



Effective Enforcement of EC Labour Law

– A comparative analysis of Community law requirements for national laws on procedures and sanctions

By *Jonas Malmberg*, National Institute for Working Life, Stockholm, Sweden

Abstract:

EC labour law directives normally do not provide any specific rules on procedures and sanctions according to which the substantive rules of a directive are to be enforced. Instead, domestic rules are to be applied. The European Court of Justice, however, has developed some requirements that limit the autonomy of the Member States in this area. The aim of this paper is to analyse the application of the principle of effective enforcement in the field of labour law in the light of how labour law directives are enforced in the Member States.

1 The principle of effective enforcement

The bulk of EC labour law consists of directives. Directives are binding upon the Member States as to the result to be achieved, but leave it to national authorities to choose form and method (Article 249 EC). One characteristic feature of EC directives is that they usually only state which behaviours are accepted or not, or which situations are to be protected. However, an EC directive normally does not say anything about the means by which it shall be possible to exercise the norms of the directive in a national context. An EC directive, for example, might prescribe how an employer shall treat employees in certain respects, but does not say anything about what may happen if the employer does not follow the rules. Another way of putting this is that EC directives lay down certain rules of conduct, but no specific rules on remedies or procedures. The idea is that, in the absence of EC rules on remedies and procedures, domestic rules are to be applied.

With regard to the lack of specific rules on procedures and remedies, there has been a discussion over the extent to which the Member States enjoy procedural autonomy. According to a classic formulation of the European Court of Justice (ECJ), it is for the domestic legal system of each Member State to designate the court having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights that individuals derive from Community law.¹ In relation to remedies, the ECJ has declared that the Treaty of Rome was not intended to create new remedies in the national courts to ensure the observance of Community law.²

Although rules on procedures and remedies are primarily a matter for the Member States, Community law may still affect such rules. Community law does not give the Member States full autonomy in deciding the rules that should be applied. The ECJ has developed two principles for how Community rules shall be protected in the Member States. According to the first principle, Community rules are not to be discriminated against by providing less favourable conditions for enforcement in com-

¹ Case 33/76 *Reve (Saarland)* [1976] ECR 1989.

² Case 156/80 *Reve (Kiel)* [1908] ECR 449 para. 44.

parison with domestic rules of a similar nature (*the principle of equivalence*).³ The second principle concerns the effectiveness of enforcement methods (*the principle of sufficient effectiveness*). Sometimes, the Court has stated that national rules may not render the exercise of (rights conferred by) Community law virtually impossible or excessively difficult. In later case law, especially concerning remedies, the Court has indicated more intrusive control, stating that enforcement rules shall guarantee real and effective judicial protection.⁴ The two principles are cumulative, and are here referred to as *the principle of effective enforcement*. This term indicates a broad understanding of the concept, covering not only judicial enforcement but also enforcement through administrative and industrial relations processes. When the principle is discussed in relation to enforcement through court systems, as usually applies with regard to the case law of the ECJ, the same principle is often called *effective judicial protection*.⁵

The principle of effective enforcement has developed in phases. At a first phase, the ECJ relied upon the specific “enforcement provision” contained in Article 6 of the Equal Treatment Directive.⁶ In *von Colson*,⁷ for example, the Court declared that, even if the “substantive” part of the Directive had been implemented, this was not sufficient to ensure that the Directive was “fully effective, in accordance with the objective which it pursues” in the absence of adequate remedies for discrimination.

At a second phase, in a judgement based on the duty of co-operation provided for by Article 10 of the Treaty, the ECJ extended the scope of its jurisprudence by requiring adequate national remedies to be available for the violation of rights conferred by EC law even in the absence of any specific “remedies provisions” in the Directive concerned. In *Johnston*,⁸ for example, the Court declared that the principle of effective judicial protection “underlies the constitutional traditions common to the Member States and is laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which must be taken into consideration in Community law”. This implies

³ Earlier often called the principle of non-discrimination. The principle is also referred to as the principle of comparability.

⁴ Case 14/83 *von Colson* [1984] ECR 19891, para. 23.

⁵ Or the principle of “effective judicial control” (Case 222/84 *Johnston* [1986] ECR 1651).

⁶ Directive 1976/207/EEC. Now amended (Directive 2002/73/EC).

⁷ Case 14/83 *von Colson* [1984] ECR 1891.

