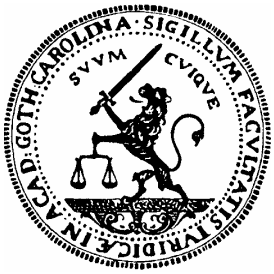

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The Effectiveness of the Enforcement Procedure in the European Community

Master thesis
30 credits

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Contents

Summary

The Community relies upon the Member States to execute their obligations. When they fail to do this, there must be a system of enforcement. The topic of this master thesis deals with the main Community enforcement procedure found in Art 226-228 EC, evaluating its state of effectiveness and its development; making suggestions of possible improvements.

The Treaty of Maastricht introduced an amendment in 1992 to the procedure that made it possible to resort to financial sanctions when Member States fail to fulfil their obligations. Even though the number of cases where the sanctions have been put to use is relatively small, an increase in the procedure's effectiveness can be seen. Nevertheless, there are still some problematic aspects left to deal with, for example, how the financial sanctions are used. In order to take advantage of the full effect of Art 228 and enhance the efficiency of the enforcement procedure to the uttermost, as well as to combat late compliance by Member States, it is crucial that the lump sum payment is applied systematically in every case when a Member State continues an infringement past the deadline laid down in the reasoned opinion. However, when it comes to infringements where the Member State is knowingly committing a breach in order to protect a national interest, it is doubtful whether the financial sanctions would have much impact. This is especially true since there is no collection mechanism – another problematic issue. Furthermore, in order to combat the strain caused by the enlargement of the Union, the effectiveness of the main Community enforcement procedure should be done through increasing the openness of the different stages of the procedure since an increase in publicity would lead to quicker compliance through the 'shame-factor'. Additionally, it is crucial that the length of the infringement procedure is shortened by keeping tighter deadlines; removing the Advocate General's opinion in simpler cases; and even by scrapping the first informal letter that is not mentioned in the Treaty.

The Lisbon Treaty includes some welcomed changes to the further enhancement of the effectiveness of the enforcement procedure, even though limited in its practical use. By including the ability to impose a financial sanction under the first infringement procedure and by scrapping the reasoned opinion in the second infringement procedure, it will enhance the deterrent effect and cut the length of the procedures. The limitations of the changes introduced in the Lisbon Treaty are, however, a sign of the Member States' desire not to make the effectiveness too effective. If the protection of important national interests is threatened it could, in a worst-case scenario, lead to Member States leaving the Community. Therefore there is a limit to just how effective the main Community enforcement procedure should become.

Sammanfattning

Den Europeiska Unionen är beroende av att medlemsstaterna uppfyller sina förpliktelser enligt Art 10 EG. När de inte gör det måste det finnas ett effektivt verkställighetsförfarande. Ämnet för detta examensarbete är den Europeiska gemenskapens huvudsakliga verkställighetsförfarande i Art 226-228 EG, och har som syfte att utvärdera dess effektivitet och dess utveckling samt att föreslå möjliga förbättringar.

Maastrichtfördraget introducerade möjligheten att använda ekonomiska sanktioner mot medlemsstater som överträder gemenskaphetsreglerna. Trots att antalet rättsfall där sanktioner har använts är relativt få är förbättringen av dess effektivitet ändå märkbar. Å andra sidan, finns det rum för ytterligare förbättring av proceduren, t.ex. genom att använda standardbeloppet som sanktion på ett systematiskt sätt i varje fall där en medlemsstat fortsätter att bryta mot reglerna efter att deadlinen satt i det motiverade yttrandet from kommissionen har passerat. På så sätt skulle Art 228:s fulla potential utnyttjas och verkställighetsförfarandets effektivitet förbättras genom att förhindra att medlemsstater uppfyller sina förpliktelser allt för sent i proceduren utan att känna av några återverkningar. I vissa situationer dock, där medlemsstaterna bryter mot reglerna för att skydda ett nationellt intresse, är effekten av de ekonomiska sanktionera troligtvis minimal. Framförallt då det saknas en insamlingsmekanism av sanktioner. Den belastning som gemenskapens expandering innebär på verkställighetsförfarandet kunde avhjälpas i viss mån genom att göra processen mer offentlig då det skulle kunna innebära en större medgörlighet från medlemsstaternas sida då de i det flesta fall skulle vilja undvika dålig publicitet. Dessutom, att korta ner längden på processen genom att ha kortare deadlines, slopa generaladvokatens yttrande i enklare fall och genom att inte längre använda sig av det första informella brevet, som dessutom inte ens är nämnt i fördraget, skulle ytterligare kunna förbättra verkställighetsförfarandets effektivitet.

Ikraftträdande av Lissabonfördraget kommer att innebära vissa efterlängtade förbättringar, även om effekten i praktiken kommer att bli begränsad. Möjligheten att föreslå sanktioner redan i den första proceduren i domstolen och slopandet av det motiverande yttrandet från kommission i den andra proceduren kommer att dels öka den avskräckande effekten och dels kommer dess längd bli betydligt kortare. Begränsningarna av de gjorda ändringarna av verkställighetsförfarandet i Lissabonfördraget är ett tecken på att medlemsstaterna inte vill att förfarandet ska bli för effektivt. Om det blir omöjligt att skydda viktiga nationella intressen kan det i värsta fall innebära att medlemsstater lämnar gemenskapen. Det finns därför en gräns för hur effektivt verkställighetsförfarandet i den Europeiska gemenskapen kan bli utan att gemenskapens effektivitet blir lidande.

Preface

Firstly, I would like to thank Dr Niamh Nic Shuibhne of Edinburgh University, School of Law. Through her inspirational seminars I developed a great interest in the area of judicial protection in the European Community and which caused me to indulge in it further. Without these, this master thesis would not have come into being.

I would also like to thank my supervisor Xavier Groussot for his contribution of interesting aspects of the topic and the time he spent assisting me throughout my writing.

Finally, but not lastly, I would like to thank Neal Gruer, for his constant encouragement and unconditional support, and for hours of proof reading.

Abbreviations

Art	Article
AG	Advocate General
CFI	Court of First Instance
CMLRev	Common Market Review
EC	(Treaty Establishing the) European Community
ECJ	European Court of Justice
E.C.R.	European Court Reports
ECSC	The European Coal and Steal Community
EELR	European Environmental Law Review
ELJ	European Law Journal
ELRev	European Law Review
EU	European Union
JEPP	Journal of European Public Policy
MLR	Modern Law Review
NGO	Non-Governmental Organisation
OJ	Official Journal of the European Communities

1 Introduction

Without an effective means of enforcement within the European Community the establishment would crumble. The Community depends upon the Member States to execute their obligations of implementing Community rules on time and comply with Commission decisions and Court judgements. When they do not, there must be a system of enforcement. The main enforcement procedure within the Community can be found in Articles 226-228 EC.

With supervision by the Commission and the enforcement by the Court of Justice, the infringement procedure found in the European Union is unlike most equivalent procedures in other international organisations. Often the members of such organisations cannot be forced to comply with the rules of the organisation, and are left to resolve disputes amongst themselves.[1] Within the Community, all the Member States are subject to the jurisdiction of the Court without having to make an express declaration thereof, and there is no possibility of making any reservations to that requirement.[2]

The main actor in the enforcement procedure, besides the Member State under scrutiny and the European Court of Justice, is the Commission. The Commission is generally referred to as being the "Guardian of the Treaty" since it, according to Art 211 EC, bears the responsibility of ensuring that Community law is correctly applied. It is the Commission that investigates, negotiates and initiates the proceedings against the Member State in the case of an infringement of a Community provision, usually following a complaint.

The current main enforcement procedure in the Community is very similar to the enforcement procedure available at the initiation of the Community, when there were only six Member States. The Treaty of Maastricht did, however, introduce an amendment in 1992 to the procedure that made it possible to resort to financial sanctions when Member States fail to fulfil their obligations. Today, the Community has 27 Member States making a properly functional enforcement procedure even more important, as well as putting strain on the enforcement mechanism. However, the Lisbon Treaty, which has not yet entered into force, will entail a further moulding of the classic enforcement procedure.

[1] A. C. Evans, 'The Enforcement Procedure of Art 169 EEC: Commission Discretion', 4 *ELRev*. (1979) p. 443.
[2] A. Dashwood and R. White, 'Enforcement Actions Under Articles 169 and 170 EEC', 14 *ELRev.* (1989) p. 389.

1.1 Purpose and Delimitations

The objective of this thesis is to examine the enforcement procedure as it is today and it intends to determine whether or not the main Community enforcement procedure is an effective means of stopping Member State infringements. The goal is to present the procedure and how it has developed through the years in order to be able to highlight its problematic aspects and present some possible solutions or improvements for the future.

The objective will be achieved by focusing on the patterns of infringements; the role of the Commission and its wide discretion; the obligations of the Member States and the execution of the judgement by the Court of Justice.

One of the main focal points will be the amendment made to Art 228 through the Maastricht Treaty that made the imposition of financial sanctions possible. The use of the new sanctions by the Court and the Commission will be analysed in order to examine the extent to which the addition to the Article changed the main Community procedure and additionally, if the financial sanctions have unused potential of enhancing the effectiveness further. Also, the changes entailed by the Lisbon Treaty will be presented and analysed in order to determine its impact on the Community enforcement procedure.

The ambition of the author is to give an as well-rounded of an overview of the Community's main enforcement procedure as possible. Nevertheless, some aspects have been examined in more depth than others. Despite its importance, the discussion of the role of the complainant will not be addressed at any detail.

Furthermore, Art 227 EC, which makes it possible for one Member State to start an enforcement procedure against another Member State, will not be dwelled upon since its significance is outweighed by the two other Articles, evident from the small amount of case law available concerning Art 227 EC.

1.2 Method and Material

The thesis is based on a dogmatic method of traditional legal analysis, through which legal sources are described and analysed. The study of relevant case law of the European Court of Justice that builds upon the Treaty Articles 226-228, is where the thesis has its starting point. Furthermore, the review of doctrine in the form of academic articles and literature in the subject of enforcement has been used in order to draw conclusions of the effectiveness of the Community procedure in question. An additional source of information has been publications on the subject by the Community institutions.

1.3 Disposition

After the introduction, the thesis initially addresses the importance of having an enforcement procedure within such an organisation as the European Community, describing the roles of the actors to the procedure: the Commission, the Member State and the complainant. Additionally, the different types of infringements are categorised and exemplified.

Secondly, the procedure under Art 226 EC and its administrative and judicial phase are presented in the third chapter, as well as a brief description of Art 227 EC. Thirdly follows the fourth chapter about Art 228 EC, where the case law available so far will be presented in detail in order to outline the limits and possibilities of the financial sanctions. Fourthly, the analysis of the problematic aspects of the procedure as well as suggestions for possible improvements will be presented in the fifth chapter, where issues such as the role of the Commission, the use of Art 228 in practice and the length of the procedures will be addressed. Finally, my findings will be summarised in the conclusion.

2 The Importance of Enforcement

In order to function properly, effectiveness in application is crucial for any legal system. It is even more crucial for a decentralized legal system such as the European Community where implementation of Community legislation lies in the hands of the Member States. Without proper effectiveness, in the form of a functioning enforcement procedure, distortion of competition and a weakening of the internal market could occur[3] as well as a general weakening of the European Union as a whole. Additionally, the enlargement of the Community, now with 27 Member States has made the importance of such an effective enforcement procedure even more poignant.

Within the European Community the Commission is considered to be "The Guardian of the Treaty" and as such, is responsible for the enforcement of Community law (Art 211 EC). The Treaty gives the Commission the power to start the infringement procedure against any Member State that has not fulfilled its obligations under the Treaty.

Arts 226-228 set out the conditions for the main enforcement procedure in the Community against Member States. After the detection of an infringement, a procedure under Art 226 lead by the Commission can be initiated. The objective of the procedure is to reach compliance as quickly as possible. The procedure begins with an administrative phase, where the Commission tries to reach a settlement through negotiation. If unsuccessful, this phase is followed by a judicial phase before the European Court of Justice. The final result of the procedure under Art 226 is a judgement stating whether or not the Member State in question has fulfilled its obligations. In the event that the Member State does not comply with the judgement, recourse can be made to Art 228, under which a similar procedure can be initiated, with the difference being that if the Member State is found in non-compliance with the first judgement it can be the subject of financial sanctions.

For a long time the only tool the Commission had in its enforcement toolbox was a declaratory judgement from the European Court of Justice under Art 226 stating that the Member State had failed to fulfil its obligation under the Treaty. Such a judgement required the Member State, according to Art 228, to take the necessary steps to reach compliance. If theses steps were not taken the Commission was left with starting a second procedure that, once again, could only lead to a declaratory judgement. Needless to say the enforcement procedure was under heavy criticism[4] and it became obvious

[3] C. Harlow, 'Voices of Difference in a Plural Community', *Harvard Jean Monnet Working Paper* 03/00 (2000) p. 18.

[4] D. Chalmers *et al*, *European Union law: Text and materials*, (Cambridge University Press, Cambridge, 2006) p. 360.

that a change was necessary. The change came in Maastricht in 1992 with amendments to Art 228 EC, which made it possible for the Court to use financial sanctions against Member States that failed to comply with Art 226 judgements.

The primary source of statistics of the number of infringements is the annual report published by the Commission. However, since the number of infringement procedures depends heavily on the discretion of the Commission and its resources for pursuing suspected breaches, the statistics of the Commission must be reviewed with a certain amount of reservation. Nevertheless, these are still a valuable source of indication of the infringement trend.

