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CHAPTER 8

Rules to Enforce the Rules

*"The problem can be simply stated. On the one hand, the Community system is a decentralised one, in that it operates primarily through the legislature, executive and judiciary of the Member States... On the other hand, Community law has to be interpreted and applied uniformly in all the Member States."*¹

*"The benefits of the internal market will not flow unless its rules are applied effectively and consistently throughout the Community... At the same time it is important that in this market, local, regional and national diversity be retained. The acceptance of such diversity is politically and culturally important to Europe, but it risks being in conflict with the effective operation of an internal market."*²

*"The difficult question which the Community has to address is whether the Member States are to be required to enable individuals to exercise their rights effectively, or enable groups to ensure that public and Community interests are protected, by spelling out objective criteria for determining who shall have the right to initiate proceedings, what remedies are to be available, and what financial and other support should be provided to make access to those remedies a reality."*³

Rules to enforce the rules: Specific Community rules for the enforcement of Community law

Community law establishes rights and obligations, and Member States have, by virtue of Article 10 EC, a duty to take all and appropriate measures to ensure the full application of Community law. At the same time, the Community does not usually prescribe any particular methods or sanctions designed to ensure that these rights are effectively protected or that these obligations are properly adhered to. The applicable procedures and remedies for the enforcement of Community law are, in principle, a matter governed by national law, provided that certain basic standards are observed⁴. Still, in a number of areas, the question of the remedies available to affected parties in national courts has been dealt with by specific Community legislation.

This chapter considers the few fields where courts in the UK have to follow Community established rules. Further, it examines the likelihood of future developments, given that the Community legislature has been invited to play a more significant role in establishing rules to enforce the rules⁵, and has also been given some new powers in this area. Finally, the problems linked with leaving the harmonisation of remedies in the judicial sphere will be analysed.

8.1 The present

In a limited number of areas, UK courts have to follow already established Community rules. For some time a number of Community directives⁶ have specifically required Member States to adopt measures to enable individuals to enforce by judicial process the rights which the directive is intended to confer.

Recently, Community influence in the field of remedies and procedural rules has become more precise.

The Community Customs Code⁷ incorporates all the basic principles of existing Community Customs legislation⁸ in relation to trade with third countries. It provides for the right for a person to repayment of duties not legally owed to the customs authorities and establishes a two-phase right of appeal against the decision taken by customs authorities in the Member States. Claims for repayment have to be made within three years. It lays down the various circumstances which would or might give rise to repayment together with the criteria attaching to their exercise. The code applies only to taxes, charges, levies and duties created by Community provisions or collected by the Member States on behalf of the Community. It does not apply to any national tax, charges or duties which may be levied contrary to Community law⁹.

In areas that directly affect the Community's financial interests¹⁰ – the common agricultural policy¹¹ and fisheries¹² – the Community legislator has attempted to harmonise the imposition of sanctions by Member States¹³. There is also the generation of legislation dealing with the functioning of the internal market¹⁴. The main provisions of the Official Control of Foodstuffs Directive¹⁵ are concerned with the scope, manner and frequency of inspections of food-processing premises as a means of enforcing EC regulations on foodstuffs, with the overall aim of providing verification of compliance with these¹⁶; Article 23 of the Television Without Frontiers Directive¹⁷ ensures a right to reply; the Community Trade Mark Regulation¹⁸ requires *inter alia* that some national courts are designated as Community trademarks courts and that these shall have jurisdiction over actions for infringement and counterclaims for revocation and invalidity.

Partial harmonisation of collective actions has occurred in a number of fields: the Misleading Advertising Directive¹⁹ requires the availability of means to combat misleading advertisements and that "such means shall include legal provisions under which persons or organisations *regarded under national law* as having a legitimate interest in prohibiting misleading advertising" may seek certain remedies²⁰. Article 12(1) of the Directive on Advertising of Medicinal Products provides likewise²¹. Article 7(2) of the Unfair Contract Terms Directive²² contains a similar rule in that "persons or organisations having a legitimate interest under national law in protecting consumers may take action according to the national law concerned before the competent authority to seek declaratory relief". These provisions therefore leave it up to national law to decide under what conditions consumer groups will have standing or title and interest to sue; the criteria for establishing such legitimate interest have not been harmonised. Furthermore, the Directive does not explicitly require that the national implementing legislation should lay down the criteria to identify those having a legitimate interest, and it does not seem to prevent countries with an independent public enforcement authority from conferring on such a public body the sole right to mount a legal challenge. This is an issue which

has given rise to litigation in the UK. The Unfair Contract Terms Directive was implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1994²³. The Regulations provided that the Director General of Fair Trading 'shall consider any complaint made to him about the fairness of any contract term drawn up for general use, and that he may seek an injunction to prevent the continued use of that term'. The Consumers' Association and Which (?) sought²⁴ a declaration that the Secretary of State for Trade and Industry acted *ultra vires* and unlawfully by failing to give organisations such as them, with a legitimate interest under national law to protect consumers, a right to take legal action under English law to obtain a ruling as to whether contractual terms drawn up for general use are unfair. It was submitted that the Directive required Member States, first, to ensure that their national law adopts criteria to define the persons or organisations who have such legitimate interest in protecting consumers, and second, to allow such persons or organisations to bring legal proceedings to establish that contractual terms drawn up for general use are unfair. The High Court asked the ECJ²⁵ whether Article 7(2) of the Unfair Contract Terms Directive imposes obligations on Member States to ensure that national law (i) states criteria to identify private persons or organisations having a legitimate interest in protecting consumers, and (ii) allows such private persons or organisations to take action before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair. The Regulations were subsequently amended so as to give organisations with a legitimate interest in protecting consumers the right to bring legal proceedings to establish that contractual terms drawn up for general use are unfair. The Directive on Injunctions for the Protection of Consumers' Interests²⁶ will approximate the laws, regulations and administrative provisions of the Member States relating to actions seeking an injunction aimed at the protection of the collective interests of consumers for a range of consumer protection directives²⁷. It addresses some of these difficulties, by providing a definition of the entities which must be recognised as qualified to seek an injunction. Transfrontier consumers' protection should also be enhanced by this new directive, as Member States must be prepared to grant *locus standi* to qualified entities outside their territories.

