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Constitutional Issues in the Implementation of EC law: Addressing the Imbalance in favour of Market Deregulation.

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Constitutional Issues in the Implementation of EC law: Addressing the Imbalance in favour of Market Deregulation.

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1 Introduction

Member States are obliged to implement EC law at national level in an effective manner. This is a reflection of the broader obligation of Community fidelity found in Article 5 EC.

If a Member State fails to implement EC law properly, it is in breach of its Treaty obligations and it is susceptible to control exercised both by the Commission/ Court via Article 169 EC (and in theory though rarely in practice by another Member State via Article 170); and by individuals entitled to effective judicial protection before national courts. This is the familiar notion that Community law is enforced through "dual vigilance".

In itself, this pattern conceals a great many hindrances to effective and even implementation of EC law across the territory of the Union. First, the obligation of "effective implementation" is extraordinarily imprecise. Second, Commission enforcement under Article 169 cannot be comprehensive because of resource constraints and, moreover, the exercise of the discretion to pursue alleged infringements may become politicised. Third, the patterns of individual protection before national courts are largely the creation of the European Court and they are marked by eccentricities bred by the accidents of litigation (for example, it is far from clear what sort of "right" is the subject of protection in the Francovich line of case law) and, moreover, their value to the individual may vary

according to national judicial attitudes. Beyond these considerations, "implementation" is too often seen as a single event, whereas in fact implementation of EC law is a continuing obligation which binds actors at many levels in the domestic system. The simple adoption of laws on paper by national authorities ("transposition") tends to be the focus of scrutiny of implementation practice, yet this is no more than a first, formal step in the direction of effective implementation. But this deeper aspect of practical implementation, which engages national actors at all levels, is very hard to monitor.

My concern in this paper is to examine one particular route recently pursued by the Court and Commission in order to improve the implementation of Community law. My objective is to use this particular area as the basis for wider comment on the problems that face the Community system in improving patterns of implementation; and to elucidate the constitutional tensions that arise in the relationship between the Community and its Member States. In particular, I wish to draw attention to the advantages enjoyed by one species of Community law, the law of market integration, over another species, the law of market regulation, in the developing patterns of Community law of implementation. My conclusion is (no more than an) invitation to discuss the need to address this "implementation imbalance".

2 Directive 83/189; notification of draft technical regulations

By virtue of Article 30 EC, as developed by the European Court, obstacles to inter-State trade arising out of disparities between national technical standards may be overcome by traders, except in so far as national rules may exceptionally be shown by regulating authorities to be necessary to satisfy mandatory requirements in the public interest. This reflects the well-known case law establishing a pattern of (non-absolute) mutual recognition of technical standards constructed by the European Court

since it took the opportunity in its "Cassis de Dijon" ruling in 1979 (Case 120/78 [1979] ECR 649) to push the law of free movement far beyond a mere prohibition against discriminatory national practices.

The vast, forbiddingly tangled and intransparent web of technical norms that exist in each Member State make it implausible that Article 30 can be fully implemented in this area simply by reliance on Commission intervention via Article 169 and private litigation. So "Cassis de Dijon" probably has a less dramatic practical impact than one might initially suppose from reading the judgment (Bernel, 1996). In order to improve transparency in the field of diverse national norms, Directive 83/189 was adopted (and subsequently extended by two amending Directives, Directives 88/182 and 94/10: respectively, OJ 1983 L109, OJ 1988 L81, OJ 1994 L100: on the development of the regime see Fronia and Casella, 1995, Fronia, 1996, Weatherill, 1997a). Directive 83/189 as amended requires notification of draft technical regulations (as defined) to the Commission. The Directive 83/189 "early warning" notification system allows the Commission to assess the compatibility of proposed new technical regulations with Article 30 - to forestall their introduction where it finds a violation and to use them as a basis for harmonisation, where appropriate, where it considers that no violation would occur.

In order to improve the effective contribution of the Directive 83/189 system to the management of the internal market in a transparent manner, Member States are obliged to refrain from enacting draft regulations for at least three months after notification to the Commission. The "stand-still" period may be extended (to a maximum of 18 months) in consequence on intervention by Commission and/or other Member States. So the Directive establishes a mandatory notification procedure which, inter alia, empowers the Commission and Member States to block the adoption of draft technical regulations by another Member State, albeit not indefinitely.

