

ON THE EFFECTIVENESS OF THE EC ADMINISTRATION: THE CASE OF ENVIRONMENTAL PROTECTION

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1. Introduction

The implementation of EC administrative law is fundamentally a matter for the Member States.¹ The administrative role of the EC institutions (and the Commission in particular) is in principle limited to supervising the Member States' duties. Nevertheless, a large and steadily growing number of instances of implementational competence have been transferred to the EC institutions, implementation of law deriving both from the Treaties ("primary law") and from secondary legal acts. The wide range of administrative tasks of the EC institutions raises the question of whether and how one could reduce or restructure the workload in order to find an indispensable minimum which meets the demands of both effectiveness and subsidiarity.

An answer to this question must distinguish between the following types of administration through Community institutions:

- tertiary rule-making (section 2);
- direct implementation of EC primary or secondary law in individual cases (section 3);
- supervision of implementation by Member State agencies in individual cases (section 4).

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1. Arts. 3B and 4(1) 2nd sentence EC.

2. Tertiary rule-making

Under the category of "tertiary rule-making", one can situate law which is promulgated on the basis of secondary legal acts, which in their turn are based on competences in the Treaties. Such tertiary law is most often found in annexes and appendices to regulations and directives (thus forming an integral part of them²), but it can also take the form of free-standing regulations and directives.³ Compared to secondary law, tertiary law is characterized by simplified rule-making procedures. Most of the relevant secondary law acts assign the rule-making competence to the Commission,⁴ although it is also sometimes reserved for the Council.⁵ The admissibility of such assignment of competence derives from Article 145 3rd indent EC.

In environmental law, it is in the framework of tertiary rule-making that the technical standards disseminated in this sector are set. It can therefore be compared with standard-setting in regulations or administrative guidelines at the national level. However, Community law does not provide any special type of legal act for this area. Instead, regulations and directives are used, and it is not immediately apparent whether they are more statutory or executive in character. It would foster greater legal clarity if a special type were introduced for executive legal acts, for instance a Community Decree.⁶ This could also be coupled with a clearer arrangement of the institutions responsible and the rule-making procedures. The European Parliament (EP) and the Council could then be left out of this procedure, thereby being left free to concentrate on

2. See e.g. the particularly extensive annexes to the Chemicals Directive 67/548/EEC.

3. Thus the "subsidiary Directives" issued on the basis of the Water Directive 76/464/EEC concerning limits for waste water discharges from various industrial sectors, Nos. 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC.

4. This applies e.g. for the annexes mentioned *supra* note 2.

5. See e.g. Art. 18(1) of the Pesticide Directive 91/414/EEC, on the basis of which the Council through Directive 94/43/EC adopted principles for the assessment of pesticides as appendix VI of the Pesticide Directive.

6. For a more elaborate discussion of this suggestion see Winter, "Summary", in Winter (Ed.), *Sources and categories of European Union Law*, (Baden-Baden 1996), pp. 38 et seq.

working out the more essential orientations in the form of fundamental legal acts, which then might be termed Community Laws. For example, continuing to require that the Water Directive's "daughter" directives (which are meant to specify, for an enormous number of individual substances, emission limits that are even varied depending on the technical processes involved) be decided by the Council and, by way of consultation, the EP makes very little sense – and serves to drag out the covering of the outstanding substances interminably.

A further problem of tertiary rule-making is connected with "comitology". With respect to setting standards in environmental law (but also in other policy areas, particularly agricultural law⁷), the Commission, to the extent that it has been assigned executive competences, is obliged to work together with committees formed by representatives of the Member States. Some of these committees have only a consulting function. In the environmental field, however, most of them are so-called regulatory committees, veritable mini-Councils which can effectively frustrate the intent of the Commission by refusing to give its proposal the necessary qualified-majority approval. In such cases the Council can take up the matter and – with a qualified majority – reach a different decision. However, if the Council fails to do so before certain time periods have passed, the matter falls back into the hands of the Commission ("filet"). In rare exceptions, the relevant legal act allows the Council to prevent – with a simple majority – this falling back ("contre-filet").⁸

Although the Commission understandably regards this procedure as a considerable restriction on its role as the EC's primary executive body, the participation of Member State representatives in the tertiary

7. A quantified look at the distribution of the various committee types across the different policy areas is offered in the contribution by Falke and Winter, "'Comitology' in executive rule-making", in Winter (Ed.) *op. cit.*

8. On the various committee procedures, see the Decision of the Council 87/373/EEC, O.J. 1987, L 197/33. The power of the Council to bind the Commission through such "modalities" is derived from Art. 145 3rd indent EC. In my opinion, however, procedure type IIIb ("contre filet"), which makes it possible for a Commission proposal to fail with a simple negative majority of the Council, is incompatible with this provision.

rule-making process does offer a chance to iron out national divergences in risk assessment, and interests which could not be reconciled earlier at the level of the fundamental legal acts. Moreover, experience acquired at the level of implementation in individual cases and on the national level can provide input into the EC standardization process; this has proven remarkably useful at the national level, for example, in the participation of the German *Bundesrat* in the regulation-setting procedure.⁹ Furthermore, the participation of the national administrations usefully increases both their knowledge of, and their willingness to follow, the European rules.

There is still not enough empirical evidence to say with any certainty whether this potential is really fully exploited in practice. From conversations with practitioners, this author has the impression that the technical issues are often overshadowed by official national instructions when the regulatory committees as such influence the substance of a decision; most often it is ministerial officials who sit on these committees, and they see themselves more as representatives of their own countries than as strictly technical experts. In contrast, technical problem-solving appears to gain ground when solutions are first prepared by working groups composed of people from the national specialized administrations (e.g. in Germany the Federal Environmental Protection Agency [*Umweltbundesamt*]). The official committees can then restrict themselves to accepting the compromise reached or, in case of conflict, confirming the lack of agreement, which indicates that the matter cannot be resolved purely technically, but will require a political solution. This way, the regulatory committees would have a sort of double function, either to find technical compromises or to identify "political" problems, which are then sent on to the Council (or, alternatively, to the Commission).¹⁰

9. Cf. Art. 80 Para. 2 *Grundgesetz*.

10. On a type of European semi-professionalism in standard-setting which is beginning to develop at this level, see Roethe, "Management von Gefahrstoffrisiken in EG-Regelungsausschüssen", in Winter (Ed.), *Risikoanalyse und Risikoabwehr im Gefahrstoffrecht* (Düsseldorf 1995), pp. 115 et seq. See also the empirical estimates in Falke and Winter op. cit.

