Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration

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Abstract

This article will deal with specific aspects of the divided-power system of the European Union and provide a legal analysis concerning federalism issues in the European Union raised before the Court of Justice that are similar to those in the United States. First, the article will reference recent U.S. case law on federalism. The bulk of the Article will concentrate on the question of whether and to what extent European Community (“EC”) directives, as legislative instruments, are capable of mandating specific courses of action to be pursued on the local or regional level in Member States. Next, the article will review case law from the Court of Justice that features the most relevant cases regarding administrative obligations based upon Community law. Lastly, the article will discuss the possible effects mandates by the Court of Justice might have on Member States and will highlight some questions that case law on this issue has yet to resolve.
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LEGAL INTEGRATION

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INTRODUCTION

Divided power or federal systems raise numerous legal questions regarding the right allocation of powers between the central entity and its constituent parts, whether those powers are legislative, executive, judicial, regulatory, or administrative. The European Union is the most interesting and probably the only international legal construction to be classified as a true divided power system. In its landmark decision *Van Gend en Loos*, the Court of Justice held that the Community constitutes a "new legal order of international law for the benefit of which States had limited their sovereign rights."2

Many academic studies have examined the question of whether the European Union can be compared to national federal systems such as the United States, Germany (sixteen Länder), or Austria (nine Länder).3 Due to recent constitutional developments, Belgium (three regions) and Spain (seventeen Autonomous Communities) must be added to the list of European countries with federal structures. In addition, there are twenty regions in Italy.

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2. *Id.* at 12, [1963] 2 C.M.L.R. at 129.
This Article will not add one more comparative study to that body of legal writing. Rather, it will deal with specific aspects of the divided-power system of the European Union. In order to familiarize the reader with those aspects, a brief reference to recent legal developments in the United States will be made. The purpose of this reference is also to offer the European reader a short overview of U.S. case law raising similar conflicts to those that are discussed by the author.

There have been several recent noteworthy developments in the U.S. Supreme Court's case law on federalism. These cases concern the ability of the federal government to legislate in matters affecting interstate commerce, to authorize suits against states in federal court, to protect individuals' constitutional rights from state encroachment, and to regulate and direct State officials. The key case decided by the U.S. Supreme Court regarding the reach of federal laws into state administration is Printz v. United States, which provides an interesting example of the regulation of state officials for European law.

The cases previously decided by the U.S. Supreme Court in this area have covered a wide range of issues such as the location of a state capital, application of labor standards such as minimum wage and overpay requirements to state and municipal employees, the status of common law, and the regulation of the disposal of low-level radioactive waste generated within a state.

In Printz, the U.S. Supreme Court struck down a federal requirement that state police officers conduct background checks on prospective gun purchasers. The U.S. Supreme Court relied on the Tenth Amendment to the U.S. Constitution to hold that the U.S. Congress could not direct state officials to carry out a federal program. The majority held that while state judges can be required to enforce federal laws, such an obligation cannot be placed on state executive officers. Justice Scalia, writing for

the majority, derived support for the enlistment of state judges into federal service from the structure of Article III and the Supremacy Clause of the U.S. Constitution, adding that “unlike legislatures and executives, [courts] applied the law of other sover- eigns all the time.”10 Imposition of a similar requirement on state executive officers, in contrast, would violate the Constitution’s “essential postulate[s],” such as the “system of dual sover- eignty.”11 The majority concluded that “the Federal Govern- ment may neither issue directives requiring the States to address particular problems, nor command the States’ officers” to “address particular problems.” The majority also determined that the Federal Government could not require states to “administer or enforce a federal regulatory program.” In addition, the U.S. Supreme Court suggested that it was not necessary to weigh “the burdens or benefits” of each case because “such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”12

The principal dissent, authored by Justice Stevens, argued that the political safeguards of federalism protect the system of dual sovereignty as long as Congress acts within the scope of an enumerated power.13 In a separate dissent, Justice Breyer added that other countries, facing similar questions of democratic accountability and the need for a balance between central and local authority, have come to different conclusions. Specifically, the dissent argued that the “federal systems of Switzerland, Germany, and the European Union” provide that “constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central ‘federal’ body.” The dissent argued that constituent states implement many such laws “because they believe that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary govern- ment, and helps to safeguard individual liberty as well.”14

Justice Scalia’s majority opinion, however, rejected Justice Breyer’s comparative analysis as “inappropriate to the task of interpreting a constitution, though it was of course quite relevant

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11. Id. at 2376.
12. Id. at 2384.
13. Id. at 2386.
14. Id. at 2404.
to the task of writing one."\textsuperscript{15}

This Article offers a legal analysis concerning similar federalism issues in the European Union raised before the Court of Justice. It is hoped that this discussion catches the attention of those having a good knowledge of European law as well as those who are more focused on comparisons of "divided power" systems.\textsuperscript{16} This Article concentrates on the question of whether and to what extent European Community ("EC") directives as legislative instruments are capable of mandating specific courses of action to be pursued on the local or regional level in Member States.

The choice of this topic has been influenced by the fact that extensive legal scholarship has thus far been devoted to questions dealing with the limitation of legislative powers between European institutions and Member States,\textsuperscript{17} the proper legislative implementation of European law by Member States,\textsuperscript{18} and the judicial interpretation and application of European law.\textsuperscript{19} Less attention has been paid to situations in which European legislation strives to commandeer state administration, including regional and local entities.

European case law provides instructive examples of techniques and legal instruments to be used by local or regional administrations to comply with precise requirements of Community directives. It follows from the rulings of the European Community's Court of Justice that, depending on the issue involved, domestic administrative bodies have to disregard conflicting national law, to go beyond those rules, or to abstain from action. The cases discussed relate to EC directives in the fields of environmental protection, public procurement, public security, and the recognition of foreign diplomas. Among all those fields, EC directives concerning environmental protection provide the best

\textsuperscript{15} Id. at 2377.

\textsuperscript{16} For a general introduction, see Deirdre Curtin, The Constitutional Structure of the Union, 30 COMMON MKT. L. REV. 17 (1933).


examples for the issues discussed in this Article. They also offer interesting starting points for legal comparisons.20

I. BASIC FEATURES OF THE COMMUNITY LEGAL ORDER

In its 1964 Costa ruling,21 the Court of Justice held that "the integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the EC Treaty make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity." The Court of Justice, continuing, determined that "the law stemming from the EC Treaty, an independent source of law, [cannot] because of its special and original nature, be overridden by domestic legal provisions, however framed."22

Regarding the obligations of state courts flowing from those principles, the Court of Justice in its Simmenthal judgment,23 declared that "a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law" must "give full effect to those provisions on national legislation, even if adopted subsequently." The Court of Justice also determined that "it is not necessary for the court to request or await a prior setting aside of such provision by legislative or other constitutional means."24

Community law thus requires that national authorities not apply a domestic rule recognized as incompatible with the EC Treaty establishing the European Community25 ("EC Treaty"),

22. Id. at 593-94, [1964] 3 C.M.L.R. at 455.
24. Id. at 644, ¶ 24, [1978] 3 C.M.L.R. at 284.
and, if the circumstances so require, take all appropriate measures to enable Community law to be fully applied. Until now, the Court of Justice has upheld those rulings by recognizing supremacy and the direct effect of Community law with respect to a wide range of EC Treaty provisions, especially in the area of the economic freedoms of the common market. National courts are therefore bound to provide the necessary legal protection for individuals. Accordingly, national rules of procedure must be applied in such a way as to prevent the individual rights created by the Community legal order from being unduly restricted.

In the **Factortame** case, the Court of Justice took protection of federal rights in state courts even further. The House of Lords had requested a preliminary ruling on the question of whether a national court is required to grant interim relief by suspending the application of a national statute in order to protect rights claimed under Community law, where that form of interim relief was not available under domestic law. The Court of Justice answered in the following way:

Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law. . . . [T]he full effectiveness of Community law would be just as much impaired if

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a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.  

Regarding the question of state liability for violations of Community law, the Court of Justice in its 1960 judgment in *Humblet*, stated that “[where] a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, . . . to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued.” Sixteen years later, the Court of Justice developed this concept in its *Russo* judgment, where it held that “[i]f such damage has been caused through an infringement of Community law the State is liable to the injured party for the consequences in the context of the provisions of national law on the liability of the State.”

The full recognition of the principle of state liability for violations of Community law was expressed in the 1991 *Francovich* decision. States now have to pay damages for losses incurred as a result of a breach of Community law. In that ruling, the Court of Justice also set out the conditions under which compensation must be paid by Member States for those legal violations. The provision in question must involve the grant of a right to individuals. The relevant rule must sufficiently identify the contents of those rights. There must be a causal link between the breach of the provision by the state and the harm suffered by the individual. The central holding of this judgment is as follows:

The full effectiveness of the Community regulations would be challenged, and the protection of the rights that they recognize would be weakened, if individuals did not have

29. Id. at 1–2473–74, ¶¶ 20–21, [1990] 3 C.M.L.R. at 29.
31. Id. at 569.
the possibility of obtaining restitution when their rights are encroached upon by a violation of Community law on the part of a Member State. The possibility of obtaining restitution by the Member State is particularly vital when the full effect of Community regulations is conditioned upon prior action by the State, and when, consequently, in the absence of such action individuals cannot enforce before the national jurisdictions the rights recognized as theirs by Community law. It is evident therefrom that the principle of the responsibility of the State for damages caused to individuals by the State’s violations of Community law is inherent in the EC Treaty.

Five years later, the Court of Justice confirmed these principles in the *Dillenkofer* judgment. In its 1996 ruling in the British Telecommunications case, the Court of Justice articulated liability principles in circumstances where a Member State had sought to implement a directive in national law but had done so incorrectly. The Court of Justice held that in view of the legislative discretion accorded to national authorities in implementing a directive, a Member State incurs liability on account of incorrect implementation only where the infringement is “sufficiently serious.” In other words, where a Member State has, in the exercise of its legislative power, manifestly and gravely disregarded the limits placed on the exercise of those powers, then it incurs liability.

II. IMPLEMENTATION OF COMMUNITY DIRECTIVES BY MEMBER STATES

One of the key features of European legal integration is the division between law-making functions of EC institutions and the execution of EC laws by Member States. From the beginning of European law-making, implementation gaps have impaired the efficiency of the Community legal order. Failure to implement

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35. *Id.* at 1-5414, ¶¶ 33-34, [1993] 2 C.M.L.R. at 72.
38. Francis Snyder, *The Effectiveness of European Community Law*, 56 Mod. L. Rev. 19 (1993). Declaration No. 19 reads as follows:

1. The Conference stresses that it is central to the coherence and unity of the
Community law takes many different forms depending on the type of measure required to comply with those rules. Under Article 5 of the EC Treaty, however, Member States are under a constitutional duty to give full effect to Community law. The attainment of the objectives of the Community requires that the rules of Community law established by the EC Treaty itself or arising from procedures that it has instituted are fully applicable at the same time and with identical effects over the whole territory of the Community. In addition, Member States must ensure that infringements of Community law are penalized under the same conditions as similar violations of domestic law.

Community legislation to be implemented and applied by Member States takes two main forms, regulations and directives. The Court of Justice has held that the provisions of a directive must be implemented "with unquestionable binding force, precision and clarity in order to satisfy the requirements of legal certainty." The Court of Justice illustrated this point in several process of European construction that each Member State should fully and accurately transpose into national law the Community directives addressed to it within the deadlines laid down therein.

Moreover, the Conference, while recognizing that it must be for each Member State to determine how the provisions of Community law can best be enforced in the light of its own particular institutions, legal system and other circumstances, but in any event in compliance with Article 189 of the Treaty establishing the European Community, considers it essential for the proper functioning of the Community that the measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law.

2. The Conference calls on the Commission to ensure, in exercising its powers under Article 155 of this Treaty, that Member States fulfill their obligations. It asks the Commission to publish periodically a full report for the Member States and the European Parliament.

TEU, supra note 25, Declaration on the implementation of Community law, [1992] 1 C.M.L.R. at 786, 31 I.L.M. at 367.

39. Snyder, supra note 38, at 23 (citing "lack of incorporation or transposition, enforcement, pre- and post-litigation non-compliance, legislative, executive and judicial non-compliance, defiance, evasion and benign non-compliance").


43. Italy v. Commission, Case C-55/91, [1993] E.C.R. I-4813, I-4872-73, ¶ 56; Fed-
cases in which it rejected the German method of transposing four environmental directives by means of administrative directives discussed in this Article. Article 189 of the EC Treaty states that directives “shall leave to the national authorities the choice of form and methods.” It is settled case law that the freedom that this provision gives Member States to choose the means by which directives are implemented does not affect the obligation to adopt in national legal systems all the measures necessary to guarantee that directives are fully effective and to achieve the results prescribed by Community law.44

The Court of Justice held that the transposition of a directive into domestic law could either be realized by formal and express incorporation in specific legislation or through the application of a general legal context provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.45

Because the German circulars did not confer individual rights, Germany was held not to have fulfilled its obligations under the EC Treaty.

