Improving the Application of Community Law:

Legal Dimensions and Challenges Faced

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Introduction

Improving the quality of application of Community law is a major challenge, the visible part of the iceberg known as "European governance", improvements in the operation of which are currently being looked at with a view, among other things, to achieving the aims of the Lisbon Strategy.

So how do we achieve this objective? Do we improve the quality of Community legislation? This could be one avenue to explore. By providing quality training in Community law? This might be another possibility. The last option is the pet subject and the raison d'être of the "antenna" that the European Institute for Public Administration set up in Luxembourg in 1992, namely the *European Centre for Judges and Lawyers* (referred to in the following as the Centre) which was originally intended to fulfil this role with the cooperation of the Government of the Grand Duchy of Luxembourg.

The Centre was created in response to the objectives sought by the White Paper on the completion of the internal market.[1] Although this White Paper encouraged the use of new harmonisation instruments such as mutual recognition or the principle of the State of origin, the application of Community law by the Member States is no less incomplete or unsatisfactory for all that.

What is more, the White Paper on European Governance[2] underlined this point. Now, according to the Lisbon Agenda, effective application of Community law is also a factor in improving competitiveness and cross-border cooperation.

So the Centre offers training programmes on the interpretation and application of Community law that are intended to provide working tools and food for thought for magistrates, lawyers, officials at the European institutions and central, regional or local government in the Member States. The Centre's activities take place in Luxembourg and in the other Member States, as well as in the accession states benefiting from bilateral technical assistance programmes.

The Centre is thus trying to do its bit for European integration both in the context of the enlargement of the European Union and that of the Lisbon objectives, by providing training courses on the principles of Community law, internal market law, the law on the area of freedom, security and justice, the application of Community legislation and Community litigation.

In the training provided for national government officials, particular stress is placed on the legal dimensions and the challenges that these face in improving the application of Community law (I), and the risks involved in failure (II).

The legal dimensions and the challenges faced by Member States in improving the application of Community law

As the European Community is a "Community based on law",[3] it relies on a set of legal standards[4] that must be followed and applied by the Member States.

With regard to secondary legislation, Article 249 EC[5] mentions in particular regulations, directives and decisions that are legally binding acts. As regulations and decisions are mandatory in all their elements and are directly applicable in the Member States, they have not generated as much litigation as the directive which for its part is supposed to be transformed into national law. The theme that follows will be limited to this last point.

The legal dimensions

What is original about the European structure is that the European Community is an integration organisation, unlike the conventional international organisations[6] which are inter-state organisations.

European integration has mainly been achieved through legislation. The process of integration is in fact largely guided by the specificities of Community law, which takes precedence over national law and which can be invoked directly by individuals in support of an appeal to a national judge.

The Van Gend en Loos judgment of 5 February 1963[7] established that the European Community is an "*independent inter-state*" organisation, meaning that the Community legal system is separate from both the international legal system and the national legal systems.

Since the Community is designed to be an integration organisation, with the States having pooled some of their competences and left it up to independent institutions to take care of the interests pooled in this way, rather than being content with cooperating or coordinating their activity, it is thus invested with its own appropriate bodies and specific procedures, legal or not, for ensuring adherence to and application of Community law by the Member States and their nationals.

The predominant position of the economy in European integration must not lead us to forget the determining role of the law which has to some extent "blockaded" the acquis: Europe as conceived by its founding fathers has proven to be a Community based on law, having a Court of Justice as the guardian of Community law, which has a precious ally in the Commission that provides, by application of Article 211 of the EC, monitoring of the application of Community law in the Member States.[8]

The way in which the monitoring of the application of Community law operates is a source of great interest for the national officials that the Centre trains. It has therefore designed tailored training programmes focusing on the challenges that these officials face in the application of Community law.

The challenges faced

As the directive is the preferred instrument for the creation of the internal market, its vocation is to intervene in areas where there are substantial differences between the national legislations. It aims to encourage Member States to approximate their legislation and to transfer to the national level the fundamental principles of the internal market.

