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Abstract

This Article first discusses the legal nature of the directive and the process by which Member States implement directives. Second, this Article explores enforcement of directives and examines the enforcement roles of the Commission of the European Communities and the Court of Justice of the European Communities. Finally this Article proposes a series of initiatives at the Member State and Community levels to improve implementation and enforcement of Community environmental law.

THE EUROPEAN COMMUNITY'S POLICY ON IMPLEMENTATION OF ENVIRONMENTAL DIRECTIVES†

Rolf Wägenbaur *

Under the Treaty Establishing the European Economic Community (the "EEC Treaty"),[1] the "directive" is one of the most widely used legal instruments. As far as environmental protection policy is concerned, the directive has been the most important instrument from the early 1970s when the European Economic Community (the "EEC" or the "Community") first took an interest in this field of activity. So far, the directives adopted in the field of environmental protection number 125, compared to twenty-five regulations. These figures show that the Community has a strong interest in the development of directives as efficient legal instruments. Member State[2] implementation of directives, however, currently poses serious problems.[3] The European Council of Dublin of 25 and 26 June 1990 acknowledged the extent of these problems by adopting a "Declaration on the Environmental Imperative"[4] which stated that "Community environmental legislation will only be effective if it is fully implemented and enforced by Member States."[5] The European Parliament (the "Parliament")[6] is increasingly interested in improving implementa-

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1. Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

2. Member States include Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, and the United Kingdom.

3. *See* H. SIEDENTOPF & J. ZILLER, MAKING EUROPEAN POLICIES WORK (1988). This volume, edited by the European Institute of Public Administration, contains national reports on Member States (except Portugal and Spain) analyzing in detail implementation of EEC directives and other Community legislation.

4. *See* European Declaration on the Environmental Imperative, E.C. BULL. No. 6, at 7 (1990).

5. *Id.* at 17.

6. *See* EEC Treaty, *supra* note 1, arts. 137-44 (creating and conferring power upon European Parliament).

tion of Community environmental legislation. In July 1990, 130 members of the Parliament from all political tendencies filed a resolution proposing the establishment of a committee of enquiry on the transposition and application of Community environmental legislation.[7] This committee would conduct an in-depth investigation in all Member States and would report the results by the end of 1991.[8]

This Article first discusses the legal nature of the directive and the process by which Member States implement directives. Second, this Article explores enforcement of directives and examines the enforcement roles of the Commission of the European Communities (the "Commission")[9] and the Court of Justice of the European Communities (the "Court" or the "Court of Justice").[10] Finally, this Article proposes a series of initiatives at the Member State and Community levels to improve implementation and enforcement of Community environmental law.

I. *THE DIRECTIVE AND THE NECESSITY OF IMPLEMENTATION*

Article 189 of the EEC Treaty sets out the legal nature of the directive:

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods.[11]

Accordingly, the nature of a directive, a binding legal act as to results which leaves the method to achieve those results open to national authorities, implies that legislation takes place in two steps. First, the competent Community institution adopts a directive following the procedure indicated in the relevant EEC Treaty provision.[12] The Council of Ministers of the

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7. Eur. Parl. Doc. No. 142.988 (session doc. B3-1392) (1990).

8. *Id.*

9. *See* EEC Treaty, *supra* note 1, arts. 155-63 (creating and conferring power upon Commission).

10. *See id.* arts. 164-88 (creating and conferring power upon Court of Justice).

11. *Id.* art. 189.

12. These procedures are usually based on EEC Treaty Articles 100a or 130s. Prior to the Single European Act, procedures were based on Articles 100 and 235. *See* Single European Act, O.J. L 169/1 (1987), Common Mkt. Rep. (CCH) ¶ 21,000.

European Communities (the "Council"), which acts on proposals from the Commission, is usually the institution competent to adopt environmental protection directives. After adoption by the Council, the directive is notified to the Member States.[13] One of the directive's final articles will generally state the date or time within which Member States must implement the directive in national law.

After adopting the directive, the Member State must implement it. Article 189 obliges Member States to implement the directive, to guarantee the enforcement of the directive, and to modify existing national law accordingly. The "form and methods" by which Member States achieve this result are left to the individual Member States' discretion.[14]

Prior to the directive's implementation in national law, mere adoption may affect the rights of private parties. The directive is like a chameleon.[15] Under Court of Justice case law, a directive may, under certain conditions, create legal rights in private parties relying upon prompt implementation. These legal rights may protect a party before national courts and administrative bodies. Such a situation generally arises where a Member State fails to implement a directive in due time[16] or as required,[17] or if the national law establishes discretionary measures which may conflict with the directive.[18]

For a directive to create legal rights upon its adoption, it must contain provisions which, according to their structure and wording, establish a direct legal relationship between

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13. Article 191 provides: "Directives and decisions shall be notified to those to whom they are adressed and shall take effect upon such notification." EEC Treaty, *supra* note 1, art. 191, ¶ 2.

14. *See id.* art. 189; *see supra* note 7. In sharp contrast to directives, Article 189 provides that "regulations" are self-executing by nature. Article 189 further provides that regulations "shall be binding in their entirety and directly applicable in all Member States." EEC Treaty, *supra* note 1, art. 189.

