Enforcement of EC environmental law and the implications of the Francovich judgment

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A general analysis of the development of the environmental policy of the European Community since its inception in 1973 reveals that whilst during the first 25 years emphasis was placed on the creation of a body of legislation addressing the most urgent environmental problems (consisting almost exclusively of Directives), more recently attention has shifted towards the application of these Directives. Although it is true that the proper implementation of Community environmental law is of general concern, a number of characteristics inherent to Community *environmental* law necessitate paying special attention to the adherence with this branch of Community law.

In the first place, reference should be made to the use of the Directive as a principal legislative measure in the field of the environment. For Directives, Art 189(3) imposes a simple obligation of result:

> "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 forms and methods".

Hence it is that once a Directive has received the approval of the Council, the task of implementing it by appropriate means is left to the Member State. Notwithstanding the erosion of Member States' discretion by the jurisprudence of the European Court of Justice, unlike Regulations which impose an obligation of form on Member States and are directly applicable, the use of Directives as instruments for environmental policy-making necessarily entails scope for differences in interpretation or, at worse, abuse.

The subject-matter itself also calls for a different approach than for other spheres of Community commitment. Unlike, for example, damages resulting from "illegal" quantitative restrictions on imports, once environmental damage has occurred it is not always possible to remedy the damage. The Court has underlined the special character of Community environmental law, noting that the faithful transposition of Community obligations into national law is *especially* important in respect of environmental Directives "as the management of the common heritage is entrusted to the Member States as regards their respective territories" (Case 236/85, *Commission* v *Netherlands* [ECR] 3989 and case 412/85, *Commission* v *Federal Republic of Germany*, [1987] ECR 3503).

Similarly, by including an Annex in the last two annual reports on Commission monitoring of the application of Community law, devoted exclusively to the implementation of environmental Directives (while no other Community policy has been granted such special treatment) the Commission on its part acknowledges that Member States' adherence to Community environmental law needs to be particularly stringently supervised (Ninth Annual Report on Commission Monitoring of the Application of Community Law, COM(92) 126 fin). Given the crucial importance of Member States' faithful implementation of environmental Directives, the question as to the efficacy of the enforcement mechanisms in case such compliance remains illusory is at least as imposing. A useful first distinction may be drawn between direct and indirect enforcement mechanisms.

Direct enforcement of environmental Directives

The most important examples of direct enforcement mechanisms are those described in Arts 169 and 170 EEC. Article 169 reads:

> "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission the latter may bring the matter before the Court of Justice."

Since Art 170, empowering Member States to institute proceedings against their fellows, has only been used once – and not in this field – in practice the bulk of "environmental" cases have emanated from infringement procedures instituted by the Commission under Art 169. This being the case, it is particularly ominous that in practice the procedure has often proved less than satisfactory. Without the need to go into great detail about the underlying reasons for the faltering of the infringement procedure in the field of the environment, some general observations are appropriate.

Firstly, whilst the Commission is more and more pursuing cases dealing with the practical aspects of the implementation of environmental Directives, it does not possess independent powers to gather the necessary data on the spot. The burden of proof in infringement procedures resting with the Commission, and its dependency on information provided by Member States evidently constitutes an imbalance. The continuing delay in the coming into force of the Regulation on the European Environment Agency – which includes amongst its tasks the making available of reliable information relating to the state of the environment – is therefore

of serious concern.

In addition, whilst the irreversible nature of the environmental damage requires that any infringements of environmental Directives are rectified immediately, the procedure under Art 169 is slow and cumbersome. By way of example, an individual complaint in September 1987 about the illegal dumping of various types of toxic wastes in rural Crete resulting in pollution of the soil and the aquatic environment culminated into a Court ruling as late as February 1992 (Case C-45/91, *Commission* v *Greece*, 26 February 1992 (not yet reported)), unnecessary threatening a site of prime ecological importance.