Despite the wording of Article 249 paragraph 3 EC[9] it has not always been easy for the States to make a clear distinction between the result to be obtained and the means to be employed to achieve this, such that numerous cases of flawed transposition have occurred.

As a result, the normative intensity of the directives has been progressively reinforced. The States have been favourable towards this, even if the result was to reduce their room for manoeuvre.[10]

This practice then declined when recourse to the "new approach" directives was preferred in order to promote the mutual recognition as affirmed by the Court in the "Cassis de Dijon" case law of 1979.[11]

It is still the case that a flawed or partial transposition, or one that introduces exceptions or derogations not provided for by the directive, or which is late, constitutes a breach by the State of its Community obligations. Furthermore, during the transposition period, the States must refrain from passing measures that are likely to seriously compromise the outcome laid down by the directive.[12]

The national formal review judge and the Court of Justice have a very important role to play here as it is up to them to check if the internal measures concerned constitute a definitive and complete transposition of the directive.

Furthermore, the transposition measures must have a legally binding effect[13] and the failure to notify transposition measures also constitutes a non-fulfilment.

Moreover, the Member State should not claim internal difficulties or particular provisions in its national legal system to escape from its obligation to correctly transpose the directives. Neither are the shortness of the periods of transposition, the dissolution of a national assembly, or an overloaded parliamentary timetable valid justifications. Nor should the direct effect of the directives be an admissible argument to justify transposition failure.[14]

Non-fulfilment of these obligations renders the Member State liable to infringement proceedings brought by the Commission.

Risks faced by the Member State in the event of flawed application of Community law

During the pre-litigation phase

The Court has acknowledged that the European Commission is invested with a *"general task of supervision"* allowing it to ensure that the Member States act in accordance with their competences.[15]

The Centre used this statement as a starting point in raising public awareness among the audience for its training of the fact that the Commission has preventive powers such as the right of information drawn from several provisions of the Treaty,[16] supplemented by wide-ranging or even repressive investigative powers such as those of competition law.

The Centre has frequently had the opportunity to train officials from the central administrations of the "new Member States" and the accession States on the operation of the procedure for establishing a non-fulfilment known as the "infringement procedure" provided for by Articles 226, 227 and 228 EC, and to allow them to develop a culture of cooperation with the departments of the Commission; the aim being to make them aware of the fact that instituting an infringement procedure does not necessarily signify the referral of a case to the Court and of their responsibilities in terms of the quality of the application of Community law.

As the infringement procedure takes place in two successive phases, one administrative known as "pre-litigation" and another for the litigation proper, it is essential that the national administrations understand their role during the pre-litigation phase, since this is the opportunity for the Member State being prosecuted to justify its position or even regularise the situation by complying with its Community obligations.

A period of exchanges may begin between the Commission and the Member State before the formal infringement proceedings are actually opened, and the Commission[17] may decide to inform the State that its departments are assuming the existence of a non-fulfilment and send it an invitation to make a statement on the veracity of these presumptions referring to the obligation of cooperation provided for by Article 10 EC.

The Commission may then proceed with the formal opening of the pre-litigation phase of the infringement procedure, which takes place in two stages: the formal notice and the reasoned opinion.

In the first stage, the Commission formally instructs the State to provide its observations on the facts for which it is being criticised.[18] This letter is a kind of succinct notification of the grievances, constituting a substantial formality that determines the correctness of the procedure.[19]

Then the Commission may send the State a reasoned opinion which is a

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coherent and detailed account of the reasons leading "*to the conviction that the State concerned failed to fulfil an obligation under the Treaty*".[20]

During the pre-litigation phase, there is still time for the State to convince the Commission of the unfounded nature of the grievances. If it succeeds, the case is dismissed. The various pre-litigation steps and referral of the case to the Court are therefore not automatic.

