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David Anderson

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David Anderson*

I. INTRODUCTION

The founding members of the European Economic Community (EEC), announced in the Treaty of Rome their determination "to lay the foundations of an ever closer union among the peoples of Europe."1 They equipped the Council and the Commission of the EEC with two principal legislative tools for this purpose: the regulation and the directive.

The stronger of the two tools is the regulation, which is stated in Article 189 of the Treaty of Rome to be of general application, binding in its entirety and directly applicable in all Member States. Repeated decisions of the European Court of Justice (the Court) have confirmed that regulations assume the force of law without the need for implementing measures to be taken in the Member States ("direct applicability"),2 and that regulations once issued may afford legally enforceable rights to those concerned by them ("direct effect").3

The directive is both less powerful and less straightforward than the regulation. In the words of Article 189: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." These words alone

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* M.A. (Oxon.), B.A. (Cantab.), of the Middle Temple, Barrister. This article was written during a five-month attachment to the Commission of The European Communities in Brussels, but the views it expresses are my own. I am grateful to Laurence Gormley, Grant Lawrence and David Vaughan, Q.C. for their valuable comments on an earlier draft, and to Michel Ayral, Ernesto Previdi and Amedee Turner M.E.P.


reveal two potential weaknesses of the directive. First, Article 189 imposes only an "obligation of result" on the Member States, leaving them with discretion as to the manner in which the directive is to be implemented. Second, the directive is not stated to bind anyone other than the Member States to which it is addressed. This leaves open the important question of whether a directive can be binding on a non-public body such as a private individual or corporation.

Despite the relative weakness of the directive as a legislative tool, there are significant fields of EEC activity in which the Treaty of Rome permits only directives to be used. These fields include the right of establishment (Articles 54, 56), freedom to provide services (Article 63(2)), liberalization of capital movements (Articles 69, 70) and the approximation of laws (Article 100). Regulations were excluded from these fields, no doubt, because the original Member States were wary of giving too much legislative power to the institutions of the Community. Yet directives may in many cases be more suitable instruments for the co-ordination of policy. Creative use of their duty to implement directives can enable national Parliaments to find neater, more flexible and less controversial means of legislative change than would be afforded by the imposition of a directly applicable regulation.

The effectiveness of the directive as an instrument for major policy change is currently being tested as never before. In June 1985, at the prompting of the European Council, the Commission issued a White Paper containing over three hundred specific proposals for completing the internal Community market by December 31, 1992. The aim of this program is to make a reality of the 'four freedoms' enshrined in the Treaty of Rome: free movement of goods (Articles 9–37), free movement of persons (Articles 48–58), freedom to provide services (Articles 59–66) and free circulation of capital (Articles 67–73).

The implementation of the internal market program should in theory be facilitated by the new Single European Act, which came into force on July 1, 1987 and incorporates the first major amendments to the founding treaties of

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4 Article 100A of the Treaty of Rome provides for measures other than directives to be used for the approximation of national provisions having as their object the establishing and functioning of the internal market. This must be read subject to the Declaration on Article 100A which was adopted by the Member States in February 1986: "In its proposals pursuant to Article 100A(1) the Commission shall give precedence to the use of the instrument of a directive if harmonization involves the amendment of legislative provisions in one or more Member States." See Treaty of Rome, supra note 1, at art. 100A. See also infra note 10.

5 The European Council is the name given to the heads of state or government of the member states when they meet at their regular summits. The European Council may function as the Council provided for in the Treaties, but was given its own official status by Article 2 of the Single European Act. See S1 HALSBURY'S LAWS OF ENGLAND 1.83 (4th ed. 1986) [hereinafter LAWS OF ENGLAND].


7 Some of these "freedoms" can be subdivided. See P. Mathijsen, A GUIDE TO EUROPEAN COMMUNITY LAW (4th ed. 1985).
the EEC. The amended Treaty of Rome now provides for the establishment of the internal market by 1992 (Article 8A). It aims to facilitate the adoption of internal market measures by a major extension of majority voting in the Council (Article 100A). Extensive advertising campaigns, notably in France, have attempted to alert the citizens of the EEC to the imminence of "1992" and to the possibilities of a "Europe without frontiers."

The plan is a highly ambitious one, envisaging an internal market which is larger and in some respects even more integrated than that of the United States. The political risks are high, because lack of progress in any one of a

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9 Article 8A states:

- The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8B, 8C, 28, 57(2), 59, 70(1), 84, 99, 100A and 100B and without prejudice to the other provisions of this Treaty.

- The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

The Treaty of Rome, *supra* note 1, at art. 8A.

10 Article 100A states:

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8A. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.

4. If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the commission of these provisions.

- The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

- By of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

5. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.

The Treaty of Rome, *supra* note 1, at art. 100A.