It follows from those judgments that every time a directive contains provisions that create rights and obligations for individuals, legislative implementation has to be realized in such a way that the potential beneficiaries of Community directives are capable of knowing their rights so that they may invoke them.

before administrative authorities. Regarding other types of directives, the Court of Justice has accepted that the transposition of a directive may be operated in a "general legal context," but that faithful implementation is particularly important where Member States are in charge of the management of a "common heritage," such as the protection of migratory birds.

As the Court of Justice provided in its judgment of May 25, 1982, each Member State is free to delegate powers to its domestic authorities, as well as to implement directives by means of measures adopted by regional or local authorities. That division of powers, however, does not release the Member State from the obligation to ensure that the provisions of the directives are properly implemented in national law.

All national authorities must decide whether to utilize central bodies of the state or the entities of a federated state, or other territorial administration. In addition, national authorities must ensure that rules of Community law are observed within the sphere of their competence. It is not for the Community institutions to rule on the division of competence by the institutional rules proper to each Member State.

Thus, the Commission, under Article 169 of the EC Treaty, may seek a declaration from the Court of Justice that a Member State has failed to fulfill its obligations concerning the government of the Member State in question, even if the failure to act

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47. Commission v. Belgium, Case 247/85, [1987] E.C.R. 3029, 3060-61, ¶ 9, 1 C.C.E. (CCH) 175, 192; Commission v. France, Case 252/85, [1988] E.C.R. 2243, 2263, ¶ 5. On October 16, 1998, the Commission brought an action against France requesting the Court of Justice to declare that by failing to take all the necessary measures to comply with the judgment of the Court of Justice of April 27, 1988, in Case 252/85, the French Republic has failed to fulfill its obligations under Article 171(1) of the EC Treaty and to order the French Republic to pay a periodic penalty payment of ECU105,500 per day in respect of each day as from the notification of the above mentioned judgment until it complies with its obligations, O.J. C 378/10 (1998).


is the result of the action or omission of the authorities of a region or a local entity. Member States are therefore fully responsible for actions of lower authorities that infringe Community law. They may not invoke the regulatory powers of those authorities to justify non-compliance with directives. Although Member States may delegate rule-making functions to lower authorities, they must provide for the necessary stipulations so that directives are properly implemented. Member States may not plead provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive.

This principle of responsibility has been explicitly confirmed for situations where independent regional and local entities were in violation of Community law. For example, the Court of Justice held Belgium responsible for the insufficient implementation of Directive 80/778 relating to the quality of water intended for human consumption. The Court of Justice stated that a decentralized authority, in this case the Walloon Region in Belgium, must ensure the observance of the requirements of Directive 80/778 in practice. The arguments concerning the cost and complexity of the construction at the water treatment station were not accepted by the Court of Justice. In addition, the Court of Justice emphasized that lower authorities are required by national law to comply with European law and to fulfill certain reporting requirements established by environmental rules.

This obligation, however, does not absolve the Member States from their liability towards the Community.\textsuperscript{58}

The obligation arising from a directive to guarantee the result prescribed and to take all appropriate measures to ensure that fulfillment of the obligation is also binding upon state courts. It follows that, when applying national law relating to a Community directive, the domestic court interpreting that law must apply such law in light of the wording and the purpose of the directive so as to achieve the desired result.\textsuperscript{59}

Where a Member State has failed to take measures required or has adopted measures that do not conform with a directive, the Court of Justice has recognized the right of individuals affected by such violations to rely on law based on a directive against a defaulting Member State. The Court of Justice's recognition of the right of individuals occurs when the relevant provision is sufficiently precise and when it does not require other measures to be taken on the part of the Member States and does not leave discretion to the national legislature.\textsuperscript{60} A Community provision is unconditional when it is not subject, in its implementation or effects, to the taking of any measure either by the institution of the Community or by Member States.

Moreover, a provision is sufficiently precise and can be relied on by individuals and applied by the Court of Justice where the obligation is set out in unequivocal terms. This doctrine of direct effect, a term that does not appear in the EC Treaty, was first phrased by the Court of Justice twenty-five years ago\textsuperscript{61} as follows: "[T]he useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law."\textsuperscript{62}

Individuals can therefore claim substantive rights derived from Community directives against Member States without im-


\textsuperscript{62} Id. at 1348, ¶ 12, [1975] 1 C.M.L.R. at 16.
implementing legislation every time the deadline for implementa-
tion has not been met and the above-mentioned substantive re-
quirements are fulfilled. The underlying reasoning of the direct
effect of directives has since evolved to a quasi-estoppel argu-
ment that has been described by the Court of Justice as follows:
“[a] Member State which has not adopted the implementing
measures required by the Directive in the prescribed periods
may not rely, as against individuals, on its own failure to perform
the obligations which the Directive entails.”

This doctrine has been upheld by the Court of Justice ever
since then. One recent example is the meaning given by the
Court of Justice to a little-known directive adopted in 1983. Di-
rective 83/189 is designed to prevent Member States from adopt-
ing technical standards that endanger the free movement of
goods in the Community. It lays down a procedure for the pro-
vision of information in the field of technical standards and reg-
ulations. Articles 8 and 9 of the directive require that Member
States not enforce new technical provisions until the Commis-

dion has had the opportunity to examine the impact of those
regulations on the common market. Article 8(1) of the directive
provides as follows:

Member States shall immediately communicate to the Com-
mission any draft technical regulation, except where such
technical regulation merely transposes the full text of an in-
ternational or European standard, in which case information
regarding the relevant standard shall suffice; they shall also
let the Commission have a brief statement of the grounds
which make the enactment of such a technical regulation
necessary, where these are not already made clear in the
draft. Where appropriate, Member States shall simultane-
ously communicate the text of the basic legislative or regu-

C.M.L.R. 96.
64. Id. at 1642, ¶ 22, [1980] 1 C.M.L.R. at 110.
65. Marshall v. Southampton and South-West Hampshire Area Health Authority,
of the draft technical regulation.\(^6\)

In the *CIA Security International* case, the plaintiff sought an injunction based on a Belgian unfair trading-practices law of 1991 against two competitors. The plaintiff asserted that the competitors had libeled it by asserting that its alarm systems did not comply with the requirements of Belgian law. The competitors counterclaimed for an order restraining the plaintiff from marketing an unapproved system. The Belgian regulation upon which this counterclaim was based had not been notified to the Commission, as required by Article 8 of Directive 83/189.

In its judgment of April 30, 1996,\(^6\) the Court of Justice examined in great detail the legal consequences that might be derived from a Member State's failure to implement this directive. The Court of Justice held Articles 8 and 9 of the directive to be effective. It also held that the legal consequences drawn from a Member State's failure to notify a technical standard or regulation, which the Court of Justice classified as a "substantial procedural defect," were that the non-notified measure was unenforceable against individuals.\(^6\) The Court of Justice emphasized the trade-facilitating motive underlying Directive 83/189, which could have been undermined if the defendants had been entitled to rely on the non-notified national regulation, given that CIA Security's alarm system contained parts manufactured in two other Member States besides Belgium.

Regarding the legal consequences of a breach by a Member State of the obligation to notify new technical rules, the Court of Justice held that individuals may rely on Articles 8 and 9 of the directive against their national authorities. The Court of Justice also held that a procedural defect in the adoption of the technical regulations renders such regulations inapplicable so that they may not be enforced against individuals.

There are two important limitations on the effects of directives. First, even in the absence of implementing legislation, a directive cannot alone have the effect of determining the liability in criminal law of persons who act in contravention of the

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\(^6\) Id. at I-2246, ¶ 48, [1996] 2 C.M.L.R. at 798.
Similar principles apply where a Member State has introduced legislation to give effect to a directive but that legislation, although creating criminal liability, does not clearly specify all the circumstances in which that liability arises. National courts are not required, as a matter of Community law, to interpret domestic legislation in light of the wording and purpose of directives where the result would be to impose criminal liability that would not otherwise arise. Second, the Court of Justice has consistently held that even in a situation of non-implementation, a directive may not alone impose obligations on an individual and may therefore not be relied upon by another individual.

III. ADMINISTRATIVE ACTION AND COMMUNITY LAW

In 1984, the Court of Justice held that “all the authorities of the Member States, including the judicial authorities, are obliged to take all measures necessary to achieve the result envisaged by directive and in particular to interpret their national law in the light of the wording and the purpose of the directive.” This requirement includes the obligation to afford effective sanctions for breaches of EC laws. As outlined above, this Article is focused on the words “all the authorities of the Member States.” Indeed, the Court of Justice has always stressed that all public entities are under a duty to act in accordance with Community law and to protect individual rights created by that legal order. It is submitted, however, that legal scholarship so far has concentrated mainly on the phrase “including the judicial authorities,” and examined the scope of the obligations for state courts to ensure compliance with Community law.

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74. Plaza Martin, Furthering the Effectiveness of EC Directives and the Judicial Protection of Rights Thereunder, 43 INT’L COMP. L.Q. 26 (1994); GIL CARLOS RODRIGUEZ IGLESIAS & KURT RIECHENBERG, ZUR RICHTLINIENKONFORMEN AUSLEGUNG DES NATIONALEN RECHTS,
The Court of Justice has given a broad meaning to the notion of public authorities that are bound by the direct effect of directives, emphasizing that their binding nature extends to all public authorities, including private entities or organizations that are controlled by the state or that have special powers based on public law.

Administrative compliance with Community law may be even more important than judicial enforcement because judicial review of administrative action or inaction may come too late and may not provide for comprehensive compliance. It is submitted that the discussion in recent years regarding the binding force of Community law within the domestic legal order of Member States has focused too exclusively on the obligations of national courts to give full effect to Community law in judicial dispute resolution. A recent example is the legal debate surrounding the impact of Community law on national rules of judicial procedure.

In many cases, the cost of judicial review might be so prohibitive that administrative behavior is not easily challenged. Administrative action very often produces results that are not always eliminated by judicial relief. Community infringement proceedings under Article 169 of the EC Treaty are too complex to have an immediate impact upon administrative authorities in the Member States. There is general recognition that the infringement procedure under Article 169 of the EC Treaty is not a particularly efficient instrument to control the respect of Community law by Member States. Last year, the Council adopted a regulation designed to accelerate this procedure in cases of serious


violations of Community law that threaten the common market.\textsuperscript{79}

The efficient application of Community law can therefore not be entrusted exclusively to the courts where litigants may face various procedural rules that may make judicial enforcement difficult.\textsuperscript{80} Compliance with Community law on the local or regional level is also important because lower administrative bodies may face financial liabilities for violations of Community rights on the basis of the case law of the Court of Justice.

It is argued that the case law surrounding the legal effects of Community directives on national administrative action is sufficiently broad and well-established to give precise guidelines to national administrative bodies as to legal directives that are to be applied in individual cases. Those guidelines are important regardless of whether the national legislature has implemented the relevant directive.

The relevant Court of Justice rulings do not contain general instructions relating to the characteristics of national administrative action. This Article, however, concludes that national administrative authorities are under a duty to apply Community directives according to the specific stipulations contained in those instruments. Such a clarification is necessary because Member States have argued that, despite the fact that a directive has not been transformed into domestic law within the prescribed time limit, national administrative authorities are only bound to apply those provisions of a directive that are intended to create individual rights and that are sufficiently precise and unconditional for that purpose.

If Community law is to be implemented not only through domestic legislation but also through decentralized administrative action, the duty of regional or local administrative bodies to apply Community law is an essential condition for the full effect of that legal order.\textsuperscript{81} In the environmental field, for example, correct implementation of the relevant Community directives would be impossible without administrative action in accordance with those directives, regardless of whether domestic legislation

has been enacted or whether that legislation alone is sufficient to implement Community law.

The nature of many Community directives that regulate administrative behavior implies a direct mandate for the domestic administration. Denying the binding force of Community directives in such situations would amount to admitting serious defects in the implementation of Community law. Such a situation would therefore run counter to the very foundations of the Community legal order.\(^8\)

Direct effect of Community directives cannot depend on whether they create individual rights.\(^8\) For example, many environmental directives contain very precise orders for action or control that can be regulated only in a general framework by domestic legislation. In practice, these requirements can be fulfilled only by protective action of the national administration. In other words, to the extent that a given subject matter is incapable of being implemented through legislation only, it is the national administration to which the mandate to give full effect to Community law applies.

In most cases, such a mandate fits into the distribution of powers within the Member States. Direct effect as a mandate for administrative action is therefore to be distinguished from the question of whether that very same direct effect also implies the existence of individual rights. The following analysis attempts to offer a definition of administrative obligations designed to guarantee the direct effect of Community law.