Given the technical orientation of the working groups active in the background of the committees, it is logical for them not to meet as closed bodies, but rather to remain open for technical contributions from the social groups affected. With respect to the control of hazardous substances, for example, the practice has developed of representatives from the European Federation of the Chemical Industry participating in meetings. Union representatives and (sometimes) environmental associations are invited, as well (although, due to a lack of personpower, the latter rarely participate). One can see this as offering a potential for more comprehensive problem-resolution, although it carries with it the danger of a lopsided impact of interests until methods are found to improve the opportunities for opposing views to be expressed.

However, even if "comitology" was reformed in this way it would not be the most appropriate procedure for *all* types of standard-setting. Apart from the Council's mistrust of an over-powerful EC executive, the committee procedure dominates so heavily at the EC level as a result of the hurdles which the ECJ erected in its *Meroni* decision for the establishment of EC regulatory agencies. Nevertheless, in the future such agencies will be unavoidable. Such an authority – for instance, the environmental agency equipped with corresponding competences – could take over responsibility for the multitude of more routine rule-making (and individual case decisions), e.g. the classification of new hazardous substances under the Chemicals Directive 67/548. This should still be reconcilable with the *Meroni* criteria, in particular that an independent EC authority may not be granted any room for applying its own discretion, since the activity would consist in the application of material standards and widely-accepted knowledge. Furthermore, it is not impossible that the ECJ might somewhat loosen its *Meroni* criteria – which were established as far back as 1958 – if given a suitable occasion to address the issue.

The third variant to consider – along with the committee procedure and the establishment of EC authorities – would be to draw on the European standardization organizations. Originally, and even today, still acting primarily with respect to economic regulation, with the "New

Approach”¹¹ they have nevertheless begun assuming tasks of consumer protection, e.g. public-interest assignments. The fact that EC environmental law has until now failed to discover them is presumably due to the subject’s comparatively high conflict potential, which in the conventional understanding would suggest political-administrative rather than corporatist structures. In keeping with more recent trends at the national level, however, it should be considered whether self-organized standardization organizations with pluralistic structures couldn’t also contribute at the European level to public interest-oriented standardization. At the EC level, of course, such a pluralistic approach is made a good deal more difficult by the fact that the standardization boards, if they hope to remain functional, can scarcely take on more than a single representative from the national standardization organizations. This individual will generally come from the major industry which sets the tone at the national level, while smaller companies, consumers and environmental associations would go unrepresented.¹² Other organizational possibilities, which attempt to achieve a specifically European pluralization through participation of the European organizations, are conceivable, but remain to be developed.¹³ However they are ultimately structured, though, under Community constitutional law it will scarcely be possible to give binding effect to the decisions of these organizations, nor is such an effect recognized even within the framework of the “New Approach”.¹⁴ To this extent, the “Commission plus Comitology” structure, which enjoys indirect national and direct Community

11. On this see Reich, *Europäisches Verbraucherschutzrecht* (Baden-Baden 1993), pp. 345 et seq.

12. This is in fact the practice of the *Centre Européen de Normalisation* (CEN), see Falke, “Standardization by Professional Organizations: the New Conception”, in Winter (op. cit. note 6).

13. Proposals have been worked out by Führ, “Reform der europäischen Normungsverfahren”, (Typoscript 1995) and Falke and Joerges, “Rechtliche Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationaler und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung”, (Typoscript 1995) under a contract from the Büro für Technikfolgenabschätzung des Deutschen Bundestages.

14. Winkel, *EG-Richtlinien und der Europäische Binnenmarkt*, DIN Mitteilungen 1993, p. 389, according to which the CEN standards establish an evidentiary pre-

legitimation, remains indispensable for the aspects of standardization relevant to the public interest.

3. Direct implementation in individual cases

On the whole, only a few individual case-related implementational competences have been assigned to the Commission through primary law,¹⁵ and none at all in the environmental field. Secondary law is substantially more generous in this regard. The legal acts which entrust direct implementation tasks to the Commission have now grown so numerous, and the terms of such assignment vary so widely, that a classification scheme would appear useful.

The Commission can be assigned a directly implementing, a dispute-resolving and a concerting function. Some participation by the Member States is frequently joined to these functions, which can consist of submitting proposals, consultation or agreement, and in its strongest form such participation justifies speaking of an equally-ranked mixed administration.

3.1. *Directly implementing administration*

The Commission acts in a directly implementing manner, e.g. in the framework of the Regulation (EC) No. 1164/94 concerning the cohesion fund, to the extent that it is responsible for authorizing resources from the fund. This concerns benefit-providing administration, while an example of regulatory administration can be found in Regulation (EEC) No. 594/91 on protection of the ozone layer, under which the Commission may authorize manufacturers of certain hazardous substances to exceed the admissible level of production when this is paired with a corresponding reduction of production by a foreign manufactur-

sumption that the product corresponding to them agree with the relevant EC legal act.

15. E.g. Art. 89(2) EC (supervision of competition), Art. 124(1) EC (administration of the social fund).

er.¹⁶ For such authorization, it is necessary to consult with the Member States involved and secure their agreement.

Another example of directly implementing activity of the regulatory type is the role the Commission plays in procuring data within the framework of the Regulation of Existing Chemical Substances (EEC) No. 793/93. Under Article 10 of the Regulation, the Commission is responsible for demanding certain additional substance tests from manufacturers. The national authorities which respectively act as "rapporteurs" for a specific substance examine the existing data and submit proposals to the Commission for its decision-making. Here the function of the national authority lies in preparing the decision, not (as above) in consultation.

3.2. *Dispute-resolving administration*

An example of the dispute-resolving function of the Commission is when it acts within the framework of the Gene Technology Directive 90/220/EEC.¹⁷ If one Member State objects to the fact that another Member State wishes to authorize the marketing of a genetically-modified organism, and the national authorities responsible cannot reach an agreement, then according to Article 13 the Commission must decide the matter. However, the Commission's decision has legal effect only for the national authorities involved. The national authority remains responsible *vis-à-vis* the company that has applied for the authorization.¹⁸ Depending on the decision of the Commission, the national authority will thus either grant or refuse the authorization. Here, only the activity in the procedural phase of the cross-border coordination of the national authorities can be characterized as "direct implementation".

