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Achieving Full Effectiveness of Community Law: The Court of Justice's Third Stage of Enforcement Rules Implementation, Compliance and Effectiveness: Emerging Issues on Compliance and Effectiveness within the European Union

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EMERGING ISSUES ON COMPLIANCE AND EFFECTIVENESS
WITHIN THE EUROPEAN UNION

The panel was convened at 9 a.m., Friday, April 11, by its Chair, Ingrid Persaud, who introduced the panelists: Roger J. Goebel, Fordham University School of Law; Jacquelyn MacLennan, Forrester, Norall & Sutton, Brussels; and Joseph Weiler, Harvard Law School.

REMARKS BY INGRID PERSAUD*

Today we will be considering the experience of the European Union (EU) as a possible model for international law. We will start with Roger J. Goebel, director since 1984 of the Center of European Union Law, Fordham Law School.

ACHIEVING FULL EFFECTIVENESS OF COMMUNITY LAW:
THE COURT OF JUSTICE’S THIRD STAGE OF ENFORCEMENT RULES

by Roger J. Goebel**

Overview

Historical perspective on the evolution of European Community (now Union) Law. The evolution of European Community law has been characterized by almost cyclical bursts of legislative activity reaching a plateau before movement to new levels. Thus, in the 1960s, the Community adopted regulations to achieve its Common Agricultural Policy (CAP), to enable initial implementation of the four freedoms of goods, services, workers and capital, and to set in place initial competition rules. In the 1970s, emphasis shifted to legislation in the field of services and establishment (e.g., company and securities laws, rules on access to professions), together with legislative action programs in the fields of social policy, environmental protection and consumer rights. After a pause in the early 1980s, the 1985 European Commission White Paper on Completing the Internal Market launched the 1992 internal market program. Thus, in the late 1980s and early 1990s, more than 500 important pieces of legislation were enacted in the following fields: financial law (banking, securities, insurance); intellectual property (trademarks, copyright and related rights); competition (merger regulation); technology (television, telecommunications); public procurement; and professional rights. Flanking its efforts to attain the internal market, the Community has also adopted major new legislation in the field of employee rights, together with legislation to achieve its current environmental protection and consumer rights programs. From the current plateau, efforts are now underway to achieve the Economic and Monetary Union.

The judicial role in the attainment of effective Community rules. A system of legislative rules depends on serious judicial enforcement in order to achieve full success. The Court of Justice of the European Communities early assumed a critical role in assuring the legal effectiveness of the Treaties and Treaty-based secondary legislation, and has maintained that position to this day. Indeed, some court judgments have catalyzed legislative efforts and have molded the substantive rules governing specific legislative

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fields (e.g., the influence of the German insurance judgment case\(^1\) on later financial industry directives).

Three stages can be discerned in the Court of Justice’s doctrinal development centered on achieving the effectiveness of Community law, and in this presentation I will emphasize the current, third stage. The Maastricht Treaty has implicitly endorsed some of the Court’s doctrines, notably in Article F’s guarantee of fundamental rights and Article C’s reference to the *acquis communautaire*, which is commonly believed to include the leading Court of Justice constitutional doctrines. The Maastricht Treaty also enhances the effectiveness of EC Treaty Article 169 proceedings against member states for failure to comply with European Community Treaty obligations through its amendment of Article 171 to enable the European Commission to propose, and the Court of Justice to award, penalty payments to be made by a recalcitrant state. But no use to date has been made of this provision, which may not prove to be of great importance in practice.