8.2 A case study: the public procurement rules

An example of a comprehensive EC legislative framework dealing with remedies and procedural law is provided by the 'Remedies Directives' in the field of public procurement: Directive 89/665²⁸ and Directive 92/13²⁹. The existing directives on public works and public supplies contracts laid down rules for advertising, tendering and the award of public contracts above a certain value, but left it to the Member States to ensure that these rules were complied with. The Commission found that compliance with the directives was very poor, as the authorities

awarding contracts in the Member States largely ignored the rules set out in the directives. Given the limited resources available to it, it was impossible for the Commission to seek to police the existing framework itself³⁰. The Community legislature took steps to ensure that effective remedies in the field of procurement were available in the national courts. The next section briefly describes the rules laid down and discusses the extent to which the Remedies Directive strengthened the existing enforcement mechanisms.

8.2.1. The Remedies Directive

The Remedies Directive provides for a conciliation procedure³¹, so that disputes may be settled without recourse to the courts. It also regulates certain issues regarding the ways in which individuals may seek redress before their national courts, such as *inter alia* the interest in bringing an action³², burden of proof³³, interim measures including suspension³⁴, setting aside of decisions taken unlawfully³⁵, and award of damages³⁶. Before the introduction of the Remedies Directives, in England, alleged illegalities in awards of public contracts could be challenged in the UK courts by an action for breach of statutory duty. In the absence of a contract between the disappointed tenderer and the procuring authority, the only remedy open was an action for judicial review of the award of the contract. The complainant had to obtain leave of the court and had to show title and interest. Awards for damages were rare.

The United Kingdom chose to implement the Remedies Directives³⁷ as part of the framework of secondary legislation governing procurement in the field of public works, public supplies and public services. The implementing Regulations designated the forum for relief³⁸. The UK, rather than creating a set of specialist review bodies to review decisions of contracting authorities or entities, opted for the solution of using the courts with limited expertise in public procurement. Under this system, litigants are immediately in the High Court or the Court of Session, where the costs of litigation will act as a deterrent not just to those who may seek to abuse such a right for an oblique motive³⁹. The Remedies Directives gives power to the High Court or the Court of Session (i) to order interim measures to correct alleged infringement or prevent further damages, for example to make an interim order suspending the award of a contract; (ii) to set aside unlawful decisions taken by the contracting parties, for example the removal of discriminatory technical specifications in the invitation to tender, and (iii) to award damages to aggrieved suppliers or contractors.

At present not enough data appears available to assess the enthusiasm of UK courts for suspending award procedures and/or awarding damages⁴⁰. It is also too early to comment upon whether the Remedies Directives have significantly improved compliance with the public procurement directives. However, some limitations of the system are already apparent. First, some breaches of the substantive rules are difficult to prove in legal actions. Failure to publish a notice is easy to show, but it is not easy to demonstrate that a local authority has

been motivated by unlawful considerations in awarding a contract to a particular firm⁴¹. Second, the lack of detailed rules governing the amount of damages to be awarded by the national courts undermines the uniform application of the rules. The Commission⁴² found that in some Member States, compensation is minimal, covering only the costs incurred in the course of submitting a bid, whereas in other Member States, it covers the firm's loss of earnings i.e. the profit that would have been made if it had been awarded the contract. The Commission commented that such significant differences in compensation arrangements affects how awarding authorities and firms behave, which the Commission opined can lead to distortion of competition. Such findings suggest that, to be effective, harmonisation of remedies must be as detailed as possible⁴³. In other words, reference to national rules must be kept to a minimum. Third, the effectiveness of a regime does not rest solely on the existence of a framework for enforcement; it is also dependent upon the quality of the substantive rules themselves. This point was made when the Remedies Directives were proposed; some evidence was adduced to the effect that the lack of effectiveness of the regime was due to the inferior quality of the substantive rules themselves. The Public Procurement Directives were criticised for not taking sufficiently into account the prevailing commercial realities⁴⁴. Finally, it is doubtful whether rules on remedies could ever improve compliance with the substantive rules, given that undertakings would be reluctant to institute proceedings against contracting authorities as this may damage a valuable commercial relationship, actual or potential⁴⁵.

This suggests that paying due regard to the question of enforcement can help to ascertain the necessity and/or usefulness (or lack thereof) of action at Community level.

8.3 Why does the Community make rules for the enforcement of Community law?

Legislative intrusions in the field of remedies have taken place for a variety of reasons.

8.3.1 From the level playing field paradigm

In a number of fields, Community harmonised measures are meant to secure a level playing field for undertakings. There has been a realisation that the mere creation of a uniform regulatory framework is not sufficient; an homogeneous system of application and enforcement must also be put in place. From the Community perspective, the existence of different national rules in the field of procedures and remedies can only be maintained insofar as these rules are capable of securing compliance with the Community substantive rules. Only effective and consistent rules are capable of ensuring fair competition. First, it

is recognised that compliance with Community legislation imposes direct or indirect costs on businesses. Secondly, where national remedies are deficient, compliance is not secured, which in turn undermines the conditions of fair competition.

8.3.2 To the very credibility of the project

Community law is not only concerned with economic operators producing, exchanging, and selling goods or relocating themselves. In the words of the Commission, ensuring compliance extends far beyond economic issues; the internal market rules require the attainment of a high level of protection with regard to health, safety, the environment and consumers. Community law needs to be complied with, otherwise the very credibility of common legislation would be damaged as it would "expose the Union's citizens and their environment to risks that are unacceptable to the individual and to Society as a whole"⁴⁶. In other instances, the need to ensure judicial protection of Community rights for Community citizens is invoked as the rationale for Community rules.

8.3.3 Making centralised enforcement easier

Community rules are also desirable if one considers that they would ease the burden of monitoring the application of Community law by the Commission. Where Member States are merely required to establish adequate, equivalent and effective sanctions for breach of Community law, the system of sanctions varies between the Member States, reflecting different legal and social traditions. Evaluating the adequacy, effectiveness and comparability of these sanctions is an uphill task. Thus Article 6 of the Timeshare Directive⁴⁷ requires the Member States "to prohibit any advance payments by a purchaser before the end of the period during which he may exercise the right of withdrawal". Does this simply mean that individual consumers affected by infringement of that prohibition by a company have the right to be reimbursed, or does it require additional sanction in order to dissuade companies from infringing this prohibition? This raises issues of principle in relation to the availability of damages and their nature i.e. enhanced, aggravated or punitive. The UK, Austria, Ireland and Sweden foresaw fines; other Member States have used traditional civil remedies: reimbursement with interest⁴⁸. In fact this example captures neatly the various and sometimes competing interests at stake. Are these sanctions equivalent, to what extent do consumers enjoy a comparable system of protection under the same Community regime, and to what extent are companies operating in this sector operating on a level playing field? Could or should the Commission have drafted its proposal differently so that all the Member States had to introduce the same sanction?