16. O.J. 1992, L 405/41, Art. 10(8).

17. O.J. 1990, L 117/15.

18. Compare Art. 13(4) of the Directive mentioned. The Regulation mentions only the grant of authorization in case of a positive decision from the Commission, but must also be applied correspondingly to the refusal of authorization in case of a negative decision.

3.3. *Concerting administration*

An example of this type of concerting administration can be found in the Habitat Directive 92/43/EEC.¹⁹ In the course of drawing up the list of areas of Community significance ("Natura 2000"), each Member State notifies suitable areas to the Commission, which then drafts a list in accordance with Article 4(2), in agreement with the Member States. The draft is then decided on in the Regulatory Committee procedure by the Commission. If a Member State has failed to designate areas which the Commission deems suitable, a "bilateral concertation procedure" is provided under Article 5 which, in the event of continuing disagreement, leads to a decision by the Council. (This decision may be regarded as another case of the dispute-resolving type of direct implementation).

3.4. *Assessment*

If we look at these structures, the dispute-resolving and concerting functions appear to have a sufficiently justifiable basis, the first because virtually no other authority is available besides the Commission or the Council; and the second because, given the highly sensitive problems at issue (the withdrawal of whole land areas from more intensive exploitation), concertation offers the best chance of success. It is also appropriate to involve administrative or regulatory committees in the dispute resolution,²⁰ although the type of procedure chosen should match the significance of the issue at hand.²¹

By contrast, where the Commission is involved in administering directly, this give greater occasion for considerations on reform. The

19. O.J. 1992, L 206/7.

20. In the case of the Gene Technology Directive 90/220, a regulatory committee is provided for which decides using the procedure IIIa (filet, compare *supra* note 8) (Art. 13(3)).

21. Thus it appears excessive to go through a regulatory committee in procedure IIIb (contre filet), when in the framework of the Chemicals Directive 67/548 the Commission has to resolve a dispute between two national authorities about the substance data to be demanded (compare Art. 18(2) with Art. 30(4)(b) of the named Directive).

first question is whether some tasks couldn't be left to the Member States. However, the relevant decisions are probably all of such a nature that, were a Member State as such made responsible, the specifically *European* aspect of the decision would be given short shrift. For example, if recipient countries could decide about the authorization of resources from the cohesion fund, the interests of the donor countries, which until now have felt themselves to be represented within the Commission, would quite possibly be ignored. In the example of the Existing Chemicals Regulation, if the national authority which is the so-called rapporteur for a given substance could make a binding decision about the demand for additional data, and if the manufacturer were domiciled in another Member State, this would be tantamount to the exercise of sovereignty by an alien authority within a foreign state, which would violate the international law principle of territoriality.

And yet it is precisely the last-mentioned example which offers a possible starting point for reforms. After all, under the currently applicable law, the authority acting as rapporteur enters into a sovereign relationship with the foreign manufacturer, even if until now this has only involved the receipt of data which the manufacturer must provide under Community law. If one wanted to expand this relationship so that the rapporteur was also empowered to order the provision of *additional* data, two possible paths could be imagined:

The first runs along the lines of "horizontal administrative assistance" (*Amtshilfe*), where the authority responsible for a trans-border order calls upon the assistance of the other Member State.²² The second leads to a concept of deconcentrated and mandated EC administration, which involves an "acting" utilization of a Member State's national administration for the purposes of, and representing, EC administration. In such an acting capacity, the responsible (national) authority would be exercising the sovereign power of the EC, *not* national sovereign

22. On examples in the field of direct and indirect taxes, see Meier, "Europäische Amtshilfe – Ein Stützpfiler des Europäischen Binnenmarktes", (1989) *EuR*, 237 et seq.

power.²³ It must then be possible to seek legal protection against its decision from the Court of First Instance.²⁴

To the extent that tasks should remain at the EC level, it must be examined (as already referred to with respect to tertiary rule-making) which of them are important enough to be performed by the Commission, and which, due to their routine character, could be transferred to separate EC agencies. Among the latter are the tasks mentioned within the framework of the Existing Chemicals Regulation, to the extent that they cannot be integrated into the above-sketched deconcentrated mandatory administration.

Since sovereign competences are involved, and the doctrinal concept of endowing private actors with sovereign powers (in German law: *Beleihung*) is not provided under Community law, a transfer to private persons or organizations is excluded.

3.5. *Digression: Administration and the integration principle*

To the extent that the Commission or the Council are responsible for direct implementation of law not directly aimed at environmental protection, the question arises of the so-called integration clause, e.g. the provision that environmental protection requirements must be included when setting and implementing other Community policies.²⁵ This provision is of great potential significance, because it is precisely the "other Community policies" which are generating dramatic levels of additional environmental pollution.

23. The concept would bear a certain similarity to the new legal type of mutual recognition of national regulations for consumer protection (so-called regulative competition), as it is practiced e.g. in EC insurance law. Here again, sovereign power has effects across the border. However, a corresponding amendment of the EC Treaty (for example of Art. 4(1) 2nd sentence, Art. 145 or Art. 155) would probably be required to support the mentioned type of deconcentrated and mandated administration.

24. One example for the fact that legal protection against decisions of subordinate authorities has also otherwise already been opened up by secondary law is contained in Regulation No. 40/94 on the Community trademark (O.J. 1994, L 11/1), Art. 63.

25. Art. 130R(2) 3rd sentence EC.

The prevailing opinion is that the integration clause is not just a general programmatic statement but rather binding law, although it is significantly weakened by the fact that the Community institutions have broad discretion when it comes to application, and only in extreme cases does a violation lead to annulment of a measure.²⁶ Substantively, therefore, what is involved is a principle, not a rule, if by "principle" one understands a requirement which in application may be balanced against other requirements. A procedural version of the principle can, however, be summarized more rigorously: to the extent that the environmental consequences of a measure compel it, these consequences *must* be taken into consideration. If this is not done, then the measure is already unlawful on that account.

