Common Market Law Review **28**: 711–716, 1991.

EDITORIAL COMMENTS

How to strengthen the effectiveness of Community law

Among many other things, the agenda of the Intergovernmental Conference on Political Union now in progress includes proposals and suggestions which are aimed at increasing the effectiveness of the Community legal order. This involves consideration of the question of sanctions to be imposed on Member States which default on their Treaty obligations. In particular, it is thought desirable to include in a new Treaty practical remedies for obtaining speedy execution by the Member States of judgments rendered by the Court under Articles 169 and 170 of the Treaty. Demonstrably, cases in which Member States fail to comply in a correct fashion with such judgments are no isolated incidents. In 1990 the number of judgments of the Court with which Member States failed to comply was 83 (82 in 1989). Most cases involved failure to transpose Community Directives. More than one third of them (33) concerned Italy.

Various suggestions have been made to help solve this problem. They range from strengthening the way in which Article 5 expresses Member States' commitment to ensure faithful implementation of Community obligations to creating new forms of legal redress based for example on the principle that a Member State incurs liability towards the victim of infringements. This would mean that where the Court finds that a state has acted in breach of the Treaty, the Court would have power to declare that that Member State is obliged to compensate the injured persons. This latter possibility is not mentioned in the Luxembourg-Dutch reference document which is the basis for the negotiations on

Treaty revisions to be agreed on in Maastricht in December 1991.

Instead, this Draft Treaty on Union[1] includes a proposal to add a new paragraph to Article 171. The new provision would give the Commission power to issue a reasoned opinion specifying the points on which the State has not complied within a reasonable period of time with a Court judgment. If the State fails to put its house in order within the grace period set by the Commission, the case may be laid before the Court of Justice. In so doing, the Commission will be required "to specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances". The Court of Justice has the final word. If it finds that the State concerned has disregarded the obligations flowing for it from a previous judgment "it may impose a lump sum or penalty payment".

Obviously such suggestions and proposals do no exhaust the whole array of possibilities which one can envisage with a view to creating improved methods of enforcement. The Community has some leverage over Member States when it is in a position to withhold funds or favours from Member States that flout certain of its rules. For instance, when projects are eligible for EC funding (grants from the Regional or Social Funds, the Transport Infrastructure Fund, the Integral Mediterranean Programmes or loans from Euratom, ECSC or EIB resources) such provision of finance can be made conditional on compliance with the Community rules on EC-wide competitive tendering,[2] or with the rules on state aids and the general prohibitions of discrimination and restrictions with respect to the free movement of goods, persons, services and capital. The extent to which entitlement to Community assistance could be made conditional on the fulfilment by the Member States of their Community obligations in the various fields of Community activity, should be carefully specified in the secondary legislation. The introduction of elements of conditionality to be observed in the conduct of Community policies and in the use of Community financial instruments is not a matter for administrative discretion but should be dealt with by the Community legislator.

1. See *Agence Europe*, Doc. Nos. 1722/1723, 5 July 1991.
2. See the article by J.A. Winter on public procurement, in this issue, 741–782.

Even if no major improvements with respect to the enforceability of Treaty obligations will be agreed on by the Member States in the immediate future, it is good to remember that legal integration in the Community can be dissociated, to a non-negligeable extent, from the progress made towards European Union and the further development of Community legislation. As far as the effectiveness of Community law is concerned, the single most important instrument for enforcing compliance with Community law continues to be the availability of legal redress open to private individuals in the national courts. This allows legal integration to make progress even in periods in which the Community fails to adopt the requisite legislation. Of course the Court of Justice is the most important propelling force in this respect.

Some time ago the thought was widespread that the coming into force of the Single European Act would more or less coincide with the onset of a period of judicial restraint on the part of the Court of Justice.[3] It was thought unlikely that the Court could continue to hand down judgments of major institutional importance. Would the Court not be overstepping the limits of its authority if it were to take decisions which were liable to further strengthen the Community legal order, e.g. by specifying the effects which Community provisions must have within the national legal order and by identifying the type of judicial remedies and procedures which the national legal order must make available to private individuals in order to secure "the useful effect of the direct effect" of the Community provisions?

