

# THE “STANDARD” ADMINISTRATIVE PROCEDURE FOR SUPERVISING AND ENFORCING EC LAW: EC TREATY ARTICLES 226 AND 228

ALBERTO J. GIL IBÁÑEZ\*

## I

### INTRODUCTION

Although the Treaty Establishing the European Community<sup>1</sup> (“EC Treaty” or “Treaty”) has created several procedures for combating Member States’ breaches of European Community (“EC”) law, the European Commission (“Commission”) enforcement procedure under EC Treaty Articles 226 and 228 is still the most far-reaching and most commonly used. This Article examines the Commission’s policy and strategy in enforcement proceedings under these provisions and attempts to discover the predominant European model, if such a model exists, for enforcing and supervising EC law. Although this Article will concentrate mainly on the administrative phase under Article 226, some reference will also be made to the judicial phase, when the Commission sues a Member State before the European Court of Justice (the “ECJ” or the “Court”) under Article 228, since Article 226 cannot be understood without Article 228.<sup>2</sup> Although much has been written on Commission enforcement, new developments and some procedural aspects merit its reassessment.<sup>3</sup> Thus, this Article ulti-

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\* Deputy Director for International Relations, Spanish Ministry for Industry, Tourism and Trade, and Senior Researcher, Institute for European Studies, Universidad de San Pablo, Madrid, Spain.

1. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, 1997 O.J. (C 340) 185 [hereinafter EC TREATY].

2. Under Article 228, the Commission may ask the ECJ to order a penalty payment or lump sum from a Member State that has failed to take measures necessary to comply with a first judgment finding it in breach. Moreover, as it is broadly known, the ECJ has allowed individuals to apply to national courts for damages to compensate for infringements of Community law by Member States or for failure to transpose directives (the “*Francovich* doctrine”). The prospect of fines under Article 228 gives the administrative complaint procedure in Article 226 special strength.

3. The bibliography on Article 226 procedure is broad. *See, e.g.*, H. AUDRETSCH, SUPERVISION IN EUROPEAN COMMUNITY LAW: OBSERVANCE BY MEMBER STATES OF THEIR TREATY OBLIGATIONS: A TREATISE ON INTERNATIONAL AND SUPRA-NATIONAL SUPERVISION (2d rev. ed., 1986); Alfredo Calot Escobar, *El procedimiento por infracción del Derecho Comunitario*, in DERECHO COMUNITARIO 155 (1993); ALBERTO GIL IBÁÑEZ, THE ADMINISTRATIVE SUPERVISION AND ENFORCEMENT OF EC LAW: POWERS, PROCEDURES AND LIMITS (1999) [hereinafter GIL IBÁÑEZ, ADMINISTRATIVE SUPERVISION]; Jean-Victor Louis, *Le rôle de la Commission dans la procédure en manquement selon la jurisprudence récente de la Cour de justice*, in DU DROIT INTERNATIONAL AU DROIT DE L’INTÉGRATION: LIBER AMICORUM PIERRE PESCATORE 387 (1987); ALFONSO MATTERA, LE MARCHÉ UNIQUE EUROPÉEN: SES RÈGLES, SON FONCTIONNEMENT 681 (2d ed., 1990); G. VANDERSANDEN & A. BARAV, CONTENTIEUX COMMUNAUTAIRE 97 (1977); Alan Dashwood

mately focuses on some general difficulties in analyzing supervision and enforcement at the European level and the problem of implementation in more general terms.<sup>4</sup>

## II

### THE PRESENT MODEL FOR SUPERVISING AND ENFORCING EC LAW

#### A. General Procedures

EC Treaty Article 211 grants the Commission a general power to “ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.” The exercise of this general power can occur in a number of ways. The EC Treaty instituted different procedures for fighting Member State noncompliance.<sup>5</sup> Of these, Article 226 is probably the most important contribution that Community law has made to the construction of a legal model of regional integration. It applies across the board, to all duties under European law and represents the common denominator for other procedures. Moreover, contrary to widespread perception, Article 226 is also useful in fighting breaches committed by legal and natural persons, albeit in an indirect way. This is tied to the requirement that enforcement authorities in the Member States pursue and correct breaches committed by natural persons and businesses.

The first procedural step, contained in the first paragraph of Article 226, is what the Commission calls “formal notice.” The Commission must give the Member State notice of a suspected breach and the opportunity to submit its observations. A pre-Article 226 letter usually precedes this stage, as the pre-Article 226 letter allows the Commission simply to attempt to collect information in order to decide if a breach exists. The administrative phase concludes with the delivery of a “reasoned opinion.” If the Member State fails to comply, the Commission may bring an action before the Court of Justice.

The EC Treaty contains four different kinds of exceptions to the use of Article 226 procedure to persuade Member States to change their behavior if they have failed to fulfill their obligations under the EC Treaty. First, the EC Treaty creates an exception when direct access to the ECJ is allowed without the need for a previous administrative phase.<sup>6</sup> Second, the EC Treaty creates exceptions for cases in which the potential intervention of the ECJ results from either a different administrative procedure, such as State aid<sup>7</sup> or supervision of competition rules in the case of public companies with

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& Robin White, *Enforcement Actions under Articles 169 and 170 EEC*, 14 EUR. L.R. 388 (1989); Alberto Gil Ibáñez, *A Deeper Insight Into Article 169 EC Treaty*, Harvard Jean Monnet Working Paper No. 11/98, <http://www.jeanmonnetprogram.org/papers/98/98-11.html>; Alberto Gil Ibáñez, *Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States*, 6 EUR. L.J. 148 (2000).

4. For a more detailed analysis, see GIL IBÁÑEZ, ADMINISTRATIVE SUPERVISION, *supra* note 3.

5. This paper does not analyze the procedures laid down in the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY], such as those established by Articles 79, 82, and 83 regarding security of nuclear materials, nor does it analyze the procedures foreseen in the expired TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140.

6. See EC TREATY arts. 95, 298.

7. See *id.* art. 88, para. 2.

special rights.<sup>8</sup> Third, the EC Treaty creates exceptions for cases in which an administrative-political procedure has been designed that reduces the role of the Commission to the benefit of the Council, such as control of excessive government public debt and deficits.<sup>9</sup> Fourth, Article Seven of the Treaty on European Union<sup>10</sup> has created a political procedure to fight against Member State violations of principles and common values mentioned in paragraph one of Article Six of the Treaty on European Union.<sup>11</sup> Furthermore, the EC Treaty grants special powers to the Commission in order to enforce competition law against legal persons.<sup>12</sup>

The EC Treaty, understood as a set of constitutional rules, does not define the different characteristics of these procedures in detail. In fact, it sometimes explicitly asks for further legislative development, such as in competition policy and State aid, while in others it remains silent on the question whether further procedural rules are necessary, as in Article 226. One exception is the new procedure introduced by the Treaty on European Union and laid down in the EC Treaty's new government debt and deficits article.<sup>13</sup>

This complex picture has become even more intricate due to a number of different but complementary trends. First, the Community has been creating newer and stronger administrative enforcement procedures through legislation, without a clear basis in the EC Treaty. Examples are air transportation policy, clearance of accounts procedure, health and safety, and public procurement. Consequently, the field of application of Article 226 has been reduced. Under the ECJ's case law, there are few legal limits to creating new procedures via legislation or soft law. The limits to this form of Commission enforcement powers are derived from the Commission's limited material capacity to perform some functions and the difficulty of passing legislation within the Council. It appears that the main obstacle to a more active role for the Commission is its limited material capacity to oversee and enforce EC law effectively, as well as because only Member States have a direct presence on their territories; only they can use compulsion to enforce law. Therefore, the efficiency criteria and the limited resources of the Commission should be taken into account in determining whether the Commission must act.

Second, the enforcement procedures set out in the EC Treaty have been joined by more modern and informal means of cooperation, including partnerships and net-

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8. *See id.* art. 86, para. 3. In John Usher's words, the proceedings framed in EC TREATY art. 225, art. 100a, para. 4, art. 93 could be called "expedited proceedings." JOHN USHER & RICHARD PLENDER, PLENDER AND USHER'S CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES 133 (3d ed., 1993); *cf.* EURATOM TREATY arts. 38, 82.