The detailed aspects of the information system instituted by Directive 83/189, and subsequently extended, involve the transmission of information by States proposing to regulate to the Commission; and then on from the Commission to other States, who are then able to feed back their views to the first (would-be regulator) State. Regular submission of (informal) comments and "detailed opinions" (which have suspensive effect) has been a feature of the system's operation. The system holds out the promise of the construction of a horizontal and vertical administrative infrastructure which will nurture a deeper and more dynamic co-operation between Community and national authorities in the development of the implementation of Community law applicable to the construction of the internal market than would be possible under a more static system based solely on reactive enforcement (by Commission and/or private parties).

3 The development of Directive 83/189

In general, the Commission adopts a positive attitude towards its assessment of the development of Directive 83/189 as a basis for transparent market management. After a rather patchy start (where there were fluctuations in the patterns of notifications between sectors and between Member States that suggested a very uneven learning process in adjusting to the Directive's requirements) numbers of notifications have risen steadily. The figure reached 200 in 1987; 318 in 1989; 435 in 1991, reached a stable rate in 1992, 1993 and 1994 of 362, 385 and 389 respectively, and then climbed to 438 in 1995 and 523 in 1996 (Commission reports on the operation of Directive 83/189, COM (88) 722, (91) 108, (92) 565, (96) 286 and Annual General Reports for 1995 and 1996.)

The increase is doubtless partly attributable to extensions in the scope of regime, both in material respects (eg the notion of a "product" subject to regulation was widened to cover food only by the first

amending Directive, Directive 88/182) and on the Community's periodic enlargements. Moreover, the Commission has taken steps to improve its supervision of the obligation of notification, inter alia by contracting with private bodies in each Member State to obtain and scrutinise official national publications with a view to identification of acts adopted in breach of the requirements of notification of Directive 83/189 and also by adopting a policy of a firmer stance on the initiation of infringement proceedings in cases of disregard of obligations under the Directive. But even taking account of these elements, the Member States seem to have acquired a savoir-vivre with the Directive, evidenced by the rather stable rate of notification and, moreover, the bodies contracted to check national practice have revealed a rather low percentage of drafts left un-notified in breach of the Directive. Compliance rates seem rather impressive. Reports produced for 1993 and 1994 revealed a total of 4340 national laws, of which (leaving aside transpositions of Community Directives, duly notified technical regulations and designations of origin and geographical ascriptions which are excluded from Directive 83/189), only 32% were technical laws either wrongfully unnotified or beyond the Directive's reach. After analysis, relatively few measures in this 32% group were found to fall within the Directive's scope. 85 technical laws - 2% of total texts discovered - were made the subject of infringement proceedings (COM (96) 286, pp.27 et seq.).

Admininstrative heterogeneity between the Member States is profound and likely to hinder the even and effective application of "top-down" control systems such as Directive 83/189. But although inadequate structural capacity to adapt among Member State administrations seems to have undermined the Directive's system of compulsory notification in its early years, the system now seems to be evolving into a fruitful collaborative network. It contributes to diminishing the risk that national regulators will damage the process of market integration by making choices in isolation from input from regulators (and regulatees) in other Member States.

4 Infringement of the obligation to notify under Directive 83/189: the unenforceability of the unnotified regulation

But what if States fail to observe the requirement of notification (and suspension) of draft technical regulations imposed by Directive 83/189? Naturally, the regulation itself may still violate Article 30 and may be the subject of challenge by the Commission and before national courts. And breach of the Directive may form the basis for an Article 169 infringement procedure. However, in a bid to increase incentives to the Member States to abide by the obligations of notification, the Commission has consistently expressed the view that the failure to notify the technical standard in breach of Directive 83/189 of itself disables the State from relying on that standard against a third party in proceedings before a national court (initially, Commission Communication "concerning the non-respect of certain provisions of Directive 83/189/EEC" OJ 1986 C245/4). That is to say: the procedural flaw (non-notification) should prevent enforceability irrespective of any consideration of the merits of the measure as a contribution to improved (national) market regulation. This view was upheld by the European Court on 30 April 1996 in CIA Security International SA v Signalson SA and Securitel Sprl (Case C-194/94 [1996] ECR I-2201), which was a ruling of the Full Court. Technical regulations that are un-notified at draft stage in violation of Directive 83/189 are unenforceable against third parties before national courts.

In CIA, Belgian orders controlling the access to the market of security products, including burglar alarms, had not been notified as required by Directive 83/189. The Court reasoned that the Directive's objective was to protect the free movement of goods and that the notification requirement was essential to achieving preventive control of national measures. It observed: "The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals".

The ruling provides a strong incentive to States to notify drafts in conformity with Directive 83/189 and will give the Directive a much higher profile in the future management of the internal market. This is already visible in the Court's ruling of 20 March 1997 in Bic Benelux v Belgian State (Case C-13/96), where orders requiring that distinctive marking be attached to disposable razors subject to an eco-tax were ruled to constitute "technical regulations" and were therefore unenforceable for want of notification in accordance with Directive 83/189.