8.3.4 Protecting the Community financial interests

In the field of protection of the financial interests of the Community, developments have been justified by the concern to see that Community law is applied properly, that the Common Agricultural Policy instruments achieve their aims and that the Community budget be used only to finance legitimate expenditure

8.3.5 Some successes

Some contributions of the Community legislator in the field of remedies and procedural rules were motivated⁴⁹ by the need to guarantee the effective application of Community law⁵⁰, the opportunity for "any person whose legitimate interest has been damaged to effectively exercise such right or remedy"⁵¹. So, harmonised rules are needed to ensure that the functioning of the internal market is not disrupted, and that economic operators and consumers' confidence in the internal market is not undermined.

One thing is to establish the desirability of Community intervention in a particular field; another is to secure agreement between the different actors as to the making of the rules. The next section traces the evolution of the policy in the area of application and enforcement of Community rules.

8.4 The Political Dimension

For a long time, there was hardly any Community legislation dealing specifically with remedies or procedural rules for breach of Community law. The Community legislator was more preoccupied by the adoption of substantive rules rather than by issues relating to their implementation and enforcement. The European Parliament was the Community institution which initiated formal reporting on the monitoring of the application of Community Law⁵², and on that occasion made the rather sweeping declaration that:

"Uniform, complete and simultaneous application of Community law in all Member States is a fundamental prerequisite for the existence of a Community governed by the rule of law."

Today, it is widely acknowledged that the mechanisms available at national level for ensuring compliance with Community law are all too often inadequate. All Community institutions declare their willingness to address this problem, the Declaration on the Implementation of Community law⁵³ and the Resolution on Effective Penalties⁵⁴ provide us examples of such calls. There is also widespread support for the proposition that market integration requires a high degree of legal uniformity: the European Parliament adopted Resolutions⁵⁵ for the harmonisation of European private law. The European Contract law Commis-

sion infers the need for European private law from the interests of trade: legal diversity means higher costs, uncertainty and greater risks⁵⁶. In a 1994 study on the *Approximation of Judiciary Law in the European Union* – a study prepared at the request of the (then) ECC Commission – Professor Marcel Storme, drew up a number of draft articles, preceded by a general introduction and an explanatory memorandum as the basis of a set of *procedural rules*. The study took “quite a narrow view of the constituent elements of procedural law”. Amongst the subjects treated there are only a few which go beyond (civil) procedural law *sensu stricto*, such as rules on conciliation, provisional remedies and the (civil) penalty of “astreinte” (penalty payments). The others were of a purely technical nature, in that they involved rules, often found in codes of civil procedure, regarding “the good functioning of civil proceedings”.

Apart from Declarations, Resolutions and the commission of academic research, in some specific areas, practical steps have been taken⁵⁷. Thus, a new provision combating fraud against the budget⁵⁸ has been inserted in the Treaty, and a new intervention mechanism to safeguard free trade in the Single Market⁵⁹ has been adopted. However, progress in this area remains slow, and is likely to remain so, given problems of political and practical feasibility which will now be addressed in turn.

First, the Member States do not have the same attachment to compliance in relation to each and every one of their Community obligations⁶⁰. They have not shown any impatience to give teeth to the centralised enforcement system. It has taken until Maastricht to provide the ECJ with a power to impose fines or penalty payments on the Member States for failure to comply with a previous judgment of the ECJ finding them in breach. Even the new Article 228 is conditional like the infringement procedure on further negotiation with the Member States. Secondly, there is an inherent conflict in the Community system between ensuring effectiveness of rules, and ensuring uniformity of interpretation and application of rules while respecting the premise that the system depends on a decentralised framework for application and enforcement. It hardly seems possible for the Community institutions to legislate to harmonise procedures and remedies when the assumption underlying the system established by the Treaties is that *national* remedies enforced by *national* courts, in accordance with *national* procedural rules should be respected.

“The underlying premise is that States based on the rule of law will organise their national legal systems in such a way as to ensure proper application of the law and adequate legal protection of their subjects”⁶¹.

Even the level playing field argument has lost some of its force. It is suggested that the Commission will have increased difficulties in demonstrating that rules pertaining to remedies are necessary to prevent distortion of competition or to ensure the proper functioning of the internal market, as can be seen in the early debate surrounding the original proposal for the introduction of a system of

civil liability for damage to the environment. It was argued that a level playing field could not stem from the mere adoption of a system of civil liability, but would require harmonisation of all rules of civil procedure as well. What this debate shows⁶² is that Community harmonisation measures cannot successfully achieve their objectives unless they are as detailed as possible and encompass the whole of European public and private law. It can therefore be seen how the Community system carries obvious contradictions.

There are other issues of practical feasibility, in particular when further enlargement is being contemplated. The challenge for the Community institutions is not merely to consider whether to do less in order to do better, but also to reflect on whether and to what extent the uniform application paradigm is realistic. Harmonisation may be desirable from an efficiency perspective, or to bring about legal certainty, but divergent legal rules are better able to satisfy the heterogeneous preferences of a large and diverse population and might have to remain in an enlarged Union. In this respect, it is important to note that intra-State differences exist as well as an inter-State dimension which the inter-jurisdictional differences within the UK serve to highlight. The question whether harmonisation of domestic laws carries with it the necessity for consequential adjustment within the domestic jurisdiction coincides, ironically, with the time when at least Scotland proposes expanding its sphere of autonomy⁶³.

The decision-making process leading up to the adoption of the Directive establishing a general framework for informing and consulting employees in the Community provides a good illustration of the political difficulties involved in the adoption of "rules to enforce the rules". Indeed the particular harmonised sanction the Commission included in the text of its original proposal was one that most legal systems already recognised, yet the Member States as a matter of principle refused Community intrusion in what they considered to be a field of national competence. The text finally adopted did not include the provision for a harmonised sanction. The sanction was not opposed because it would have been alien to the existing legal system in the Member States. Rather it was opposed because, as a matter of principle, Member States could not agree on the desirability of Community intervention in this field. The Member States remained unconvinced by the different arguments put forward to support its inclusion. Neither the fact that the sanction was shown to be already in existence in most Member States in one form or another, nor the fact that ultimately employers would benefit from improved legal certainty, or the fact that the sanction would have contributed to the objective of the Directive, were strong enough to overcome the will for national procedural autonomy to be preserved.