Furthermore, would there not be a risk that judicial activism could backfire, in the sense that the gains made in the field of legal integration and improved effectiveness could be neutralized by losses as regards the Community's capacity for action? Indeed, in the absence of Community legislation dealing with the way in which the legal systems of the Member States should be structured so as to guarantee the full protection of Community-generated rights, it seems difficult to avoid the conclusion that what could lie ahead is a more pronounced cleavage between "normative" supranationalism (mainly characterized by the autonomy

3. See e.g. T. Koopmans, "The Role of Law in the next stage of European integration", (1986) ICLQ, 925–931.

of the Community legal order exemplified by the doctrines of supremacy, direct effect and preemption) and "decisional" supranationalism (majority voting in the Council, decision-making powers for the Commission, legislative role for the European Parliament). If there is a constant increase in the effectiveness of the Community rules through improved systems of supervision and legal remedies, States will become more acutely aware of the fact that they have surrendered a certain amount of sovereignty. The realization that the Community is in a position to make its rules "stick" may cause them to have second thoughts about transferring even more powers to the Community and to be reluctant to increase the Community's capacity for action.[4]

Whether such fears are warranted or mostly imaginary, the Court of Justice does not appear to be particularly impressed by the arguments of those who advocate restraint or a minimalist attitude. Its role today is no less prominent than it was yesterday. Readers of this Review will not have failed to notice the potential impact of the Court's decisions in cases such as *Factortame*[5] and *Zuckerfabrik Süderditmarschen*.[6] These judgments throw new light on the question in what way legal protection in the Member States can be further improved, and how, in the absence of the enactment of Community legislation, Member States can be ordered to introduce judicial remedies and procedures where none have hitherto existed.

For a long time it was thought that the Court's judgment in the *Comet* Case[7] ruled out any obligation for the Member States to facilitate the enforcement of Community law by creating new remedies. The remedies and procedures governing the enforcement of directly effective Community provisions were said to be solely a matter for national law. This was subject to the dual requirement that the national procedural rules are not less favourable than those governing the same right of action on matters relating to national law alone ("principle of non-

4. See J.H.H. Weiler, "The Community System: The dual character of supranationalism", (1981) *Yearbook of European Law*, 267 et seq.

5. Case C-213/89, Judgment of 19 June 1990. See the case note by Toth in (1990) CML Rev. 573.

6. Cases C-143/88 and C-92/89, Judgment of 21 February 1991. A case note by Schermers is forthcoming in this Review.

7. Case 45/76, (1976) ECR 2052.

discrimination") and that such rules (e.g. time limits) would not make it impossible in practice to exercise rights which the national courts have a duty to protect ("principle of effectiveness"). In the *Rewe* Case of 1981, the Court expressed this idea even more clearly. It stated that Community law "was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law".[8] In the *Russo* case, which concerned a claim for damages against a Member State, the Court held that it was "for the State, as regards the injured party to take the consequences upon itself in the context of national law relating to the liability of the State".[9]

In light of the judgments mentioned above and considering the Court's insistence in cases such as *Simmenthal*[10] and *Heylens*[11] that persons deriving rights under Community law be given an effective remedy for protecting these rights, the better view would now appear to be that the relative autonomy of the national legal system in this respect only exists in so far as the national remedies and procedures satisfy minimum requirements as to effectivensss. If there are no remedies or if there are certain obstacles preventing a national judge from protecting Community rights (e.g. the possibility of obtaining interim relief against Government decisions), remedies must be created or the national rules constituting an obstacle to the full effectiveness of the Community rule must be set aside.

Evidently, the Court, in dealing with these "second generation" problems, has not come to the end of its tether. Recently, in its judgment in the *Emmott* Case,[12] it has refused to regard as a matter for the law of the Member States the determination of the time-limits within which proceedings must be brought for national courts by persons wishing to rely on a directive against a defaulting Member State. It held that such time-limits could not begin to run before the Directive in question had been properly transposed into the domestic legal system.

8. Case 158/80, (1981) ECR 1805 at 1838.
9. Case 60/75, (1976) ECR 45.
10. Case 106/77, (1978) ECR 629.
11. Case 222/86, (1987) ECR 4097.
12. Case 208/90, Judgment of 25 July 1991, nyr.

As these comments are written, the Court has not yet handed down its judgment in the Cases C-6/90 and 9/90, *Francovich* and *Bonifaci* v. *Italian Republic*. In his opinion of 28 May 1991, Advocate General Mischo has forcefully argued that national courts may be called upon to entertain actions for damages if the State does not properly implement Community directives, even in cases where the national law does not recognize the non-contractual liability of the state *vis-à-vis* private individuals, and even if the provisions which the State has failed to transpose into domestic law are not sufficiently precise and unconditional to admit of direct judicial application. If the Court is prepared to follow its Advocate General, such a jurisprudential development will undoubtedly have far-reaching effects for the effectiveness of Community law and for the amalgamation between the legal order of the Community and that of its Member States.