IV. THE CASE LAW OF THE COURT OF JUSTICE REGARDING THE DIRECT EFFECT OF COMMUNITY DIRECTIVES IN THE AREA OF NATIONAL ADMINISTRATIVE ACTION

The case law discussed in the following part concerns a wide variety of legal situations. The common feature, however, is the question of how the Court of Justice has reached its conclusions that EC directives may mandate state authorities to apply specific provisions of EC directives. The following review of the Court of


Justice's case law features the most relevant cases regarding administrative obligations based upon Community law.

**A. Environmental Protection**

Environmental litigation in the European Court of Justice is a recent phenomenon compared with other types of litigation. Environmental cases brought before the Court of Justice and discussed in this Article can be divided into two categories, namely litigation between the European Commission and the EC Member States under Article 169 of the EC Treaty and references for preliminary rulings from national courts pursuant to Article 177 of the EC Treaty.

In the environmental field, only a small part of Community law is implemented directly by Community institutions. By virtue of the decentralized structure of the Community, which is even less amenable to unitary administration than federal bodies, protective measures are, for the most part, implemented by the authorities of the Member States. If a national court is called upon to rule on the legality of such national implementing measures, then it must take into consideration Community law that forms the legal basis for such measures and determines the results to be achieved.

Environmental litigation plays an ever increasing role because implementation and enforcement of Community directives lags behind the legislative output. European institutions have more impact on policy formulation and legislation than on implementation. The areas under the Community's jurisdiction include the whole field of environmental protection, encompassing even measures not directly linked to intra-Community trade and not necessarily involving transborder pollution. Environmental protection has become one of the most dynamic areas of legislative activity at the Community level. The European environmental policy area is characterized by complex interactions between the Community and its Member States that diverge con-

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siderably from one another in their state of environmental awareness and capacity for environmental protection.

Although some states may have stronger standards of environmental protection than those prescribed by Community directives, the overall tendency has been one of significantly upgrading most of the Member States' protection of the environment. While it is conceivable that the concept of subsidiarity might be applied in the future to this area, diluting or weakening the Community's jurisdiction, European institutions are still at the center of EC environmental policy. Not many areas have been left entirely untouched, even if the depth of Community involvement remains uneven. By the mid-1980s, virtually all aspects of environmental policy had been addressed, in one form or another, at the Community level. Air and water pollution as well as waste management have received considerable legislative attention, and the Community has also legislated in the areas of chemicals, hazardous substances, nuclear safety, wildlife, and noise.

The problem of inadequate implementation of Community legislation has various aspects. First, the actions brought by the Commission show that a significant number of Community directives on the environment are transposed incompletely or belatedly into national legislation. The number of those infringements has been constantly increasing since 1979. For example, it amounted to more than 500 between all Member States in 1990.

Second, rules of Community or national environmental law are not always monitored and enforced by administrative authorities due to a lack of personnel and technical equipment. Envi-

ronmental management, moreover, is sometimes characterized by a lack of transparency of responsibilities as well as by the fact that national officials do not always have a sufficient knowledge of EC environmental law and of the Court of Justice's case law.\(^9\)

The large number of environmental directives means that many different procedures are laid down in those acts that often concern different authorities at the same time. Additional problems arise if directives stipulate procedures that require completely new organizational structures and processes in the Member States. On the other hand, there may be problems in Member States that already apply a similar but not identical procedure. In such a case, authorities have already developed procedures and are perhaps not convinced of the need to make changes that they may perceive as unnecessary. Environmental legislation comprises a wide range of administrative obligations, such as obligations to formulate plans, to identify areas under threats, to grant permissions, to provide information, to carry out assessments and evaluations, and to enact prohibitions relating to the handling of hazardous substances, as well as general supervisory obligations.\(^9\)

Where Community environmental directives have not been complied with, various legal options exist, at least in theory, to ensure enforcement.\(^9\) If national authorities either fail to apply environmental rules to the measures that they adopt or fail to enforce the environmental laws regarding the private sector, then citizens may challenge those authorities in national courts. When a Member State is alleged to have violated environmental directives, citizens may complain to the European Commission and call upon that body to bring enforcement proceedings against the Member State under Article 169 of the EC Treaty. This option relates to various kinds of infringements, including incomplete or incorrect implementation or inadequate enforcement by the national authorities. The Court of Justice then is empowered to establish formally an infringement of Community

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92. Ludwig Krämer, Focus on European Environmental Law (2d ed. 1997).
law, but the affected Member State alone decides what conclusions to draw from the judgment and how to comply with it.

Due to the formalized nature of the procedure, it regularly takes at least two years from the commencement of the Article 169 proceedings to the Court of Justice ruling. The Commission may also initiate "urgency procedures" under Article 185 of the EC Treaty to speed up the whole process, but due to a lack of staff and documentary resources, this is rarely done.

There has been a substantial amount of litigation between the Commission and Member States regarding issues of notification, correct legislative implementation, and practical enforcement of the many environmental directives. It is questionable whether a central authority such as the Commission will ever be able to police effectively the implementation of environmental law over such a large territory as the Community. Moreover, the principle of subsidiarity, as laid down in Article 3b of the EC Treaty, speaks against any large-scale extension of administrative powers on the Community level. The preferable solution to the problem, therefore, is to promote a decentralized control of the implementation of environmental law by improving the access to national courts and to administrative procedures for citizens and organizations who act in the interest of environmental protection.

As already mentioned, the Court of Justice has held that Community law may confer substantive rights in certain areas of environmental protection. In its judgments of February 28, 1991, and May 30, 1991, the Court of Justice emphasized that the obligation imposed on Member States to prescribe certain limit values in the interest of human health, as contained in the water and air pollution directives, creates rights for all affected individuals. Accordingly, they must be able to assert their rights and to invoke those binding provisions of Community law in national courts.

Precise legislative and administrative obligations can be created from the objective to protect human health. If there is a

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lack of implementing legislation or insufficient administrative action, then Member States could be liable for the harm suffered by individuals. The question of whether an EC environmental directive is capable of creating individual rights was brought before the Court of Justice for the first time in 1987.

The problems referred to the Court of Justice were raised in proceedings brought by several producers of plastic containers, wrappings, and bags against an Italian municipality. The proceedings concerned the decision of the mayor to prohibit the supply of non-biodegradable bags and other containers in which customers carry away their purchases. The sale and distribution of plastic bags, with the exception of those intended for the collection of waste, was also prohibited.\textsuperscript{96}

The plaintiffs claimed that the prohibition was contrary to Community law. The Italian court therefore asked the Court of Justice whether Directive 75/442 on waste\textsuperscript{97} gives citizens a right under Community law to sell or to use the products named in the directives. The Italian court observed that the three directives regulated the disposal of the products governed by them, but did not prohibit their sale or use. The Italian court also asked the Court of Justice whether it followed from the directive that any draft regulation or legislative measure regarding the sale or use of the products in question that may give rise to technical difficulties in their disposal or to excessive costs of disposal must be brought to the attention of the Commission before its adoption.\textsuperscript{98}

Regarding the question whether Directive 75/442 gives individuals the right to sell or use to plastic bags and other non-biodegradable containers, the Court of Justice stressed the purpose of the directive, which it held was the harmonization of national laws regarding the disposal of waste with a view to eliminate barriers to intra-Community trade. The Court of Justice also held that the directive did not prohibit the sale or use of any product. Accordingly, it cannot be inferred that the directive prevents Member States from imposing such prohibitions in order to protect the environment. Directive 75/442 does not,


therefore, create an individual right to sell or to use plastic bags. 99

The Court of Justice added that Article 3(2) of Directive 75/442, properly construed, does not give individuals any right that they may enforce before national courts in order to obtain the annulment or suspension of national rules falling within the scope of that provision on the ground that the rules were adopted without having been previously communicated to the Commission. 100

It follows that not all EC directives in the field of environmental protection are designed to create individual rights. This does not mean, however, that they do not produce legal effects. On the contrary, if they fulfill the requirements of clarity, precision, and unconditionality described above, then they generate obligations regarding the national legislature and administration.

1. Protection of Birds

Directive 79/409/EEC 101 of April 2, 1979, on the conservation of wild birds provides the best example for a legislative instrument that requires implementation measures not only at the national but also at the regional and local level. None of the Member States incorporated Directive 79/409 into national law by a single legislative instrument or set of rules. 102 Rule-making powers in the sphere of nature conservation are often delegated to the regions, as is the case in Belgium, Germany, Italy, and Spain. Even in a country like France, the rules governing hunting are laid down partly at the departmental level. Administrative obligations to act on the basis of various protective provisions of that directive have to be distinguished from the question of whether additional legislative implementation is required. Compared to other environmental directives, there is a signifi-

cant number of judgments of the Court of Justice, beginning in 1987, that have clarified the scope of administrative obligations based upon Directive 79/409.103

Two aspects of bird protection are discussed here. First, Article 4 of Directive 79/409 requires Member States to designate special protection areas for birds that are in danger of extinction and to take measures to protect those areas. Second, Articles 7 and 9 of the directive provide for a comprehensive regulation of bird hunting.

a. Special Protection Areas

Article 4 of Directive 79/409 is the first Community directive creating comprehensive rules for the selection and management of nature habitats.104 Under the directive, Member States are required to designate special protection areas for migratory birds or other species threatened with extinction. Reflecting the seriousness of the subject matter, the selection of designated areas must be made on the national or regional level through legislation establishing a special legal status for such areas. Also, Member States must provide a framework of instruments for the management of these areas.

Section 4 of Article 4 requires Member States to take specific protection measures, including appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds. Three judgments of the Court of Justice have established precise obligations of national administrative authorities to comply with the mandate of protection established by Section 4.

The first case brought before the Court of Justice was preceded by a Commission request to stop the construction of a dike in Northern Germany. This application was rejected.105 In


its main judgment, the Court of Justice held that Member State authorities may not reduce the surface of special protection areas, except for exceptional reasons of public interest. In the *Leybucht* case, the Court of Justice recognized that both the danger of flooding and the protection of the coast constituted sufficiently serious reasons to justify the dike works, and that the strengthening of coastal structures as long as those measures were confined to a strict minimum involved only the smallest possible reduction of the special protection area. The Court of Justice's judgment provides an interesting example of the impact of a Community directive upon planning decisions by local authorities.

In 1993, the Court of Justice dealt with another action brought by the Commission, in which several local infrastructure measures in Spain were criticized for being in violation of Article 4 of the directive. In its judgment, the Court of Justice held:

although Member States do have a certain margin of discretion with regard to the choice of special protection areas, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive, such as the presence of birds listed in annex I, on the one hand, and the classification of a habitat as a wetland area, on the other.

In this case, the Commission alleged that the Kingdom of Spain had failed to fulfill its obligations under Articles 3 and 4 of Directive 79/409. The Commission suggested that Spain had failed to take certain measures to protect the environment in accordance with the ecological needs of certain habitats. It also alleged that sufficient measures were not taken to re-establish biotopes that had been destroyed in the Santoña marshes in the Autonomous Community of Cantabria. Moreover, the Commission accused Spain of not classifying certain marshes as special protection areas and not taking appropriate steps to avoid pollution and deterioration of habitats in that area.

The Commission identified a series of local measures en-

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107. *Id.* at I-930-31, ¶ 20.
108. *Id.* at I-931, ¶ 23.
110. *Id.* at I-4273, ¶ 1.
dangering bird life in the Santofía marshes, such as the construction of a road through a part of the marshes, the establishment of industrial estates, the granting of administrative authorization to a fishermen's association to farm clams in the middle of the marshes, and the discharge of untreated waste water. The Court of Justice held that Spain's actions were incompatible with the requirements of Article 4(4) of the Directive. Although the judgment is against the Kingdom of Spain, it is clear whether the Court of Justice considered local administrative action and inaction to be in violation of Community law.

These rulings were confirmed by the Court of Justice in first judgment based upon a reference for a preliminary ruling in the field of special protection areas. In 1993, the British Secretary of State had decided to designate the Medway Estuary and Marshes as a special protection area for birds. At the same time, an area of about twenty-two hectares, known as Lappel Bank, had been excluded from this area. Lappel Bank is an area of intertidal mudflat immediately adjoining the Port of Sheerness, situated within the boundaries of the Medway Estuary and Marshes. It shares several of the important ornithological qualities of the area as a whole, and it is an important component of the overall estuarine ecosystem. The designated Medway Estuary is a wetland of international importance also listed under the Ramsar Wetlands Convention for a range of wildfowl and wader species who use it as a wintering area and as a staging post during spring and autumn migration. Further, the site supports breeding populations of avocet and little tern, with area species listed in Annex I for the purpose of Article 4(1) of the bird directive.

