THE IMPACT OF EUROPEAN COMMUNITY LAW ON ENGLISH LAW

CLIVE M. SCHMITTHOFF*

On January 22, 1972 the United Kingdom, together with the Irish Republic and the Kingdom of Denmark, signed the Treaty of Accession to the European Communities.[1] The conditions of admission and the provisions for the adjustment of the treaties establishing the three Communities — the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community — were laid down in the Act of Accession which was attached to the Treaty of Accession. The United Kingdom gave effect to these international measures by the European Communities Act 1972 which came into operation on January 1, 1973.

This was a momentous and historical step in the development of English law. Section 2(1) of the European Communities Act 1972 provides that Community law shall form part of the law of the United Kingdom, and of the European Court of Justice has asserted repeatedly that, if there is a conflict between Community law and national law, the former is the superior source of law and the latter must give way[2] in the limited area in which such conflict may arise. Lord Denning summed up the position in a statement which has become classical:[3] —

> "The first and fundamental point is that the Treaty concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the common market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute."

It is intended in the following to examine the impact of Community law on English law. This examination will proceed

* LL.M., LL.D., Dr. jur., Drs.h.c., Hon.F.I.Ex., Barrister, Visiting Professor in International Business Law at the City University and the University of Kent at Canterbury

1. The Treaty was also signed by the Kingdom of Norway which, however, did not ratify it and did not become a member of the EEC.

2. The concept of supremacy of Community law was asserted by the European Court of Justice e.g. in *Humblet v. Etat Belge* (1960) 6 Rec. 1125, Valentine II, 817; *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] C.M.L.R. 105, 129; *Costa v. ENEL* [1964] C.M.L.R. 425, 455; *Walt Wilhelm v. BKA* [1969] C.M.L.R. 100, 119; *Internationale Handelsgesellschaft v. EVSt.* [1972] C.M.L.R. 255, 283.

3. In *H.P. Bulmer Ltd. and Showerings Ltd. v. Bollinger S.A.* [1974] Ch. 401. . . .

under three headings:

1. The impact of Community law on English statute law;
2. The impact of Community law on English common law; and,
3. Conclusions.

THE IMPACT OF COMMUNITY LAW ON ENGLISH STATUTE LAW

The EEC Treaty, as the Treaty of Rome, by which the European Economic Community was founded,[4] is known in the United Kingdom, provides in article 3(h) that the activities of the Community shall include "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." Articles 100-102 further elaborate this aim; article 100 provides:—

> "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market."

Under this article directives have been issued concerning the control of production methods or production characteristics of chemicals and pharmaceuticals, animal products, electrical equipment, food and drink, glass, measuring equipment and instruments, textiles, vegetable products and wood and customs legislation; directives have also been made under article 100 in respect of motor vehicles, insurance law and taxation.

When the United Kingdom joined the EEC, it had to give effect to all measures of Community law which had come into operation before its accession.[5] This international obligation was carried out to a large measure by the European Communities Act 1972. Two provisions of that Act merit particular mention in this connection. By section 9 of the 1972 Act, effect was thought to be given, in appropriate terms, to the First Council Directive on Company Law Harmonisation of March 9, 1968, which will be reviewed briefly later; the provisions of that section "shall be construed as one with the Companies Act 1948."[6] Section 10 of the 1972 Act which was replaced by the Restrictive Trade Practices Act 1976[7] provided, in particular, for the so-called double barrier according to which the United Kingdom restrictive trade practices legislation should apply[8] notwithstanding the requirements of Community

4. The EEC Treaty is dated March 25, 1957. The Treaty came into force on January 1, 1958.
5. Act of Accession, arts. 2-5.
6. European Communities Act 1972, S.9(8).
7. Restrictive Trade Practices Act 1976, ss. 5, 21(1)(a), 27(1)(a) and 34.
8. New Restrictive Trade Practices Act 1976, s.5.

competition law; that means that a restrictive trade agreement in the United Kingdom has to overcome two hurdles, viz. it must be valid under Community law as well as United Kingdom law.