Even if the Court eventually reaches a decision, this in itself cannot guarantee that an environmental Directive will eventually be adhered to. Article 171 merely requires Member States "to take the measures [required] to comply with the judgment of the Court of Justice". Yet, none of the institutions of the Community possess the power to enforce the Court's judgments by imposing sanctions upon recalcitrant Member States (*cf* Art 171 of the Treaty on European Union). Although renewed recourse to Art 169 for failure to fulfil the obligations under Art 171 can hardly be termed an effective legal remedy, it is all the Commission is at present empowered to do. Seen in this light, the fact that in an increasing number of environmental cases the Court is asked to rule on the failure to implement one of its judgments is evidently discouraging (most recently Case 75/91, *Commission* v *Netherlands* (wild birds) 6 February 1992 (not yet reported)). Although, for reasons to which we shall turn below, it would be incorrect to suggest that a judgment has no legal significance, the fact remains that the efficacy of the direct enforcement powers at the disposal of the Community leave much to be desired and do not satisfactorily safeguard the application of the environmental Directives.

Potential of indirect enforcement of environmental Directives: an overview

With indirect enforcement we refer to the power of individuals to uphold Community law before national courts. As the Court pointed out in its famous *Van Gend & Loos* judgment "the vigilance of private individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Arts 169 and 170 to the diligence of the Commission and the Member States" (Case 26/62, [1963] ECR 1) The vehicles enabling this kind of private policing of Community Directives are the doctrines of supremacy and direct effect.

The doctrine of the direct effect of Directives has been developed by the Court in a long line of cases. As it is not viable to discuss the requirements for direct effect in any detail here, it suffices to recall that for a provision to produce direct effects it must be clear and precise, unconditional and not subject to any discretion on the part of Member States or Community institutions. Meanwhile, the direct effect of a provision of a Directive will only arise if a Member State has failed correctly to implement its provisions. This necessarily implies that only after the deadline for the implementation has passed can a Directive that has not been fully implemented give rise to rights and obligations (Case 148/78, *Ratti*, [1979] ECR 1629). In such cases, the supremacy of Community law dictates that if a directly effective provision of Community law is at variance with national law (irrespective of its nature), the former will prevail (Case 106/77, *Simmenthal*, [1978] ECR 629).

In practice, the indirect enforcement of Community law has proved at least as effective as direct enforcement carried out by the Commission and the Court. This is not surprising if it is realised that, unlike the European Court of Justice, national courts do possess a wide range of instruments enabling them effectively to enforce Community law. As an illustrative example, reference need merely be made to the enforcement of the equal pay Directives by British courts. Yet, surprisingly, unlike in the sphere of equal pay, individuals have yet to play a role of real significance in the enforcement of environmental directives. Relatively few cases have arisen before national courts, the vast majority having been instituted by the Commission under Art 169 (though often after complaints by private individuals). Since the protection of the environment is such a contentious issue, the reluctance of individuals to uphold Community environmental law before their national jurisdictions may at first seem surprising. There are, however, a number of factors which may serve an explanation.

First, as the Commission has observed, "the business Community has less direct interest than in other spheres in seeing these standards applied" (Fourth report on Commission monitoring of Community law at p15) Hence, the absence of the element of (financial) self-interest means that individuals are less vigilant to uphold Community environmental law than, for example, equal pay legislation. Evidently, this does not apply to environmental interest groups. As will be seen below, however, in respect of common-interest groups problems of a different nature arise.

Secondly, not unlike domestic environmental law, Community environmental law is often expressed in the form of plans, general guidelines or frameworks for future action. Given the fact that for provisions of Community law to be relied upon directly in the national courts they must be clear, precise and unconditional, this implies that in many instances environmental Directives do not produce direct effects.

