

FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG

BEI DER HOCHSCHULE FÜR VERWALTUNGSWISSENSCHAFTEN SPEYER

in co-operation with the
European Institute of Public Management, Maastricht

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THE IMPLEMENTATION OF COMMUNITY
LEGISLATION BY MEMBER STATES

Guidelines for the Research Projekt

SPEYERER



FORSCHUNGSBERICHTE

FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG
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**THE IMPLEMENTATION OF COMMUNITY LEGISLATION
BY MEMBER STATES**

**Guidelines for the research project
(revised version)**

SUMMARY

- A. Introduction to the research project
- B. The concept of politico-administrative culture
- C. The application of directives by Member States
- D. Selected bibliography

A. INTRODUCTION TO THE RESEARCH PROJECT

Article 5 of the European Economic Community Treaty sets forth the principle of Community loyalty; Member States and Community organizations have an obligation to cooperate justly with each other.

According to this principle, Member States are obliged to ensure that Community law is applied effectively and to adapt their national authorities accordingly. Effective implementation of Community legislation depends on the different legal and material conditions of the Member States concerned.

Differences in the implementation of Community legislation are accepted and approved within certain limits by the decisions of the European Court of Justice. In effect, Community law itself can permit operational leeway which takes specific national conditions into account. In addition, there are differences in the implementation of Community law due not only to differences between the respective legal systems, but also to differences between the politico-administrative systems of Member States and their governmental and administrative practice. These differences cannot, therefore, be understood simply by a legal-institutional analysis; they will only become understandable by means of a political and administrative science analysis of the politico-administrative and legal cultures of each country.

With this aim in view, the research project on the implementation of Community legislation by the Member States aims to examine the causes for the differentiation in the implementation of Community law in order to explain them by the variations which exist in the politico-administrative systems, and the way in which they function in each Member State. Within the framework of this introduction we will attempt to establish the following as the basic areas for study:

1. The concept of "the implementation of Community legislation".
2. Legal-institutional analysis.
3. Political and administrative science analysis.

1. The concept of "the implementation of Community legislation"

The object of the research project on the implementation of Community legislation is to study Community norms of diverse legal nature, involving very different implementing bodies and methods of application. That defines the field of the research project.

Community legislation can originate from different juridical enactments, for example, the Treaty, the rules and regulations, directives and decisions of the Community institutions. All these legal acts are applicable to the Member States as Community legislation, but in a varied form and by different acting bodies.

a) The transposition in the internal legal system

In principle, the directive has to be implemented by national legislative bodies. Within the context of this research project, directives are of particular importance, since the directive, is on the one hand, a means of harmonizing the law, and on the other, the national legislative body has a more or less limited margin of discretion in setting up the forms of transposition nationally. The legal basis of the intensity of the regulation resulting from the directives and the extent of the national legislative bodies' discretionary power are controversial subjects. This does not prevent an analysis of the use of this operational leeway, rather it justifies one.

In practice, it is the way in which the operating margins of the directives are used which most clearly reflects the differences in the implementation and the differences in the form of legislative application of Community law (see number 3 for a definition of the criteria used in this analysis). The proceedings relating to the contents, deadlines and progress of the national transposition will form part of the study.

b) The administrative/executive implementation

The implementation of Community legislation as an administrative undertaking may, in special cases, be reserved for Community institutions; similarly its enforcement may also be conferred exclusively to the institutions of the Member States. In which case, Community law is enforced by the

central, regional or local authorities of the Member State, either directly - in accordance with Community law currently in force concerning individuals; or indirectly - in accordance with national law which effects the transposition of Community norms within the domestic system.

As a rule, the Member State determines which national administrative authority is competent to enforce Community law within the framework of its constitutional and domestic administrative structure. Not only the competent administrative body, but also the method of decision-making in the implementation of Community law is determined nationally. In general, national authorities generally implement both Community and national law, without knowing the respective source. For this reason, custom and practice in national administration will prove important as far as the implementation of Community legislation is concerned.