A further question is whether the principle applies only for rule-making, or additionally and independently for administration of individual cases as well. Since Article 130R(2) Sentence 3 – as distinct, for example, from paragraph 3 – covers not only the establishment, but also the implementation of policies, the second option seems correct. However, in administration, the principle mentioned can only influence the exercise of margins of discretion. It does not entail an expansion of intervention beyond the specific primary or secondary law authorization. Thus, the Commission can tolerate an anti-competitive agreement, if at the same time it enhances environmental protection;²⁷ but it cannot regard an agreement which is *not* intrinsically anti-competitive as unlawful merely because it also has environmentally harmful effects.

A further problem with the integration clause is the question whether a policy (and therefore also its administration) can be *so* far removed from environmental aspects that, despite having de facto environmental effects, it may be fashioned in an "environment-blind" manner, at least as long as the environmental protection interest can still be established as an independent, parallel or subsequent countervailing check. For

26. Hailbronner, "EG-Verkehrspolitik und Umweltschutz", in Rengeling (Ed.), *Umweltschutz und andere Politiken der Europäischen Gemeinschaft* (Cologne 1993), pp. 160 et seq.; Krämer, *E.C. Treaty and Environmental Law*, 2nd ed., (London 1995), p. 58.

27. See on this Krämer, "Die Integrierung umweltpolitischer Erfordernisse in die gemeinschaftliche Wettbewerbspolitik", in Rengeling op. cit. pp. 55 et seq.

example, should an invention's potential environmental effects already be examined at the patent-granting stage, or should this be left (as it has until now) to the structure of administrative-law protective standards (e.g. production plant approval or product licensing)? With respect to the approval of the free transfer of profits from one country to another, should it be examined whether this results in a withdrawal of resources for environmental protection investments, or should this be a matter for production plant-related environmental laws? I wish to limit myself here to posing the question. It would require a more thorough examination to clarify precisely where the lines should be drawn in this area.

4. Supervision of implementation by Member State agencies in individual cases

A distinction can be made between infringements by national authorities of directly applicable Community law and infringements of national law which has incorporated Community law. In the first case it is possible that the authority applied national law which, however, is superseded due to infringement of the directly applicable Community law; most of the time, however, it will be the case that no relevant national law exists which would have to be superseded. While in both variants of this case the illegality consists only in the violation of Community law, in the second case there is first of all a violation of national law, which at the same time, however, also contains an infringement of the Community law behind it.

4.1. Treaty violation procedure

As mentioned above, Community law provides only for supervisory action by the Commission as a sanction for its infringement. This applies not only for failure to incorporate EC law into national law, but also for non-compliance in the case of implementation in individual cases.

According to Articles 169, 171 EC, the procedure consists of the following formal steps:

- hearing of the Member State (which is offered in the form of a warning letter setting a time limit for relief);
- an opinion stating the grounds on which it is based (which is likewise linked to the setting of a time limit for relief);
- complaint;
- judgment;
- and in case the judgment is ignored: renewed hearing, opinion and complaint, this time with application for the imposition of a lump sum or administrative fine.

Informal interactions precede and follow these formal actions. These include the flow of information on cases of Community law violation. The Commission does not deploy many systematic monitoring activities; instead, its attention is generally drawn to violations from “outside”, primarily by the public, e.g. private individuals, associations, members of Parliament and others, and only rarely by authorities (e.g. of other Member States). By publishing a simple complaint form²⁸ the Commission has established a sort of semi-official complaint procedure, which includes a self-imposed obligation to check and communicate the result.²⁹

Another informal structure which has developed in practice consists of the so-called Package sessions.³⁰ In such sessions, representatives from both the Commission and the responsible Member State ministries (in Germany, in exceptional cases, from the ministries of the *Länder* as well) meet in order to discuss the complaints relating to the State involved, sort out the unsubstantiated ones, decide how to remedy the substantiated ones and establish the facts for those still in dispute. The Commission, whose bargaining power is based on little more than the possibility of bringing an infringement action, is generally willing to keep quiet if the Member State promises concrete relief measures.

28. O.J. 1989, C 26/8. In 1992, 515 complaints were filed, of which the Commission regarded 121 as presumably grounded. See Krämer, *European Environmental Law. Casebook* (London 1993), p. 394.

29. Compare O.J. 1989 C 26/6. On this, see Krämer, *op. cit.* p. 394.

30. On this, see the article by Krämer in Lübke-Wolff *op. cit.*

Finally, one should mention the consultation which the Commission provides, with respect to the implementation of the judgment, for Member States which have been condemned in the Treaty violation procedure. Here, Commission representatives in the field sometimes negotiate about relief measures, and indeed with a view to and supported by a possible subsequent procedure under Article 171 EC.³¹

A whole series of doctrinal problems arise in connection with the Treaty violation procedure: how long does the period set in the warning letter and the opinion with reasons have to be? How far can the complaint go beyond the criticisms communicated in the preliminary procedure, and the formal opinion beyond the criticisms in the warning letter ("*ne ultra monita*")? Under what conditions does relief before the action is brought or during the course of the judicial procedure remove the legal protection interest of the Commission? To what extent is the Commission's discretion with respect to bringing an action judicially reviewable? and so on.³² These questions, interesting as they may be in the juridical context, do not grasp the more fundamental problem of the Treaty violation procedure, i.e. the hopeless overload of the Commission were it really to be prepared to prosecute any Treaty violation.

Besides the more informal means mentioned above, a number of alternatives shall be discussed, some of which may be more far-reaching.

4.2. *Direct effect of directives*

To the extent that the Treaty violation by national administrative agencies is due to non-transposition of an EC directive into national law, the individuals concerned may invoke the directive when complaining before a national court about administrative action or inaction. The

31. E.g. following the *Santoña* decision of the ECJ of 2 Aug. 1993, (Case C-355/90), in which certain development measures undertaken in protected areas were condemned, a committee was formed at the local level whose members also included a representative of DG XI (information from the Diputación Regional de Cantabria of 30.5.1995. I thank Mr. Eulogio Cigarán Bidebieta for the correspondence).

32. See on this Krück in von der Groeben et al., *Kommentar zum EWGV*, as well as von Karpenstein in Grabitz and Hilf, *EGV, Kommentar*, both on Art. 169.

directive may either be invoked as a reference for a new interpretation of the national law, or – should the framing of this law leave no room for such reinterpretation – the directive may even be invoked *contra legem nationale*m, i.e. setting the national law aside.

As is well known, in the context of direct effect, the ECJ has followed the principle of estoppel and subjected this second possibility to the qualification that the directive provision in question not only be precise and unconditional, but also have been intended to bestow a right on the party invoking it.