15. Wägenbaur, *Die Umsetzung von EG-Recht in deutsches Recht und ihre gesetzgeberische Problematik*, ZEITSCHRIFT FÜR GESETZGEBUNG 303 (1988).

16. *See* Pubblico Ministero v. Ratti, Case 148/78, 1979 E.C.R. 1629, 1642, Common Mkt. Rep. (CCH) ¶ 8569 (preliminary ruling requested by Pretura Penale, Milan).

17. Commission v. Belgium, Case 102/79, 1980 E.C.R. 1473, 1487, Common Mkt. Rep. (CCH) ¶ 8673.

18. Yvonne van Duyn v. Home Office, Case 41/74, 1974 E.C.R. 1337, 1349, Common Mkt. Rep. (CCH) ¶ 8283 (preliminary ruling requested by Chancery Division of U.K. High Court of Justice).

Member States and their citizens. This legal relationship can arise only if the provision is drafted clearly and unequivocally and if Community and national law require no additional discretionary measures.[19] Where the structure and wording of the provision create direct legal rights, the directive's effects resemble those of a regulation. In such cases, the Commission may intervene and require national authorities to obey the directive. Notwithstanding national courts' tendency to recognize a directive's direct effects—with the sole exception of the French Conseil d'Etat—direct effect is not yet taken seriously by a number of administrative bodies in Member States. The direct effect of environmental protection directives has meant little practical improvement in their enforcement.

A. *Case Law Concerning the "Forms and Methods" of Implementation*

Court of Justice case law provides interesting clarifications of Member State obligations to implement directives. The Court has addressed repeatedly the question of which Member State regional entity is competent to implement directives. In general, the Court has done so when the Member State objected to implementing a directive because national constitutional law required implementation by regional or local entities. The Court of Justice responded unambiguously to this objection: "each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional or local authorities."[20] This ruling is of particular relevance for Member States with a federal structure (such as Germany) or with decentralized legislative competences (such as Belgium). According to the ruling, the Commission's contact should be solely with the Member States' central authority, notwithstanding the national-law question of which authority is competent to implement the directive.

The Court of Justice has clarified the means by which a Member State must implement a directive. For instance, to im-

19. *See* Commission v. Belgium, Case 102/79, 1980 E.C.R. 1473, Common Mkt. Rep. (CCH) ¶ 8673.

20. Commission v. Netherlands, Case 97/81, 1982 E.C.R. 1791, 1804, Common Mkt. Rep. (CCH) ¶ 8842; *see* Commission v. Belgium, Case 102/79, 1980 E.C.R. 1473, Common Mkt. Rep. (CCH) ¶ 8673.

plement directives, Member States must use national provisions with the same legal status as previous regulations.[21] The Court has further held that "each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty in legal situations."[22] The Court has also noted that "[m]ere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough cannot in the circumstances be regarded as a proper fulfilment of the obligation imposed by Article 189 on Member States to which the directives are addressed."[23] In addition, the Court noted that "according to the consistent case law . . . each Member State must implement directives in a manner which fully meets the requirement of legal certainty and must consequently transpose their terms into national law as binding provisions."[24]

B. *The "Binding Nature" of the Directive*

The Court of Justice has, quite rightly, underlined repeatedly that prompt implementation of directives is particularly important since implementing measures are left to Member State discretion. If implementation is delayed, the directive would be ineffective to remedy discrimination resulting from differences in Member State rules after implementation deadlines expire.[25] Accordingly, the Court has rejected a variety of excuses which Member States have made when charged with failure to implement a directive. Among those rejected are the following:

- The Member State concerned attributes direct effect to the provisions of the directive and alleges that giving di-

21. *See* Commission v. Belgium, Case 102/79, 1980 E.C.R. 1473, Common Mkt. Rep. (CCH) ¶ 8673.

22. *Id.*; *see* Commission v. Netherlands, Case 96/81, 1982 E.C.R. at 1804, Common Mkt. Rep. (CCH) ¶ 8841.

23. Commission v. Netherlands, Case 102/79, 1980 E.C.R. at 1486, Common Mkt. Rep. (CCH) ¶ 8673; *see* Commission v. Belgium, Case 96/81, 1982 E.C.R. 1791, 1804, Common Mkt. Rep. (CCH) ¶ 8841.

24. Commission v. Belgium, Case 239/85, 1986 E.C.R. 3645, 3659, Common Mkt. Rep. (CCH) ¶ 14,383 (with conclusions by Advocate General da Cruz Vilaça); *see* Commission v. Netherlands, Case 96/81, 1982 E.C.R. at 1804.