Before the ambit and the details of Community legislation are considered it may be appropriate to say a few words about its nature and its effect on the sovereignty of the Parliament of the United Kingdom. Essentially Community law, as far as contained in directives and regulations issued by the Council of Ministers, is compromise law, founded on the consent of the Member States. Even in the cases in which the EEC Treaty admits a majority decision of the Council, the principle of majority voting has been abandoned and that of the unanimity rule has been adopted since the Luxembourg Accords of January 28 and 29, 1966 which ended the abstention of France from the deliberations of the EEC under General de Gaulle. But that EEC law is essentially compromise law does not mean that the Council adopts only measures based on the lowest degree of consent; it aims at the adoption of meaningful modern measures of progressive nature, regulating its subject-matter in considerable detail, and if no consent is forthcoming immediately, it rather postpones a decision until public opinion in the Member States is ready to accept the proposed measure, possibly with some amendment.

It is also clear that the Parliament of the United Kingdom, by incorporating Community law into English law and thus indirectly accepting the supremacy of the former over the latter, has restricted its sovereignty in favour of the new supranational institutions of the three European Communities. In that respect the legislative measures by which the United Kingdom became a Member State of the EEC have been compared with the Act of the Union between England and Scotland of 1707. That, however, is only partially true. The aims of the European Communities are limited and the United Kingdom Parliament has restricted its sovereignty only in so far as necessary to achieve the aims of the Communities; the residual power, with all that that implies, still rests with the United Kingdom Parliament. To assert and preserve it, Parliament has constituted a scrutiny committee which strictly examines every Community measure in order to assure it does not transgress the competence of the Communities.

It follows that the main — but not the only — effect of Community law on the United Kingdom legislation is in the commercial field. Company law, patents and trade marks law, bankruptcy law, product liability, agency, private international law, and mutual recognition and enforcement of judgments in civil and commercial matters are the areas already affected or likely to be affected in the forseeable future, apart from technical

matters, such as are necessary to establish a customs union. That is only reasonable. It is impossible to establish a single economic territory in which goods and capital can move freely without let and hindrance, in which the free movement of workers is safeguarded, and the right of establishment is assured to self-employed persons and companies, unless the commercial laws of the Member States are harmonised in their basic aspects.

The harmonisation of company law

The spearhead of harmonisation of the commercial laws of the Member States is the attempt of the Commission at creating a "common market for companies" in the Community. That is not surprising since the Community is founded on the economic principle that every Member State must have a free market sector and the company is the prototype of free market economy. A national mixed economy in which a private enterprise sector exists side by side with a public sector, is acceptable in the EEC, but a State which runs its economy solely as a state-planned economy, cannot be a member of the EEC because its economic order would not fit into the framework of the economic system of the EEC.

The effort to harmonise the company laws of the Member States has reached an advanced stage of planning and is already partially carried out. The attempt to establish a "common market of companies" proceeds on three levels. First, a number of directives on company harmonisation will be issued, of which the first two are already in operation; the legal basis of these directives is article 54(3)(g) of the EEC Treaty which admits the adoption, by the EEC, of measures enabling companies and firms[9] to establish themselves throughout the Community;[10] these directives have to be given legal effect by the Member States in their territories. Secondly, it is intended to create a new form of company, the so-called European Company which shall have the same status as the various national companies in the respective territories of the Member States; the draft statute of the European Company, which in its final form is at present being considered by the Council of Ministers, derives its authority from article 235 of the EEC Treaty which provides that if action by the Community should prove necessary to attain one of the objectives of the Community and the Treaty has not provided machinery for it, the Council of Ministers, acting unanimously, may take the necessary measures; the draft statute of the European Company is at present envisaged to take the form of a regulation to be made by virtue of article 235; the same article is the legal source for the contemplated

9. Within the meaning of art. 58, second paragraph, of the EEC Treaty.

10. The power to issue directives is contained in art. 54(2).

introduction of a legal form of joint venture on the European level, viz. the European Co-operation Grouping, which is framed on the model of the French *Groupement d'intérêt économique*. Thirdly, article 220 of the EEC Treaty provides that the Member States shall conclude three conventions relating to company law of which the first, that on the Mutual Recognition of Companies and Bodies Corporate, was signed in Brussels on February 29, 1968, but has not been ratified by the Member States yet; the other two will deal with the transfer of the registered seat of a company from one Member State to another, and with mergers across the frontiers, but drafts of them have not been submitted by the Commission to the Council yet.