⁸ Case 222/84 *Johnston* [1986] ECR 1651.

an extension of the application of effective judicial protection beyond the field in which it was originally formulated, i.e. equal treatment.⁹

At a third phase, which is currently underway, the ECJ's jurisdiction on effective enforcement has been "codified" in European legislation – sometimes by reproducing within the legislative text the precise wording previously used by the Court. For example, the Information and Consultation Directive¹⁰ contains the "effective-proportionate-dissuasive penalties" formula that appeared in earlier case law.¹¹ Further, the same formula is adopted in the new, amended Equal Treatment Directive.¹² In any case, it is worth noting that the latest generation of EC social directives already contains specific "enforcement provisions" similar to those contained in Article 6 of the Equal Treatment Directive.¹³ Still more explicit is the recent Framework Employment Equality Directive, requiring the Member States to:

“... ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended”.¹⁴

The principle of effective enforcement (i.e. the principles of equivalence and sufficient effectiveness in tandem) has developed on a case-by-case basis. It is commonly held that the ECJ in the 1980s and the early 1990s pursued an interventionist approach towards effective judicial protection. Since the mid-1990s the Court seems to have been more inclined to protect national procedural autonomy from the “assaults” of effectiveness.¹⁵

⁹ C.f. *Ward* (1998) at 70.

¹⁰ Article 8.2 of the Directive 2002/14/EC.

¹¹ Case 68/88 *Commission v Greece* [1989] ECR 2965.

¹² Article 6 Directive 2002/73/EC.

¹³ For example, Article 9 the Transfer of Undertakings Directive (2001/23/EC). A similar provision is present in the 1998 Collective Redundancies Directive (Article 6 Directive 98/59/EC).

¹⁴ Article 9 Directive 2000/78/EC.

¹⁵ See, for example, case C-338/91, *Steenborst-Neerings* [1993] ECR I-5475); case C-188/95, *Fantask* [1997] ECR I-6783); case C-126/97, *Eco Swiss China Time NV* [1999] I-3055).

The outcome of the case law has been described as “highly complex with some perplexing inconsistencies”.¹⁶

It is to a large extent an open question what conclusions may be drawn from the case law, and there are several different proposals for understanding the scope of application of the principles. Are they applicable just to judicial processes in court and the outcome of these processes? Or, are the principles also applicable to administrative enforcement processes and enforcement processes taking place outside the courts, e.g. through the industrial relations system? Are the meanings of the principles uniform or should they be applied differently according to which parts of the enforcement process are being discussed? Should the principles be applied differently depending on which policy area is under concern? If so, is there any significance to the fact that many cases concerned with effective enforcement jurisprudence relate to labour law and social security issues? How shall it be determined which actions are similar according to the principle of equivalence? What demands for effectiveness are inherent in the principle?

2 A comparative approach

Application of the principle of effective enforcement in the field of labour law has been the subject of a recent project performed by a group of European labour law researchers.¹⁷ The resulting study comprises analyses of rules designed to enforce the directives on *equal treatment*, *restructuring of enterprises* and *working time* at European level, and also in France, Germany, Italy, the Netherlands, Sweden and, to some extent, the UK. It also includes an analysis of regulations in Poland, which illustrates some of the challenges that candidate countries will face when

¹⁶ Craufurd Smith (1999) 318.

¹⁷ The group consisted of Jonas Malmberg (Sweden), Barry Fitzpatrick (the United Kingdom), Michael Gotthardt (Germany), Sylvaine Laulom (France), Antonio Lo Faro (Italy), Taco van Peijpe (the Netherlands) and Andrzej Swiatkowski (Poland). The project was conducted within a programme known as SALTSA. SALTSA is the Swedish acronym for a joint research programme on working life in Europe organised by the National Institute for Working Life (Arbetslivsinstitutet) in Sweden and the three Swedish confederations of employees – LO, TCO, SACO.

joining the EU. This paper summarises some of the results of the project.¹⁸

For evaluation of the principle of effective enforcement a two-pronged comparative approach was required. It is obvious that application of the principle of equivalence involves comparison with domestic rules of a similar nature. However, the principle of sufficient effectiveness also calls for comparison, but this time with standards common in the Member States. This latter statement will be elaborated upon somewhat in what follows.