8.4.1 Legal (un)feasibility

The legal obstacle to adoption of common rules in the field of remedies stems from the fact that the Community institutions do not have general compe-

tence, but may act only within the limits conferred upon them. In other words, for the Community to be able to act, there must be a legal basis in the Treaty. This limit on Community competences has been further exacerbated by the principle of subsidiarity – decisions must be taken as close as possible to the citizens. For the Community to be able to act, the Commission has to demonstrate that the objective of the action envisaged can be better achieved by the Community. Furthermore, the Treaty⁶⁴ makes it incumbent on the Community not to go beyond what is necessary to achieve the objectives of the Treaty. Accordingly, the specific features of national legal systems must be taken into account to every extent possible by leaving a wide scope for national decisions. Reliance on national systems is the norm; defining common penalties, sanctions or remedies must remain the exception. As the Commission itself acknowledged:

“Clearly, and taking into account the subsidiarity principle, the Community legislator’s rules pertaining to remedies cannot but be exceptional⁶⁵”.

At the same time, the Commission at least has made clear that respect for the integrity and diversity of national legal systems is capable of harming the achievement of Community objectives. The Sutherland Report clearly showed how the risk of fragmentation of the Single European market arises just as much from divergent interpretation and enforcement of Community law as from the introduction of national obstacles to trade: “Subsidiarity does not and cannot be interpreted as permitting such developments”. Accordingly the report called for greater equivalence of legal procedures and sanctions and urged the Community institutions “to make some progress on long outstanding issues about practical recourse to Community law”.

Even in an area like the application of EC competition law, the Commission is reticent. Thus, the ‘White paper on the Modernisation of the rules implementing Articles 85 and 86’⁶⁶ fell short of suggesting harmonisation of sanctions and remedies. The Commission considered that the general requirements of effective judicial protection of Community law as developed in the case law of the ECJ as sufficient to ensure effective enforcement before the national courts. Accordingly, the ensuing Regulation⁶⁷, while recognising that national courts have an essential part to play in applying the Community competition rules, does not introduce minimum harmonisation of national substantive and procedural rules other than rules on burden of proof. Furthermore, more decentralisation of competition law to national competition authorities and to national courts will mean more burden for the Union judicial system.

8.4.2 Will Article 65 EC change matters?

The Community institutions can now take measures in the field of judicial co-operation in civil matters having cross-border implication in accordance with Article 67 and insofar as necessary for the proper functioning of the internal

market. Such Community measures can include by virtue of Article 65 (c) EC measures with a view to eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. At Tampere the European Council agreed a blueprint for action which provided for 'Better access to justice in Europe' and more specifically facilitating access to justice. What was envisaged was measures such as the launch of an information campaign and publication of appropriate "user guides" on judicial co-operation within the Union and on the legal systems of the Member States. Tampere also called for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities.

The European Council also invited proposals to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. The European Council also recommended that alternative, extra-judicial procedures be created by Member States, that common minimum standards be set for multilingual forms or documents to be used in cross-border court cases throughout the Union, and that such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union. The protection of victims of crime was also signposted as a priority. To that end the European Council recommended that minimum standards be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims of crime.

Greater convergence in civil law was also called for and in this respect the European Council invited the Council and the Commission to prepare new procedural legislation in *cross-border* cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits.

As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council was due to report back by 2001 but has failed to do so.

Apart from these two aspects, the focus of Tampere in relation to these new Treaty provisions was the mutual recognition of decisions.

"A genuine area of justice must provide legal certainty to individuals and to economic operators. To that end, judgments and decisions should be respected and enforced throughout the Union. Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate

cooperation between authorities and the judicial protection of individual rights. The principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union."

Much progress has been made in this field. So the real change brought about by Article 65 so far is that now, alongside Article 293 EC, there is an additional legal basis for new private international law initiatives, and Brussels I and II are now no longer in the form of Conventions but in the form of Regulations⁶⁸.

It can be seen from the Tampere scoreboard that, save the adoption of the Regulation on insolvency proceedings⁶⁹, the legislation adopted to date on the basis of Article 65 EC does little to improve the question of remedies for breach of Community law. Indeed even the proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings now adopted only concerns, as its name suggests, litigation which has a cross border element, and does not address the question of whether the same level of financial support should be available in the different Member States to litigants who are trying to assert the same Community based claims, albeit before different domestic courts. The Directive on access to justice in accordance with the Aarhus Convention, which contains rules on access to justice for non-governmental organisations in the event of environmental litigation, has not been adopted on the basis of Article 65 EC, and furthermore it has been superimposed on the Union by another governance level.

8.5 The role of the ECJ in facilitating harmonisation

The ECJ has a significant role to play in helping to buttress the case for a Community harmonisation programme of remedies and procedure. In certain areas, although the Community legislator carefully avoided indicating the legal nature of the new Community sanctions and penalties, attempts at harmonisation have met with resistance on the ground that the Community had no competence in criminal law matters. By adhering to the view that the Community is competent to prescribe sanctions that have a punitive character without being criminal, the Court made harmonisation of the sanction system easier. Indeed, after the judgment of the ECJ legitimising the power of the Commission to adopt anti-fraud sanctions⁷⁰, the Commission came forward with a set of proposals for regulations introducing far-reaching measures to combat fraud⁷¹. Furthermore it is suggested that the ECJ case law can act as a catalyst for consideration of remedies issues when substantive rules are adopted. The case of *Hedley Lomas* is a case in point. It may be remembered that in this case the ECJ refused to accept that the UK Government could justify an export restriction on the ground that treatment of animals in Spanish slaughterhouses was contrary to Directive 74/577, a Directive which did not lay down any Community proce-

ture for monitoring compliance with its provisions. Perhaps this will encourage Member States to regard substantive issues as inseparable from remedies issues.

Whether or not the Community legislator manages to adopt harmonised rules in the field of remedies, such rules will continue to be needed and claims will come before national courts. So the ECJ, following pressure from national courts, will have to continue to influence national rules on a case by case basis. Leaving the development of Community law in this area to the hazards of private litigation has a number of severe drawbacks which will now be analysed.