9. EC TREATY art. 104.

10. TREATY ON EUROPEAN UNION, Feb. 7, 2002, 1992 O.J. (C 224) 1.

11. TREATY ON EUROPEAN UNION art. 7 has been modified by the TREATY OF NICE, Mar. 10, 2001, O.J. (C 80) (2001). As it is widely known, the measures to be taken against the concerned Member State include suspending certain rights derived from the Treaty, including the Member State's voting rights in the Council. *See* Commission Communication of 15 October 2003 (discussing implementation of *Treaty on European Union* art. 7).

12. *See* EC TREATY art. 85.

13. *See id.* art. 104.

works. The White Paper on *European Governance*<sup>14</sup> is one example of this trend. To complicate matters further, in the area of Community inspections, which are the first step in enforcing EC law, procedures have been developed on a sectoral basis without a common legal basis.<sup>15</sup> This means that inspectors are assigned to the Commission, case by case, depending on the extent of agreement among the Member States and not on real need. Third and finally, the legislative strategy, that is, the choice of different types of rules, also varies from one area to another.

This multifarious legal panorama shows the difficulty in finding a clear model for the administrative supervision and enforcement of EC law. The following situations now co-exist:

1. Competition policy, which has been governed by clear formal rules from the beginning;<sup>16</sup>
2. State aid, which in recent years has evolved from the traditional predominance of soft law to formal rules;<sup>17</sup>
3. Article 226 procedure, which is governed by the ECJ's case-law and soft law.<sup>18</sup>

#### B. Special Administrative Procedures with a Clear Legal Basis in the EC Treaty for Fighting Infringements Committed by Member States

##### 1. Supervision of Aid Granted by States Under EC Treaty Article 88

State aid, an area in which the breach of Community law is committed by the Member States themselves, constitutes a clear exception to Article 226 procedure. EC Treaty Article 88 defines two procedures—one for existing aid and another for new aid. The ECJ has since created a third procedure for aid granted or altered without notification of the Commission. According to the ECJ, the Treaty provides for a special procedure in such cases because “the assessment in such cases of whether a State aid is or is not compatible with the common market raises problems which presuppose the examination and appraisal of economic facts and conditions which may be both complex and liable to change rapidly.”<sup>19</sup>

##### 2. Special Tools to Ensure the Application of Competition Rules in the Public Sector under EC Treaty Article 86

Article 86 of the EC Treaty entrusts the Commission with guaranteeing that public undertakings, as well as undertakings to which Member States grant exclusive or special rights, adhere to competition rules. The third paragraph of Article 86 grants the

14. European Governance: White Paper from the Commission to the European Council, COM(01) 428 final.

15. See GIL IBÁÑEZ, ADMINISTRATIVE SUPERVISION, *supra* note 3, at 71–86.

16. Council Regulation 1/2003, 2003 O.J. (L 001) 1; see Council Regulation 17/62, 1962 O.J. (P 013) 204.

17. Council Regulation 659/1999, 1999 O.J. (L 083) 1. See generally Deborah Heredia Benot, *El Reglamento 659/1999 del Consejo, de 22 de marzo, normas de procedimiento en material de ayudas públicas*, 196 NOTICIAS DE LA UNIÓN EUROPEA 17 (2001).

18. See text accompanying notes 24–60, *infra*.

19. Case C-301/87, *France v. Commission*, 1990 E.C.R. I-307, I-355, paras. 15–16, I-367.

Commission the power to address, as necessary, appropriate directives or decisions to Member States.

### 3. A Unique Procedure: Control of Excess National Public Deficit and Debts Under EC Treaty Article 104

When a Member State fails to implement a recommendation of the Council on the reduction of public spending, the Council has the power to notify the Member State that it must take, within a specified time, measures considered necessary for reducing the deficit. Insofar as a Member State fails to comply with the Council's decision, paragraph 11 of Article 104 gives the Council the power to adopt several measures, such as imposing fines "of an appropriate size," or "inviting" the European Investment Bank to end its lending policy towards the Member State concerned.

### 4. Obstacles to the Single Market

In 1998, the Commission initiated a new strategy, in the free movement of goods, based on EC Treaty Article 308, under which the Community may take measures necessary to attain any of the objectives of the treaty. The legislation created, based on the previous experience with health and safety, a system under which any Member State can inform the Commission of obstacles encountered in other Member States.<sup>20</sup> The Commission then must transmit that information to the concerned Member State, which within five working days must either inform the Commission of the steps taken or explain why the obstacle does not exist. The results of this Regulation have been poor, however, in that Member States have not taken advantage of the procedure and have not strictly adhered to its requirements.<sup>21</sup>

The more informal approach was adopted by the Commission in 2001.<sup>22</sup> This is a network created for informally solving the problems that arise when rules intended to achieve an internal market are not applied correctly through the exchange of communications between national coordination centers.<sup>23</sup>

## III

### ARTICLE 226: THE VIRTUES AND DRAWBACKS OF PROCEDURAL AMBIGUITY

#### A. A New Approach: The Commission's Strategy of Selective Enforcement

Selective enforcement means having the discretion to select the parties against whom the law will be enforced, the situations in which the law will be enforced, and the law that will or will not be enforced. It can also signify the discretion to choose among different types of enforcement tools, depending on the characteristics of the particular case. It can be argued that selective enforcement violates principles such as

20. Council Regulation (EC) No. 2679/98 of 7 December 1998 on the Functioning of the Internal Market in Relation to the Free Movement of Goods Among the Member States, 1998 O.J. (L 337) 8.

21. See Nineteenth Annual Report on Monitoring the Application of Community Law, COM(02)324 final.

22. Commission Recommendation of 7 December 2001 on Principles for Using "SOLVIT"—The Internal Market Problem Solving Networking, 2001 O.J. (L 331) 79.

23. See *infra* note 49 and accompanying text.

“equal justice under the law” and non-discrimination. However, it can also be said that to obligate the Commission to pursue all the complaints it receives would destroy the objectivity and impartiality it must, in principle, uphold. Complaints are not neutral, because not all private individuals and legal persons are equally aware of their Community rights. Often those who have good reason to complain lack sufficient knowledge of the channels for complaining, while individuals with more negative attitudes towards law and bureaucracy overuse the system. Moreover, the effectiveness of Article 226 derives, partially, from the rarity with which it is used, which must be carefully preserved. Any increase in Article 226 proceedings devalues its symbolic significance and hence the basis of its authority.<sup>24</sup>

In both domestic and supranational administration, selective enforcement is an important element of a good enforcement policy. Administrative agencies must develop different strategies for dealing with complying and non-complying businesses. They must take into consideration the practical constraints on prosecuting a breach, such as limited resources and staff. Constrained budgets require flexible enforcement, since administrations must deploy their limited staffs more selectively. The Commission, like national administrations, is affected by constraints of limited human resources and of other general resources. Therefore, to require the Commission to carry out a detailed and formal examination of all complaints would preclude it from paying satisfactory attention to more important cases. Furthermore, the enlargement of the Union, the principle of subsidiarity, and the growth of European legislation all demand decentralization away from the Commission including decentralization of supervision and enforcement functions.

As a purely legal matter, the Commission has discretionary power over which infringements to pursue. The Commission is proud of its discretionary power in monitoring and prosecuting breaches under Article 226. The ECJ has recognized that it is for the Commission to decide whether to bring proceedings concerning the application of EC law.<sup>25</sup> Although discretionary power is critical for the reasons discussed above, there is the potential for abuse. The Commission can come under pressure either to start proceedings in spite of scarce evidence or to close a file in spite of a clear breach. In both cases the Commission’s arbitrary action is difficult, if not impossible, to prove.

The Commission has chosen to limit its discretion by establishing criteria reflecting the seriousness of the alleged breach of EC law. In a Communication entitled *Better Monitoring of the Application of Community Law*,<sup>26</sup> the Commission lays down the following three priorities:

1. Infringements that undermine the foundations of the rule of law.
  - Breaches of the principles of the primacy and uniform application of Community law.

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24. Cf. Roland Bieber, *Comment on Case C-52/90, Commission v. Kingdom of Denmark*, [1992], I-2187 and *Case C-362/90, Commission v. Italian Republic*, [1992], I-2353, 30 CML REV. 1207 (1993).

