The Charity Law & Practice Review

ARTICLE 7 OF THE TREATY OF ROME: FISCAL DISCRIMINATION BETWEEN NGOs[1]

Harry Kidd[2]

1. A working group met a year ago in Amsterdam, under my chairmanship, to explore ways in which qualifying NGOs and donors to them might be assisted by fiscal benefits across national boundaries. By "qualifying NGOs" is meant non-profit-seeking, non-governmental organisations for the public benefit, which qualify for such fiscal reliefs as their jurisdictions of residence allow. What we had in mind was that qualifying French NGOs, say, should have in Germany the same tax-reliefs as qualifying German NGOs; and German donors to French NGOs should have the same tax-reliefs as if they were giving to German NGOs (and vice versa all the way). Thus, one might say, we should have a single market for qualifying NGOs.

2. In their report[3] the working group drew attention to Article 7 of the Treaty of Rome, which says:

> "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

3. In the jurisprudence of the European Court of Justice it has been established that discrimination on grounds of residence is contrary to Article 7, since most of us are nationals of the states where we reside.

---

1 Edited extract from an intervention by Harry Kidd at the New Europe Conference, Paris, July 1992.

2 Harry Kidd, Emeritus Fellow and Bursar of St John's College, Oxford; Consultant to the Charity Commissioners on European matters.

3 Report of a working group, arranged by the Europhil Trust with the assistance of the International Bureau of Fiscal Documentation, which met at Amsterdam on Friday 13th September 1992, obtainable from Harry Kidd, 7 Market Street, Woodstock, Oxfordshire OX20 1SU.

Fiscal Discrimination Between NGOs a Breach of Article 7?

4. It is common for a Member State of the Community to treat one of its own qualifying NGOs (or a donor to it) more favourably for tax purposes than a wholly similar NGO resident in another member state (or a donor to it). The report raised the question whether, in discriminating in this way against the NGOs of other Member States, a Member State is in breach of Article 7.

5. On behalf of the working group, I have put this question to the Commission but am told that no official reply can be obtained. I have had some helpful conversations about this with an old friend in the service of the Commission, but the responsibility for what I am about to say is mine alone.

No Response from Commission

6. Why no reply? We can all form our own hypotheses. Can it be that the Commission does not believe Article 7 applicable, but does not wish to say so, lest at some time it should wish to argue the contrary, and does not now wish to risk prejudicing its position? Or perhaps the Commission believes Article 7 applicable, but does not wish to take action. There may be a problem of scale and priorities. Differences in the tax treatment of companies - especially big companies - are not just important as a matter of principle; they may have powerful effects on investment decisions and in consequence may seriously distort competition. In comparison, discrimination between NGOs, however deplorable in principle, must in practice have effects which are relatively minuscule. The Commission has severely limited resources, and must apply them where they can be most cost-effective. If NGOs could prove (and not merely assert) their quantitative importance at the European level, and could demonstrate that present fiscal disparities cause real and quantitatively serious problems, would a different answer - indeed, an answer - be forthcoming from the Commission? Who knows?

7. Or can it be that the Commission does not want to say a word until after 15th September? On that day, it is understood, an Advocate General is to deliver his Opinion to the Luxembourg Court on the case of a German dentist. The dentist practises his profession in Germany but lives in the Netherlands. He complains that he is required to pay more German tax than he would if he lived in Germany. This looks like pure fiscal discrimination on grounds of residence. Is it caught by Article 7? The Opinion of the Advocate General and, later, the judgment of the Court may shed some light on our problem.

8. Be that as it may, it has been said to me by officials of the Commission, as relevant to our question, that the Commission takes the view that direct taxation is not within the scope of the Treaty, and that therefore such fiscal discrimination as I have described is not caught by Article 7. I find this a little surprising.

Direct Taxation and the Treaty: Some Precedents

9. Let us take an example drawn from another area. Article 92, on *Aid granted by States*, says that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings shall, in so far as it affects trade between Member States, be incompatible with the common market. If the aid in question took the form of a fiscal provision, can we believe that the Commission would take the view that it was not

caught by Article 92 because direct taxation is not within the scope of the Treaty? If distortion of competition by fiscal means is caught by the Treaty, why is discrimination by similar means not caught?

10. We all know that the Commission has in the past been ready to act in matters of direct taxation, as a few instances will show.