The Court observed in CIA that Directive 83/189 "is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community." Its judgment acts as a firm shove in the direction of sustaining that protection. The sanction of non-enforceability attaching to unnotified draft technical regulations falling within Directive 83/189 joins the company of the principles of direct effect, the obligation of consistent interpretation and Francovich liability as devices for empowering individuals to employ national procedures in order to police particular types of Member State infractions of Community law which undermine the stabilisation of the internal market. In this sense, CIA is part of the process of stopping States agreeing to the rules of the integration game, but then cheating, in order, inter alia, to protect their own markets in a way that denies opportunities to out-of-state producers. Directive 83/189, as interpreted by the Court in CIA, addresses the phenomenon of competitive under-implementation by Member States where it manifests itself in regulation of a national market in an intransparent manner that is likely to confer advantages on domestic producers more readily able to adapt to the regime of technical standards. In principle, CIA allows an out-of-state trader to ignore a technical regulation, unless it has passed through the Directive 83/189 filter, which, inter alia, will have allowed scrutiny of its compatibility with primary Community law.

5 The scope of application of the rule of non-enforceability

At a detailed level, the Court's ruling throws up some difficult questions of interpretation. Deciding what is, and what is not, a technical regulation within Directive 83/189 will be of critical importance for the purposes of national challenge to unnotified norms (see already Bic Benelux, above). More generally, it will be necessary to determine whether the ruling in CIA is limited to failures to notify falling within Directive 83/189. In CIA the Court felt able to a take a different approach from that which it had preferred in Enichem Base v Comune di Cinsello Balsamo (Case 380/87 [1989] ECR 2491 - non-notification in breach of a Directive did not result in unenforceability) in the light of the different wording and purpose of the relevant Community measures. On the other hand, the Court's ruling in CIA that failure to notify a draft technical regulation under Directive 83/189 results in its unenforceability against third parties before national courts is closely comparable to its insistence that implementation of State Aid in breach of the Treaty obligation to notify the Commission and not to put "proposed measures into effect until this procedure has resulted in a final decision" (Article 93(3)) should be treated by a national court as a sufficient reason for refusing to regard the aid as compatible with the common market (irrespective of consideration of substantive matters connected with the aid, which are the preserve of the Commission: eg Case C-354/90 Fédération Nationale du commerce extérieur des produits alimentaires v France [1991] ECR I-5523). Unnotified aid must be treated as unlawful aid by national courts. Notification, allowing transparent market management, is thereby promoted.

So there are some detailed questions to resolve relating to the reach of the sanction of non-enforceability where States damage the Commission's capacity to manage the market by failing to notify acts in violation of EC law requirements. For example: what approach should be taken to violation of the notification requirement in Articles 129a(3) and 130t EC? What of violation of the range of notification requirements that are being instituted, inspired by the 1992 Sutherland Report,

as part of a general Commission drive to improve transparency as a cornerstone in the effective management of the internal market (eg Decision 3052/95 OJ 1995 L321/1, on which see Fournier and La Pergola, 1997, which establishes "a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community" and which is, in essence, a micro-level version of the type of vertical and horizontal co-operative market management foreseen by Directive 83/189). Probably, in resolving these detailed matters, a distinction should be drawn between Directive 83/189, which institutes a system for transmitting information and comment through a system embracing the Member States and the Commission, including a specified timetable governing dates for permissible entry into force of national rules depending on response received from the Commission and/or other Member States, and other, less complete control systems (such as, in my view, Articles 129a(3) and 130t EC and Decision 3052/95) which will not attract the sanction of unenforceability in the event of failure to notify.

Broadly the Court's ruling in CIA seems likely to make States take the obligation to notify under Directive 83/189 (and other systems to which the same reasoning is applied) more seriously than they would have done were the sanction for breach merely the prospect of Article 169 proceedings. (Although I would add, without elaborating, that in so far as failure to engage in vertical co-operation is the result of structural incapacity to adapt to the Community method at national (or sub-national) level, rather than deliberate cheating, the problems cannot be overcome (and will simply be missed) by increased top-down structures and strengthened sanctions. Such endemic implementation deficits require a more sophisticated treatment).

But I do not want to focus on such (important) issues of interpretation (which will inspire further litigation, Slot 1996, Weatherill 1997a, Candela Castillo 1997). I want instead to prompt discussion of the limits of this method of improving implementation of the law of market integration. Specifically, the approach taken by the Court in CIA is suited to one species of internal market law only.