Even though the situation of non-compliance in the Community has been described as a "black hole"[5] there are certain specific signs pointing to an infringement problem, such as the increase of complaints against Member States; the increase of detected infringements (even though between 2005 and 2006 there was a slight decrease: 2653 compared to 2518); and the increase of the number of infringement procedures.[6] The reasons behind the increase can be explained by several factors: better awareness by the citizens of their rights, the increase in the number of Member States and an increase in the volume of Community legislation.[7]

The expansion of the EU has made the importance of enforcement even more crucial and has at the same time put more strain on the enforcement mechanism. Suggestions of preventive measures, alternative dispute resolutions and focusing on specific types of breaches have been made in order to enhance the effectiveness of the procedure and will be further addressed later on.

The enforcement procedure under Art 226-228 EC may be the main one in the Community but is nevertheless not the only one. There are other infringement proceedings for specific breaches of Community law, for example State Aid (Art 88 EC) and Excessive deficit procedure (Art 104 EC).[8] These procedures will not be dealt with at any detail.

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[5] As quoted by C. W. A. Timmermans in, 'Judicial Protection Against the Member States: Articles 169 and 177 Revisited', in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration* (Dordrecht: Martinus Nijhoff, 1994) p. 393.
[6] *Ibid*., p. 394.
[7] R. Munoz, 'The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate', *Jean Monnet Working Paper* (2006) p. 8.
[8] See e.g. A. Ibánez, 'Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States', 6 2 *ELJ* (2000) p. 148.

2.1 The Obligations of the Member States

It could be said that compliance is a matter of choice by the Member States[9], since it is the Member States that are responsible for their own compliance. According to Art 10 EC the "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." The obligations on Member States stem from different sources: the Treaty; international agreements which the Community is a party to; regulations, directives and decisions; or by the general principles of law recognised by the Community.[10] This means, for example, that the Member States have an obligation to implement Community directives by their deadline date and to comply with Commission decisions and judgements issued by the Court of Justice. The responsibility additionally includes direct application of Community law, as well as the application of the laws implementing Community law.[11]

The duty under Art 10 is both positive and negative.[12] That means that breaches can consist not only of actions such as failure to notify implementation, partial or faulty implementation, or refusal to implement a measure; but also 'non-actions' such as continuing to maintain application of national measures or procedures that are contrary to Community law.[13]

When the obligations are not fulfilled the Commission can prosecute the non-compliant Member State. The defendant in the enforcement procedure under Art 226-228 is the State but in practice the proceedings are brought against the central government of the State. The central government is considered to be responsible for the actions of all of the state's agencies, which include acts of local and regional government.[14] As a result of the outcome of the *Strawberry Case*[15] (further elaborated on below) the State might even be responsible for the actions of its citizens.

The national courts play an important role in the enforcement of Community law, since the national courts have to ensure proper application of Community rules. Under an Art 226 procedure the ECJ has not directly ruled on whether or not a State can be responsible for the action of a national court that fails to comply with its obligations under the Treaty. Often in cases where a national court has not applied Community rules

[9] P. Haas, 'Compliance with EU Directives: insights from international relations and comparative politics', 5 *JEPP* (1998) p. 19.
[10] J. Steiner *et al*, *EU law* (Oxford University Press, Oxford, 2006) p. 228.
[11] The European Commission, *Communication A Europe of Results – Applying Community Law* COM(2007) 502 final, para II.
[12] M. Accetto, S. Zelptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law', 11 *European Public Law* (2005) p. 386.
[13] Steiner *et al*, *supra* note 10, p. 236.
[14] Case 77/69 *Commission* v. *Belgium* [1970] E.C.R. 243, para. 15 and Case 1/86 *Commission* v. *Belgium* [1987] E.C.R. 2797.
[15] Case 265/95 *Commission* v. *France* [1997] E.C.R. I-6959.

correctly the non-compliance issue stems from the national legislation and therefore the blame has been put on the body responsible for the national legislation instead.[16] Recently, however, the Commission has issued a reasoned opinion aimed at the behaviour of one Member State's national courts – those of Sweden. The opinion was directed at Sweden and its lack of adequate laws or regulations governing the preliminary reference procedure and additionally, the Swedish Supreme Court's failure to make references under Art 234.[17] The Swedish government has issued a proposal for new legislation aiming at correcting the issues addressed in the reasoned opinion. It remains to be seen if the efforts are sufficient to satisfy the Commission and if not, this might be the first case where the acts of a national court produce a judgement under Art 226 EC.

2.2 Different Types of Infringements

An infringement could occur from a failure to fulfil an obligation found in the Treaty itself or from non-compliance with sources such as regulations, directives, decisions or ECJ judgements. It could even be an obligation stemming from a general principle of Community law[18], including the principles protecting fundamental rights.[19]

The implementation of Community law lies in the hand of the Commission, the Court of Justice and the Court of First Instance, but nevertheless it is foremost the responsibility of Member States and their national administrations. The Community system is in that sense run through indirect administration, where the laws laid down by the Council or Commission are implemented on national level.[20]

The different types of infringements can be divided into categories, the first being "Violations of Treaty provisions and regulations". Community legislation stemming from these sources is directly applicable and there is therefore no need for implementation. Infringements falling into this category occur if Community provisions are incorrectly applied and if national provisions are maintained despite not being in line with the Community rules.[21]

The body of legislation in the Community is massive with 9000 legislative measures, of which 2000 are directives.[22] The directive has been, and continues to be, the most frequently used and important Community act.[23]

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[16] J. Steiner *et al*, *supra* note 10, p. 227.
[17] P. Craig and G. de Búrca, *EU Law* (Oxford University Press, Oxford, 2008) p. 448.
[18] Evans, *supra* note 1, p 444.
[19] Dashwood and White, *supra* note 2, p. 390.
[20] F. Snyder , 'The Effectiveness of European Community Law', 56 *MLR* (1993) p. 22.
[21] T. Börzel, 'Non-compliance in the European Union: pathology or statistical artefact?', (2001) 8:5 October *JEPP* pp. 804-806.
[22] The European Commission, *supra* note 11, para I.
[23] Snyder, *supra* note 20, p. 41.

When the use of directives as Community measures increased so did the importance of their implementation. The Member States themselves stressed the importance of correctly transposing directives in a declaration issued at Maastricht.[24] The implementation of directives remains as one of the main infringement issues addressed under the enforcement procedure, a common infringement being the failure to transpose a directive. According to EC law a directive has to be formally implemented and it is not enough that the directive is followed in practice. Nevertheless, implementation does not necessarily require new legislation in Member States if sufficient protection already exists in the national legislation through general principles of law.[25]

Secondly, there is the category of "non-transposition of directives". Since directives are not directly applicable they require implementation by the Member State in a form of the Member State's choosing. Infringements of this type could occur from a failure to adopt accurate national legislation to incorporate EC directives.[26] A common type of infringement occurs when Member States do not execute the transposition on time or do not communicate the transposition to the Commission. This breach is not problematic and the Commission handles these infringements almost routinely since they usually do not imply any complicated investigations.[27]

Just because a Member State has failed to notify an implementation, when such notification is mandatory, does not in itself mean that the Commission can assume that no measures have been implemented[28], but failure to notify is in itself sufficient to open procedures under Art 226.[29] In the same vein, the Commission cannot assume that a directive has not been implemented correctly strictly on the basis of the existence of a certain situation in the Member State not in line with Community law.[30]

The third category of infringements is "incorrect implementation of directives" in the form of transposing directives wrongly through incomplete or incorrect implementation. Keeping national legislation that clashes with the directive is one example of this type of infringement.[31]

Even though a directive is implemented correctly there can still be a breach if it is applied contrarily to Community law, which brings us to the fourth category of infringements: "improper application of directives", either by state authorities or individuals behaving incorrectly. Examples of this sort of

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[24] A. Arnull *et al, Wyatt and Dashwood's European Union Law* (Sweet & Maxwell, London, 2006) p. 433.
[25] Case 29/84 *Commission* v. *Germany* [1985] E.C.R. 1661.
[26] Börzel, *supra* note 21.
[27] Timmermans, *supra* note 5, p. 395.
[28] Case 96/81 *Commission* v. *Netherlands* [1982] E.C.R. 1791, paras. 4-6, Case C-217/97 *Commission* v. *Germany* [1999] E.C.R. I-5087; Case C-221/04 *Commission* v. *Spain* [2006] E.C.R. I-4515.
[29] H. Schermers and D. Waelbroeck, *Judicial Protection in the European Union* (Kluwer, The Hague 6th ed., 2001) p. 602.
[30] Case C-365/97 *Commission* v. *Italy* [1999] E.C.R. I-7773, para. 68.
[31] Börzel, *supra* note 21.

breach include a failure to apply the implemented measures; applying conflicting national legislation; or not taking positive action against violators.[32]

The final category is "non-compliance with ECJ judgements establishing a violation of Community obligations".[33] These types of infringements are addressed under Art 228 EC and result from Member States failing to comply with judgements given under Art 226 that establish an existing infringement.

Infringing acts do not necessarily have to be positive acts. Equally, a failure to act can be an infringement. For example, by not stopping actions by individuals who breach Community law, a Member State can be considered to have failed to fulfil its obligations as in the *Strawberry case*. Here, French farmers were using violence in order to prevent transports with fruit and vegetables imported from other Member States. France was considered not to have fulfilled its obligations since it did not ensure the free movement of goods by preventing the actions of the farmers.[34]

More often, however, is a breach a positive act of a Member State that is not in line with Community law. Important to remember though, is that it is not the act in itself that is the breach, but the failure to comply with Community law.[35] Nevertheless a national law, which does not comply, with Community law can be a breach even though it is not applied in practice.[36]

2.3 The Detection of Infringements

According to Art 211 EC, the Commission is responsible for ensuring that Community law is correctly applied – hence that is the reason for the Commission often being referred to as "The Guardian of the Treaty".[37]

The Commission has the power to bring proceedings against a Member State that has breached Community law through Art 226. The proceedings are initiated by the Commission following a complaint from a citizen, a co-operation or a NGO; following petitions and questions from the Parliament; from the Commission's own monitoring; or simply due to non-communication by the Member States of the transposition of directives.[38]

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[32] Börzel, *supra* note 21.
[33] *Ibid*.
[34] *Commission* v. *France*, *supra* note 15.
[35] Case 167/73 *Marine Labour Code Commission* v. *France*, paras. 41 and 46 [1974] E.C.R. 372, 373.
[36] Schermers and Waelbroeck, *supra* note 29, p. 604.
[37] I. Harden, 'What future for the centralized enforcement of Community Law?', 55 *CLP* (2002) p. 495.
[38] Börzel, *supra* note 21, p. 806.

Infringements in the form of non-transposition or non-application of EC law completely are fairly easily detected. Contrastingly, infringements in the form of non-enforcement of transposed EC law or its incorrect application are much harder to detect.[39] Therefore, the Commission is heavily dependent on complaints of such breaches since it does not have an investigation service of their own.

The main tool for detecting an infringement is through complaints from individuals. In 2006 complaints from individuals represented 41.7 % of the total infringements detected, which should be compared with the number of cases initiated on the basis of the Commission's own investigation: 24 %.[40] When a complaint is received the Commission produces a receipt for the private party. The Commission also informs the party of what action is taken and weather of not infringement proceedings have been initiated. If no action is taken or no proceedings are initiated within a year, a decision to close the file is made. The reasons for closing the file are usually stated.[41] The number of complaints is increasing every year but only very few cases initiated by complaints end up in the Court.

The enforcement procedure is often criticised because of its failure to include the individual complainant in the procedure. The complainant is not a party to the procedure and does not have the right to intervene. Additionally, if the Commission decides to pursue the suspected infringement there are no means for the complainant to appeal that decision. Nevertheless, the main objective behind the enforcement procedure is compliance; it is not to ensure the rights of individuals – something which is somewhat accomplished anyway as an indirect effect of the process. The Court has stated that the procedure should not be "a means of redress for individuals, but an objective mechanism for ensuring state compliance with EC law".[42] The complainant has a much more prominent role in other enforcement procedures available within the Community, for example in the competition and state aid procedures, than in the main enforcement procedure.[43]

In the White Paper on European Governance,[44] the Commission set out some priorities for the use of the infringement procedure. The following infringements were considered to be particularly serious: the effectiveness and quality of transposing directives, situations involving the compatibility of national law with fundamental Community principles, cases that seriously affect the Community interests or the interests that the legislator

[39] C. Harlow and R. Rawlings, 'Accountability and Law Enforcement: The Centralized EU Infringement Procedure' 31 *ELRev*. (2006) p. 453.
[40] The European Commission, *24th Annual Report from on Monitoring the Application of Community Law* COM(2007) 398 final, p. 3.
[41] The European Commission, *On Relations with the Complainant in respect of Infringements of Community Law*, COM(2002)14.
[42] Craig and de Búrca, *supra* note 17, p. 429.
[43] Timmermans, *supra* note 5, p. 398.
[44] The European Commission, *European Governance, a White Paper* (COM(2001) 428 final), p. 26.

intended to protect, cases where a particular piece of European legislation creates repeated implementation problems in a Member State, and finally cases that involve Community financing. The priorities can be clearly noticed in the types of infringement procedures that have been initiated.

3 Art 226

3.1 The Main Community Enforcement Procedure

The enforcement procedure in Art 226 EC is usually considered to be the main enforcement procedure. The key objective is to reach compliance as quickly as possible. The procedure entails a number of different stages where, through negotiation with the Member State, the Commission are trying to persuade the Member State to comply. Only if the persuasion fails does the Commission bring the case before the Court.

Article 226 EC reads:

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

3.1.1 The Administrative Phase

The proceedings are divided in to two main phases: the administrative and the judicial. The first paragraph of Art 226 describes the administrative phase of the Art 226 procedure. During this part of the procedure the Commission lets the Member State know that it considers that the State has failed to fulfil its obligations; gives the Member State the opportunity to "submit its observations" and finally, if necessary, delivers a reasoned opinion.