11 Some of the fields in which the White Paper envisages integration more advanced than in the United States are the mutual recognition by States of professional diplomas, the harmonization of indirect taxation and the proposed statute for a European company. In other important respects, most
dozen fields will jeopardize the centerpiece of the program: the removal of frontier controls within the Community. Finally, the program depends to a large extent on the use of directives. There is a substantial overlap between the objectives of the internal market program and the fields in which directives have to be used. The directive is the only instrument available for policies as diverse as the creation of an EEC product liability regime, the removal of exchange controls, the harmonization of VAT systems and the mutual recognition of professional qualifications. It may well be asked whether, at the current stage of its legal development, the directive will prove equal to the task.12

II. The Crisis of Implementation

Since a directive enacted by EEC institutions requires implementation by the Member States, it is particularly vulnerable to any friction between EEC and national interests. Such friction should in theory be minimal, because controversial directives have usually required for their adoption the unanimous support of the Member States' governments as represented on the Council. In practice, however, the states which are keenest to support a new directive in the Council are often the most reluctant to give them effect or to notify implementing provisions to the Commission.13 A great potential for slippage exists between the adoption of a directive by the Council and the transfer of enforceable obligations into the law of each Member State.

Some indication of the size of the problem is given by the Annual Reports to the European Parliament on Commission Monitoring of the Application of Community Law.14 The most recent report reveals that 60 percent of all proceedings initiated against Member States by the Commission in 1986 concerned notably the absence of a common currency and a common language, the Community market will remain divided for the foreseeable future.

12 For the place of the directive in the Community legal order see Schermers, Judicial Protection in the European Communities (4th ed. 1987); T. Hartley, The Foundations of European Community Law (2nd ed. 1988); Capelli, Le Direttive Comunitarie (1983). For the implementation of directives see also the articles cited at supra note 3 and at infra notes 13, 29, 52 and 64.

13 The extremes commonly cited are Denmark (hard negotiator but scrupulous implementer) and Italy (flexible in negotiations but notoriously poor at implementation); M. Cappelletti, 2 Integration Through Law: Europe and the American Federal Experience 84 (1986) [hereinafter Cappelletti]. For the constitutional and administrative background to implementation in the various Member States, see Meny and Giavarini Azzi, Mises en Oeuvre Nationales des Politiques Communautaires: Les Directives de la Communauté Economique Européenne, 54 Rev. Franc. d'Admin. Pub. 177 (1985). For the position in two of the member states most frequently in default, see Lewaeris, The Application of Community Law in Belgium, 23 Common Mkt. L. Rev. 253 (1986); Rossi, L'Attuazione in Italia del Diritto Comunitario Mediante Atti Amministrativi, in DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI (1987).

14 COM (84) 181 final (for 1983); COM (85) 149 final (for 1984); COM (86) 204 final (for 1985); COM (87) 250 final (for 1986).
failure to implement directives properly. The Commission sent 372 letters of formal notice concerning directives in 1986, exactly twice the number sent in 1983. Even with the two newest Member States, Spain and Portugal, excluded from the count, the Commission admits that approximately 290 out of the 780 directives for which the time limit for incorporation into national law had lapsed were 'giving rise to problems.' Of these 290 troublesome directives, one third were concerned with the completion of the EEC internal market.

The crisis of implementation is not necessarily worsening. Only a small proportion of infringement proceedings find their way to the Court, and the sharp increase in complaints over recent years may be better explained, by greater awareness of Community law or by increased diligence on the part of the Commission than by greater lawlessness among the governments of the Member States. On the other hand, inadequate implementation of directives may be a bigger problem than the infringement figures suggest. In the absence of a systematic procedure for examining the implementation of all directives in all Member States, the Commission relies heavily (though not exclusively) on parties affected by an infringement making a complaint. Inadequate implementation of directives sometimes comes to light only as a result of private litigation which is referred to the Court under Article 177, quite independently of the Commission. It is fair to assume that other examples of inadequate implementation never come to light at all.

Member States' failure to implement directives is generally attributed to inefficiency or incompetence rather than deliberate disobedience. The Court occasionally draws attention, however, to the deliberate refusal of a Member State

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15 COM (87) 250 final, at 4. The terms “failure properly to implement” and “inadequate implementation” are used here to embrace both non-implementation and purported implementation which is faulty. The distinction between the two is generally insignificant in legal terms: a Member State which has taken no specific implementing measures will often claim that pre-existing legislation itself constitutes adequate “implementation.”

16 Id. at Table 4.

17 Id. at 2.

18 Id. at Annex B.

19 One analysis of infringement proceedings between 1975 and 1981 concludes that barely five percent of infringement proceedings went as far as judgment. CAPPELLETTI, supra note 13, at 69.

20 See the reference at COM (87) 250 final, at 4, to “a big operation to police the implementation of directives” launched by the Commission in 1983.

21 The number of infringements detected on the Commission's own initiative is increasing. COM (87) 250 final, at 2 and Table 8.

22 A forthcoming Report to the European Parliament by Amedee Turner MEP is expected to recommend the scrutiny of all implementing measures by lawyers answerable to the Commission. See also CAPPELLETTI, supra note 15, at 87. The author suggests that a new entity should be created, independent of direct Commission authority and principally responsible for ensuring legal observance. Id.

23 COM (87) 250 final, at 13, 15.
to take the necessary implementing measures. More commonly, Member States will prolong the infringement proceedings in order to take full advantage of their failure to implement. They can then escape the censure of the Court by implementing the directive just before trial. Still more worrying, because it suggests not just disobedience but a possible threat to the perceived legitimacy of the Court, is the recent growth in proceedings under Article 171 for non-observance of a previous judgment of the Court.

