INTRODUCTION

Law has always been a basic instrument and a central symbol of European integration. Yet today the effectiveness of European Community law increasingly seems in issue. Even in ordinary circumstances, this state of affairs would raise serious questions of law, policy, politics and social theory. Stimulated by the Maastricht Treaty on European Union, however, it has converged with and fuelled an emerging debate on the future of western Europe. Two important strands in this debate concern, on the one hand, the merits of different ways of ensuring the effectiveness of Community law, and, on the other hand, the institutional structure of future European society and the relations between its component parts. This article focuses mainly on the first strand, but it also seeks to contribute to the wider debate.
The article has three specific purposes. First, it considers some of the principal means which are currently used to ensure the effectiveness of Community law. 'Effectiveness' is taken to mean the fact that 'law matters: it has effects on political, economic and social life outside the law - that is, apart from simply the elaboration of legal doctrine.' By its emphasis on the social context in which law operates, as well as in its interdisciplinary character, this definition is broader than the legal doctrine of 'effectiveness,' either 'procedural' or 'substantive.' It includes - but is not limited to - implementation, enforcement, impact and compliance.

This article is concerned not only with the nature of effectiveness but also with its legal and institutional preconditions. The European Community has a complex institutional structure. The effectiveness of Community law depends on Community institutions, Member States, corporatist arrangements, pluralist politics, policy networks, and individuals. This article focusses on two Community institutions, the Commission and the Court of Justice. Consequently, its second purpose is to present a systematic reinterpretation of these institutions, including their basic processes, tools and techniques, with regard to the task of ensuring the effectiveness of Community law.

For this purpose, it is necessary to draw on both law and


4. The extent to which efficiency is a prerequisite of effectiveness, in the sense either of a specific relation between costs and benefits or of a particular quality of decisions, lies outside the scope of this article.


other disciplines. In addition to charting the development of certain aspects of legal doctrine, this article thus may illustrate some of the ways in which our understanding of Community law, and in particular of Community institutions, may be enriched by a contextual method.  

On the basis of this discussion of different institutional arrangements for ensuring the effectiveness of law, the third purpose of the article is to pose several normative questions. What division of labour should prevail among Community institutions in ensuring the effectiveness of Community law? Are existing institutions adequate? If not, what gaps exist, and how might they be filled? What is our vision of future western European society? Do we have any criteria and any processes by means of which choices about the future can be made? These questions direct our attention to the connections between the purposes of the Community, its rules and processes, and its institutional structure. They help us to consider whether the institutions of the present are adequate for the future. This article aims to put these questions on the legal and political agenda.

The remainder of the article is divided into three main parts. The first of these identifies the nature of non-compliance in the contemporary Community legal system, and then considers the effectiveness of Community law as a problem of policy and theory. The following two parts discuss different responses to non-compliance with Community law: administrative negotiation of effectiveness by the Commission, and the development of a judicial liability system by the Court of Justice. Each of these two parts presents a heuristic model, designed not to give a comprehensive account of the institution, but instead to identify some of its main features in the light of the issue of the effectiveness of Community law. In conclusion, a systematic comparison is proposed between the two sets of institutions, processes, tools and techniques. It is also argued, however, that administrative negotiation and improved adjudication should not be envisaged as alternatives. Instead they should be developed in tandem, if necessary following appropriate modifications in the two institutions and changes in the institutional structure of the Community. It is further suggested that neither the Commission and the Court of Justice taken together as institutions, nor negotiation and adjudication taken together as processes, despite their merits, are sufficient alone to ensure the effectiveness of Community law. Instead, further changes in both the institutions and the processes of the Community are necessary in order to ensure the effectiveness of Community law in the future.

I COMPLIANCE, IMPLEMENTATION, ENFORCEMENT AND EFFECTIVENESS

The New Challenge of Compliance

The deadline for the completion of the internal market passed at the beginning of the year. The deadline was not legally binding, but this does not mean that it has had no effect. On the contrary, its practical consequences stand as a tribute to the brilliance of specific individuals and organisations in elaborating strategies for further integration, as well to the instrumental and symbolic use of law by organisations without recourse to legal force.  


In addition, the mere fact that the 1992 deadline was stated in the Single European Act, and consequently in Article 8A EEC, focused a fierce spotlight on the effectiveness of Community law. It led to a concentration by politicians, administrators, judges, lawyers and academics on implementation, impact and compliance. This in turn highlighted many achievements but also revealed numerous problems. The latter centred on the transposition of Community directives and national compliance with Community law, including Court of Justice decisions. These concerns were to culminate in a Declaration on the Implementation of Community Law, annexed to the Maastricht Treaty. The Declaration enjoined Member States to transpose Community directives fully and adequately into national law within the specified deadlines; it also stated that, while Member States might take different measures to enforce Community law, these measures should result in Community law being applied with the same effectiveness and rigour as national law.

These concerns reflect the transformation of the legal, economic and political configuration of western Europe since the late 1950s. This new context gives a different character to non-compliance with Community law today. Withdrawal from the Community is now ruled out as an option for national policy. As a result, it has been argued, in order to avoid the rigours of closer integration, Member States may resort increasingly to a new political and legal strategy. This strategy consists in the selective application of Community law. Such a state of affairs could, without exaggeration, be described as the 'new challenge of compliance.'


11. Declaration 18, para. 1. The same Declaration asks the Commission to report regularly to the Council and the Parliament on its monitoring activities. Previously, the report was addressed to the EP alone.


Effectiveness as a Policy Problem

The effectiveness of Community law is, first of all, an issue of public policy. The issue is not, however, unique to the Community: instead it is common to most if not all contemporary states. The same is true of the tension between centralised steering and decentralised action, even though in the Community this tension may take specific forms, and even if it is sometimes manifested publicly in the lack of effectiveness of law.\(^{14}\)

Yet the Community system has specific features. Despite the importance of centralised institutions, such as the Commission, the Council, the European Parliament, the Court of Justice and the Court of First Instance, both intergovernmental and decentralised decision-making have always been part of the Community system. The European Council, composed of the Heads of State and Government, plays an essential role in European integration,\(^{15}\) while the importance of decentralised decision-making is legally expressed by the principle of subsidiarity in the Maastricht Treaty. The implementation and the enforcement of Community law are carried out partly by the Commission, the Court of Justice and the Court of First Instance, but it is done primarily by the Member States through national administrations and national legal systems.\(^{16}\) The Community operates mainly by means of indirect administration, in which Community policies and laws, enacted by the Council or the Commission, are implemented by national authorities. These features pose specific problems with regard to the effectiveness of Community law.\(^{17}\)

Commentators agree that the effectiveness of Community law has become increasingly problematic. An empirical study published in 1986 distinguished different types of non-compliance.\(^{18}\) Though the categories were not discrete, they included lack of implementation (incorporation or transposition), lack of application, lack of enforcement, pre- and post-litigation non-compliance, legislative, executive and judicial non-compliance, defiance, evasion and


\(^{15}\) See J. Werts, The European Council (Amsterdam: North-Holland, 1992).

\(^{16}\) See Rideau, 'Le rôle des états membres dans l'application du droit communautaire' (1985) 18 AFDI 864.

\(^{17}\) As to the ways in which the European Court has dealt with such problems, see Case 103/88, Fratelli Costanza SpA v. Comune di Milano [1989] ECR 1839 (all levels of the national administration are bound by the duty of Community loyalty in Article 5 EEC) and Case C-8/88, Re Suckler Cows: Germany v. EC Commission [1992] 1 CMLR 409 (the Commission is not entitled to interfere in the distribution of powers established by national law, but may verify whether the supervisory and inspection procedures established according to the arrangements within the national legal system are in their entirety sufficiently effective to enable the Community requirements to be correctly applied).

benign non-compliance. The authors concluded that, even though most non-compliance was benign, being due to factors of political or administrative paralysis rather than deliberate political decisions, there was a 'growing problem of compliance' and that 'non-compliance has become an issue high on the Community agenda.'

It is difficult to evaluate the extent of non-compliance satisfactorily. Our knowledge concerning the implementation and enforcement of Community law by Member States has been described recently as a 'black hole.' Apart from the specific numbers, however, two types of non-compliance, or instances of the ineffectiveness of Community law, have a particular symbolic importance. First, it is clear that in the past decade the number and proportion of instances in which Member States fail to comply with a judgment of the Court of Justice has increased significantly. As the Commission pointed out in 1989, '[t]his situation gives rise for concern as it undermines the fundamental principles of a Community based on law.' Secondly, there is the failure of Member States to transpose directives adequately or at all. One commentator has remarked that this 'represents not only a drain on the Commission's limited enforcement capacity, but also an obstacle to the credibility of EEC law as a whole and to the creation of the internal market in particular.'

The Commission's contributions to the 1991 Intergovernmental Conferences included a staff paper, which canvassed potential sanctions to ensure compliance with the judgments of the Court of Justice and the effectiveness of Community law more generally. The list included countermeasures against a recalcitrant Member State; financial sanctions, to be imposed by the

19. Ibid.
20. Ibid., pp 68, 87.
22. Weiler, op cit., n 12, p 63. See also Krislov, Ehlermann and Weiler, op cit., n 18, p 77.
23. Compare Krislov, Ehlermann and Weiler, op cit., n 18, pp 74-77 [28 cases]; and Commission of the European Communities, 'Seventh annual report to the European Parliament on Commission monitoring of the application of Community law - 1989', OJ 1990 C232/1 at C232/5 [82 cases]. As of 1988 this increase may have been roughly in proportion to the increase in the number of judgments delivered: Anderson, 'Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?' (1988) 11 Boston College International and Comparative Law Review 91, 96 n 25. However, from 1989 to 1990 the number of judgments delivered fell from 94 to 77 while the number not complied with rose from 12 to 25: see Commission, 'Eighth Annual Report', op cit. n 10 at pp II, 102-119.
27. Dismissed immediately; ibid., p 151. The possibility of such countermeasures under the ECSC Treaty is provided by Article 88(3)(b) ECSC, but this has never been used; ibid.
Court of Justice in an action for failure to comply with a previous judgment of the Court of Justice, and more explicit requirements flowing from Article 5 EEC. The paper also canvassed an extension of the jurisdiction of the Court of Justice, including (a) the power for the Court to take its own decision, with direct effect, on the measures needed to transpose Community law into national law, (b) the power to declare national law incompatible with Community law or to annul it, and (c) the power to issue injunctions. Finally, the Commission proposed recognition of the financial liability of a Member State towards persons suffering harm from the failure of the State to meet its Community law obligations.

In addition to contributing to the formulation of Community policy, the debate on the effectiveness of Community law has had more general implications. On the one hand, it has confirmed the well-known truth that the implementation and enforcement of law are often highly political, in the sense that they require the exercise of power and a choice between competing values. Indeed the very definitions of effectiveness, implementation and compliance frequently involve sensitive institutional and political questions. Compared with national legal and political systems, the Community system is complex, novel and lacking in legitimacy. As a result, it may be suggested, these observations as to the political nature of the effectiveness of law hold with stronger force in the Community system, though this has not always been recognised. Consequently the discussion concerning the effectiveness of law, which might have seemed initially to be primarily of a technical character, has begun to open the Community system to a salutory discussion of the politics of law, and politics more generally, at Community level.