25. See *Case C-422/92, Commission v. Germany*, 1995 E.C.R. I-1097.

26. COM(02)725 final.

- Violations of the human rights or fundamental freedoms enshrined in substantive Community law, such as the interference with the exercise by European citizens of their right to vote.
  - Serious damage to the Community's financial interests.
2. Infringements that undermine the smooth functioning of the Community's legal system.
    - Action in violation of an exclusive European Union power in an area such as the common commercial policy or serious obstruction of the implementation of a common policy.
    - Repetition of an infringement in the same Member State within a given period or in relation to the same piece of Community legislation. These are mainly cases of systematic, incorrect application detected by a series of separate complaints by individuals.
    - Cross-border infringements, in which it is more complicated for European citizens to assert their rights.
    - Failure to comply with a judgment given by the Court of Justice against a Member State on an application from the Commission for failure to comply with Community law.<sup>27</sup>
  3. Infringements consisting in the failure to transpose or the incorrect transposition of directives, which can deprive large segments of the public of access to Community law and are common sources of infringements.

Although there is a clear need to establish some criteria for selective enforcement, it is questionable whether a Communication is the most appropriate legal instrument. In fact, based on the cases that are subject to Article 226, it can be concluded that the Commission is not strictly respecting those criteria. The Communication's status as soft law instead of binding rule is probably responsible for this failure. Communications are sometimes approved more for public relations purposes and in response to external pressure from the European Ombudsman, academics, or others, than out of a real commitment to change. Nevertheless, as enforcement priorities were previously established by the Commission's internal rules behind close doors, the Communication has improved the former situation at least in terms of transparency.

## B. The Need for a Quick Response: Procedural Time Constraints and Interim Measures

### 1. Procedural Time Constraints

No formal rules set down deadlines for either Member States or the Commission. The Commission is not subject to time limits of the type familiar to national systems of administrative law. The ECJ is relatively ineffectual on this score. It can only review Commission actions and correct procedural irregularities once a case is brought before it and only after the possibly irregular administrative act has occurred.

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27. See EC TREATY art. 228.

Because of pressure from the European Ombudsman, however, the Commission has accepted a formal time limit when dealing with individual complainants alleging national breaches of Community law. Thus, in a Communication to the European Parliament and the European Ombudsman, the Commission states the following:

As a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General. Where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing.<sup>28</sup>

This Communication represents a step forward, but such a time limit is still a mere principle of conduct without clear legal consequences. The Commission has the obligation only to inform.

Time limits are also required for internal organization and management. They are needed for an organization to function properly. Consequently, the Commission has approved several internal rules that require adherence to time limits in the Article 226 procedure.<sup>29</sup> Those rules, however, remain for the exclusive internal use of the Commission and lack, in principle, any formal binding character. For instance, in the phase which precedes a formal notice under Article 226, the normal deadline for a Member State response to a request for information from the Commission is two months.<sup>30</sup> Moreover, it is questionable whether the Commission and national administrations should be granted discretion to fix their own time constraints, given that they lack the necessary neutrality. Clear deadlines and time limits are restrictions on administrative action that serve as guarantees for citizens and social actors. A balance between flexibility and legal certainty should be ensured at both levels of administration.

## 2. Interim Measures

The lack of binding deadlines generates a second problem: relief before the final decision is issued. The common wisdom is that proceedings under Article 226 actions are slow, often lasting one-and-a-half years plus the duration of the judicial phase, so interim special procedures are necessary to stop potentially serious violations. After the Commission issues a reasoned opinion, but before it obtains a final judgment from the Court of Justice, it may request interim measures from the Court so as to prevent irreparable harm to the Community interest. Thus, in *Commission v. Germany*,<sup>31</sup> the Commission lodged an action before the ECJ on June 23, 1990, against a German law on charges relating to the use of federal roads and motorways by heavy goods vehicles, which had been approved on April 30, 1990. Then, by an order of July 12, 1990, the Court upheld the Commission's application for interim measures under EC Treaty

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28. Commission Communication to the European Parliament and the European Ombudsman on Relations with the Complainant in Respect of Infringements of Community Law, 2002 O.J. (C 244) 5, 7.

29. These internal rules are neither published nor communicated to Member States or other interested parties, since the rules remain for the exclusive internal use of Commission services.

30. For a more detailed analysis on time constraints, see GIL IBÁÑEZ, ADMINISTRATIVE SUPERVISION, *supra* note 3, at 167-172.

31. Case C-195/90, *Commission v. Germany*, 1992 E.C.R. I-3141.



Article 186 and ordered Germany to suspend the charging of a road tax on vehicles registered in other Member States, pending delivery of the judgment in the main proceedings.<sup>32</sup>

These examples show that the problem of time with respect to Article 226 procedure can be resolved when the Commission has a clear will to do so and when its internal procedures are simplified. However, the Commission still appears to be more efficient when it resolves a potential breach of European law through a directly applicable decision, as occurs, for example, in Member State aid.

### C. The Burden of Proving the Breach and the Potential for Conflicting Interpretations of EC Law

The Commission lacks formal legal power to interpret EC legislation. In fact, the ECJ has always refused to grant the Commission autonomous power to interpret EC law in the form of instructions to national administrations. Thus, the Commission may only issue nonbinding opinions to national authorities.<sup>33</sup> This is problematic in proceedings against Member States in which the potential violation relates to a piece of legislation with various interpretations. Indeed, the ECJ has said that when there are difficulties in interpreting and implementing an EC rule, the Commission cannot claim that the Member State concerned has not cooperated in good faith under EC Treaty Article 10.<sup>34</sup> One solution to the problem of proving breaches in such cases would be to grant both the Commission and the Member States, and not only national courts, the power to certify questions to the ECJ concerning interpretation of European legislation.

### D. The Collegiality of the Commission as a Requirement

It is widely known that the most important decisions relating to Article 226 procedure are subject to the principle of collegiality:

[T]he principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all members of the college of Commissioners should bear collective responsibility at the political level for all decisions adopted. The Court has stated that a decision by the Commission to bring infringement proceedings against a Member State must be the subject of collective deliberation by the college of Commissioners and that all the information on which that decision is based must be available to the members of the college.<sup>35</sup>

Collegiality poses two kinds of problems. First, it gives Article 226 procedure a pseudo-political character subject to political discussion. In fact, the meetings of the college of Commissioners are normally prepared by previous meetings of their heads of cabinet, in which political issues routinely arise. Yet Article 226 procedure should

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32. For another example where interim measures were granted quickly, see C-320/03, *Commission v. Austria*, 2003 E.C.R. I-7929.

33. See, e.g., Case 133/79, *Sucrimes v. Commission*, 1984 E.C.R. 1299, para. 16.

34. Case C-1/00, *Commission v. France*, 2001 E.C.R. I-9989, para. 140.

35. *Id.* at paras. 79–80 (citations omitted); see also Case C-191/95, *Commission v. Germany*, 1998 E.C.R. I-5449, paras. 39, 48.

be as neutral as possible, and the Commission's discretion should only be used to search for the best way to assure the Community interest. Second, collegiality introduces bureaucratic requirements with which the Commission must comply or risk a judicial declaration of nullity. For instance, when not all Commissioners receive all the relevant information concerning an infringement proceeding, the Commission's decision will be found invalid because it is contrary to the principle of collegiality.<sup>36</sup>

#### E. Article 226 versus EC Treaty Articles 230 and 232

Member States may be tempted to plead the unlawfulness of decisions addressed to them as a defense to infringements proceedings arising out of their failure to implement precisely those decisions. However, the present system of remedies established by the EC Treaty, as it has been interpreted by the ECJ, does not permit the assessment of the legality of a Community decision in an action brought under Article 226.<sup>37</sup> The reason, according to the ECJ, is their different objectives.<sup>38</sup> Thus, Article 226 is merely directed at obtaining a declaration that a Member State has failed to fulfill its obligations, whereas EC Treaty Articles 230 and 332 are directed at obtaining judicial review either of measures adopted by the Community institutions or of a failure to act on their part.<sup>39</sup>

The consequence of this doctrinal approach is that a Member State can be accused by the ECJ of violating a certain Community act under Article 226 procedure, yet such an act may later be declared unlawful under Article 230. This causes prejudice to the Member State's right to defense. There is clear room for improvement in the present ECJ case law.