25. Commission v. Italy, Case 52/75, 1976 E.C.R. 277, 284, Common Mkt. Rep. (CCH) ¶ 8345.

rect effect is equivalent to normal implementation;[26]
- The time allowed for implementation is insufficient;[27]
- Other Member States failed to implement the directive in due time;[28]
- A governmental crisis prevented implementation;[29]
- Non-implementation was due to the premature dissolution of the Member State national legislature;[30]
- Internal difficulties or provisions of the national constitution caused non-implementation;[31]
- Constitutionally independent institutions caused internal difficulties preventing timely implementation;[32]
- Current practice within the Member State conforms with the directive; all that remains is to conform national law to the established practice and the directive.[33]

In other words, Member States must adopt measures giving full effect (effet utile) to the directive,[34] notwithstanding the circumstances preventing timely implementation. A Member State may not, therefore, refer to "provisions, practices or circumstances" existing in that Member State's legal system to justify failure to meet the obligations and time limits of Community directives.[35] "General principles of constitutional or administrative law" may, however, render superfluous implementation by specific legislation.[36]

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26. Commission v. Belgium, Case 102/79, 1980 E.C.R. 1473, 1487; Commission v. Belgium, Case 301/81, 1983 E.C.R. 467, 478, Common Mkt. Rep. (CCH) ¶ 8945.

27. Commission v. Italy, Case 52/75, 1976 E.C.R. 277, Common Mkt. Rep. (CCH) ¶ 8345.

28. Commission v. Blangueron, Case C-38/89, [1990] 2 C.M.L.R. 340.

29. *Id.*

30. *See* Commission v. Italy, Case 79/72, 1973 E.C.R. 667, 671, Common Mkt. Rep. (CCH) ¶ 8214; Commission v. Italy, Case 91/79, 1980 E.C.R. 1099, 1105, Common Mkt. Rep. (CCH) ¶ 8657.

31. Commission v. Belgium, Case 102/79, 1980 E.C.R. 1473, 1487, Common Mkt. Rep. (CCH) ¶ 8673.

32. Commission v. Belgium, Case 77/69, 1970 E.C.R. 237, Common Mkt. Rep. (CCH) ¶ 8089.

33. Commission v. Belgium, Case 102/79, 1980 E.C.R. at 1484, Common Mkt. Rep. (CCH) ¶ 8673; Commission v. Germany, Case 29/84, 1985 E.C.R. 1661, Common Mkt. Rep. (CCH) ¶ 14,203.

34. Jean Noel Royer, Case 48/75, 1976 E.C.R. 497, 516, Common Mkt. Rep. (CCH) ¶ 8359; Von Colson v. Land Nordrhein-Westfalen, Case 14/83, 1984 E.C.R. 1891, Common Mkt. Rep. (CCH) ¶ 14,092 (preliminary ruling requested by Tribunal de Premiere Instance Liege).

35. Commission v. Italy, Case 52/75, 1976 E.C.R. 277, 285, Common Mkt. Rep. (CCH) ¶ 8345.

36. Commission v. Germany, Case 29/84, 1985 E.C.R. 1661, Common Mkt.

II. *THE ENFORCEMENT OF DIRECTIVES*

As compared with the powerful regulation—which plays a minor role in environmental protection law—the "directive" has decisive weaknesses. A "regulation" is true Community-wide law with direct effect. A regulation grants direct rights to and imposes charges on private parties without interference of national law.[37] The feature that the directive has in common with the regulation is that it is binding law. The directive must, however, be implemented and the national law changed accordingly. Upon Member State failure to implement a directive, the Commission may take enforcement action.

A. *Commission Monitoring of Enforcement*

Under Article 155 of the EEC Treaty, the Commission must "ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied."[38] Control of implementation, and ensuring the directive's timeliness and substantive correctness, forms part of this activity. The Commission has exclusive competence: The EEC Treaty gave no comparable mandate to the Council, to the European Parliament, or to any other institution. In addition, this attribution of competence is reserved strictly to the Commission, which may not delegate this power partially or totally to another Community institution or to a newly-created authority.[39]

The Commission takes very seriously its duty of monitoring implementation of directives. The Commission determines whether Member States respect the deadline for implementation and whether the measures Member States adopt comply with a directive's terms. It also verifies whether the national provisions correctly and completely implement a directive. The Commission may do this by simply comparing the

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Rep. (CCH) ¶ 14,203; Commission v. Italy, Case 363/85, 1987 E.C.R. 1737, 1742, Common Mkt. Rep. (CCH) ¶ 14,434; Commission v. Belgium, Case 247/85, 1987 E.C.R. 3029, 3060, C.E.C. (CCH) 292; Commission v. Italy, Case 262/85, 1987 E.C.R. 3097, Common Mkt. Rep. ¶ 14,518; Commission v. Netherlands, Case 236/85, 1987 E.C.R. 3989, 4007.

37. *See* EEC Treaty, *supra* note 1, art. 189, ¶ 2.

38. *See id.* art. 155.

39. This last point is of particular relevance to the powers to be given to the European Environment Agency which is to be established in the near future. *See infra* notes 62-76 and accompanying text (discussing creation of European Environment Agency).

directive's wording with the corresponding national provisions which Member States must send to the Commission.

The Commission needs information and assistance from third parties, however, in order to control Member State adherence to the provisions of the directives before and after implementation, to monitor the expiration of the time for implementation, and to determine whether the directive or parts of it should take direct effect. The Commission has no administrative structure which would enable it to make systematic checks on the Member States. A number of directives provide for Member State monitoring duties, but only a minority of directives also require Member States to send information on monitoring to the Commission.