On the other hand, the debate has stimulated a renewed interest in the advantages and disadvantages, not only of the role of law in European integration, but also of different strategies and indeed different degrees of economic and political integration. The effectiveness of Community law, different forms of economic and political integration, and the Community's institutional integrity are seen increasingly to be closely related. We have only to recall the recent Opinions of the Court of Justice concerning the draft Agreement on the European Economic Space. The Opinions made it clear that questions concerning the nature, role and effectiveness of Community law are fundamental to the future legal and institutional architecture of western Europe. They concern not only the existing Member States of the Community. They are also of great importance to the members of EFTA and the countries of eastern Europe which have recently negotiated, or are currently seeking, closer ties with the Community.

Ensuring the effectiveness of Community law involves basic questions concerning the political bases of the Community, its legitimacy, the scope for institutional change and hence its likely future development. It is suggested that any serious discussion of how to improve the effectiveness of Community law leads on to a consideration of the potential for development of Community institutions, the relation between the Community and the Member States, and hence the purposes of the Community and the possible and desirable alternatives for the shape of

28. See now Arts. 169, 171 EC, as amended by the Maastricht Treaty.


Effectiveness as a Theoretical Issue

The effectiveness of Community law needs also to be conceived as a theoretical issue. Effectiveness may refer not only to compliance but also to implementation, enforcement and impact. These terms are often taken to denote distinct phenomena, though sometimes they represent different perspectives on the same phenomena, and sometimes the meanings of the terms overlap. There is no universally accepted definition of these terms, in particular with respect to Community law. Nor is there much empirical research with regard to Community law on these topics.

A commonly used approach to the effectiveness of Community law is that of implementation theory. The political process is defined as 'a process of problem-solving by the politico-administrative system.'\textsuperscript{32} This process consists of three phases: policy formulation, implementation and impact.\textsuperscript{33} Based on this approach, the study by Krislov, Ehlermann and Weiler distinguishes between four phases: adoption, implementation (incorporation), application and enforcement.\textsuperscript{34} This conception is based on the traditional hierarchy of administrative organisation, used in implementation theory, and the formal stages of the legal process in the Community system. It can be extremely useful in analysing the effectiveness of law as a problem of policy, in particular in identifying points of non-compliance with hierarchically superior rules.

Yet, even as a means to identify potential solutions to problems of policy, this kind of approach has substantial shortcomings. First, it reflects the top-down perspective of the policy-maker.\textsuperscript{35} Consequently it tends to minimise the extent to which the implementation and enforcement of law, whether by administrative means or by courts, might involve processes of negotiation, in which the specific characteristics of the various parties concerned are extremely important. This feature is likely to be especially prominent, and hence the shortcoming particularly great, in systems with divided-powers. In the Community, we can observe, several levels of government have decision-making powers and responsibility for the implementation and enforcement of law. Horizontal as well as vertical relations between them are crucial, and, as will be shown later, a fundamental role in ensuring the effectiveness of law is played by negotiation.

Secondly, as applied in the Community context, the term 'effectiveness' has a wide variety of meanings. We can distinguish at least seven types of effectiveness: (1) the enactment

\textsuperscript{32} Siedentopf and Ziller, \textit{op cit}, n 9, p 3.


\textsuperscript{34} Krislov, Ehlermann and Weiler, \textit{op cit}, n 18, p 62.

of Community policy into legislation by Community institutions; (2) the implementation of Community regulations by the Member States; (3) the transposition of Community directives into national law; (4) the implementation of Community secondary legislation, or of national transposing or implementing legislation, within or by the national civil service; (5) the use of Community law by economic undertakings, other organisations and individuals, in the sense, following Weber, that they orient their behaviour in relation to Community law; (6) recourse to litigation in a national court based on Community law, including a directive which has been recognised as having, or is argued to have, direct effect; and (7) the enforcement of Community law by national courts, including the interpretation of national legislation in the light of Community law. Implementation theory does not always distinguish between these different situations.

Thirdly, for the purposes of this article, the effectiveness of law is conceived of in relatively broad terms, so as to emphasise the social meaning of law as well as positive norms. Seen from this perspective, the effectiveness of law is not easily contained within legal doctrinal or administrative categories. In every legal system there is a gap between law in the books and law in action. It would be remarkable if Community law were any different. The mere existence of such a gap should not necessarily be a cause for concern. With respect to the effectiveness of Community law, what is more important is to concentrate on those gaps which are (a) especially problematic and (b) capable of being at least partially resolved or closed. This requires us to identify the gaps which exist; to explain why they exist; to identify and distinguish those gaps which are likely to be long-term features of the Community system; and, if possible, to focus on those (ideally less-enduring) gaps which pose real difficulties for the operation and development of the Community. This in turn requires a more multi-faceted, open-ended enquiry than is consistent with implementation theory. Thus, a different approach is necessary in order eventually to elaborate a theoretical conception of the effectiveness of Community law. Though completing this task lies beyond the scope of this article, let us begin by conceiving of effectiveness as including implementation, enforcement and compliance. We may define implementation as 'the process and art of deliberately achieving social change through law.'

This definition appears at first glance to start from the viewpoint of the policy-maker, but it is sufficiently broad to encompass perspectives at different levels of a divided-power system. It also conceives of implementation as a continuous process, not as a fixed state of affairs. The implementation of law involves conflict, negotiation, compromise and mutual adjustment. Even though implementation may be characterised by patterns and relative stability in the long term, it


37. Situations of non-compliance are clearly distinguished, however, in Krislov, Ehlermann and Weiler, op cit, n 18, pp 62-77.


is not one-way but rather is recursive and circular.\textsuperscript{40}

Compliance can then be seen as 'a series of reactive behaviors through which the targets of state action seek to accommodate the new incentives and disincentives with existing imperatives.'\textsuperscript{41} Such behaviour often takes place within organisations, such as national administrations. Consequently, it is essential to take account of the priorities, structures, incentives and ideologies of these organisations, in short, bureaucratic politics.\textsuperscript{42} This concept of compliance focuses less on ultimate outcomes and more on ongoing negotiations, political and legal processes and organisational change. The latter are potentially both forms of implementation and forms of compliance, and they may (but often do not) involve means of enforcement, such as incentives, recourse to courts, or the threat or use of sanctions. For present purposes, implementation, enforcement and compliance, defined in this way, will be deemed to be different facets of effectiveness. This theoretical conception may seem very different from the conception of effectiveness which underpinned the discussion of the effectiveness of Community law as a problem of policy. Its utility for policy should emerge, however, during the course of this article.

\section{II ADMINISTRATIVE NEGOTIATION OF EFFECTIVENESS}

\textbf{Introduction}

In the 1985 White Paper on 'Completing the Internal Market'\textsuperscript{43} the Commission outlined its strategy for economic integration. A central aim was to ensure the effectiveness of Community law. Instead of relying mainly on the harmonisation of national laws by means of Community directives, the Commission envisaged the combined use of three techniques: essential harmonisation, mutual recognition and reference to standards. Each involved different institutions, different techniques and a rather different configuration of interests in the quasi-federal politics of the Community. Put forward by the Commission, these proposals were designed primarily to stimulate action by other institutions, save to the extent that they required Commission proposals for harmonising directives or more enforcement proceedings by the Commission. The strategy has been fully explored by other scholars.\textsuperscript{44} This article focuses instead on the means by which the Commission has sought, not to stimulate or

\begin{footnotesize}
\begin{itemize}
  \item 40. See Clune, \textit{op cit.}, n 39, p 78. See also Snyder, \textit{op cit.}, n 1, pp 8, 32-62, 169-171.
  \item 41. Clune and Lindquist, \textit{op cit.}, n 39, p 1068.
  \item 42. \textit{Ibid.}, p. 1068; see also Peters, 'Bureaucratic Politics and the Institutions of the European Community' in Sbragia (ed), \textit{op cit.}, n 6.
\end{itemize}
\end{footnotesize}
orient the action of other institutions, but instead itself to ensure the effectiveness of Community law.

The principal means used by the Commission are three-fold: litigation, in particular infringement proceedings under Article 169 EEC; so-called 'soft law'; and structural reform involving national administrations. Legally speaking, all are based on the powers of the Commission as set out in Articles 4 and 155 EEC. Each, it will be suggested, is best conceived of as part of a process of administrative negotiation.

**Litigation as Negotiation**

In its capacity as 'watchdog' of the Treaty, the Commission obtains its cases both proactively by its own investigation and reactively in the form of complaints. In 1990, for example, it detected 283 cases and received 1252 complaints. If rough estimates from previous years serve as a guideline, about 85% of the complaints come from companies, 5% from private individuals, 5% from the European Parliament and 5% from Member States.45

The Commission has in fact prepared a standard complaint form which it prefers complainants to follow.46 It requests details concerning the complainant; the subject-matter of complaint and damage suffered, if any; information on the steps taken before national or Community authorities, including administrative steps and any proceedings before courts or tribunals; and documentary or other evidence available in support of the complaint. A note on the back of the form states that the complaint may be lodged with the Commission in Brussels or at any of its information offices in the Member States. It also lists a series of administrative safeguards, notably that the complainant will be informed of the action taken in response to the complaint, including representations made to the national authorities, Community bodies or undertakings concerned, and that the complainant will be informed of any infringement proceedings that the Commission intends to institute against a Member State as a result of the complaint and of any legal action it intends to take against an undertaking.

As is well-known,48 Article 169 provides in formal terms that an infringement proceeding is to have two stages: first, an administrative stage including (a) the Commission invitation to a Member State to submit observations on the alleged breach and (b) delivery by the Commission of a reasoned opinion; and, secondly, a judicial stage, in which, if necessary, the Commission brings the matter before the European Court.

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46. 'Complaint to the Commission of the European Communities for Failure to Comply with Community Law' (89/C26/07), OJ 1989, C26/6.

47. The form states that the Commission undertakes to observe the customary rules of confidentiality when investigating the complaint.

In practice, the administrative stage is usually preceded by a request by the Commission to the Member State for further particulars. Moreover, beginning in 1978, under the dual influence of the judgment of the Court in *Cassis de Dijon*[^49] and the Jenkins presidency[^50], the Commission changed its policy concerning Article 169. The issue of formal notice and other steps leading to litigation became systematic, routine, and de-politicised.[^51]

The formal notice, if issued, delimits the subject matter of the dispute,[^52] and the Member State is not obliged to submit observations[^53]. Usually, however, the formal notice leads to negotiations. If these fail, the Commission issues a reasoned opinion, which contains a statement of the reasons that led the Commission to believe that the Member State has failed to fulfil a Treaty obligation.[^54] The reasoned opinion determines the subject matter of the judicial stage, as the reasoned opinion and the application under Article 169 must be founded on the same grounds and submissions.[^55] As in most if not all legal systems, however, most disputes are settled (or otherwise disposed of) in the early phases of the process. The following Table shows the general trend in the use of the procedure.