#### F. The Protection of the Right of Defense of Member States

The case law of the ECJ grants Member States an important guarantee: the right to be heard.<sup>40</sup> Some of the most important decisions of the ECJ stress that the administrative phase of these proceedings represents an essential procedural requirement. The right to be heard serves to protect the Member States' interests and cannot be ignored, even if the Member State concerned does not consider it necessary.<sup>41</sup>

This is not true for all administrative proceedings under the Treaty. Thus, within some special procedures either the Commission or any Member State can bring the matter directly before the ECJ, bypassing the previous administrative phase.<sup>42</sup>

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36. Cf. Case C-1/00, *Commission v. France*, 2001 E.C.R. I-9989.

37. See, e.g., Case C-261/99, *Commission v. France*, 2001 E.C.R. I-2537, para. 18; Case C-74/91, *Commission v. Germany*, 1992 E.C.R. I-5437, para. 10.

38. See Case C-1/00, *Commission v. France*, 2001 E.C.R. I-9989, para. 101; Case C-261/99, *Commission v. France*, 2001 E.C.R. I-2537, para. 18; Case C-74/91, *Commission v. Germany*, 1992 E.C.R. I-5437, para. 10.

39. Case C-1/00, *Commission v. France*, 2001 E.C.R. I-9989, para. 101.

40. See, e.g., Case 31/69, *Commission v. Italy*, 1970 E.C.R. 33, para. 13.

41. See Case 211/81, *Commission v. Denmark*, 1982 E.C.R. 447, paras. 9–11.

42. See, e.g., EC TREATY art. 95, para. 9 (introducing a more demanding requirement than the harmonized measure); *id.* art. 298, para. 2 (introducing unjustified measures for reasons of national security).

### G. Article 228 Procedure: Discretion of the Commission and the Principle of Legal Certainty

Article 228 constitutes the second phase of Article 226 procedure in that it significantly reinforces the “strength” of the standard procedure.<sup>43</sup> Article 228, however, is not without controversy. Yet this Article is not the place to add to the literature on Article 228. Instead, this Article focuses on the role of the Commission during this phase.

The Commission has published two Communications on the application of Article 228 and the calculation of fines.<sup>44</sup> In continental law, sanctions generally must be clearly established by parliamentary law. Here, the use of the soft law of Communications does not offer adequate guarantees. Moreover, the Commission has great discretion to assess the circumstances and select the most appropriate moment to initiate an Article 228 action against a Member State. It is true that the ECJ can decide to revise the Commission’s proposed fine upwards or downwards, but it can only decide on the basis of a case brought to it by the Commission.<sup>45</sup>

Advocate General Jean Mischo has recently criticized the Commission’s policy in this area.<sup>46</sup> The EC Treaty does not set down a clear deadline for coming into compliance with an ECJ decision, after which fines start running. It is left to the Commission to evaluate when it must start an Article 228 procedure, issue a reasoned opinion, and bring the second case to the ECJ. Advocate General Mischo has shown that the Commission has treated cases differently without clear justification.<sup>47</sup> In cases in which Member State compliance was relatively straightforward, the Commission waited considerably before bringing an Article 228 action. In contrast, in cases in which more difficult and costly national measures had to be taken, the Commission acted more quickly.<sup>48</sup>

### H. Formal Versus Informal Means

Several informal means of resolving potential conflicts have also appeared in recent years. These include the “internal market scoreboard,” the SOLVIT network, the package meetings, and the national contact points.<sup>49</sup> This compatibility of formal and

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43. According to EC TREATY art. 228, the Commission may ask the ECJ to order a penalty payment or lump sum from a Member State which has failed to take the necessary measures to comply with a first judgment finding the Member State in breach.

44. See Commission Communication of 21 August 1996 on the Implementation of Article 228 (former 171), 1996 O.J. (C 242) 7; Commission Communication of 28 February of 1997 on the Method of Calculating the Penalty Payments Provided for Pursuant to Article 228 (former 171) of the EC Treaty, 1997 O.J. (C 063) 2.

45. Case C-387/97, *Commission v. Greece*, 2000 E.C.R. I-5047, para. 89.

46. Opinion of Mr. Advocate General Mischo Delivered on 12 June 2003, Case C-278/01, *Commission v. Spain*, 2001 O.J. (C 245) 16.

47. *Id.*

48. *Id.*

49. See Commission Recommendation of 7 December 2001 on Principles for Using “SOLVIT”—The Internal Market Problem Solving Networking, 2001 O.J. (L 331) 79. SOLVIT establishes national contact points for citizens and for business to which specific internal market problems can be channeled and cross-border problems be solved. To create national contact points, the European legislation is increasingly using networks of national officials, specially appointed, in order to deal with problems of supervision. Moreover, package

informal means was clearly recognized by the Commission in the Communication on *Better Monitoring of the Application of Community Law*.<sup>50</sup> Direct contact between the Commission and national administrations and between citizens and national administrations has proven effective for resolving problems.

#### IV

##### PROPOSALS FOR THE IMPROVEMENT OF INFRINGEMENT PROCEEDINGS

###### A. The European Convention

The discussion circle of the Court of Justice proposed three measures to expedite infringement proceedings: (1) abolish one if not both administrative stages prior to bringing an action before the Court for sanctions under Article 228; (2) allow the Commission to establish a breach of Community law and propose a sanction in the same procedure, hence combining Articles 226 and 228; and (3) give the Commission the power to adopt a decision finding that a State has failed to fulfill an obligation under the EC Treaty.<sup>51</sup>

Only the first two proposals on Article 228 were accepted by the European Convention (the "Convention") and partially included as paragraphs two and three of Article III-362 of the Treaty Establishing a Constitution for Europe<sup>52</sup> ("Constitutional Treaty"):

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment referred to in paragraph 1 [the Court's judgment], it may bring the case before the Court of Justice of the European Union after giving that State the opportunity to submit its observations. . . .

3. When the Commission brings a case before the Court of Justice of the European Union pursuant to Article III-360 on the grounds that the State concerned has failed to fulfill its obligations to notify measures transposing a European framework law, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstance.<sup>53</sup>

EC Treaty Article 226 remains untouched as the new Article III-360 in the Constitutional Treaty.

The administrative, pre-litigation component of Article 228 has been compressed into one phase. Moreover, in cases lacking transposition, the Commission can ask the Court for both a declaration of an infringement and sanctions in the same action. The latter provision raises the question of what happens when the failure to transpose is itself disputed. It is unclear whether paragraph three of the new Article III-362 of the Constitutional Treaty applies if the Member State and the Commission disagree over

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meetings take place between Commission and national officials in order to deal on an informal basis with a concrete group of pre-selected infringements.

50. COM(02)725 final.

51. European Convention, Final Report of the Discussion Circle on the Court of Justice, CONV 636/03, Mar. 25, 2003.

52. 2004 O.J. (C 310) 3.

53. *Id.* art. III-267.

transposition and the Member State claims that it has fully or partially implemented the Community law. This will be a question of interpretation for the Court.

It is unfortunate that the discussion circle's third proposal was not adopted. Article 226 procedure would be more efficient if the Commission could record the infringement by a directly applicable decision instead of a reasoned opinion that is binding only if ratified by the ECJ after a long judicial procedure. This power would certainly not be without precedent, since the Commission could previously find a breach of EC law by way of a decision under Article 88 of the expired Treaty Establishing the European Coal and Steel Community,<sup>54</sup> or the Commission could presently find a breach under the EC Treaty on a sectoral basis, such as with State aid or competition law.

#### B. Other Reform Proposals: Deadlines, Time-Limits, Presumed Administrative Action, and Committees

Rules that guarantee individual rights and criteria that improve efficacy in other areas of Community administration and domestic administration could very well be extended to infringement proceedings. The following aspects of Article 226 could also be improved.

##### 1. Maximum Period of Time for the Commission's Action

Clear deadlines are generally imposed on national administrations, improving their efficiency. The same method should be adopted for the Commission.