3.1.1.1 The Letter of Formal Notice

The Commission's very first step after having decided to start the infringement procedures is to notify the Permanent Representative of the State in Brussels or to send an informal letter to the government of the Member State.[45] This allows the Member State to communicate to the Commission its point of view of the matter and submit any useful information.

After having conducted a preliminary investigation, the first formal step follows: the letter of formal notice. The purpose of the letter is to define the issue at hand and to give the Member State an opportunity to submit its

[45] Dashwood and White, *supra* note 2, p. 396.

observations.[46] The full nature of the complaint does not need to be stated, but it is necessary that all the charges that might be relevant in a case before the Court are stated in the letter. Charges not raised in the letter of formal notice will run the risk of not being considered by the Court.[47]

After the letter of formal notice has been issued, a reasonable period of time has to follow in order for the Member State to have time to respond to the Commission. What is considered to be a reasonable time period varies. If the nature of the subject matter calls for it, the period of time can occasionally be fairly short.[48] However, there is no obligation on the Member State to respond to the letter of formal notice at all.[49]

The intent behind the administrative phase is to settle the issue and to reach an agreement in the matter. Not all the cases go through all of the following steps; in fact most of them are resolved before they reach the Court. However, if the initial negotiations based on the letter of formal notice are fruitless, the Commission issues a reasoned opinion.

3.1.1.2 The Reasoned Opinion

The reasoned opinion is the key document setting out the complaint of the infringement. There is no need for the letter of formal notice and the reasoned opinion to be identical, however, the core points of the complaint must be the same in the letter of notice, the reasoned opinion and the application to the Court.[50] Due to the reasoned opinion being such a crucial document, the Commission is not allowed to amend it when the case has come before the Court. If the Commission would like to add anything to the content of the reasoned opinion it must restart a 226 procedure from the beginning.[51] However, a limitation in the application to the Court of the points in the reasoned opinion is acceptable.[52]

The purpose of the reasoned opinion is to give the Member State a chance to comply, and if that does not happen, to define the issue at hand for the later stage in Court.[53] In the reasoned opinion the Commission usually sets a deadline for compliance. If the Member State does not comply with the reasoned opinion before the deadline the Commission is free to bring the matter to Court. Should the Member State comply after that date, the Commission can still bring the matter to the Court. The question for the Court to decide is whether or not the Member State was in breach at the time of the end of the deadline set in the reasoned opinion.

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[46] Arnull *et al*, *supra* note 24, p. 421.
[47] Steiner, *supra* note 10 p. 229.
[48] Arnull *et al*, *supra* note 24, p. 421.
[49] Case 293/85 *Commission* v *Belgium* [1988] E.C.R. 305, para. 14.
[50] Case C-191/95 *Commission* v. *Germany* [1998] E.C.R. I-5449, para 54; Case C-365/97 *Commission* v. *Italy* [1999] E.C.R. I-7773, para. 26.
[51] Craig and de Búrca, *supra* note 17, p. 439.
[52] Case C-191/95 *Commission* v. *Germany* [1998] E.C.R. I-5449; under Art 228 Case C-177/04 *Commission* v. *France* [2006] E.C.R. I-2461.
[53] Dashwood and White, *supra* note 2, p. 397.

Where a Member State has complied before the Court proceedings but after the time limit in the reasoned opinion the possibility of continuing judicial proceedings exists partly because a short infringement can be just as bad as a long one[54], but also so that Member States cannot undermine the infringement proceedings by complying just before the judicial phase and then possibly continuing its behaviour afterwards[55]. Finally, a 226 judgement can be a basis for a liability case against the State by individuals before a national court.[56]

It has, however, been suggested that because of the heavy workload of the Court the pursuit of such cases might not be justified in drawing parallels to the procedure under Art 232 EC where an action that has been remedied by the institution in question after the case has been brought before Court is considered to be overplayed.[57] The workload of the Court is indeed heavy, but it is at the same time important that Member States are deterred from dragging their feet and waiting to comply until the eleventh hour, which might frequently be the case if such behaviour went without repercussions. Therefore the decision of pursuing a case where a Member State has complied after the deadline but before the delivery of a judgement should be made after having considered the specific background in every individual case.

As in the case of the letter of formal notice the Commission has to give the Member State a reasonable time period to comply with the reasoned opinion. If a reasonable period of time is not given the Court might consider the case to be inadmissible.[58] A reasonable time to comply is usually considered to be a month or two. However, shorter periods can be justified when there is a great need for the infringement to cease.

The Commission has tried to use the issued opinion under the Directive 83/189 as an informal letter but the Court, however, has not accepted this. The 83/189 Directive forces Member State to notify so called technical regulations in national legislation before being implemented on domestic level. When the Commission has considered the Member State to have ignored its comments on the national legislation they have wanted to use the issued opinion as a letter of formal notice. The Court does not accept this method of procedure since there has to be an infringement before the letter of formal notice is issued and at the stage were the opinion on the legislation is issued there is no infringement since the legislation is not yet in force.[59]

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[54] AG Lenz in Case 240/86 *Commission* v. *Greece* [1988] E.C.R. 1835, 1844.
[55] AG Lagrange in Case 7/61 *Commission* v. *Italy* [1961] E.C.R. 317 at 334.
[56] Craig and de Búrca, *supra note 17,* p. 442.
[57] A. Arnull, *The European Union and its Court of Justice*, (Oxford University Press, Oxford, 2006) pp. 41-42.
[58] Arnull *et al*, *supra* note 24, p. 424.
[59] See Case C-341/97 *Commission* v. *Netherlands* [2000] E.C.R. I-6611; Case C-230/99 *Commission* v *France* [2001] E.C.R. I-1169.

The purpose of the administrative phase is, according to the Court, to give the Member State the chance to end the infringement, defend itself and identify the issue of concern for a contingent procedure in Court.[60] The majority of the initiated infringements are settled before they reach the Court and agreements are reached at every stage of the process. Out of 2551 closures in 2006, 2238 were reached before the judicial stage.[61] In proportion to the number of complaints the number of the infringement cases that reach the Court is fairly small. Approximately 70 % of the complaints are closed before a letter of formal notice is sent out, 85 % are closed before the reasoned opinion is issued and as many as 93 % are closed before the Court delivers a judgement.[62]

The remaining cases that are not settled between the Commission and the Member State continue on to the Court of Justice.

3.1.1.3 The Discretion of the Commission

For the Commission, the principal objective with the infringement procedure is compliance by the Member State. The Commission believes that compliance is reached quicker if bad press and publicity are avoided. Therefore the administrative phase is very much within the control of the Commission and what occurs during this stage of the process is – in principle – not revealed to the public.[63]

The handling of the administrative stage of the process is within the discretion of the Commission and is not a reviewable matter. The width of the discretion of the Commission was demonstrated in the early case of *Lütticke* v. *Commission*[64], where Lütticke, a German company, were unsatisfied with a decision by the Commission not to pursue an infringement procedure against Germany and wanted the decision to be judicially reviewed. The Court ruled the application as being inadmissible explaining the nature of the administrative stage as an opportunity for the Member State to submit its opinion and that it forms a part of the proceedings leading to the action before the Court. Conclusively, no measures taken by the Commission during the administrative phase have binding effect.

Since the measures during the administrative phase are not legally binding they cannot be subject to the annulment proceedings under Art 230 EC. They can, however, be reviewed by the Court during the 226 proceedings, if the case reaches the judicial stage.[65]

[60] Case C-135/01 *Commission* v. *Germany* [2003] E.C.R. I-2837, para. 21.
[61] The European Commission, *supra* note 41, Annex II p. 15.
[62] The European Commission, *supra* note 11.
[63] Harlow and Rawlings, *supra* note 40, pp. 454-455.
[64] Case 48/65 *Lütticke* v. *Commission* [1956] E.C.R. 19.
[65] Joined Cases 76 and 11/69 *Commission* v. *France* [1969] E.C.R. 523, para. 36

When reaching the point of the delivery of a reasoned opinion the Commission has to accommodate itself to procedural rules laid down by the Court.[66] If the procedural rights are not followed, the Court can declare the application to Court inadmissible. According to the Court, one of the rules is that the reasoned opinion cannot extend the issue addressed in the letter of formal notice.[67] The letter and the opinion do not have to be identical but they have to be based on the same grounds and pleas. Even though the issue cannot be extended or altered it can be limited and additionally, the reasons of and background of why the Commission considers the Member State to be in breach of the Community law is allowed to be more detailed in the reasoned opinion than in the letter of formal notice. [68]

Attempts by the Commission to include complaints found in the formal letter but not in the reasoned opinion, have been declared inadmissible by the Court based on the premise that the Member State did not have a chance to stop the infringement or submit observations on the issue before the Court proceedings was started.[69]

Even though the wording of the Art 226 EC contains the word "shall", there is no obligation on the Commission to issue a reasoned opinion. There is also no obligation on the Commission to bring the matter before Court, even if the Member State in question has not complied with the reasoned opinion.[70] The Commission's full discretion of the procedure means that it is entirely the Commission's decision on whether or not to act on a suspected infringement. The wording in Art 226 – that the Commission "shall deliver a reasoned opinion on the matter" – does not mean that the Commission has to deliver a reasoned opinion in every infringement case. The word "shall" is most likely intended instead to refer to the reasoned opinion as being a mandatory step before judicial proceedings can commence.[71]

The discretion of the Commission in the infringement proceedings means that if the Commission does not act on a complaint of infringement by an individual, that individual has no success with a failure-to-act procedure under Art 232 EC. The classic case illustrating this is the *Star Fruit* case[72]. Star Fruit, a Belgian banana trader, sought to take the Commission to Court for not having acted on a complaint from Star Fruit against France and its banana market. The Court stated that the decision by the Commission to act on a complaint and beginning judicial proceeding was within the Commission's discretion and that it was not bound to begin proceedings.[73] Member States are the only ones who can intervene in the infringement proceedings. The only remaining alternative for complainants who are

[66] Case 7/61 *Commission* v. *Italy* [1961] E.C.R. 317.
[67] Case C-358/01 *Commission* v. *Spain* [2003] E.C.R. I-13145, paras. 27-29.
[68] Arnull *et al*, *supra* note 24, p. 423.
[69] Case C-350/02 *Commission* v. *Netherlands* [2004] E.C.R. I-6213, para. 28.
[70] Arnull *et al*, *supra* note 24, p. 422.
[71] Schermers and Waelbroeck, *supra* note 29, p. 633.
[72] Case 247/87 *Star Fruit* v. *Commission* [1989] E.C.R. 291.
[73] *Ibid*., paras. 11-12.

unsatisfied with the work of the Commission is to turn to the European Ombudsman and submit a complaint about maladministration.

The Commission's heavy dependence on complaints from individuals in order to discover Member State infringements seems to contradict the fact that individuals or complainants are not allowed to take part in the proceedings; and in 1997 The European Ombudsman initiated a maladministration investigation about how complaints from individuals were handled. Even though the Ombudsman did not conclude any maladministration, the Commission nevertheless agreed to extend their conduct by informing all individuals about the outcome of their complaints.[74] Furthermore, due to criticism in the Ombudsman's Annual Report from 2001[75] the Commission made a publication[76] in the Official Journal establishing the way it was going to handle complaints from individuals. Now every complaint is to be registered and a receipt of acknowledgement is to be sent of within 15 days. The Commission will inform the complainant after every decision taken in the case and before closing a case the Commission will give prior notice to the complainant stating the reasons of the closure and inviting the complainant to submit comments on the issue. The goal is to produce a letter of formal notice within a year, or alternatively, close the case within that time frame. The Commission, however, emphasises its discretion, acknowledged by the Court, on deciding whether to initiate infringements proceedings and whether or not to refer the matter to Court.

3.1.2 The Judicial Phase

If a Member State does not comply with a reasoned opinion, the Commission can bring the proceedings to the Court of Justice. As mentioned before, it is within the discretion of the Commission to decide on whether and when to do this. However, the Court has stated that if it takes too long, the right of defence might be threatened.[77]

The burden of proof for the existence of the infringement lies with the Commission. The Commission has to prove that the Member State has not fulfilled its obligations by providing not only the legal basis but also detailed facts and circumstances of the specific situation.[78] If the Commission fulfils the burden of proof, the ball is in the Member State's court to challenge the information put forward by the Commission.

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[74] Arnull *et al*, *supra* note 24, p. 419.
[75] Jacob Söderman, The European Ombudsman, *Annual Report 2001*.
[76] European Commission, *On Relations with the Complainant in respect of Infringements of Community Law*, COM(2002)14.
[77] Case C-96/89 *Commission* v. *Netherlands* [1991] E.C.R. I-2461; Case C-187/98 *Commission* v. *Greece* [1999] E.C.R. I-7713.
[78] E.g. cases C-347/88 *Commission* v. *Greece* [1990] E.C.R. I-4747; Case C-55/99 *Commission* v. *France* [2000] E.C.R. I-11499; Case C-458/00 *Commission* v. *Luxemburg* [2003] E.C.R. I-1553, paras. 44-45.

Member States other than the one accused of the infringement are allowed to intervene in the proceedings. The Commission also has the possibility of requesting interim measures.

If the Commission is successful the Court declares the Member State to have failed to fulfil its obligations under the Treaty. The Court is not in a position to state what action needs to be taken in order for the obligations to be fulfilled. However, an indication of what sort of steps needs to be taken in order to comply might be given.[79] According to Art 228(1) EC the Member State is obliged to "take the necessary measures to comply with the judgement". These measures have to be taken as soon as possible.[80] If the Member State fails to do so, it can be subject to further proceedings under Art 228.