Increasingly, the Commission receives information on implementation from private complainants (private parties or environmental protection associations) or via questions put to it by members of the Parliament. The complaints received in this way are a precious source of information. The number of complaints has risen considerably. In 1984, for instance, the Commission received a total of nine complaints; in 1989 it received 465.[40] These complaints concerned mainly the quality of drinking water,[41] the environmental impact assessment directive,[42] and the protection of wild birds.[43] Broad fields of environmental policy (such as the rules applicable to waste) are subject to very few complaints. A lack of complaints does not mean that Community legislation applicable to waste disposal is implemented perfectly. The absence of complaints in a number of areas shows the unreliable nature of the Commission's information system rather than an accurate picture of the environmental situation.

B. *Commission Procedure for Infringements*

Where a directive should have "direct effect" in the national legal system, the Commission may initiate an Article 169

40. *See* COMM'N SIXTH ANNUAL REPORT, O.J. C 232/58 (1990).

41. Council Directive on Drinking Water, No. 80/778, O.J. L 229/11 (1980).

42. Council Directive on the assessment of the effect of certain public and private projects on the environment, No. 85/337, O.J. L 175/40 (1988).

43. Council Directive on the conservation of wild birds, No. 79/409, O.J. L 103/1 (1979).

infringement procedure.[44] This is true whether the infringement is the non-implementation of a directive in the prescribed time, an incorrect implementation in national law, or an incorrect application. An Article 169 infringement procedure is comprised of three stages: (1) letter of formal notice, (2) reasoned opinion, and (3) application to the Court of Justice.

1. Letter of Formal Notice

First, the Commission issues a letter of formal notice. The letter of formal notice is a written allegation that the directive may be infringed—without indicating its sources in the case of a complaint—and gives the Member State the opportunity to express its views, generally within a two-month period. After the Commission receives the answer to the letter of formal notice—or the Member State fails to respond within the prescribed time—the Commission must determine whether to proceed to the second stage.

2. Reasoned Opinion

If the Commission remains convinced of an infringement, it may decide to deliver a "reasoned opinion." The reasoned opinion is a detailed factual and legal analysis under Community law. The conclusion—if adopted by the Commission—is that the Member State has infringed the Treaty and that the Member State must remedy the situation within two months.

3. Application to the Court of Justice

After expiration of two additional months without satisfactory Member State implementation, the Commission may enter the third stage by sending an application to the Court of

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44. EEC Treaty, *supra* note 1, art. 169. Article 169 states:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Id.

Justice.[45] The Member State may express its views before, in writing, as well as during the oral hearing. Other Member States may intervene and support either the Commission or the defendant Member State.

C. *Court of Justice Action in Cases of Infringement*

If, after having completed both the written and the oral phase of the procedure and after having heard its Advocate General, the Court reaches the conclusion that the Commission's application is well-founded, the procedure finishes with a declaratory judgment. The declaratory judgment usually takes the following form: "The Court hereby declares that by not bringing into force within the periods prescribed the provisions needed to ensure the full implementation of Council Directive N . . . ., [the name of the Member State concerned] has failed to fulfil its obligations under the Treaty."[46]

Article 171 clearly establishes the consequences of such a judgment.[47] The Member State "shall be required to take the necessary measures to comply with the judgment of the Court of Justice."[48] In practice, however, there are no enforcement, financial, or other consequences of the judgment. Further Member State noncompliance with Article 171 obligations constitutes another violation of the Treaty.[49] Continued noncompliance could lead to another infringement procedure, another application to the Court of Justice and another judgment, still of a declaratory nature.

In the field of environmental protection, few national courts have requested preliminary rulings under Article 177.[50] This situation is deplorable, especially since Article 177 rulings have proved essential in interpreting and enforcing Community law in other areas of Community action.

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45. *Id.*

46. *See, e.g.*, Commission v. France, Case 312/86, 1988 E.C.R. 6315; Commission v. Netherlands, Case 96/81, 1982 E.C.R. 1791, Common Mkt. Rep. (CCH) ¶ 8841, at 7943.

47. EEC Treaty, *supra* note 1, art. 171. Article 171 provides: "If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice." *Id.*

48. *Id.*

49. *See id.*

50. *Id.* art. 177. Article 177 provides:

D. *Commission Reports on Implementation of Directives*

The Commission reports on its fulfilment of its obligation to check Member State implementation of directives in its annual report as well as in special reports to the Parliament on its monitoring of Community law application.[51] These reports have statistical annexes giving detailed information on various infringement procedures. The annual reports also contain information on Court of Justice judgments not yet executed by Member States and on the implementation of different directives in Member States.

On February 8, 1990, the EEC Commissioner in charge of environmental protection, Mr. Ripa Di Meana, "went public" because of unsatisfactory Member State implementation of environmental protection directives and execution of Court of Justice judgments in the environmental domain. In a press conference he highlighted the omissions and negligence of Member States. He mentioned the pertinent figures and stated how many infringement procedures the Commission has had to undertake so far. His declarations, which drew criticism, on both the relation to Commission procedure and to alleged incorrect Commission figures, have received wide press coverage and have had considerable political impact.[52]

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Id.