If the directive provision is disadvantageous in comparison to valid national law, direct effect is accordingly to be denied. At any rate, this applies for two-sided legal relationships between individuals and the State³³ (for in the logic of estoppel, the party burdened by the directive will not invoke the directive against his delinquent State, but will prefer application of the national law) – so-called “vertical” relations – as well as for legal relationships between private parties³⁴ – so-called “horizontal” relations.

What is still undecided is the case (especially frequent in environmental law) of three-sided legal relationships in the vertical dimension, i.e. when a directive requires that a duty (e.g. a stricter emission value) be created for a “second party”, which at the same time represents a legal advantage for a “third party”, and when the duty and the right exist not directly between the two participants, but rather *vis-à-vis* the State, in other words when they are not of a private law nature, but rather of an administrative-law nature.

Based on the construction of the ECJ,³⁵ direct effect could be justified

33. Case 80/86, *Kolpinghuis*, [1987] ECR 3982 at 3985.

34. Case C-91/92, *Dori*, (1994) ECR I-3325 at 3356.

35. In my opinion, the following construction is preferable: a Member State which has failed to respect the incorporation deadline acts in bad faith *vis-à-vis* the EC and the other Member States when it continues to apply its own national law. It is a matter of indifference whether the Directive creates rights or duties. Precisely in the case of duties, the inhabitants of the delinquent Member States would obtain unjustified advantages over individuals in the other Member States. The counter-argument (which is also used by the ECJ) that the definition of the Directive, compared to the definition of the Regulation, excludes direct effect, would apply in like manner for direct effect

for this case if one focuses on the relationship between the favoured third party and the State: the State would be estopped from invoking its own failure to fulfil its obligation under the directive *vis-à-vis* this party. Thus, if the third party complains, the court must apply the directive directly. That this imposes a burden on the "second party" is an unintended side effect in which, in the terms of the *Dori* judgment, no "extension" of the direct effect jurisdiction "to the field of relationships between citizens" should be seen, since no relationship of rights and duties exists between citizens.³⁶ That the ECJ is ready to accept such burden-imposing unintended legal side effects can also be seen from the *Costanzo* decision, which is once again cited in the *Dori* decision. There, too, a right of the complainant, namely to be fairly considered in the tendering procedure, was the counterpart of a duty of the other competitor, namely to accept that the competitor be awarded the contract.

To refer the complainant along the lines of the *Francovich* decision to a damages compensation claim against the delinquent Member State³⁷ would frequently be unhelpful in the vertical constellation, because the disadvantages generated by abortive legal relationships of an administrative-law nature are expressed more rarely in monetary damages than they are in cases of private-law relationships. Administrative law more frequently intervenes preventively, to stop damages

in the case of the concession of a right. Those who stray from the literal wording in one case can not simply return to it when they find it convenient. The other counter-argument, that a duty cannot be imposed on all parties to read the EC Official Journal, is just as inconsistent since, after all, precisely such reading is required in the case of regulations (which indisputably have a direct effect) and imposed on all. Finally, if it is objected that direct effect in cases where the directive has a burdening effect contradicts the principle of *nulla poena sine lege*, this can be taken into account by excluding criminal law measures from direct effect. For a more extended discussion, see Winter, *Directive or framework law?* in op. cit. *supra* note 6. Following A.G. Van Gerven and A.G. Jacobs in earlier cases, A.G. Lenz has also (although equally unsuccessfully) called for extending direct effect to cases imposing obligations; see his concluding arguments in case C-91/92, *Dori*, [1994] ECR, I-3328.

36. Jans, *European Environmental Law* (The Hague 1995), p. 173.

37. Joined Cases C-6 & 9/90, [1991] ECR, I-5357. The ECJ also points to this path in the *Dori* decision, see loc. cit. para 28.

from arising in the first place. The example of the unincorporated emissions limit illustrates this: the third party suffers under the higher emission, without this however necessarily giving immediate rise to financial expenditures.

The problems of interpretation described here could be resolved through a clarification undertaken as part of the forthcoming Treaty revision. In this author's opinion, the best solution would be a provision which, in case of failure to incorporate clear and unconditional directive provisions, would guarantee direct effect in both favourable and burdensome cases, with an exception for provisions which trigger criminal sanctions.³⁸ The same could apply for regulations and decisions which impose an obligation to create national law.

4.3. *No review of individual cases?*

Given the heavy workload of the Commission, one should consider whether legal supervision with subsequent infringement actions should be limited to the creation of national legal norms in the implementation of directives (or in the execution of regulations and incorporation of decisions).³⁹ Control of the application of Community law in individual cases would then be left to the courts of the Member States.

However, such a proposal should be rejected. The more profound divergences in the implementation of Community law, which necessitate an opinion *ex cathedra europea*, frequently only become apparent as a result of concrete cases. This is precisely the reason why those procedures only involving review by the ECJ of the transposition of

38. The Sutherland Report (*The Internal Market After 1992* (1992)) also goes in this direction. However, its proposal, that each Directive be converted after a certain time into a Regulation, goes too far, because it may be reasonable to allow the Member States room for manoeuvre even after the first transposition.

39. Compare along these lines Ehlermann, "Ein Plädoyer für die dezentrale Kontrolle der Anwendung des Gemeinschaftsrechts durch die Mitgliedstaaten", in *Liber Amicorum Pierre Pescatore* (Baden-Baden 1992), pp. 205 et seq., 209: "for example, the Treaty violation procedure is hardly suited for ensuring that the rules on public tender invitations, so indispensable for the Single Market, are respected on a day-to-day basis by literally tens of thousands of Member State authorities."

legal norms, frequently appear somewhat anaemic. This has sometimes (and not altogether without reason) provided an occasion to reproach the Commission for formalism.⁴⁰ In addition, the ECJ's potential for development of the law and the stimulation of legal policy would be largely eliminated if it had to confine itself to this anaemic exercise. While it is true that the preliminary ruling path under Article 177 EC would remain open, in many cases this does not result in procedures in which the national courts decide about Community law violations in administration. For it is precisely in the field of environmental law that disputes are focused on the threat to collective goods, which however – due to the more or less pronounced individualization of the locus standi concepts in the Member States – cannot be brought to court.⁴¹ The “objective” Treaty violation procedure is not dependent on such prerequisites.