The principle of effective enforcement is considered as a general principle of EU law. It is well known that one of the main sources of guidelines when the ECJ establishes or interprets Community principles consists in the national laws of the Member States.¹⁹ The role of national laws in determining the content of supranational law is well recognised. Here, it is enough to recall the Statute of the International Court of Justice in the Hague (from 1945), which states that the Court, when deciding a case, shall apply “the general principles of law recognised in the civilised nations” (Article 38 c). The EC Treaty also contains an explicit reference to common principles of national law. According to Article 288.2 EC, the non-contractual liability of the Community for damage caused by its institutions shall be decided “in accordance with the general principles common to the laws of the Member States”. In addition, there are some more vague references in the Treaty to “the law”. For example, according to Article 220, the Court of Justice shall ensure that *the law* is observed in interpretation and application of the Treaty. The concept of “law” in this Article has, in the case law of the ECJ, been interpreted to include the laws common to the Member States.²⁰

A first question that arises in this context concerns under what circumstances there is need for the ECJ to recourse to national law for inspiration. The first situation is where there are gaps in the Community legal system. This need to fill gaps with rules from national law is often felt, and is due to the nature of Community law. Community law is to a large extent adopted on a piecemeal basis and lacks the comprehensive regulation that often exists in the Member States. Further, the compara-

¹⁸ See further Malmberg et al. (2003), with references to additional literature and case law.

¹⁹ See, for example, van Gerven (2000).

²⁰ Joined Cases C-46 and C48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para. 27 and para. 41. See also Case 11/79 *Internationale Handelsgesellschaft* [1970] ECR 1125 para. 4.

tive method is utilised in connection with judicial review of Community acts,²¹ and is also employed for interpretation of explicit rules in the Treaty and in secondary legislation. It is, for example, clear that the interpretation of the concept of “worker” in Article 39 – although it is an autonomous Community concept – is inspired by the definition used in continental law.

There are several reasons why the Court should turn to national legal systems when interpreting Community legislation or filling gaps in existing Community law. One reason is that Community law represents a new legal order, which in many respects lacks the accumulated experiences possessed by national legal systems in the form of case law. National laws are often more developed than Community law.

Another argument for the ECJ to be inspired by the national laws of the Member States is that such consideration is likely to contribute to the acceptance at national level of the Courts case law. The ECJ is to a large extent dependent on the acceptance of national courts. If national courts do not accept its interpretation, the judgements of the ECJ will not be effective. One example is found in the case law concerning the Transfer of Undertakings Directive.²² In *Schmidt* from 1994,²³ the Court adopted an interpretation of what constitutes a transfer of undertaking that was contrary to the interpretation of the concept established in the case law of several of the major Member States. The consequence of the ECJ not taking into account the interpretation of, in Paul Davies’s words, “the most experienced courts” was not only that the ECJ came into heavy criticism but also that the national courts to a large extent were reluctant to accept the interpretation of the ECJ. This seems to have prompted the ECJ to abandon its own interpretation of the concept.²⁴

Another question is how the comparative method is used by the ECJ. What use does the Court make of comparative material? Does the Court use comparative material as a box of examples from which to pick and choose? Or, does it try to find a common denominator?

This question is closely linked to the previous question on why a comparative method is employed. If the purpose of adopting a compara-

²¹ C.f. Case 11/79 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 4/73 *Nold* [1974] ECR 491.

²² Now Council Directive 2001/23/EC.

²³ Case C-392/92 *Schmidt* [1992] ECR I-1311.

²⁴ Case C-13/95 *Süzen* ECR [1997] I-1259. See further the articles by Paul Davies and Sylvaine Lалуom in Sciarra (2001).

tive approach is to take into account experiences at national level, it is not necessary that the solution chosen should be represented in all or even most of the Member States. The Court should then – to quote Advocate General Lagrange – choose “from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best”. Such a maximalist approach has been described as “evaluative”.²⁵ If, on the other hand, the purpose is to find a solution likely to be accepted by the national courts, a minimalist approach should be adopted, aimed at finding a common denominator.