This is not the place to review the already adopted and further contemplated measures of harmonisation of company law in the EEC in detail,[11] but a few observations shall be added on the harmonisation directives and the statute of the European Company.

The First Council Directive on Company Law Harmonisation of March 9, 1968,[12] to which, as already observed, effect was given by the European Communities Act 1972, s. 9, introduced important changes in English company law. The most important of them was the restriction of the ultra vires doctrine. That was a change which was long overdue but it is to be regretted that the opportunity was not taken to restrict that doctrine still further, as suggested by the Jenkins Report in 1962.[13] Section 9(1) of the 1972 Act now lays down that the company can no longer plead that a contract into which it has entered is ultra vires, provided that the party with whom the company contracted acted in good faith and the transaction in question was decided on by the directors of the company; the doctrine of constructive notice can no longer be invoked by the company if it wants to plead that the transaction was ultra vires. The Second Council Directive, of December 13, 1976,[14] deals with the maintenance of capital in the public company and does not apply to private companies; it requires a public company to have a minimum subscribed capital of 25,000 European units of account (approx. £16,500) and shares issued for a cash consideration must be paid up at not less than 25 per cent; further the name of the company shall indicate whether it is a public or private company; the United Kingdom shall give effect to the Second Council Directive within two years, subject to an extension of time for some of its provisions; the measure introducing it is already under active consideration by the

11. For a detailed review see my annotation of articles 54, 220 and 235 in Vol. II B of the *Encyclopedia of European Community Law*.
12. No. 68/151 EEC; J.O. 1968 L. 65/8; see C.M. Schmitthoff, European Company Law Texts, 51.
13. Cmnd. 1749.
14. No. 77/91 EEC; O.J. 1977, No. L. 26/1.

British Department of Trade.[15] All the other Directives on Company Harmonisation are still in draft form, some more advanced than the others. The Third Draft Directive, of June 16, 1970 and amended on January 4, 1973, concerns mergers of public companies within a Member State. The Fourth Draft Directive, of November 10, 1971 and amended on February 21, 1974, deals with the accounts of public and private companies. The Fifth Draft Directive, of October 9, 1972, contains rules on the structure of public companies and proposes the introduction of the two-tier board system,[16] and of employee representation on the supervisory board; the suggestions of this Draft Directive were much critized in the United Kingdom and other Member States and for that reason the Commission published, in 1975, a discussion paper on the proposals made therein. The Sixth Draft Directive, which is not published yet will deal with groups of companies. The Seventh Draft Directive, published on May 4, 1976, concerns group accounts. There exist further an unnumbered Draft Directive of September 26, 1972 on prospectuses issued by companies seeking Stock Exchange listing, and a further Draft Directive on the admission of securities to official Stock Exchange listing, dated January 12, 1976. On July 25, 1975 the Commission submitted to the Council an amended Draft Directive on the safeguarding of the rights of employees on occasion of a merger.[17]

The draft Statute of the European Company (*societas Europea, SE*), in its amended form of May 13, 1975,[18] has as its object the creation of a new type of company which shall have the status of a national company in the territory of each Member State. The company will come into existence by registration in the European commercial register which will be kept by the Court of Justice of the European Communities in Luxembourg. The relationship of the European Company to the national companies incorporated by registration in the Member States will not be dissimilar to that of the Canada business corporation incorporated under the Canadian Act of March 24, 1975 and the companies incorporated under the various Provincial enactments.

The project of harmonising the company laws of the Member States and of evolving a distinct European form of company is thus well advanced.

The harmonisation of other branches of commercial law

A considerable advance has also been made with the

15. "Implementation of the Second EEC Directive on Company Law: an explanatory and consultative note." July 1977.

16. The two-tier board system consists of a supervisory board and a managing board, usually — but not necessarily — appointed by the supervisory board.