The Port of Sheerness planned extended facilities for car storage and value-added activities on vehicles and in the fruit and paper product market in order to compete better with continental ports offering similar facilities, and Lappel Bank was the only area into which the Port of Sheerness could envisage ex-

111. Id. at I-4274, ¶ 6.
112. Id. at I-4281-84, ¶¶ 37, 41, 46, 53.
113. For another Spanish example, see James J. Friedberg, Views of Doñana: Fragmentation and Environmental Policy in Spain, 3 COLUM. J. EUR. L. 1 (Fall/Winter 1996/1997).
115. Id. at I-3848-49, ¶¶ 11, 12.
panding. Accordingly, taking the view that both the need not to inhibit the viability of the port and the significant contribution that expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude that area from the Medway special protection area.116

The Royal Society for the Protection of Birds brought an action against that decision, arguing that it was illegal by virtue of the Wild Birds Directive to consider economic considerations when classifying a special protection area. The House of Lords stayed proceedings and asked the Court of Justice whether the Wild Birds Directive allowed a Member State to take account of economic requirements when designating such an area and defining its boundaries. The Court of Justice observed that the directive prescribed the creation of a special protection area and a regime that targeted both the most endangered species and migratory species. The Court of Justice concluded that the ecological requirements laid down by the directive did not have to be balanced against the economic requirements.117

The House of Lords also considered whether the Wild Birds Directive allows a Member State, when designating a special protection area, to take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive. The Court of Justice replied that, regarding its 1993 judgment in the Santofa Marshes case, economic requirements could not correspond to a general interest superior to that represented by the ecological objective of the Directive. It follows from those three rulings that it is obligatory under Section 4 of Article 4 that special protection areas should be protected and that permission should not be granted for activities that threaten these areas.118

Regarding the designation of special protection areas, the Court of Justice in 1998 held the Netherlands to be in violation of Directive 79/409 for not having designated a sufficient number of special protection areas.119 This holding was the first time that a Member State had been condemned for its wild bird

116. Id. at I-3849, ¶¶ 13, 14.
117. Id. at I-3850-52, ¶¶ 17-27.
118. Id. at I-3853, ¶¶ 28-31.
conservation policy as a whole. The Court of Justice held that "while the Member States have a certain margin of discretion in the choice of those areas, their classification is nevertheless subject to certain ornithological criteria determined by the Directive." 120 In addition, Member States are required to designate special protection areas, an obligation that it is not possible to avoid by adopting other special conservation methods.

The Court of Justice was of the opinion that the designation by the Netherlands of only twenty-three areas of a total surface area of 327,602 hectares was insufficient in comparison with the figures published in the Inventory of Important Bird Areas in the European Community (IBA 89). 121 According to the report, there were to be seventy Dutch special protection areas covering 797,920 hectares. The Court of Justice emphasized that the IBA ornithological study is the "only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as special protection areas the most suitable territories." 122 Germany supported the Netherlands in this case, arguing that the IBA list was non-binding and discretionary. 123

At present, several cases are pending before the Court of Justice that raise questions regarding the obligations of local authorities to protect habitats of wild fauna and flora. The most interesting cases are infringement proceedings brought by the Commission against France. 124 Another case is a reference for a preliminary ruling from the English High Court, Queen's Bench Division, asking the Court of Justice whether

a Member State is entitled or obliged to take account of the consideration laid down in Article 2(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, namely, economic, social, and cultural requirements and regional and local characteristics, when de-

120. Id. at 1-3070, ¶ 60.
121. Id. at 1-3073, ¶ 72.
122. Id. at 1-3072, ¶ 69.
123. Id. at 1-3068, ¶ 53.
ciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites.\textsuperscript{125}

b. Bird Hunting

Articles 7 and 9 of Directive 79/409 provide for strict control over bird hunting. While Article 7 establishes the general rules of protection, especially with regard to nesting and migratory birds, Article 9 regulates the conditions under which bird hunting is permitted. The Court of Justice has taken a very strict position on the obligations of national administrative authorities to ensure the full effect of those protective provisions. Hunting regulation is a good example of the decentralized implementation of Community law due to the very nature of the subject matter. National legislation can only offer a general framework but is certainly unable to say when and where a certain species of birds can be hunted.

In some Member States, such as France, the rules for hunting, which were introduced long before the adoption of Directive 79/409, fail to coincide with the directive, due partly to the lobbying of pressure groups.\textsuperscript{126} Since 1987, the provisions of the directive relating to hunting restrictions have been interpreted by the Court of Justice in the context of numerous infringement proceedings initiated by the Commission against Member States.\textsuperscript{127}

In two judgments of general importance to all Member States,\textsuperscript{128} the Court of Justice held that Article 2 of Directive 79/409 is not an autonomous detraction from the general system of protection of wild birds. Specific provisions of the directive, such as Article 7(4), suggest that the effective protection of birds is necessary, as well as the "requirements of public health and safety, the economy, ecology, science, farming, and recrea-


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tion."\textsuperscript{129}

The Court of Justice's judgment of January 17, 1991,\textsuperscript{130} is the most important ruling regarding the protection of migratory birds. The Court of Justice first noted that birds' migratory movements are subject to a degree of variability that depends in part on meteorological circumstances. Thus, birds from a specific migratory species may begin their return journey to their rearing grounds earlier compared to average migratory flows. This is particularly true where the species concerned regularly travels between migration and rearing grounds that are a considerable distance apart, causing the birds to cross numerous borders. Within one species, there are different populations whose routes sometimes diverge and pass through separate areas.\textsuperscript{131}

The Court of Justice concluded that Article 7(4) of Directive 79/409 is designed to secure a complete system of protection while the survival of wild birds is threatened. Accordingly, protection against hunting activities could not be confined to the majority of the birds of a given species, as determined by average migratory movements.\textsuperscript{132} The Court of Justice also stressed that regional authorities are unconditionally bound by those protective provisions.\textsuperscript{133}

On the basis of those judgments, the Court of Justice has clearly defined the scope of administrative obligations in this field. Its ruling of January 19, 1994, was the first case dealing with a preliminary reference regarding bird hunting.\textsuperscript{134} In 1992, questions concerning the interpretation of Article 7(4) of Directive 79/409 were raised before the administrative tribunal in Nantes annulment actions. These actions were introduced by various associations for the protection of the environment as well as by hunters' associations against the decisions of the Prefets of Maine-et-Loire and Loire-Atlantique mandating the closing dates of their respective departments for the 1992-1993 hunting season. Those proceedings essentially concerned the

\textsuperscript{129} Belgium, at 3060, ¶ 8, [1989] 1 C.E.C. (CCH) at 192; Italy, at 3097, ¶ 8.
\textsuperscript{131} Id. at 1-86-87, ¶¶ 12-13.
\textsuperscript{132} Id. at 1-87, ¶ 14.
\textsuperscript{133} Id. at 1-88, ¶ 17.
provisions of the directive relating to the protection of migratory birds during their return to their rearing grounds.

The French administrative tribunal asked the Court of Justice whether the hunting season of migratory birds and waterfowl should be closed when pre-mating migration begins or when migration begins. The French administration also asked whether staggering the closing dates for hunting seasons by species was compatible with the system of protection provided in the Directive.\(^{135}\)

Under Article 7(4) of Directive 79/409, wild birds are not hunted during rearing season or during the various reproductive stages. The Court of Justice suggested that pursuant to Article 7(4), the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method that guarantees complete protection of those species during the period of pre-mating migration. It follows that protective measures that do not protect a certain percentage of a species do not fulfill the obligations of the provision.\(^{136}\) This implies a direct mandate of action for the Prefets.

The Court of Justice also noted that any hunting activity threatens to affect the state of conservation of the species concerned, independently of the extent to which it depletes numbers. The regular elimination of animals keeps the hunted populations in a permanent state of alert, which has disastrous consequences for the species.\(^{137}\) The Court of Justice referred to the risk that certain species face when their hunting season has already finished. Such species will be subject to indirect depletion owing to the confusion faced by other species who are still being hunted. The third sentence of Article 7(4) is intended to prevent those species from being exposed to depletion because they are hunted during pre-mating migration.

Article 7(4) requires Member States to take all necessary measures to prevent any hunting during that period.\(^{138}\) The Court of Justice concluded that closing the hunting season for all species when the earliest species migrates guarantees in principle that the objective laid down in the third sentence of Article

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136. *Id.* at I-93, ¶ 13, [1994] 3 C.M.L.R. at 706-07.
137. *Id.* at I-93, ¶ 16, [1994] 3 C.M.L.R. at 707.
7(4) is realized.  

The Court of Justice, however, recognized that some evidence suggests that staggering the closing dates for various hunting seasons does not impede the complete protection of the species of bird liable to be affected by such staggering. National authorities are therefore not empowered by the directive to fix closing dates for the hunting season that vary according to the species of bird, unless the Member State brings such scientific evidence forward. As a result, it is clear that if the power to fix the closing date for the hunting of migratory birds is delegated to subordinate authorities, those bodies must ensure that the closing date can be fixed only in such a way as to make possible complete protection of the birds during pre-mating migration. Article 7(4) thus imposes specific protective obligation on all administrative entities empowered to regulate bird hunting.

In 1996, the Court of Justice had to rule again on a regional Italian hunting law. In the national proceedings, the applicants claimed that in the contested measure the Veneto Region had fixed the regional hunting calendar for the 1992-1993 season in violation of Articles 7 and 9 of Directive 79/409 because hunting had been allowed during nesting and migration periods of several protected species. The applicants argued that the administrative decision had to be in full compliance with the derogation criteria laid down in Article 9 of the directive. That provision allows Member States to derogate from the restrictions and prohibitions contained in Articles 5, 6, 7, and 8 of the directive for specific reasons that are expressly and exhaustively listed, provided that the derogation contains specific details defining its scope.

In its judgment of March 7, 1996, the Court of Justice held that the derogation provided for by Article 9, which forms an exception to prohibitions, and is exhaustive as to reasons and scope, is the same kind of provision as the prohibition itself, and must, therefore, be regarded as directly effective, without any

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139. Id. at I-95, ¶ 21, [1994] 3 C.M.L.R. at 708.
140. Id. at I-95, ¶ 22, [1994] 3 C.M.L.R. at 708.
specific implementing measure. It therefore binds administrative authorities in charge of regulating bird hunting. In other words, if the regional law is found not to comply with EC law, the former will not be applied and the legal basis for the permit to hunt birds will hence have disappeared. As a result of this, the permit will be quashed, meaning that the competent authorities will be unable to act legally for as long as the national law in question has not been amended.

In its judgment of December 12, 1996, the Court of Justice held that Article 9(1)(c) means that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries. This is where breeding and reproduction of those species in captivity are possible but are not yet practical on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits. National authorities are authorized under Article 9(1)(c), however, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity. The problems would result from too many endogenous crossings. On condition that there is no other satisfactory solution, it is understood that the number of specimens that may be captured must be fixed at the level of that proves to be objectively necessary.

2. Environmental Impact Assessment

Among Community laws concerning environmental protection, Council Directive 85/337 concerning the assessment of the effects of certain public and private projects on the environment offers the most instructive example for administrative obligations. The directive does not contain any material standards for protection but is designed to promote public involvement in decision-making processes in all planning procedures where an

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143. Id. at 1-1248-50, ¶ 18-23.
144. Id. at 1251, ¶ 24-26; Maria Clara Maffei, Hunting in Italy: Freedom of Movement, 2 EUR. ENVTL. L. REV. 46 (1993).
146. Id. at 1-6800-01, ¶ 22, 27.
environmental impact assessment is required. Because of the complexity of the directive and the subject matter, all Member States have experienced a great number of difficulties with regard to the legislative implementation of Directive 85/337. In most cases, legislative implementation has required important changes in national rules of administrative procedure, as well as the establishment of new channels of communication. Those rules are often very complex owing to their regional nature and do not always refer to the same criteria as Directive 85/337 and may contain omissions or deviations.

In addition, even if implementing legislation has been enacted, the question of whether administrative authorities are under a duty to give priority to the stipulations of the directive can still arise. Such questions may arise, for example, where domestic law is unclear, incomplete, or has not made the choices offered by the directive.

In the latter case, the problem is whether Community law requires administrative authorities to make those choices as long as the national legislature has not acted. With respect to gaps or unclear provisions of implementing legislation, the question is whether administrative authorities are under a duty to interpret domestic law in a way that is in conformity with the directive and use all means of interpretation so as to achieve the results as intended by the Community legislator.