The study of the administrative implementation of Community law takes on additional importance because it will in fact allow specific elements of a national administrative culture to be understood.

c) Judicial control

One aspect of the implementation of Community law is found in judicial control, concerning not only measures taken by the administration against individuals, but also cases where an individual is able to claim justice through Community law.

Both the attitude of the citizen, for example, his/her awareness of the existence, substance and importance of Community law, as well as the decisions made by the judicial organs of the Member State, may differ according to the national politico-administrative system.

d) Summary

Differences in politico-administrative systems are reflected in the differences found in the implementation of Community law. This explains why the aim of the research project covers the various legal enactments of Community law, in particular the directives and the different phases in the application of

Community law including the legislative and administrative implementation as well as judicial control.

The levels of this application analysis are on the one hand the institutional structures, and on the other the behavioural elements in the politico-administrative culture of each Member State.

2. Legal-institutional analysis

The legal-institutional analysis of the implementation of Community legislation by Member States follows the national processes of decision-making and the internal division of competences.

- Who is responsible for the implementation of Community law in the legislative or administrative fields?
- How is this implementation prepared, by the national Government and/or administration?
- How is the internal legal coherence and the coordination between the technical administrations organized?
- In what way, within what period of time, by which procedure and using which arguments is the transposition or transformation of Community law brought about by the national legislature?
- How is the allocation of competences regulated in the implementation of Community law at national level and the allocation of competences in the federal states or, in the unitary states, among the regional administrations?
- What development can be noted in the judicial implementation of Community law? What importance does Community law hold for civil and public law, particularly in case-law?

Extensive legal literature, the results of empirically-based research as well as the first research project carried out on this subject by the Research Committee on European unification, has already furnished a wealth of scientific material which answers most of the questions.

These studies will be used in this project. But beyond the results already acquired, the main interest of the current project is to go deeper into and to

enlarge upon the elements and conditions of the national politico-administrative culture of each Member State in the process of the implementation of Community law by the legislature, administration and case law. For this reason, an administrative and political science analysis must introduce into this study additional criteria which supplement the simple structural and institutional elements.

3. The political and administrative science analysis

Such an analysis must be based on the observation that the implementation of Community legislation does not consist only of the legislative transposition or administrative implementation of the legal rules concerned. The implementation of Community rules entails not only a legal and institutional process, but also that policies are put into effect in important and definite areas, through the legislature, the administration and the courts within the framework of the national politico-administrative systems.

For this reason, the implementation of Community legislation can lead either to harmonization and integration or to conflict with national policy areas with regard to their substance, procedures and rules.

The national system of interests, the national system for conflicts of interest, and the system for reconciliation of interests will be discussed in this project. The traditional attitudes and behaviour of the acting bodies, the interaction of those bodies in charge of the implementation as well as the style of the recipients of national and Community law, all form part of the process of implementation of Community legislation. Likewise, Community law is itself influenced by the various national politico-administrative systems. For this reason, the study will not be made primarily at the level of Community law, as enacted by the Community institutions, but at the level of Community law, applied and carried out by the Member States. We will also consider the supplements and modifications brought about, as well as the examples of non-implementation by Member States. The research project, above all, aims to shed light on the differences in implementation by Member States and their causes. Such an examination can only be made empirically and within the actual fields of Community law.

The choice is determined by a double principle:

- firstly, Community law will be analyzed over a certain period of time, covering a random sample of directives taken from a certain period. These directives will be examined as they are applied by the Member State according to identical criteria: horizontal examination
- next, two specific areas of Community law will be examined in detail in all the stages of their implementation: e.g. the EAGGF-orientation and certain aspects of the application by the customs administrations of the Common Customs Tariff. In the same way the customs nomenclature, the customs valuation or the rules of origin could be analyzed in their application by the Member States: vertical examination.

Such a two-fold approach to the research project should be able to answer two expected methodological objections; firstly that the fields of Community law chosen are not representative, and secondly that the application of Community legislation by the implementing body has not been examined in sufficient detail. This two-fold approach, imposed for fear of limiting the scope of the project, allows a uniform structure of study to be set up for all the Member States included in the research.