A third important explanation for the fact that questions related to environmental Directives only relatively rarely arise in national jurisdictions, stems from the Court's denial of so-called "horizontal direct effect". This implies that unimplemented environmental Directives may be invoked against "the State" but not as against "individuals", a serious restriction on the degree individuals can directly rely on Community environmental law. The Court has attempted to compensate for its refusal to afford horizontal direct effect in two ways. Firstly, the question as to what constitutes "the State" is determined by Community law which in *Foster* v *British Gas plc* resulted in a wide interpretation (Case 188/89, 12 July 1990). Secondly, the Court has developed a doctrine of "indirect effects" whereby national courts are under an obligation to interpret their national laws in the light of the objectives and wording of Community Directives, irrespective of the question whether they produce direct effects or whether the national provisions predated or post-dated the Community directive (Case 14/83, *von Colson*

[1984] ECR 1891, more recently, Case 106/89, *Marleasing* case of 13 November 1990, and Case 213/89, *Factortame*, ECR I-2466).

This being as it may, it is appropriate to consider in what kind of circumstances individuals are likely to invoke directly effective provisions of Community law against the State. Basically, there would seem to be two different scenarios. Individuals may either wish to invoke Community environmental law in order to dispute national standards (for example attached to a permit) which are more stringent than Community law or, conversely, they may do so in an attempt to raise national environmental standards to EC standards. As almost all environmental Directives pursue "minimum harmonisation", allowing Member States to adopt more stringent standards, attempts to challenge higher national standards on the basis of directly effective Community law will normally fail (see also Art 100A(4) and Art 130T). It therefore appears that the direct effect of environmental Directives is most likely to be invoked by individuals pursuing environmental standards which are higher than those contained in national legislation, in which case the plaintiff will normally be an environmental interest group. Yet as it is well known, national requirements relating to *locus standi* of common interest groups in many instances will rule out access to the courts. Although the harmonisation of national provisions relating to *locus standi* for environment interest groups has been considered, it has never reached the state of a proposal for a Directive. As a result, considerable differences in the availability of judicial remedies for the enforcement of Community environmental law remain.

However, the conventional wisdom that it is left exclusively to the national legal systems to devise the remedies and procedures necessary to ensure that "environmental rights" conferred by Community law are upheld is no longer tenable. From the "minimum requirements" formulated in the Court's early jurisprudence, *locus standi* for environment interest groups may arguably already be inferred. Thus precisely because – for the reasons set out above – in practice only environmental interest groups are likely to rely upon Community environmental law in the national courts. The first minimum requirement that the national provisions must not make it impossible to uphold individual rights in practice by implication would seem to oblige Member States to allow environmental interest groups access to the courts in order to uphold Community standards. The mere fact that national procedural law does not distinguish between national law and community in the availability of remedies (the second minimum requirement laid down by the Court) does not alter this conclusion. In fact, after the Court's reasoning in *Factortame*, it is not too eccentric to argue that national courts have a duty to disregard national rules ruling out *locus standi* for environmental interests groups. It is perhaps worthwhile to recall some of the key passages from this case:

> "... the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of a judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule" (para 21).
>
> "a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule" (para 23).

If this reasoning is applied to national provisions regarding *locus standi* for environmental interest groups, it follows that national courts must set aside any procedural provisions which deny common interest groups the right to enforce Community environmental law. (a view consistent with that of Advocate General Mischo in *Francovich*, *cf* Section 6 of the Opinion). In conclusion, it appears that the obstacles accounting for the relatively insignificant role played by the doctrine of direct effect in the enforcement of environmental Directives are not insurmountable.

Remedies after Francovich

A year has passed since the court delivered its landmark judgment in case C-6/90 and C-90, *Francovich and Bonifaci* v *Italy* (judgment of 19 November 1991, (not yet reported – see [1992] *Water Law* 35–7), and an attempt can be made to assess some of its implications for the indirect enforcement of environmental Directives. The case has already been extensively commented upon by various eminent scholars and it therefore suffices to recall its most important elements in brief.