It has been considered whether legal supervision, if extended beyond rule-making to administrative practice, should at least confine itself to “inspecting the inspectors”.⁴² This would mean that individual cases would not be reviewed, but only organizational structures (e.g. the frequency and quality of emission measurements). But such a limitation would also leave unexploited the significance attached to individual cases which are representative of specific problems. For example, under such restrictive conditions we would never have obtained such path-

40. Compare Siedentopf and Hauschild, “Europäische Integration und die öffentlichen Verwaltungen der Mitgliedstaaten”, in *Die öffentliche Verwaltung* (1990), 445 at 454, who explain this situation on the basis that the Commission, chiefly limited to contact with the ministerial administration, is largely cut off from administrative reality.

41. A different path would be the association complaint. On its admissibility in the Member States and on an approach for strengthening it through Community law, see the contributions in Führ and Roller (Eds.), *Participation and litigation rights of environmental associations in Europe* (Frankfurt 1991), and Führ, Ormond, Gebers and Roller, *Access to Justice* (Öko-Institut, 1994)

42. House of Lords, Select Committee on the European Communities, *Implementation and enforcement of environmental legislation*, vol. 1- Report, London 1992.

breaking decisions as *Leybucht* and *Santoña-Delta*, both of which have had a major impact on EC nature protection law.⁴³

Instead of excluding individual cases from the start, we should attempt to find a rational way of selecting them. A selection is already being made, if only through the backlog of uncompleted procedures. Criteria could be found by borrowing from those for constitutional complaints under §§93a and 93c of the German law on the procedure of the *Bundesverfassungsgericht* which require e.g. the fundamental significance of the subject matter, a serious disadvantage arising for those affected, or a still-undecided legal issue.

4.4. *Binding supervisory decision of the Commission?*

In order to restrict the infringement action to a few especially important matters, one might consider granting the Commission for the other matters the power formally to establish the existence of a violation of the law, and possibly also to order relief measures. The Commission possesses such a competence in the areas of state aid supervision⁴⁴ and supervision over companies with sole and exclusive rights.⁴⁵ Under Article 88 ECSC, the Commission is competent to establish Treaty violations, but not to order relief measures.⁴⁶

The decisional competences mentioned have the consequence that the burden of introducing the legal protection procedure is transferred

43. See Wils, "The birds directive 15 years later: a survey of the case law and a comparison with the Habitats Directive", in (1994) *Journal of Environmental Law*, pp. 218 et seq.

44. Art. 93(2)(1) EC.

45. Art. 90(3) EC. Against the view that the provision only admits preventive measures, while repressive measures are reserved for the procedure under Art. 169 EC (as A.G. Tesauro argued in his concluding arguments in case C-202/88, [1991] ECR I-1239 para 30), one can adduce both the very wording and the fact that the often subtle questions of competition control of public companies could be clarified more flexibly by Commission decision than through the more cumbersome Treaty violation procedure. See Pernice in Grabitz and Hilf (op. cit.) Art. 90(73) et seq. See there also on the competence to go beyond the establishment of the violation and prescribe relief measures.

46. See however the possible sanctions under Art. 88(3) ECSC.

to the affected Member State. If this Member State fails to file the complaint within the time limits provided under Article 173(5) EC, the decision can no longer be attacked. If the Member State does not comply with the decision, the Commission can apply to the European Court of Justice under Article 169 EC, which no longer has to examine the substance of the matter, however, once the decision has become unattackable.⁴⁷

Certainly the affected Member State must be heard before the legal-supervisory decision is issued. Beyond this, it would contribute to securing the factual and legal basis of the decision if it were preceded by a formal procedure in which (particularly for decisions in individual cases) the private party and affected third parties are also heard. However, since the effort this would entail would far outstrip the workload capacities of the Commission, one should consider entrusting the hearing (following the model of the British inquiry) to an independent individual who would give the Commission a recommendation for its decision.

Due to the shifting of the complaint burden to the disadvantage of the Member States, one might suppose that the proposal mentioned could only be realized through a revision of the Treaty. However, to the extent that the legal standards of the relevant substantive law are sufficiently exact and/or a clarification of the legal questions is presupposed by the Community courts, the decision-making competence can also be regarded as an implementing authority, which in accordance with Article 145 3rd indent can be transferred to the Commission. Of course, this would require an express authorization by legal acts relating to specific individual areas⁴⁸ or by a general legal act which covers the legal supervision competences in one policy sector or all of them. In so doing, the competence could also be limited to certain areas of obligation or to certain types of measures, which indeed would be particularly logical for a trial phase.

47. See on this in the context of Art. 90(3) Pernice, *op. cit.*

48. Art. 3(2) of the Directive of the Council 665/89, O.J. 1989, L 395/33 contains an example, according to which the Commission may demand that a Member State and the national contract-awarding authority remedy violations of Community regulations concerning public contracts.

4.5. *Investigating powers relating to legal supervision*

If legal supervision were to encompass not only rule-making, but also administration, factual situations would have to be investigated, for which corresponding powers would be necessary. Article 169 EC does not contain anything of the kind: in its context, it involves the granting of a legal hearing prior to commencing an action, thus from the perspective of the Member States not an obligation, but rather a right. By contrast, active obligations on the Member States to provide information derive from Article 5(1) Sentence 2 EC⁴⁹ as well as from a plethora of secondary-law provisions.⁵⁰

For the Commission, however, what is more interesting than the often dilatory submission of information from Member State governments is the power to undertake its own factual investigations, in particular through on-site examinations, gathering of information and inspection of documents from authorities and private parties, entering property, questioning of witnesses, requests for expert opinions, etc. It is true that the documents presented to the Commission generally suffice for commencing the action, so that the use of special investigative powers need not become virulent. In some complicated cases, which at the same time are significant for development of the law, however, more probing investigation can be useful.