Similarly, the use of the concept of politico-administrative culture in the Member States will prove worthwhile in two ways for the purpose of the research project. On the one hand, we already have a certain amount of general knowledge of the politico-administrative differences in the government and administration of Member States, thanks, inter alia, to the previous research project. On the other hand, the difference between the politico-administrative cultures of the Member States may be examined in the light of the results of the national research reports into the implementation of Community law in the chosen fields.

Politico-administrative culture is a concept very often used to analyze the various programmes and their set up in different states. It is in this context, that the question is asked whether governments and administrations have characteristic procedures for carrying out public tasks, for applying the law and implementing their programmes. On this point, we can express the hypothesis that there are probably more similarities in one single country concerning the manner of developing and implementing different policies, than there are in several countries within the same field.

The defining of the implementation of Community legislation by the Member States calls for a uniform concept of study so that the information, statistics and evaluations of the national research reports may be satisfactorily collected. These results make it possible to re-constitute the politico-administrative culture at national level and, at a later date, to make a comparison between the Member States. The concept of study will be identical for both the horizontal and vertical examination. As far as the vertical examination is concerned, the study concept is to be supplemented by the technical aspects of the field of study (EAGGF, Common Customs Tariff).

For the three sections of the research policy the following questions arise:

a) The analysis of the contents of the field of study:

- What significance does the field of Community law have in the policy of the Member State?
- What regulations and national programmes already exist in the Member State?
- Links between new Community legislation, both the law as well as its actual contents, and the existing national regulations?

b) The analysis of procedure in the preparatory phase:

- Participation of the government/administration (different levels of administration) of the Member State in the preparation of Community law?
- Coordination in the Member State?
- Participation of the acting bodies and interested parties?
- Coordination and cooperation at European level?

c) The analysis of the implementation of Community legislation by the Member State:

- Contents of Community legislation?
 - Community legislation: the extent, density and intensity of the regulations?
 - field and extent of the impact of national regulations in implementation?

- Participation of Parliament, government and administration in the implementation of Community legislation?
 - "respect for the programme", use of operating margins?
 - types of attitude and styles of behaviour among the political and administrative acting bodies;
 - styles of acting bodies in charge of application and of recipients.

d) Analysis of the control of the European Community concerning the Member States:

- entitlement to and processing of information of the Commission by Member States,
- political, administrative, financial and judicial control by Community institutions.

The study concept is to be put into operation and completed by the use of questionnaires which are to be as definite as possible for the study of the aforementioned three fields of research. The entire research, which will be based on the concept of politico-administrative culture, will take place in two phases:

- the first phase will be devoted to the study of the implementation of a sample of directives which reached their due date of implementation in 1980 (horizontal approach)
- the second phase will consist of the detailed analysis of two policy fields of the E.E.C., which remain to be decided.

B. THE CONCEPT OF ADMINISTRATIVE CULTURE

The concept of administrative culture covers the question of whether governments and administrations have characteristic ways of carrying out public tasks, implementing the law and realizing their programmes.

These problems present two different aspects of significance.

On one hand, you have organizational, personnel and procedural resources, that is to say the structure of organization, personnel and procedure, which make politico-administrative action possible; on the other hand, you have that very action; that is to say, how are the contents of policies, which are fixed for example by the laws, programmes and plans, detailed and implemented.

The starting point of the concept of administrative culture is the assumption that there are models of the ways in which policy contents are elaborated and applied, which are specific to the various states (see e.g. Blankenburg 1978 and 1979).

Perhaps it was Ashford who expressed it the most explicitly, without even using the idea of "administrative culture": "what a country is doing seems to have very little association with how it does it. There is probably more similarity across policies for one country in how policies are formed and implemented than there is for the same policy across several countries " (Ashford 1978, 82).