Article 2(1) of the directive provides that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environ-


150. Commission v. Germany, Case C-301/95, (ECJ Oct. 22, 1998) (not yet reported) ¶ 18-24 (holding that Member States are obliged to collect information from all national authorities in charge of impact assessment procedures and to transmit that information to Commission).


ment by virtue _inter alia_ of their nature, size or location are made subject to an assessment with regard to their effects.” According to Article 2(2), “the environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or failing this, into other procedures or into procedures to be established to comply with the aim of this Directive.” Annexes I and II of the directive list those projects in which an environmental impact assessment either must always be carried out (Annex I) or must be carried out “where Member States consider that their characteristics so require” (Annex II). In relation to Annex II projects, Article 4(2) provides that “Member States may _inter alia_ specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment.”

As shown above, after the expiration of the implementation period, administrative authorities are under a duty to give full effect to the provisions of the directive that are sufficiently clear, precise, and unconditional.153 This obligation does not depend on a prior ruling of the Court of Justice holding the relevant provisions to be directly effective.154

The first case relating to Directive 85/337 was decided in 1994.155 The plaintiffs objected to the construction of a section of a new federal highway and a by-pass in Bavaria. In their application, the plaintiffs sought the annulment of the two planning approval decisions. The environmental impact assessment process was introduced into German law on August 1, 1990. Article 12 of the directive, however, provides that Member States shall take the measures necessary to comply with the directive within three years of its notification, in other words, by July 3, 1988.156

The Bavarian Court doubted whether the provisions of the


156. _Id._ at I-3749, ¶ 9.
implementing German law could be reconciled with Directive 85/337. The court therefore raised a series of questions concerning the interpretation of this directive since the planning approvals were given without an environmental impact assessment. National legislation implementing the directive excluded from its scope planning procedures in respect of which public notice was given before national rules were implemented. In other words, the Court of Justice was asked to establish whether the Member State concerned was obliged to apply national measures implementing Directive 85/337 to a planning procedure initiated after the date for implementation of the directive but before the date on which national implementing measures came into force.

This case, therefore, raised the question whether the provisions of Directive 85/337 are sufficiently clear and precise regarding the required procedures adopted by the planning authorities. The case also questioned whether national implementing measures are needed to lay down in detail the ways and means by which the required consultations with public authorities are to take place.\textsuperscript{157}

If a directive lacks the clarity and precision needed to impose procedural requirements upon a competent authority in the absence of domestic implementing measures, the failure of a national body to comply with the procedural requirements of the directive in a case where no national implementing measures are applicable cannot, as a matter of Community law, give rise to a right of individuals to challenge the measure in national proceedings. It does not follow, however, that the directive is incapable of having legal consequences in such a case because national rules should be construed so as to give effect to relevant directives, whether the national rules in question predate or postdate the relevant directive.\textsuperscript{158}

If the competent planning authority has discretion under domestic law to take account of environmental considerations in the course of planning procedures conducted pursuant to national measures implementing Directive 85/337, then it might

\textsuperscript{157} Id. at 1-3751-52, ¶ 15.

be possible for the competent authority to approximate in practice the result contemplated by the directive. Furthermore, it could be argued before a national court that a failure of the competent authority to exercise its discretion in such a way as to approximate as far as possible the outcome of national procedures to the result contemplated by the Directive is in violation of Community law. The possibility cannot be excluded that the failure to exercise such discretion as exists under national law might give grounds for the annulment of a planning consent if the competent authority failed to take advantage of that margin of discretion as were available to it to assess the impact of a project upon the environment.

The next question is whether Article 12(1) of the directive permits a Member State to exempt projects in respect of which the consent procedure was initiated before the entry into force of the national law transposing the directive, from the European requirements concerning an environmental impact assessment. Here, the Court of Justice pointed out that there is nothing in the Directive that could be construed as authorizing Member States to exempt these projects from the procedures prescribed by Community law.

The Court of Justice emphasized the binding nature of the Community provisions for the regional road project. It follows from this ruling that the competent authorities should have applied the impact assessment procedures prescribed by the directive. The Court of Justice confirmed this interpretation of the directive four years later, emphasizing that all consent procedures initiated after the deadline for implementation of Directive 85/337 must be conducted according to the stipulations of the directive.

The question of whether a directive may produce administrative obligations that are independent of the existence of individual rights was raised for the first time in an infringement act.

tion brought by the European Commission against Germany.\textsuperscript{163} It was one of the exceptional cases where an individual situation of non-compliance with a directive was brought before the Court of Justice under Article 169 of the EC Treaty. The Commission had argued that a regional authority in Germany had infringed various provisions of Directive 85/337 by not carrying out environmental impact assessment proceedings before construction of a power station was approved.\textsuperscript{164}

The German Government challenged the admissibility of the action, arguing that only legislative non-implementation, rather than non-compliance, in individual situations may be referred to the Court of Justice under Article 169 of the EC Treaty.\textsuperscript{165} The Court of Justice rejected this challenge, holding that a Member State may not plead the fact that it failed to take the necessary measures to implement a directive in order to prevent the Court of Justice from dealing with an application for a declaration that it has failed to fulfill a specific flowing from that directive.\textsuperscript{166} The German Government also submitted that only provisions of a directive may have direct effect when they create rights for individuals and that Articles 2, 3, and 8 of Directive 85/337 do not confer such rights. The British Government supported the German position, arguing that direct effect of a directive expresses the capacity of a legal provision to give rise to rights in individuals to rely upon that provision as against the addressee of the directive in question.\textsuperscript{167}

In its judgment of August 11, 1995, the Court of Justice held that the existence of administrative obligations to comply with precise stipulations of a directive is "quite separate from the question whether individuals may rely as against the State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the Court of Justice."\textsuperscript{168} These few words contain the key statement of the Court of Justice. Accordingly, there is no link between the obligations imposed upon Member States by

\textsuperscript{164} Id. at I-2213, ¶ 1, [1996] C.M.L.R. at 216.
\textsuperscript{165} Id. at I-2219, ¶ 19, [1996] C.M.L.R. at 219.
\textsuperscript{166} Id. at I-2219-20, ¶¶ 19-23, [1996] C.M.L.R. at 219-20.
\textsuperscript{167} Id. at I-2220, ¶ 24, [1996] C.M.L.R. at 220.
\textsuperscript{168} Id. at I-2220-21, ¶ 26, [1996] C.M.L.R. at 220-21.
virtue of Community directives and the rights of individuals that may be derived from those instruments.

The Court of Justice also held that Articles 2, 3, and 8 of the directive "unequivocally impose[d] on the national authorities responsible for granting consent an obligation to carry out an environmental impact assessment." The Court of Justice did not address the question whether the directive conferred rights on individuals, nor did it even use the words "direct effect." The action failed, however, because the Commission showed that the procedures carried out by the German authorities fell short of what the directive required.

One year later, the Court of Justice again addressed the impact of Directive 85/337 on local planning procedures. This dispute concerned a Dutch zoning plan in connection with dike reinforcement measures. In the contested decision, the Pro vincial Executive considered that the line of the dike set out in the zoning plan was the outcome of a policy appraisal conducted in connection with the implementation of the Dutch Delta Law under the auspices of the Province through the coordination commission on dike reinforcement, which had weighed all types of factors against each other. Under the Delta Law, works are to be carried out in order to safeguard the land against high storm water so as to strengthen the high-water embankment. The plaintiffs whose business properties were affected by the zoning plan argued that the administrative decisions were in violation of Directive 85/337.

The Dutch court, therefore, raised various questions on the interpretation of that directive. One such question was whether Articles 2(1) and 4(2) required that, if a Member State in its national implementing legislation lays down wrong specifications or criteria within the meaning of Article 4(2) for a project listed in Annex II, then an obligation exists due to Article 2(1) that subjects the project to an environment impact assessment if the project is likely to have "significant effects on the environment by virtue of inter alia of [its] nature, size, or location." In the event that this question was answered in the affirmative, the

172. Id. at 1-5439, ¶¶ 17, 18, [1997] 3 C.M.L.R. at 29.
Dutch court asked whether that obligation has direct effect, so that it can be invoked by an individual before a national court and accordingly has to be applied by the competent authorities.\textsuperscript{173}

In its judgment of October 24, 1996, the Court of Justice noted that Article 2(1) of the directive refers to Article 4 for the definition of projects that must undergo an assessment of their effects. Article 4(2) allows Member States a certain amount of discretion because it states that projects of the classes listed in Annex II are to be subject to an assessment “where Member States consider that their characteristics so require” and that, to that end, Member States may, \textit{inter alia}, specify certain types of projects as being subject to an assessment. In the alternative, Member States may establish criteria for determining the projects that will be subject to an assessment.\textsuperscript{174}

The limitations of that discretionary power, however, are to be found in the obligation set out in Article 2(1) that projects that are likely, by virtue of their nature, size, or location, to have significant effects on the environment are to be subject to an impact assessment.\textsuperscript{175} The Court of Justice therefore stressed that a Member State that establishes criteria or thresholds at a level such that, in practice, all projects relating to dikes would be exempted in advance from the requirements of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2). The Member State would overstep its discretionary power unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.\textsuperscript{176}

The Court of Justice considered the question of whether a national court dealing with an action for the annulment of a decision approving a zoning plan is required to raise its own motion. The Court of Justice also considered the issue of whether an environmental impact assessment should have been carried out pursuant to Article 2(1) and Article 4(2) of the directive. The Court of Justice recalled that the obligation of a Member State to take all the measures necessary to achieve the result pre-

\textsuperscript{173} Id. at 1-5440, ¶ 20, [1997] 3 C.M.L.R. at 29.
\textsuperscript{174} Id. at 1-5449, ¶ 48, [1997] 3 C.M.L.R. at 35.
\textsuperscript{176} Kraaijeweld, at 1-5451, ¶ 53.
scribed by a directive is a binding obligation imposed by Article 189 of the EC Treaty and by the directive itself. This duty is binding on all the authorities of Member States. 177

Regarding the rights of individuals to invoke the provision of a directive, the Court of Justice considered case law suggesting that it would be incompatible with the binding effect attributed to a directive by Article 189 of the EC Treaty to exclude, in principle, the possibility that the obligation that it imposes may be invoked by those concerned. The Court of Justice stressed that where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts. Such an act would also be weakened if the courts were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive. 178 The Court of Justice added that "the fact that in this case the Member States have a discretion under Articles 2(1) and 4(2) of the directive does not preclude judicial review of the question whether the national authorities exceeded their discretion." 179

It follows from this ruling that Directive 85/337 does not create a direct effect in the sense of conferring enforceable rights on individuals to require an environmental impact assessment for an Annex II project, even if the particular project in question was likely to have significant effects on the environment. On the other hand, the directive is not, for this reason, prevented from having some effect because of its non-implementation. The individual has thus a procedural right through the obligation of the national court to have the national implementing provisions reviewed, but not a substantive right to require an environmental impact assessment to be carried out before construction of the dike could begin. In other words, the right recognized was not to secure any positive remedy or to have a particular result achieved, but rather the right to call for judicial

177. Id. at 1-5451-52, ¶ 55 (with references to Court of Justice's jurisprudence).
178. Id. at 1-5452, ¶ 56.
179. Id. at 1-5453, ¶ 59.
review or the right to ask the courts to ensure that the national legislature and executive, when acting in fields covered by a Community directive, comply with their obligations and do not exceed the bounds of their permitted discretion.

The national court is thus under a duty to review whether the national authorities had exceeded their discretion in establishing national thresholds or criteria. If so, the domestic provisions must be set aside. The national authorities must then take all the general or particular measures necessary to ensure that projects are examined to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.\footnote{Andrew Geddes, \textit{Locus Standi and EEC Environmental Measures}, 1 \textit{J. ENVTL. L.} 29 (1992); \textit{European Commission, Administrative Structures for Environmental Management in the European Community} (1993).}

National courts are now required not only to set aside national laws that are incompatible with clear, precise, and unconditional Community directives, but also to review the exercise of Member State’s discretion. This clearly elevates the role of national courts within the Community legal order regarding the enforcement of Community law obligations against Member States.\footnote{Peterbroeck Van Campenhout & Cie SCS v. Belgium, Case C-312/93, [1995] E.C.R. I-4599; [1996] 1 C.M.L.R. 793; Jeroen van Schijndel & Johannes van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten, Joined Cases C-430-431/93, [1995] E.C.R. I-4705, [1996] 1 C.M.L.R. 801.} Consequently, where a court may raise its own motion pleas pursuant to national law based on a binding national rule that was not put forward by the parties, it must analyze whether the legislative or administrative authorities of the Member States exceeded their discretion under Articles 2(1) and 4(2) of the directive.