### Article 169 Infringement Proceedings for All Member States 1975-1990

<table>
<thead>
<tr>
<th>Total Complaints*</th>
<th>Letter of Formal Notice</th>
<th>Reasoned Opinion to ECJ</th>
<th>Reference Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
</tr>
<tr>
<td>1975</td>
<td>+</td>
<td></td>
<td>60</td>
</tr>
<tr>
<td>1976</td>
<td>+</td>
<td></td>
<td>90</td>
</tr>
<tr>
<td>1977</td>
<td>+</td>
<td></td>
<td>68</td>
</tr>
<tr>
<td>1978</td>
<td>+</td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>1979</td>
<td>+</td>
<td></td>
<td>200</td>
</tr>
</tbody>
</table>

[^49]: Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Brantwein ('Cassis de Dijon')* [1979] ECR 649. For the Commission's interpretation of this judgment, see Commission of the European Communities, 'Communication from the Commission concerning the Consequences of the Judgment given by the Court of Justice on 20 February 1977 in Case 120/78 ('Cassis de Dijon'), OJ 1980 C256/2.

[^50]: See Dashwood and White, *op cit*, n 48, pp 399-400.


[^52]: Case 211/81 *Commission v Denmark* [1982] ECR 4547.

[^53]: *Ibid*.


[^55]: Case 211/81 *Commission v Denmark, op cit*, n 52.
<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints</th>
<th>Infringements</th>
<th>Rejected</th>
<th>Approved</th>
<th>Notified</th>
<th>Acquired</th>
<th>Discharged</th>
<th>Terminated</th>
<th>Abandoned</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>208</td>
<td>**</td>
<td>82</td>
<td>39.4</td>
<td>28</td>
<td>13.5</td>
<td>19</td>
<td>9.1</td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>353</td>
<td>256</td>
<td>147</td>
<td>41.6</td>
<td>50</td>
<td>14.2</td>
<td>17</td>
<td>4.8</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>464</td>
<td>335</td>
<td>157</td>
<td>44.5</td>
<td>45</td>
<td>9.7</td>
<td>31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>591</td>
<td>289</td>
<td>83</td>
<td>14.0</td>
<td>42</td>
<td>7.1</td>
<td>18</td>
<td>3.0</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>621</td>
<td>454</td>
<td>148</td>
<td>23.8</td>
<td>54</td>
<td>8.7</td>
<td>17</td>
<td>2.7</td>
<td></td>
</tr>
<tr>
<td>1985</td>
<td>929</td>
<td>503</td>
<td>233</td>
<td>25.0</td>
<td>113</td>
<td>12.2</td>
<td>26.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>1084</td>
<td>516</td>
<td>164</td>
<td>15.1</td>
<td>71</td>
<td>6.5</td>
<td>30</td>
<td>2.8</td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>1110</td>
<td>572</td>
<td>197</td>
<td>17.7</td>
<td>61</td>
<td>5.5</td>
<td>41</td>
<td>3.7</td>
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</tr>
<tr>
<td>1988</td>
<td>1444</td>
<td>569</td>
<td>227</td>
<td>15.7</td>
<td>73</td>
<td>5.1</td>
<td>50</td>
<td>3.5</td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>1547</td>
<td>664</td>
<td>180</td>
<td>11.6</td>
<td>96</td>
<td>6.2</td>
<td>26</td>
<td>1.6</td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td>1535</td>
<td>960</td>
<td>251</td>
<td>16.4</td>
<td>77</td>
<td>5.0</td>
<td>38</td>
<td>2.4</td>
<td></td>
</tr>
</tbody>
</table>

* includes both complaints and infringements detected by the Commission's own inquiries
** reported figures; discrepancy due to slightly different counting methods
+ not available
++ not calculated because of lack of availability of number of total complaints

Sources:
(a) Complaints:
1975-79: not available
1982-90: 'Eighth Annual Report', op cit, n 10, p 133 (Table 12)

(b) Letters of Formal Notice:
1975-80: Krislov, Ehlermann and Weiler, op cit, n 18, p 69 (Table 9)
1981-90: 'Eighth Annual Report', op cit, n 10, p 91 (Table 1)

(c) Reasoned Opinions:
1975-80: Krislov, Ehlermann and Weiler, op cit, n 18, p 69 (Table 9)
1981-90: 'Eighth Annual Report', op cit, n 10, p 91 (Table 1)

(d) References to ECJ:
1975-80: Krislov, Ehlermann and Weiler, op cit, n 18, p 69 (Table 9)
1981-90: 'Eighth Annual Report', op cit, n 10, p 91 (Table 1)

(e) Judgments:
1975-81: Krislov, Ehlermann and Weiler, op cit, n 18, p 69 (Table 9)
1982-84: 'Seventh Annual Report', op cit, n 23, p C323/37 (Table 7)
1985-90: 'Eighth Annual Report', op cit, n 10, p 97 (Table 7)

The Table is sufficient only to show rough orders of magnitude rather than precise figures, in particular because a specific complaint does not progress through the series in a given year. Nevertheless, it indicates clearly the decline in the number of outstanding cases as the procedure moves through the administrative stage towards the judicial stage and then to judgment. It also suggests three more interesting hypotheses regarding the Commission's use of the procedure to ensure the effectiveness of Community law. First, the Commission's reasoned
opinions have sometimes been called the 'hidden jurisprudence' of Community law. Their importance, however, may be in decline. Current statistics indicate an increasing termination of infringement procedure at the formal notice stage. Secondly, the last point suggests, in turn, that the informal request for further particulars may be playing an increasingly important role in the settlement of infringement disputes. Thirdly, if this is the case, it may represent a significant change since the mid-1980s in the dominant mode of settling infringement disputes. Informal requests are dealt with today mainly via the Committee of Permanent Representatives of the Member States (COREPER: the ambassadors (and their deputies) of the Member States to the Community), or in 'package meetings' between the Commission and national administrative authorities; in both settings a specific legal obligation may be merely one element among many in a particular negotiation.

These statistics compel us to reconsider the relationship between negotiation and adjudication within Article 169 procedure. We usually think of negotiation and adjudication as alternative forms of dispute settlement. It may be suggested, however, that, in the daily practice and working ideology of the Commission, the two are not alternatives but instead are complementary. The main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process. The Commission's view of litigation thus differs substantially from that of the European Court. In order to understand why this is so, we need to consider the role of the Commission in the Community litigation system.

Put simply, it is a distinctive role. The Commission has complete discretion in bringing infringement proceedings against Member States under Article 169; it is a necessary intermediary in actions by one Member State against another under Article 170; it will, if the Maastricht Treaty is ratified, be entitled under the amended Article 171 to request the Court of Justice to impose a lump sum or penalty payment on Member States which have failed to comply with a previous judgment by the Court; it is a privileged applicant in actions for annulment under Article 173; and it intervenes as a matter of course in every reference for a preliminary ruling under Article 177. By virtue of its position and expertise, it is the ultimate 'repeat player' in

60. See Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 95, 98-100; Galanter, 'Afterward: Explaining Litigation' (1975) 9 Law and Society Review 347. Member States are also repeat players in Community litigation, though litigation rates vary from country to country and no Member State uses the Luxembourg courts nearly as much as does the Commission. The few repeat players among non-privileged applicants under Article 173 EEC use the Court of Justice or the Court of First Instance even less, not to mention the fact that in such cases the defendant is
Community litigation.

Consequently, the Commission can use litigation as an element in developing its longer-term strategies. Instead of simply winning individual cases, it is able to concentrate on establishing basic principles, or playing for rules. Not that it is always wishes to do so or is always successful in this respect. The point is simply that, in relation to litigation, the Commission occupies a dramatically different position from that of most litigants. It is in a position to use litigation in a continuous, proactive as well as reactive way, so as to create counters, lay down conditions or establish frameworks for negotiation. In other words, it can convert litigation into a resource for structured bargaining. In the context of what is essentially litigation between governments, frequently involving unresolvable conflicts and indeterminate conclusions, the Commission can use litigation as an aspect of its negotiating strategy.

Soft Law

In its 1989 monitoring report the Commission bemoaned the limited legal means for strengthening Court of Justice judgments. It stated that in some instances it was able to use financial pressure to bring Member States into line. Except in the agricultural sector, however, the Commission is not often in a position to use dominium, the wealth of government, to achieve its policy objectives. Consequently one might expect that it would usually turn to imperium, the command of law, for this purpose.


64. A good example is Case 232/78, Commission v France [1979] ECR 2729, which was part of the lengthy negotiations leading to Council Regulation 1837/80 on the common organisation in sheepmeat and goatmeat. The use or threat of litigation in this way may be facilitated by the Maastricht Treaty revision of Articles 169 and 171 EEC to provide for fines or penalty payments as a result of infringements of Community law.


67. On the distinction between dominium and imperium, see Daintith, 'Legal Analysis of Economic Policy'
Three potential alternatives may be envisaged. First, the Commission could adopt original legislation. Secondly, it might enact delegated legislation, with or without seeking simultaneously to expand its powers to implement Community law. Thirdly, it could encourage the Council to establish forms of economic or social regulation: viewed sometimes as a relatively costless form of intervention, this might also expand the Commission powers in the Community system.

Each of these alternatives, however, is limited severely by the current structure and operation of Community institutions. The Community legislative process is dominated by the Member States. The Commission's original legislative power, though extant, is limited, and, except to the extent provided in the Maastricht Treaty, it is unlikely to expand. With regard to delegated legislation, the power of the Commission is extensive; it accounts for a very high proportion of all Community legislation. However, the Twelve, qua European Council and qua Council, have encroached in practice on the right of the Commission to initiate legislation. Moreover, much delegated legislation, especially concerning the agricultural sector, is highly technical, detailed and short-lived. The power of the Commission to enact delegated legislation in other fields has been circumscribed by the Council. In any event, direct administration by the Community is limited, and Community legislation is implemented primarily by national administrations. Finally, the development of Community regulation, especially social regulation, has so far been restricted by the Member States, which, qua national governments, have constrained the expansion of the legislative competence of the Community. The Commission has therefore had recourse to means other than formal legislation.

Among the most important of these means is soft law, rules of conduct which, in principle, have no legally binding force but which, nevertheless, may have practical effects. Such measures are frequent in Community law. For example, according to Article 189 EEC,

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recommendations have no binding force. However, the Court of Justice has held that national courts are bound to take them into consideration in deciding disputes, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.73 Similarly, protocols annexed to the treaties by common accord of the Member States are an integral part of the treaties.74 In contrast, declarations annexed to the treaties are generally considered to be political statements, but they too may influence Community practice.75

In using soft law, the Commission follows a practice which has been employed for some time by national administrations.76 To give one example, beginning in 1980 after the Cassis de Dijon case, the Commission developed the quasi-legal form of the communication.77 In its 1985 White Paper it announced an intention to make greater use of this device.78 In order to be effective, according to a leading commentator and Commission official, a communication must concern matters within the Commission's sphere of competence, be published in the official journal and be clearly written and informative.79 In the Commission's view, the legal basis of communications lies in Articles 5 and 155 EEC. Together these articles are said to give the Commission both the power and the duty to explain Court of Justice judgments and to spell out their implications for national governments and private parties.80

Three types of communication have been distinguished: informative, declaratory and interpretative.81 From the standpoint of the Commission, all have several advantages.82 They


74. Article 239 EEC. See also Phelan, 'Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union' (1992) 55 MLR 670. This does not mean that protocols are necessarily compatible with Community law, as is demonstrated by the controversy concerning the Protocol on Article 119 (the 'Barber Protocol') annexed to the Maastricht Treaty: see Coppel, 'The Retrospective Effect of Barber and the Maastricht Treaty' (1992) 21 Benefits and Compensation International 26.