In scientific discussion, you find that the idea of "administrative culture" has three very distinct aspects of significance:

1. the values, attitudes and opinions of society as a whole towards the administration.
(Peters 1978; Peters/Nelson (ed., 1979),
2. the values, attitudes and opinions within an administration (or jointly within all the administrations) (French/Bell 1977; Putnam 1976),
3. the behaviour models within and towards the administration (outlines of cooperation and interaction; the attitude of whoever carries it out; environment) which are linked to a particular form of social institution and

institutional behaviour (administrative/bureaucratic style; forms of procedures) (Blankenburg 1978). In short: the structures, processes and outlines of politico-administrative action.

This is why in German literature, instead of administrative culture, the notion of "politico-administrative culture" is also used to indicate this third aspect (Feick 1983).

Within the framework of the research project, it is advisable to concentrate particularly on this actual administrative action, and consequently on the third aspect of administrative culture. Similarly, within the framework of this research, it will be necessary to concentrate on the values, attitudes and opinions within the actual administration in as far as they are important for the study area (second aspect of administrative culture).

In the description of administrative action, you deal on the one hand with the institutional and procedural characteristics of the administration or with the politico-administrative system: who is responsible for the preparation, and the legislative and administrative application of the directives? In what way are the directives translated into national law?

On the other hand, you deal with the manner of elaborating and carrying out these directives: contents of directives, forms of procedure, administrative style, cooperation and interaction model, attitude of those who carry them out, public opinion.

These elements must then be interpreted as far as possible as expressions of national administrative cultures.

On that subject, comparative research into public policies ("Comparative Public Policy") and research into the implementation of policies ("Implementation studies") will allow useful knowledge of administrative action and national administrative cultures to be acquired (Rose 1973, Feldman 1978, Ashford (ed.) 1978; Mayntz 1980, 1983; Wollmann 1979).

These expressions of national administrative cultures are basically influenced by the national political and legal cultures of the countries concerned.

The general meaning of political culture is "the particular distribution of patterns of orientation toward political objects among the members of the nation" (Almond/Verba 1963, 74), that is, all the opinions, attitudes and values in a given society towards the political system. In that case administrative culture, as defined in point 1, is then a part of the political culture. A nation's political culture is fashioned throughout history, and social, political and economic processes have an important influence on it's evolution.

Several authors are particularly concerned with the impact of national political culture on national administrative culture: Hofstede 1980; Crozier 1964; Pye/Verba 1978; Almond/Verba 1963.

Administrative culture is influenced not only by the political but also by the legal culture of the country concerned. The concept of legal culture means, in this context, the qualities of a legal system at the legislative and institutional as well as behavioural levels (attitudes towards the legal system). For legal culture, see in particular Ehrmann 1976 and Blankenburg 1981.

The concept of administrative culture must be made operational from the methodological point of view by the formation of pairs of opposite concepts (e.g. cooperative and conflicting) which are used in the different phases of detailing and implementing the directives. These pairs of opposite concepts must set the framework within which the administrative action will be outlined.

All of this should make it possible for the different national working groups to produce coherent analytical work.

C. THE APPLICATION OF DIRECTIVES BY MEMBER STATES

The horizontal analysis will be the means of examining the implementation of directives by Member States within a period of time covering all the fields of regulation. We will study a sample of the directives which reached their implementation date in 1980. These directives concern quite different fields of regulation and have very different regulatory substance, these are of variable importance as regards political impact, contents and practical importance. The period of study of one year can however give a representative picture of Community law. The directives can permit operational leeway which takes particular national living conditions into account. The interest in the harmonization of the law by Community law must be linked with the national interest and with the practice of discretionary power allowed for in the Member States' operating margin. A year's directives must make evident the procedure used, probably varied, in the implementation of Community law by Member States.

The large number of directives in a year, as well as the different fields and contents of regulations, do not permit - in a limited research project - a detailed study of the implementation procedures so that surveys, both general and technically detailed in the cases chosen, can be made simultaneously. In order to make a comparison possible of the application procedures used in all the Member States, the national research papers should be set up according to the same questionnaire.

Questionnaire concerning the directives

The directives chosen reached their deadlines and their implementation by Member States in 1980.

Introduction: Elements of the politico-administrative culture of the Member State
- a brief description

1. The contents and significance of the directives for the Member State

1.1. List of directives chosen:

N.B. the Commission will furnish a historical information file on each of the directives.