*The Court of Justice’s First Contributions to the Effectiveness of Community Law: The Doctrines of Treaty Primacy and the Direct Effect of Treaty Articles*

*The primacy of Treaty law.* In its landmark judgment in *Costa v. ENEL*,\(^2\) the Court of Justice enunciated the doctrine that the member states had “limited their sovereign rights,” and effected a permanent transfer of power to the “new legal order” of the Community, so that the European Community Treaty took primacy over any domestic rules. In subsequent cases, most recently *Factortame I*,\(^3\) the Court of Justice has developed its primacy doctrine to assert that the European Community Treaty and secondary legislation under it prevail over both written and unwritten national constitutional norms. The Court’s doctrinal source lies in EC Treaty Article 164, stating the Court’s duty to “ensure that in the interpretation and application of this Treaty the law is observed,” and in Article 5, imposing on member states both the duty “to ensure fulfillment of [Treaty] obligations” and the duty to “abstain from any measures which could jeopardize the attainment of the objectives of this Treaty.” The Court’s doctrine of Treaty primacy has gradually been accepted by several state supreme and constitutional courts, though not without continuing challenges from the German Constitutional Court.

The concept of Treaty primacy is at the core of all other Court doctrines intended to achieve the efficacy of Community law, because it achieves the binding nature of the Court’s own judgments.

*The direct effect of certain Treaty provisions.* In *Van Gend en Loos*,\(^4\) another audacious judgment of the fledgling Court of Justice, the Court held that certain provisions of the European Community Treaty could have direct legal effect such that individuals and enterprises could claim Treaty-based rights in member state courts, prevailing over contrary national rules. This direct-effect doctrine has great practical importance, since it enables Treaty-based rights to prevail over contrary national rules even in the absence of Community secondary legislation to achieve the Treaty-based rights.

The doctrine also avoids the necessity to wait for the European Commission to sue member states under Article 169 to challenge the contrary state rules, important since the Commission often lacks the resources (and sometimes the political willpower) to act. The

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Court’s doctrine is again rooted in the idea of the Community’s “new legal order,” which grants to individuals “rights which become part of their legal heritage.”

In Van Gend en Loos and later judgments, the Court has ascribed direct effect to those Treaty articles, or parts thereof, which are clear, precise and absolute in their terms; are aimed at achieving individual rights; and do not necessarily require Community or member state legislation for their effective application. The Court has found many substantive Treaty articles to have direct effect, for example, Article 30 on free movement of goods, Article 48 on free movement of workers, Article 52 on the right of establishment and Articles 59–60 on the free provision of services. In each instance, this has enabled individuals and enterprises to assert their rights effectively in court proceedings against their own or other member state governments in cases where Community secondary legislation is lacking, or is inadequate or insufficiently broad. As noted above, some of the Court’s judgments have in turn catalyzed the European Commission and the Council of Ministers into embarking on new legislative programs, or have helped provide substantive content to the form of proposed legislation.

In a few instances, the Court has even held that a Treaty article can have horizontal direct effect, meaning that an individual or enterprise can invoke the article in a private legal action to gain rights against or impose obligations upon another individual or enterprise. This has occurred in the field of competition law, EC Treaty Articles 85–86, and with regard to the right of equal pay for equal work between men and women, Article 119. A well-known recent judgment on football association rules that impeded the free movement of professional players strongly suggests that Article 48 on free movement of workers may also have horizontal direct effect.

The doctrine of the direct effect of Treaty articles has enabled individuals and enterprises to challenge successfully a wide variety of national measures, not only to eliminate rules that discriminated based on nationality, but also to strike down national rules that cannot be objectively justified on grounds of compelling state interests. Thus, the doctrine has proved to be a very successful, substantive supplement to Community harmonization of legislation with a view to attaining an internal market in which the four freedoms are fully achieved.

**The Second Stage of Court Enforcement: The Doctrine of Direct Effect of Certain Directives**

The doctrine of direct effect of directives. In the European Community Treaty category of legislative measures contained in Article 189, regulations are to have “general application” and be immediately binding, “directly applicable in all Members States”—rather like U.S. federal statutes. In contrast, under Article 189, directives, while binding, represent legislative rules that member states are to implement with a “choice of form and methods”; that is, the states have the discretion as to how the Community directives shall be incorporated into their own codes, statutes, regulations or other binding legal instruments. Somewhat surprisingly, the Court of Justice concluded in the Van Duyn judgment that certain provisions in directives that member states had either not implemented at all in their legal system, or had only inadequately or improperly implemented, could be invoked by individuals in member state courts to claim rights against their states, setting aside, if necessary, contrary provisions of national law.