The Centre places special emphasis on this fact in the training that it provides to the officials of the Member States, in order that they take cognisance of the fact that the aim of the infringement proceedings is to arrive at a situation where the State concerned regularises its position in relation to its Community obligations and that by cooperating with the Commission they can actually contribute towards improving the quality of the application of Community law in their State.[21]

During the litigation phase

If the Court considers that the State is in breach of its obligations, it issues a declaratory judgment recording the breach.

In the event that after it has been sentenced for a first time by the Court by application of Article 226 EC, the State continues not to fulfil its Community obligations, the Commission may open a new infringement procedure, this time by application of Article 228 CE, which may lead the Court to find that the State has committed a "breach on breach" and to impose upon it a lump sum and/or a penalty payment.

The Republic of Greece was the first Member State to be ordered to pay a penalty under Article 228 EC. The amount was €20,000 per day of delay in discharging the obligations incumbent upon it.

The Republic of France was, for its part, the first Member State to be sentenced to pay both a lump sum AND a penalty by application of Article 228 EC in the "undersize fish" case. The lump sum was €20,000,000 and the periodic penalty €57,761,250 for each period of six months counting from delivery of the judgment.[22]

The Court statistics show that huge numbers of cases are the result of actions for failure to fulfil obligations brought by the Commission,[23] which shows that the States are still experiencing difficulties in correctly applying Community law.

Would not one possible solution for improving the quality of application of Community law, be to deal with the problem at its source by simplifying the acquis and by legislating better?

Conclusion

The message issued by the Centre stresses the various aspects (organisational, functional, etc.) of the obligation of Member States to correctly apply Community law. Here, the will and the capacity of the national authorities have a particular role to play, as the Commission noted in 2005 in connection with the transposition of directives.[24] Hot on the heels of this statement, the Centre is ensuring that the officials that it trains, both from institutions and Member States, are made aware of the need to develop among them a mutual understanding and better working methods.

Furthermore, in order to satisfy the increasing demands of its main "clients", more and more activities relating to the operation and management of courts, such as the management of relations between courts and the press, are currently being offered.

Training workshops on the drawing up of preliminary rulings, legal documents, pleadings before the Court of Justice, and on the practice of infringement procedures brought by the Commission are also provided by the Centre.

The training offered has traditionally been centred on an analytical and interpretive approach to new developments in Community legislation and case law. Whilst retaining this preferred approach, in recent years the Centre has been using modern training methods combining an interactive and open approach, in the context of workshops and discussion fora, with the aim of

transferring and/or exchanging specific tools for practitioners of Community law.

Moreover, could not the simplification of the Community acquis and improved legislation be the keys to making the task of the Member States in the application of Community law easier?

This has not escaped the Commission which has made the simplification of the acquis an absolute priority for achieving the objectives of the Lisbon Strategy and "reforming" the governance of the European Union. This realisation could work to the advantage of the Member States. In fact, cases of lack of or flawed transposition cannot be explained solely by their unwillingness or lack of coordination on European matters.

The Centre is also active in this area, training officials from the accession States in the various techniques and methods of coordinating their work on European issues:[25] it has designed training programmes focused on a comparative analysis of the national methods of coordination for existing European matters and practical role play exercises.

Should not the Commission put itself in the place of the recipient of the legislation when drafting new directive proposals? Better legislation, the fight against legislative inflation and simplification of the acquis would benefit from a move in this direction.

So, an impact analysis performed before the production of legislation allowing an assessment of how the legislation can be correctly received into national law, and prior identification of the difficulties of application that could arise, should not be overlooked.

This is moreover the method that the Commission is currently trying to apply[26] in order to bring into effect the White Paper on European Governance:[27] *"proposals must be prepared on the basis of an effective analysis of whether it is appropriate to intervene at EU level and whether regulatory intervention is needed. If so, the analysis must also assess the potential economic, social and environmental impact, as well as the costs and benefits of that particular approach."*

For their part, if the States were also to improve their evaluation tools,[28] the application of Community law would be improved and facilitated as a result. The Centre plans to develop training activities on this subject, either in cooperation with its general management in Maastricht or the other "antennae" of the European Institute of Public Administration, based in Barcelona, Milan and Warsaw, or individually by concentrating on a legal approach to the question. ::