6. CIA - the implementation imbalance.

On the one hand, the approach taken in Case C-194/94 CIA constitutes an attractive and direct means of strengthening the implementation of EC law. Directive 83/189 was itself designed to make national processes of market regulation more transparent; this ruling simply penalises non-conformity with the requirement of notification. The ruling in CIA might seem opportune at a time when the Commission is placing great emphasis on transparency and administrative co-operation as a leitmotif in the management of the internal market. The influential Sutherland Report of October 1992 persuasively emphasised that the operation of the internal market depended for its success on much greater vertical and horizontal cooperation between national and Community institutions. It envisaged a growth of administrative partnership to enhance the practical application of the rules. The Commission has responded ("Making the Most of the Internal Market: Strategic Programme", COM (93) 632), Council Resolutions of 1994 and 1996, prompted by the Commission, on the development of administrative cooperation in the implementation and enforcement of Community legislation in the internal market, OJ 1994 C179/1, OJ 1996 C224/3, Mario Monti's Single Market Action Plan aimed at the Amsterdam Summit) and efforts to improve transparency in relation to national regulatory practice persist in specific sectors (the Green Papers on "Commercial Communications in the Internal Market" COM (96) 192, and on the information society, COM (96) 392, both propose mandatory notification mechanisms on the model of Directive 83/189 for proposed national regulatory initiatives that may cause market fragmentation as part of a Community-level scheme of market management).

But this is a focus on national initiatives that may cut across Community law of market integration. That is part of Community law; but only part.

Some priorities in implementation of EC law are concealed within the Court's decision in CIA. It is appealingly simple to determine that failure to notify an act deprives that act of its enforceability in

proceedings involving those seeking market freedoms. But a State omission to act, in breach of EC law, cannot be addressed in the same way by those seeking effectively enforced market regulation. For example, a failure to conduct an environmental assessment in advance of a major project or a failure to take appropriate remedial action to rid the market of unsafe products that fail to conform to EC safety requirements constitute misimplementations that require a sophisticated response - notification/non-notification in respect of State omissions, rather than acts, is not of direct relevance in developing strategies for improving implementation. What is needed is some method of requiring that the action be taken; or, if it is too late, that effective remedial measures be introduced. In orthodox Community law, this takes the search back to the Article 169 infringement procedure which may lead to the Court ruling envisaged by Article 171(1) and, ultimately, the long-winded (and, as yet, formally unused) fining procedure under Article 171(2); and individual enforcement at national level building beyond reliance on direct effect through the Court's jurisprudence on effective judicial protection powered by Article 5 EC. But there are well-documented weaknesses in such procedures, for in neither cited instance (environmental assessment, unsafe products) are the familiar systems of "dual vigilance" adequate (explored further below). Indeed, as explained above, Directive 83/189 was intended to surpass the limitations of such reactive control of national intrusion into the process of market integration driven by EC law. But what is at stake in my examples is the process of market regulation driven by EC law; and the Directive 83/189 model coupled to a sanction of unenforceability does not fit. So, in CIA, by focusing on the procedural aspects of misimplementation in connection with Directive 83/189, the Commission/Court may have found have a soft target - but one which sharpens the process of implementation in relation to market freedoms obstructed by state measures without making any advance in the methods for implementation of EC law in circumstances where national authorities neglect responsibilities under EC law to secure effective market regulation. There is, then, an implementation imbalance, which favours market deregulation under EC law over market regulation under EC law.

In fact, on further reflection, the imbalance prejudicing the market regulatory aspects of internal market law is still more glaring. For the opportunities for individuals to use Community law before national courts to require States to live up to their regulatory responsibilities under Community law suffer in comparison with the opportunities enjoyed by (typically) traders to prise open national markets unlawfully regulated under national law. This observation has several aspects and will be developed below. It relates to the identification of legally enforceable rights and the practical capacity to secure access to justice. Those seeking to vindicate the EC law of market integration are in a relatively more favourable position than those seeking to vindicate the EC law of market regulation.

7. Hedley Lomas

Before exploring further the implementation imbalance sketched in the previous sub-section, I pause to mention another decision of the European Court in the early months of 1996 which offers an insight into the institutional imbalance which allows readier access to effective enforcement of the law of market integration than the law of market regulation. This is R v MAFF, ex parte Hedley Lomas (Ireland) Ltd (Case C-5/94 [1996] I-2553). In Hedley Lomas, as with Case C-194/94 CIA, it is not my purpose to criticise the Court's decision in the case as such, but rather to draw attention to the areas of impeded implementation that lie beyond its explicit terms. Hedley Lomas is, in this sense, interesting for what it does not say rather than what it does say.