In addition, the court must take account when examining the action for annulment. If that discretion has been exceeded, causing the national provisions to be set aside, then the authorities of the Member States, according to their respective powers, must take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.
ture projects often involve numerous parties and oblige local or regional authorities to take into account requirements as established by Directive 85/337. Pending case C-435/97 provides a good example. It is also the first reference for a preliminary ruling drafted in German by the administrative court for the German-speaking Bolzano province of Italy. The dispute concerns the procedure for the approval of a project for the reconstruction of the Bolzano Airport. In particular, the Court of Justice considered a decision of the Regional Government of the Autonomous Province of Bolzano-South Tirol. The works and facilities proposed were the renewal and extension of the existing runway, construction of access roads, car parks, a control tower, a departure building, and a hangar. The Italian administrative court considered whether, if the directive has been incorrectly transposed, Article 4(2) in conjunction with Article 2(1) is self-executing in the sense that the authorities of the Member State are required to subject the projects at issue to an environmental assessment.

3. Access to Information

Article 6 of the Environmental Impact Assessment Directive requires that information gathered in connection with the relevant procedures is made available to the public. It also mandates that "the public concerned is given the opportunity to express an opinion before the project is initiated." Five years later, the Council adopted a more far-reaching legal instrument designed to enhance the individual's ability to bring legal action in this field. This directive grants an individual right of access to information and entitles every person who considers that a request for information has been unreasonably refused, ignored, or inadequately answered by a public authority, to seek judicial or administrative review of the decision in accordance with the relevant national legal system. The directive is one of the Community instruments that is about to provoke profound changes in national administrative law. For example, Article 3 establishes a

right for individuals to receive environmental information that is in possession of public entities.

There can be very little doubt that this provision can be relied upon by individuals directly even if Article 3 has not been translated into domestic law provided that no other rights are affected by disclosure. Problems, however, could arise if a third party enjoyed some constitutional right to the information requested because of its privileged nature (personal or business data) and if that third party in addition were able to rely on due process principles as recognized by constitutional law, such as the right to be heard before an administrative decision.

In such a situation, the administrative body would be under an obligation to exercise its powers of scrutiny under domestic law and also follow the internal procedure of legal control established by Article 4 of Directive 90/313. As far as the final decision is concerned, however, non-disclosure on grounds of conflicting individual constitutional rights would be seen as a proper legal determination. In such a case, judicial review would be the forum for the final balancing test. In addition, the Member States must create a means of review. Article 4 provides for judicial or administrative review where a person is refused the desired environmental information.

In 1998, the Court of Justice dealt for the first time with a reference for a preliminary ruling as to the construction of this directive. It held that Article 2(a) of Council Directive 90/313 is to be interpreted as covering a statement of views given by a countryside protection authority in development consent proceedings if that statement is capable of influencing the outcome of those proceedings with respect to interests pertaining to the protection of the environment.

B. Public Procurement

In its simplest form, public procurement means the purchase of goods or services by the state. It is subject to rules at the Community level, with the aim of creating tendering procedures that are transparent and do not place suppliers in other Member States at a disadvantage. Regulation is considered to be

186. Id. at 1-3833, ¶ 22.
necessary in order to counteract closed markets and the tendency of the State to influence the procurement of public bodies as a means of favoring national industry at the expense of suppliers located elsewhere in the Community.\footnote{187}

Although equality in public procurement procedures is important to the achievement of the single market, the EC Treaty does not contain any specific provision governing this field and, consequently, European legislation is primarily to be found in the various directives relating to procurement adopted since 1971. In order to make adequate provision for the different considerations required to regulate public works, public supplies, and services, the procurement directives were adopted by the Council dealing with each of the different subject matters. They lay down specific requirements as to the procedures to follow before public contracts are awarded.

The rules regarding participation and advertising in directives coordinating the awarding of public contracts are intended to protect tenderers against arbitrariness on the part of the contract-awarding authority. Such protection cannot be effective if a tenderer is not able to rely on those rules as against the contract awarder and, if necessary, to plead a breach of those rules before national courts.\footnote{188}

The objective of Directive 71/305 is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional, or local authorities and of other legal persons governed by public law. The wide scope of the notion of "authorities awarding contracts" in Article 1(b) of the directive is evidenced by a 1992 ruling of the


Court of Justice,\textsuperscript{189} which involved the Complutense University in Madrid. The Court of Justice held that the university had violated Articles 9, 12, 13, 14, and 15 of Directive 71/305 when it awarded contracts for the extension and renovation of buildings for the Faculty of Political Science and Sociology.\textsuperscript{190}

Due to the public nature of most academic institutions in Europe, they are covered by the various EC procurement directives. A case pending before the Court of Justice involves the applicability of Article 1 of Directive 92/50/EEC, 93/36/EEC, and 93/37/EEC to the University of Cambridge as a "contracting authority."\textsuperscript{191} The above-mentioned definition comprehensively describes the state and all organs exercising state derived powers.\textsuperscript{192}

In addition, Article 2(1)(a) of Council Directive 90/531 has introduced the concept of "public undertaking," which is also covered by Community law and which is defined as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it." A dominant influence will be presumed on the part of public authorities where they hold a major part of the undertaking's capital, control the majority of voting shares, or where they may appoint more than half of the members of the undertaking's administrative, managerial, or supervisory bodies.

This is consistent with the purpose of the procurement directives, namely, to ensure that public procurement is carried out in a manner free from government influence that might cause the entity in question to procure on a nationalistic or a discriminatory basis. For that purpose, the Council enacted a special directive on the coordination of the laws, regulations, and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.\textsuperscript{193}

In 1993, the new supplies Directive 93/36\textsuperscript{194} was enacted.

\textsuperscript{190} \textit{Id.} at I-2006, § 16, [1994] 2 C.M.L.R. at 632.
This directive aligns the definition of contracting authorities to that contained in the works directive. To that end, the works directive definition of contracting authorities in Article 1(b) provides that "contracting authorities" shall be the state, regional, or local authorities, bodies governed by public law, associations formed by one or several of such authorities, or bodies governed by public law. These include the following entities:

- those established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,
- those having legal personality, and
- those financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

The same definition is contained in Council Directive 93/3795 of June 14, 1993, concerning the coordination of procedures for the award of public works contracts. The Court of Justice’s judgment of January 15, 1998, confirmed that the Austrian State Printing Office is a "body governed by public law." In a similar ruling, the Court of Justice held the Regional Assembly of Flanders to be in violation of the same directive.

As shown by those examples, administrative compliance with EC public procurement rules is probably more important than judicial review of administrative decisions. Once a contract has been awarded, there are obvious limits to the remedies that might be available in judicial proceedings. Administrative

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respect of Community law is especially important in this field because judicial review may not provide for adequate financial relief if a public contract has been illegally awarded. Problems regarding the administrative implementation and application of EC public procurement directives have since been raised in a great number of infringement actions since 1976.199

One of the key provisions of the first public procurement directive is Article 29(5) of Directive 71/305, which provides the following:

If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.200

In 1982, the Court of Justice held with regard to Article 29, that the directive’s rules concerning participation and advertising are intended to protect tenderers against arbitrariness on the part of the public authority awarding the contract.201 To that end, the directive sets out requirements regarding publication. Because no specific implementing measure is necessary for compliance with those requirements, the resulting obligations incumbent on the Member States are sufficiently precise and unconditional. The directive’s rules concerning participation and advertising are intended to protect tenderers against arbitrariness on the part of the public authorities awarding the contract.

The Court of Justice takes the view that the significance of the provisions of Directive 71/305 extends beyond the mere harmonization of laws. By restricting the discretionary nature of decisions regarding participation on a tender procedure and ensuring their transparency, those provisions seek to give undertakings in the Community equal access to the activities in question without any overt or disguised discrimination. Consequently,


the provisions of Directive 71/305 must be directly applicable where an individual relies on them in order to protect his right to participate in the tender procedure.

Article 9 of Directive 71/305 is of special importance. It allows for an exception from the prescribed tender procedure in case of an "unforeseeable event" or "extreme urgency" that renders the observance of the time-limit laid down by other procedures impossible. This provision, however, must be construed narrowly.\(^2\) As may be inferred from the Court of Justice's jurisprudence, Article 9 of Directive 71/305 is directly applicable.\(^2\) Member States are also required to provide for appropriate legislative implementation so as to enable companies to know their rights in procurement procedures. Internal administrative instructions are not sufficient in that respect.\(^2\)

In the first judgment based upon a reference for a preliminary ruling in the field of public procurement,\(^2\) the Court of Justice addressed whether a body that was an administrative authority independent of the state was covered by the public procurement rules. The Court of Justice stated that a body that was not technically part of the state administration would nonetheless be regarded as a state body where its composition and functions were laid down by legislation and where it depended on the authorities for the appointment of its members, the observance of the obligations arising out of its measures, and the financing of the public works contracts that it awarded.\(^2\) This judgment also emphasized that the rules of Directive 71/305 on the economic and technical suitability of candidates, as well as on the criteria to be used for the award and on the publication of these criteria (Articles 20, 26, and 29) may be invoked by an individual before national courts.\(^2\)

The key judgment in the field of public procurement is the


\(^2\) Id. at 4655, ¶¶ 11-12, [1990] 1 C.M.L.R. at 301-02.

\(^2\) Id. at 4661-63, ¶¶ 38-44, [1990] 1 C.M.L.R. at 306-07.
Costanzo\(^{208}\) ruling of June 22, 1989. This case concerned the award of a construction contract to extend, modernize, and roof a soccer stadium in the City of Milan for the 1990 World Championship. The City Council decided in 1987 that the tendering procedure for the work should take the form of a restricted invitation to tender. The criterion chosen for awarding the contracts was the greatest discount from the basic amount. The City Council further decided that tenders that offered a percentage discount greater than the average percentage divergence of the tenders admitted plus ten percentage points will be considered anomalous and considered eliminated.

Fratelli Costanzo, the plaintiff in the national proceedings, was a member of a consortium of several undertakings that took part in the tendering procedure. In 1987, the Municipal Executive Board of Milan disqualified the tender submitted by the consortium of which Costanzo was a member. The decision to disqualify was based upon the consideration that the tender was abnormally low. By the same decision, the Municipal Executive Board awarded the contract to another consortium of undertakings\(^{209}\).

Costanzo challenged the decisions of the Municipal Executive Board and the Municipal Council in proceedings before the competent administrative court. It claimed that the contested decisions were illegal on the grounds that they were based on a law that was incompatible with Article 29(5) of Directive 71/305. The incompatibility resulted because the law could not provide for the automatic exclusion of tenders considered abnormally low due to the directive allowing such expulsion only after the parties concerned have been heard. The Italian court stayed the proceedings and submitted several questions to the Court of Justice for a preliminary ruling\(^{210}\).

Among the problems raised by the Italian court was the question whether administrative authorities, including municipal authorities, are under the same obligation as national courts to apply Article 29(5) and to refrain from applying provisions of


\(^{210}\) Id. at 1853, ¶¶ 12, 13, [1990] 3 C.M.L.R. at 244.
domestic law that are in conflict with Community law.\textsuperscript{211} In its answer, the Court of Justice first emphasized that whenever an individual relies upon "self-executing" provisions of a directive in a situation of non-implementation in proceedings before a state court, the same must apply to all other state authorities that are equally bound by the relevant provisions of a Community Directive.\textsuperscript{212} In its key statements the Court of Justice held:

It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a Directive which fulfill the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the Directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a Directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

The answer to the fourth question must therefore be that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.\textsuperscript{213}

It follows from this ruling that even regional or local administrative bodies are responsible for the proper application of Community public procurement directives. The reasoning of the Court of Justice is even more significant as it did not follow the opinion of the Advocate General, who had rejected the theory

\textsuperscript{211} Id. at 1856-57, \textsuperscript{212} Id. at 1857, \textsuperscript{213} Fratelli Costanzo SpA v. Comune di Milano, Case 103/88, [1989] E.C.R. 1839, 1857, \textsuperscript{2} 31-33, [1990] 3 C.M.L.R. 239, 248.
that administrative authorities could be bound by Community directives. He had argued that the risk of "wrong interpretations" and the lack of adequate legal protection against administrative action precluded the direct effect of a Community Directive. The reasoning of the Advocate General was as follows:

The sole question is whether it is possible to oblige them under Community law to do so. In my view it is not possible, because it is not open to the administrative authorities to refer the matter to the Court of Justice and obtain a ruling on the direct applicability of the relevant provision of the Directive. If it applies the directly applicable provisions of a Directive and disregards conflicting national law, it does so at its own risk and without the endorsement of the Court. In my opinion they are entitled to act in this manner but are not obliged to do so, because the EC Treaty does not afford it the requisite legal protection for doing so.214

The Attorney General's arguments do not carry much conviction. First, administrative authorities are under a duty to examine all relevant points of law before taking a decision. No distinction can be made between national and Community law.215 The risk of wrong interpretations therefore concerns both national and Community law. In any case, that risk is inherent in all types of administrative action, and it is accepted every time the legislator grants jurisdiction over an certain area of law to an administrative body. Second, all Member States provide for some kind of internal review of administrative action.