51. *See, e.g.*, COMM'N SIXTH ANNUAL REPORT, 1988, O.J. C 330/1 (1989); COMM'N SEVENTH ANNUAL REPORT, 1989, O.J. C 232/1 (1990).

52. *See Monitoring the Implementation of Community Law on the Environment: An Initial Report by the Commission* (Brussels, Feb. 8, 1990) (copy on file at the *Fordham International Law Journal* office) [hereinafter Press Conference]. These figures, produced by Mr. Ripa Di Meana in his press conference, may mislead because letters of formal notice do not yet contain the statement that there is an infringement—only reasoned opinions do. Besides, all applications to the Court of Justice are necessarily preceded first by letters of formal notice and then by reasoned opinions. Finally, the term "infringements" covers very different situations, (*i.e.*, the state of non-implementation as well as minor omissions in implementing a directive).

Procedures under Article 169 Prior to December 31, 1989

State	Letters of Formal Notice	Reasoned Opinions	Applications to the Court	Total
Germany	13	8	8	29
Belgium	27	8	7 (+ 4)	46
Denmark	5	—	—	5
Spain	45	9	3	57
France	28	6	7	41
Greece	37	5	3	45
Ireland	16	5	—	21
Italy	17	16	7	40
Luxembourg	9	2	1	12
Netherlands	18	5	2	25
Portugal	10	4	—	14
United Kingdom	18	8	5	31
TOTAL	243	76	47	366

III. *HOW TO IMPROVE THE PRESENT SITUATION*

Every directive is a direct appeal to Member States to fulfil EEC Treaty obligations. Legally, the situation is clear. In addition to the specific provisions of Article 189(3),[53] Article 5 of the EEC Treaty states the general rule that Member States shall take all measures appropriate to fulfil Treaty obligations.[54] As neither legal proceedings nor political interventions have speeded the implementing process or improved the quality of implementation, it is necessary to ask—as did Mr. Ripa Di Meana—how to improve implementation and enforcement of Community environmental law. Member States could take some initiatives; other initiatives require Community action.

53. EEC Treaty, *supra* note 1, art. 189(3). Article 189(3) provides that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.*

54. *Id.* art. 5.

A. *Possible Member State Initiatives*

1. Coordination of Member State Administrative and Legislative Bodies

At the national level, implementation of environmental directives may involve four or more ministerial departments. Those departments must agree before a legislative body may adopt national measures. This multiplicity often causes avoidable delays. Member States should therefore take steps to coordinate and speed the work of ministerial departments.

The federal or quasi-federal structure of certain Member States further complicates the implementation of directives. For example, adoption of legislation by the Belgian regions or the German Länder usually requires more time than adoption by one legislative body. Internal measures of rationalization (such as model regulations) might reduce these delays.

In certain Member States, administrative authorities can obtain a delegation from the national parliament enabling them to implement directives through administrative, rather than legislative measures. Italy has taken this step and Belgium is about to follow. Other Member States should consider taking similar initiatives.

2. Practical Enforcement Measures

Enforcement of directives would be assisted if organizations such as environmental protection associations were given standing before national courts in environmental protection matters. Member States could take initiative in enacting individual legislation giving private parties standing. At present, the rules on access to the courts differ widely from one Member State to another. Giving standing to these private associations under national law would benefit environmental protection and the enforcement of directives. The institution of an "ombudsman" for environment might serve the same purpose. Similar initiatives could apply on the Community level under Article 130s of the EEC Treaty.[55]

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55. *See id.* art. 130s.

3. Direct Commission Contact With National Administrative Agencies

Member States should allow Commission environmental services to contact directly national environmental agencies, offices, and services. The Commission may currently ask Member States for information only through cumbersome official diplomatic channels. As a result, the Commission gets limited, outdated environmental information. Direct contacts would bring environmental officials together efficiently. Direct contact could be achieved by a general procedural agreement among individual Member States and the Commission. Additionally, future directives could also include procedural provisions. Directive-specific procedures would allow the Commission to tailor procedures to suit the directive's particular character.

B. *Possible Community-Level Initiatives*

1. Choice of Regulation Over Directive

To avoid implementation problems, the regulation, rather than the directive, should serve as the legal instrument to carry out environmental policy where possible.[56] The directive is the most common legal instrument in the environmental field. A change in favor of the self-executing regulations would eliminate the problems surrounding implementation of directives.

In other Community activities, replacing directives with regulations has produced good results. For example, harmonization of customs law was, at first, accomplished largely through directives. Later, post-implementation national divergences created many difficulties. With Member State general consent, the Community produced uniform customs law using regulations and replaced existing directives with regulations.