8.6. The limits of the decentralised enforcement model

8.6.1 The interests at stake: effectiveness *v.* national procedural autonomy

Where the Community system relies on the laws and authorities of the Member States to supply the procedures and remedies for the enforcement of Community law, the availability and effectiveness of the enforcement mechanisms are dependent upon national solutions. It has been shown how, from a Union perspective, this dependency presents obvious risks since the Member States have in effect, and not necessarily consciously or through bad will, the opportunity to *dilute* or more importantly *vary* the impact of Community law through inadequate or different domestic law definitions. As a result, what is regarded as a principle of paramount importance in the Community, the uniform application of the Community obligation, is jeopardised. As has been explored, the ECJ intervened. Still, the Court can only ensure an adequate standard of judicial protection on a case by case basis. Such an approach is evidently haphazard and dependent on the capacity of litigants to get access to the national courts in the first place, and subsequently on the willingness of national courts to co-operate. It seems therefore an overstatement to refer to this process as the ECJ embarking upon the harmonisation of national procedural rules, or the development of a new common law⁷². Rather, the case law should be understood in the context of the Court striking a balance between, on the one hand, the need for national courts to provide proper protection for Community rights, and/or secure the proper application of Community law, and, on the other, the importance of respecting – within appropriate limits – the procedural and indeed organisational autonomy of the Member States' legal systems⁷³. If uniform rules and uniformity in the implementation, application and enforcement of the rules might be desirable from an efficiency perspective, the adoption of such rules by the Community legislature has consistently proven politically difficult. This in turn begs the question as to whether it is appropriate for the ECJ to fill these lacunae⁷⁴. The fact that the principle of national institutional autonomy carries with it undesirable limitations such as a *varying* degree of protection to the *same* Community rights does not suffice to give the ECJ a mandate to establish such rules. Equally the fact that national rules governing sanctions provide insuffi-

cient incentives for the Member States to comply with their Community obligations appear a weak base from which to legitimate judicial activity.

If the decentralised system of implementation, application and enforcement of Community rules carries with it inherent drawbacks – divergence and possibly non-operation, it protects the integrity and diversity of national legal systems. National sanctions do differ in their severity or modes of application. This merely reflects the fact that they have often historically been conceived for other purposes by a defined social group and reproduce that group's values and priorities. National institutional autonomy constitutes an application of the principle of subsidiarity⁷⁵, and the ECJ has had to take on board the trend towards greater scrutiny of the extent of Community competences. In the same way, the interest in full and uniform application of Community rules has to be balanced against considerations such as legal certainty, sound administration and the orderly conduct of proceedings by the courts. All legal systems commonly impose various restrictions which, in the absence of a reasonable degree of diligence on the part of the plaintiffs, will lead to a full or partial denial of their claims and therefore denial of their rights⁷⁶, irrespective of the merits of their claims. The Community system itself follows such an approach. An illustration is provided by the very strict time-limits imposed to challenges to the validity of Community legislation under Article 230 EC.

*"the limitation period for bringing an action fulfils a generally recognised need, namely the need to prevent the legality of administrative decisions from being called into question indefinitely, and this means that there is a prohibition on reopening a question after the limitation period has expired"*⁷⁷.

It follows that in the absence of a consensus on the desirability of uniform rules the Community system needs to learn to live with a varying degree of protection of the rights it creates.

8.6.2 Private litigation is not always an option for all

The other limits of the decentralised system and of *ad hoc* judicial intervention have been explored throughout, and will be summarised only briefly here. First, reliance on private litigation may not be an option. For a variety of reasons, access to the judicial process at national level is threatened. The Commission itself considers that the fact that it receives complaints is evidence that individuals are unable to secure compliance with Community law at national level⁷⁸. Secondly, private litigation is particularly inadequate as a means of enforcement of Community law in certain specific fields. The following examples will illustrate this point. In the area of public procurement, firms might never be willing to use judicial remedies – however effective and easy to use – because of the fear of losing future government business: "Thou shalt not bite the hand that feeds you". In the field of environmental protection, establishing title and

interest may be difficult, and even where it is not, in most cases no identifiable material loss exists. The fact that private litigation is particularly inadequate as a means of enforcement of Community law in the environmental field has led the Commission, in its White Paper on Governance, to propose that the Member States link up existing national or regional ombudsmen and mediators in a network whose members could receive special training in hearing and in handling complaints in the field of environment protection. Thirdly, the ECJ can only ensure an adequate standard of judicial protection on a case by case basis⁷⁹. Such an approach is evidently haphazard, dependent on the financial resources and tenacity of the litigants, and the ECJ might never be called upon to adjudicate on what in reality are the most important obstacles in the way of adequate enforcement.

A related issue is that only a limited category of litigants has the resources and energy to resort to litigation. Throughout the Community, impairments to litigation are built into and around the judicial system which, in different ways, all have the capacity to weed out all but the strong and hardy complainant. Certainly the few studies relating to those cases before national courts which came to the ECJ via Article 234 EC⁸⁰ tended to show that so far it is mostly for wealthy or well-backed⁸¹ players, that the potential of litigation at European level is significant. This in turn carries the risk that the haphazard development of Community law which takes place in the enforcement process is rather one-sided⁸². And as has been shown, litigation so far resembles more organised law enforcement than public interest litigation⁸³. This is particularly so given that, in the context of preliminary references, title and interest is dependent entirely on the requirements defined under national law. These requirements, for the most, have favoured personal, individual rights⁸⁴.

Throughout the Union, the requirements on all those seeking judicial review are particularly effective in excluding from the courts those representing the public interest such as consumer, environmental or human rights groups. This remains largely the case even though it has been argued that some changes can be observed⁸⁵, as other actors⁸⁶ are discovering the potential for action offered by EC law. Fourthly, the guidelines laid down by the ECJ regarding the manner in which national courts must evolve national rules are neither clear nor precise, and in turn invite litigation. Because the ECJ is entirely in the hands of national courts, it is also impossible to predict how the ECJ case law may evolve. Lastly, if the ECJ rationale for influencing the workings of national legal systems is that the same Community right should be afforded the same degree of protection, then the non discrimination or assimilation principle is of very little help. As a matter of fact, the principle only requires that a remedy be available on conditions no less favourable than those applied to a similar right of action in purely domestic matters. It does nothing to address and/or correct the variety in national practices⁸⁷, and therefore nothing to secure the much wanted level playing field. The piecemeal intervention carried out in the national legal systems brings about not only new divergences between the various national

legal systems, it also affects the integrity of national legal systems. There is one consequence of judicial intervention which is considered to be so problematic that it deserves to be described in detail in the next section.