In Hedley Lomas the UK was found to have violated Article 34 EC (free movement of exported goods), with no possibility of justification under Article 36 EC, by refusing to issue export licences for live sheep to Spain on the grounds that Spain was in breach of Directive 74/577 on stunning of animals before slaughter. According to the Court, "Member States must rely on trust in each other to

carry out inspections on their respective territories". Crucially, the UK could not resort to "self-help" in the face of alleged violation of EC law by a fellow Member State. It could not act unilaterally and it was obliged to limit its response to alleged Spanish under-implementation to the procedures foreseen by the EC system. This means control under Articles 169 or 170 (proceedings instituted against Spain at Community level by either the Commission or another Member State, ultimately leading to a ruling of the European Court); and/or control through national procedures before domestic courts. So the trader, Hedley Lomas, was entitled to export to Spain free of restrictions introduced by the UK authorities.

The ruling seems to stand as a strong statement of the institutional sophistication of the Community legal order. No retaliation allowed! But what really were the alternative methods for controlling Spain (if it was truly in breach, which was not proven)? Animal welfare groups in Spain and the UK had complained to the Commission about Spanish non-compliance, only for the Commission to choose not to initiate Article 169 proceedings after receipt of assurances from Spain. Complainants have no standing to participate in such a negotiated settlement. The UK had not pursued proceedings against Spain under Article 170; for obvious political reasons, this is virtually unknown in the Community system. This would then leave animal rights groups (and slaughterhouses located in States which enforce the Directive properly who suffer competitive disadvantage in comparison with lightly regulated Spanish houses) with the theoretical possibility of action before Spanish courts, but in practice questions of standing, rights and resources would all conspire against such claims. Would they have any right recognised by a Spanish court? Would they have the time and money required to pursue the matter? Furthermore (and at a more general level), identification of mis-implementation is typically harder in the sphere of market regulation required by Community law than in the sphere of market integration, where obstacles are rapidly flushed out by traders suffering tangible impediments to market access. Flawed "paper" transposition of Directives is the subject of legal challenge from time to time (both at Community and national level), but foot-dragging or under-resourced enforcement of market

regulatory laws rarely reaches the courts. Underimplementation is hard to track, for it is a continuing process, embedded within, and subject to the adaptive capacity of, administrative structures. Moreover, the very content of the Community norm is vague: what is "effective implementation" of laws of market (re)regulation? What does it require in hard, budgetary terms?

8. Incentives to address the problem of the implementation imbalance

In areas such as environmental policy and product safety policy, much more significant constitutional development is needed if implementation is to be taken seriously. And I insist on "implementation" here in a broad continuing sense, not the one-shot "paper implementation" notorious from Commission League tables.

But why care?

Improvement in the intensity of scrutiny of the application of EC market regulatory law is in the interests of those seeking protection as such. However, it also benefits those suffering competitive disadvantage as a result of their State's relatively rigorous enforcement regime compared to another State's lax practice. It is important to remember that EC law of market regulation is often the law of market re-regulation; that is, it is not de novo regulation, but rather the result of complex bargains whereby EC rules replace diverse national rules. In these circumstances, the "post-decisional" phenomenon of "competitive underimplementation" is corrosive of the integrity of the Community system and likely to lead to a downward spiral via covert retaliation in the practical impact of Community law. The significance of this task cannot be underestimated, for States have incentives to cheat in domestic implementation after agreement at Community level. Moreover, parties with interests

affected by measures agreed at Community level can be expected to develop strategies for persuading "their" governments to dilute the practical domestic impact of agreed norms. The temptation of governments to yield to such blandishments will be especially strong where the interests likely to be prejudiced by underimplementation lie out-of-State (consumers, environment). In order to maintain stability within the Community structure, the gulf between effective enforcement of the law of market integration and the law of market regulation demands attention.

In mapping pathways to addressing the implementation imbalance, I would separate attempts to provide improved individual access to justice, Part 9 below, from an enhancement of Commission powers, Part 10 below. However, I am not proposing a choice between the two: both routes are capable of contributing to the resolution of problems caused by the implementation imbalance.

9. Building improved individual access to justice.

It would be desirable to confer on individuals an enhanced legal status when they complain to the Commission of unlawful State action.

At present, it is plain that the Commission has a discretion as to whether to initiate proceedings under Article 169 which cannot be reviewed at the suit of an individual complainant (Case 247/87 Star Fruit v Commission [1989] ECR 291). The Commission is hampered by resource constraints, but this is not the sole reason explaining some instances of reluctance to proceed under Article 169. The politicisation of the procedure is an open secret, if a secret at all (eg Williams 1994), and it may cause the individual to be shut out (and left to seek protection under national systems, the deficiencies of which are considered below).