In the field of environment protection, the newly-introduced Articles 100a and 130s give the Community a legal basis for action by directives or regulations: no further legal obstacle exists to block selection of the regulation as a legislative vehicle. Article 100a may, however, render the choice of the regulation politically difficult. Article 100a does not exclude

56. This suggestion has been put forward very strongly by Ehlermann. *See* H. SIEDENTOPF & J. ZILLER, *supra* note 3, at 225.

regulations explicitly, but after a Declaration adopted together with the Single European Act, Member States agreed that "in its proposals pursuant to Article 100a the Commission shall give precedence to the use of the instrument of a directive if harmonization involves the amendment of legislative provisions in one or more Member States."[57] Nevertheless, in July 1990 the Commission submitted a proposal for a regulation on the evaluation and control of the environmental risk of existing substances to the Council based on Article 100a.[58]

The Community recently missed a good opportunity to use a regulation rather than a directive. The Council agreed in principle during its March 1990 session on a directive on freedom of environmental information.[59] Instead of a directive, the Council could have adopted a regulation to avoid implementation problems. In the future, the Commission and the Council should examine closely every draft in order to determine whether a regulation could be drafted instead of a directive.

2. Drafting Directives to Produce Direct Effect

As long as directives remain the most important legal instrument of the Community in the field of environmental protection, emphasizing direct effect would be a way to increase independence from Member State implementation. This implies that directives would have to be drafted more closely in the style of regulations. In addition, it would be necessary to inform the public that one can compel the competent authorities to obey such directives once the deadline for implementation expires. If this idea were accepted, the problem would not be solved, but in practice the situation would be likely to improve, provided that national authorities (and not only national courts) were prepared to accept the principle of direct application of directives.

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57. Single European Act, final act, Declaration 4, O.J. L 169/1, at 24 (1987), Common Mkt. Rep. (CCH) ¶ 21,370, at 9,841.

58. *See* Draft Proposal, O.J. C 276/1 (1990).

59. The directive was formally agreed upon in June 1990. *See* Council Directive No. 90/313, O.J. L 158/56 (1990).

3. Early Commission—Member State Consultation

In his press conference, Mr. Ripa Di Meana rightly mentioned how the Commission might assist Member States during the process of implementing directives, thus contributing to easing and accelerating this process.[60] Until now, with a few exceptions, implementation was solely in the hands of Member States. The Commission intervened only when it appeared that implementation did not take place in due time or was incorrect. In the future, the Commission could be involved more closely in the implementation process. First, Member States and the Commission should start early discussions concerning implementation problems and possible solutions. To arrive at this, there should be a general obligation for Member States to consult the Commission on all legislative measures having an environmental impact. Such an obligation is already in force in the field of transport policy.[61] It would be a positive step to introduce similar rules in environment policy, thereby averting erroneous developments which could later on lead to infringement procedures. Additionally, early dialogue would help to avoid later confrontation.

4. Creation of Community Environment Funds

Another possibility for stronger commitment to the Community—also mentioned by Mr. Ripa Di Meana—is to have one or two Community environment funds following the model of the existing Structural Funds (the Regional, Social and Agricultural Funds).[62] In the past, the Parliament has repeatedly insisted that such funds be created. The funds would assist Member States financially in reducing pollution or in implementing important directives. Some of these environmental directives require considerable expenditure, for example, the Commission's proposal for a directive on municipal waste water treatment.[63] It seems certain that the adoption of this draft directive by the Council would be greatly facilitated if an

60. Press Conference, *supra* note 51.

61. *See* Council Decision of 21 March 1962, J.O. 720/23 (1962).

62. *See* Council Regulation No. 1787/84 (Regional Fund), O.J. L 169/1 (1984); Council Decision No. 83/516 (Social Fund), O.J. L 289/38 (1983); Council Regulation No. 729/70 (Agricultural Fund), O.J. L 94/13 (1970); Council Regulation No. 2052/88 (outlining tasks of Structural Funds), O.J. L 185/9 (1988).

63. *See* Draft Proposal, O.J. C 1/20 (1990).

environment fund were available to finance the heavy expenditure which the directive will necessitate.

To date, within the framework of the Structural Funds, the Commission has already made an initial Community contribution to the protection of the environment. The ENVIREG program has been alloted 500 million ECU for three years for environmental protection projects at the regional level. The program sets out precise guidelines for Member States in order to help them to reduce pollution along coastal areas by treating waste water and better managing urban waste, to enhance the natural beauty of coastlines, to scale back production of toxic industrial waste, to improve waste management, and to save raw materials and water resources.[64]

MEDSPA, with much smaller budgetary resources of only 25 million ECU for the first five-year phase, will be dedicated to helping Mediterranean regions to improve their environments, especially with regard to the treatment of urban sewage, solid waste management, management of hazardous waste, and sewage sludge.[65] Early in 1990, the Commission sent to the Council another draft proposal providing for a general environmental fund called "LIFE."[66] There can be little doubt that the adoption of these two proposals help to implement a number of expensive environmental protection directives.

Under the present rules, measures financed by the European Regional Development Fund, the European Agricultural Guidance and Guarantee Fund, and the European Social Fund must be consistent with the Community environmental policy.[67] Accordingly, payments to be made under the new funds will be suspended if the national measure is not compatible with EEC environment rules.

5. The European Environment Agency: The EEC's New Watchdog

The Community made considerable progress towards bet-

64. *See* Guidelines Established by the Commission, O.J. C 115/3 (1990).