3.1.2.1 Common Defences

There are no restraints of what defence arguments the Member States can use, however the Court rarely takes the Member State's side. In the majority of the cases the Commission is the successful party. In 2002 93 judgements were issued and 96.77 % of them were in favour of the Commission. One explanation for this is that the Commission does not proceed to Court and the judicial stage unless it feels that it has a watertight case.[81] However, certain types of defence arguments from the Member States seem to occasionally be more successful than others, for example, defences concerning the procedural requirements. For instance, applications to Court from the Commission have been considered inadmissible on grounds that the Commission has not allowed enough time to respond to the letter of formal notice or to comply with the reasoned opinion; whilst another successful defence could be that the complaints made in the application to Court by the Commission were not included in the reasoned opinion.[82]

An example of a situation were a Member State's defence argument regarding procedural requirements was successful is *Commission* v. *Belgium*[83]. Belgium was given eight days to reply to the letter of formal notice and 15 days for the reasoned opinion. The Court did not consider the periods to be reasonable and dismissed the Commission's application. A short period can be allowed in urgent cases but this was not one of those. Such an urgent situation was nevertheless at hand in *Commission* v. *Austria*[84], and the Court approved of seven days to respond to the formal letter and 14 days to respond to the reasoned opinion.

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[79] Schermers and Waelbroeck, *supra* note 29, p. 637
[80] Eg joined cases 227 to 230/85 *Commission* v. *Belgium* [1988] E.C.R. 1, para. 11; C-387/97 *Commission* v. *Greece* para. 82 [2000] E.C.R. I- 5047
[81] D. Chalmers, 'Judicial Authority and the Constitutional Treaty', *International Journal of Constitutional Law* (2005) 3 (2-3) p. 453.
[82] Arnull *et al*, *supra* note 24, p. 429.
[83] *Commission v. Belgium, supra* note 50.
[84] Case C-328/96 *Commission* v. *Austria* [1999] E.C.R. I-7479.

Another example of a situation where compliance was urgent is in a case against Ireland[85]. Ireland tried to argue that the Commission's application was inadmissible since the period the Commission had given for compliance after the issuing of the reasoned opinion was too short; the Commission had given five days to amend legislation that had been applied for over 40 years. The Court did not agree with Ireland and stated that even though the Court disapproved of the behaviour of the Commission and that the short time frame was unreasonable, the application was still not inadmissible since there was a particular urgency at hand.

This issue was also raised in the *Commission* v. *France*[86] case where France refused to allow imports of beef from the United Kingdom in the aftermath of the BSE crisis. Being that this was contrary to a Commission decision, the Commission started infringement proceedings. France raised the matter in Court that the Commission had not given France enough time to respond to the Commission's view. Initially France had been given 5 days to comply with the reasoned opinion, which had been extended to two weeks, although those two weeks included the Christmas holidays. The Court did not agree with France, stating that France had been well aware of the view of the Commission long before the letter of formal notice was sent and therefore France had had enough time to respond.

Even though the discretion of the Commission is great it does have its limits. Although the Commission can choose when to initiate the infringement[87], they cannot, however, take as long as they like: a too lengthy procedure could harm the Member State's right to defence.[88] Nonetheless, such an argument was rejected, when presented by the UK. The length of the period between the infringement events and the procedures was not considered to impair the principle of legal certainty by the Court.[89]

As for the motive behind the proceedings, that is also within the discretion of the Commission and cannot make the proceedings inadmissible. The Court has made clear that it will not scrutinise the Commission's reasons behind the proceedings, but only examine whether or not there is an infringement.[90] The Commission does not have to demonstrate a specific interest when acting under Art 226, since it is presumed from the Commission's responsibility to ensure the correct application of Community law which means that an argument based on the absence of interest will not be accepted by the Court.

[85] Case 74/82 *Ireland* v. *Commission* [1984] E.C.R. 317, para. 12.
[86] Case C-1/00 *Commission* v. *France* [2001] E.C.R. I-9989.
[87] Case 7/68 *Commission* v. *Italy* [1968] E.C.R. 423, 428.
[88] Case C-96/89 *Commission* v. *Netherlands* [1991] E.C.R. I-2461, para. 16.
[89] Case C-508/03 *Commission* v. *United Kingdom* [2006] E.C.R. I-3969, para. 17.
[90] Case C-200/88 *Commission* v. *Greece* [1990] E.C.R. I-4299, para. 9; Case 416/85 *Commission* v. *United Kingdom* [1988] E.C.R. 3127 para. 9.

As for defence arguments concerning implementation of directives, Member States sometimes try to maintain that even though a directive is wrongly implemented, individuals can turn to national courts if the directive has direct effect, and that only if the national court then fails to apply the Community rules, is there a breach. The ECJ has countered this argument by stating that these are two separate remedies and that the procedure in the national court and the 226 procedure have different objectives and also, different effects.[91]

Member States have also tried to argue, without success, that even though a directive has been wrongly implemented there is no breach of Community law since the directive is applied correctly in practice.[92] France[93] tried to use this type of claim in justifying the French Maritime Code that required three working Frenchmen for every working foreigner. Even though this rule was not enforced in practice the Court did not approved since having national laws that are contrary to Community law could "give rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law".[94] The fact that the Community rule in question could be directly effective did not make any difference.

In infringement actions concerning Member States' failure to implement directives, Member States are not allowed to challenge the validity of the directive in question, because another special legal proceeding in the Community legal system exists to deal with those issues – namely, the action for annulment.[95]

Even when judicial proceedings, on the same issue, are *pending* in a national court, infringement proceedings are not made inadmissible, which the UK tried to argue in a recent case. The Court explained the rejection of the UK argument by pointing to the different objectives and effects of the two procedures.[96]

Defences based on the fact that the action can no longer be remedied have also been rejected by the Court. Italy claimed that since the action that caused the breach was in the past, the action brought by the Commission was pointless because retroactive compliance would be impossible.[97] The Court pointed out that the judgement could be used as a basis for action brought against the State in national courts for damages due to the infringement.

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[91] Case 31/69 *Commission* v. *Italy* [1970] E.C.R. 32, para 9; Case 102/79 *Commission* v. *Belgium* [1980] E.C.R. 1487, para. 12; Case 29/84 *Commission* v. *Germany* [1985] E.C.R. 1661, para 29.
[92] Case 301/81 *Commission* v. *Belgium* [1983] E.C.R. 478, 479, para 13.
[93] Case 167/73 *Commission* v. *France* [1974] E.C.R. 359.
[94] *Ibid*., para 41.
[95] Arnull *et al*, *supra* note 24, p. 433.
[96] *Commission* v. *United Kingdom*, *supra* note 90, para. 71.
[97] Case 39/72, *Commission* v. *Italy* [1973] E.C.R. 112, para. 10.

Defence arguments concerning internal circumstances, for example the dissolution of a national parliament, has time after time been rejected by the Court: "a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits laid down in Community directives".[98]

In a case against Italy[99], the Member State tried to claim *force majeure* since a data-centre necessary in the implementation process of the relevant directive had been exposed to a bomb attack. The Court accepted the reason in principle, but nevertheless considered the delay of four and a half years to be inexcusable.[100]

Member States trying to justify an infringement by blaming a Community institution that had not complied with their obligations have not been successful.[101] The appropriate procedure in that case is through a direct action against the responsible institution. Similarly, the argument that the infringing action had the objective of correcting the breach of another Member State, have been equally unsuccessful. A Member State cannot take the law into its own hands. Instead, the correct remedy would be to use Art 226 or Art 227.[102]

The list of examples of defence arguments used by Member States is endless. From the few examples presented here the conclusion that the Court often takes the Commission's side is evident, leaving little room for any successful defence arguments by the Member States.

3.1.3 Art 227

Art 227 allows a Member State to initiate infringement proceedings concerning breaches of Community law committed by another Member State. The initiating Member State must, however, still take the proceedings through the Commission. Each Member State has to be given the opportunity to submit its observations and respond to the other Member State's comments after which the Commission will issue a reasoned opinion. If the Commission has not issued a reasoned opinion after 3 months of the notification of the complaint, the initiating Member State may still bring the matter before the Court.

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[98] Case 280/83 *Commission* v. *Italy* [1984] E.C.R. 2361, para 4; Case 160/82 *Commission* v. *Netherlands* [1982] E.C.R. 4637; Case 215/83 *Commission* v. *Belgium* [1985] E.C.R. 1039; Case C-298/97 *Commission* v. *Spain* [1998] E.C.R. I-3301; Case C-326/97 *Commission* v. *Belgium* [1998] E.C.R. I-6107; Case C-39/88 *Commission* v. *Ireland* [1990] I-4271, para. 11.
[99] Case 33/69 *Commission* v. *Italy* [1970] E.C.R. 93.
[100] J. Steiner, *supra* note 10, p. 233.
[101] Joined cases 90 and 91/63 *Commission* v. *Luxembourg and Belgium* [1964] E.C.R. 625, 631.
[102] Case 232/78 *Commission* v. *France* [1979] E.C.R. 2729, para. 9.

Compliance by the responding Member State of the reasoned opinion has no real effect on the complainant Member State's right of action. As for admissibility in front of the Court there are only two criteria: that the Commission was notified and that three months have passed or a reasoned opinion has been delivered. During the judicial phase under Art 227 the burden of proof lies with the complainant Member State and the Commission can choose to intervene on whichever side it prefers. As for the effect of the judgement, it is the same as under Art 226 EC.[103]

One of the few occasions and one of the more recent ones where Art 227 was put to use in a case was between Spain and the UK in 2006.[104] This case additionally illustrates the situation of a Member State choosing to bring the proceedings before the Court even though the Commission have not issued an opinion on the matter. Spain started infringements actions due to the way the UK granted certain residents in Gibraltar the right to vote and to be elected in elections to the European Parliament even though those residents were not considered to be European Union citizens. The Commission chose not to issue a reasoned opinion "given the sensitivity of the underlying bilateral issue"[105] and since it preferred if the two states solved the dispute without involving the Court. The Court, however, found in favour of the UK, stating that "the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State"[106].

Art 227 procedures are rare and have only occurred a few times.[107] The Member States seem to prefer to rely on the Commission to initiate proceedings and instead intervene in the proceedings if wanting to express their opinions.

[103] Dashwood and White, *supra* note 2, p. 409.
[104] Case C-145/04 *Spain* v. *United Kingdom* [2006] E.C.R. I-7917.
[105] *Ibid*., para. 32.
[106] *Ibid*., para. 78.
[107] Case 141/78 *France* v. *United Kingdom* [1979] ECR 2923; Case C-388/95 *Belgium* v. *Spain* [2000] ECR I-3123; Case C-145/04 *Spain* v. *United Kingdom* [2006] E.C.R. I-7917.

4 Art 228

In the majority of the infringement cases the Member State complies, even though that often occurs after a lengthy procedure. However, there are cases where the Member State, after having received a judgement under Art 226, still fails to comply with its obligations. A Member State that does not comply with a Art 226 judgement can be subject to proceedings under Art 228, under which pecuniary penalties, in the form of a recurring penalty payment or a lump sum, can be imposed.

Article 228 reads:

> 1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
>
> 2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.
>
> If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
>
> If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
>
> This procedure shall be without prejudice to Article 227.

4.1 The Procedure

Even though the numbering has changed, the text of Art 226 EC (formerly Art 169) has not been altered since the Treaty of Rome was finalised in 1957. However, due to an increase of non-compliance with Art 228 judgements in the 1980s a second paragraph was added to Art 228 EC. Between 1980 and 1990 non-compliance with judgements under Art 226 EC had risen from two to 86.[108]

The amending paragraph was thought to be able to combat the increase of infringements and made it possible for the Court to impose financial sanctions in the form of a penalty payment or a lump sum. Before the financial sanctions were introduced, the only means of enforcing the Art 226

[108] M. Ruffert, 'Case C-278/01, *Commission* v. *Kingdom of Spain'*, 41 *CMLRev*. (2004) p. 1387.

judgement was by another declaratory judgement merely stating that the infringement persisted.

The infamous 'Sheepmeat affair' clearly illustrates the state of the situation before the amendments to Art 228 EC. The case concerned a series of trade barriers put up by France in order to protect the French meat industry from competition of lamb and mutton meat from the United Kingdom. The Court ruled against France in a 169 EC procedure (now 226 EC)[109]. The French government had no intentions of complying with the judgement and the Commission started another procedure against France for having breached Art 171 EC (now 228 EC). However, no judgement was ever delivered since France removed the barriers after a political agreement.[110]

By the end of 1993 82 judgements under Art 226 EC had still not been complied with[111], clearly showing the lack of teeth of the enforcement procedure before the amendments. As for the 'Sheepmeat affair', if no agreement would have been reached on political level, the second time in Court would only have resulted in another declaratory judgement stating that France was in breach of Community law.

A Member State must initiate compliance with a judgement immediately and the implementation must be completed as soon as possible.[112] Nevertheless, the Commission cannot initiate the Art 228 proceedings until a State has been given a reasonable time to comply with the Art 226 judgement. The procedure under Art 228 EC is similar to the procedure under Art 226, with a reasoned opinion issued before the judicial proceedings are started. As in the 226 procedure the relevant time for determining if a breach still persists is at the time when the deadline of the Art 228 reasoned opinion expiries.[113]

So far, there have been just a few cases decided under Art 228. The Commission seems, however, to be putting the procedure more to use. Through the case law the scope and the limits of the procedure are materialising.

The Commission issued guidelines for the applications of the newly introduced financial sanctions, starting with the *1996 Memorandum on Applying Article 171 of the EC Treaty*[114] and the *1997 Communication on the Method of Calculating the Penalty payments Provided Pursuant to Art 171 of the EC Treaty*[115]. From the publications, one can learn that the

[109] *Commission* v. *France*, *supra* note 103.
[110] M. Theodossiou, 'An Analysis of the Recent Response of the Community to Non-compliance with Court of Justice Judgements: Art 228', 27 *ELRev*. (2002) pp. 25-26.
[111] *Ibid*., p 26.
[112] Case 69/86 *Commission* v. *Italy* [1987] E.C.R. 773.
[113] C-119/04 *Commission* v. *Italy* [2006] E.C.R. I-6886, para 27.
[114] The European Commission, *Memorandum on applying Article 171 of the EC Treaty*, OJ 1996, C 242/6.
[115] The European Commission, 1997 *Communication on the Method of Calculating the Penalty Payments Provided for Pursuant to Art 171 of the EC Treaty*, OJ 1997, C 63/2.