This is strikingly out of line with complaint-handling in the field of competition policy, where individuals have acquired a markedly stronger position vis-à-vis the Commission as a result of legislative and judicial activity (Art.3 Reg.17/62; Case T-37/92 BEUC v Commission [1994] ECR II-285. See Weatherill, 1996, Adamantoupolos, 1996). It would do much for individual access to justice were such procedures to be transplanted to permit more intense participation by complainants in wider spheres of enforcement activity relating to market regulatory law. This could comprise a right to a reasoned explanation of why the Commission chooses not to pursue an investigation into the matter that is the subject of complaint. However, anticipation of moves in the direction of curing the current bias in favour of complainants in the field of competition policy by boosting the status of complainants generally seems politically implausible at present; and would in any event require major resource commitments to the Commission to underpin any requirement that it widen its willingness to take complaint-handling seriously.

In the absence of a Commission willingness to pursue an alleged violation of Community law, the complainant must turn to national procedures.

The nature of "individual rights" that are the subject of protection at national level requires elucidation in the context of the need to address the implementation imbalance. Whereas the trader's ability to rely on, for example Article 30 EC before national courts to challenge obstacles to trade in goods is clear and illustrated by a vast body of case law, the same cannot be said of the individual's ability to invoke Community to challenge under-implementation of the law of market regulation. Finding "rights" to markets freed of unsafe products or to environmental protection in line with EC Directives (or, a fortiori, in line with primary Community law) is jurisprudentially difficult. It is a well-known paradox that the greater the number harmed by an allegedly unlawful activity, the less likely that any single individual among those harmed will have a legal right that will be recognised by a court.

From the perspective of rights to regulation, there are some signs of progress in this area. The European Court insists that individuals relying on EC law should enjoy all remedies available under national law in similar circumstances and, in addition, that there should be available to them the remedies that are required in order effectively to protect rights created by Community law. In Francovich this prompted the Court to find that as a matter of Community law a national system may be required to make available the remedy of damages in the event of violation of Community law, and that this may obtain independently of a finding that the right in question is directly effective in nature (Cases C-6, C-9/90 [1991] ECR I-5357). So in principle a State failure to observe Community law obligations to secure defined standards of environmental or consumer protection, whether or not pursued as part of a deliberate strategy of competitive underimplementation, could be the subject of proceedings at national level initiated by an individual. This has occurred. Francovich itself involved failure to implement a Directive concerning worker protection. The intended beneficiary of such a measure who successfully challenges a State omission to act, thereby prompting the making of the necessary legislation, litigates on his or her own behalf, but also, indirectly, on behalf of companies based in other States who are forced to bear the full cost of a properly implemented regime (though not on the facts of the case: cf Case C-479/93 Francovich v Italy judgment of 9 November 1993). The same tale of control over failure to (re)regulate in accordance with Community law may be traced in Dillenkofer and others v Germany (Joined Cases C-178, C-179 & C-188-190/94 judgment of October 8, 1996). This was a damages claim arising out of Germany's failure properly to implement Directive 90/314 on package travel, a measure adopted as a harmonisation measure under Article 100a EC. The Court was prepared to find rights capable of invocation by a consumer and eschewed a formal reading of the Directive as a one-dimensional tool of market integration. The Court made it explicit that "the fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers". So the Francovich line of case law shows potential to control failures to (re)regulate the market - even where those duties arise under the Community's harmonisation programme.

But there are many obstacles to effective individual enforcement in cases of misimplementation of regulatory standards mandated by Community law. Despite Francovich and Dillenkofer, rights to environmental protection and to consumer protection remain jurisprudentially difficult to conceptualise (Van Gerven 1996, Micklitz 1996, Micklitz/Roethe/Weatherill 1994, Chalmers 1997). Claiming such "rights" is plainly far more difficult than the case of commercial interests employing Community law of market integration as the foundation of a directly effective right to trade into unlawfully protected national markets.

On a more practical level, even assuming a "right" to regulation of a nature that will be recognised by a Court can be identified, the fact remains that litigation is costly, time consuming and yields advantages to free riders. The more diffuse the interests protected, the less likely in practice that their neglect will provoke legal challenge. Dispersion of loss diminishes the practical probability that it will form the basis for legal action. Costly actions against the State on the Francovich model are hardly likely to become the norm; indeed, precisely this realisation prompted AG Jacobs (in Case C-316/93 Vaneetveld v Le Foyer [1994] ECR I-763) to urge on the Court reconsideration of its refusal to countenance the horizontal direct effect of Directives. He was not successful (Case C-91/92 Paola Faccini Dori v Recreb Srl [1994] ECR I-3325, confirmed in Case C-192/94 El Corte Inglés SA v Cristina Blázquez Rivero judgment of 7 March 1996.)