The temptation to deliberate disobedience will arguably increase with the advent of the Single European Act and majority voting on measures relevant to the completion of the internal market. If a Member State is outvoted in the Council on a politically controversial harmonizing measure, its authorities might feel more justified in refusing to implement a directive than they would have done had they given their assent to it under the old unanimity requirement. On the other hand, the qualified majority requirement has not created any particular problems in fields where it already applies, notably company law and the right of establishment. Finally, Article 100(A)(4) of the amended Treaty of Rome will in some cases lessen the frustration of an outvoted Member State by legitimizing derogations from the new harmonized measure.

Whatever the future trend, the present reality is that the inadequate implementation of directives 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 relative weakness of the directive as a policy instrument is underlined in the customs sphere by a Commission program to make regulations out of existing directives concerning customs warehouses and free zones. In most areas, however, the only solution available to the Commission or to a private party affected by


25 Table 7 of COM (87) 250 final contains a list of Court judgments not yet complied with as of December 31, 1986. The Commission points out in its report, however, that non-compliance has only risen in proportion to the number of judgments delivered by the Court. Id. at 5.

26 See Treaty of Rome, supra note 1, at art. 100A.

27 Article 100A(4) permits Member States to apply their own national provisions in place of a harmonized measure on a wide range of grounds including those referred to in Article 36 (public morality, public policy, public security, public health, protection of national treasures and of industrial and commercial property) and protection of the environment and working environment. The scope of this potentially enormous derogation will depend on how the Commission and ultimately the Court exercise their supervisory power. Treaty of Rome, supra note 1, at art. 100A(4). For different views of its likely effect see Pescatore, Some Critical Remarks on the “Single European Act,” 24 Common Mkt. L. Rev. 9 (1987); Ehlermann, The Internal Market Following the Single European Act, 24 Common Mkt. L. Rev. 361 (1987).

28 COM (87) 250 final, at 17.
inadequate implementation of a directive is to seek redress in accordance with the rules laid down by the European Court.

III. THE SANCTIONS FOR INADEQUATE IMPLEMENTATION

Undaunted by the less than promising material of Article 189, the Court has in the last fifteen years developed four principles by which the inadequate implementation of directives can be attacked. In descending order of boldness, these principles are as follows:

1. Acknowledging the direct effect of directives;
2. Refusing to give effect to national laws which conflict with directives;
3. Requiring national laws to be interpreted with reference to directives;
4. Restricting the Member States' discretion as to "the choice of form and methods."

Of these four approaches, the first appears to have lost its impetus but to have preserved most of its early advances. The second is effectively moribund, and the third and fourth are still developing. After briefly summarizing the first three approaches, the fourth approach—which is relatively recent and has attracted little academic attention—will be considered in more detail.

A. Acknowledging the Direct Effect of Directives

The Court's first and most radical approach was to develop the doctrine that an unimplemented or wrongly implemented directive may nonetheless be directly effective against a Member State. Even though a Member State has not taken the implementing measures envisaged by the text of the directive and by Article 189, the directive may still bestow rights on individuals which these individuals can enforce in national courts.

The concept of a directly effective directive, addressed to Member States but invocable by individuals, is not implicit in the wording of Article 189. Direct
effect has its legal basis in two principles: the status of Community law as an integral part of the legal system of the Member States,31 and the Civil law doctrine that a legal measure must be presumed to have an *effet utile* or useful effect. The application of these principles to the directive, buttressed by an adventurous interpretation of Article 17732 and by the estoppel-like notion that Member States should not be able to rely on their own failure to implement,33 is one of the most impressive pieces of judicial activism in the Court's history.34 Direct effect provides a powerful countercheck to the non-implementation of directives. The use of the direct effect doctrine is not restricted to EEC courts, but is available in local courts to individuals who have rights under directives which should have been implemented. The directly effective provisions of a directive, without having the precise legal force of a regulation, may in practice constitute an equally effective vehicle for the transfer of EEC obligations into national law.

A number of reasons exist, however, why direct effect is not by itself an adequate response to the problems of non-implementation and defective implementation. First, direct effect can be accorded only to a provision which is "sufficiently clear and precise."35 Though this requirement will not always be interpreted strictly,36 its mere existence raises a doubt as to the direct effect of many nontechnical directives.

Second, the relevant provision must be "unconditional":37 it will not be directly effective if it affords some discretion to the Member States regarding the contents of the rule to be transferred into their legal systems. This requirement

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32 This argument was expressed as follows by the Court in Case 41174, Van Duyn v. Home Office, 1974 E. Comm. Ct. J. Rep. 1357, 1 Common Mkt. L.R. 347 (1974): "Article 177, which enjoins national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts." However this argument has not been used in the more recent cases.
34 The Court's reputation for activism has won it mixed praise. See RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1986); Cappelletti, 12 EUR. L. REV. 3 (1987) and Weiler, The Court of Justice on Trial, 24 COMMON MKT. L. REV. 555; and Pescatore, La Carence du Législateur Communautaire et le Devoir du Juge, in RECHTSGLEICHUNG, EUROPARECHT UND STAATENINTEGRATION, GEDÄCHTNISCHRIFT FÜR LEONTIN-JEAN CONSTANTINESCO 559.
too has sometimes been liberally interpreted, but it remains a significant barrier to the direct effect of many directives which, for political or practical reasons, give the Member States a certain flexibility as to substance.