77. Op cit, n 49.


79. Mattera, op cit, n 48, p 45.

80. Ibid., pp 44-45. It remains true however that Article 5 cannot be used by the Commission as a basis for creating new obligations for Member States in the absence of a particular Treaty provision or of secondary legislation: see Case 229/86 Brother Industries v Commission [1987] ECR 3757 at 3763.

81. See Mattera, op cit, n 48, pp 43-44; see also Melchior, 'Les communications de la Commission' in Mélanges en honneur de Fernand Dehousse, Vol. 2 (Brussels: Labor, 1979). An example of an informative communication is 'Completion of the Internal Market: Community Legislation on Foodstuffs' (Communication from the Commission to the Council and the European Parliament) (COM(85)603 final (8 November 1985), often known as the 'White Paper his'. On declaratory communications, see Mattera, op cit, n 48, p 43. An example of an interpretative communication is the 'Communication on the free movement of
are systematic rather than piecemeal, resembling legislation rather than litigation. They are under the control of the Commission, thus in effect bypassing the Council. They are also proactive rather than reactive, enabling the Commission, without waiting for the Council or the Court of Justice, to present its interpretation and stake out its position concerning entire economic sectors.

Communications play an vital role today in Commission efforts to ensure the effectiveness of Community law. They identify what is settled and what is in dispute, circumscribe the arena for debate, and define the agenda for negotiation and, if necessary, litigation. In other words, they aim to provide guidelines for negotiating the implementation of Community law.

Can this soft law become 'hard' law? Communications refrain from asserting that they have legal force. However, the translation from quasi-legal to legal form could occur directly by Community legislation, assuming the Member States agreed, or it could be accomplished indirectly by judicial recognition. In the latter event, two avenues are conceivable. The first involves the positive invocation of soft law. It might comprise either an action by the Commission under Article 169, using soft law as a 'sword', or an action by a private party in a national court, involving the use of soft law as either 'sword' or 'shield', with recourse to the Court of Justice by means of Article 177. In either event, legal force could be given to a previously quasi-legal act. The second avenue might consist of an Article 173 action to annul the Commission's act. Such an action is most likely to be brought by a Member State.

In fact, Member States have increasingly challenged forms of Commission soft law before the Commission itself, in the Court of Justice and, recently, the Court of First Instance. France v. Commission was an Article 173 action to annul internal instructions adopted by the Commission. Based on article 9 of Council Regulation 729/70 on the financing of the Common Agricultural Policy, the instructions were designed to lay down procedures to be followed by Commission officials in relation to sampling and analysis of products for the management and control of operations within the European Agricultural Guidance and Guarantee Fund (EAGGF, known usually by its French acronym, FEOGA: Fonds Européen d'Orientati et de Garantie Agricoles). They were prepared by a Commission inter-departmental working party, notified to foodstuffs within the Community,' COM(89)258 final, OJ 1989 C271/3: see Burrows, Daintith, Hancher, Snyder and Usher, 'United Kingdom Report', in Schwarze, Govaere, Helin and Van den Bossche (eds), op cit, n 10, pp 636-646.

82. The remainder of this paragraph is drawn from my contribution to the 'United Kingdom Report' in Schwarze, Govaere, Helin and Van den Bossche (eds), op cit, n 10, p.611.

83. See the Community framework on State aid to the motor vehicle industry, OJ 1989 C123/3, and the German reaction, which led the Commission to issue Decision 90/381 amending German aid schemes for the motor vehicle industry, OJ 1990 L188/55.

84. See Commission Decision 90/381, op cit, n 83.

85. For a more detailed analysis of these and other cases, see Snyder, 'Commission Soft Law in the European Courts' in Martin (ed), The Construction of Europe: Essays in Honour of Emile Noel (forthcoming, 1993).

the FEOGA Committee and then published in the Official Journal. Among other provisions, they purported to empower Commission officials themselves to take samples for analysis. The Court of Justice held, first, that the instructions differed from ordinary service instructions or purely internal documents, both by the circumstances in which they were adopted and by the conditions under which they were prepared, drawn up and published. Secondly, the instructions went beyond clarification of the Regulation and produced legal effects by empowering the Commission to take samples, independently of the Member States, and by laying down detailed arrangements for this purpose. The instructions could therefore be reviewed under Article 173.

Thirdly, Regulation 729/70 did not in any case confer implementing powers on the Commission. Instead it expressly gave such powers to the Council. Consequently, the instructions constituted a decision adopted by an authority which had no power to do so. As such, they were annulled by the Court of Justice.

In a second case France brought an action against the Commission to annul a Code of Conduct on the reporting of fraud against the Community. Council Regulation 4253/88 required Member States to report and take legal action against irregularities. In order to implement the Regulation the Commission prepared the Code, which it notified officially to the Member States by letter and subsequently published in the Official Journal. Inter alia, the Code required Member States to report on national systems to prevent or take action against irregularities, to report on cases of irregularity and to report on certain irregular practices.

The Court of Justice upheld the French argument that the Code imposed legal obligations on the Member States and also that the Commission lacked the competence to implement Regulation 4253/88. It stated that, ever since its judgment in the ERTA case, an annulment action may be brought to challenge any provisions taken by Community institutions ‘aimed at producing the effect of law.’ The Court of Justice considered that the Code was not a simple explanatory document. Instead, the Code required Member States to identify irregularities, reveal the identity of beneficiaries as well as the persons and companies implicated in irregularities, deal with the financial consequences, and examine the possibility of recovering the sums paid. In the view of the Court of Justice, these duties were not inherent in the obligation of providing information, as provided in the 1988 Regulation.

These two cases concerned the Commission’s powers with respect to fraud against the Community. In this matter the division of powers between the Community and the Member States is not entirely clear, and Member States are often concerned to prevent the expansion of Community competence, as well as to maintain the current division of powers within the Community system between the Commission and the Council. As the Court of Justice suggested in the first French case, one of the preconditions for successful Commission soft law is at least a measure of consensus among Member States not to contest the Commission’s position.


91. Op cit, n 86, at 229 [para. 10]. It has been argued that Article 5 EEC obliges Member States to try to
The process of making soft law thus bears a striking resemblance to the process of making Community hard law under the 1966 Luxembourg Accords. The Accords, designed to resolve the so-called 'empty chair crisis', were a political 'agreement to disagree', which in fact gave Member States a veto power concerning measures that they considered to affect their vital national interests. In practice, the Accords replaced the voting requirements provided in the Rome Treaty with a requirement of unanimity based on implicit consensus. In other words, they crystallised a procedure founded on the lowest common denominator. Like Commission soft law, they expressed the dominance of the Member States in the Community legislative process.

The making of Commission soft law differs, however, from the enactment of hard law under the Luxembourg Accords in one crucial respect. Under the Luxembourg Accords the dominance of the Member States was manifested explicitly before legislation was enacted. In the making of Commission soft law, this dominance, though implicit, is manifested expressly only when a Member State contests an already 'adopted' measure in the Court of Justice. This in itself confers advantages on the Commission, though perhaps only in the short-term. That this generalisation may apply not only to internal instructions and codes of conduct but also to Commission communications is illustrated by a recent action, also brought by France and now in progress, to annul the Commission Communication on the application of Articles 92 and 93 EEC to public undertakings in the manufacturing sector.

Commission soft law thus is enacted and operates in the shadow of Community law. It may be used in matters concerning which the Commission has legal authority to act, within the limits of Commission discretion, and so long as it does not impose on Member States any new legal obligations. Though specific procedures, forms and conditions of publication may increase the likelihood that soft law will be effective, these same elements risk translating soft law into hard law, if and when the soft law is contested before the Court of Justice. Exercising its power of judicial review, the Court of Justice may decide that the putatively soft law has hard legal consequences, and thus transgresses the boundary between negotiation and legislation. In this event, the advantages of soft law are negated, and the Commission then has little recourse except inaction or the Community legislative process.

Structural Reform

A third, more general technique by which the Commission tries to ensure the effectiveness of Community law is structural reform. Structural reform means the reform or

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95. An excellent illustration of this distinction, though the converse of soft law, is the PVC case concerning, inter alia, the legal status of the rules of procedure of the Commission: see Joined Cases T-79/89 et al Re the PVC Cartel: BASF and Others v Commission [1992] 4 CMLR 357. See also Hill, 'Court ruling imperils work of Commission' Financial Times, 28 February 1992; see also Case C-292/90 British Aerospace plc and Rover Group Holdings plc v Commission [1992] 1 CMLR 853.
reshaping of legal, economic and political structures,\textsuperscript{96} including those of the Community or the Member States. It is a type of social, usually institutional adjustment, involving the reallocation of power. In the Community setting, such reforms are likely to affect the distribution of power between the Community and the Member States, among Community institutions and among various parts of the national governmental systems. Some of these reforms increase the effectiveness of Community law; others do not; some may possibly be neutral.

Structural reform may be undertaken by the judiciary, the administration or other parts of government. Legal scholars in Europe and the United States have concentrated mainly on the courts.\textsuperscript{97} However, structural reform in the Community has occurred at least as much, if not more, by administrative means, in particular by relations between bureaucratic organisations. Such relations have been referred to variously as bureaucratic interpenetration,\textsuperscript{98} structural coupling,\textsuperscript{99} or inter-organisational exchange.\textsuperscript{100} In Commission jargon they are now often called \textit{parténariat} (partnership), a term which has recently been consecrated in Community legislation.\textsuperscript{101}

The general legal framework of structural reform by administrative means is the duty of Community loyalty or principle of sincere co-operation, the so-called 'fidelity clause': Article 5 EEC. The potential scope of this principle as applied to the Commission is illustrated by \textit{Zwartveld}.\textsuperscript{102} In this case the Court held that the Commission was obliged to give active assistance to a national judge who was acting in the prosecution of offences under Community

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\textsuperscript{96} On the meaning of structures, see Snyder, \textit{op \ cit.} \textsuperscript{n 1}, chap. 2. Structures have a dynamic as well as a static aspect. For the present purposes, it is useful to emphasise that structures 'represent outcomes of processes that have previously occurred; they are configurations of interests, congealed at least temporarily in the form of institutionalised sets of social relations' (\textit{ibid.} at 42). They are 'simultaneously representations of previous outcomes as well as frameworks, influences and sometimes determinants of continuing conflicts and compromises' (\textit{ibid.} at 61).

\textsuperscript{97} See the sources cited in \textsuperscript{n ***} and \textsuperscript{n ***} below.


\textsuperscript{100} See Levine and White, 'Exchange as a Conceptual Framework for the Study of Interorganizational Relationships' (1961) \textit{Administrative Science Quarterly} (March) 583.

\textsuperscript{101} For example, see Council Regulation 2052/88, art. 4(1), OJ 1988 L185/9, which provides \textit{inter alia} for 'une concertation étroite, entre la Commission, l'Etat membre concerné et les autorités compétentes désignées par celui-ci au niveau national, régional, local ou autre, toutes les parties étant des partenaires poursuivant un but commun. Cette concertation est ci-après dénommée 'parténariat.' This example illustrates only one type of \textit{partenariat} in a broader sense.

law, in casu alleged fraud against the fish marketing regulations, and who required the disclosure of information connected with the offences. It stated that the Commission was not entitled, on the basis of the 1975 Protocol on the Privileges and Immunities of the European Communities, to refuse to disclose documents which might otherwise be confidential or to permit its officials to refuse to give evidence as witnesses in national proceedings. Such refusals would breach Article 5 unless they were based on an order issued by the Court of Justice.