Under Article 213 EC, it seems as though the Commission requires its own specific secondary-law basis for investigations in each and every case. However, this provision should be interpreted to mean that a special legal basis is needed only for establishing information-related *obligations* (duties to provide information, to permit inspection of documents and to tolerate entry onto property and premises). The power to collect information which is voluntarily given, by contrast, exists as a general primary-law competence, in connection with the legal supervision based on Article 155, 1st indent.⁵¹

49. Grunwald in von der Groeben et al., op. cit. Art. 213, para 3.

50. See the examples in Grunwald in von der Groeben et al., op. cit., Art. 213 paras. 26 et seq.

51. Same result Grunwald in von der Groeben et al., Art. 213 para 23.

The question is whether, beyond this, one can also derive from Article 5(1) Sentence 2 a general duty on the part of Member State authorities to give the Commission information directly via administrative assistance and not just indirectly, via the representative of the Member State. Such direct inter-agency relationships are provided for in a series of Regulations, but also by directives which have (to this extent) direct effect.⁵² For the environmental field, one should especially highlight the relationships between the European Environmental Agency and the "domestic contact point" on the basis of Regulation (EEC) No. 1210/90.⁵³ Although direct contacts of an informal nature presumably go far beyond the scope of such explicit arrangements, a general administrative assistance duty would nevertheless appear to be going too far, in view of the enormous variety of duty relationships and newly-opened information flows that would thus be constituted.⁵⁴

4.6. *Bolstering the Commission's preventive resources?*

As means for helping prevent violations altogether, one could consider either administrative guidelines issued by the Commission to interpret or concretize standards, or Commission participation in the national decision-making process.

52. Examples in Pipkorn in Beutler, Bieber, Pipkorn and Streil, *Die Europäische Union*, 4th ed. (Baden-Baden 1993) p. 404.

53. O.J. 1990 L 120/1. The data collection serves not only purposes of statistics, policy advising and informing the public, but can also be used for legal supervision, see the 8th consideration of the Regulation. For an example for direct contacts with national authorities from the sectoral environmental law, see Regulation (EEC) No. 594/91 on protection of the ozone layer, which in Art. 12(1) authorizes the Commission "to collect all necessary information from the governments and the responsible authorities of the Member States" and in para 3 obliges the authorities responsible to conduct investigations which the Commission regards as necessary.

54. Going further, Segond, "Untersuchungsbefugnisse der EG-Kommission", in Ladeur and Winter (Eds.) *Verfassungsprobleme der Europäischen Gemeinschaft*, ZERP-DP 1/1991 p. 104.

4.6.1. *Quasi-administrative guidelines*

As far as administrative guidelines are concerned, the Commission certainly has the inherent power to issue administrative guidelines to its subordinate agencies, guidelines which are internally binding and, by creating legitimate expectations, could be indirectly binding externally as well. Unlike the German federal government *vis-à-vis* the *Länder*⁵⁵, however, the Commission cannot issue any binding administrative guidelines to the Member States. Article 155, 1st indent, which might be considered as justifying this,⁵⁶ is not explicit enough for such a far-reaching competence.⁵⁷

Nevertheless, the Commission has developed a wealth of informational instruments which, although not legally binding, undoubtedly *de facto* establish certain ties, whether of such a nature that a Member State who ignores them risks being disadvantaged (e.g. introduction of the procedure under Article 169 EC, or withholding of development funds), or conversely of such a nature that the Commission can be appealed to under confidence protection aspects if discrepancies arise. Such instruments bear labels like "communications", "Community frameworks", "vade mecum", "information notices", "good practice rules", etc., and contain information on the interpretations presented by the European Courts or the Commission of primary and secondary law, or on just how the Commission plans to use the margins of discretion it possesses.⁵⁸

The admissibility of such non-binding instruments is not free of doubt, but can be derived *a maiore ad minus* from the procedural powers of Article 169, Article 155, 1st indent EC, as well as from the secondary-law substantive intervention powers.

It appears that this possibility of persuasive "soft law" is used less frequently in the field of environmental policy than in other policy

55. In accordance with Art. 84(2) and Art. 85(2) GG.

56. Thus however Bleckmann, "Zur Verbindlichkeit von Rechtsauskünften der EG-Kommission", (1988) RIW, 936 et seq.

57. Adam and Winter, "Commission guidance addressed to Member States", in Winter, *op. cit. supra* note 6.

58. Adam and Winter, *op. cit.*; Scherer, "Das Rechnungsabschlußverfahren – Ein Instrument zur Durchsetzung europäischen Verwaltungsrechts?", (1986) *Europarecht*, 52 et seq.

sectors.⁵⁹ It might be wise to modify this practice. The detailed documentary materials supporting the complaints should provide a rich source for questions which could form the subject of clarificatory communications.

4.6.2. *Participating in decisions at the national level*

As far as participation of the Commission in the decision-making processes of the Member States is concerned, there are already a few examples of this in the applicable law. Most of the time, it involves cases in which the Member States wish to, and also may, deviate from a rule established in the legal act at issue, provided however that the Commission plays a role. Thus if, in exceptional cases, a Member State wants a project to be exempted from the obligation to perform an Environmental Impact Assessment, it must first notify the Commission.⁶⁰ Similarly, a Member State which wishes to take the EC water quality targets as its criterion instead of the EC emission limits for waste water, must demonstrate to the Commission that it can and will meet these targets.⁶¹ Finally: if, for the release of genetically modified organisms, a Member State wishes to shift over to simplified monitoring procedures, it must first obtain authorization from the Commission.⁶²

These examples show that preventive participation of the Commission can relate to both decisions in individual cases and the establishment of norms by the Member States.

From a legal policy perspective, however, it is not advisable to extend such participation all too freely, since this would place an unacceptably heavy burden on the Commission. Of course, this does not rule out retaining the procedure for carefully selected, important cases. One should also consider entrusting the Environmental Agency with the preventive control function.

59. An example is the "Community framework" for the admissibility of state assistance for environmental protection, see Krämer, *supra* note 28, p. 48.

60. Art. 2(3)(c) of the EIA-Directive (Directive of the Council 85/337/EEC, O.J. 1985, L 175/40).

61. Art. 6(3) of the Water Directive (Directive of the Council 76/464/EEC, O.J. 1976, L 129/23).

62. Art. 6(5) of the Release Directive (Directive of the Council 90/220/EEC, O.J. 1990, L 117/15).

4.7. *EC environmental inspectorate?*

However appealing decentralized implementation monitoring may sound at first, central control remains indispensable at least where environmental hazards with border-crossing effects are involved, because in these cases the possibility remains that the judgment of decentralized monitoring authorities will be too strongly influenced by a regional or national perspective. In the final analysis, no one argues for far-reaching decentralized aid supervision under Article 93 EC or competition supervision under Article 87. Furthermore, local administrations and courts are sometimes politically or socially involved in local projects, especially the larger-scale ones, whereas the distant monitoring offered by European legal supervision makes necessary corrections possible.