17. Position: August 1, 1977.

18. Bull., Suppl. 4/75.

harmonisation of *patent law*. Here two conventions have been signed, the European Patent Convention (EPC), signed in Munich in October 1973 and the Community Patent Convention (CPC), signed in Luxembourg in December 1975.[19] The former convention will become operative between the nine Member States of the EEC and Greece, Lichtenstein, Norway, Sweden, Switzerland, Austria and Monaco; the latter has been signed by the Member States of the EEC only. A European Patent Office is being built in Munich and it is hoped that it can start receiving applications early in 1978. Under the EPC, as the result of a single application to and examination by the European Patent Office, a bundle of national patents in the countries for which application is made will be granted. Under the CPC, when it has become effective, a single European patent covering all nine Member States or some of them, according to the application, will be granted.

The Commission published on February 16, 1970 a Preliminary Draft Convention on *Bankruptcy*, Winding-up, Arrangements, Compositions and Similar Proceedings.[20] This Draft Convention was prepared by M. Noel and M. Jacques Lemontey.[21] The Convention provides that the court of the debtor's centre of administration shall have exclusive bankruptcy jurisdiction, and that, in principle, bankruptcy orders in the other Member States shall be barred. Furthermore, the Convention is intended to cover the liquidation of insolvent companies. It is also provided that in the liquidation of a company, any director, manager or person who has dealt with the company's profit for his own account or merely for his personal profit may likewise be declared bankrupt.

The Commission further submitted on July 23, 1976 to the Council of Ministers a Draft Directive on *Product Liability*. The Draft Directive is founded on the principle of absolute liability of the producer for defective products but the liability of the producer is limited in amount. This, if accepted, would alter the English law of negligence.

As regards *agency*, the Commission proposed on December 14, 1976 a Draft Directive relating to Self-employed Commercial Agents. The regulation of the rights and duties of the principal and agent is proposed; it is also provided that on cessation of the contract the commercial agent shall be entitled to a goodwill indemnity which shall be equal to not less than one tenth of the annual remuneration calculated on the basis of the average remuneration during the preceding five years but not exceeding

19. W.R. Cornish. "The European Patent Conventions" in [1976] J.B.L. 112.
20. CEE Doc. 3/327. XIV/70-F and CEE Doc. 16/775. XIV/70-F (Rev. 1.).
21. See John H. Farrar. "The EEC Draft Convention on Bankruptcy and Winding-up" in [1977] J.B.L. (October) 320.

twice the average annual remuneration so calculated. The entitlement of a goodwill indemnity calculated on this basis is controversial in the Member States.

The Commission published further in 1976 an amended Preliminary Draft Convention on *Private International Law* which deals with the law applicable to contractual and non-contractual obligations. As far as contracts are concerned, the Draft Convention provides first, in harmony with established doctrine, that a contract shall be governed by the law chosen by the parties; in the absence of an express or implied choice of law, the contract shall be governed by the law of the country with which it is most closely connected, and that, on principle, shall be the law of the country in which the party who is to carry out the obligation "characteristic of the contract" has his habitual residence at the time of conclusion of the contract. Torts shall be governed by the *lex delicti commissi.*

The EEC adopted on September 27, 1968 the so-called Brussels Convention o the Jurisdiction and Enforcement of *Judgments in Civil and Commercial Matters.* This Convention came into operation in the six original Member States on February 1, 1973 and its adoption in the United Kingdom is under consideration; it will, as far as the Member States of the EEC are concerned, supersede the bilateral conventions made under the Foreign Judgments (Reciprocal Enforcement) Act 1933. Some of the provisions of the Judgment Convention have already been interpreted by the European Court of Justice.[22] Of particular interest is article 17 of the Judgments Convention which provides that an agreement as to jurisdiction shall be in writing or confirmed in writing; the Court of Justice has construed this provision strictly and has held that where a jurisdiction clause was included in general conditions of sale printed on the back of the contract, the requirements of article 17 were satisfied only if the contract signed by both parties contained an express reference to those general conditions.[23]

The preceding observations indicate the great variety of topics selected by the EEC authorities as suitable for harmonisation. They also indicate that the harmonisation attempts of the Community, despite the restricted aims of that supra-national organisation, are in the end likely to affect many branches of English commercial law.