In theory, allowing collective or representative action is the obvious method for responding to an absence of adequate incentives to individual action, but the availability of such redress, though valuable in principle, varies among the Member States, thereby impeding effective and even enforcement (Deimann and Dyssli, 1995; Bourgoignie, 1992; and more broadly Harlow and Rawlings, 1992). Where those suffering because of one State's underimplementation are resident in another Member State, the legal and practical problems that beset effective challenge, whether pursued individually or collectively, are further magnified (Micklitz, 1993; Reich, 1992). And, to repeat, the

vague nature of the obligation of "effective enforcement" to which the Member States are subject also undermines the attraction of legal challenge, other than in the clearest cases of plain failure even to transpose. In sum, the Francovich line of case law is no panacea for State violation of Community law and must be placed in the context of impeded access to justice. One commentator has concluded: "[I]n locking the Community into national systems of liability, the ECJ may be creating an illusion of remedy where few remedies are in practice found." (Harlow, 1996).

Progress beyond the inadequacy of individual challenge may be achieved where EC law mandates the existence of specialist enforcement agencies at national level rather than simply leaving implementation choices to the national level under the cover of the vague notion of "effective implementation". In the field of public procurement the EC has strikingly abandoned the assumptions of national choices about enforcement and has instead developed a specific Community content to national remedies law (Dirs. 89/665, 92/13; Arrowsmith 1996). Less dramatic trends may be identified elsewhere. For example, Article 7 of Directive 93/13 (OJ 1993 L95/29) on unfair terms in consumer contracts requires Member States to ensure that "adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." Article 7(2) adds that these means "shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so they can apply appropriate and effective means to prevent the continued use of such terms." A similar, though not identical, formula appears in Directive 84/450 (OJ 1984 L250/17) which harmonises national measures concerning misleading advertising and in Directive 97/7 on the protection of consumers in respect of distance contracts.

In general, such initiatives improve the likelihood of even and effective enforcement of Community law across the territory of the Union and help to fill gaps caused by the general weakness of individual

access to justice in relation to regulatory standards agreed at Community level. But the coverage of such initiatives is patchy. Nor can the examples of misleading advertising nor unfair terms truly be accounted pathbreaking (although a little path could be broken if the European Court upholds the argument put to it in (pending) Case C-82/96 Consumers Association that Article 7 of Directive 93/13 requires (rather than simply permits) empowerment of consumer representative organisations). Finally, Member States seem far from enthusiastic about such trends and there seems little basis for predicting their dramatic extension across a wide range of sectors of Community regulatory/ legislative activity.

There are practical and political blockages to using and improving these avenues for tackling the implementation imbalance.

10 Commission powers.

In some areas, the Commission itself has been given powers to enforce Community law in a more assertive manner than that allowed by Article 169 EC. Competition policy is, of course, the clearest example (it is notable that those powers are directed predominantly at the private sector). Elsewhere development of Commission power to control State action has been instructively patchy and controversial. The spheres of environmental and consumer protection provide examples. In the environmental sphere, a Community agency has been established (Reg. 1210/90 OJ 1990 L120/1), but the Member States have been unwilling to equip it with a specific role in the area of monitoring compliance nor to allow it to penalise infractions (Davies, 1994). And it is not simply State reluctance that is at work: institutional rivalry lurks. The Commission's communication of 1996 on implementing Community environmental law (COM (96) 500) conspicuously avoids making any case for enhancement of the agency's role, probably because of the Commission's own ambitions in that

direction. In the meantime, matters of monitoring and imposition of penalties remain within the scope of national competence subject to the requirements of effective enforcement drawn, fundamentally, from Article 5 EC, supervised by the Commission using the blunt instrument of Article 169. The perils of this method for ensuring that the States regulate adequately have been amply discussed above.

In the consumer field, the Directive on General Product Safety included in Article 9 provisions empowering the Commission to adopt decisions requiring the Member States to take named measures in respect of products (Dir.92/59 OJ 1992 L228/24). The Commission's power is subject to stringent preconditions, which, moreover, had been extended beyond those contained in earlier drafts proposed by the Commission (Weatherill, 1997b, pp.130-2). Yet even the Commission's very limited power to act rather than simply leave enforcement to national level provoked Germany to seek annulment of the Directive before the European Court on the basis that Article 9 lacked a legal base. The application was unsuccessful (Case C-359/92 Germany v Council [1994] ECR I-3681). The Court accepted that measures within the meaning of Article 100a "must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products." However, although the Court was here receptive to the use of Article 100a as a valid basis for empowering the Commission to act, the very fact that Germany felt compelled to bring the case reveals sensitivity about extension of the Community's competence to build institutional structures in support of the process of market integration.