The Court of Justice emphasized the importance of legal protection of all participants in a public tender, but it did not take a position on the question of whether third party rights might constitute an obstacle to the direct effect of Community directives. Any positive direct effect, however, of a public procurement provision in favor of a company that has been excluded from the bidding process in violation of the applicable directive only entails an indirect effect on another company whose business expectations might be diminished. In any event, public procurement directives are not directed against any po-

potential bidder but are rather intended to prevent unjustified exclusions from the bidding process.

Those directly applicable provisions, in fact, often require the public administration to fulfill certain administrative activities by reference to the directive itself as the sole, direct, and immediate discipline. In such a way, these provisions were created in favor of the legitimate interests of individuals. An example of this can be found in the directive issued for the co-ordination of national procedures for the award of public works contracts.

This directive contains extremely detailed norms, by means of which the administrative activity of the state and other public entities for the award of such contract is disciplined. The direct norms regulate the contents of the calls for tenders and their publications and norms that establish the criteria in the award of the contract. All the provisions center on regulating the exercise of powers by the administration and as such are therefore apt to create legitimate interests.

Duties deriving from clear, unambiguous, and unconditional directives can therefore be upheld in front of all authorities of Member States. It follows that a provision of a directive that satisfies the conditions for direct effect and that has not been implemented by national law is binding to all organs of the administration, including decentralized authorities and municipalities. On further analysis, this cannot be seen as an unexpected development, if one considers that this conclusion was already implicit in the position of the Court of Justice on the powers of national judges when faced with national legislation contrasting with Community law.

During the past seven years, the Commission has brought an increasing number of infringement actions against Member States for violations of public procurement directives in individ-

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In addition, the preliminary reference procedure serves as an avenue of jurisdiction regarding the implementation of the EC procurement directives. These developments show the impact of these EC rules on national administrative proceedings.

In most of these cases the parties accept that the relevant directives are directly effective and are to be applied by the public administration, even though, at the time they enter into force, they will not yet have been transposed into national law. The Court of Justice's assessment of procurement directives has been progressively refined and broadened. For example, the class of public agencies against which directives can be relied on has been widened. Among the infringement procedures brought by the Commission, the most interesting examples are those that relate to violations of procurement directives by lower state authorities.

In 1994, the European Commission instituted legal proceedings against Germany for failing to publish the information regarding the award of a public contract for dredging work on the Ems river, as required by European legislation. The Water and Inland Waterway Navigation Board of the City of Emden awarded the contract to a German firm through a negotiated procedure without prior publication of the call for tender in the Official Journal of the Community.

According to the board, it was urgent to carry out the dredging work to enable a shipyard to meet its commitments, which in their opinion justified resorting to an accelerated procedure without publication in the Official Journal. The Court of Justice rejected the argument of the German authorities that it was

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220. Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH, Case C-54/96, [1997] E.C.R. I-4961, [1998] 2 C.M.L.R. 237. In its judgment of September 17, 1998, the Court of Justice dealt with the scope of the direct effect of Directive 92/50/EEC, O.J. L 209/1 (1992). In particular, the Court of Justice discussed whether the procedural remedy available for public supply and public works contracts had to be available also for public service contracts. The Court of Justice decided that it is for the national court to determine whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.
222. Id. at I-1952-53, ¶¶ 4-5.
urgent to act, emphasizing that the consequences of any delay in delivery of a boat could not justify resorting to the negotiated procedure, especially because the decision to dredge the Ems had been made in 1989. In addition, the procedures that would have done less injury to the rights of competing companies if they had been observed would only have lasted fifty-five days. The Court of Justice also held that the delay caused by an unexpected refusal of the Weser-EmS Regional Authority to grant approval for the works was not an unforeseeable event. 223

Also, the fact that public procurement directives require Member States to establish independent bodies responsible for review procedures brings awarding authorities closer to the reach of Community law. Two instructive examples are provided by recent Austrian references for preliminary rulings. In its judgment of September 24, 1988, 224 the Court of Justice dealt with the effects of Directive 89/665 on procedures for public supply and public service contracts and Directive 92/50 relating to the award of public service contracts upon a regional sickness insurance fund that had excluded the plaintiff from the bidding process for the award of a transportation contract. The Court of Justice affirmed that the insurance fund was bound by the stipulations of both directives and that the plaintiff was entitled to rely upon the provisions of Directive 92/50 in the absence of domestic legislation implementing Community law. 225

Another judgment decided the same day 226 concerned an invitation to tender for the supply of buses for regional transportation services. In that judgment, the Federal Procurement Office of Austria asked the Court of Justice whether an individual may derive from Directive 92/13 regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors. 227 The Federal Procurement Office questioned whether a specific right existed to have review proceedings conducted before authorities, courts,

223. Id. at 1-1954-57, ¶ 14-20.
225. Id., slip op. at 1-12, ¶ 42-47.
or tribunals complying with Article 2(9) of that Directive, which is so precise and specific that, in the event of non-transposition by a Member State, the individual may rely on the provision. In addition, the Federal Office requested that the Court of Justice determine whether the adjudicating court must disregard procedural provisions of national law if they impede or prevent a review procedure from being effectively conducted.\textsuperscript{228}

The Court of Justice held that in order to construct domestic law in conformity with Directive 92/13 and to protect the rights of individuals effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring review proceedings in relation to awards of public contracts in the water, energy, transport, and telecommunications sectors.\textsuperscript{229} The national court must, in particular, verify whether the right to bring review proceedings can be exercised before the same bodies as those established to hear applications for review concerning the award of public supply contracts and public works contracts. The Court of Justice added that if domestic law cannot be constructed in conformity with the stipulations of Community law, the aggrieved individual is entitled to claim compensation for the damage suffered as a result of the failure to transpose the directive within the prescribed time limit.\textsuperscript{230}

There are cases in which national courts have independently recognized the direct applicability of the public procurement directives.\textsuperscript{231} Also, several preliminary references pending before the Court of Justice are based upon the assumption that lower state authorities are bound by EC directives on public contracts.\textsuperscript{232}

\textsuperscript{228} EvoBus Austria, slip op. at I-6, ¶ 13.
\textsuperscript{229} Id., slip op. at I-7-8, ¶ 19.
\textsuperscript{230} Id., slip op. at I-8, ¶ 21-22.
\textsuperscript{232} Case C-258/97, O.J. C 271/9 (1997) (pending case) (concerning questions raised by Independent Administrative Senate for Carinthia (Austria) regarding effects of Directives 89/665/EEC and 92/50/EEC upon regional hospital); Case C-264/97, O.J. C 271/10 (1997) (pending case) (regarding questions raised by Administrative Court of Justice of Sardinia regarding obligations of City of Cagliari resulting from Directive 92/50/EEC); Connemara Machine Turf Co. Ltd. V. Coillte Teoranta, Case C-306/97 (ECJ Dec. 17, 1998) (not yet reported) (holding that Coillte Teorante, Irish Foresting Board, is contracting authority within meaning of Article 1(b) of Directive
C. Deportation of Foreign Nationals on Grounds of Public Security

The free movement of persons within the common market is guaranteed by Article 48 of the EC Treaty. Pursuant to Article 48(3), however, states retain certain reserve powers relating to public policy, public security, and public health, which may be employed to limit that freedom. Directive 64/221 was created to implement that provision and to secure the coordination of national measures concerning the movement of foreign nationals. It applies to all measures affecting entry into a Member State, issue and renewal of residence permits, and expulsion of foreign nationals.

The Court of Justice, however, has emphasized that the power to derogate from the fundamental principle of free movement is exceptional and must be interpreted restrictively. The provisions of the directive are therefore designed to limit the discretionary power of national police authorities. Individuals may consequently invoke those provisions in administrative and judicial proceedings against measures of national police authorities restricting the free movement of persons in the Community.

The key judgment in this field is the 1974 ruling of the Court of Justice in the Van Duyn case. The Court of Justice held that the terms of Directive 64/221 regarding the legal grounds allowing deportation of an EC citizen from a Member State are preemptory. The Court of Justice emphasized that
measures taken on grounds of public policy or security should be based exclusively on the personal conduct of the individual concerned.\textsuperscript{239} This ruling is a clear mandate for police authorities, which are directly bound by the Court of Justice’s interpretation of Community law, no matter what kind of measures domestic law might allow. In addition, the Court of Justice held that individuals must be able to rely on this protective design before administrative authorities and national courts.

Article 8 of Directive 64/221 ensures that the Community national gets the same legal remedies as are available to the state’s own citizens, with respect to acts of the administration regarding any decision about refusing entry, renewal of a residence permit, or ordering expulsion.\textsuperscript{240} Accordingly, there must either be full right of appeal with suspended effect going beyond a mere assessment of the legal validity of the decision or at least review of the decision to exclude a Community national exercising or seeking to exercise Treaty rights by an independent authority.

The judicial authority reviewing the decision must be in a position to examine the facts and circumstances, including the discretionary factors on which the measure was based. The judicial authority should also be able to determine whether the measure restricting the right of free movement was proportionate to the interference of this fundamental right. Judicial review, however, might not always be the most efficient means to control the legality of administrative action. This is why Article 9 of Directive 64/221 deals with situations in which national law does not provide for judicial review. It requires Member States to provide for minimum guarantees of administrative due process.\textsuperscript{241}

\textsuperscript{239} Id. at 1349-51, ¶ 16-24, [1975] 1 C.M.L.R. at 16-18.
\textsuperscript{241} Article 9 of Directive 64/221 provides as follows:

1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defense and of assistance of representation as the domestic law of that country provides for.
It is settled law that the purpose of Article 9(1) is to ensure minimum procedural safeguards for persons affected by a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit. That provision applies where there is no right of appeal to a court of law, or where such appeal cannot have suspensory effect. It envisages the intervention of a competent authority other than the authority empowered to take the decision. In proceedings before that competent authority, the person concerned must enjoy such rights of defense and of assistance or representation as are provided for by the domestic law of that country.

The Court of Justice has also held that the purpose of the intervention of the competent authority referred to in Article 9(1) is to enable an exhaustive examination of all the facts and circumstances to be carried out before the decision is finally taken, including the expediency of the proposed measure. This means directly effective obligations for administrative bodies in charge of public security.

D. Recognition of Foreign Diplomas

Freedom of establishment and freedom to provide services in the common market require the recognition of professional qualifications acquired in other Member States. Regarding Articles 52 and 59 of the EC Treaty, the Court of Justice has established that, when the competent authorities of a Member State receive a request to admit a person to a profession to which access, under national law, depends on the possession of a diploma

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This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit of ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defense in person, except where this would be contrary to the interests of national security.


or a professional qualification, such authorities have certain duties. They must take into account the diplomas, certificates, and other evidence of qualifications that the person concerned has acquired in order to exercise the same profession in another Member State. By making a comparison between the specialized knowledge and the abilities certified by those diplomas and the knowledge and qualifications required by the national rules, the Community has found it necessary to adopt a series of directives designed to facilitate the recognition of foreign diplomas. Those directives contain specific obligations for all national authorities and all other bodies that are competent to issue certificates acknowledging the equivalence of foreign diplomas.

Council Directive 89/48/EEC, dated December 21, 1988, introduced a general system for the recognition of higher-education diplomas awarded on the completion of professional education and training of at least three years' duration. Article 3 refers to the competent authorities for the individual decisions of recognition. Depending on the internal educational structure of each Member State, those bodies can be administrations, schools, universities, or even professional associations. Although Member States have to provide for the general legal framework for the recognition of foreign diplomas, the above-mentioned bodies have to make the individual decisions.

In addition, professional bodies must enroll the holders of foreign diplomas in their registers. Every time national law
does not provide for a legal basis for those administrative decisions, the criteria for recognition established by Community directives become the point of reference for the competent authorities. One of the major problems in the application of Directive 89/48 is the recognition of diplomas of unregulated professions.

In the Aranitis case, the plaintiff asked the Berlin City Science and Research Department for a declaration that his Greek diploma was equivalent to the German diploma awarded on completion of a comparable course. The City Department considered that the applicant could not rely on the directive because it applied only to taking up regulated professions, which did not include the profession of geologist in Germany. It authorized him therefore to use the title attaching to his diploma only in its original Greek form. In brackets, it added the literal translation “Geologist with a Diploma.”

Under Article 1(c) of Directive 89/48, a “regulated profession” is the regulated professional activity or range of activities that constitute that profession in a Member State. Article 1(d) defines “regulated professional activity” as “a professional activity, in so far as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma.”