Since the Commission has not got the staff which would be necessary for an effective legal supervision (and they are not supposed to handle routine matters anyway), it would be advisable to set up an environmental inspectorate. The inspectorate should also have a limited number of field offices in selected regions, so that it is accessible for the affected parties and can more readily conduct investigations.

It is a delicate question whether the inspectorate function should be transferred to the environmental agency. Arguing in its favour is the fact that the environmental agency is already engaged in collecting environmental information, plus the fact that the functional expansion of an already-created authority, even under the aspect of an experimental procedure, is easier than establishing a wholly new authority. However, it is problematic to link the task of collecting general information too closely with the tasks of legal supervision and the sanctioning of violations of the law. On the one hand, such a linkage means that information will no longer be made so readily available; on the other, the data collection and presentation could be distorted by political considerations in the sanction context. This was precisely the reason why the German *Umweltbundesamt* was originally conceived solely to

procure information, not to regulate (even though this distinction has sometimes been blurred in the meantime).⁶³

4.8. *Improvement of sanctions?*

In its decisions in the Treaty violation procedure, the ECJ only establishes that an infringement of Community law exists. Under Article 169 EC, it is not authorized to order concrete relief measures. What the Member State must do or refrain from doing after the decision, it must deduce from the Court's findings. Frequently, however, the operative provisions of the judgment are quite generally formulated, so that what has to be done in a particular case must be derived from the grounds of the decision. For example, the decision of 2 August 1993⁶⁴ concerned the construction of a dam and a road through the delta area of several rivers near Santoña in northern Spain. In grounds 35 and 41, the ECJ found these construction measures to be incompatible with the Bird Protection Directive. In the operative provisions of the judgment, however, it only stated generally that Spain, in violation of the Treaty, had failed to implement the measures necessary to prevent harm to the natural areas in the region at issue. At the same time, this example shows that the grounds of the decision do not always give clear indications. Thus, it is not compellingly clear whether the road and dam have to be removed or not.⁶⁵

It would therefore be advisable, within the framework of the forthcoming Treaty revision, to give the Court of Justice the authority to prescribe certain relief measures upon motion of the Commission.⁶⁶

63. See v. Lersner, "Zur Funktion einer wissenschaftlich-technischen Umweltbehörde in Europa", in Callies and Wegner (Eds.), *Europäisches Umweltrecht als Chance* (Tausenstein 1992), pp. 87 et seq.

64. Case C-355/90.

65. In fact, the dam is supposed to be dismantled. The road was given a reprieve, but compensating measures are planned. (For the source, see note 31 *supra*).

66. The ECJ itself once proposed exactly this, see Bulletin of the EC, Supp. 9/75, p. 18. Going further, Karpenstein in Grabitz and Hilf, *op. cit.* Art. 171, para 4 sees this competence already grounded in the applicable Art. 169.

The frequently difficult question as to the form and jurisdiction in which the required measure must be taken could be circumvented by only naming the measure itself.

A particular problem for operative holdings and further for passive legitimation in the Treaty violation procedure arises as a result of the fact that the decision is directed against the defendant Member State and not against the public body or authority which was responsible for the contested action or omission. That reduces the effectiveness of the decision in those cases in which the Member State possesses absolutely no power to order and sanction the responsible corporate body or authority, e.g. Belgium *vis-à-vis* its regions and the German Federal Republic *vis-à-vis* the *Länder* with respect to subjects under a *Land's* own administration. To remedy this, it has been proposed that it be possible to direct the supervision against the corporate body or authority.⁶⁷ For federal States, whose sub-states after all do possess a partial sovereignty *vis-à-vis* the rest of the world, this should certainly be considered, however only with respect to the sub-states, not any other public bodies.⁶⁸

Authorizing the Court of Justice to make not just findings but also orders in its decisions could also help resolve the problem of failure to respect ECJ decisions and the often equally fruitless subsequent procedure,⁶⁹ for it is generally easier to conceal a failure to respect a finding than outright disobedience of an order.

Nevertheless, and despite the sanction possibility which has now been introduced under Article 171(2)(3) EC, the problem of an adequate sanction for non-observance of decisions remains firmly on the agenda. The lump sum and the administrative fine which the ECJ can impose bear little relation to the particular type of Treaty violation, and are to this extent conceived more as a monetary fine or coercive measure. It would be preferable if the sanction could be adapted to

67. Macrory, *The enforcement of Community environmental laws: some critical issues*, 29 *CML Rev.*, 347 at 357.

68. Thus the German Commission of Inquiry on Constitutional Reform in its Final Report, Part II: Federal Government and *Länder*, *Zur Sache 2/77* pp. 86 et seq., at 93.

69. On this, see covering all policy areas Ehlermann (*supra* note 39) p. 213, and for environmental policy specifically Krämer (*supra* note 28) pp. 430–433.

the specific nature of the given case. Thus, in the agricultural area, the Commission has shifted over to reducing grants from the agricultural fund in the case of unjustified expenditures by the authorities of the Member States.⁷⁰ For Treaty violations in the area of allocation of own resources, it demands compensation for the loss of revenues.⁷¹ In aid cases, it generally calls on the Member State to demand that the recipient return the aid received.⁷² In the area of the structural fund, in cases of failure to observe the environmental laws, it can delay or reject the financing.⁷³ A more open authorization in Article 171(2)(2) and (3) would permit the ECJ a more pragmatic sanctioning practice in this respect.

5. Final remarks

Decentralized forms certainly stand in the front line of control over observance of Community law in administration. They deserve increased attention and can be further developed in a number of respects. Nevertheless, central control will remain indispensable, first of all simply because there is considerable direct administration by EC institutions, and secondly because a backup line is necessary where the regional horizon obstructs a more distanced and border-transcending vision. The problem is to find *appropriate* forms, ones which select the relevant cases and ensure the quality and effectiveness of the decisions.

70. On this, see Scherer, *supra* note 58 at 52 et seq.

71. See e.g. Case 303/84, *Commission v. Germany* [1986] ECR, 1192.

72. Art. 93(2) EC. Examples in Ehlermann (*supra* note 39), p. 215.

73. Art. 7 Council Reg. No. 2052/88/EEC, O.J. 1988, p. 9. See Krämer (*supra* note 69).