8.6.3 Judicial intervention and discrimination

In matters where Community law arises, and provided that access to courts can be secured, national courts must adopt the interpretative techniques developed by the ECJ. National courts must ascertain the purpose of national legislation, assess its compatibility with the Community superior norm, adjust procedure and remedies to fit the EC law based claim and award compensation in appropriate circumstances. But the same national rules when falling outside the reach of Community law do not evolve; they remain the same, even though they are dealing with the same type of issue. This possibility of the emergence of a double standard for the protection of individual rights, depending on whether claims are based on national or on Community law, has been a matter of debate for some time.

"The insistence in the Court's case law on an effective judicial remedy for the enforcement of Community rights may result paradoxically in a new form of discrimination in the national courts against those whose rights arise on the basis of national law alone"⁸⁸.

When, in order to protect a Community law based claim, national courts evolve national rules governing remedies, the result is the co-existence of two sets of rules, one governing purely internal situations and the other governing Community-related domestic situations. This paradox is difficult to justify, given that there is no separate national court structure to apply Community law which might allow two separate bodies of law to grow within the same jurisdiction.

A "variable speed system of guarantees for individual rights" may arise, unless and until national courts decide, on their own initiative, to rectify this situation. Some of these issues, notably whether such a double standard of protection is prohibited by Community law, were raised in *Volker Steen*⁸⁹. In this case, a German court inquired whether it had a duty under Community law to evolve national rules which, in a situation *unconnected* with any of the situations contemplated by Community law, treats national workers less favourably than nationals from other Member States. The ECJ answered that

"Community law does not preclude a national court from examining the compatibility with its constitution of a national rule which, in a situation UNCONNECTED with any of the situations contemplated by Community law, treats national workers less favourably than nationals from other Member States."

In short, national judges are free to correct such anomaly, but Community law itself does not seem to prohibit the emergence of two different systems⁹⁰. Where national judges are not prepared to correct this discrimination, Community rights are afforded a higher level of protection, and it may be asked what is so special about Community rights to warrant this situation – an abnormality raised by A G Jacobs himself⁹¹:

“rights are not, by virtue of being Community rights, inherently of greater importance than rights recognised by national law.”

This of course could serve as an argument to convince national judges to extend the privileged status awarded to Community based claims to claims based on national law. In this way, Community law could lead to a higher level of protection for claims whether or not they fall within the remit of Community law. In this manner, courtesy of Community law, the standard of protection of individual rights is enhanced. However this spill-over effect has consequential effects for the integrity of the national systems as a whole.

8.7 Conclusion

Today there are three different models of enforcement of Community rules⁹²: direct enforcement, indirect enforcement and ‘joint action’. Powers of direct enforcement of the Community competition rules have been entrusted to the Commission⁹³. The ‘joint action’ model of enforcement involves procedures, and remedies laid down – with a varying degree of detail – in Community instruments, but to be imposed by the Member States. Decentralised enforcement remains the norm, and through the years, a body of rules and principles has emerged⁹⁴. The spill-over of such rules and principles to matters of purely internal law has taken place in a number of areas in the UK⁹⁵ and Community law has, indirectly, improved the standards of judicial protection of individual rights. However it remains the case that too many problems face national courts in their duties to act as Community courts.

In the absence of Community rules for the enforcement of Community law, some of the obstacles to the enforcement of Community law at national level may be alleviated by the adoption, at national level, of rules of court⁹⁶ codifying the various principles derived by the ECJ. Community law is not foreign law, and therefore the Member States must take the same care and commitment in seeing that it is properly enforced as they take to see that their own law is enforced.

Nonetheless efforts also need to be made at Community level. As the White Paper on Governance stressed, better compliance with Community law is the joint responsibility of the Member States and the European institutions, with the Commission bearing the ultimate responsibility for securing proper application.

The Commission is charged with the monitoring of the application of Community law and so appropriate resources should be made available to the Commission to enable it to discharge this task appropriately. First, given the relationship between the centralised and decentralised system of enforcement of Community law, the Commission should actively pursue a reform of the handling of the infringement proceedings in a way that enables it to concentrate in those areas where the private enforcement model is under particular strain. In addition the Commission should target some resources towards improving the enforcement of Community law at national level. A number of practical steps could be taken by the Commission, which should not be resisted on the ground that that interferes with the integrity of national legal systems. So for example, the Commission could oversee the preparation of a code which would compile all the different Community rules existing to date whether in secondary legislation or in the case law of the ECJ concerning the enforcement of Community law. Furthermore, the Commission should also put greater care to the preparation of its studies of the application of Community law in the Member States, maybe by adopting across the board the model adopted under the Bulletin on equality, which incorporates a comparative analysis of the application of a particular area of Community law in the national courts. There must also be increased effort in encouraging the development of databases on the application of Community law by national courts.

The Commission opened its White Paper on governance by recognising that the gulf between the EU and the people it serves is widening. One way for the Union to reconnect with its citizens is to devise mechanisms so that the citizens can see what are the practical advantages of European integration.