- 1.2. **Grouping of directives according to contents**
- 1.3. **Grouping of directives according to significance for the Member State**
- political, economic and legal significance
 - public discussion
- 2. The preparatory phase of the directives from the point of view of the Member State**
- 2.1. **Preparation at the political and/or administrative level**
- 2.1.1. **Cooperation and coordination between ministries and/or specialized administrations at national level**
- | | | |
|-----------------------|--------|-----------------------|
| intensive (extensive) | versus | reduced (limited) |
| institutionalized | versus | non-institutionalized |
- (commissions, working groups)
- 2.1.2. **Cooperation and coordination between national and regional or local levels**
- | | | |
|-----------------------|--------|-----------------------|
| intensive (extensive) | versus | reduced (limited) |
| institutionalized | versus | non-institutionalized |
- 2.2. **Participation of acting bodies and interested parties**
- 2.2.1. **Formalized/informal procedures of participation**
- | | | |
|--|--------|---|
| at an early date in the decision procedure | versus | at a later date in the decision procedure |
| intensive | versus | limited |
- (strong integration and coordination of opposing interests, public discussion)

of a compulsory nature, versus optional
 legally sanctioned
 formalized (discussions, versus informal (consultations;
 registration and making official contacts....)
 known Government
 decisions....)
 regular versus incidental

2.2.2. Public discussion
 active/regular . versus reduced/incidental

2.3. **For the preparation at European level**

2.3.1. Instructions
 Instructions, operating margins

2.3.2. Formation of compromise and consensus
 consensus versus conflict
 (compromise between (predominance of certain
 different interests) interests studied sub 2.1 and 2.2)

2.3.3. Position of the Member State during the negotiation of the
 directives at European level
 disposed to agreement/ versus intransigent
 compromise

N.B. The preparation processes of the directives will be studied to the extent that this preparatory phase has an impact on the implementation.

3. The application of directives by the Member State

3.1. **Division of competences for the application of the directive**

3.1.1. Legislative application:

Competence

| | | |
|---|--------|---|
| central/federal (Bund)/parliament/ government | versus | decentralized/Länder/ parliaments of the Länder; regional representative bodies |
|---|--------|---|

Transformation of the directive into national law

| | | |
|-----------------------------|--------|-------------------------|
| rapid | versus | retarded |
| pure and simple adaption | versus | amendments/ adaptations |

3.1.2. Administrative applicationCompetence in implementation matters

| | | |
|--|--------|---|
| central administrative authority | versus | decentralized administrative authority (regional/local) |
| competence in matters of execution entrusted to one single administrative authority | versus | competence in matters of execution entrusted to several administrative authorities |

3.2. **Contents of the directive and adaptation by the Member State**3.2.1. Extent of the directives field of regulation

| | | |
|-------------------|--------|-----------------------------|
| global/integrated | versus | limited/isolated/fragmented |
|-------------------|--------|-----------------------------|

3.2.2. Density of regulation and strenght of action

| | | |
|--------------|--------|---|
| general/open | versus | limited/isolated detailed/compulsory |
|--------------|--------|---|

3.2.3. Use of discretionary power by the Member State

| | | |
|-----------------------------|--------|------------------------|
| pure and simple adaption | versus | amendments/adaptations |
|-----------------------------|--------|------------------------|

modifications made to national law
respect for the programme

3.3. Procedures by the Member State for the application of the directive

3.3.1. Procedures for transposition of directives into national law

| | | |
|-------------------------------------|--------|---|
| central (parliamentary decision) | versus | decentralized (Association of Federal Organs, e.g. the Bundesrat) |
|-------------------------------------|--------|---|

3.3.2. Administrative application and setting up

Information of the competent executive authorities on the modification of national law by the directives ("new law")

| | | |
|---|--------|---|
| detailed/clear/rapid/ comprehensible | versus | insufficient/difficult to find/retarded/incomprehensible |
| formal (correspondence, publication in the official journal) | versus | informal (conversation, contacts) |