22. *Industrie Tessili Italiana Como v. Dunlop A.G.* [1977] 1 C.M.L.R. 26; *Etablissements A. de Bloos Sprl v. Etablissements Bouyer S.A.* [1977] 1 C.M.L.R. 60; *Lufttransportunternehmen GmbH & Co. K.G. v. Eurocontrol* [1977] 1 C.M.L.R. 88; *Colzani v. Ruwa Polstereimaschinen GmbH* [1977] 1 C.M.L.R. 345; *Galeries Segoura Sprl v. Firma Rahim Bonakdarian* [1977] 1 C.M.L.R. 361; *De Wolf v. Harry Cox B.V.* [1977] 2 C.M.L.R. 43.

23. *Colzani v. Ruwa Polstereimaschinen GmbH* [1977] 1 C.M.L.R. 345, 355.

THE IMPACT OF COMMUNITY LAW ON ENGLISH COMMON LAW

In order to understand the impact of Community law on the judge-made law of England, it is necessary to define the relationship between the European Court of Justice in Luxembourg to the English courts. The European Court is not the highest court of last appeal in the European Community. It has clearly defined jurisdictional functions; it has to "ensure that in the interpretation and application of [the EEC] Treaty the law is observed."[24] In fact, the European Court does not decide litigious matters between the parties at all; its principal function is to consider the provisions of the Treaty and thus to secure a uniform interpretation of the Treaty in all Member States. Having given its authoritative view on how the Treaty shall be interpreted, it leaves the decision of the litigation to the national courts of the Member States.

In order to carry out this division of Judicial functions between the European Court and the national courts, the Treaty provides the procedural remedy of a reference of questions of interpretation from the national courts to the European Court of Justice. Article 177, one of the key provisions of the Treaty, regulates the reference procedure. It provides that the Court of Justice shall have jurisdiction to give preliminary rulings concerning:—

"(a) the interpretation of the Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."

Where such a question is raised before a court or tribunal of a Member State and that court or tribunal considers the decision on the question to be necessary to enable it to give judgment, it may request the European Court to give a ruling thereon, but where the question arises in a national court or tribunal against whose decisions there is no judicial remedy under national law, the court or tribunal shall refer the matter to the European Court. The reference procedure can thus only be initiated by a national court or tribunal; the European Court has no jurisdiction to attract national proceedings on its own initiative. As far as the higher courts in England and Wales are concerned, the reference procedure is regulated by the Rules of the Supreme Court, Order 114.

A reference to the European Court may arise in almost any

24. Article 164 of the EEC Treaty.

type of procedure in the English courts and the cases in which it has been argued in court that a reference should be ordered are frequent. A few illustrations may indicate the type of cases in which this issue arose. *In Van Duyn v. Home Office*,[25] the question arose whether the Treaty prevented the Home Office from refusing entry into the United Kingdom to an EEC national who, in the view of the Home Office, was an undesirable alien. In *Esso Petroleum Co. Ltd. v. Kingswood Motor (Addlestone) Ltd.*,[26] the question arose in a restraint of trade action and the court had to consider whether the restraint contravened the competition law of the EEC. In *H.P. Bulmer Ltd. and Showerings Ltd. v. Bollinger S.A.*,[27] the problem arose in connection with passing off and the question arose whether the descriptions "champagne cider" and "champagne perry" contravened certain regulations of the EEC protecting the *appellation d'origine controlée* of wine. In *E.M.I. Records Ltd. v. CBS United Kingdom Ltd.*,[28] the question of a reference to the European Court was argued in connection with trade mark law, the problem being whether the owner of a trade mark in a Member State could prevent the import from outside the Community of goods bearing the same trade mark where the two trade marks had been in the same ownership 43 years ago but since that time were in different ownership and the non-EEC owner had a trading presence within the EEC.