It seems that both these arguments are relevant to the Court. The arguments seem to be cumulative. The more commonly a particular solution is found in the Member States and the better the solution fits with the objectives of Community law, the stronger is the reason to choose that solution. This question will not be discussed further. It is enough to note that it is possible to find examples of both these directions in the case law of the Court.²⁶

In light of these circumstances we chose, in our project, to conduct a comparative analysis of the national regulations designed to implement the substantive rules laid down in the labour law directives. The comparative method made it possible not only to discuss whether a certain national rule is in line with Community law (i.e. a top-down-approach), but also to analyse how the outcome of comparative scrutiny might affect the Community principles under concern. In this way, the comparative approach enabled us to illustrate symbiosis between EU level and national level.²⁷

Through comparative analysis it was, for example, possible to identify some rules that are common to all, or almost all, the participating Member States. Such rules are likely to be adopted as minimum standards of effective enforcement. Here, it is enough to offer one example.

The Working Time Directive (93/104/EC) provides for rather detailed regulation of different aspects of working time. For example, maximum working time is set at 48 hours (Article 6), and the Directive also contains rules on night work, and daily and weekly rest, etc. It is a common point of departure in national labour law for an employee’s refusal to obey an order to perform work to count as a breach of con-

²⁵ Tridimas (1999).

²⁶ See, for example, Tridimas (1999) 14.

²⁷ Bercusson (1996) 11 et seq.

tract, and for such insubordination to be accepted as just cause for dismissal. Let us assume that substantive rules have been correctly implemented. What then will be the outcome if an employee refuses to obey an order to work when the order is – or the employee thinks the order is – contrary to the rules prescribed in the Working Time Directive. Protection against dismissal is of key importance in enabling individual employees to enforce their rights. This is accepted in the national laws of all the Member States considered in the comparative study, and, thus, an employee may not be dismissed for refusal to obey an order to perform work that he correctly thinks is contrary to working time legislation. Further, a dismissal will in most of the countries not be considered lawful if the employee's opinion is later found to be wrong but held on reasonable grounds. One situation where the employee normally will have good reason for his view is when he relies on the opinion or advice of a labour inspector or workers' representative. Arguably, this shared national standard with regard to protection against dismissal would have to be taken into account by the ECJ as a common minimum standard of enforcement.

3 The complementary functions of different kinds of enforcement processes

3.1 Industrial relations and administrative and judicial enforcement processes

Comparative analysis of national rules on procedures and sanctions also facilitates evaluation of EC regulation on effective enforcement.

At national level three different kinds of processes are used to enforce rules derived from the directives on working time, restructuring and equal treatment. In the first kind of process, supervision and enforcement is a task for public authorities, such as labour inspectors or equality agencies (*the administrative process*). In the second kind of process, the supervision and enforcement of rules are entrusted to trade unions, works councils or other workers' representatives (*the industrial relations process*). The third kind of process is *the judicial process*, where the enforcement of rules is carried

out through judicial procedures in court. A judicial process may be initiated by either individual employees or their representatives.

The relations between these three kinds of processes are complicated. They are often applied alongside each other, but sometimes the existence of one kind of process replaces, or at least limits, the scope of application of another. For example, if there is a collective agreement concerning working time in Sweden, then the supervision of working time is no longer in the hands of the public supervision authorities, but a task for the trade unions. On other occasions, administrative and industrial relations processes are best described as pre-stages to a judicial process. If public authorities or workers' representatives fail to make an employer comply with the rules, they (or the individual employee) may turn to the courts.

There is strong interrelation between the source of the norm regulating a substantive issue and the kind of enforcement process used. In France, for example, where legislation plays a predominant role, administrative enforcement (by labour inspectors) is the principal enforcement mechanism. In Sweden, by contrast, where the collective agreement is the most important source of norms for regulating the employment relationship, the industrial relations process carries greater weight. However, it should be stated that it is by no means necessary that labour law statutes are supervised and enforced by administrative organs, and collective agreements through industrial relations processes. In France, the Labour Inspectorate has the task of controlling the enforcement of collective agreements. In Sweden, on the other hand, trade unions are entrusted with the task of controlling the enforcement of labour law statutes (e.g. in the Employment Protection Act), and grievance negotiations must take place before a judicial procedure is initiated.

3.2 Macro and micro perspectives on enforcement

When analysing the means for effective enforcement of EC labour law at national level, it is possible to distinguish between two different views on "effectiveness". One view stresses the possibility for individuals – either on their own or with the help, for example, of trade unions or an equality agency – to enforce their rights. On this view, the enforcement mechanism is more effective the easier it actually is – say, for a woman, individually, to claim the right to equal pay for work of equal value. This view

might be described as entailing a *micro perspective* on enforcement. The other view focuses more on how rules are materialised in society as a whole than on the possibility for individuals to pursue their claims. On this latter view, enforcement is more effective, for example, the higher is the proportion of women who receive equal pay for work of equal value. This can be regarded as entailing a *macro perspective* on enforcement.