Third, the terms of a directive may be invoked against a Member State only after the expiration of the implementation period specified in the directive, which is typically two years from notification. Therefore, even a directly effective provision is at best a delayed-action weapon, whether in the hands of the Commission or of a private party.

A further block seems to have been placed on the expansion of direct effect by a recent judgment of the European Court in an Article 177 reference from the United Kingdom on the interpretation of a sex discrimination directive. After several years of prevarication on the point, the Court decided in Marshall that a directive had only "vertical" direct effect (conferring rights against national governments or other bodies exercising public authority) and not "horizontal" direct effect (conferring rights against private parties), even though the directive in question gave effect to a provision of the Treaty of Rome (Article 119) which was itself directly effective in a horizontal as well as a vertical sense. The repercussions of the Marshall decision extend well beyond sex discrimination. They will, for example, affect the Commission's attempts to place obligations on private corporations by means of the company law and consumer directives. The Marshall decision is a serious blow, though not an unexpected blow.

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58 See, e.g., id. That case held that a safeguard clause would fall foul of the "unconditionality" requirement only if invoked. See also Case 8/81, Becker v. Finanzamt Munster-Innenstadt, 1982 E. Comm. Ct. J. Rep. 53, 1 Common Mkt. L.R. 499 (1982), in which an exempting provision of the Sixth VAT Directive was held to be "unconditional" even though it required member states to lay down conditions regarding the application of the exemption.

59 See, e.g., Case 148/81, Von Colson v. Land Nordrhein-Westfalen, 1984 E. Comm. Ct. J. Rep. 1891, in which a provision of a directive requiring a remedy for refusal of employment on grounds of sex but not specifying the nature of the remedy was held not to meet the unconditionality requirement.


42 "Vertical" direct effect works in one direction only and does not enable a Member State to rely on an unimplemented directive as against an individual. Case 80/86, Officier van Justitie v. Kolpinghuis Nijmegen BV, Judgment of Oct. 8, 1987 (not yet published).


44 Though the court could have restricted itself to Directive 76/207, it expressed itself in broad terms:

[It follows] that a directive may not of itself impose obligations on an individual, and that a provision of a directive may not be relied on as such against such a person.

1 Common Mkt. L. Rev. 688, 711 (1986).
one,45 to the principle of direct effect and to the power of the directive as an instrument for controlling the legal relationship between private parties.

The direct effect doctrine has significantly strengthened the directive as an instrument of EEC policy; indeed it may be doubted whether the directive-led drive for 1992 could realistically have been envisaged without the discipline provided by direct effect. Yet the limitations on the doctrine exclude potential plaintiffs from large areas of concern to them, and the head of the recalcitrant Member State is further strengthened by the lack of certainty as to whether a given provision is directly effective or not. The Marshall judgment suggests that the present concern of the Court is to consolidate the advances of the 1970s, rather than face the legal complexities and political risks46 of attempting to extend the doctrine further.47

B. Refusing to Give Effect to a Conflicting National Law

Aware of the limitations of the direct effect doctrine, the Court made an ingenious but short-lived attempt to outflank it in three decisions dating from the late 1970s.48 These decisions appeared to signal the emergence of a general duty on national courts to prevent reliance by their national authorities on a


46 The chief of these risks is that the jurisprudence of the court will not be accepted by the national tribunals of the member states. The highest French administrative court, the Conseil d'Etat, refuses to accept that a Community directive can be directly effective. See, e.g., Ministre de l'Interieur v. Cohn-Bendit, [1970] S. Jur. 155, 1 Common Mkt. L.R. 543 (1980), discussed by Simon and Dowrick, Effect of EEC Directives in France: The Views of the Conseil d'Etat, 95 L.Q. Rev. 376 (1979). This position has recently begun to look extremely isolated, however, both within France (where the Cour de Cassation takes the other view) and in the Community as a whole. For the Italian position following the landmark judgment of the Corte Costituzionale in S.P.A. Granital v. Amministrazione Finanziaria, 21 Common Mkt. L.R. 756 (1984) see La Pergola and Del Duca, Community Law, International Law and the Italian Constitution, 79 Am. J. Int'l L. 598 (1985). The German position has changed as the result of the Judgment of the Bundesverfassungsgericht (Constitutional Court) in Case _BVerfGE _AZ.2 BvR 687/85 (November 20, 1987). Quashing a decision of the Bundesfinanzhof on the application of the Sixth VAT Directive, the Bundesverfassungsgericht affirmed the obligation on all German courts to accord direct effect to directives on the principles laid down by the European Court. See also Laws of England, supra note 5, at 1.83.

