretative provision that would strengthen the presumption against a conflict between United Kingdom and Community Law in fields where they might overlap. We can recognise that there may be severe practical limits to the extent to which it may be possible to proceed in this way.

43. Indeed, it remains the case, after all our consideration of these important issues, that, as has previously been envisaged, the principal effective means of securing the "supremacy" of Community Law will be the continuing avoidance of conflict between Community Law and our own national statutes.

Conclusions:

44. In the light of the conclusions we have reached, we advise on the questions submitted to us as follows:

(1) The initial legislation should make express provision to secure the direct internal effectiveness of directly applicable Community Law:

(4) No express provision should be made to the effect that a directly applicable rule of Community Law should prevail over any conflicting United Kingdom statutory provision;

(5) and (6) No attempt should be made, by way of express provision, to secure the supremacy of Community Law;

(2) and (3) The Treaties (and consequent Community legislation) should be embodied in United Kingdom municipal law, either by being scheduled to the initial legislation or in such a way as to secure the same result.

(7) and (8) We set out in paragraphs 41 and 42 of our Opinion the kind of provision that will need to be made in order to eliminate avoidable conflict between Community and United Kingdom municipal law.

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