Commission considers it to be crucial that the penalties are deterrent and not merely symbolic and that the amount of the sanction corresponds to the objective of the sanction: to reach compliance as quickly as possible. Initially the Commission thought that these objectives were reached most efficiently by the periodic penalty payment.

The size of the payment should, according to the Commission, be based on three criteria: the seriousness of the infringement, its duration, and the need to ensure that the penalty itself is a deterrent to further infringements. The calculation of the penalty payment is done by taking a standard flat rate amount (EUR 500) multiplied with a coefficient for seriousness (1-20) multiplied with a coefficient of duration (1-3) and finally multiplied with a country fixed amount (the n-factor), which is based on the capacity of the Member State to pay and the number of votes in the Council.[116]

After an important development in the case law of Art 228 the Communications from 1996 and 1997 were replaced with a new Communication from 2005[117] where the guidelines on how to calculate the penalty payment were updated and the method for calculating the lump sum was included.

4.2 Art 228(2) Put to Use – Case law

As Advocate General Ruiz-Jarabo Colomer pointed out in the first case in which the new financial sanctions were put to use, *Commission* v. *Greece*, even though the wording of Art 228 is quite clear, the Treaty Article offers no clues on how and when to apply it.[118] The application of the sanctions has therefore been developed slowly through case law.

4.2.1 The Early Cases

The financial sanctions came into force in 1993 but were not used until 2000, when the first judgement was delivered. The first case tried under Art 228 was a case against Greece for failing to comply with a judgement under Art 226 where Greece was found not to have fulfilled its obligations under two directives concerning the disposal of waste.

The Commission had suggested a penalty payment of EUR 24 600 for each day that non-compliance with the previous judgement continued, relying on the calculation method from the guidelines,[119] but the Court did not follow either the Advocate General's suggestion or the Commission's when

[116] The European Commission, *supra* note 116.
[117] The European Commission, *Application of Article 228 of the EC Treaty*, SEC(2005)1658.
[118] Case C-387/97 *Commission* v. *Greece* [2002] E.C.R. I-5047, para.1.
[119] *Ibid*., para. 79.

deciding the penalty. Greece was issued to pay a penalty payment of EUR 20 000 per day from the date of the Art 228 judgement until complete compliance had been reached.[120]

Evidently the Court did not consider itself bound by the Commission's suggestion about the amount of the sanction, even though it found the guidelines set out by the Commission helpful.[121] The Court even added two more criteria when determining the amount of the sanction: the effects of failure to comply on private and public interests and the urgency of getting the Member State concerned to fulfil its obligations.[122]

Not until 26 February 2001 did Greece adopt the measures necessary to comply with the initial Art 226 judgement which meant that in total, Greece paid EUR 5 400 000 for the period of July 2000 to March 2001.[123]

Further evidence of how the Court agrees with the guidelines but does not consider itself bound by them or the suggestions made by the Commission can be found in the *Commission* v. *Spain*[124] case, where the Court did not follow the Commission's suggestion of a *daily* penalty payment but instead decided on an *annual* penalty. Spain was found not to have fulfilled its obligations from a judgement of the Court on non-compliance with a directive concerning the quality of bathing water. Since assessment of the state of the bathing water was made on an annual basis, an application of a daily penalty payment could have meant that Spain was forced to pay for periods were an infringement actually could have stopped. The Court therefore decided, contrary to the suggestion of the Commission, to impose a penalty payment on an annual basis. The Court also found it important to take account for the progress Spain might have made and therefore decided that the annual penalty payment should be calculated based on the percentage of the bathing areas that still did not reach the level stated in the Directive.[125]

In the end Spain did not pay anything, since by the time the water was examined, in the end of the first bathing period, Spain had reached 94.7 percent compliance. Since the Commission had decided that a 95 percent compliance was enough to fulfil the obligations, and Spain was less than a percent from the goal, the file was closed.[126]

[120] *Commission* v. *Greece*, *supra* note 119, para. 99.
[121] *Commission* v. *Greece*, *supra* note 119, paras. 87-90.
[122] *Commission* v. *Greece*, *supra* note 119, para. 92.
[123] Arnull *et al*, *supra* note 24, p. 439.
[124] Case C-278/01 *Commission* v. *Spain* [2003] E.C.R. I-14141.
[125] *Ibid*., paras. 43-46.
[126] I. Kilbey, 'Financial Penalties under Article 228(2) EC: Excessive Complexity?', (2007) 3 44 *CMLRev*. p. 749.

4.2.2 The Introduction of the Lump Sum

The British beef controversy[127] where France had put a ban on importation of British beef due to the BSE crisis, led to a change of attitude of the Commission. Even though the case was not pursued to Court the controversy had made the Commission consider the use of the lump sum as a complement to the penalty payment.[128]

Nevertheless, in a later 228 case against France[129] concerning non-compliance with a judgement where France had been found in non-compliance with regulations establishing control measures for fishing activities, the Commission did not suggest a lump sum as a penalty. However, that did not stop the Court from actually imposing one. The case was controversial since it was the first time both a lump sum and a penalty payment was issued at the same time and additionally; it was done without the suggestion of the Commission. The outcome of the case strongly emphasised the complete discretion of the Court to determine the financial sanction.

The Advocate General Geelhoed considered the breach of the obligation to be so serious that both a lump sum and a penalty payment could be imposed, arriving at the amount using the same general criteria as used when calculating the penalty payment.

Concerns arose from Member States about the Court departing from the suggestion from the Commission of only imposing a penalty payment. From earlier case law[130] it was clear that the Court had the final say in the size of the penalty payment but the Court determining a completely new type of sanction than what had been suggested by the Commission was considered by the Member States to be contrary to legal principles. Matters of legal certainty, predictability, and transparency were raised. Member States did not think that the Court could go beyond parties' claims and remove France's right of defence on this point. The Court rejected these arguments and referred to the special nature of Art 228 and that the determining of the sanction was within the discretion of the Court and therefore it was not bound by the suggestion made by the Commission, as established in earlier cases.

The wording of Article 228 gives one the impression that the financial sanction could be *either* a lump sum *or* a penalty payment, not both. The Court nevertheless considered it possible to impose both a penalty payment and a lump sum since the "or" was of a cumulative sense, not alternative. In doing so, the Court referred to the different objectives behind the lump sum

[127] *Commission* v. *France*, *supra* note 87.
[128] The European Commission, 20th Annual Report on Monitoring the Application of Community Law COM(2003)669 final, p. 9.
[129] Case C-304/02 *Commission* v. *France* [2005] ECR I-6263.
[130] Case C-387/97 *Commission* v. *Greece* [2000] E.C.R. I-5047, paras. 89-90, and C-278/01 *Commission* v. *Spain* [2003] E.C.R. I-14141, para. 41.

and the penalty payment: while the function behind the penalty payment should be to get the infringement to stop as soon as possible, the lump sum was connected to non-compliance with the first judgement.[131]

The Court imposed a lump sum of EUR 20 000 000 on France[132]. The analogous use of the Commission's guidelines, applied by the Advocate General, was not applied the Court. How the Court came up with the amount is not discussed in the judgement by any length, the Court simply made a reference to the length of the infringement, which was 12 years. Wennerås suggests that the lack of further explanation of how the Court arrived at this number might be because it wanted to leave room for future guidelines from the Commission.[133]

As pointed out by some commentators, the Court could have reached a similar effect without imposing both the lump sum and the penalty payment by letting the penalty payment run form a date before the judgement under Art 228, alternatively raising the amount of the penalty payment.[134]

As for the penalty payment, the Court followed what both the Advocate General and the Commission had suggested. The Court considered the infringement to be so serious that it decided to use the coefficient of 10 out of 20 for the seriousness. This should be compared to the coefficient of 6 used in the case against Greece and 4 in the case against Spain. As for the duration, the coefficient was set to 3, which is the maximum. The Court arrived at the amount of EUR 57 761 25 to be paid bi-annually.[135]

The Commission considered France to have eventually complied in July 2006 and France paid a total of EUR 77 761 250, made up of the lump sum and the penalty payment, the latter of which France paid for the six months after the deliverance of the judgement.

The new stricter approach by the Court demonstrated in the case against France led to the publishing of a new communication of the Commission replacing the earlier ones from 1996 and 1997. A lump sum had never been imposed before the France case and there were no guidelines on the application or the calculation of this type of financial sanction. The Commission had before considered the penalty payment to be the best instrument to reach compliance as fast as possible and that the lump sum was only relevant in exceptional cases[136] but the Commission now recognised that the old approach of only proposing a penalty payment was

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[131] *Commission* v. *France*, *supra* note 130, para. 81.
[132] *Commission* v. *France*, *supra* note 130, para. 115.
[133] P. Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums, and Penalty Payments', 43 *CMLRev*. (2006) p. 57.
[134] A. Arnull, *supra* note 58, p. 51.
[135] *Commission* v. *France supra* note 130, para. 112.
[136] The European Commission, *Memorandum*: *Financial Penalties for Member States who fail to comply with Judgements of the European Court of Justice: European Commission clarifies rules*, 14 December 2005, MEMO/05/482, p. 5.

not effective when it came to stopping late compliance and could lead to cases where no sanction was imposed at all. Compliance by the Member State often happens at a late stage in the procedure and if the infringement would stop before the judicial phase of Art 228 but after the Art 226-judgement there would not be any possibility of imposing any sanctions if the lump sum was not used, since the penalty payment only covers the period *after* the Art 228 judgement.[137] This led to the adoption of a new approach where the Commission from now on (starting 1 January 2006) would ask for both a lump sum, penalizing the period between the first and the second judgement, and a penalty payment for the continuing of the infringement after the delivery of the judgement in the Art 228 procedure. The new approach of the Commission means that in cases of late compliance – after the reasoned opinion but before the deliverance of the judgement – the Commission would no longer withdraw the case based on that action alone making it possible for the Court to impose a lump sum.[138]

The method proposed by the Commission to be used when determining the lump sum is similar to the one used for calculating the penalty payment, but not identical. The Commission suggested a minimum fixed lump sum determined in advance for each Member State and also a method of calculation that should be used only when the result exceeds the fixed lump sum. This method of calculation is based on a daily amount multiplied by the number of infringement days being the number of days between the Art 226 judgement and the Art 228 judgement. The calculation of the daily amount is made in the same way as the daily amount for the penalty payment with the exception of not using a coefficient for duration since it already is considered in the multiplication with the number of infringement days. Furthermore, the standard flat rate is lower – only EUR 200.

The new 2005 guidelines also introduced some news for the calculation of the penalty payment: the flat-rate amount was increased from EUR 500 to EUR 600 due to inflation developments.[139] Additionally, the n-factors for the 10 new Member States were added and finally, details on how the coefficient for duration should be calculated were amended in accordance with case law.

From the guidelines of the Commission and the opinion of the AG in the case against France one might think that the result of the case is that the lump sum would be used in every case where a Member State had not complied with a reasoned opinion under Art 228. However, judging from what the Court stated the lump sum would be relevant in cases where the failure of the Member State to comply with its obligations had had an effect on public and private interests and especially where the breach had persisted for a long time.[140] It has, however, been suggested that these two factors are

[137] The European Commission, *supra* note 118, p. 3.
[138] The European Commission, *supra* note 137, p. 6.
[139] The European Commission, *supra* note 118 para. 15.
[140] *Commission* v. *France, supra* note 130, para 85.

only relevant when calculating the amount of the lump sum.[141] Conclusively, to determine which situations cause for the use of the lump sum from the Court's point of view on the basis of the reasons stated in *Commission* v. *France* is difficult.

In 2006 the Court delivered two more judgements concerning infringements under Art 228 EC. The first one was a second case against France about non-compliance with a judgement concerning the incorrect transposition of a directive on liability for defective products.

Despite the fact that the incompliance had been going on for 17 years, the Court did not impose a lump sum nor was this suggested by the Commission. This might have been because the infringement was not considered particularly serious.[142] The Court raised the amount proposed by the Commission from EUR 13 715 to EUR 31 650 per day. The Commission had proposed to use the coefficient 1.3 of 3 for the duration of the infringement but the Court did not accept this, and instead raised the coefficient to 3.[143]

A few months after the Court delivered its judgement against France, Italy was found to have breached its obligation when not complying with a judgement determining Italy in breach of Art 39 when not guaranteeing recognition of the rights acquired by former foreign assistants who had become associates and linguistics experts even though such recognition was given to national workers.[144] The Commission suggested a penalty payment of EUR 309 750 for each day the incompliance persisted. The Court found that Italy had not fulfilled its obligations since at the time of the expiry of the time limit in the reasoned opinion it had not complied with the former judgement under Art 226 EC. However, the Court did not impose any financial sanctions since at the date of the Court's examination of the facts there was insufficient evidence that the breach persisted since Italy could show that it had taken some measures to comply with the judgement after the deadline. The Commission had not fulfilled its burden of proof and therefore the Court did not consider an imposition of a financial penalty to be justified.[145]

From the early case law some basic conclusions can be drawn: firstly, the Commission does not have to propose the exact amount of a contingent financial sanction before the case is brought before the Court[146] and secondly, there is no obligation for the Court to follow the amount or nature specified by the Commission.[147] In *Commission* v. *Spain* the Court imposed an annual payment instead of the daily penalty suggested by the

[141] Wennerås, *supra* note 134, p. 59.
[142] Steiner *et al*, *supra* note 10, p. 239.
[143] Case C-177/04 *Commission* v. *France* [2006] ECR I-2461, para. 68.
[144] *Commission* v. *Italy*, *supra* note 114, para. 8.
[145] *Commission* v. *Italy*, *supra* note 114, paras. 38-47.
[146] Arnull *et al*, *supra* note 24, p. 437.
[147] *Commission* v. *Greece*, *supra* note 119, para. 89; *Commission* v. *Spain*, *supra* note 125, para. 41.