65. Not yet published. As to the draft proposal, *see* O.J. C 80/9 (1990).

66. *See* Council Regulation No. 2052/88, art. 7, O.J. L 185/9, at 13 (1988) (outlining tasks of Structural Funds).

67. *See id.*

ter enforcement of directives when the Council agreed at its March 1990 session on the Regulation on the European Environment Agency (the "Agency").[68] In Parliament—which had to be consulted under the Article 130s procedure[69]—the Rapporteur, Mrs. B. Weber, criticized the tasks, too restricted in her view, which the Commission wished to entrust to the Agency.[70] In her view, the new authority should be entrusted with an inspection role to scrutinize the enforcement of Community directives. The resolution adopted by Parliament on March 14, 1990 followed the line taken by Mrs. Weber and stated that the field of activity of the Agency should be extended to oversight of Community directive enforcement within the next two years.[71] Remarkably, the Council accepted this amendment at its May 1990 session.[72] Article 20 of the regulation states that:

> No later than two years after the entry into force of this Regulation, and after having consulted the European Parliament, the Council shall, on the same basis as this Regulation and on the basis of a report from the Commission with appropriate proposals, decide on further tasks for the Agency in particular in the following areas:
>
> -associating in the monitoring of the implementation of Community environmental legislation, in cooperation with the Commission and existing competent bodies in the Member States.[73]

The implementation of this provision will provide precious assistance to the Commission in its role of supervising the enforcement of directives. The decision adopted by the Council is welcome, even if it will take at least two years to achieve.[74] The Parliament came back to this idea on a more

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68. Council Regulation No. 1210/90, O.J. L 120/1 (1990).

69. EEC Treaty, *supra* note 1, art. 130s. Article 130s, paragraph 1 provides: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committe, shall decide what action is to be taken by the Community." *Id.* art. 130s, ¶ 1.

70. *See* The Weber Report, O.J. C 68/37 (1990).

71. Parliament Resolution on the European Environmental Agency, O.J. C 96/113 (1990).

72. *See* Council Regulation No. 1210/90, O.J. L 120/1, at 1 (1990).

73. *Id.* art. 20, O.J. L 120/1, at 5.

74. Following a literal interpretation, the wording of article 20 suggests that the Council decision due in two years time could be adopted by a simple majority of Member States. *See* EEC Treaty, *supra* note 1, art. 148 (requiring majority vote).

general line when it adopted a Resolution on Institutional Reforms in July 1990.[75] The Parliament takes the view that "in order to be in a position to check on the implementation of Community law, the Commission must be reinforced by the creation of European Inspectorates working with or within it, most notably and urgently in the field of environment."[76]

6. Automatic Enforceability of Court of Justice Judgments

In addition, one might consider augmenting the powers of the Court of Justice in the context of the infringement procedure under Article 169.[77] A short while ago, Belgium favored this idea in an April 1990 Memorandum on EEC institutional reforms.[78] The Dublin Summit of June 1990, in an annex dedicated to the future "Political Union," picked up the idea and mentioned the question of "automatic enforceability" of the judgments of the Court of Justice.

As a practical matter, the possibility of launching a second procedure for violation of Article 171 of the EEC Treaty—because the Member State did not execute the first judgment—would be unsatisfactory. The Court may make only a declaration as to the Treaty violation. The idea of going beyond this stage and including real sanctions in Article 171 has been put into practice under the European Coal and Steel Community Treaty of 1951.[79] This first European treaty provides that if a State has not fulfilled its obligation by the time limit set by the High Authority, or if it brings an action which is dismissed, the High Authority, with the assent of the Council acting by a two-thirds-majority, may suspend the payment of any sums which it may be otherwise liable to pay to the State in under the Treaty.[80]

However, it is not certain that the Council intended a literal interpretation when it adopted the present regulation by unanimous consent. *See id.* art. 130s, ¶ 2 (requiring unanimous consent).

75. Resolution of July 1990 on Institutional Reforms, (No. A3-166) (1990) at ¶ 29.

76. *Id.* at ¶ 28.

77. EEC Treaty, *supra* note 1, art. 169; *see supra* notes 44-45 and accompanying text (discussing Article 169 infringement procedure).

78. Not yet published.

79. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140.

80. *Id.* art. 88. Article 88 provides:

Should equivalent measures be introduced in the EEC Treaty? This idea needs thorough examination. Another possibility of providing for adequate sanctions might be to give the Court the right to impose fines if so requested by the Commission, if a Member State does not end infringement within acceptable time limits after the Court's judgment. Along this line, the Parliament found it

> necessary for the Court of Justice to be given powers, to be written in the Treaties, to impose sanctions, including financial sanctions, on Member States which fail to apply Community legislation or implement Court Judgments.[81]

In any event, and whatever the merits of such a clause in the EEC Treaty might be, one should bear in mind that Member States may not consider the changes enthusiastically. Chances of their adoption are therefore slim.