Although the doctrinal basis initially was not altogether clear, the Court now seems to rely on a sort of estoppel theory, namely, that a state should not be able to set up its

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failure to implement a directive in due time, or to implement it adequately and properly, against a claim of right based upon a proper application of the directive. The test applied in determining whether a directive provision can have direct effect was taken over from that used in deciding if Treaty articles can have direct effect, namely, whether the directive as a whole, or one of its provisions, accords rights or creates obligations that are clear, precise, absolute and do not require discretionary application by state legislators or rule makers.

The doctrine has occasionally been used to grant rights to individuals and enterprises when a state law fails to implement a directive within the prescribed period, for example, the Sixth Value-Added Tax Directive in Becker. More common, and having greater impact, are the cases in which the Court has concluded that a state has too narrowly or improperly implemented a directive, or has enacted or maintained other rules that contradict a directive’s terms, for example, Ratti (Italy’s retention of rules that violated terms of the Dangerous Solvent Directives); Marshall 1979 (United Kingdom state agency retirement rules violated the Directive on Equal Treatment in Working Conditions for Men and Women); Sindesmos Melon10 (Greek rules on state intervention in distressed companies violated the shareholder-protection provisions of the Second Company Law Directive). Thus, the doctrine of direct effect of certain directive provisions has had a substantial beneficial impact in ensuring the proper harmonization of state laws and the complete and proper application of directive-created rights and obligations.

Many directives or directive provisions do not meet the clear, precise and absolute language test, for example, Defessa della Cava11 (the waste prevention and recycling directive only sets general framework standards for state authorities, which have discretion in implementation). The doctrine has, moreover, been only reluctantly accepted by supreme and constitutional courts, notably in France and Germany, and has met with mixed reactions from academic commentators.

Finally, the Court of Justice has refused to extend the doctrine to provide horizontal effect of directives, that is, to permit private actions between individuals or enterprises based upon a nonimplemented directive, or an improperly implemented directive. The Court’s decision to this effect in Faccini Dori12 was taken despite the urging of three Advocates General who argued that granting horizontal direct effect to directives represented better policy. The Court has confirmed its view to the contrary in El Corte Inglés.13

**Interpretation of state rules to conform to directives.** Related to the doctrine of direct effect of directives is the Court’s doctrine that member states should interpret their rules, in cases of doubt, to accord with principles set forth in directives. Thus, in Marleasing,14 even though Spain had not yet adopted the First Company Law Directive because the period to do so was not over, the Court held that Spanish courts should interpret unclear provisions of the Spanish civil code in a manner consonant with the directive’s rules. In

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9 Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), 1986 E.C.R. 723.
Habermann-Beltermann, the Court held that a German court should interpret German Civil Code-based case law principles in a manner best reflecting the approach of the directive on equal treatment of men and women in the workplace. The doctrine reflects another example of the way in which Community harmonization directives are providing principles that infuse and modify traditional national code or case law principles.

The Third Stage of Court of Justice Enforcement: Achieving Effective Remedies for Community Rules

Introduction. It is a legal maxim that there exists no true right if there is not a sufficient remedy for violation of the right. The European Community Treaty itself authorizes a system of regulatory penalties only for competition law (Article 87), although the power to create market organizations for agricultural products under Article 40 has been deemed to include the power to create administrative fines and penalties. The traditional view of the European Commission and Council of Ministers legal services has been that the Community cannot set a specific system of penalties to enforce internal market harmonization rules, but can only mandate within a directive that states create appropriate systems of enforcement. Thus, Council Directive 89/592 on insider dealing declares in Article 13 that states shall set the penalties for infringement of the rules, but adds that “the penalties shall be sufficient to promote compliance” with measures taken pursuant to the directive.

The Court of Justice has now stepped in to ensure that there will be real teeth in the enforcement of Community rules, especially directives.