47 See also Koopmans, The Role of Law in the Next Stage of European Integration, 35 Int'l & Comp. L.Q. 925 (1986).

provision of national law which is incompatible with an EEC directive. This principle lacks the power of direct effect, for it would result not in the application of the relevant directive but merely in the non-application of the offending national law. In practice, however, the threat of a legal vacuum would provide a powerful incentive for legislation to be amended in accordance with the directive. By deliberately divorcing the formulation of this new duty from the conditions traditionally attached to direct effect, the Court appeared to be opening the way for the application of a very similar principle to areas never penetrated by the direct effect doctrine.

For one reason or another, this divorce proved to be unsustainable. Though the Court in subsequent cases has continued to require national courts not to apply national provisions incompatible with a directive, it has emphasized that this duty applies only when the obligation imposed by the directive is “unconditional and sufficiently precise” and when the implementation period is over. These conditions are identical to those attaching to direct effect. The doctrine which the Court attempted to establish in the early cases has now been quietly assimilated into the doctrine of direct effect, and can no longer be said to add anything to it.

C. Requiring National Laws to be Interpreted with Reference to Directives

At the same time as it has developed the doctrine of direct effect, the Court has been concerned with strengthening the power of the directive even in fields where direct effect or a similar doctrine is out of the question. It has sought to minimize the distinction between implemented and unimplemented directives by means of the emerging principle—grounded partly on Article 5 of the EEC Treaty—that national tribunals are required to use the text of any directive as an aid in interpreting the relevant national rules.

50 Case 38/77, In Enka, 1977 E. Comm. Ct. J. Rep. 2203, 2 Common Mkt. L.R. 212 (1978), the Court contrived to reply to a straight question on direct effect with reference only to the Verbond decision and without mentioning the Van Dyne limitations on direct effect as generally applied.
53 Article 5 states:
Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.
Treaty of Rome, supra note 1, at art. 5.
This principle was first developed in Article 177 references from tribunals which themselves appear to have accepted it in advance. This can be deduced from the fact that they asked the Court to interpret directives which were clearly not directly effective. The current leading case is Von Colson v. Land Nordrhein-Westfalen, a case concerning the compatibility of Council Directive 76/207 (discrimination in matters of access to employment) with the remedies furnished by the German implementing legislation. The Court held that the sanctions provision of the directive was not directly effective, and could not be relied upon by an individual to obtain specific compensation which was not provided for in the national implementing legislation. Nevertheless, it also held that:

In applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189. (emphasis added).

The Court added further that the wording and the purpose of the directive were such that the compensation provided for in the implementing legislation could not on its own be considered sufficient.

Taken at face value, this extract from the judgment suggests that the duty to interpret national law in conformity with an EEC directive applies not only to specific implementing provisions but to all national rules falling within the scope of a directive. If this is indeed the case, national courts have the power to supplement inadequate implementing rules by a sympathetic interpretation of background legislation. This will be so even when implementation of a directive is nonexistent rather than just defective.

This bold reading of the duty to interpret national laws in the light of directives is not supported by other parts of the Von Colson judgment, and was disapproved by Advocate General Slynn in the Marshall case. The bold approach was however reaffirmed by the recent decision of the Court in Officer van Justitie v. Kolpinghuis Nijmegen BV. In this case it was undisputed that the

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56 The German government argued in Von Colson that the required remedies might have been available under other provisions of German law. Id.
57 See, e.g., id., paragraph 3 of the ruling itself.
Netherlands had taken no measures at the relevant time to implement Council Directive 80/777 on the marketing of mineral waters. The Dutch Officer of Justice, for the purpose of a criminal prosecution, nonetheless wanted to use the specific requirements of the directive as an aid to the interpretation of a pre-existing national rule which prohibited the stocking of defective produce. The Court held that the directive could not be used as an aid in interpreting the national law. The only reason for this, however, was that the Von Colson rule of interpretation, if applied in this rather unusual criminal context, would conflict with two general principles of Community law: legal certainty and non-retroactivity. In the absence of such conflicts, the Court expressed the opinion that the Von Colson rule of interpretation should apply to any relevant national law, and not simply to those enacted expressly to give force to a directive. Most striking of all, it appears from the Court's judgment that the rule of interpretation is applied even if the time for implementation of the directive has not yet elapsed.

If the Court continues to follow the bold approach of the Kolpinghuis Nijmegen case, another significant blow will have been struck against Member States, which rely on non-implementation or incomplete implementation of directives in order to escape their EEC obligations. The Court's refusal to restrict the duty of interpretation to specific implementing legislation has the further advantage of consistency with the line of authority establishing that a directive may be sufficiently implemented without specific implementing legislation.

The Von Colson and Kolpinghuis Nijmegen decisions are bold in another sense, for they risk decoupling the jurisprudence of the Court from the position as understood in the Member States. As a rule of interpretation, the Von Colson principle applies only within the limits permitted by the various national laws. It has no power to exclude the operation of other interpretational rules. The Court's effort to secure acceptance of the Von Colson principle thus depends heavily on the cooperation of national tribunals, both in sending suitable cases on preliminary reference under Article 177 and in generally adhering to the Court's guidelines. Some jurisdictions have already made significant steps towards acceptance of the principle; but in the last resort there is nothing to stop national courts from being as rebellious as national governments.