The case arose when, after bankruptcy of two Italian firms, a number of employees risked losing substantial sums consisting of unpaid salaries. Directive 80/987 on the other hand – which according to its Art 11 should have been implemented by October 1983 – establishes a Community-wide system providing minimum protection of employees in case of insolvency of their employer. In 1989, the Court ruled in an action pursuant to Art 171 that Italy had failed to properly implement the Directive ([1989] ECR 143). Italy apparently not having implemented the Court's judgment, the Italian court submitted the following preliminary questions in accordance with Art 177 EEC;

(a) whether, in view of the Community provisions in force, an individual who is adversely affected by the State's failure to implement Dir 80/987 – a failure confirmed by the Court – can directly rely upon its provisions insofar as they are sufficiently precise and unconditional;

(b) whether, irrespective of the answer to the first question, that individual may claim damages suffered as a result from the Member State's failure to implement provisions.

In respect of the first question, the Court found that the provisions of the Directive did not produce direct effects. For our purpose, it is not necessary to deal with the way in which the Court arrived at this conclusion.

The crucial question raised by the Italian court is that of the non-contractual liability of the Italian State for damages resulting from the breach of the Directive. The Treaty, in Art 215(2), does embrace (the principle of) non-contractual liability of *the Community*, but its emphatically si-

lent on such liability of the Member States arising out of the breach of a Community obligation. This apparent inconsistency is not surprising when it is appreciated that, in view of the traditional rule that "*le Roi ne peut mal faire*", non-contractual liability of the State is a most controversial and evolving subject even within Member States' national legal orders. Thus, even though a degree of state liability is accepted in all Member States, the extent to which the state may be held liable differs significantly amongst Member States. What the national concepts of state liability do have in common, is that the conditions allowing the state to be held liable are always much more restrictive than those applying to individuals *inter se.*

In respect of the non-contractual liability of the Member States, the Court had to address two separate but related issues. First, in view of the fact that the Treaty does not contain any explicit rule on which this liability can be based, it needed to clarify the legal basis for such liability. Secondly, once it accepted the notion of State liability in principle, it needed to explain the conditions in order for such liability to arise.

In respect of the first question, that of non-contractual liability in principle, we shall not devote too much attention. The seeds of the Court's decision can be traced back to previous jurisprudence, especially that of the 1960s, in particular *Van Gend & Loos* and *Costa.* Thus, the uniqueness of the Community legal order, in conjuction with the required *effet utile* and primacy of Community law, as well as Art 5, necessarily implied a right to claim reparation of damages resulting from a breach of Community law.

More important for the purpose of the present article are the conditions which the Court formulated which must be satisfied before such State liability can arise. The Court formulated three conditions;

(a) the result pursued by the Directive involves rights conferred upon individuals;
(b) the content of those rights must be identifiable on the basis of the provisions of the Directive;
(c) the existence of a casual link between the failure by the Member State to fulfil its obligation and the damage cause within the context of national law.

It is proposed to discuss these conditions in the light of the possibility to obtain reparation for damages as the result of the non-implementation of environmental Directives.

The first requirement, that (environmental) Directives must confer rights upon individuals, is not unlike the doctrine which in civil law is often referred to as "*Schutznorm*": the protection of the interests breached by the unlawful act must belong to the objectives of the norm that has been violated.

In respect of some environmental Directives, this criterion is undoubtedly satisfied. Examples are the Directive on the freedom of access to environmental information, the provisions in the context of the environmental impact assessment Directive, or some provisions regarding publicity in the chemicals Directives. It may seem less clear whether Directives which essentially seek to safeguard minimum environmental standards by way of limit values or quality objectives, as in the case of EC water law, can be said to afford rights to individuals. Yet, there can be little doubt that these Directives are also encompassed by the Court's formula. Thus, from the way the Court phrased the first condition it follows that, in common with the nature of Directives, it is not so much the form in which their provisions are phrased as the result they intend to achieve which should be used as a yardstick in deciding whether or not individual rights have been breached. A Directive pursuing minimum standards for drinking water, groundwater or air therefore creates an (implicit) right for individuals. This interpretation is consistent with the Court's case law, in which it confirmed that for example, Dir 80/68 on the quality groundwater and Dir 80/779 on sulphur dioxide and suspended particles in air create rights for individuals (most recently Case 361/88, *Commission* v *Germany*).

