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EDITORIAL COMMENTS

Implementation of internal market legislation

Will the Community be able to keep up the pace at which it has so far been adopting the directives and other measures of legislation required by the 1985 White Paper on the completion of the single market? Will efforts have to be stepped up to ensure that directives are incorporated in the internal legal order of Member States in a manner which is both timely and correct? Are the Member States sufficiently aware of the need to change national administrative practice and procedures, and are they prepared to create new administrative mechanisms if such steps are needed to guarantee that the Community measures will be effectively applied?

It is with this type of question that the Commission's recent report of 22 November 1990 under Article 8b of the EEC Treaty, and its Communication to the Council of 5 October 1990 on the implementation of the legal acts required to build the single market are primarily concerned. And rightly so. At present attention may seem to be focussed primarily on the start of the Intergovernmental Conferences, which will be addressing problems in relation to the transition of the Community from the stage of a common market to that of an economic and monetary union and which must also tackle basic issues concerning democracy and the effectiveness of the Community decision making process. Nevertheless, the fact remains that the achievement of a single market without frontiers is in itself of tremendous importance. Though it is obviously necessary to look beyond 1992, the prospects of promising developments towards EMU and EPU and the attractiveness of reflecting upon "grand design" initiatives do not diminish the need for making concentrated efforts to remove the remaining barriers to the free flow of goods, persons, services and capital and to set up machinery to safeguard the proper functioning of the unified market.

On the whole the Commission reports satisfactory progress with re-

spect to the programme of legislation. More than two thirds of the proposed 280 odd directives, decisions and regulations have been adopted by the Council. Proposals for the remaining one third of the White Paper programme are now before the Council. The most difficult dossiers are in the area of the elimination of physical controls (free movement of persons, phytosanitary checks) and fiscal barriers. Moreover, the new approach to the harmonization of technical specifications which traded goods must satisfy, though it is relatively successful, is not a panacea. The normalization bodies CEN, CENELEC and ETSI are turning out some 150 decisions on common standards a year. This is ten times as much as in former years, but 850 common standards need to be elaborated before the end of 1991, that is 3 standards per working day! Nevertheless, the Commission is confident that it is still possible to complete the programme in time. For this reason it has refrained from submitting to the Council proposals, under Article 8b, second paragraph, for making adjustments to the White Paper or for determining "the guidelines and the conditions necessary to ensure balanced progress in all the sectors concerned."

As far as the timely and effective implementation of legal instruments is concerned, the picture is not bright. The Commission has decided to take various steps to increase transparency of national transposition measures and, in general, to foster awareness of the need for all Member States to remedy shortcomings in their approaches to the correct implementation of Community law. The problems experienced in the various Member States do not appear to be of a political nature. Delays are due above all to defects in the administrative organization of the Member States concerned and not to a lack of will on their part. There is no relationship between a poor record of implementation of a Member State and the position taken by that State within the Council. But whatever the reasons for non-implementation or delayed implementation of directives in the Member States, all those whose concern it is to see the Community flourish must be worried by some of the statistics produced by the Commission in this field. Since September 1989 the rate of transposition has increased slightly. In September 1990 it had gone up to 60 percent. This means that 40 percent of national measures that ought to have been adopted for giving effect to Community direc-

tives, weren't. Of the 107 measures in force and for which the date of implementation had expired, the total number of measures transposed in all the Member States was 18. This was slightly better than a year before. Likewise, the number of Court judgments not yet complied with and in respect of which procedures are underway pursuant to Article 171 of the Treaty has come down from 44 to 36. In this connection the Commission uses descriptive terms such as "definite improvement", "positive development of the situation" but this use of constructively ambiguous language cannot conceal the fact that the situation is very worrying indeed.

This is not the place for analysing possible methods for securing improved compliance with their Community obligations by the Member States. One thing is clear, however. If Member States prefer to retain the system of "two-stage legislation" by way of directives, and if decentralized application of the Community rules is not replaced by a system of dual administration (e.g., Community inspectorates, Community agencies, Community fraud squads, etc.), and if the Member States are not really prepared to give the Commission the personnel, the financial means and other facilities for monitoring and supervising the implementation and administrative application of Community law, enforcement of these rules has to be secured by other means. As guardians of respect for the law, it will fall to the judicial organs in the Member States and to the Court of Justice to continue to play a vital role in seeing to it that Community law is observed throughout the Community.