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60 An unresolved question is whether other general principles of Community law such as equity or proportionality could be evoked so as to avoid the rule of interpretation.
61 See infra, note 85 and accompanying text.
63 Even after the Von Colson case, English courts have been far from consistent on the use of Community directives as an aid to the interpretation of implementing measures. The House of Lords in Commissioners of Customs and Excise v. Apple and Pear Development Council, 2 Common Mkt. L.R. 634 (1987), took the strict view that a court was required to construe implementing legislation in the light of the Sixth VAT Directive and as intended to carry out its purpose, if such a construction
D. Restricting Member States’ Discretion as to the Choice of Form and Methods

The three approaches already discussed are linked by their common purpose of giving meaning to the first part of the Article 189 definition of a directive: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed." The last few years have seen the development of a fourth approach, based this time on the scope of the subsequent provision: "... but shall leave to the national authorities the choice of form and methods." The limits imposed by the Court on the choice of form and methods open to an implementing Member State have evolved out of a series of Article 169 cases brought by the Commission for non-implementation and/or faulty implementation of directives. All save the latest in this series of complaints have been upheld; but there are signs in the more recent decisions that this approach too may be nearing the limits of its development. It may therefore not be premature to attempt a broad summary of the principles laid down by the Court on the "choice of form and methods."

1. The Court Will Not Accept Any Excuse for Non-Implementation

A Member State which does not expect to be able to comply with the deadline for implementing a directive can apply to the appropriate institution for an extension of that deadline. In the absence of such an application the Court—in keeping with its general refusal to distinguish between the different organs of a Member State on which an obligation rests—is impervious to excuses for failure to implement. It held in the Type Approval case that: “a Member State is possible. By contrast, Warner J., in National Smokeless Fuels Ltd. v. Commissioners of Inland Revenue, 3 Common Mkt. L.R. 227 (1986), was prepared to look at the text of directives on company taxation only if the implementing legislation was ambiguous. See also Gormley, The Application of Community Law in the United Kingdom, 1976–1985, 23 COMMON MKT. L. REV. 287, 306–07 (1986). I am unaware of any English case in which the existence of an obligation to construe pre-existing background legislation in a manner consonant with a directive was even contemplated.

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64 See Green, Directives, Equity and the Protection of Individual Rights, 9 EUR. L. REV. 295 (1984); Molinier, Note sous CJCE, 23 Mai 1986 (aff. 29/84), Commission c/RFA (application des directives—droit d’établissement), 3 REV. TRIM. DR. EUROPE, 479 (1986).


cannot rely upon domestic difficulties or provisions of its national legal system, even its constitutional system, for the purpose of justifying a failure to comply with obligations and time limits contained in Community directives.” In addition, the Court held that late implementation is not excused by difficulties in interpreting a directive or by the direct applicability of the relevant provisions. More recently the Court has taken the offensive, by arguing that the participation of a Member State in preparatory drafting sessions should ensure that it is able to implement the directive on time.

The Court has nonetheless rejected one of the Commission’s arguments on non-implementation. The Commission argued in Commission v. Netherlands that failure to notify the Commission of implementing measures taken, which is an extremely common infringement of many directives, should raise a rebuttable presumption that the Member State has failed to put into effect the necessary implementing measures. The Court did not follow Advocate General Capotorti’s reasoning and refused to acknowledge such a presumption. The Court now requires the Commission to prove a failure to implement in each case.


The earlier cases frequently emphasized that the latitude allowed to the implementing Member State varied according to the objective of the EEC directive. The Court stated this principle in the case of Enka BV v. Inspecteur der Invoerrechten en Accinzen, Arnhem as follows:

It emerges from the third paragraph of Article 189 of the Treaty that the choice left to the Member States as regards the form of the measures and the methods used in their adoption by the national authorities depends upon the result which the Council or Commission wishes to see achieved.

In the Type Approval case, similarly, a case concerning highly detailed harmonization directives issued pursuant to Article 100, the Court held that Member
States were obliged to introduce "measures sufficient to meet the purpose of each directive." The wording of the directives, their nature, and their legislative context were all factors inclining the Court to the view that they had not been properly implemented by the Belgian authorities.

In subsequent cases on Article 100 directives, the Court has generally echoed these references to their detailed nature, their aim of approximation and sometimes to their wording. Nonetheless, there are clear signs that the Court is now paying less attention to the aim of specific directives, and is instead moving towards the formulation of general principles applicable to the implementation of all directives. The directive in the Banking Directive cases, issued pursuant to Article 57 of the Treaty, had according to its own preamble the relatively modest and imprecise aim of reducing the discretion of bodies authorizing credit institutions by eliminating "the most obstructive differences" between national laws. A directive such as this is at the opposite end of the spectrum from a technical harmonization directive on type approval. The Court, however, defined the Member States' discretion as to implementation in almost identical terms to those used in the Type Approval case, and did not refer to the different aims of the directives. The same point emerges from Commission v. Germany. The case concerned mutual recognition directives pursuant to Articles 49, 57, 66 and 235, the judgment of the Court elaborated upon the criteria developed in cases on Article 100 directives. It is notable also that the most recent cases, in contrast to the earlier ones, make little or no mention of the wording used in the implementation clause of the directive.