Conversely, Member States are also governed by Article 5. According to Temple Lang, the 'fidelity clause' affects their participation in four different ways. First, Member States may have a legal duty, in certain circumstances, to consult the Commission, especially if there is any doubt as to whether a national measure is contrary to Community law, in particular to avoid the risk of infringing Community rules. Secondly, Member States may have a duty to provide information if the Commission believes it needs certain information and requests it. Thirdly, the Commission and the Member States have a reciprocal duty of cooperation in the Community sphere, that is, 'when Member States are implementing Community measures or policies, are acting on behalf of the Community, or are using powers which are regulated by the Community.' Fourthly, Article 5 may conceivably be invoked to prevent a Member State from insisting on 'linkage' between unrelated measures in Council discussions; it is at least arguable that a similar rule might apply to negotiations in the form of inter-organisational exchange.

Some forms of inter-organisational exchange are initiated by the Commission, acting on the basis of Articles 4 and 155. Current examples include dialogue with Member States in the preparation of transposing legislation, sectoral or 'package' meetings, and horizontal meetings between the Commission and national administrations to review progress in the application of directives. Also important are exchanges of staff between the Commission and national departments responsible for applying Community law. Inter-organisational exchange is not necessarily limited, however, to national administrations. The Commission has long maintained close continuing contacts with non-governmental organisations concerned with development, and it has recently initiated contacts with other groups, such as environmental organisations.

Neither the fluidity of the setting nor the importance of negotiation, however, serves to expand the legal power of the Commission, at least if this power is contested in the Court of Justice. In the French case involving the Code of Conduct, the Commission argued that it was entitled to take certain informal measures, having no legal force, within the framework of its partenariat with national administrations. It suggested that Article 189 did not prevent the

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104. Ibid., p 655. See also Case C-33/90 Re Toxic Waste in Campania: EC Commission v Italy [1992] 2 CMLR 353.

105. See Commission, op cit, n 23, p C232/6; Commission, op cit, n 10, p iv. With regard to environmental matters, see Macrory, op cit, n 45, p 348 n 5, p 362 n 35.


108. Ibid., Rapport d'audience, p 20 [para. 18].
conclusion of consensual arrangements with Member States concerning the scope of a provision of Community law: the consensus itself guaranteed legal certainty for the parties, who in practice were perfectly aware of their obligations, while the arrangement did not affect third parties.\(^{109}\) However, the Commission's argument was rejected by the Court of Justice, which, without examining whether the measure in question had been negotiated and agreed, concluded that the Commission lacked the power to adopt any such acts.

As a technique for ensuring the effectiveness of Community law, these types of structural reform are largely incremental. Other types, however, may occasionally be dramatic, at least when viewed in the longer term. These are forms of inter-organisational exchange which are broader in scope, often initially unforeseen or even unintended. The most striking examples are the changes in national administrations which have resulted from the practical requirements of Community membership. These changes can be grouped into five categories.\(^{110}\)

First, Community membership has led in some countries to changes in the relationship between the executive and the legislature. For example, in Italy and France the need to ensure the transposition of EC directives has resulted recently in a much greater delegation of legislative power by the parliament to the executive.\(^{111}\) Secondly, Member States with divided-power systems have had to reconsider, and sometimes clarify, the constitutional allocation of powers with regard to the enactment, transposition and implementation of Community law. This has occurred, for example, in Spain, Belgium, Italy and Germany.\(^{112}\) Indeed, the origin of the term 'subsidiarity' in Community law is widely ascribed to a spring 1988 meeting between Commission President Jacques Delors and representatives of the German Länder.\(^{113}\) Third, Community membership has required all Member States, not only to establish representatives in Brussels, known collectively as COREPER,\(^{114}\) but also to maintain continuing links between COREPER and national administrations. With the increasing development of the Community, these links have tended to give less prominence to ministries concerned with general diplomatic matters and more to technical ministries.\(^{115}\) Fourth, special administrative bodies dealing with

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109. Ibid., p 20 [para. 19].

110. Some of these categories are also identified in Meny, 'Variation sur un thème donné: l'application des directives par les Etats membres' (1985) 34 Revue francaise d'administration publique 179, 182.


112. See, eg, Bayerische Staatsregierung (Bavarian Government) v Bundesregierung (German Federal Government) (Case 2 BvG 1/89) before the Bundesvergassungsgericht (German Federal Constitutional Court) [1990] 1 CMLR 649.


115. See Hayes-Renshaw, Lequesne and Mayor Lopez, 'The Permanent Representatives of the Member States to the European Communities' (1989) 28 JCMS 119; Lesquesne, 'L'adaptation des administrations
Community matters have been established, special sections within some existing departments have been created and the substance of work in numerous departments has changed. In the United Kingdom, for example, accession to the Community required the establishment of the Intervention Board for Agricultural Produce, as well as major changes in the work of the Ministry of Agriculture and Fisheries, Customs and Excise and the Department of Trade and Industry. Fifth, in virtually all Member States Community membership has led to the development of mechanisms to coordinate participation in the making and implementing of Community law. Among the most well-known examples are European Secretariat of the Cabinet Office in the United Kingdom, the SGCI in France and the Dipartimento per il coordinamento delle politiche comunitarie in Italy. These institutions are especially important for the present purposes, since a lack of coordination within national administrations has been among the major reasons for delays in the implementation of Community law.

For both the Commission and national administrations, structural reform serves useful purposes. The Commission is able to fulfil its functions only by entering into relations with national administrations, and vice versa. For example, each needs clients (e.g. national administrative support for Commission proposals), labour services (e.g. experts of different types) and other resources (e.g. information). Indeed, despite continuing problems concerning the delineation of organisational domains, whether in terms of legal competence or political terrain, such inter-organisational exchanges have become indispensable, both to segments of the Commission on the one hand and parts of national bureaucracies on the other.

In addition, inter-organisational exchange has been concerned increasingly with the effectiveness of Community law. Recent Commission monitoring reports note that 'contacts between Commission departments and national authorities concerning the implementation of Community law have been stepped up.' As the Commission pointed out:

Beyond the formal incorporation of Community directives into national law,
there is the problem of how the rules are actually applied by the national authorities. Private individuals very rarely come into contact with Community law or the Community authorities, such contacts generally being established via national legislation or a national department. It is for this reason that consistency in application is important. As this is a matter of administrative practices rather than of legal rules, consistency can be guaranteed only by exchanges of experience. This was the approach adopted by the Mattheus programme in the customs field, and it is an approach which the Commission proposes to extend to other areas covered by a body of Community rules.\textsuperscript{122}

In such exchanges the meaning of compliance - the effectiveness of Community law - is negotiated or 'constructed' by the Commission and its national counterparts.\textsuperscript{123} At the same time these negotiations contribute to the gradual reshaping of both Community and national institutions.

III THE DEVELOPMENT OF A JUDICIAL LIABILITY SYSTEM

Introduction

Among the central problems of the effectiveness of Community law has been the failure of Member States to transpose Community directives into national law. During the past twenty-five years, the Court of Justice has responded to this problem, not by negotiation, as in the case of the Commission, but in processes of adjudication. In seeking to fulfil its role - set out in Art. 164 EEC - of ensuring 'that in the application and interpretation of this Treaty the law is observed', the Court of Justice has created a judicial liability system. By 'judicial liability system' is meant a set of institutional arrangements in which 'a liability rule is established providing that one person or organization can seek relief from a government agency for specified conduct.'\textsuperscript{124} The system is triggered by complaints brought by injured parties; the government agency need not of course be a court.\textsuperscript{125} The judicial liability system of the Community has been elaborated by the Court of Justice less by design than in an \textit{ad hoc}, reactive and unsystematic manner. As a result, its constituent elements are often viewed merely as individual cases and discrete, though related, principles. If one seeks to compare Community institutions with regard to ensuring the effectiveness of Community law, however, these elements can be seen to be interconnected, interdependent, forming a coherent whole and in this sense systematic.

Directives typically lay down a deadline for transposition, and it is assumed in Article 189 EEC that they will be transposed before or by the deadline. Art. 189 also assumes that once a directive has been transposed into national law, an individual upon whom the directive has conferred rights will rely, not on the directive, but on the national transposing legislation. By virtue of its unique characteristics, a directive is ideally suited to a federal or confederal system.

\begin{itemize}
\item \textsuperscript{122} Seventh Annual Report', \textit{op cit}, n 23, p C232/7.
\item \textsuperscript{123} See also Clune, \textit{op cit}, n 39, p 65.
\item \textsuperscript{124} Clune and Lindquist, \textit{op cit}, n 39, p 1083.
\item \textsuperscript{125} Ibid., pp 1083-1084.
\end{itemize}
In principle, it provides a Community umbrella which allows for national diversity and variation within the range and scope permitted by the terms of the directive.

Two features of a directive thus are especially pertinent from the standpoint of ensuring the effectiveness of Community law. On the one hand, directives involve a two-phase legislative procedure, in which, following the enactment of the directive at Community level, Member States must transpose the directive into national law. On the other hand, directives are designed to harmonise national legislation rather than to make it absolutely uniform, with the result that national transposing legislation may differ in each Member State. Each of these features raises a well-known problem of effectiveness. On the one hand, Member States may not fulfil their legal obligation to transpose a directive into national law, either by failing to enact the transposing legislation, or by transposing a directive inadequately or partially. On the other hand, uniform application of Community law depends partly upon mutual recognition, partly upon national administrations, and partly upon litigation in national courts; its effectiveness may thus often depend upon national political and legal systems.

These problems are, for three reasons, especially serious in the Community now and in the near future. First, the directive is the main legislative act for completing the Single Market. Secondly, by virtue of its structure and purpose it is, of all Community acts, the one that is the most consistent with the principle of subsidiarity. Thirdly, though the question whether the directive should be replaced as a Community act has long been discussed, the 1991 Intergovernmental Conference on Political Union rejected a proposal for the incorporation into the treaty of a 'Community law', a new act of the Community under Article 189 that would have been adopted by the co-decision procedure. Instead it settled for a Declaration on the Hierarchy of Community Acts, annexed to the Maastricht Treaty, according to which the Member States agreed to reconvene the Intergovernmental Conference in 1996 to examine to what extent it might be possible to review the classification of Community acts with a view to

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127. The original proposal for a revised Article 189 provided, inter alia, that:

'A Community law shall have general application. Its provisions may either be binding in their entirety and directly applicable in all Member States or may be binding, as to the result to be achieved, upon the Member States, but shall leave to the national authorities the choice of form and methods...'

The Community law was designed to establish in the Community legal order a hierarchy of norms similar to that found in national legal systems. It was to be used to establish basic principles and general policies; in addition, certain matters would be reserved for determination by a Community law. Among its stated advantages was that "en particulier, il devient possible, dans ce schéma, de faire désormais l'économie de l'instrument hybride, et de statut ambigu, que constitue, à l'heure actuelle, la directive" [Commission, 'Document de travail' SG(91)4021, 27 février 1991, p 3]. On the Luxembourg Presidency's revised draft of Articles 189 and 189a of the proposed Treaty, see: 'Draft Treaty of the Union' (1991) 1722/1723 Agence Europe (5 July 1991), pp 17-18.