The fact that the present case involved breach of a Directive, does not mean that the importance of the case is limited to Directives or even secondary Community law. If all conditions are fulfilled, Member States are liable for the damages resulting from any breach of Community law attributable to them. This follows from the Court's sweeping formulation in para 37 of the judgement:

> "... le droit communautaire impose le principle selon lequel les États members sont obligés de reparer les dommages causes aux particuliers par les violations du droit communautaire qui leur sont imputables."

The second condition, which requires that the content of the provision of Community law should be sufficiently clear and precise to infer the right referred to above, should not be confused with the requirements for direct effect. Indeed, the fact that the direct effect of a provision of Community law is *not* a condition for the non-contractual liability of the State is one of the significant aspects of the case (in respect of liability arising from the breach of provisions of directly effective Community law, see Case 188/89, *Foster, op cit*). The clarity of environmental Directives should be assessed on a case-by-case basis which cannot be undertaken here. As far as water Directives containing limit values and values and quality objectives are concerned, however, quality objectives are concerned, however, this requirement should raise few problems (see Kramer, L "The implementation of Community environmental Directives within Member States", (1991) 3 *Journal of Environmental Law*, at p39).

The last requirement formulated by the Court, that of the existence of a casual link between the failure of a Member State to fulfil its obligations and the damage caused, is self-evident and in itself needs no further comment. On the other hand, it is important to recall that according to established case law, the duty to adhere to Community law extends to the "organs of the State". As pointed out by Bebr, from the examination of the Court's jurisprudence it appears that this concept encompasses municipalities, local authorities and professional societies entrusted with public functions (Bebr, G, (1992) 29 *Common Market Law Review* at p578). The privatisation of the water industry hence would not seem to preclude its possible liability for a breach of an environmental Directive, although this is a matter for the Court to establish.

From the Court's reasoning it also appears that for the State to become liable, no fault or negligence is required which accords with analogous

case law to the effect that for a judgment pursuant to Art 169 the question as to any possible fault on the part of the Member State is irrelevant.

It is important to note that, merely because the Court leaves questions related to causality and the enforcement of the liability to national law, this does not mean that the liability itself is not a matter of Community law. In other words, if the conditions set out above are met, liability for breach of an environmental Directive arises even if under national law this would not be the case. In as far as the procedural aspects governed by national law are concerned, these should comply with the "minimum Community standards" referred to as above.

Conclusions

From this analysis, it appears that by embracing the principle of non-contractural liability of Member States for breaches of Community law, the Court has significantly extended the potential for the indirect enforcement of Community environmental law. It is when speculating about the practical impact of the judgment in the field of the environment however, that it becomes clear that a number of issues remain to be resolved.

The question whether an environmental Directive affords rights and to whom, for example, may be difficult to answer in a particular case. Neither has the Court provided any guidance as to the type of causality it has in mind in establishing the existence of a casual link between the Member State's breach and the damage caused, thus leaving scope for the unacceptable differences in the application of the Francovich formula amongst Member States. A further question, especially important in the sphere of the environment, is for what kind of damages the state is liable and to which extent. Eventually, the effective of non-contractual state liability as a deterrent against the infringement of Environmental Directives will depend on the answers to these questions. A theoretical and somewhat provocative question is whether, on the basis of *Francovich*, environmental interest groups which have incurred costs upholding Community environmental law may eventually invoke the non-contractual liability of the defaulting state, analogous with the provisions in the proposed Directive on civil liability for damage caused by waste. Undoubtedly, in the years to come national courts will have to seek the Court's guidance on these issues by way of preliminary references.

Meanwhile, although a previous judgment by the Court under Art 171 is not the the only way for national courts to ascertain breaches of environmental Directives, a judgment by the European Court will nevertheless be of great assistance to them. Bearing in mind that a case pursuant to Art 171 is an indirect source of individual rights, it is therefore important that the Commission remains vigilant and actively pursues cases under Art 169 EEC even if in the course of the proceedings the infringement is terminated.

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