When comparing the effectiveness of the three kinds of processes from micro and macro perspectives, it is clear that they all have their strong and weak sides. It should be mentioned that enforcement through trade unions or works councils will often lead to rules being complied with to a considerable degree, i.e. a high degree of enforcement from a macro perspective. On the other hand, from the micro perspective, the industrial relations process does not usually contain sufficient guarantees for individuals to get their claims judicially reviewed. Further, it is obvious that it is not possible just to resort to individuals using the judicial process if a regulation is to be sufficiently enforced from a macro perspective. Compared with the industrial relations process, it is clear that a major problem with regard to the effectiveness of administrative processes is that public authorities in charge of enforcement regularly lack the resources effectively to supervise what happens in different workplaces. In this respect, trade unions and works councils are often institutionally better equipped. On the other hand, rules designed to check that the power exercised by labour inspectors and other public authorities are not misused are usually more developed than corresponding rules concerning trade unions and works councils.

Our overview indicates that administrative and industrial relations processes are more concerned with enforcement from a macro perspective, whereas judicial processes are more concerned with a micro perspective on enforcement.

3.3 Different focuses on national and European labour law

When looking at *national labour law* it is obvious that the focus has, to a large extent, been on enforcement through administrative and industrial relations processes. All the national legal systems considered in the project have developed some type of non-judicial control through administrative organs, such as the Labour Inspectorate. When health and safety legislation was introduced, it was clear that it would not be effective if

enforcement was left to the parties themselves. Thus, specific administrative processes for the enforcement of the legislation were introduced; administrative enforcement is mainly found in the areas of health and safety, including working time. In some countries, especially in France, such supervision by public organs covers a wide range of topics. Over the last decades, different forms of administrative supervision of the enforcement of equality legislation have been developed. In France, the enforcement of equality principles forms part of labour inspectors' responsibilities. In other countries, certain specialised independent agencies have been set up, and are involved in the enforcement process. One exception is Germany, where public authorities do not play any role in this field.

Further, the national legal orders under concern contain extensive regulations on the role of trade unions and other workers' representatives in the enforcement of labour law. It is commonly accepted that workers' representatives in the workplace have an indispensable role to play in the enforcement of labour law. As Kahn-Freund puts it:

“As a power countervailing management the trade unions are much more effective than the law has ever been or ever can be. (...) Everywhere the effectiveness of the law depends on the unions far more than the unions depend on the effectiveness of the law.”²⁸

Where there are suspicions that a certain norm of labour law has been violated, information, consultation and negotiation will be used to assess the facts, and to discuss whether a rule has actually been violated and how this should be remedied. In all the Member States considered we find rules on information, consultations and negotiations that aim to underpin industrial relations processes as means of enforcing substantive rules of labour law. Such rules strengthen workers' representatives opportunities to influence projected managerial decisions (e.g. on collective redundancies), and control how substantive rules are applied in the workplace.

At national level there is also thorough regulation of the procedures in legal disputes. However, these rules are often questioned on the ground

²⁸ Kahn-Freund (1977) 10.

that they do not give individual workers sufficient judicial protection, e.g. when it comes to locus standi, time limits or sanctions.²⁹

A global view on the national regulation of enforcement of labour law shows that the main focus has traditionally been on enforcement from a macro perspective, whereas the micro perspective has been somewhat neglected.

At *EC level*, it is obvious that the situation is quite the reverse. The case law of the ECJ concerning effective enforcement of EC labour law deals almost exclusively with judicial procedures. There is extensive case law regarding questions such as access to judicial protection for individuals, sound rules of procedure (time limits, burden of proof, and *ex officio* application of Community law), and adequate reparation for the infringement of rights. Through this case law a principle of judicial protection has been developed. The core of this principle is that Member States must ensure that individuals may effectively rely upon the rights conferred by EC law before national courts. Thus, the principle enshrines a micro perspective on enforcement, and indicates a rather narrow understanding of enforcement as limited to judicial processes. Administrative and industrial relations procedures have, until recently, only received scant attention at EC level.