Notes

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1 White Paper on the completion of the internal market, 28-29 June 1985 COM (1985) 310.
2 White Paper on European Governance 25 July 2001 COM (2001) 428 final.
3 As Advocate-General Darmon mentioned in his conclusions in the case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, [1986] ECR p. 01651.
4 Primary, secondary, conventional and case law.
5 Article 249 paragraph 1 EC provides that: *"In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions."*
6 OECD, UN, NATO, WHO, ILO, etc.
7 ECJ 5 February 1963, case 26/62, Van Gend en Loos v. Nederlandse Administratie. der Belastingen, [1963] ECR p. 00003, paragraph 23.
8 Article 211 paragraph 1 EC provides that: *"In order to ensure the proper functioning and development of the common market, the Commission shall: ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."*
9 *"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".

10 Once an initial period of opposition had passed, they in fact called for very precise directives for evident reasons of legal security and also in order to avoid possible "mistakes" by the national members of parliament at the national transposition stage.

11 ECJ 20 February 1979, case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, [1979] ECR p. 00649.

12 ECJ 7 December 1993, C-83/92, Pierrel SpA and others v Ministero della Sanità, [1993] ECR p. I-06419 and ECJ 18 December 1997, case C-129/96, Inter-Environnement Wallonie ASBL v Région wallonne, [1997] ECR p. I-07411, paragraphs 43 to 46.

13 Which is not the case with simple administrative practices or circulars, ECJ 25 May 1982, case C-96/81 Commission v the Netherlands, [1982] ECR p. 01791, ECJ 6 May 1980, case 102/79, , Commission v Belgium, [1980] ECR p. 01473 and ECJ 2 December 1986, case 239/85, Commission v Belgium, [1986] ECR p. 3645.

14 ECJ 14 March 2006, case C-177/04, Commission v France, [2006] ECR I-02461 and ECJ 6 May 1980, case 102/79, Commission v Belgium, [1980] ECR p. 01473.

15 ECJ 5 May 1981, case 804/79, Commission v the Netherlands, [1981] ECR p. 01045.

16 In particular, Article 88(3) EC (notification of planned state aid to the Commission); Article 95(4) EC requiring Member States to notify the deviating measures that they intend to adopt to the harmonisation regulations adopted by the Council; the obligation of the Member States to notify the Commission of the national measures for transposition of directives, etc.. Articles 81 to 89 EC (monitoring on the basis of evidence and in situ performed by agents duly authorised by the Commission whom the companies must obey).

17 In practice, the competent Directorate General of the Commission charged with instituting the infringement procedure.

18 The Member State is generally allowed a period of 2 months for submission of its observations to the Commission.

19 ECJ 27 May 1981, Joined cases 142/80 and 143/80, Essevi and Salengo, [1981] ECR p. 1413.

20 ECJ 19 December 1961, case 7/61, Commission v Italy, [1961] ECR p. 00635.

21 And thereby avoid being brought before the Court of Justice.

22 ECJ 4 July 2000, case C-387/97, Commission v the Republic of Greece, [2000] ECR p. I-05047 and ECJ 12 July 2005, case C-304/02, Commission v France, [2005] ECR p. I-06263.

23 97.97% of direct appeals to the Court are actions for failure to fulfil an obligation, see legal statistics of the Court of Justice for the year 2005.

24 Communication from the Commission of 16 March 2005 "Better regulation for growth and jobs in the European Union" COM (2005) 97 final and its annex SEC (2005) 175.

25 Whether in the legislation preparation phase or in the implementation phase of the Community legislation.

26 Impact analysis guidelines 15 June 2005, updated 15 March 2006 SEC (2005) 791. "Commission objectives for the period 2005-2009" COM (2005) 12.

27 White Paper on European Governance 2001, COM (2001) 428 final.

28 Dossiers and studies on the legal, budgetary or administrative impact of proposed directives, networks of correspondents charged with coordinating and providing monitoring of legislative preparation and transposition activities, etc.