Commission; in the second case against France under Art 228 the Court rejected the guidelines for calculating when alternating the coefficient for the duration of the infringement; and finally in the first case against France, the Court imposed a lump sum without it having been suggested by the Commission.

4.2.3 Recent cases

On 18 July 2007 the Court of Justice delivered an Art 228 judgement against Germany. The case[148] concerned non-compliance with a former judgement[149] where the handling of the awarding of contracts of the collection of waste water and waste disposal in the Municipality of Bockhorn and the City of Brunswick had been found to be contrary to Council Directive 92/50/EEC. Since the former contract was annulled the Commission discontinued that part of the case. Germany, supported by the Netherlands, wanted the case to be closed since the contract concerning the City of Brunswick had also been rescinded on 10 July 2005. The Commission, however, wanted a judgement on whether or not Germany had complied by the end of the deadline (1 June 2004) in the reasoned opinion even though it did not consider a penalty payment to be relevant anymore. The Court agreed and stated that the relevant date of determining whether or not Germany had complied was 1 June 2004 and since the contract in question had not been rescinded and was, at the relevant date, going to continue for 30 years, Germany was in breach. Merely preventing any similar contracts from being made was not enough; the contracts had to be rescinded.

Several Member States tried to claim that demanding the rescission of the contract in order to comply was contrary to *inter alia* the principle of legal certainty and the principle of *pacta sunt servanda*, but these were all rejected by the Court stating that a Member State can not rely on these principles in order to justify non-implementation of a judgement under Art 226.[150] Since Germany had rescinded the contracts at the time of the judgement a penalty payment was not relevant, nor did the Court consider a lump sum to be relevant. In reaching this decision the Court simply referred to the facts of the case, without further elaborating upon which specific facts contributed to the ruling out of a lump sum payment.[151] Advocate General Trstenjak considered the lump sum payment only to be relevant in cases where "the Member State concerned has complied with the judgement only because it fears that a second set of proceedings may be brought against it, the breach is particularly serious or there is a tangible risk of its reoccurrence".[152] The AG did not consider there to be any risk for reoccurrence nor that the case was particularly serious (due to the relevant

[148] Case C-503/04 *Commission* v. *Germany* [2007] E.C.R. I-6153.
[149] Joined Cases C-20/01 and C-28/01 *Commission* v. *Germany* [2003] E.C.R. I-3609
[150] *Commission* v. *Germany*, *supra* note 149, para. 36.
[151] *Ibid.*, para. 41.
[152] AG Opinion *Commission* v. *Germany*, *supra* note 149, para. 89.

contracts having only local relevance and not a large impact on the internal market) and therefore shared the opinion of the Court of a financial penalty being unnecessary.[153]

The most recent case under Art 228 EC concerned[154] Portugal which was found to have failed to comply with a judgement whereby a Portuguese national law, making the award of damages to people harmed by a breach of Community law relating to public contracts conditional on proof or fraud, was found to be contrary to Community law. Since the national law examined in the first judgement had not been repealed at the time of the expiration of the deadline in the reasoned opinion, Portugal was considered to have failed to fulfil its obligations under the former judgement.[155] Constitutional difficulties in the form of a recent change of government did not justify the breach since, as mentioned above, according to settled case law such internal circumstances do not justify failures to fulfil Member State obligations.[156]

The Commission suggested a penalty payment of EUR 21 450 per day until the judgement had been fulfilled but the Court did not agree and imposed a sum of EUR 19 392 per day instead; the same amount as suggested by the AG. The Court arrived at this sum by lowering the coefficient for seriousness from the suggested 11 to 4 and raising the coefficient for duration from 1 to 2, since the infringement of non-compliance with the former judgement had persisted for more than three years. The Court thereafter continued to use the *n* factor and the fixed amount of EUR 600, which can be found in the new guidelines from 2005. The Commission did not use these numbers since it had stated that the guidelines would be applied first for cases where the decision to refer the matter to the Court has been taken after 1 January 2006. A lump sum was neither suggested by the Commission, nor considered by the Court.

The development of the use of financial sanctions is evolving slowly, but still the number of cases where it has been put to use is low, and the full picture of the sanctions is still to be painted.

[153] *Ibid*., para. 90.
[154] Case C-70/06 *Commission v. Portugal* [2008] E.C.R. 0000.
[155] *Ibid*., para. 19.
[156] *Ibid*., paras. 21-22.

5 Problematic Issues and Possible Ways of Improvements

In the 80s the enforcement procedure was proven to be ineffective as the number of unresolved disputes concerning Community infringements steadily increasing. The introduction of the financial sanction in Art 228 was a step forward, since through this novelty the Commission and the Court had a chance to put pressure on the Member States in a way that a purely declaratory judgement had not been able to.

The *Francovich case*[157], in which the principle of state liability was laid down as being applicable to cases where individuals been damaged by Member State's breaches of Community law, came after the Maastricht Treaty was signed, and can be said to have deprived Art 228(2) of a modicum of its significance. Nevertheless, there are still some situations where state liability does not come into play, since theses principles are only relevant in individual cases and are depending on the fulfilment of strict conditions.[158] Additionally, in some situations the loss faced by the individual might be too insignificant in comparison to the cost of bringing the proceedings to the Court. Finally, this sort of proceeding postulates a litigant. To wait for a litigant to arise may not be desirable in all cases. In these types of situation the sanctions under Art 228 is a better way to go.[159]

So what is the state of the enforcement procedure today? Judging from the latest Commission report it seems like it is heading in the right direction. In 2006 the total number of infringement proceedings initiated was 2518, which represents a decrease, albeit a fairly slight one, in comparison to 2005, where the number of initiated infringements was 2653. By the end of 2006 the majority of the initiated proceedings were still ongoing, 1642 out of 2518.[160]

Despite, the introduction of the sanctions and the seeming decrease of infringements, there are still some problematic issues with the enforcement procedure under Art 226-228 EC. Traditionally, three principal issues are held to limit the effectiveness of the infringement proceeding: firstly, the discretion of the Commission; secondly, the reliance of administrative sanctions rather than judicial sanctions; and thirdly, the lack of resources. These issues, together with some complementary ones, will be highlighted in this chapter.

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[157] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] E.C.R. I-5357.
[158] Arnull *et al*, *supra* note 24, p. 438.
[159] Arnull, *supra* note 58, p. 48.
[160] The European Commission, *supra* note 41.

5.1 The Role of the Commission

5.1.1 Discretion and Secrecy

The Art 226 procedure is often criticised for its secretive nature. The Commission sees the secrecy of the administrative phase as promoting faster compliance in that by avoiding bad press and publicity it is possible to have a forthright dialogue with the Member States. Tomkins agrees, and suggests that this might be one of the procedure's strengths and refers to the Sheapmeat affair, which was solved by political negotiation.[161] Jakob Söderman, in his role as the European Ombudsman, however, considered that a more public infringement procedure would promote compliance by the Member States.[162] Harden agrees and believes that by opening up the procedure and allowing citizens to monitor it, the publicity would make the procedure more effective, since the "shame-factor" would have a persuasive effect on the Member States.[163] However, to go so far as to make the Commission responsible to the extent that individuals could bring judicial proceedings against the Commission would not enhance effectiveness but instead, would most certainly slow the process down since such proceedings could delay cases, especially where the outcome of the case seemed to be unfavourable.[164]

Enhancing the publicity and the openness in the procedure could have its benefits through the "shame-factor" but there is another factor to consider. As Rawlings points out, the Commission is heavily dependent upon complaints from individuals in order to detect infringements, and as such it is important that the complainants approves of the process.[165] Conclusively, shutting the complainants out so they do not feel included in the process might in the long run lead to fewer complaints over all, which would be devastating for the procedure since the resources of the Commission does not allow for them to single-handedly monitor every aspect of the Member States' behaviour.

The change of procedure by the Commission that followed after the inquiry by the Ombudsman in 1997 (when the Commission decided to start informing the complainant before a file was closed), meant that the complainant now got an opportunity to express their opinion of the reasons given by the Commission before the final decision about the closure of the

[161] A. Tomkins, 'The Enforcement of EC Law' in *Law and Administration in Europe*, (P. Craig and R Rawlings eds, Oxford, Oxford Press, 2003) p. 291.
[162] Speech by Jacob Söderman, 'The citizen, the rule of law and openness', European Ombudsman, European Law Conference, Stockholm, 10 -12 June 2001, available on the EO's website.
[163] Harden, *supra* note 38, pp. 509-510.
[164] Harden, *Ibid*., p. 514.
[165] R. Rawlings, 'Engaged Elites, Citizen Action and Institutional Attitudes in Commission Enforcement', 6 *ELJ* (2000) p. 13.

file is taken[166]. This may have been sufficient to offer the complaint the feeling of inclusion that is necessary in order to safeguard the future of the Community enforcement procedure.

It is additionally important to remember that the boundaries of the discretion of the Commission are not set by the Commission themselves, but by the Court through its case law. Therefore the Court bears the responsibility for the shaping of the procedure. Despite the lack of support in the Treaty, the Court has insistently maintained the discretion of the Commission as being unreviewable and the reasoned opinion as being non-binding.[167]

5.1.2 Prioritisation and Politics

The true picture of the effectiveness of Art 226 is hard to determine since the procedure is not used to the same extent across the different sectors of Community law. The procedure seems to be used more in certain areas – such as the environment – than in others[168], and the Commission itself stated in its White Paper that certain types of infringements would be prioritised, meaning that cases falling into those categories would be dealt with faster and more intensively than others. The prioritisation is based on those infringements that would have the greatest impact on citizens and businesses and those infringements that persist for a long time. The categories are cases of non-communication of national measures transposing directives or other notification obligations; infringements having particularly negative impact on citizens such as infringements of Treaty principles and important regulations and directives; and finally, infringements of non-compliance with Court judgements declaring an existing breach (Art 228).[169]

Some consider that the approach to infringement taken by the Commission in areas such as the environment, where detection is difficult, as undermining the effectiveness of the procedure of both Arts 226 and 228, since the Commission seems to have a tendency to react on "an ad hoc basis".[170]

There are some areas that the Commission traditionally have avoided; such as politically sensitive areas like the activities of the national courts.[171] In fact, up until now there has never been a case under Art 226 concerning national courts.[172] However, the recent reasoned opinion aimed at Sweden and its courts' preliminary reference procedure indicates a change in the

[166] Tomkins, *supra* note 162, p. 293.
[167] *Ibid*., pp. 293-294.
[168] *Ibid*., p. 291.
[169] The European Commission, *supra* note 11, para. 3.
[170] Wennerås, *supra* note 134, pp. 31-32.
[171] Rawlings, *supra* note 166, p. 10.
[172] U. Bernitz, 'Controlling Member State Courts under EU Law: The Duty to Refer Cases to the ECJ and the Köbler Doctrine on Member State Liability', Paper presented at a seminar in Harvard Law School Nov. 9, 2005, p. 7.

agenda of the Commission. In the reasoned opinion against Sweden, the Commission questions whether the practice applied is according to the state's obligations in Art 234(3) and objects to the lack of national regulation on the procedure for deciding on referrals of cases to the ECJ. The main point of concern is that when the Supreme Court of Sweden decides on the admissibility of the case at hand it does not take into consideration whether or not a referral to the ECJ could be relevant.[173]

Moving into the area of the practice of national court is politically sensitive and might result in the loss of the vital co-operation by national courts.[174] In order for the judicial system to function properly within the EU there needs to be a high level of cooperation between the national courts and the Community courts since a great deal of the cases concerning Community issues are handled by the national courts. Therefore, one might hope that this case, as in the majority of the procedures started under Art 226, will be resolved through a negotiation settlement.[175]

The three areas that had the most newly registered cases during 2006 were energy and transport, environment and infringements concerning the internal market and services.[176] Due to the limited resources of the Commission there has to be some kind of focus on specific areas of where infringement occurs. If not, the result would be an unsustainable workload for the Commission. Furthermore, the emphasis on the administrative phase of the procedures might ease the workload of the Commission as well as the Court, even though it could make the procedures quite lengthy. Using the full Art 226 procedure in every case that the Commission considers a breach has been committed would inevitably result in the use of a fair amount of manpower, maybe even to an instinct that is not available for the Commission.[177]

Whether or not the reasons behind the initiation of infringement cases are political or are motivated by a prioritisation by the Commission is nevertheless unimportant in practice, since the Court has stated that it will not look into the reasons behind the case.

5.2 The Use of Art 228

A more frequent use of Art 228 can be detected and the sanction seems to be working fairly well. In 2002, in 23 out of the 28 proceedings brought against Member States under Art 228, Member States had complied.[178] In spite of

[173] The European Commission, *Reasoned Opinion addressed to Sweden* 13/10/2003, 2003/2161 C(2004)3899.
[174] Evans, *supra* note 1, p. 454.
[175] Bernitz, *supra* note 173, p. 19.
[176] The European Commission, *supra* note 11, Annex II, p. 6.
[177] Evans, *supra* note 1, p. 450.
[178] D. Chalmers and A. Tomkins, *European Union Public Law* (Cambridge University Press, Cambridge, 2007) p. 364.

this, there are some aspects that could be improved in order to enhance the effectiveness of the enforcement procedure as a whole.