As previously noted, the Commission has already accepted a maximum time-limit.<sup>55</sup> Within one year of receiving an individual complaint, the Commission must decide whether to issue a formal notice and commence an Article 226 proceeding. Although the Commission has the discretion not to initiate an infringement procedure, the discretion cannot be arbitrary such that it leaves the complainant defenseless. Consequently, if an unreasonable period of time elapses without action, individuals should be entitled to sue the Commission in the ECJ for an order forcing the Commission to act. To bring such an action, the individual would need a sufficient and specific interest and would need to show that there was no other equally convenient remedy.<sup>56</sup> Moving forward to the decision to bring a legal action in the ECJ, the maximum period should be calculated by taking into account the time that Member States take to answer the Commission's formal notices and reasoned opinions.

Alternatively, any delay of the Commission can be considered a case of maladministration appropriate for an inquiry by the European Ombudsman.<sup>57</sup> In fact, delay

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54. Apr. 18, 1951, 261 U.N.T.S. 140.

55. See *supra* text accompanying notes 28-30.

56. These are the conditions required in the United Kingdom for the legal instrument of a "mandamus." With this instrument, a public body can be required to exercise its discretion according to law and to carry out its duties accordingly. The equivalent in the EU would imply that the Commission has a legal duty to pursue infringements of EC law, which is not the case at present under the existing case law.

57. See EC TREATY art. 195.

constitutes one form of maladministration overseen by ombudsmen in some national systems.<sup>58</sup>

## 2. Limitation Periods and Prescription

The principle of legal certainty also entails that infringement proceedings be limited to a maximum period of time from the moment at which the suspected breach of EC law was committed. In other words, infringement proceedings should not be initiated if they concern acts and events that occurred many years ago and that no longer have any effect. Similarly, the Commission should not require Member States to pursue infringements on their territories if they occurred before a predetermined date. A statute of limitations would guarantee the fairness of the whole system. Five years would appear to be a reasonable period. In Article 18 of the first draft of the *Proposal for a Regulation of Procedures on State Aid*,<sup>59</sup> the Commission suggested a period of ten years as a limit for exercising its powers. This provision, however, was withdrawn in the final version.

## 3. The Commission's Power to Impose Deadlines on Member States' Actions

The right to be heard implies that any deadlines must give Member States sufficient time to present available defenses, to consult the central, regional, or local public entities involved, to coordinate the different parties involved, and to challenge or refute every piece of evidence presented by the Commission. The deadlines should differ for responses to a formal notice and responses to a reasoned opinion. One issue is the time required to answer a formal notice, which usually involves simply a discussion of law and facts. Another issue is the time necessary to comply with a reasoned opinion, which usually requires a change in the factual and legal situation in a Member State. The response time for reasoned opinions therefore will depend on the extent and complexity of the changes needed to achieve compliance. However, since the Commission is not required to indicate what steps the Member State concerned must take to eliminate the alleged breach of Community law, it does not usually take into account the need to lay down different deadlines depending on the circumstances. Furthermore, sometimes the Commission lacks information on the difficulties that the Member State concerned may encounter in putting an end to an infringement<sup>60</sup> or on the alternative means of correcting infringements.<sup>61</sup>

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58. The Parliamentary Commissioner in the United Kingdom is one example of an ombudsman whose mandate extends to delay. Maladministration has been defined in Britain as covering "bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on." WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 89 n.97 (7th ed. 1994) (emphasis added).

59. 1998 O.J. (C 116) 13; see J. R. Keppenne, *Révolution dans le système communautaire de contrôle des aides d'Etat*, 2 *REVUE DU MARCHÉ UNIQUE EUROPÉENNE* 125 (1998).

60. See, e.g., Case 85/85, *Commission v. Belgium*, 1986 E.C.R. 1149, 1164, para. 9 (considering arguments by the Belgian government alleging the considerable autonomy that Belgian municipalities enjoy in the area of concern); Case 74/82, *Commission v. Ireland*, 1984 E.C.R. 317, 338, para. 12 (finding it unreasonable to allow a Member State only five days to amend a piece of legislation that had been in force for more than forty years).

61. Case C-247/89, *Commission v. Portugal*, 1991 E.C.R. I-3659, I-3688, para. 20, I-3694.

In order to cope with some of these problems, the following approach is suggested. The Commission should ask the respondent Member State three questions in the reasoned opinion: (1) whether it agrees with the Commission's finding of an infringement in the reasoned opinion; (2) how much time the Member State considers to be necessary to take the steps to comply with it; and (3) what reasons would make faster compliance impossible.

Only a short period of time, such as one month, would have to be afforded to the Member State to reply to these three simple questions. If the Member State did not concede that it was in breach or if it failed to answer, the Commission would be free to bring the matter to the ECJ. If the Member State conceded a breach, then the negotiation between the Commission and the Member State could focus on the kind of measures to be taken or the time foreseen by the Member State as necessary for the adoption of those measures. In the latter case, where the dispute was narrowed to the remedial measures to be taken, the procedure before the ECJ could be notably abridged.

These questions and answers would focus the dispute on the actual points of contention before the matter went to the ECJ. It would also give the Member States the opportunity to know early, at the administrative phase, whether the measures they intended to adopt were appropriate according to the Commission. This proposal is fully in agreement with the Commission's legal duties: checking and deciding whether the measures taken by a Member State to comply with a judgment of the ECJ are sufficient. Indeed, when the characteristics of the remedial measures incumbent upon Member States are sufficiently clear, this phase would give the Commission an opportunity to remind the Member State of their duties.<sup>62</sup>

#### 4. The Uses of Presumptions in the Face of Administrative Silence (*Silenzio-accolgimento*)

*Silenzio-accoglimento*, an administrative law doctrine employed in civil law countries, could be used against foot-dragging Member States to further expedite Article 226 proceedings. The problem of unreasonable administrative delay has been dealt with differently in common law countries and in countries of *droit administratif*.<sup>63</sup> In common law countries, the legal response focuses on judicial remedies such as the "mandamus," the injunction, and the principle of due process of law. On the other hand, in France, for example, the courts require a *décision préalable* of the administration for a judicial action to be brought against it. This in turn forces the French legislator to create statutory presumptions yielding a decision after a certain

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62. For example, if a measure, whether legislative or administrative, is unlawful, the State must remove or repeal that measure because it is not enough to cease to apply it. Mere administrative practices that may be altered at the will of the national authorities do not constitute proper transposition of a directive.

63. For a detailed analysis of the situation in the different countries and the history of the problem, see Giorgio Lombardi, *Il silenzio della pubblica amministrazione (Profili comparatistici e spunti problematici)*, in *IL SILENZIO DELLA PUBBLICA AMMINISTRAZIONE: ASPETTI SOSTANZIALI E PROCESSUALI* 79 (1985). For a more concrete analysis of the common law countries, see Giorgio Recchia, *Il silenzio: profili comparatistici (nei Paesi di Common Law)*, in *IL SILENZIO DELLA PUBBLICA AMMINISTRAZIONE: ASPETTI SOSTANZIALI E PROCESSUALI* 109 (1985).

elapse of time, ensuring that the administration will not escape judicial control by failing to act.<sup>64</sup> For instance, if a French citizen applies for a permit and does not receive a response within a statutory period, the law will specify the consequences—whether the permit is “presumed” granted or denied—and the presumed grant or denial will then be amenable to judicial review.

The general rule among the countries of *droit administratif* is that in the case of inaction, the presumed administrative decision is negative, or, in other words, it denies what is requested. Sometimes, however, such a silence implies an affirmative decision, for example, by granting a right. This outcome is a clear guarantee for the individuals holding those rights.<sup>65</sup>

In Community law, there are some instances, including infringement procedures, in which the Commission must act under precise deadlines. If the Commission does not respect these time limits, the submitted agreement or project is presumed legal. This is the principle of *qui tacet consentire videtur*.<sup>66</sup>

*Silenzio-accogliamento* could also be brought into Article 226. This is a fairly radical but necessary proposal. As a counterweight to the more stringent timetables suggested above for the Commission, the Member States should accept certain negative consequences for their lack of response. As matters currently stand, Member States do not suffer any adverse consequences if they fail to answer the Commission’s formal notice and reasoned opinion. Persistent and deliberate failure to answer could have two different ramifications: the tougher option would be a presumption of Member State guilt, and the more moderate option would be a reduction in the amount of time available to a Member State to respond in subsequent procedural phases.