128. The reference to a new Community law was eliminated in the Dutch Presidency's second draft. In its place, a Declaration was drafted for inclusion in the Final Act of the Conference, and this Declaration was agreed with the final draft of the Treaty: see 'Draft Union Treaty (Dutch Presidency's Working Document)' (1991) 1746/1747 Agence Europe (20 November), pp 14-15.
establishing an appropriate hierarchy between the different categories of act. As a result, the most frequently used type of Community act in the near future is likely to remain the directive.

The Court of Justice has elaborated the elements of the judicial liability system in four overlapping stages. They concerned the direct effect of directives, the interpretation of national legislation, the availability of compensation and the potential harmonisation of national remedies.

The Direct Effect of Directives

Though the direct effect of directives was implicit in Grad, it was not held expressly to be possible until SACE. The European Court first held a directive on its own to be directly effective in Van Duyn. The rationale for these decisions was the principle of effet utile. In Ratti, the Court held that a directive may have direct effect, if at all, only after the expiration of the deadline for transposition. In contrast to the earlier cases, this decision was based on a type of Community estoppel, the idea that a Member State should not be allowed to profit from its own failure to fulfil its Community obligations.

All of these cases involved claims by individuals against governments. The question whether a directive could be invoked by one individual against another was settled in the Marshall case. The Court held that a directive could not be invoked horizontally, that is, by one individual against another. It considered that according to Article 189 EEC, and consistently with the idea of estoppel, a directive is binding only on Member States. Consequently, a directive may not of itself impose obligations on an individual.

In elaborating these principles, the Court of Justice addressed a central problem with regard to the effectiveness of Community law. Article 189 EEC assumes that Member States will transpose directives into national law by the specified deadline. Member States failed increasingly to do so. Individuals were therefore not able to invoke rights conferred upon them by Community directives. The Court of Justice filled this gap by recognising that a directive


134. This was the first time the European Court used the idea of Community estoppel, according to Pescatore, 'The Doctrine of Direct Effect: An Infant Disease in Community Law' (1983) 8 ELRev 155, 169. See also Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 ELRev 195.


could have vertical direct effect. This recognition formed the first plank in the judicial liability system.

The Interpretation of National Legislation

Nevertheless, important problems remained. Indeed, each successive judicial decision both resolved outstanding questions and opened up new areas of controversy. Three issues proved especially difficult. First, a directive could not be enforced by one private party against another. Second, once a directive had been transposed into national law, the relationship between the directive and the national transposing legislation was not entirely clear. Third, this confusion was acute in the case of directives which did not have direct effect, but which were eventually transposed into national law.

Confronted with these problems, the Court of Justice was to employ the technique of judicial interpretation. In order to settle the last two issues, it relied on the doctrines of *effet utile* and estoppel, together with the Article 5 EEC 'fidelity clause'. In *von Colson* and *Harz*, the Court laid down certain rules of construction, which were to be used by national courts for interpreting national legislation designed to implement Community directives. Even when a directive did not have direct effect, a national court, in applying the provisions of a national law specifically introduced to implement the directive, was required to interpret its national law in the light of the wording and the purpose of the directive.

However, some national courts continued to interpret national legislation according to national methods of interpretation, even if the directive was enacted prior to the national legislation. This difficulty arose especially in the United Kingdom, with its distinctive tradition of statutory interpretation.

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137. The Court of Justice has held, however, that if a directive has been correctly implemented, individuals must rely on national transposing legislation, not on the directive: Case 270/81 *Felicitas Rickmers-Linie KG & Co.* v *Finanzamt für Verkehrsteuern, Hamburg* [1982] ECR 2771; see also Case C-208/90 *Emmott* v *Minister for Social Welfare* [1991] 3 CMLR 894, 915.

138. For more detailed discussion, see my section on directives and national law in Emiliou, Sharpston and Snyder, *op cit*, n 113, pp 59-61.


142. *Von Colson*, *op cit*, n 147; *Harz*, *op cit*, n 148. This rule of construction is subject to the general principles of legal certainty and non-retroactivity: Case 80/86 *Criminal Proceedings against Kolpinghuis Nijmegen* [1987] ECR 3969; see also Case C-262/88 *Barber* v *Guardian Royal Exchange* [1990] ECR I-1889.

143. See *Duke* v *Reliance* [1988] 1 All ER 626; *Finnegan* v *Clowney Youth Training Programme* [1990] 2 All ER 546. For discussion, see Howells, 'European Directives - The Emerging Dilemmas' (1991) 54 MLR 456, 461-463.
national legislation appeared to be perfectly clear; this view was held for example in France. In November 1990 the Court of Justice decided Marleasing, which expanded and clarified the scope of its guidelines for the interpretation of national legislation in the light of Community directives. Marleasing was an Article 177 reference from a Spanish court. The parties in the main action were both private parties; the Community directive in question had not been transposed into national law; and the directive omitted basic substantive rules embodied in the national legislation. The Court of Justice restated that a directive could not have horizontal direct effect. Nevertheless, it stated that national courts, called upon to determine a dispute in a matter falling within the sphere of application of a directive, are required to interpret their national legislation, as far as possible, in the light of the wording and the purpose of the directive. In contrast to previous cases, this obligation was stated expressly to apply to national legislation enacted either before or after the directive. According to the Court of Justice, the obligation flows from two sources: first, the obligation imposed on Member States by Article 189 EEC to achieve the results provided for in directives, and, second, the obligation of Community loyalty stated in Article 5 EEC.

This broad guideline was the second plank in the development by the Court of a judicial liability system. It bears especially heavily on national courts. Not only does it enlist their cooperation in referring cases to Luxembourg for preliminary rulings. It also requires them to confront expressly the distinctive judicial techniques of Community law. Moreover, it may go even further by requiring them to re-appraise, modify or even abandon, in the light of Community law, some of the time-honoured techniques of their national legal systems. Marleasing may enable private parties inter se to rely on Community directives, at least provisionally and in some circumstances. However, given the diversity of the legal systems of the Member States, Marleasing is likely to be only a short-lived solution to the problem of the effectiveness of Community law that is posed by the nature of directives.

The Availability of Compensation

A Community directive may confer rights on individuals, but be too imprecise to have direct effect. If a Member State fails to transpose the directive into national law, it in effect deprives individuals of otherwise enforceable Community rights. The failure is the more flagrant if the Member State continues not to transpose the directive even after a successful infringement proceeding by the Commission. It may also be the case that no national legislation falls within the ambit of the directive, so, unlike Marleasing, the dilemma cannot be resolved by judicial interpretation. An opportunity to formulate a solution to this conundrum arose in Francovich.


146. Joined Cases C-6/90 and C-9/90 Francovich and Bonifaci v Italy [1992] IRLR 84. For further
Briefly, Council Directive 80/897 sought to ensure employees throughout the Community a minimum level of protection in case of insolvency of their employer. Specific guarantees were provided for the payment of unpaid remuneration. Member States were required to implement the Directive by October 1983. In *Commission v Italy*, the Court of Justice held that the Italian Republic had failed to comply with its obligation. Subsequently various employees of undertakings which became insolvent, leaving substantial arrears of salary unpaid, brought proceedings in Italy against the Italian Republic. They sought payment of the compensation provided for by the directive or, alternatively, damages. By means of the Article 177 procedure the Court of Justice was asked, *inter alia*, whether the State was liable to pay compensation for harm suffered by an individual as a result of its failure to transpose the directive.

In a bold judgment the Court of Justice accepted the principle of State liability. It stated that the full effectiveness of Community rules might be called into question, and the protection of enforceable Community rights would be weakened, if individuals could not obtain compensation where their rights were infringed by a breach of Community law for which a Member State was responsible. The possibility of compensation was particularly important where the effectiveness of Community rules was subject to action by the State and where, if the State failed to act, individuals could not vindicate their Community rights before national courts. According to the Court, the principle of liability of the state in such a case was inherent in the scheme of the Treaty and also followed from the Article 5 EEC fidelity clause.

The principle of State liability is a new development in Community law. It was not previously recognised by the Court of Justice, though the Commission had considered for some time that Article 5 EEC, together with the general principles of Community law, required Member States to provide a compensation scheme for private individuals whose interests are prejudiced by government acts conflicting with Community law. The precise scope of Member State liability remains of course to be determined. It is not clear, for example, whether it extends to all directives which meet the conditions stated by the Court; whether it applies to Community acts other than directives; and whether national courts, as well as the European Court, are entitled to determine a breach of Community law leading to liability.

Even as it stands, the *Francovich* principle, though not exactly 'a charter for private sector

147. [1989] ECR 143


149. See Bronckers, *op cit*, n 45, pp 519-520; see also Mattera, *op cit*, n 48, pp 700-704, and the text at n 30 above.

150. Liability was said to be subject to three conditions. First, the result laid down by the directive must involve rights conferred upon individuals. Secondly, the content of those rights must be identifiable on the basis of the provisions of the directive. Thirdly, there must be a causal link between the Member State's failure to fulfil its obligations and the damage suffered by the persons affected.

151. See also the sources cited in n 153 above.
employees", is likely to give individuals, organisations and their lawyers a significant instrument to use in national courts in enforcing Community law against their national governments, with eventual recourse to the Court of Justice under Article 177. Of equal importance for the effectiveness of Community law is the broader impact of the judgment. First, the principle of State liability may prove a powerful political and legal symbol. A declaration of liability

'creates an abstraction, an absolute claim on public resources. Through its visibility and its authoritative source, it commands central attention on the crowded public agenda. A judicial declaration demands responsive action, and it stirs political actors to prepare such a response....'154

Secondly, the Francovich case is likely to have an effect on relations between the Community and the Member States. The principle of State liability is embodied in a complex judgment, yet its generality and ambiguity may help to create an expectation that the principle might be enforced. Thirdly, this expectation in itself is likely to be an element, implicit if not explicit, in bargaining processes between the Commission and Member States, especially concerning the implementation of Community law. The principle of State liability represents the third plank in the judicial liability system elaborated by the Court of Justice.

Towards the Harmonisation of National Remedies?

In Francovich the Court of Justice recalled that, in the absence of Community provisions, it was for national legal systems to lay down the procedural steps for legal action to ensure the full protection of Community rights. These 'conditions of substance and form' were not to be less favourable than those governing national remedies, and they were not to make the enforcement of Community rights impossible. While thus recognising that Community rights are to be enforced primarily in national courts, the Court's jurisprudence has none the less


153. It has been argued that individuals should be able to seek the grant of an injunction or the award of damages against a Member State which adopts a measure in breach of a directly effective rule of Community law, and also that in principle they should be able to rely on these rules even in the case of Community rules which are not directly effective: see Temple Lang, op cit, n 114, p 653.