Such difference in focus between EC and national levels is clearly illustrated by the rules on *locus standi*. According to the case law of the ECJ, all persons shall have right of access to a competent court to dispute measures they consider to be contrary to the rights conferred on them by EU law.³⁰ This is usually explicitly regulated in labour law directives.³¹ However, labour law directives have traditionally not contained any rules providing trade unions or other workers' representatives with locus standi in national courts. Nor has the case law of the ECJ so far provided any explicit support in that direction. By contrast, national laws to a large extent give trade unions and other collective-interest representatives standing in disputes concerning individual members of their organisation. The strongest position of collective actors in this respect is found in Sweden, which reflects the Nordic model of labour relations. But, even in Italy, where an individualistic approach is dominant, the need is felt for

²⁹ See cases such as, 222/84 *Johnston* [1986] ECR 1651; C-208/90 *Emmott* [1991] ECR I-4269 and 14/83 *von Colson* [1984] ECR 1891.

³⁰ C.f. case 222/86 *Heylens* [1987] 4097.

³¹ See, for example, Article 9 of the Transfer of Undertakings Directive and Article 6 of the Equal Treatment Directive.

additional support from collective actors in the judicial enforcement of labour law. The role of collective actors is at its weakest in the United Kingdom, where unions only have standing in cases in which the consultation rights of a union's representatives are at stake. At national level, such rules are considered important for labour law to be effectively applied in the workplace.

The labour law directives adopted in recent years have marked a new direction in this area. The *Framework Equality Directive*³² expresses a new awareness of the need to take both micro and macro perspectives on enforcement into account. In an explanatory memorandum, the Council states that there are two main preconditions for effective legislation against discrimination: the right of victims to an effective personal remedy against the person or body that has perpetrated the discrimination, *and* the existence of adequate mechanisms in each Member State to ensure adequate levels of enforcement.³³ The Directive does not only regulate individual judicial processes, but also explicitly deals with the industrial relations process as a means of enforcement. The Member States shall, according to Article 13, promote dialogue between the social partners with a view to fostering equal treatment, which shall include, *inter alia*, the monitoring of workplace practice. This indicates that social dialogue is seen as a means not only of developing future practices in the area of equal treatment, but also of monitoring the enforcement of the principle of equal treatment in the workplace. Further, the Member States shall encourage dialogue with appropriate non-governmental organisations that have a legitimate interest in contributing to the struggle against discrimination with a view to promoting the principle of equal treatment (Article 14). To provide a more effective level of protection, the Directive contains a provision on *locus standi* for "associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with". This would include trade unions, other workers' representatives, and also non-governmental organisations. The Member States shall ensure that such entities may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under the Directive (Article 9.2). The Directive does not

³² Directive 2000/78/EC.

³³ COM/99/0565 final.

contain any obligation for the Member States to establish any administrative procedures for the enforcement of the Directive.³⁴

Similar provisions are found in the *Directive Against Race Discrimination*³⁵ and the amended *Equal Treatment Directive*.³⁶ According to these two directives the Member States shall also designate a body or bodies for the promotion of equal treatment. Member States are free to decide on the structure and functioning of these bodies in accordance with their legal traditions and policy choices. The independent bodies may be specialised agencies or may form part of wider human rights bodies, whether pre-existing or newly established. However, the directives establish a number of minimum requirements for such independent bodies in the Member States. They should have the competence to provide independent assistance to victims of discrimination in pursuing their complaints, to conduct independent surveys concerning discrimination, and so on.

4 Concluding remarks

It has been indicated above that the administrative process and the industrial relations process are primarily concerned with a macro perspective on enforcement, whereas judicial enforcement is more related to a micro perspective.

The principle of effective enforcement contains, in the first instance, a requirement that all persons have the right to obtain an effective remedy in a competent court against measures they consider contrary to the rights conferred upon them by EU law. It is for the Member States to ensure that this principle of effective judicial protection is satisfied as regards compliance with Community law and national legislation intended to give effect to the rights for which any directive provides. A first observation is that neither administrative processes nor industrial relations processes will usually be sufficient to fulfil the principle of effective enforcement, because these processes typically do not give individual employees “locus standi”. Thus, the Member States must usually provide a proper judicial process.

³⁴ C.f. Article 9.3, which requires the Member States to ensure that “judicial *and/or* administrative procedures” are available (*italics added*).