It is surprising with what facility English judges have adapted themselves to the new challenge raised by the incorporation of Community law into English law. There is no doubt that the wording, legal technique and methology of the EEC Treaty and EEC legislation are different from the legal thinking of the common lawyer. That, however, did not deter the English judges. They apply the EEC provisions with complete and astonishing mastery and fuse them with common law concepts into a coherent legal system. Judgments such as that of Lord Denning, M.R. in the *Bulmer* case, where he tried to establish some general principles on the reference from the English courts to the European Court of Justice, or of Graham J. in the *E.M.I. Records* case where he — successfully — suggested to the European Court that it should not pursue its doctrine of exhaustion of patent and trade mark rights to its logical but impractical conclusion, belong to the great judgments of English legal history. The impact of Community law on English judge-made laws has thus raised in practice no insurmountable difficulty.

25. [1975] Ch. 358; for the decision of the European Court see [1975] 2 W.L.R. 760 and [1975] 1 C.M.L.R. 1.
26. [1974] Q.B. 142.
27. [1974] Ch. 401.
28. [1975] 1 C.M.L.R. 285; for the decision of the European Court see [1976] 2 C.M.L.R. 235.

CONCLUSIONS

The present and prospective impact of Community law on English law is immense. It fully bears out the observations of Lord Denning, quoted earlier,[29] that Community law, in the areas in which it applies, "is like an incoming tide. It flows into the estuaries and up the rivers."

The impact of Community law on English law, in its long-term prospect, can be compared with the influence of Equity on the old common law in the fifteenth century. Equity, like Community law now, added a new dimension to the common law.

Is the impact of Community law to the advantage of English law? That question has to be answered unhesitatingly in the affirmative. Law reform has always been a sluggish process in the United Kingdom and Community law is introducing into English law many new ideas which are of progressive and salutary character, and which the United Kingdom, as a member of a new supra-national organisation, cannot ignore but has to accept. Fortunately English law is of such flexibility and inherent strength that it can absorb Community law without fundamental difficulty.

Community law thus operates as a leaven which makes an important contribution to the revitalisation and modernisation of the common law.

It should not, however, be thought that what we are witnessing at the present time is a reception of the civil law, through the medium of Community law, by the common law. That impression would be totally false. It should not be overlooked that Community law is essentially compromise law which tries to amalgamate civil law and common law ideas in a progressive spirit or to create something entirely new. In fact, the influence of the common law on the formation of Community law should not be underestimated. It can be discerned in the cautious approach of EEC legislation and its concentration on detail as well as in the pragmatic attitude of the European judges in Luxembourg. Moreover, the Commission in Brussels which prepares the EEC legislation pursues an open door policy. Since the European Parliament in Strassbourg, even when directly elected by the people of the Member States, has only consultative status, it is important that the preparatory process of EEC legislation be lengthy and the pressure groups of interested parties have an opportunity of making heard their views during the preparation of the EEC directives and regulations by the Commission.

29. See p. 2. *ante*.

At present the legislative programme of the EEC presents a relatively patchy picture, apart from the area of company law where a coherent pattern of the future law begins to emerge. But the final result of the various attempts at harmonising topics of commercial law in the EEC is already discernible; one day a wide area of commercial law will be covered by harmonised EEC law. But that law will not constitute a single code, comparable to the continental commercial codes or the American Uniform Commercial Code. It will be contained in a multitude of legislative measures. Such far-reaching harmonisation is necessary in order to establish an integrated single market in the European Community. The time scale is, in this connection, irrelevant. The important point to note is that the harmonisation programme of the commercial law of the Community is a political instrument used to achieve economic — and perhaps later — political union, in the same manner as the creation of a common commercial law in the Germany of the nineteenth century was an effective means for obtaining political unity at the end of that century.

The invigoration of the common law by Community law concepts is likely to have effect beyond the common law countries which are members of the Community, viz. the United Kingdom and the Irish Republic. That process will affect indirectly the other common law jurisdictions. They will note the changes in English law and will have to consider whether the introduction of these changes may be of value to their own law. This radiation effect may, in the end, be as important as, in the long term, the impact of Community law on English law is likely to be.