A few years ago it was generally thought that improved decision-making processes would result in more effective rule-making by the Community's political departments. This in turn would reduce the need for judicial activism since gaps in the legislation would be filled by the Council rather than the Court. Member States did not seem keen on allowing the Court of Justice to continue its habit of handing down "des grand arrêts" susceptible of depriving the Member States of the means to frustrate the aims of the Community. Obviously, the Declaration on Article 8a of the Treaty that was appended to the Single Act ("Setting the date of 31 December 1992 does not create an automatic legal effect") stems from the same concern. Incidentally, one doubts whether this statement will stop the Court from finding that a possible failure

on the part of the Council to adopt certain provisions by 31 December 1992 cannot stand in the way of the full effectiveness of the provisions which it is the Council's duty to implement by that date (e.g., Article 100b, para. 1(2)).

Looking at developments in the Court's case law and at certain initiatives to strengthen the right of recourse to the judiciary in relation to questions of Community law, one cannot escape the impression that the Community as a law-dominated organization will continue to depend heavily on the action of judges for its progress and its integrity. In this connection it is important that directives are adopted for the purpose of introducing more effective or rapid remedies against infringements of Community law. New arrangements of this nature have been adopted in order to guarantee better possibilities of review in the field of public procurement.[1] It might be equally useful if Member States could be ordered to create more adequate judicial remedies to prevent or correct breaches of Community provisions in other areas such as that of state aids.

Recently there have been a considerable number of judgments in which the Court has sought to improve the legal protection of claimants and the effectiveness of Community law. Examples are the *Factortame* case[2] and the *Zwartveld* Decision.[3] A decision such as the judgment in the *Boussac* case[4] shows the same concern for making the Community system of supervision of state aids more effective. In this last case the Court held that the Commission has the power to take interim protective measures where the practices of Member States in the matter of aid have the effect of threatening the system established by Articles 92 and 93 of the Treaty.

It goes without saying that the case law on the effect of directives is equally important for ensuring maximum legal protection and effectiveness of Community law in the Member States. Even if directives cannot

1. Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. O.J. 1989 L 395/33.
2. Case C-213/89, Judgment of 19 June 1990. See annotation by Toth in this Review at 573.
3. Case C-2/88, Decision of 13 July 1990.
4. Case 301/87, Judgment of 14 Febr. 1990. See article by Slot in this issue at 741.

be invoked in the context of horizontal relationships (see *Marshall*),[5] any specific state involvement with bodies against which directives are invoked will permit such bodies to be characterized as organs of the state. Under these circumstances the directives may be capable of having vertical direct effect (*Foster* v. *British Gas*).[6] Moreover, as was recently confirmed in the *Marleasing* case,[7] national authorities and especially national courts are not at liberty to ignore provisions of directives that lack direct effect. In applying national law, such organs or courts are required to interpret this law in so far as possible in the light of the wording and the purpose of the directive so as to achieve the result provided for in the directive and to ensure the performance of the Member State's obligations under Article 189, para. 3.

The message is clear. Correct implementation and application of Community rules by the organs and administrative bodies of the Member States will have to be enforced through judicial action rather than by forms of surveillance or administrative monitoring exercised by the Commission. Obviously the latter type of control must be further developed. However, for the time being the vigilant individual who is able to protect his own rights under Community law through improved access to the courts is able to make an invaluable contribution to the enforcement of this law. Seen in this light it is appropriated that a substantial number of articles published in the 1990 Volume of this Review, and in particular the contributions included in this Winter issue, deal with institutional questions and concerns, *inter alia*, the extent to which the Court of Justice possesses (inherent) jurisdiction, the powers of the Commission vis-à-vis the Member States and the legal effects of Community acts.

5. Case 152/84, [1986] ECR 723. See article by Prechal in this Review at 451.
6. Case 188/89, Judgment of 12 July 1990. See annotation by Szyszczak in this issue at 859.
7. Case 106/89, Judgment of 13 Nov. 1990.