155. See also Elmore, op cit, n 35, pp 220-221.

156. Op cit, n 147, at 93 [para. 42].


impinged increasingly on national legal remedies. At the same time as national administrative law is being influenced considerably by general principles of Community law, such as proportionality,\textsuperscript{159} the Court of Justice is beginning to contribute to the restructuring of national procedural systems.\textsuperscript{160}

In the celebrated \textit{Factortame} case the Court of Justice set aside the rule of English constitutional law that an injunction cannot be granted against the Crown, at least where the rule prevents the enforcement of a right conferred by Community law.\textsuperscript{161} In \textit{Emmott} it declared that, where an individual wishes to rely as against a Member State on rights contained in a directly effective directive, time does not begin to run, and therefore the individual cannot be time-barred even under the normal domestic rules on limitations of actions, until such time as the directive has been properly transposed into national law.\textsuperscript{162} More recently, in \textit{Zuckerfabrik} \textsuperscript{163} the Court held that interim measures should be available when the legality of Community law was being questioned before a national court, and a national court has a duty to consider granting such relief if requested by a party to do so.\textsuperscript{164} These steps towards the gradual reshaping of national remedies can be viewed as a fourth element in the Community judicial liability system.

The four elements in this system need to be appreciated as a whole from two different perspectives. Seen from the bottom up, they help to provide judicial protection for the individual. Seen from the top down, they perform an essentially political function of social control.\textsuperscript{165} These two perspectives are complementary, one representing the view of individual actors or organisations, and the other representing a conception of the Community legal system as a whole. Both perspectives are essential in order to understand the contribution and the limits of the judicial liability system in ensuring the effectiveness of Community law.

Seen from the second perspective, the judicial liability system embodies a type of structural reform, not by administrative negotiation but by adjudication. In the United States constitutional lawyers have focussed on the Supreme Court. In the late 1970s they identified a

\begin{thebibliography}{9}
\bibitem{duffy} See Duffy, \textit{op cit}, n 147, pp 137-138.
\bibitem{factortame} Case C-221/89 \textit{R. v Secretary of State for Transport ex p Factortame Ltd and Others} [1991] 3 CMLR 589.
\bibitem{emmott} Including where the directive has been implemented but in terms which vary from the directive such that the implementing measure does not fully represent the rights contained in the directive: Case C-208/90 \textit{Emmott v Minister for Social Welfare} [1991] 3 CMLR 894, 916 [para 23].
\bibitem{oliver} In addition, the conditions for suspending Community acts could not vary from one Member State to another. See further Oliver, 'Interim Measures: Some Recent Developments' (1992) 27 CMLRev 7, 24-25; Barav, 'Enforcement of Community Rights in the National Courts: The Case for Jurisdiction to Grant Interim Relief' (1989) 26 CMLRev 369.
\bibitem{shapiro} Shapiro, 'Appeal' (1980) 14 \textit{Law and Society Review} 629. Note that a similar dual role in the Community legal order is played by the concept of institutional balance: see the Opinion by Advocate-General Van Gerven in Case 70/88 \textit{European Parliament v Council}, [1990] ECR I-2041. Whether such a duality of function is characteristic of other basic concepts of Community constitutional and administrative law remains to be seen.
\end{thebibliography}
new kind of public law litigation, 'institutional litigation,' which
 typically requires the courts to scrutinize the operation of large public
 institutions. The suits
 are generally brought by persons subject to the control of the institutions who
 seek as relief some relatively elaborate rearrangement of the institution's mode of

Views have differed as to the novelty of institutional litigation.\footnote{Chayes and Cox argue that its procedures and remedies depart significantly from the model of traditional litigation: see Chayes, \textit{op cit}, n 170; Cox, \textit{op cit}, n 170. In contrast, Eisenberg and Yeazell, \textit{op cit}, n 170, suggest that the only new features are its substance, especially new rights, and its power.}

All agree, however, that, in institutional litigation, '[l]itigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.'\footnote{Chayes, \textit{op cit}, n 170, p 1304; Diver, \textit{op cit}, n 154, p 65.}

It is tempting to apply these observations to the Court of Justice. After all, in the Community, as in the United States, the institutional vacuum resulting from executive and legislative inaction led to an increased role for the judiciary. In both systems, the appropriateness of such a judicial response has been the subject of intense controversy.\footnote{With regard to the Community, see Pescatore, 'La carence du législateur et le devoir du juge' in \textit{Rechtsvergleichung, Europarecht und Staatenintegration, Gedächtnisschrift für L.-J. Constantinesco} (Cologne, Berlin, Bonn, Munich: ***, 1983) and Rasmussen, \textit{On Law and Policy in the European Court of Justice} (Dordrecht: Martinus Nijhoff, 1986).}

It is suggested, however, that the precise analogy is misplaced. First, the Court of Justice is activated by individuals and organisations who, in contrast to plaintiffs in American institutional litigation, are not inmates of institutions in any specific sense. Secondly, the judicial liability system in the Community has been developed by the Court of Justice mainly through the Article 177 procedure: the reach of the Court into the operation of national public institutions, including administrations, is restricted by the fact that its jurisdiction is limited in principle to interpreting (or ruling on the validity of) Community law. Thirdly, and consequently, Community litigation does not involve the negotiation by the Court of Justice with defendant institutional parties of detailed rules regarding the internal organisation of national institutions.

In the United States it has been argued that

The demands of structural reform have magnified the explicitly political dimensions of litigation. Parties have used litigation less as a method for authoritative resolution of conflict than as a means of reallocation of power. Rather than an isolated, self-contained transaction, the lawsuit becomes a component of the continuous political bargaining process that determines the shape and content of public policy. This transformation in the character of litigation necessarily transforms the judge's role as well...\footnote{Diver, \textit{op cit}, n 154, p 45.}
In the Community, it is suggested, the role of ‘political powerbroker’\textsuperscript{171} in this strong sense has been resisted thus far by the Court of Justice. None the less, there are common features, and this brief comparison with the United States Supreme Court is instructive. It enables us to begin to situate Community law litigation in the political process, at both the Community and the national levels, and it illuminates the political dimension of the Community judicial liability system. By elaborating the elements of this system, rather than by institutional litigation in the American sense, the Court of Justice has played a central role in organising and reshaping relations among Community institutions and between the Community and the Member States.

CONCLUSION

This article has explored the nature and preconditions of the effectiveness of Community law as well as some of the principal means of ensuring it. In doing so, it has focussed on two of the main Community institutions, the Commission and the Court of Justice. For this purpose it has treated each of these institutions as part of a distinctive configuration of elements, each comprising particular processes, tools and techniques. We can now draw these strands together more systematically, identify some of the advantages and disadvantages of each institutional configuration and point to some possible future developments.

During the past thirty years the Commission has fluctuated between the poles of European government and European secretariat.\textsuperscript{172} After a period of dynamism in the early 1960s, it was undermined by the 1966 Luxembourg Accords, the development of the European Council and the growth of intergovernmentalism in the Community throughout the 1970s. Then, after the Single European Act, fortified by the 1992 deadline, it became increasingly active in regulation, including social regulation, and in negotiation in a variety of forums with national governments. Recently the Commission has been weakened by the Maastricht Treaty: most of its proposals were not accepted, its right of legislative initiative was diluted, and its legitimacy was questioned, as has become clear in subsequent debates.\textsuperscript{173} The Commission has sought to ensure the effectiveness of Community law mainly by the process of negotiation. It has relied essentially on three tools: the Article 169 EEC procedure, soft law and structural reform. Its techniques have included efforts to increase its powers to implement Community law and to expand the legal competence of the Community; these have often employed in conjunction.

It has been suggested here that the three tools used by the Commission to ensure the effectiveness of Community law are all best viewed as different forms of negotiation. Among them, however, structural reform has assumed a special significance. For three reasons, this should not be surprising. First, the increasing role of the Member States in the Community system has constrained the Commission, with the result that the other tools available to it are relatively ineffective or increasingly fragile. Secondly, the effectiveness of Community law, like its making, depends primarily on negotiation. Of all the tools used by the Commission,

\textsuperscript{171} Ibid.

\textsuperscript{172} This distinction is drawn by K. Neunreither, Transformation of a Political Role: Reconsidering the Case of the Commission of the European Communities’ (1972) 10 JCMS 233.

structural reform represents negotiation in the purest form. Consequently, and thirdly, structural reform seems to be the most appropriate tool for dealing with problems of effectiveness which result from recalcitrance or administrative incapacity. Potentially at least, it can focus directly on the lowest or most problematic levels of the system. In addition, it may involve a broader range of interests and can be more finely tuned. It has thus been especially well-adapted to (though not always successful in dealing with) the problems of effectiveness which up to now have appeared to be the most typical of the Community system.

But administrative negotiation as a means of ensuring the effectiveness of Community law also has shortcomings. First, though allowing potentially for a broad representation of interests, it may be limited in practice to those subjective interests expressed by governments or by powerful organisations. Hence it may tend to favour objective interests which are crystallised in everyday assumptions or which are embodied in largely implicit, organisational constraints. The same generalisation may hold true of courts, though the use of courts by weaker parties to assert their interests in the Francovich case is instructive. In the process of administrative negotiation, however, the risk that other interests may be neglected is increased by the lack of publicity, the informal nature of any agreement and the relative lack of procedural safeguards.

Secondly, litigation, soft law and structural reform need to be assessed, not simply as part of Commission strategy for implementing Community law, but also with regard to the effectiveness of Community law in the broad social sense, including its legitimacy. Litigation and structural reform may be used solely to elaborate legal doctrine. Usually, however, in common with the use of soft law, they are deployed as forms of negotiation to achieve broader social, political or economic aims. The aims, the means of achieving them and the eventual results are frequently unknown to the general public. In addition, the legal framework within which these tools are deployed is ambiguous or uncertain. European administrative law is currently being developed. This, it may be suggested, could enhance the legitimacy of the Commission, perhaps facilitate an increase in its powers to adopt delegated legislation, and hence increase the efficacy of its tools and techniques for ensuring the effectiveness of Community law.

Third, the use of structural reform as a means of increasing the effectiveness of Community law must also be assessed at a more general level. The increasing inter-penetration of Community and national administrations risks accentuating an already great orientation in the Community towards administrative means of policy-making, techniques of problem-solving and political culture. More than twenty years ago Scheinman warned of the danger that ‘the technical ministries and services will become the dominant actors along with their Commission counterparts in the direction and management of major economic sectors, if not the entire


175. See also Clune and Lindquist, op cit, n 39, p 1088.

176. See Streeck and Schmitter, op cit, n 5.

177. See Snyder, op cit, n 1, chap. 2.

178. But see Chayes, op cit, n 170.

179. See Schwärze, op cit, n 160.
Since then, political choices have often been treated as if they were ideologically neutral. It has been argued recently that the Community has already ventured too far down this road. Regardless of the merits of this argument, it is crucial - for citizens, national governments and the integrity of the Community itself - that political values be expressed in the Community system and at the level of the Community. For this reason, it is imperative that structural reform not be the only, or even the principal, means of ensuring the effectiveness of Community law.