##### 5. The Need for an Advisory Committee

As explained above, the European Convention did not adopt the recommendation that the Commission be given the power to find infringements through the simple and relatively speedy legal instrument of a decision. Member States might be ready to reinforce the powers of the Commission if their roles were also reinforced. The Commission has the power to remedy infringements of EC law by adopting decisions in other areas, but Member States generally require that they be formally consulted before the Commission may adopt the decision. Member State participation usually takes place in the form of an “Advisory Committee.” The first and clearest example is in competition policy under the Advisory Committee on Restrictive Practices and Monopolies, which has been imitated in most other policy areas to produce committees like the Advisory Committee on Air Transportation Policy and the Fund Committee on Clearance of Accounts. In fact, the ideal of the Commission as an independent and autonomous enforcement agent under Article 226 has always been at odds with

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64. See GEORGES VEDEL & PIERRE DELVOLVÉ, *DROIT ADMINISTRATIF* 258–59, 680–82 (1984) (calling that kind of decision “*décision implicite de rejet*”). In Spanish, it is called “*silencio negativo*.”

65. On the different nature and justification of the two kinds of administrative inaction, see ERNESTO GARCÍA-TREVIJANO GARNICA, *EL SILENCIO ADMINISTRATIVO EN EL DERECHO ESPAÑOL* 68 (1990).

66. Consider, for example, cases in competition policy and State aid procedures. See GIL IBÁÑEZ, *ADMINISTRATIVE SUPERVISION*, *supra* note 3, 182, 189–91.



the political reality of the need for input and support from the Member States. One example of this phenomenon is the regular meeting of the heads of the Commissioners' cabinets.

The results of the European Convention show that Member States are not ready to reinforce the powers of the Commission without also reinforcing their participation in these powers. To address the need for Member State participation, an Advisory Committee should be set up for infringements. This Committee would also enable Member States to monitor the situation in other Member States and provide a forum for resolving some infringements through cooperative rather than adversarial means. The Commission, however, would have to take care to avoid being captured by national governments.

## V

### A SPECIAL CASE: HOW TO ADDRESS BREACHES COMMITTED BY REGIONS OR STATES WITHIN A FEDERAL SYSTEM

In the United States, there is considerable experience with direct relations between federal and local governments. For example, federal authorities have used certain types of project grants to bypass the states and to deal directly with specific localities and even with non-governmental bodies. Furthermore, the U.S. federal government supplies direct aid to local communities, primarily in the fields of public works and education.<sup>67</sup>

In the Community, some Council regulations allow for direct relations between the Commission and regional administrations. This type of administration, however, is still of a very limited nature.<sup>68</sup>

As for infringements of EC law, the ECJ holds a Member State liable under Article 226 irrespective of the State agency responsible for the alleged failure and even in the case of constitutionally independent institutions.<sup>69</sup> The fact that a national constitution renders the parliament or the regions autonomous of the central government does not preclude Member State liability. This legal rule is based on the principle of international law, according to which only Member States are members of the international legal order. Only States have legal personality, and only they can have legal representation in international organizations. This reasoning, however, does not resolve the potential contradiction between competences of the central government and competences of the regional authorities. The case law seeks to avoid the problem of

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67. DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 73, 80–83 (2d ed. 1972). In spite of some important differences between federal systems and the Community, the former still remains a powerful model of comparison. Cf. Jena Paul Jacqué, *Cours général de droit communautaire*, in 1 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT EUROPEEN* 265 (1990).

68. See, e.g., Council Regulation (EEC) No. 792/93 of 30 March 1993 Establishing a Cohesive Financial Instrument, 1993 O.J. (L 79) 74, art. 8, para. 4, art. 9, para. 6 (noting that it is the Member State that must allow this direct relation between the regions and the Commission); Council Regulation (EEC) No. 2088/85 of 23 July 1985 Concerning the Integrated Mediterranean Programmes, 1985 O.J. (L 197) 1, art. 16 (no longer in force).

69. Case 77/69, *Commission v. Belgium*, 1970 E.C.R. 237, 243, para. 15; see also Case 199/85, *Commission v. Italy*, 1987 E.C.R. 1039 (holding the State responsible for breaches committed by municipal authorities).

domestic allocation of competencies between central government and regional authorities through the international law principle of Member State responsibility.<sup>70</sup> Yet, as previously noted, the dilemma remains: How should the monopoly of international representation, vested in central governments by national constitutions and recognized under international law, be reconciled with the existence of regional authorities that are responsible for certain specific competences under some of those very same national constitutions?<sup>71</sup>

The ECJ has quite strictly applied the liability principle. The question whether a Member State can be held liable for regional infringements, even if it takes measures to stop or avoid the regional body's action, is still an open one. In a case brought by the Commission against Italy, the Court addressed this matter, albeit somewhat obliquely.<sup>72</sup> The ECJ dismissed the Commission's suit because the grounds for finding an infringement in the administrative phase were different from the grounds for the infringement action in the Court. In the reasoned opinion produced during the administrative phase, the Commission considered that the Member State had failed to comply with its obligations because the provincial administration had acted illegally. Before the Court, the Commission argued that Italy had failed to comply with its obligations by allowing a provincial administration to act illegally and by not taking steps to preclude the effects thereof. Nonetheless, in the last paragraph of the decision, the ECJ suggested it was not very interested in the difference between Member States that take no steps to prevent local infringements and those that do. Instead, according to the ECJ, proof of the regional body's breach is enough to hold the Member States responsible vis-à-vis the Community.<sup>73</sup> This comes close to creating vicarious liability of Member States for their regions.

Another approach to Member State liability is warranted when one considers that Community law constitutes a new legal order of international law for which the States have limited their sovereign rights, applying the new legal order not only to Member States but also to their citizens.<sup>74</sup> If Community law differs from international law by making individuals and other legal persons the direct subjects of its rules, then as a matter of law, although perhaps not politics, the same conclusion should apply to local and regional entities that enjoy political autonomy.<sup>75</sup> When a local or regional authority issues an illegal decision, perhaps by undertaking an illegal construction project, it is usually expected that any national administrative or judicial action will be taken di-

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70. See Oriol Casanovas y La Rosa, *La acción exterior de las Comunidades Autónomas y su participación en la celebración de Tratados internacionales*, in 1 LA ACCIÓN EXTERIOR Y COMUNITARIA DE LOS LÄNDER, REGIONES, CANTONES Y COMUNIDADES AUTÓNOMAS 61 (Manuel Perez González ed., 1994).

71. Cf. Vlad Constantinesco, *Comunidades europeas, Estados, regiones: el impacto de las estructuras descentralizadas o federales del Estado en la construcción comunitaria* 16 REVISTA DE INSTITUCIONES EUROPEAS 13 (1989).

72. Case C-296/92, *Commission v. Italy*, 1994 E.C.R. I-1.

73. See *id.* at I-12 & I-13, paras. 12–13.

74. Cf. Case 26/62, *Van Gend en Loos v. Netherlands Fiscal Administration*, 1963 E.C.R. 1, 12.

75. In this sense, P. Pescatore has interpreted *Van Gend en Loos v. Netherlands Fiscal Administration* as the consequence of an understanding of the European Community as “Communauté non seulement d'Etats, mais également de peuples et de personnes.” P. Pescatore, *Aspects judiciaires de l'acquis communautaire* 17 RTDE 636 (1981).

rectly against that body and not against the central ministry or secretary of state, even though the latter may have overall responsibility for that area. If this is true at the national level, it is not clear why it should be different for the Community.<sup>76</sup>

Furthermore, the direct dealing between the Commission and the regions would sometimes be more efficient for dealing with infringements. For example, in the public procurement sector, an action would be more effective if it were taken against the local or regional contract-awarding body than if it were addressed to the Member State.<sup>77</sup> Indeed, Article Three of the Public Procurement Directive already obliges the Commission to notify not only the Member State but also the contracting authority of “the reasons which have led it to conclude that a clear and manifest infringement has been committed.”<sup>78</sup> In fact, however, central governments often have few means of controlling regional bodies even though they are directly responsible for the policy area and the infringements.<sup>79</sup> In certain cases, allowing direct contact between the Commission and the regional authorities would be a more efficient and more realistic approach to the problem of compliance.