5.2.1 The Use of the Financial Sanctions

One of the main matters of concern is how the two financial sanctions – the penalty payment and the lump sum – under Art 228(2) have been used in practice. Wennerås considered the penalty payment to be lacking in its deterrent effect since it only comes into play after an Art 228 judgement and is not already in the procedure under Art 226, which could mean that Member States can continue with the infringement for several years without any sanctions.[179] In the same vein, Hedemann-Robinson considers the effectiveness of Art 228 to be limited by the fact that the financial sanctions in reality only relate to the failure to fulfil the Art 226 judgement and not the initial breach of Community law and is therefore, in practice, a sanction aimed at penalising contempt of court. Relating to this is the fact that the calculation of the sanctions is only made from the date of the first judgement and not the end of the deadline of the first reasoned opinion.[180] This structure enables Member States to comply at a very late stage whilst still avoiding financial sanctions.

In the beginning it appeared that when a State did not comply with a reasoned opinion under Art 228 EC within the prescribed time limit but before the proceedings before the Court, the Member State would not receive any financial sanctions at all. Since the lump sum penalty has been put to use, the outlook seems to be changing since the thought behind the lump sum is to penalize the continuance of the infringement between the Art 226 judgement and the initiation of the judicial Art 228 proceedings.[181] In the past, the Commission's practice has been to eschew legal proceedings against a Member State that complies before the ruling of the second judgement even though the liability under Art 228(2) comes into play when the deadline of the reasoned opinion is reached.[182] According to the guidelines from 2005, that practice is going to change, starting with cases referred to Court after 1 January 2006.[183]

A textbook example of an instance where the lump sum should have been put to use in order to combat late compliance occurred in the case against Germany[184] concerning the waste handling contracts. Germany complied before the judgement under Art 228 was delivered but after the Art 228

[179] Wennerås, *supra* note 134, pp. 31-32.
[180] M. Hedemann-Robinson, 'Art 228(2) and the Enforcement of EC Environmental Law: A Case of Environmental Justice Delayed and Denied? An Analysis of Recent Legal Developments', (2006) *EELR* p. 316.
[181] Craig and de Búrca, *supra* note 17, p. 453.
[182] Hedemann-Robinson, *supra* note 181, p. 318.
[183] The European Commission, *supra* note 118, p. 13.
[184] *Commission* v. *Germany*, *supra* note 149.

reasoned opinion deadline. Neither the Commission nor the Court considered the lump sum to be a relevant sanction against Germany.

Interestingly, the case against Germany was considered by Wennerås whilst it was still pending. He used the case as an example of when to impose a lump sum in order to curtail late compliance by Member States. The circumstances at hand in this case were such that Germany could financially benefit from delaying compliance with the judgement under Art 226, by not terminating the contracts at hand, and in doing so, reducing the damages that the State might have to pay to the private parties for rescinding the contracts.[185]

Additionally, in the recent case against Portugal, a lump sum in addition to the imposed penalty payment could have been appropriate in order to sanction the three years that had gone by between the two judgements.

In order to take advantage of the full effect of Art 228 and to combat late compliance by Member States it is crucial that the lump sum payment is put to use systematically in every case when a Member State continues the infringement past the deadline laid down in the reasoned opinion. The profit of such an approach would be an increased deterrent effect on Member States' late compliances.

So far there have been very few cases under Art 228 EC since the amendments where introduced. Of the two financial sanctions available, the lump sum payment has only been used once, and that was on the Court's own initiative without the Commission having suggested it. After the case against France, where the Court decided to use the lump sum payment for the first time, the Commission stated that from now on, with the effect from 1 January 2006[186], the lump sum would be used more frequently, especially to prevent Member States from complying after the Art 228 reasoned opinion but before the Court's judgement; penalising the period of non-compliance between the two judgements. Due to the transitional rule it therefore still remains to be seen if the Commission will use the full potential of Art 228. However, since the Court is not bound by the Commission's suggestions of sanction under Art 228, a change of approach by the Commission may have little impact in practice. The Court has stated[187] that it considers the lump sum to be appropriate in cases only where there has been an effect on public and private interest, particularly where a breach had persisted for a long time. To what extent these conditions need to be fulfilled in order for a lump sum sanction to be qualified remains quite unclear since there has only been one such situation, in the case against France.

It has been questioned whether or not the Court's criteria of the effect on public and private interest are relevant in determining if a lump sum

[185] Wennerås, *supra* note 134, p. 61.
[186] The European Commission, *supra* note 118, p. 13.
[187] *Commission* v. *France, supra* note 130.

payment should be imposed. Wennerås considers such an effect to be present in all the cases where an Art 228 procedure has reached the Court, since in order to reach the judicial stage under Art 228 there has to be, first of all, an infringement of Community law under Art 226; secondly, a failure by the Member State to comply with that judgement; and thirdly, a failure to comply during the administrative procedure under Art 228. Through this sort of behaviour, by failing to respect the legal order of Community law and its effectiveness, the effect on this public interest is enough for a sanction to be justified and such a criteria does not have to be considered separately.[188]

Finally, it is important not to undermine the deterrent effect that the mere proposal by the Commission of a lump sum could have even though the Court may not agree with the suggestion in the proceedings. Therefore, in spite of the criteria suggested by the Court, the Commission will hopefully adopt a more systematic use of the lump sum payment.

5.2.2 The Lack of a Collection Mechanism

Since it is not within the discretion of the Court to state the exact steps necessary for a Member State to take in order to comply, the situation may occur whereby a Member State, after an Art 228 judgement, considers itself to be complying but the Commission does not. The two fairly obvious possibilities for a Member State in such a situation would be to seek judicial review of the matter under Art 230 or simply refuse to pay.[189]

One of the problematic issues with Art 228 EC is the lack of a mechanism for collection of the sanctions; which makes the outcome of a situation where a Member State would be refusing to pay somewhat uncertain. In the case of a refusal by a Member State to pay a financial sanction, the procedure could be as toothless as before the introduction of the financial sanctions. If a situation similar to the 'Sheepmeat affair' would be repeated, what are the avenues available to the Commission? Starting another Art 228 procedure would be pointless, especially considering that this procedure aims to correct a breach of a judgement under *Art 226*. The answer might be to withhold sums payable to the State in question, such as EU aids. Such an interpretation of Art 228 EC would, however, require quite a stretch of the wording of Art 228 EC, which describes the sanction as having to "be paid by the Member State".[190] However, a similar sanction was previously available in the European Union context. Under Art 88 ECSC Treaty (this will be dealt with in greater depth below) the Commission, with a two-thirds majority in the Council, had the power to impose a sanction in the form of suspension of payments that were due to the Member State. Nevertheless,

[188] Wennerås, *supra* note 134, p. 60.
[189] C. Hilson, 'Article 228 and the Enforcement of EC Environmental Law', 3 2 *Environmental Law Review* (2001) p. 138.
[190] Theodossiou, *supra* note 111, pp. 39-40.

the success of the sanction is hard to determine since it was never used in practice when the ECSC Treaty was in force.

As a response to such a withholding of the sums by the Community to the Member State, the Member State could equally retort by refusing to pay the Community what it owes. Conclusively, in the most severe cases, the sanctions may end up not having any effect at all. If the matter concerns an important national interest, the Member State may not be put off by the threat (or reality) of a financial sanction.[191]

Would the empowerment of the Court to state what steps the Member States have to take in order to comply with the Art 228 judgement enhance the effectiveness of the procedure? Firstly, such an empowerment could be seen as an infringement of the separation of powers between the Community and the Member States since it is the Member States that are responsible for implementing Community law. Also, the Court may not have enough competence for such an empowerment since it is not familiar with all national legal systems.[192] Additionally, the effect on the effectiveness might be fairly limited since the reason for non-compliance with a judgement is most unlikely to result from a lack of knowledge of *how* to comply, especially, after the administrative phases where the case has been discussed at length with the Commission.

The lack of a collection mechanism and possible means available if the situation of Member State refusing to pay would arise suggests that there is a limit to the effectiveness of the enforcement procedure and any sanction connected to it. In the case of an sufficiently important national interest becoming threatened, a Member State will probably not be discouraged from breaching certain Community provisions in order to protect the national interest in question. However, the limitations of the effectiveness in this area might be hard to overcome and perhaps no attempt should be made to do it – a "too" effective procedure would never be accepted by the Member States, since it would completely remove the scope for the Member States to even attempt to protect their national interests and could be perceived as a threat to their sovereignty, ultimately leading to severe consequences such as Member States withdrawing their Community membership.

5.2.3 The Method of Calculation

Commentators have raised issues concerning the calculation of the financial sanctions, both aimed at the method laid down by the Commission and its application by the Court, making suggestions that the calculation of the penalties are more complicated than necessary and that there seems to be an inconsistent use of the coefficients.

[191] T. Hartley, *Constitutional Problems of the European Union* (Hart 1999) pp. 109-110.
[192] Theodossiou, *supra* note 111, p. 37.

Kilbey states that calculation laid down by the Commission means that duration is considered twice when both types of penalties are imposed. This is because the calculation of the penalty payment is performed on the basis of the duration from the date of the first judgement to the date when the Commission takes the decision to proceed to the Court under Art 228(2). The relevant period of time for the calculation of the lump sum also starts with the first judgement under Art 226 proceedings, with the result that the same period is sanctioned twice if the two sanctions are used simultaneously.[193]

Kilbey suggests a simpler calculation of a daily penalty payment that could be used both for the penalty payment and the lump sum, which would be based on the criteria of seriousness of the infringement and the Member State's ability to pay. Just one method of calculation would be necessary since the start date of the two penalties would be the same. A lump sum would be imposed if the infringement desists before the delivery of the Art 228 judgement and the penalty payment would be relevant if the infringement persists. The amount referable to the period between the two judgements could be paid at once and would be followed by a regular payment until compliance is reached. By using this calculation method, duration is not taken into consideration twice and there is no need to impose both of the penalties in the same case. Avoiding imposition of both types of sanctions would additionally be in line with the wording of Art 228(2).[194]

There seems to be an inconsistency with the use of the calculation coefficients. In the first case against France, the infringement had been going on for 12 years and the coefficient was set to 3, which is the maximum. When compared to the case against Spain, where the infringement had lasted for 10 years, the resulting coefficient was only 1.5, showing a slight unbalance in the duration coefficient. Nevertheless, Spain was given 10 years to comply in practice there were only three years between the Art 226 judgement and the initiation of the Art 228 proceedings. Nonetheless, Spain had 10 years in total to comply since the directives in question were supposed to have been implemented by the time Spain joined the EU in 1986.[195]

In the second case against France the infringement had been going on for 17 years and the Court decided to use the maximum coefficient of 3, which seems to be in line with the first France case since the coefficient used in the first infringement case against France had been 3 and that infringement had "only" lasted for 12 years.

An inconsistent use of the coefficient could pose a threat to the principle of legal certainty. On the other hand, even though financial sanctions have been available for more than 10 years there have still been few cases and

[193] Kilbey, *supra* note 127, p. 754.
[194] *Ibid*., pp. 755-756.
[195] *Ibid*., pp. 754-755.

hopefully a more consistent use of the coefficients will crystallise when more cases have been determined.

5.2.4 The Deterrent Effect

In order for the infringement procedure to create as significant a deterrent effect as possible and enhance its effectiveness, it is vital that the breaches in form of not complying with judgements under Art 226 EC are combated through the frequent and systematic use of Art 228 and its financial sanctions. It is promising that there seems to be an increased use of the procedure under Art 228 due to a more frequent review of cases of non-compliance with Art 226 judgement following the new Commission Communication on the Application of Art 228. During 2006 ten cases were referred to the Court under Art 228, out of which two were withdrawn due to compliance by the Member State.[196]

As for the deterrent effect of penalty payments, that is not achieved until the cost of not compliance is higher than the benefits deriving from the infringement. Therefore, the financial sanctions must be high enough to ensure that it is not cheaper for the Member State to continue with the non-compliance, which has also been recognised by the Commission.[197] A failure to maintain proper enforcement could affect the credibility of EC policies in different areas, for example, the EC policy of environmental protection. If Member States are not deterred from infringing environmentally protective legislation the legislation might lose its value and could, in the long run, reduce incentives to make environmental protection commitments.[198]

In an Art 228 procedure the date from which to calculate the duration is set at the date of the Art 226 judgement. The date from where a possible penalty payment should be *imposed* is the date of the Art 228 judgement. To further enhance the deterrent effect of the sanction and to prevent Member States from benefiting from late compliance it has been suggested that the relevant date instead should be the date of the Art 228 reasoned opinion.[199]

It is claimed by the Commission that the financial sanctions are not intended to be a penal sanction and instead, the deterrent effect is highlighted. In *Commission* v. *Greece* the Court stated that it does not consider the penalty to be of penal nature.[200] The Court additionally avoids using the word sanction throughout the case, probably in support of that opinion. However, 'sanction' and 'penalty' are two words that have quite interchangeable

[196] The European Commission, *supra* note 41, p. 4.
[197] Hilson, *supra* note 190, p. 136.
[198] Hedemann-Robinson, *supra* note 181, p. 312.
[199] Hilson, *supra* note 190, p. 137.
[200] *Commission* v. *Greece*, *supra* note 119, para 41

definitions[201] and as pointed out by Hilson, the two effects are hard to separate – a parking fine can be perceived both as a punishment and a deterrent.[202] The Commission's method of calculating the penalty payment, using the duration of the infringement, its seriousness and the ability of the Member State to pay, does also support the penal nature of the sanction – a method that is also supported by the Court. If the single objective of the sanction were to make the Member State comply as fast as possible, an amount that could counter the benefits for the Member State of the infringement would be sufficient.[203] In the case of the lump sum it is particularly hard not to look past the penal element since it is a sanction punishing behaviour that occurred in the past. On the other hand, as pointed out by Schrauwen, the Court has stated that the Art 228(2) procedure is 'a special judicial procedure, peculiar to Community law'[204] and therefore, the punitive effect of the lump sum sanction might not be relevant as long as it can secure the objective to ensure compliance and have a deterrent effect on possible future infringements.[205]

Between 1997 and 2000 a penalty payment was proposed in 21 cases, only in one of theses cases (*Commission* v. *Greece*) did the Member State continue to breach and ending up paying. These numbers do suggest that the sanction has a highly deterrent effect[206], however, a more systematic use of the lump sum would enhance the deterrent effect of the Community enforcement procedure further.