7. Monitoring Clause in Directives

The task of the Commission in controlling the correct implementation of directives would be facilitated if all directives contained a clause enabling it to monitor Member State implementation. At present, a restricted number of directives require Member States to take all necessary steps to ensure regu-

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> If the high Authority considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time limit for the fulfilment of its obligation.
>
> The State may institute proceedings before the Court within two months of notification of the decision; the Court shall have unlimited jurisdiction in such cases.
>
> If the State had not fulfilled its obligation by the time limit set by the High Authority, or if it brings an action which is dismissed, the High Authority may, with the assent of the Council acting by a two-thirds majority:
>
> (a) suspend the payment of any sums which it may be liable to pay to the State in question under this Treaty;
>
> (b) take measures, or authorize the other Member States to take measures, by way of derogation from the provisions of Article 4, in order to correct the effects of the infringement of the obligation.
>
> Proceedings may be instituted before the Court against decisions taken under subparagraphs (a) and (b) within two months of their notification; the Court shall have unlimited jurisdiction in such cases.
>
> If these measures prove ineffective, the High Authority shall bring the matter before the Council.

Id.

81. Resolution of July 1990 on Institutional Reforms, *supra* note 73, at ¶ 29.

lar monitoring of quality standards. Only a few directives, however, lay down the obligation to supply the Commission at its request with all information concerning, for example, results of monitoring and inspection operations.[82] If a general clause of this type were to be inserted in all relevant directives, the Commission would be less dependent on complaints and would get a more complete overview of the implementation of the directives. It would, for instance, be in a position to check to what extent the imperative values attached to the fifty parameters of the drinking water directive—of great concern to many people in the EEC—are matched. For the moment, the Commission simply does not know and is not really in a position to ask Member States for full information.[83] New legislative initiatives are necessary to change this situation.[84]

8. Commission Use of Public Opinion

If all else fails, the Commission may always appeal to public opinion and draw its attention to the situation.[85] In the view of the Commission, pressure stemming from public opinion can improve enforcement of environment directives. Moreover, pressure from public opinion may help to improve our environment.

Another appeal to public opinion might be made by organizing annual public hearings in all Member States. These hearings on the state of the environment could be prepared by assessments of the environmental situation, to be made by experts from Member States together with Commission staff.

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82. *See, e.g.*, Council Directive No. 80/68, O.J. L 20/43 (1980) (protection of groundwater against pollution caused by dangerous substances).

83. In its answer to a parliamentarian question on the pollution caused by the herbicide Atrazine, the Commission recently had to admit that "in its efforts to determine the extent to which water supplies are polluted by this and other substances, the Commission has been hindered by the fact that Council Directive No. 80/778, O.J. L 229/11 (1980), relating to drinking water does not require Member States to report to the Commission on the quality of their water supplies." Answer to Written Question No. 985/90 by Mrs. Anne Hermans, June 1990, O.J. C 272/31 (1990).

84. The Commission recently submitted to the Council a draft directive amending certain environment directives with a view of harmonizing and rationalizing reports about their implementation. COM 287 (1990), O.J. C 214/6 (1990).

85. In his press conference of February 8, 1990, Commissioner Ripa Di Meana has already opted for this approach. He announced that the Commission would "go public" every year with a special report on the application of Community environmental law.

There is little doubt that the outcome of such hearings would result in strong support for further Community action for the benefit of Community environment and health, without much consideration for the "subsidiarity principle," enshrined in Article 130r of the EEC Treaty. The Community may take action in the environmental domain only to the extent to which environmental objectives "can be attained better at Community level than at the level of the individual Member States."[86]

CONCLUSION

At the end of this study of the European Community's experience in implementing environmental protection policy directives, two questions remain. The answers to these questions constitute at the same time a summary of the results of this study. The first question is: given the obvious weaknesses of the directive, has it failed and should it be replaced by more efficient instruments, such as the self-executing regulation? The second question is: should the policy of implementing directives be improved?

The second question has been the subject of most of this Article. The Article concludes that appropriate measures should be taken in order to improve implementation of environmental directives. Responsibility for improvement lies with Member States as well as with the European Community—combined action will be necessary. The improvements suggested in this Article for directives in the field of environmental policy are also applicable to other fields of Community policy experiencing similar difficulties with directives.

The first question, regarding choice of a legal instrument, goes far beyond the sector of environment and a definite answer could only be given following a more in-depth investigation into Community experience with directives. This reservation being made, it emerges from our sectoral study that despite the fact that implementation of directives poses problems which ought to be overcome, the directive is nevertheless the legal instrument which is more readily accepted by Member States because it fits more easily into the existing national rules. If "subsidiarity" is a valuable Community principle,[87] as

86. EEC Treaty, *supra* note 1, art. 130r (governing EEC environmental action).
87. *See id.* Article 130r, paragraph four provides:

it is commonly held, the directive will continue to play an important role in the future.

> The Community shall take action relating to the environment to the extent to which [Community] objectives . . . can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures.

Id. art. 130r, ¶ 4. *See* Giscard d'Estaing, *The Principle of Subsidiarity*, (PE 139.239) (1990); European Parliament Resolution, (A3-163) (1990). Giscard d'Estaing's recommendation of avoiding the directive in favor of the regulation whenever appropriate confirms this Author's opinion that the directive will continue to play an important role in Community environmental law. *Id.*