³⁵ Directive 2000/43/EC.

³⁶ Directive 2002/73/EC.

Although correct transposition of labour law directives generally requires that Member States ensure individuals a proper judicial procedure and effective sanctions, national experiences show that judicial processes alone are not sufficient for implementing substantive rules in the workplace. To achieve effective enforcement from a macro perspective, other kinds of mechanisms are needed. Thus, the question becomes not whether administrative processes or industrial relations are sufficient for effective enforcement of the directives concerned, but rather whether or not effective enforcement of the directives requires some type of administrative intervention to supplement the judicial process.

One of the major conclusions drawn from the project is that administrative, industrial relations and judicial processes should not be regarded as alternatives, but rather as complementary mechanisms for the effective enforcement of EC labour law. If effective enforcement from a macro perspective is considered a desirable aim, there is an obvious need for the European legislator to impose requirements on the Member States to safeguard or underpin administrative and industrial-relations enforcement processes. For two reasons, the need to develop such requirements seems to be increasing.

First, the methods of European law-making in the field of labour law are changing. The tendency seems to be that the Community resorts to less precise EC rules, with use of framework directives, opt-outs, derogation and delegations, or of a so-called “open method of co-ordination”. It is obvious that such rules will often not be regarded as creating enforceable rights for individuals, and that the value of individual judicial strategies will diminish.³⁷

Second, and most important, industrial relations in the candidate countries seem to be less developed than in the current Member States. Recent research has shown that institutionalised workplace industrial relations in most of the candidate countries are established only in a relatively small and declining number of large enterprises; by contrast, in the growing number of small and “micro” companies, and in new private businesses, both the structures and the actors for formal bargaining and social dialogue are lacking.³⁸ Without functioning industrial relations in

³⁷ Kilpatrick et al. (2000) 15. See also the European Social Agenda approved by the Council in Nice in December 2000 (OJ 30.5.2001 C157).

³⁸ C.f. Ladó (2002).

the workplace, the substantive rules of European labour law run the risk of being paper constructions.

The Framework Employment Equality Directive, the Directive Against Race Discrimination and the amended Equal Treatment Directive indicate a new direction in rules for the enforcement of EC labour law. The directives acknowledge the need for administrative and/or industrial relations processes to obtain actual compliance in the workplace of the substantive rules contained in labour law directives.

The impact of these new provisions is yet to be seen. However, it is obvious that the obligations of the Member States that follow from these provisions need to be legally evaluated through a two-pronged comparison. The provisions should be compared with both domestic rules of a similar nature (the principle of equivalence) and the standards common in other Member States (the principle of sufficient effectiveness).

References

- BERCUSSON, B. (1996) *European Labour Law*. London: Butterworths.
- CRAUFURD SMITH, R. (1999) "Remedies for Breaches of EU law in National Courts: Legal Variations and Selection". In Craig P. & de Búrca, P. (eds.) *The Evolution of EU Law*. Oxford: Oxford Univ. Press.
- KAHN-FREUND, O. (1977) *Labour and the Law*, 2nd ed., Stevens: London.
- KILPATRICK, C., NOVITZ T. and SKIDMORE P. (eds.) (2000), *The Future of Remedies in Europe*. Oxford: Hart Publishing.
- LADÓ, M. (2002) *Industrial Relations in the Candidate Countries*. Available on <http://www.eiro.eurofound.eu.int/2002/07/feature/TN020712F.html> (2002-01-09).
- MALMBERG, J. (ED.), FITZPATRICK, B., GOTTHARDT, M., LAULOM, S., LO FARO, A., VAN PEIJPE, T. & SWIATKOWSKI, A. (2003). *Effective Enforcement of EC Labour Law*. Uppsala: Iustus (forthcoming)
- SCIARRA, S. (ed.). (2001) *Labour Law in the Courts*. Oxford: Hart Publishing.
- TRIDIMAS, T. (1999) *The General Principles of EC Law*. Oxford: Oxford University Press.
- VAN GERVEN, W. (2000), "Comparative Law in a Texture of Communitytarization of National Laws and Europeanization of Community

- Law”, in O’KEEFE D. and BAVASSO A. (eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. I *Judicial Review in European Union Law*, Kluwer Law International.
- WARD, A. (2000) *Judicial Review and the Rights of Private Parties in EC Law*. Oxford: Oxford University Press.