Judicial emphasis on the aim of a directive is thus waning, and the formulation of general principles of implementation is taking its place. The opinion of Advocate General Reischl in the Marketing of Medicines case mentions two such general principles: "same legal force" and "clarity and certainty in legal situations." They will be considered in turn.

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76 The aim of the directives was to eliminate technical barriers to trade by introducing a system of "EEC type approval" for motor vehicles and tractors. Once the various technical checks had been made to the standards specified in the directive, type approval was to be granted for the whole EEC market.


80 The implementation clause typically requires member states to introduce "all measures necessary" and/or "the laws, regulations and administrative provisions necessary" for compliance with the directive.

3. The “Same Legal Force” Principle

In the Type Approval case, the Court stated:

It is apparent from the whole of these provisions and from the nature of the measures which they prescribe that the directives in question are meant to be turned into provisions of national law which have the same legal force as those which apply in the Member States in regard to the checking and type-approval of motor vehicles or tractors (emphasis added).

The Court went on to hold that the implementing measures “in this case” had to be “equivalent to those which are applied under the national legal system for the purpose of securing observance of requirements which are described as ‘mandatory’ in the preamble to the two framework directives . . .” The meaning of “same legal force” is unclear. Advocate General Reischl in the Marketing of Medicines case took it to mean that implementing provisions should have “the same legal force as those governing the same subject-matter in the other Member States.” It is true that the Court will sometimes look for guidance as to what is reasonable to the implementing measures taken in other Member States. Advocate-General Reischl’s interpretation, however, suggests that the obligations of one implementing state would vary according to the manner of implementation selected previously by other Member States. Apart from being inherently unlikely, this interpretation is inconsistent with the second above-quoted passage from the Type Approval case, which refers to “the national legal system” and not to other Member States.

Nor will it suffice to explain the “same legal force” requirement as an unvarying obligation on Member States to introduce measures of the same type or effect as those which before the issuance of the directive governed the subject matter covered by the directive. This interpretation makes sense in the context of a harmonizing directive, but not in the context of a directive which gives statutory force to something previously regulated less formally, or to a directive which seeks to impose obligations where none existed before. The common

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84 Id. at 1487.
sense solution must be to apply the "same legal force" requirement only where suggested by the construction of the directive, and to interpret the requirement as meaning simply that an EEC regime is not to be given less legal force than the national regime it replaces.

4. The "Clarity and Legal Certainty" Principle

A Member State is sometimes in compliance with a directive or with a substantial part of it by virtue of legislation which predates the directive. For an implementing measure of whatever vintage to be fully effective, however, it must comply with a number of criteria recently developed by the Court and usually classified under the name of clarity and legal certainty.

The effective meaning of the clarity and legal certainty requirement is that the provisions of a directive must be given effect by "national provisions of a binding nature," or by "provisions which have the character of law." It is not sufficient for a Member State to prove that its policy in the relevant area is "substantially in harmony with the aims of the directives." It must demonstrate, also that the applicable measures are not "mere administrative practices." The Court maintains that a measure is an administrative practice, under the standard twin tests, if the measure "by [its] nature may be altered at the whim of the authorities and lack[s] the appropriate publicity." (emphasis added). Most of the case law discussions of clarity and legal certainty boil down to an application of these twin tests. The twin tests may be summarized as imposing the requirements of binding force and of appropriate publicity.

Measures which have been held to be insufficient for lack of binding force include Dutch water quality guidelines and Italian ministerial orders and circulars concerning the marketing of medicines. Ministerial orders and cir-

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88 Case 100/81, Commission v. Netherlands, 1982 E. Comm. Ct. J. Rep. 1837, _Common Mkt. L.R._; Case 363/85, Commission v. Italy, Judgment of Apr. 9, 1987 (not yet published). See also the extraordinary case 420/85, Commission v. Italy, Judgment of July 7, 1987 (not yet published), in which Italy demonstrated that it was physically unable to implement parts of a directive relevant to water transport because it shared no navigable waterways with other member states.


94 Id.

95 Case 145/82, Commission v. Italy, 1983 E. Comm. Ct. J. Rep. 711, 1 Common Mkt. L.R. 148 (1984). The court appeared to consider that these measures were "mere administrative practices." Advocate General Reischl thought they had "a different legal quality" from mere administrative
culars concerning the marketing of medicines also failed the "appropriate publicity" test on the ground that as internal administrative instructions, there was no requirement to publish them officially.  

The Court considered both of the tests for a "mere administrative practice" in *Commission v. Germany*, a case on the mutual recognition of nurses' qualifications pursuant to Council Directives 77/452 and 77/453. On the binding force point, the German authorities argued that their established practice was consistent with the directives, and that the continuation of this practice was guaranteed by three superior principles of German constitutional or administrative law. This concept was referred to at the hearing and by Advocate General Slynn as the "Selbstverbindung der Verwaltung" (the self-binding of the Administration). The Court acknowledged that general legal principles of constitutional or administrative law might indeed be capable of rendering specific legislative action superfluous. This was however subject to the fourfold proviso that:

1. The "general legal principles" guarantee that the national authorities will in fact apply the directive fully;
2. Where the directive is intended to create rights for individuals:
   a. The legal position arising from those principles is sufficiently precise and clear;
   b. The persons concerned are made fully aware of their rights;
   c. Where appropriate, the persons concerned are afforded the possibility of relying on their rights before the national courts.