In contrast to the Commission, the Court of Justice has aimed to ensure the effectiveness of Community law by means of adjudication. In dealing with the problem of non-transposition of directives, the basic tool of the Court of Justice has been the gradual, piecemeal development of a judicial liability system. As a means of supervision and control, the creation of a judicial liability system is not unusual. However, the system which has been developed by the Court of Justice has distinctive features. First, it has been established by the process of adjudication, that is, gradually by the judiciary, rather than in a single act by the legislature. Secondly, it has been directed mainly at governments, not at private organisations. Thirdly, its primary target has been the failure of Member States to fulfil their Treaty obligations, in particular by failing to transpose Community directives into national law. Fourth, and consequently, its aim has been limited in scope: to enforce the correct transposition of directives, that is, to ensure the effectiveness of Community law in this limited (but none the less important) formal sense. Fifth, the branch of Community-level government from which complainants seek relief, in the last instance, is the same branch which is the source of the rules, that is, the Court of Justice. Sixth, the system depends on one of the key relationships in the Community, namely the relationship between the Court of Justice and national courts.

The Court of Justice has also used two other tools which are characteristic of the Community judicial process. One is individual litigation, typically beginning in a national court and reaching the Court of Justice on an Article 177 reference. This tool determines a reactive, ad hoc working method. The second tool is the judicial decision, which in the Court of Justice is embodied in a single written judgment. For present purposes, the judgment has two features of special importance. On the one hand, it usually contains two related but distinct decisional parts: the dispositif, which is narrowly formulated and refers only to the particular case at hand; and significant principles, which, expressed in key paragraphs of the judgment, encompass not only the particular case but also potential future situations. On the other hand, the Court of Justice is not bound by precedent and, though it tends of course to follow a jurisprudence constante, it can change its mind. Together with the nature of individual litigation, these features of the judgment give the Court of Justice considerable flexibility in testing its ideas, developing its 'courteously didactic method' or modifying its strategies for ensuring the effectiveness of Community law.

The main techniques employed by the Court of Justice include the constitutionalisation of the founding treaties, the interpretation of legal texts, and judicial creativity, particularly

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180. Scheinman, op cit, n 98, p 769.
182. See Kennedy and Specht, 'Austria and the European Communities' (1989) 26 CMLRev 615.
with regard to basic Community law principles. On the one hand, the Court of Justice has given great emphasis to the doctrine of effet utile, explicitly or implicitly. As if following Pescatore,\(^\text{185}\) it has presumed that any rule of Community law is meant to have an effect. On the other hand, the Court of Justice has gradually 'hardened' the duty of Community loyalty expressed in Article 5 EEC. In fact, Article 5 EEC may be viewed as the cornerstone of the Court of Justice's judicial liability system.

The use of a judicial liability system to ensure the effectiveness of Community law has several disadvantages. These disadvantages, as the advantages, flow from a particular configuration of institutions, processes, tools and techniques. The first disadvantage stems from the judicial origins of the system. The system has been developed by means of the process of adjudication, that is, by the judiciary in response to ad hoc claims. Consequently, almost by definition, it is likely to be less normatively coherent and less comprehensive than a legislative scheme.

A pertinent example concerns the judicial harmonisation of national remedies. The general principles of law, elaborated by the Court of Justice on the basis of Articles 164, 173 and 215 EEC, surely include the right to an effective remedy.\(^\text{186}\) Differences in national remedies affect the extent to which individuals can rely in practice on rights derived from Community law. It is however open to question whether the institutions, processes, tools and techniques which are currently being used to harmonise remedies are entirely adequate for this purpose. Achieving a harmonisation of national remedies sufficient to ensure effective enforcement of Community rights, while simultaneously respecting the legitimate differences among Member States, is a difficult task. The judiciary, litigation, Article 5 EEC and treaty interpretation all have inherent limits.\(^\text{187}\) Consequently, it is suggested, serious consideration should be given to enacting legislation designed to harmonise selected elements of national systems of remedies for the enforcement of Community rights.\(^\text{188}\) Such elements might include, for example, time limits and

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\(^\text{185}\) See Pescatore, \textit{op cit}, n 134, p 177.


\(^\text{187}\) On the use of Article 5 EEC by the European Court of Justice in reforming national procedural systems, see Temple Lang, \textit{op cit}, n 108, p 647. Summarising the case law, he argues that national procedures and national remedies must be adapted as far as possible to protect fully the rights given by Community law (ibid. at 651); Member States are required to legislate to create sanctions and to provide administrative and enforcement procedures and personnel (ibid. passim); but that the Commission cannot use Article 5 EEC to create new kinds of obligations for Member States (ibid. at 650). See also Constantinesco, \textit{op cit}, n 140.

the availability of interim relief. Otherwise Member States may fail adequately to fulfil their obligations under Article 5 EEC, and individuals may find Community law to be ineffective.

In the Community context, moreover, the structure of the judicial liability system has broader implications for institutional development. By breathing new life into the form of judicial co-operation envisaged by Article 177, it strengthens the vertical relations of collaboration within the judicial branch at two levels of government. However, it does not involve directly any other national institutions, such as parliaments. In addition, it does not necessarily strengthen existing relations between Community institutions, nor does it create any new horizontal links between them, as might have been the case if, for example, the judicial liability system had been enacted by the Council, following a Commission proposal and in cooperation with the Parliament. Such implications for the potential development of institutions need to be considered in evaluating alternative processes, tools and techniques for ensuring the effectiveness of Community law.

A second shortcoming of the judicial liability system with regard to ensuring the effectiveness of Community law derives from the fact that it relies on ad hoc claims. On the one hand, in general, there is a real question whether the effectiveness of law can be ensured adequately by a system triggered solely by individual claims. This deficiency is accentuated by the absence of framework legislation. On the other hand, a judicial liability system of the Community is inevitably more complex than in any national system. For example, litigation rates throughout the Community are influenced by diverse legal cultures, and, for this reason among others, they differ substantially among the Member States. This alone would make it unlikely that individual litigation by itself could result in the uniform effectiveness of Community law. More generally, however, we simply know too little about the sociological features of Community law or litigation involving Community law to rely heavily on a judicial liability system as a principal means for ensuring effectiveness.

Third, any judicial liability system is only a very diffuse, extensive form of supervision. It represents one end of a continuum, the other end of which is occupied by direct regulation. In developing the judicial liability system, it may be suggested, the Court of Justice so far has been concerned more with ensuring the formal enactment of national transposing legislation, and less with guaranteeing any particular legislative content; this is because the content is mainly determined already by the Community directive. The judicial liability system has been mainly a means to enforce this Community law obligation. Its main strength so far has been the articulation of legal principles. Correlatively, its principal weakness lies in the fact that its most public result has been the creation of political symbols. The extent to which these symbols are likely to coerce Member States for other purposes, let alone whether they appeal or are even known to the wider public, is open to question. Symbolic action is significant, but it may fail to make any real impact on the effectiveness of Community law, especially if by 'effectiveness' we refer to effects in addition to the elaboration of legal doctrine.

189. The Commission staff paper to the 1991 Intergovernmental Conference proposed that Article 5 EEC be amplified to state which types of remedies are required for the effective enforcement of Community rights: see 'Contributions by the Commission ...', op cit., n 26, pp 152-153.


Fourth, the European Community system involves complex and delicate relations, not only among Community institutions, but also between the Community and the Member States. Some room for manoeuvre for Member States is essential. It may be suggested that if one means of preserving such a political space is denied, others will be found. Therein lies the difficulty of an increasingly extensive interpretation of Article 5 EEC. The Court of Justice has increasingly deduced specific practical duties from its general words. In these circumstances, it would not be surprising if Member States were to seek other strategies. Such strategies may be illegal, such as various forms of non-compliance; or they may be legal, such as systematic recourse to subsidiarity, creative compliance with the letter but not necessarily the spirit of the law, or opting out. In addition, Member States may resort to devices which can play a role analogous to that of directives, as originally intended, that is, to encourage, facilitate or permit decentralised decision-making. Such devices include techniques of statutory interpretation, national legal remedies, or instances in which central governments take refuge behind national constitutional structures to preserve regional or local decision-making.

In this context, the increased use by the Court of Justice of Article 5 EEC is a double-edged sword. It tends to restrict or close off some of these avenues, but at the same time it suggests the existence of underlying problems which currently cannot be dealt with by the Community by any other means. As part of the process of enforcing Community law, it may be effective both in elaborating legal doctrine and in stimulating changes in specific cases. At the same time, however, when used as a tool to achieve major institutional changes, such as the harmonisation of national remedies, the increasingly broad interpretation of Article 5 may have reached its limits. Its further extension may jeopardise the legitimacy of the Court of Justice without necessarily achieving more general social and political results. Adjudication and a judicial liability system may be less adequate than other processes and tools, whether at

192. More than half of the cases in which Article 5 EEC and the corresponding Articles 86 ECSC and 192 EAEC were cited up to 1990 have occurred since 1 January 1985: Temple Lang, op cit, n 108, p 645.


Community level, through the European Council, by intergovernmental means or by the
Community in conjunction with the Member States.

The preconditions for the effectiveness of Community law are complex. It has been
possible here to consider only the Commission and the Court of Justice, their role in ensuring the
effectiveness of Community law and, to some extent, the advantages, disadvantages, legitimacy
and potential limits of their strategies. The basic question, however, is not which set of
institutions, processes, tools and techniques is to be preferred absolutely to the other. Instead, it
concerns the types of policies, issues or participants for which each is more suitable. Viewed
from this standpoint, the preceding discussion of the Commission and the Court of Justice
pinpoints certain institutional gaps in the Community system.

With regard to ensuring the effectiveness of Community law, the Community system
seems to have worked best so far in creating legal principles and dealing with national
administrations. Adjudication and negotiation have been sufficient, first, to establish the
Community legal order vis-à-vis those of the Member States and, secondly, to cope with the
ineffectiveness of Community law stemming from recalcitrance or administrative incapacity.
But judicial and administrative processes do not occur in a political vacuum. Neither the
Commission and the Court of Justice taken together as institutions, nor negotiation and
adjudication taken together as processes, despite their merits, are sufficient alone to ensure the
effectiveness of Community law in the broader social sense, in particular in so
far as it entails the commitment of citizens, popular
participation and political legitimacy. For this purpose, it may be suggested, other institutions,
processes, tools and techniques are also required.

The legal and political future of the Community is now on the agenda. A debate is
emerging as to the Community's institutional and political configuration. This debate is often
couched in purely technical terms, especially in legal literature, but none the less it inevitably
concerns political values and choices. Yet the institutions and processes for people to express
such choices are lacking, by and large, in the Community system. At the top of the agenda,
therefore, must be the creation of effective democratic political institutions at Community level,
 together with the establishment of processes for the public expression of choices concerning
Community politics and Community law within the Community system.

Painting with broad strokes, it may be suggested that this might include greater
transparency of Community decision-making, a further re-consideration of the relations between
the main Community institutions, the horizontal direct effect of directives, the elaboration of a
European administrative law, increased powers for the European Parliament and a more effective
role for national parliaments. It might also entail the development of a coherent federal system
or a politically acceptable alternative, both involving appropriate checks and balances and the
decentralisation of power; a clearer allocation of power between the Community, the Member
States and subordinate units; public and clear guidelines for putting into practice the concept of
subsidiarity; increased networks among
sub-national political units in the Community system; reforms in the methods of selecting
members of the main Community institutions; and the development of a real European as well as
national citizenship. These and other measures could help to develop political participation,
together with negotiation and adjudication, as one of the basic processes in the Community
system. Such changes, or similar reforms, in the institutions and the processes of the Community
are likely to be essential in ensuring the effectiveness of Community law in the future.