In its judgment of February 1, 1996, the Court of Justice held that Article 1(c) and (d) of Directive 89/48/EEC provides that a profession cannot be described as regulated when there are no laws, regulations, or administrative provisions in the host Member State governing the taking up or pursuit of that profession or of one of its modes of pursuit, even though the only education and training leading to the profession consists of at least four and one half years of higher-education studies for which a diploma is awarded and, consequently, only persons possessing that higher-education diploma ordinarily seek employment in that profession.

In 1997, the question of liability of an administrative autho-
ity as a result of a wrongful application of a directive in the field of recognition of diplomas has been referred to the Court of Justice. In this case, which is pending before the Court of Justice, a German regional court has asked several questions. First, if an official of a legally independent public law body of a Member State breaches primary Community law when applying national law in the context of an individual decision, can the public law body be held liable as well as the Member State? Second, if yes, then where a national official has either applied conflicting national law against Community law, or has applied national law in a manner that does not comply with Community law, is there a serious breach of Community law simply on the ground that the official had no discretion in making his decision? Third, where a national of another Member State has been recognized in the host Member State as having the status of a dental practitioner but does not hold a diploma mentioned in Article 3 of Directive 78/686, may the competent authorities of the host Member State make the admission of such person to treat patients affiliated to social security schemes conditional upon his having the knowledge of languages that he needs for the exercise of his professional activity in the host state?

The defendant authority had previously refused the plaintiff enrollment in the register of dentists on the ground that he had not completed the two-year preparatory training period. The plaintiff then brought an action against that decision arguing that there had been an infringement of the EC Treaty, which was later referred to the Court of Justice for a preliminary ruling.

In its judgment of February 9, 1994, the Court of Justice held that, in examining whether the requirement under national law of a preparatory training period had been fulfilled, the competent national body was obliged to take the plaintiff's professional experience into account. Taking such experience into account might include the fact that a dentist was authorized to treat patients affiliated with social security schemes in another Member State. In the present action, the plaintiff claims compensation for the loss that he alleges that he has suffered be-

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cause, between 1988 and 1994, his earnings were lower than those that he could have expected had he worked as a dentist treating patients affiliated with social security schemes.

In this case the Court of Justice must determine whether the plaintiff derives a right to compensation directly from Community law. As shown above, every Member State is liable under the EC Treaty for loss and damage caused to individuals as a result of breaches of Community law for which the state can be held responsible. So far the case law of the Court of Justice has dealt only with situations of non-implementation of Community law by national legislatures. Case C-424/97\(^5\) raises the issue of wrongful administrative conduct for the first time. In this case, Germany may be found liable, as may the defendant as the public law body who made the wrongful administrative decision. The question of whether the two may be claimed against, or whether a claim should be made against both cumulatively, has not yet been clarified by the Court of Justice.\(^5\)

**CONCLUSION: PROBLEM AREAS AND FUTURE CONFLICTS**

As shown, it follows from the case law of the Court of Justice that where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if individuals, domestic administrations, or courts were precluded from taking that mandate into consideration. Consequently, a Member State that has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations that the directive entails.

Thus, wherever the provisions of a directive are, as far as their subject-matter is concerned, unconditional and sufficiently precise, those provisions may, in the absence of implementing

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254. Salomone II, C-424/97 (pending case).
measures adopted within the prescribed period, be relied upon as against any national provision that is incompatible with the directive. They may also be asserted against public authorities. The question whether a Community provision fulfills those requirements should be answered on a case-by-case basis including the legislative history and the economic context in which those provisions have been adopted.

Member States that have delegated law-making and administrative functions to lower authorities are required by virtue of Articles 5 and 189 of the EC Treaty to ensure that those authorities comply with the directly applicable provisions of Community directives. Moreover, as shown by a review of the Court of Justice’s case law, those regional or local bodies are themselves bound by Community law and might be liable if they break those rules.

Even in Member States where no executive powers are delegated to lower authorities, the very nature of many directives in the environmental field implies that protective obligation can only be performed on a local level. For example, Article 6(3) of Directive 92/43/EEC of May 21, 1992, on the conservation of natural habitats and wild fauna and flora,\(^{256}\) prescribes that:

> [a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.\(^{257}\)

Article 6(3) can only be properly applied by local bodies in charge of protection of natural habitats.

As highlighted by the Court of Justice’s case law regarding Article 4 of the Wild Birds Directive, the administrative obligations in the field of habitat designation and habitat protection


\(^{257}\) Id. art. 6(3), O.J. L 206/7, at 11 (1992).
are quite clear and are capable of being implemented by competent authorities. The Court of Justice’s jurisprudence has identified a number of objective criteria, such as the presence of endangered species and status as an internationally recognized wetland, which can easily be applied by regional or local authorities. In case of doubt, the Court of Justice has explicitly allowed the use of scientific studies and publications in the area of fauna and flora.

The only problem that could arise in this context is that positive protective action might not be covered by the jurisdiction of the administrative body in charge, especially if such actions could infringe property rights guaranteed by national constitutional law. In comparison, a refusal to act, (i.e., a grant of authorization for an activity that might harm birds in a special protection area), could probably be justified on the ground of the binding direct effect of the aforementioned provision. In any case, no invitation to act is necessary. This is to protect those habitats that would be directly affected. The body in charge of such habitats has to act every time that it comes across circumstances that might endanger the special protection area or threaten the quality of the habitat.

Denying the binding force of Community directives in such situations would therefore amount to admitting serious deficits in the implementation of Community law and run counter to the very foundations of the Community legal order. Because many environmental directives contain very precise orders for action or control that can be regulated only in a general framework by domestic legislation, protective action by lower administrative entities is essential to achieving common standards of protection in all Member States. In other words, to the extent that a given subject matter is incapable of being implemented through legislation only, it is the national administration to which the mandate to give full effect to Community law applies. In most cases, such a mandate fits into the distribution of powers within the Member States.

The direct effect of Community law, therefore, does not only relate to the protection of individual rights, but also ex-
tends to objective parameters of administrative action, especially regarding planning authorizations or building permits. This argument finds support in the above cited *Costanzo* ruling in which the Court of Justice emphasized that "if individuals . . . may rely upon provisions of a Directive before national courts, this is because the obligations following from those provisions apply to all administrative bodies of the Member States."^{259}

The possibility to invoke the provision of a directive as an individual right is therefore not the prerequisite, but simply the result of the direct effect of such a provision. In other words, direct effect as a mandate for administrative action is to be distinguished from the question of whether that very same direct effect also implies the existence of individual rights. The Court of Justice has upheld this definition of administrative responsibilities in the previously cited case *Commission v. Germany.*^{260}

It has been argued that administrative authorities cannot be expected to comply with directives that have not been implemented in the Member State because they do not have the ability to refer questions regarding the proper interpretation of Community law to the Court of Justice.^{261} Indeed, this faculty is reserved to judicial bodies. All other avenues of information, however, are available to national administrators to clarify doubts about the meaning and the scope of directives.

Given the dynamics of European legal integration, all national administrators can be expected to know the relevant directives and, if necessary, the jurisprudence of the Court of Justice interpreting those instruments. Lack of knowledge of documentary resources is therefore not an adequate reason not to apply Community law. Information and legal advice for administrative bodies are essential to enable them to apply Community law. Because the technical enforcement of EC environmental law begins at the local level, local authorities have a special responsibility.

Administrative action must take into account all provisions of Community law capable of having a direct effect.^{262} For ex-

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260. *Supra* note 164.


262. *See* Opinion of Advocate General La Pergola, Commission v. Ireland, Case C-
ample, provisions should be precise and clear enough to be applied in an individual situation. Here, interpretation of domestic law, in light of the stipulations of Community law in accordance with the guidelines established by the Court of Justice, plays a key role.

The Court of Justice has no power to inflict sanctions for failure to comply with its judgments in the preliminary reference procedure. It therefore depends on the implementation of its judgments on national courts and administrative authorities. The requirements of effective application of Community law also extend to the operation of national rules of administrative and judicial procedure. Procedural conditions laid down by national law for claims based on Community rights "may not be less favorable than those relating to similar claims" based on rights under national law. Similarly, national procedural rules "may not be framed so as to render virtually impossible the exercise of rights conferred by Community law." The Court of Justice’s case law establishes that "Community law does not preclude a national court from examining of its own motion." the application of Community law, and compatibility of national legislation with its requirements.

It follows from the case law that administrative authorities must disregard or leave unapplied all those rules of domestic law that are in conflict with provisions of directives that are sufficiently clear and precise in their scope. Also, where domestic law is ambiguous or open to interpretation, or where it contains explicit mandates for administrative bodies to fill in the gaps, those entities have to use their powers according to the directions given by Community law, including the Court of Justice’s case law.

Administrative authorities must be held responsible for interpreting these rules in conformity with the purposes of the directive. Although this might result in a certain degree of legal uncertainty, it is the duty of administrative bodies to make determinations as to whether the procedures established by the directive have to be followed. In making this decision, the Commu-

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nity definition should prevail over national definition. Of course, any administrative decision is subject to judicial review by domestic courts and the Court of Justice under the preliminary reference procedure.

The fact that by way of direct application of Community law, rights or legal expectations of third parties may be affected cannot lead to different results. As demonstrated above, Community law supercedes conflicting national laws. Also, third parties are supposed to know the scope and the meaning of Community law, especially in the field of common market rules, such as directives on public procurement. For example, the Court of Justice has emphasized that legitimate expectations recognized under national law may not be invoked against Community rules in the area of state subsidies. Third parties may therefore not rely upon the concept of legal certainty to claim the exclusive application of national law.

From a legal point of view, environmental and public contracts directives require new approaches and innovations in many states. Directive 85/337 is probably the best example of these challenges. This is evidenced by numerous domestic legal controversies about the legislative procedure to be applied, the implementation procedure, and the determination of the competent authorities, especially in states with advanced legal systems. This directive shows that it is above all those states with a highly differentiated legal system that face technical legal problems when transposing and applying Community legislation.

Another open question is whether domestic law allows administrative authorities to overrule national law for the benefit of Community law. In Germany, for example, opinions are divided as to whether administrative bodies are entitled not to apply provisions that in their legal analysis violate superior rules of law and, if not, what are the ways and means to obtain a determination on the legal problem involved. Legal scholarship in Germany is divided over the problem of whether administrative bodies enjoy a Verwehrungsbeugnis. In other words, scholars question the right of administrative bodies to refuse to apply a law

265. Translation: Right to ignore or to overrule a legal provision.
that they consider to be unconstitutional. Under Article 101 of the German Constitution, courts may refer such a question to the Federal Constitutional Court. The academic discussion in Germany has little practical relevance due to the efficient machinery of judicial review, which normally answers all questions regarding possible conflicts between national legislation and the constitution.

Even if administrative authorities were entitled, under German constitutional law, to overrule conflicting domestic law and to apply Community provisions, the problem remains as to whether it can be expected from an individual official to act in such a way. The official might be subject to disciplinary measures if he fails to follow domestic law. It might be too much to ask a local official to choose between conflicting legal options, especially if the official is bound by internal instructions.

The question is whether in the case of application of a statute contrary to Community law, the official has the same room to maneuver as the legislature does. The line between a case in which a statute contrary to Community law is to remain unapplied and a case in which a statute, despite its wording to the contrary, must be interpreted in accordance with Community law, is an extremely fluid one. Another factor to be taken into account is that in case of administrative decisions in individual cases, in determining whether a serious breach has occurred, reference must be made to the complexity of the facts considered by the body in question, difficulties in applying the regulations, and the question whether the contested decision was based on an erroneous, but excusable, interpretation or an inexcusable mistake.

The state is bound to pay compensation for unlawful acts or omissions of its bodies in the exercise of their administrative functions. It is not, however, possible as a rule for acts and omissions of state bodies in the exercise of the legislative task of the state to set in motion the mechanism whereby the state incurs civil liability where such acts are issued or such omissions brought about by bodies of the legislative authority or by executive bodies especially empowered for that purpose, that is, unless those acts or omissions affect the constitutionally protected personal or social rights of those administered.

All national legal systems recognize that administrative au-
authorities acting within their area of jurisdiction are entitled and, in fact, are required to evaluate all aspects of law before taking a decision. This must include Community law.\textsuperscript{266} In certain areas, such as tax law, administrative authorities are even capable of laying down general rules of application. The area of discussion only concerns the question of to what extent administrative authorities are entitled to decide against the written law. Constitutional law, especially by order of higher authorities, is probably not at the disposition of administrative authorities. Also, problems arise when mandates of Community law require positive action that might not be covered by the scope of jurisdiction of the entity concerned.

These are the most important questions that the case law of the Court of Justice has yet to address. The United States' experience in this field and its definition of hard core state sovereignty could provide beneficial guidelines for the European Union.\textsuperscript{267} The question of whether there are limits mandating state officials is still unanswered. Further clarification can only be provided by a case-by-case analysis from the Court of Justice. The author hopes that the present study makes a contribution to the discussion of this issue.