Resources of the competent administrative authority for enforcement:

| | | |
|--|--------|--|
| personnel/qualifications sufficient | versus | personnel/qualifications insufficient |
| financing sufficient | versus | financing insufficient |
| technical capacity sufficient | versus | technical capacity insufficient |

Administrative/ bureaucratic style / **distribution of competences**

| | | |
|--|--------|---|
| clear/simple | versus | muddled/complex |
| central/hierarchic (from top to bottom) | versus | decentralized/horizontal (at the same level) |

Foundation (instrument of command) of the enforcement process

| | | |
|---|--------|--|
| fixed/formal rules (laws, rules of procedure) | versus | undefined/informal rules (developed by long administrative practice) |
|---|--------|--|

Enforcement of the laws

| | | |
|--------------------------------------|--------|---|
| literal/legalistic interpretation | versus | adaptation to the situation and case/pragmatic |
|--------------------------------------|--------|---|

Control of the enforcement process

| | | |
|--|--------|---|
| administrative control of enforcement (higher administrative authority) | versus | absence of administrative control of enforcement |
| financial control of efficiency | | absence of financial control of efficiency |
| legal control of enforcement (national case law) | | absence of legal control of enforcement |

Outline of cooperation and interactionbetween the competent administrative authorities (local, regional, national) in matters of enforcement

| | | |
|--|--------|---|
| institutionally formalized: as to content/ as to procedure (formal structures/rules of procedure/stipulated) | versus | not institutionally formalized: as to content/ as to procedure (informal structures/ procedures acquired through tradition and custom/unwritten rules) |
| cooperative (confidence; consent) | versus | conflict (distrust; conflict) |

between the competent administrative authorities in matters of enforcement and the recipients of administrative action

| | | |
|---|--------|--|
| extensive/open (strong cooperation with, and participation of, recipients) | versus | limited/closed (limited cooperation with and not much participation of, recipients) |
| institutionalized (formalized participation in enforcement, working groups) | versus | non-institutionalized (consultation, contacts) |

| | | |
|--|--------|---|
| formalized (respect for established structures, procedures and standards) | versus | non-formalized (personal relations, informal opinions) |
| cooperative/encouraging attitude (observance of norms) | versus | conflicting/negative attitude (circumvention of norms/transgression of norms) |

Attitude of those who enforce

Towards Community law

| | | |
|---------------------|--------|------------------|
| positive/supporting | versus | negative/refusal |
|---------------------|--------|------------------|

Understanding of roles/ orientation of tasks of those who enforce

| | | |
|-----------|--------|----------------------|
| political | versus | bureaucratic/neutral |
| pragmatic | versus | "legalistic" |

Public opinion (press, political parties, social groups)

| | | |
|---------------------|--------|------------------|
| positive/supporting | versus | negative/refusal |
|---------------------|--------|------------------|

4. Control of the application of directives - national controls

4.1. Control within the national administration structures

4.1.1. Hierarchical control

4.1.2. Financial control

4.2. Contents and intensity of control

4.2.1. Regularity control

4.2.2. Management control

4.2.3. Means of information

4.3. Judicial control

5. Control of the implementation of directives - Community controls

- 5.1. Means of information in the Community**
- 5.1.1. Communication by Member States of enforcement measures
- 5.1.2. Registers of the Commission
- 5.1.3. Power of investigation
- 5.2. Judicial control**

6. Result: Politico-administrative culture in the implementation of Community law by the Member State

- 6.1. Politico-administrative culture as a descriptive and explicative category**
- 6.2. Categories of politico-administrative culture e.g.**
- forms of procedure
 - styles of cooperation and interaction
 - administrative style, bureaucracy
 - attitude of acting bodies
 - public opinion

The present questionnaire is concerned with a sample of directives and their implementation during the period of study. This must result in a general picture giving prominence to the principal characteristics; it is not necessary to make a study-in-depth of individual directives. In the introduction, the basic principles of politico-administrative culture are to be described in general terms. This should however prove useful in the case study itself for the description and explanation of specific national practice in the implementation of Community law by the Member State.

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