There is yet another reason for modifying the current system of Member State liability. The same event can produce two different kinds of infringement, one at the national level and another at the regional level, both of which would merit legal treatment. For example, in *Fratelli Costanzo v. Comune d. Milano*,<sup>80</sup> the Italian national authorities failed to transpose Directive 71/305 concerning the coordination of procedures for the award of public works contracts, and the commune of Milan failed to apply directly the provisions of Community law.<sup>81</sup> Two different duties exist: the duty of the State to transpose the directive, and the duty of other public authorities to apply the directly effective provisions of the non-transposed directive, disregarding the national law still in force. In an infringement action, the Member State is poorly positioned to defend the second form of noncompliance. Furthermore, the regions are placed in the odd position of having duties under Community law yet not being held legally liable for infringing those duties. They are faced with the dilemma of choosing between the national law still in force and the unconditional provisions of a direc-

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76. Cf. Richard Macrory, *The Enforcement of Community Environmental Laws: Some Critical Issues*, 29 COMMON MKT. L. REV. 347, 356–57 (1992).

77. Cf. ANDREW COX, *THE SINGLE MARKET RULES AND THE ENFORCEMENT REGIME AFTER 1992*, at 242 (1993).

78. Council Directive 89/665/EEC of 21 December 1989 on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts, 1989 O.J. (L 395) 33.

79. For a more detailed analysis of the difficulties of central States in enforcing EC law on their regions, see ROBERT POCHMARSKI, *SUBSTITUTIVE POWERS VIS-À-VIS REGIONS: A MEANS TO IMPROVE COMPLIANCE WITH EUROPEAN LAW? THE CASES OF GERMANY, ITALY, AND AUSTRIA* (1995). See also DAVID ORDÓÑEZ SOLÍS, *LA EJECUCIÓN DEL DERECHO COMUNITARIO EN ESPAÑA* 177–99, 435–64 (1994).

80. Case 103/88, *Fratelli Costanzo v. Comune d. Milano*, 1989 E.C.R. 1839.

81. *Id.*, 1870–71, paras. 30–31. In a later case, the ECJ disregarded an argument put forward by Germany that public authorities can only be blamed for not applying Community law with direct effect when they fail to account for the legal position of individuals protected by the directive. Case C-431/92, *Commission v. Germany*, 1995 E.C.R. I-2189, I-2227. According to the Court, the obligation of public authorities to comply with those provisions of an unimplemented directive which are unconditional and sufficiently precise is quite separate from the question whether individuals may rely on those provisions. *Id.* at I-2220, para. 24, I-2221, para. 26.

tive that has not been implemented. A choice in favor of the directive implies bypassing the role of national parliaments if that directive must be implemented by statute.<sup>82</sup> Indeed, the loyalty clause of EC Treaty Article Ten might require the regions to communicate directly to the Commission any information on the application of directly effective provisions of a directive not properly transposed by the central government.<sup>83</sup>

The tension between regional authority and Member State liability could be attenuated through a procedure of “decentralization of liability.” Member States would be, in principle, responsible for resolving all the infringements of Community law on their territory. However, if the violation continued after a predetermined period, and if the Commission considered resolution of the problem to be important for the uniform application of Community law, then the Commission could act directly against the local or regional authority responsible for the violation, provided the Member State concerned agreed. With this procedure the delicate internal division of powers between the central and regional administrations would be respected. Moreover, the decentralization of liability would have several advantages. First, it might increase the efficiency of negotiations that usually take place between the Commission and the Member States following an infringement. Second, it might give more power to the sanctions available under Article 228, paragraph two, by making clear that the entity directly responsible for the infringement—even if the entity is a local authority—will be liable for the fine.

This proposal would probably require amendments to Articles 226 and 228. However, it is fully consistent with other trends in the Community legal system. Most regions, if they are directly affected, can already challenge the legality of a piece of European legislation under EC Treaty Article 230 as well as the failure of an institution of the Community to act under EC Treaty Article 232.<sup>84</sup>

## VI

### DOES THE EUROPEAN UNION REALLY HAVE AN IMPLEMENTATION PROBLEM?

#### A. Background

It has been argued that data is insufficient to support the claim of an implementation problem in EC law. According to a recent study, when the growing body of European legislation and the expanding number of Member States are taken into consideration, “the level of non-compliance appears to be rather modest and has remained

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82. This conflict is patent in Case C-431/92, *Commission v. Germany*, 1995 E.C.R. I-2189, especially in the Advocate-General’s Opinion of Mr. Elmer, *id.*, I-2199, para. 12. Another possible area of conflict between national and regional authorities on matters of Community law is when a directive is transposed into national law by both the national and the regional governments but pursuant to different interpretations of the directive.

83. Bart Hessel & Kamiel Mortelmans, *Decentralized Government and Community Law: Conflicting Institutional Developments?* 30 CML REV. 935–36 (1993). Hessel and Mortelmans have suggested that the obligation of regional governments to transfer information to the Commission could be counterbalanced by a parallel obligation to communicate the same information at the same time to national authorities. *See id.*

84. *See* Case C-107/91, *Empresa Nacional de Uranio SA v. Commission*, 1993 E.C.R. I-599.

stable.”<sup>85</sup> However, comprehensive research on the real degree of noncompliance across all policy areas is still lacking. Indeed, European law may not be an exception to the normal problems that the application of law encounters in other environments. The implementation problem of EC law may be simply the implementation problem of national law. In fact, there is probably no difference in the attitude among European individuals and businesses towards compliance with European law as opposed to compliance with national law.<sup>86</sup>

European law is nevertheless unique compared to other legal systems, and the problem of compliance is characterized by certain special features. First, based on the declarations of the most important Community institutions, it would appear that the survival of the Community depends largely on the degree of practical effectiveness of Community law. This can be traced to the Community’s lack of legitimacy and tradition and also to the purposive nature of the Community as a political order. The failure to fulfill the stated objectives could give rise to doubts about the real need for the Community.

A second difference between Community and national legal orders is the far more complex inter-linking between different levels of administrations of the Community. Community law is overseen and enforced by numerous national administrations with different degrees of administrative capacity, financial resources, legal and social cultures, and territorial structures. Some differences can be eliminated, but others must be respected and taken into account. The central question is how much diversity can the system tolerate while still being considered efficient.

The following subparts explore the above themes in more detail.

## B. The Role of Administrations and the Lack of Capacity

Today’s complex societies rely on administrative enforcement of government legislation, not on judicial application of the law in courts. Yet the Commission and national administration have limited human and financial resources.

The Community’s predominant administrative model—indirect application of Community law by national administrations—means that enforcement turns on the financial means and legal remedies available in the legal system of each Member State, regardless of whether they are effective. Differential enforcement is also a function of the lack of capacity to use available legal remedies to ensure proper application of EC law. Some administrations are reluctant to enforce EC law, whereas others are quite

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85. Tanja A. Börzel, *Guarding the Treaty: the Compliance Strategies of the European Commission*, in *THE STATE OF EUROPEAN UNION: LAW, POLITICS AND SOCIETY* 198 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003); see also Tanja A. Börzel, *Non-Compliance in the European Union: Pathology or Statistical Artifact?* 8 *J. EUR. PUB. POL’Y* 803 (2001).

86. The question of why individuals obey laws has been the subject of very intensive study not only by lawyers but also by philosophers, yielding little agreement. See, e.g., H. L. A. HART, *THE CONCEPT OF LAW* 50 (1972) (asserting habit of obedience); MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 324 (1964) (suggesting a comprehensive approach); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 217 (1976) (suggesting blind obedience). See generally Sally Lloyd-Bostock, *Explaining Compliance with Imposed Law*, in *THE IMPOSITION OF LAW* 9 (S. Burman & B. Harrell-Bond eds., 1979).

eager because of peer pressure from regulators in other Member States and the surveillance of the Commission and interest groups.

In sum, there is a gap between myth and reality. The myth is full enforcement. The reality is that a certain degree of noncompliance occurs in any legal order. With few exceptions, the objective of one hundred percent compliance is utopian. The real problem is determining what level of noncompliance the system can tolerate and still be considered useful, effective, and legitimate.