The general legal principles of German law failed to satisfy any of the provisos. The Court covered the last three with the remark that "the legal analysis relied
on by the German Government is not such as to create a situation which is sufficiently precise, clear and transparent as to enable nationals of other Member States to discover their rights and to rely upon them." In a later comment, the Court suggests that general principles of national law will in practice rarely suffice to guarantee compliance with precise and detailed directives.

The Court effectively assimilated the appropriate publicity test into its analysis of the binding force requirement. Advocate General Slynn, considering the point separately, spoke of two reasons for the publicity requirement:

1. to enable the Community citizen to know his rights and have at his disposal a text on which he can rely simply and cheaply;
2. to ensure sufficient transparency to enable the Commission to check effectively whether a directive has been implemented.

The requirement that the implementing text be simply and cheaply available to citizens of other Member States is implicit also in the Court's formulation. Advocate General Slynn's second reason is a reminder that appropriate publicity is required even for directives which do not create rights for individuals.

The Court's jurisprudence on "choice of form and methods" leaves a number of questions unanswered, not least as to when, and for whom, a directive is "intended to create rights." There are signs, however, that the Court will not go much further in trying to restrict the discretion of the Member States under Article 189. The Court continues to insist that "the implementation of a directive does not necessarily require legislative action in every Member State." Similarly, it has stopped short of requiring the adoption of particular phrases in the implementing legislation, even in those instances where the directive is a relatively technical one.

In only a few years, the Court has traveled from an ill-defined prohibition on "mere administrative practices," apparently limited to certain types of directives, to something approaching a general requirement that the rights derived from a directive be publicized throughout the EEC and made legally enforceable by all those intended to benefit from them. This development can only strengthen the head of the Commission as against the Member States, particu-

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100 Id. at 1674.
101 Id. at 1675.
102 Id. at 1666.
104 Id. at 1673.
105 In Case 363/85, Commission v. Italy, Judgment of April 9, 1987 (not yet published), the court was asked to consider the non-transposition into Italian law of three definitions in a directive on animal feedstuffs. Finding that the scope of the pre-existing Italian legislation had not been shown to differ from that of the Community rules, the Court refused to condemn "a simple terminological difference which could have no possible effect on the fulfillment of the obligations flowing from the Community system."
larly with regard to the implementation of directives in fields (e.g. financial services) where national rules have not always had statutory force or created legal rights.

IV. Conclusion

The case law of the last dozen years on the implementation and effect of directives is a powerful reproach to those who contend that the Court has lost its will or capacity for innovation. By the end of 1975 there had only been one judicial finding of failure to implement a directive, and the notion of a directive taking effect without implementing measures was in its infancy. Twelve years later, the Court has a range of weapons available against inadequate implementation of directives, all of which involve national tribunals and private individuals, rather than just the Commission, in the struggle against reluctant Member States. The Member States' discretion as to the manner and form of implementation has been limited by principles developed in a large number of successful infringement proceedings, and designed to safeguard the rights conferred by a directive. Member States that fail to implement a directive within the allotted time risk having it applied directly against them, almost as though it were a regulation. Finally, national courts are being encouraged to use directives as an aid to the interpretation of relevant national laws, even if these laws were not intended to implement the directive and even if the time allotted for implementing the directive is still running.

These advances do not afford directives the same legal force as regulations. The distinction drawn in Article 189, combined with the absence of effective sanctions against disobedient national courts and governments, has prevented the Court from exploring to the full all the avenues that it has opened. This is evident in the Court's abandonment of its audacious attempt to extend direct effect under another name in the Verbond line of cases, and in the decision in Marshall not to give unimplemented directives the force of law against private parties.

It takes an optimist to believe that the internal market program will be fully in place by December 31, 1992. The Single European Act, widely viewed by

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107 See supra notes 64–100 and accompanying text.
108 See supra notes 29–47 and accompanying text.
109 See supra notes 52–63 and accompanying text.
110 See supra note 48 and accompanying text.
integrationists as too little and too late, will at best only partially dispel the lourdeur\textsuperscript{113} which seems inseparable from the EEC legislative process.\textsuperscript{114} The failure of Member States properly to implement directives is certainly another source of delay, and a further obstacle to the prompt achievement of the goals of the White Paper. Yet in view of the basic structural weakness of the directive, and the vital part it has been given in the achievement of the internal market, the wonder is not that inadequate implementation exists but that it has been kept within manageable bounds. For the legal principles it continues to fashion and apply in this field, the European Court deserves some unfashionable praise.

\textsuperscript{113} Lourdeur is the tendency of legislative proposals to suffer from procedural blockages and the dilution of substantive content. See Capelletti, supra note 13.

\textsuperscript{114} A recent Director General of the Commission Legal Service, now the chief Commission Spokesman, has written: "The provisions of the Single European Act on the internal market are probably not bold enough to achieve the objective laid down in Article 8A by the given deadline." Ehlermann, The Internal Market Following the Single European Act, 24 Comm. Mkt. L. Rev. 361, 404 (1987).