11 Concluding comments

The "implementation imbalance" condemns Community law of market re-regulation to a status in practice which is subordinate to the law of market integration/ deregulation.

However, the problem of the "implementation imbalance" needs to be placed in context. The quest to improve access to justice in relation to diffuse interests in the Community involves problems that are far from unique to the Community. National systems too must pursue the objective of refining regulatory strategies and choosing associated methods for citizen involvement. But the heterogeneity of regulatory practice State by State in the geographically and functionally expanding Community combined with relative institutional unsophistication at Community level makes the case of the European Community peculiarly problematic. Approaching from a different direction the need to place the EC's imbalances in context, it is a well-established phenomenon of international agreements that implementation is typically dependent on State structures and that impacts will therefore vary. Yet aspirations in the EC surpass those which motivate traditional international organisations and greater institutional ambition has always been appropriate.

Such perceptions tend towards issues far grander than implementation, yet intimately connected to that apparently mundane world. The advance of market freedoms on a European scale is outstripping the structure of market regulation, which as yet remains far more closely tied to national structures. The paradigmatic form of control found in Directive 83/189, developed by the Court in CIA, prioritises one particular form of control: national measures that conflict with Community requirements of market integration may be set aside, either by Commission intervention or in proceedings driven by cross-border traders. But this fails to address the more complex issue of responsibilities of States to regulate, where invalidating action that is not notified does not work because the complaint is precisely that action has not been taken; and where in any event policing lies in the hands of individuals whose interests are diffuse and therefore either go unrecognised by the law or are in practice incapable of effective vindication. This is well illustrated by pondering on how Spanish malpractice of the type alleged in Hedley Lomas could really be controlled under the current patterns of Community law.

Opening up the process of implementation (in its widest sense) to greater transparency is vital to the

EC's ability to convince commercial and consumer interests of even and effective law enforcement across the territory of the EC; and reliance on individual action before national courts is misplaced optimism. This means proposals extending far beyond transparency combined with dependency on national enforcement structures. So although I advocate:

. support for the construction of networks linking administrative agencies in different Member States;

. a wider requirement imposed on the Commission to give reasons in complaint-handling; and

. a greater willingness to mandate specific national remedial procedures under Community instruments;

the argument in favour of more ambitious institutional development looms unavoidably.

In the light of the types of problem identified in elaborating an effective strategy for even and effective implementation of Community law, a Community-level "implementation agency" may be the logical, albeit constitutionally sensitive (Everson, 1995), proposal. This could involve a Community-level agency equipped with an overall role in monitoring national practice in EC law implementation (in its broadest, continuing sense).

But perhaps what is needed is something more than a Community-level agency. Perhaps an agency at Community level could be equipped with powers to pursue at national level procedures defined (by Community law) to control misimplementation. That is: the model of public procurement and the Unfair Terms Directive, whereby a Community measure describes necessary enforcement patterns at national level, but with a Community enforcement agency able to exploit those powers at national level. This would inject the supranational into the national and could make enforcement of market regulatory law more effective and more even across the territory of the Community. Such proposals ought to find favour with the commercial sector as well as proponents of effectively enforced social protection, because dealing with one agency is better than dealing with 15. It may seem a paradox that commercial interests might press for European market regulation, but the explanation lies not in desire for regulations but rather, if there are to be regulations, in a desire for them to operate at a common

European level. Naturally, there would be problems of ensuring adequate resourcing for an agency; it would be vital to be alert to the risk that it could be captured by those nominally subject to its supervision; and politicisation of its role (as the Commission's enforcement role has been in part politicised) would be a real risk. Moreover, the injection of a Community-level agency into domestic procedures could imperil one of the most attractive features of the current enforcement system - namely that national infractions of EC law are controlled by national procedures and national judges, thereby denying State-centric defaulters the opportunity to shrug off EC law obligations as external to "real law" (i.e. national law). This might suggest that a Community agency should operate alongside established national agencies, in a mutually-reinforcing collaboration.

The current implementation imbalance severely prejudices the enforcement of market regulatory law and demands that attention be focused on institutional development at European level, if not to match the process of European market integration then at least to begin to take small steps in its pursuit. The creation of a general "implementation agency" could begin to convince both trading interests and diffuse interests of the realistic possibility of even and effective enforcement of EC law.

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