#### C. The Problem of Lack of Will to Supervise and Enforce EC Law

Patterns of compliance and noncompliance suggest that enforcement is not simply a problem of capacity but also a question of political will to apply Community law in all cases. For example, administrations are often more effective in fighting fraud and tax evasion when the monies go to or come from the national budgets rather than the Community budget, notwithstanding that both budgets are mainly the result of national taxes such as VAT. Furthermore, the task of overseeing and enforcing EC law might be characterized as an impossible job. National administrations face resistance from those sectors affected by EC law, but they also come under pressure from the Commission and the sectors favored by the EC law.

In some Member States enforcement varies according to policy area or according to some other special characteristic such as a federal or decentralized territorial model, making it more difficult for those States to comply with certain aspects of EC law.<sup>87</sup> Furthermore, some countries with a national culture of respecting rules will nonetheless follow a strategy of deliberate noncompliance with Community law.

#### D. A Suitable EC Rule for Enforcement

The quality of the content of a rule influences the quality of its enforcement. The concept of enforcement is only applicable to those cases in which the rule is of "adequate" quality: it is a work of good draftsmanship, it contains realistic objectives, and it is based on sound scientific knowledge. Otherwise, the lack of enforcement is an understandable consequence of the rule's inferior caliber. In other words, according to G. Majone and A. Wildavsky:

If both the decision and the execution are good, then evidently there is no problem; if both are bad, then we can only be grateful that poor decisions are made ineffective by worse actions. If the decision is good but the execution is bad, then the problem can only be one of control (over ineptitude, laziness, or whatever) in connecting premises to conclusions.<sup>88</sup>

In some cases, laws are drafted, never to be applied. It is relatively easy for the legislator to adopt laws when induced by social pressure. Yet the laws may be unsuitable for application because of their length, inadequate legal techniques, demanding

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87. For example, Germany can be considered a federal country when, due to such a characteristic, more effort must be made in certain cases, such as the transposition of EC directives.

88. G. Majone & A. Wildavsky, *Implementation as Evolution*, 2 POL'Y STUD. REV. ANN. 105, 115 (1978).

and intricate requirements, or confused nature.<sup>89</sup> Confusion is the best way of undermining enforcement.

Rules should be drafted taking into account their future application. European laws might include a separate section, which could be called “instructions to enforcers” and which could contain advice on the better implementation and application of the rule, together with the justification for the rule. Furthermore, actual enforcers do not generally participate in the adoption of the rules. It would be advisable to integrate them in that process and obtain their clear commitment to the enforcement of the European rules.

Finally, the Commission has taken action to improve the quality of European legislation and regulation. This includes two communications: European Governance: Better Lawmaking;<sup>90</sup> and the Action Plan “Simplifying and Improving the Regulatory Environment.”<sup>91</sup>

#### E. Confusing EC Terminology

EC law is made by scholars, judges, and officials who write in different languages and come from different legal cultures. The confusion over language and the meaning of words perpetuates underlying differences in what is considered legal and illegal. This paper, for example, is written in English by a non-native speaker, like many other articles that appear in reviews, periodicals, and books on Community law.

In order to improve the quality of the discussion, it is critical to clarify terms, concepts, and ideas like administration, executive power, supervision, implementation, application, and enforcement. The language in which this is likely to occur is English: English is becoming the most widely used language in EC law and hence a specialized tool with its own life and development. Turning to the subject of this Article, supervision and enforcement should be treated as two separate but related concepts. Supervision is the act of checking. Only if the results of this verification are negative is enforcement summoned to ensure that the rules are properly and truly applied. In this definition, enforcement is not reduced to the classic meaning of compulsion or coercion but also covers different strategies of compliance, such as conciliation and bargaining.

## VII

### CONCLUSION

There is significant room for improvement in EC Treaty Article 226, notwithstanding the recent changes occasioned by criticism from the European Ombudsman. When rules are drafted, enforcement should not be forgotten. Although full enforce-

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89. See, e.g., Ernest Feder, *Counter Reform*, reprinted in *THE POLITICAL ECONOMY OF LAW* 528 (Yash Ghai et al. eds., 1987). Feder argues that politicians deliberately adopted “bad” laws to make land reform in Latin America a complete failure. He gives the example of the Peruvian law reform, which included 250 articles numbering about 80 pages and which required implementing regulations that ultimately contained over 500 articles. *Id.*

90. COM(02)275 final.

91. COM(02)278 final.

ment is unrealistic, the substance of rules must always be checked to ensure that application will be effective on the groundlevel.

The lack of formal procedural rules to discipline Article 226 proceedings is also problematic. In spite of the foundational role of Article 226 in bringing non-compliant Member States in line with European law, the Treaty text—a mere two paragraphs—is the only law that regulates this procedure.<sup>92</sup>

The Commission's soft law and internal rules that have stepped in to fill the gap are inadequate.<sup>93</sup> Notwithstanding that the Commission consults Member States before adopting its rules, its soft law may alter the equilibrium of powers set down in the EC Treaty between the Commission and Member States. Furthermore, this approach is not conducive to developing general and neutral procedural rules. Additionally, the Commission reacts to the case law of the ECJ, rather than anticipating and addressing problems in a comprehensive and logical fashion.

Moreover, Article 226 procedure is not up to the task of resolving urgent breaches. The administrative phase simply takes too long, and once the Commission issues a reasoned decision, it is often necessary to obtain a judgment from the Court. As discussed above, the discussion circle of the ECJ proposed, as part of the European Convention, to grant the Commission the power to make infringement findings via a decision. It is unfortunate that this was not incorporated in the Constitutional Treaty. The power would render the Commission more effective and would be consistent with the general trend in other areas, such as competition, in which the Commission has enforcement powers. An additional improvement would be to allow the Commission, in a second decision, to impose financial sanctions if the Member State failed to comply with the first decision. At present, under Article 228, only the Court has this power. To protect against abuses of the decision powers, the criteria and possible amounts of lump sums and penalties would need to be clearly fixed in a European law according to the co-decision procedure and not by a simple Commission Communication, as is presently the case. This approach would be both more efficient and more loyal to the principle of legal certainty.

In conclusion, further thought is needed to develop a model for European administrative infringement proceedings. Legally, this might take the form of an administrative enforcement act.<sup>94</sup> The specific roles of the Commission and national administrations in the different infringement procedures should be clarified. Coherence among infringement proceedings in different areas of European law should be guaranteed, and the administrative tools used successfully in one area should be extended to all

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92. Article 226 does not expressly call for any further legal development. The lack of a specific legal basis has been given as a justification for the failure to develop legal rules to regulate Article 226 proceedings. However, Article 308 would provide an adequate legal basis.

93. Soft law instruments include the Commission Communication to the European Parliament and European Ombudsman on Relations with the Complainant in Respect of Infringements of Community Law, 2002 O.J. (C 244) 5, the Commission Communication on Better Monitoring of the Application of Community Law, COM(02)725 final, and the Commission's internal rules of proceedings which are not published and whose legal force is unclear. Aside from these rules, only the case law of the ECJ has resolved some of the problems of the daily functioning of this procedure.

94. EC TREATY art. 308 offers a clear legal basis for an administrative enforcement act.



other areas. This list of procedural tools includes the following: procedural rights for citizens and businesses, limitation periods and prescription, maximum periods of time for the Commission to act, deadlines for Member States' responses, presumed administrative action when Member States fail to respond to the Commission, and direct prosecution of regions that commit breaches.

A future administrative enforcement act should be guided by the principle that specific procedure should be tailored to specific situations, not specific policy areas.<sup>95</sup> For instance, the need for speedy action or the possibility of irreparable damages should produce similar consequences in all infringement proceedings, regardless of whether they relate to agricultural policy or competition procedures. The act should also clearly specify the circumstances that would warrant departing from the general model, for example, by setting out the conditions for granting the powers to the Commission to resolve infringements via decisions.

Whatever its shape, a European administrative enforcement act is the next step in creating an EU-wide system of effective administrative oversight and enforcement.

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95. See GIL IBÁÑEZ, ADMINISTRATIVE SUPERVISION, *supra* note 3, at 310–24.