11. Specific fiscal measures were included in proposals that the Commission put forward in 1977 and 1984 for action in the cultural sector. Again, on 21st December 1979 it put forward a Proposal[4] for a Council Directive concerning the harmonization of income taxation provisions with respect to freedom of moment for workers within the Community. The proposal recited (inter alia):

> "Whereas the present systems of income taxation have different rules for residents and non-residents; whereas these differences may penalize workers who exercise their employment in Member States where they are not resident for tax purposes; whereas these differences are most acute in the case of frontier workers ... "

12. The Commission on that occasion displayed no doubts whether income tax fell within the scope of application of the Treaty.

13. We may note, by the way, that the Treaty base for that Proposal was Article 100. Article 7 might have been recited, but was not. We may also note that the proposed Directive included (Article 9) the following provision:

> "Where a Member State grants an advantage for the purposes of income tax ... , for payments made by a natural person to an insurance company, bank, pension fund, building society *or any other recipient* [my emphasis], such a tax advantage shall not be refused solely because that recipient is situated, established or resident in another Member State."

---

4 OJ C21/6. 26.1.80.

14. Had that provision, so deceptive in its simplicity, been enacted it would have carried us some way forward, would it not? But the proposal, alas, has made no progress.

15. More recently still, no doubts about whether direct taxation was within the scope of the Treaty have held the Commission back from promoting directives on the taxation of parent companies and subsidiaries, or from appointing the Ruding Committee of Independent Experts on Company taxation, and calling on it to determine whether existing differences in the taxation of business (including non-corporate income taxes) lead to major distortions affecting the functioning of the internal market. The Conclusions and Recommendations have been published.[5] They are far-reaching, leading ultimately to a minimum level throughout the Community for corporation tax, and common rules for the tax base. The detailed recommendations include these:

* that Member States with various forms of tax relief for dividends received by domestic shareholders from domestic companies should be obliged, on a reciprocal basis, to provide equivalent relief for dividends received by domestic shareholders directly from companies in other Member States.

* that the Commission urgently study solutions so as to ensure that contributions paid to pension schemes are tax deductible, regardless of where the pension fund is situated or whether any subsequent benefits paid out would be taxable in the same Member State.

16. Change a few words as to their scope, but leave the structure of these recommendations, and NGOs could be a large step forward.

17. Reflecting on all this in broad terms, it seems to me that the internal market is the same space without frontiers for every type of entity which inhabits it, and if it is legitimate to strike down differences in direct taxation for one type of entity, why not for others?

Discrimination in Area Covered by Treaty

18. Those who have said to me (and the words have been said more than once) that direct taxation is outside the scope of the Treaty may have been expressing themselves inexactly, trying to say something different. The question is perhaps not whether direct taxation is within the scope of the Treaty but whether the discrimination complained of occurs in an area which is within the scope of the Treaty.

---

[5] Conclusions and recommendations of the Committee of Independent Experts on Company Taxation, Commission of the EC, Luxembourg, 1992, ISBN 92-826-3990-8.

19. In a valuable study recently published[6], Frederick Crone and Dominique de Crombrugghe have drawn attention to a series of decisions in which the Court of Justice has held that a Member State may not charge nationals of other Member States fees which it does not charge to its own nationals for admission to courses of higher education. The organisation of education is outside the scope of the Treaty but Article 128 empowers the Council to lay down general principles for implementing a common vocational training policy. The Court held that university and higher education courses are vocational training courses, and then, by applying Article 7 with Article 128, that the charging of differential fees was discrimination contrary to the Treaty.

20. The authors of the study to which we have just referred go on to point out that Title XVII of the Treaty of Maastricht establishes a Community policy in the sphere of development cooperation, and argue persuasively that this could have the result that any discrimination between national NGOs in that sphere and those of other Member States would be prohibited: and "any discrimination" must surely include fiscal discrimination, must it not? Similar arguments would be possible, would they not, in other areas where NGOs operate within a Community policy?

21. Are there not real possibilities of progress here? If Article 7 cannot be brought to bear on fiscal discrimination between NGOs generally, but can be brought to bear on discrimination between development NGOs, the strategy for the sector as a whole is clear. Let the case of development NGOs be taken up first. It should be received by the Commission with ready sympathy. After all, the development NGOs are old friends of the Commission, with which they were collaborating before some of us were aware that Europe existed. If the case of the development NGOs succeeds, an irreparable breach will have been made in the fortifications of discrimination, for it is hard to believe that Member States will wish to discriminate between development NGOs and other NGOs.

---

6 *NGOs in 1993 and Beyond* study conducted for the Liaison Committee of Development NGOs to the European Communities, by Frederik Crone and Dominique de Crombrugghe, in collaboration with Bruno Carton, Published by the Liaison Committee at Avenue de Cartenbergh 62, B-1040 Brussels, 1992, no ISBN quoted.