Endnotes

- ¹ Jacobs, "Remedies in national courts for enforcement of Community law" in *Liber Amicorum for Don Manuel Díez de Velasco* (1993) at 969.
- ² The Sutherland Report: "The Internal Market after 1992: Meeting the Challenge." Report to the EEC Commission by the High Level Group on the operation of the internal market.
- ³ C. Vincenzi, *Private initiative and public control in the regulatory process*, p. 273.
- ⁴ See Chapter 5.
- ⁵ See C. Boch, "Rules to enforce the rules: Subsidiarity v. Uniformity in the implementation of the Single European Market Policy" in: *The Evolution of Rules for a Single European Market*, Part II: Rules Democracy and the Environment" Mayes (ed) (Office for Official Publications of the European Communities Luxembourg 1995, p. 1).
- ⁶ *Inter alia* Directive 64/221; Directive 76/207.
- ⁷ Council Regulation 2913/92 establishing the Community Customs Code OJ 1992, L302/4.
- ⁸ The definitions of 'import duties' and 'export duties' are drawn in broad terms to include agricultural levies and monetary compensatory amounts.
- ⁹ See Chapter 5.
- ¹⁰ OJ 1995, L312/1, OJ 1995, C315/48.
- ¹¹ Regulation 3887/92, OJ 1992, L391/36.
- ¹² E.g. Regulation 2847/93, OJ 1993, L261/1.
- ¹³ B. Swart, "From Rome to Maastricht and Beyond: The Problem of Enforcing Community Law", in Harding and Swart (eds.) *Enforcing European Community Rules: Criminal Proceedings, Administrative Rules and Harmonisation* (Dartmouth, 1996).
- ¹⁴ G. Betlem & C. Joustra, "The Draft Consumer Injunctions Directive" [1997] 5 *Consum.L.J.* pp. 8-18.
- ¹⁵ Directive 89/39 OJ 1989, L186/23.
- ¹⁶ N. Burrows & H. Hiram, "The Official Control of Foodstuffs" in T. Daintith (ed) *Implementing EC Law in the UK* (Wiley, 1995), at pp. 139-164.
- ¹⁷ Council Directive 89/552 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ 1989, L298/23.
- ¹⁸ Council Regulation 40/94 OJ 1994, L11/1, Articles 90-104.
- ¹⁹ Council Directive 84/450 OJ 1984, L250/17.
- ²⁰ Article 4(1); however it does not require any specific remedies. So, whilst the French implementing legislation uses criminal sanctions, German law has adopted civil remedies for redressing unlawful advertisements.
- ²¹ Council Directive 92/28 of March 31, OJ 1992, L113/13.
- ²² Council Directive 93/13 of April 5, 1993 OJ 1993, L95/29.
- ²³ SI 1994 No 3159 which came into force on 1 July 1995.
- ²⁴ *R v. Secretary of State for Trade and Industry, ex parte The Consumers Association* unreported, see LEXIS CO/656/95, (Transcript: John Larking).
- ²⁵ Case C-82/96 was in fact withdrawn on 7 October 1998.
- ²⁶ Directive 98/27 on injunctions for the protection of consumers' interests, OJ 1988, L166/ 51.
- ²⁷ The directives listed in the Annex are: Directive 84/450 (misleading advertising) OJ 1984, L250/17; Directive 85/577 (contracts negotiated away from business premises) OJ 1985, L372/31; Directive 87/102 (consumer credit) OJ 1987, L42/48, last amended by Directive 98/7 OJ 1998, L101/17; Directive 89/552

- (television broadcasting activities) OJ 1989, L298/23 as amended by Directive 97/36/OJ 1997, L202/60; Directive 90/314 (package travel, holidays and tours) OJ 1990, L158/59; Directive 92/28 (advertising of medicinal products for human use) OJ 1992, L113/13; Directive 93/13 (unfair terms in consumer contracts) OJ 1993, L95/29; Directive 94/47 (timeshare) OJ 1994, L280/83; Directive 97/7 (distance contracts) OJ 1997, L144/19.
- ²⁸ OJ 1989, L395/33.
- ²⁹ OJ 1992, L176/14.
- ³⁰ Although the Commission did pursue a number of Article 226 EC actions in this field.
- ³¹ Directive 92/13 OJ 1992, L176/14, the Utilities Remedies Directive, Articles 9-11.
- ³² *Ibid* Article 1.
- ³³ *Ibid* Article 2 (7).
- ³⁴ *Ibid* Article 2(1) a.
- ³⁵ *Ibid* Article 2(1) b.
- ³⁶ *Ibid* Article 2(1)d.
- ³⁷ For an analysis see L. Gormley, "Remedies in Public procurement: Community Provisions and the United Kingdom", in Lonbay & Biondi *op. cit.* pp. 155-164. S. Weatherill, "Enforcing the Public Procurement Rules in the U.K." in S. Arrowsmith (ed) *Remedies for enforcing the public procurement Rules*, (Earlsgate Press, 1993) pp. 271-304.
- ³⁸ Regulation 26(3) of the Public Supply Contract Regulations, Regulation (31)4 of the Public Works Contract Regulations.
- ³⁹ The fear of abuse of the review procedures by cowboys claimants was evident in the negotiations leading up to the adoption of the directives see Gormley *op. cit.* at 157 and 159.
- ⁴⁰ C. Bovis, *EC Public Procurement Law* (Longman, 1997) pp. 102-108 in particular 107.
- ⁴¹ See S. Arrowsmith, "Public Procurement: an example of a developed field of national remedies established by Community law" in Micklitz & Reich (eds) *Public Interest Litigation before European Courts* pp. 125-152 at p. 128.
- ⁴² COM (95) 162 Communication on the role of penalties in implementing Community internal market legislation p. 5.
- ⁴³ But this jeopardises the political and practical feasibility of harmonisation see below.
- ⁴⁴ See House of Lords Select Committee on the European Communities Session 1988-1989 12th report.
- ⁴⁵ *Ibid* and also C. Bovis *op. cit.*
- ⁴⁶ COM (95)162 *op. cit.* p. 3.
- ⁴⁷ Directive 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis OJ 1994, L 280/83.
- ⁴⁸ Commission's working paper on enforcement of European Consumer legislation available from http://europa.eu.int/comm/dg24/policy/developments/enfo/enfoo1_en.pdf p. 5.
- ⁴⁹ COM (93) 576: "Green Paper on Access to Justice", and also COM(96) 13 Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market.
- ⁵⁰ Directives 84/450, 89/665, 92/13, and 92/28.
- ⁵¹ Directive 93/7.
- ⁵² Resolution of 9th February 1983 on the Responsibility of the Member States for the application of Community Law" OJ 1983, C68/32, and also the Resolution on the monitoring of application of Community law by the Member States OJ 1985, C343/8 see in particular points 2 and 12 of the latter; OJ 1993, C21/513, Opinion of the EcoSoc OJ 1993, C201/59, Council Resolution OJ 1992, C334/1.