The doctrine that Member States must create adequate and effective remedies for violation of Community legislative rules. In earlier judgments, the Court followed the approach of permitting states to set procedural and substantive rules for the enforcement of EC regulations and directives that parallel the rules used to enforce similar domestic regulation. Thus, in Rewe-Zentralfinanz, Germany was permitted to set reasonable periods of limitation for the filing of claims for the refund of health inspection charges levied in violation of an EC agricultural health inspection regulation.

Later, in Von Colson, the Court was more rigorous in interpreting the directive on equal working conditions for men and women, holding that state action must be “sufficiently effective to achieve the objective of the directive.” The Court specifically declared that the German regulatory sanctions must constitute “real and effective judicial protection” for employees, with a “real deterrent effect on the employer,” concluding that traditional German civil damage rules granting only nominal out-of-pocket expenses would not represent an adequate penalty when a prospective employer discriminated against women in hiring prison personnel.

The Court has now amplified this doctrine in Marshall II, in which the issue was whether a woman who was retired against her will in violation of the equal workplace treatment directive could be limited in securing remedial damages by a ceiling applied to all employee rights claims pursuant to UK labor relations law. Citing Von Colson, the Court of Justice made clear that the plaintiff’s recovery must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be “made good in full.” In

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consequence, the United Kingdom’s arbitrary damage ceiling must be disregarded. Indeed, the Court even cited reinstatement in the job as a possible alternate remedy. The *Marshall II* judgment is all the more noteworthy because the Court rejected the argument of the United Kingdom which contended, in reliance on *Rewe-Zentralfinanz*, that its damages ceiling should be respected because it was not set unreasonably low, and because it applied equally to any violation of domestic employee rights law.

*Marshall II* has far-reaching implications for many internal market, social, environmental protection and consumer rights measures. The European Commission currently is reviewing the level of penalties set by member states for violation of a number of directives, notably those regulating money laundering and insider trading, to see if Article 169 proceedings are warranted for insufficient penalties or enforcement. However, thus far the Court has refused to require that a state must create criminal penalties to enforce an internal market rule, provided the civil penalties are "effective, proportionate, and dissuasive."20

Another important recent judgment came in the Commission’s Article 169 proceeding against the United Kingdom for its failure to adequately implement the directive providing employees with information and consultation rights in the event of a collective redundancy.21 The Court of Justice held that the British penalties set to ensure that employees fully complied with the worker information and consultation rights arising out of a collective dismissal were not adequate. Referring to a state’s obligations under Article 5 of the Treaty, the Court held that while a state has the choice of penalties, and can normally parallel its usual domestic procedural and substantive rules, nonetheless the state’s penalties must be “effective, proportionate and dissuasive.” Since the British penalties under its usual domestic rules were not deemed to be sufficiently effective or dissuasive, the Court held that the U.K. had not properly implemented the collective redundancy directive.

*A new enforcement mechanism: making a member state liable in damages in its own courts for a violation of Treaty obligations.* The Court’s latest doctrine developed in response to the need to deal with a state’s failure to implement a directive whose provisions could not be given direct effect, with the consequence that individuals appeared unlikely to receive any relief. In *Francovich*,22 when Italian workers could not claim back pay from a guarantee fund for insolvent enterprises because Italy failed to create such a fund in accordance with a directive, the Court held that Article 5 required Italy “to make restitution for the damages caused [to the employees by Italy’s] violations of Community law.” The *Francovich* judgment set a three-factor test to determine when this recourse in damages was appropriate: (a) the directive must grant specific rights to individuals, (b) the nature of the right must be clearly identifiable, and (c) the state’s violation must cause the damage suffered by the individual.

*Francovich* was quickly followed in the instance of defective and inadequate implementation, rather than total nonimplementation of a directive, in *Miret*.23

Far more important is the Court’s recent conclusion in *Brasserie du Pêcheur* and *Factortame III*24 that member states could be liable to damage in their own courts to individuals who suffer because of the state’s violation of Treaty rights. Since Germany’s

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20 Case C-7/90, Criminal Proceedings against Vandevenne, 1991 E.C.R. I-4371 (involving road transport driving hours).