- ⁵³ TEU, Final Act, Part III: Declarations, Declaration No 19 "Declaration on the Implementation of Community Law".
- ⁵⁴ Council Resolution on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market OJ 1995, C188/1.
- ⁵⁵ OJ 1989, C158/400; OJ 1994, C205/518.
- ⁵⁶ R. van den Bergh, "Subsidiarity as an Economic Demarcation principle and the Emergence of European Private law" (1988) 5 MJECCL 129.
- ⁵⁷ See above.
- ⁵⁸ Article 279 EC.
- ⁵⁹ COM (97) 619, and Regulation 2679/98 OJ 1998, L337/8.
- ⁶⁰ Witness the difficulties surrounding the adoption of the Directive on the burden of proof in cases of discrimination based on sex, Directive 97/80 EC OJ 1998, L14/6, directive for which a proposal was first submitted to the Council in May 1988 COM(88) 269.
- ⁶¹ A.G. Jacobs' opinion in Case C-430 & C-431/93 *Van Schijndel et al v. SPI* [1995] ECR I-4705 para. 30.
- ⁶² And see above the discussion of the experience of the Remedies directive in the field of public procurement.
- ⁶³ C. Himsworth, "Things fall apart: the harmonisation of Community judicial procedural protection revisited" (1997) 22 ELRev pp. 291-311 at 305.
- ⁶⁴ Article 6 EC Treaty, and the Protocol on the Application of the Principle of Subsidiarity and Proportionality.
- ⁶⁵ For a discussion of how Community legislation in the field of procedural remedies developed and the question of legal basis see COM (93) 576: "Green Paper on Access to Justice".
- ⁶⁶ COM (99) 101.
- ⁶⁷ Council Regulation 1/2003/EC, OJ 1993, L1/1.
- ⁶⁸ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 2001, L 12/1; Council Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matter of parental responsibility for children of both spouses OJ 2001, L 60/1.
- ⁶⁹ Council Regulation 1346/2000 relating to insolvency proceedings OJ 2000, L 160.
- ⁷⁰ Case C-240/90 *Germany v. Commission* [1992] ECR I-5381.
- ⁷¹ See above the regulations adopted in relation to PIF.
- ⁷² But for such a view see *inter alia* van Gerven, "Bridging the gap between Community and National Laws: towards a principle of homogeneity in the field of legal remedies?" (1995) 32 CMLRev 679, R. Caranta, "Judicial Protection against Member States: a new *ius commune* is taking shape" (1995) 32 703.
- ⁷³ Advocate General Jacobs in Case C-62/93 *BP v. Supergas*, [1995] ECR I-4599 para. 53; Case C-312/93 *Peterbroeck, van Campenhout & Cie v. the Belgian State*, [1995] ECR I-4599, and in Lonbay & Biondi (eds) *Remedies for Breach of EC Law* (Wiley 1997) pp. 26-28.
- ⁷⁴ C. Boch, "Rules to enforce the rules: Subsidiarity v. Uniformity in the implementation of the Single European Market Policy." in: *The Evolution of Rules for a Single European Market* Part II "Rules Democracy and the Environment" D. Mayes (ed) (Office for Official Publications of the European Communities, 1995).
- ⁷⁵ Boch *op. cit.*
- ⁷⁶ Jacobs, *op. cit.*
- ⁷⁷ Case 156/67 *Commission v. Belgium* [1978] ECR 1881, emphasis supplied.

- ⁷⁸ COM (96) 600 *op. cit.* at 84.
- ⁷⁹ Chapter 5.
- ⁸⁰ C. Harlow (1992) 12 YEL 213-248; C. Harding, "Who goes to court in Europe? An analysis of litigation against the European Community" (1992) 17 ELR pp. 105-125.
- ⁸¹ The role of Maitre Vogel-Polski in the *Defrenne* litigations, or that of the EOC in the two *Marshall* sagas.
- ⁸² For a discussion of the standard of protection of 'diffuse interests' in the Community see S. Weatherill: "Compulsory Notification of Draft Technical Regulations: The Contribution of Directive 83/189 to the Management of the Internal Market" (1996) 16 YEL 129 at pp. 197-201.
- ⁸³ H.-W. Micklitz, "The interest in Public Interest Litigation" in *Public Interest Litigation in European Courts* Micklitz & Reich (eds) (Nomos Verl. Baden Baden 1996).
- ⁸⁴ Micklitz *ibid.* at 29. Economic actors have successfully instrumentalised EC law through the Article 234 procedure to foster the development of the Internal Market. In the pursuit of their own special interests, economic actors have contributed to the establishment of common rules governing the market. The four freedoms translated not only into rights to trade, but also into rights to open up markets.
- ⁸⁵ Case C-470/93 *Vereinigung Unwesen in Handel und Gewerbe v. Mars* [1995] ECR I-1923, Case C-34/95 *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB* [1997] ECR I-3843 and Reich, "Public Interest litigation before European jurisdictions" in Micklitz & Reich (eds) *op. cit.* at 9.
- ⁸⁶ Certainly in the U.K. the EOC is aware of this and developed a clear and well-organised litigation strategy L. Fletcher, "Enforcement of Community Sex Equality Law" in Hervey & O'Keefe (ed) *Sex Equality law in the European Union* (Wiley 1996) pp. 173-178.
- ⁸⁷ C. Himsworth, "Things fall apart: the harmonisation of Community judicial procedural protection revisited" (1997) 22 ELRev pp. 291-311.
- ⁸⁸ Jacobs, "Remedies in national courts for enforcement of Community law" in *Liber Amicorum for Don Manuel Diez de Velasco* (1993) at 983.
- ⁸⁹ Case C-132/93 *Volker-Steen v. Deutsche Bundespost* [1994] ECR I-2715.
- ⁹⁰ Fernandez Esteban de la Marre, "National Judges and Community Law: the Paradox of the Two Paradigms of Law" in 4 MJEL (1997) 143 points to a number of principles which should lead to a reconciliation of the two "paradigms of law".
- ⁹¹ Case C-430/93 & 431/93 *van Schijndel et al v. SPE* [1995] ECR I-4705, para. 27.
- ⁹² A typology borrowed from R. Guldenmund & L. Westeroun van Meeteren, "Towards an administrative sanctioning system in the Common Agricultural Policy" in Harding & Swart (eds) *Enforcing European Community rules* (Dartmouth 1996).
- ⁹³ But in this field too decentralisation is seen as an overriding priority.
- ⁹⁴ Chapters 5 and 6.
- ⁹⁵ Chapter 1.
- ⁹⁶ As have been adopted for use of Article 234, see for England and Wales, RSC, Ord 114, r11-6; County Court Rules, Ord 19, r11; Crown Court Rules 1982 (SI 1982/1109), r 29; Scotland, RC 65.2-65.5; Act of Adjournment (Consolidation) 1988, rr 63-67 and 113-118; and the Sheriff Courts (Scotland) Act 1907 c51, Sch1, r 134.