5.3 Lengthy Procedures

One aspect of the main Community enforcement procedure that poses a threat to its effectiveness is the matter of time – the procedures are usually of great length. The statistic from the Commission shows that it takes an average of 19 months to close a case before a letter of formal notice is sent; 38 months for a case to close between the letter of formal notice and the reasoned opinion; and as many as 50 months when a case is closed after the reasoned opinion but before the case is sent to Court. This gives an average of 26 months to close a case.[207] The expansion of the EU has meant even more strain on the infringement procedure mechanism. Suggestions have therefore been made of focusing on preventive measures in order to reduce the number of infringement procedures.

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[201] L. Borzsak, 'Punishing Member States or influencing their behaviour or ludex (non) calculate?', 13 *Journal of Environmental Law* (2001) p. 251.
[202] Hilson, *supra* note 190, p. 135.
[203] Borzsak, *supra* note 202, p. 252.
[204] *Commission* v. *France*, *supra* note 130, para. 91.
[205] A. Schrauwen, 'Fishery, Waste Management and Persistent and General Failure to Fulfil Control Obligations: The Role of Lump Sums and Penalty Payments in Enforcement Actions Under Community Law', 18 2 *Journal of Environmental Law* (2006) p. 295.
[206] J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', *International Organization* 56 (2002) p. 619.
[207] The European Commission, *supra* note 11, para 3.

The effectiveness of the Community enforcement procedure could be improved by cutting the processing time. Even though the intention behind the administrative phase of the procedures is to reach compliance without the involvement of the Court, it is important to keep in mind that the Member States are given a considerable amount of time to implement legislation even before the very first stage of the infringement procedure. Hedemann-Robinson suggests that the Commission should set shorter deadlines for the letter of formal notice and the reasoned opinion. Additionally, he suggests that the judicial process could be made more effective by ending the involvement of the Advocate General in simpler cases and maybe even by granting jurisdiction to the Court of First Instance.[208]

It has been suggested that by stop using the pre-letter the over all length of the Art 226 procedure could be shortened. Since this is not a stage mentioned in Art 226 it cannot be seen as a compulsory stage of the procedure. Abandonment of the pre-letter would decrease the administrative work of the Commission and, together with applying the deadlines in each phase, would increase the effectiveness of the procedure.[209]

If the case at hand involves a Member State which does not comply with an Art 226 judgement, the time for the procedure under Art 228 EC must be added on to the total time to achieve compliance. Before arriving at a judgement under Art 228, there must first have been a procedure under Art 226, and then a reasonable time to comply with the Art 226 judgement before the administrative stage of the Art 228 procedure.

The Court has said that a Member State has to initiate compliance with an Art 226 judgement at once and be completed as soon as possible,[210] on the other hand the Court had said that the Commission is not allowed to initiate the administrative phase of the Art 228 proceedings before the Member State has been given reasonable time to comply with the Art 226 judgement.[211] Added to this is the time needed to comply with the Art 228 reasoned opinion, which usually amounts to two months. This could lead to years of non-compliance before the case reached the Court for the second time. Failing to impose a lump sum when a State has not complied with a reasoned opinion in time (with the reference to the duration of the infringement not being long enough) could be seen as being contrary to the objective of Art 228(2): to get Member State to comply as quickly as possible. If the Member State did not in fact get enough time to comply, the Court could instead dismiss the proceedings.[212]

[208] Hedemann-Robinson, *supra* note 181, p. 317-318.
[209] Munoz, *supra* note 7, pp. 32-33.
[210] *Commission* v. *Greece*, *supra* note 119, para. 82; *Commission* v. *Spain*, *supra* note 125, para. 27.
[211] *Commission* v. *Spain*, *supra* note 125, para. 30.
[212] Wennerås, *supra* note 134, pp. 59-60.

As with many of the problematic issues of the enforcement procedure, the matter of having a too lengthy procedure stems from the resources available to the Commission and the workload of the Court. However, there seems to be an improvement when it comes to shortening the length of the procedures. The average time to process infringements were cut by 3.5 months between 1999-2005 in comparison to the period between 1999-2002. Now the average time to process an infringement is 20.5 months. However, cases initiated on the basis of complaints and the Commission's own investigations have an average process time of 28 months.[213]

Additionally, the Commission has set special benchmarks for how long the procedures should take: for non-communication cases the Commission aims at a period of no longer than 12 months from the sending of the letter of formal notice to the case being settled or reaching the Court and for the 228 procedure the equivalent period should be between 12 and 24 months.[214]

5.4 The Existence of a Community Infringement Problem

It might be important to take a step back and look at the main Community infringement and enforcement procedure from another point of view, where the European Union as an international organisation is emphasised. Compared to other international organisations the European Union is unique, with the compulsory jurisdiction that has to be accepted by the Member States, leaving no room for discretion not to. Also, considering that only six out of every hundred infringements on record reach the judicial stage of the 226 procedure, the effectiveness of the procedure comes into a different light.[215]

Could the fact that the Commission has only used the 228 procedure in so few cases (less than 50 in over 10 years) suggest that the Commission itself does not consider non-compliance with Art 226 judgements to be a major issue?[216] Or is the reason behind this only that the Commission is not yet really sure of how to use it? Or do the few cases depend solely on the lack of Commission resources?

The state of the infringement problem in the Community is, as addressed earlier, hard to determine. The available statistics of infringement only represent the infringements that have indeed been *detected*, which could potentially be a mere fraction of the real number,[217] which suggests that there is even a possibility of the Community infringement problem being larger than suspected.

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[213] The European Commission, *supra* note 41, p. 4.
[214] The European Commission, *supra* note 11, para. 3.
[215] Tomkins, *supra* note 162, p. 288.
[216] *Ibid.*, p. 291.
[217] Börzel, *supra* note 21, p. 808.

5.5 The ECSC Treaty

Under the ECSC (The European Coal and Steal Community) Treaty, which expired 2002, there was a similar enforcement procedure as in Art 226-228 under Art 88 ECSC. There were, however, some differences. Under Art 88 the Commission had the power to take a binding decision on the existence of an infringement and to put down a time limit for compliance. The Member State could then either comply or bring the matter to the Court to challenge the decision within two months. If the Court came to the same conclusion as the Commission, the decision would stand. In that case, the Commission, with a two-thirds majority in the Council, had the power to impose a sanction in the form of suspension of payments that was due to the Member State. Within two months, the Member State could challenge the decision to impose sanctions in the Court.[218]

Even though, on the surface, the procedure seems quite effective, the sanctions were never actually used which may have resulted from the complicated role the Commission had in playing the accuser, the judge and the executioner, alongside its everyday amicable collaboration with Member States. [219]

It has been suggested, in the Report of the Reflexion Group on the Future of the Judicial System of the Communities (Report of January 2000), that giving the power to the Commission on deciding whether or not there has been an infringement could ease the workload of the Court significantly. However, it seems difficult to see how such a system would ever be accepted by the Member States; a system where the Commission plays the multi-facetted role of investigator, prosecutor and judge.[220]

The return to such a practice is supported by some commentators since it would drastically decrease the length of the time Art 226 cases are treated.[221] However, there is no guarantee that the Member States against which the Commission has taken a decision would not systematically challenge the decision in the Court. In that case scenario neither the length of the infringement procedure nor the workload of the Court would be decreased. Additionally, the fact that this system was never used when it was available under Art 88 casts shadows over any suggestion of re-enforcing it.

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[218] Dashwood and White, *supra* note 2, p. 410.
[219] *Ibid*..
[220] Schermers and Waelbroeck, *supra* note 29, p. 601.
[221] Munoz, *supra* note 7, p 35; R. Mastroianni, 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?' 1 *EPL* (1995) p. 539.

5.6 The Impact of the Lisbon Treaty

Although it has not yet entered onto force, the Lisbon Treaty that was signed by the Heads of State or Government of the 27 Member States on 13 December 2007 presents some changes to the Community enforcement procedure. Art 226 EC and Art 227 EC, with the new numbering being Art 258 and Art 259, remain unchanged. However, Art 228 EC, changed to Art 260, contains a few changes to the procedure that can become significant in practice. The new Art 228 (non-consolidated version)[222] reads:

> **Art. 260 [ex 228]**
>
> 1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
>
> 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. 2It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
>
> If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
>
> This procedure shall be without prejudice to Article 259.
>
> 3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, 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 circumstances.
>
> If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

At the 'Convention on the Future of Europe' proposals were made making it possible for the Commission to start proceedings for a fine at the same time as the initial infringement procedure.[223] To this end, this possibility was only opened in procedures regarding states' failure notify transposition measures (Art III-362(3) CT) in the now scrapped EU Constitution.[224] However, that part of the Constitution lives on in Art 260 of the Lisbon Treaty, which makes it possible for the Commission to suggest a lump sum

[222] At the time of writing, since the Lisbon Treaty has not yet been ratified by the Member States, no consolidated version of the Treaty documents exists. As such the Article numbers given for the Lisbon Treaty are equally still awaiting ratification.
[223] Final Report of the Discussion Group on the Court of Justice, CONV636/03
[224] Chalmers and Tomkins, *supra* note 179, p. 364.

or penalty payment in the first infringement proceeding; corresponding to the Article we presently know as Art 226 EC.

The possibility of the Court being able to impose financial sanctions contemporaneously with the initial infringement procedure is a thrilling prospect and would, without any doubt, add to the deterrent effect. The fact that a sanction at present can only come into play after an Art 226 judgement has been delivered and when the proceedings under Art 228 EC has reached the judicial stage, has been highlighted by many commentators as being particularly problematic. This adds further time to the lengthy proceedings and makes it possible for a Member State to continue its breach for a considerable time even after the delivery of an Art 226 judgement, without receiving any sanctions. Therefore, it goes without saying that the change introduced in the Lisbon Treaty is a welcome one, making it possible to combat Member States which drag their feet in complying with the first infringement judgement. However, it seems that the possibility is quite limited; applicable only to infringements concerning failure to *notify* measures transposing a directive. In the case of a directive being transposed wrongly, there still have to be proceedings under Art 260 following an initial judgement under Art 258 in order to impose a financial sanction. This additionally applies to all other cases of infringement – Art 228 has to be used in order to allow sanctions to be imposed. Therefore the change introduced in the Lisbon Treaty might not have a great practical impact on the effectiveness of the enforcement procedure. Nevertheless, it has to be emphasised that by being able to impose a financial sanction in the initial infringement procedure, some of the purely declaratory nature of the Art 226 judgement would be removed, and its teeth would be sharpened, even if only marginally.[225]

As for reducing the problematic length of the infringement procedures, the Lisbon Treaty introduces another welcome change: in cases where the Court has previously stated the infringement of a Member State, the issuing of the reasoned opinion is no longer necessary. This could in practice remove several months, if not years, from the length of the Community enforcement procedure, which would doubtlessly improve its effectiveness. Even though the possibility of suggesting a sanction as early as the first infringement proceeding is strictly limited to 'failure-to-notify' breaches, the removal of the reasoned opinion would mean that the period of time that Member States could wait to comply with the first judgement without receiving any sanctions would be considerably shortened.

Finally, in the spirit of the principle of legal certainty, the Court – according to the new Treaty – is no longer allowed to impose higher penalties than those suggested by the Commission. Whether or not that also means that the Court cannot impose a different *type* of sanction, for example, a lump sum where a penalty payment is suggested remains to be seen.

[225] Steiner *et al*, *supra* note 10, p. 241.

Arnull suggests that the reason behind limiting the changes introduced in the Lisbon Treaty is "governments' traditional wariness of judicial oversight". They have achieved this by only allowing the Commission to ask for financial sanctions in the first proceedings for certain types of breaches and by making it impossible for the Court to impose a higher amount than specified by the Commission.[226] Obviously, it is not in the interest of the Member State to make the enforcement procedure too effective and therefore the final wording has been limited in light of this.

5.7 An Alternative Solution

Much of the discussions about the effectiveness of the enforcement procedure are focused on reforming the tools already available. Munoz, however, adds that another possible way to enhance the effectiveness be to apply a filter that would reduce the number of infringement procedures. Such a filter would not necessarily been in the form of a selectivity policy since that could result in the weakening of the Commission's role and the protection of citizen's rights; and be practically difficult to implement. Munoz instead suggests "*ex-ante* control tools" that would monitor Member States' measures *before* they are made, in comparison to "*a posteriori* control tools", as in Arts 226-228 EC that comes into play first when a national measure has been adopted. An example of such an *ex-ante* control tool is Directive 83/189/EEC which lays down a notification procedure for so called national technical regulations.[227] The Directive has been in force since 1988 and is applicable to all goods and makes it compulsory to notify the Commission of the implementation of certain national measures. When the Commission has been notified a copy of the notification in question is sent out to the rest of the Member States. During the process the Member State cannot implement the measure in question. The process can take anything from four months up to a year, if not more in some cases, depending on the opinion of the Commission of the measure.[228]

If a measure is not notified to the Commission it is without legal effect.[229] Through this process future infringements are avoided since the contents of the national measure are checked before they are adopted in order to ensure that they are in line with Community law. It would also mean that any obscurity of how the Community legislation should be interpreted could be remedied.[230]

[226] Arnull, *supra* note 58, p. 52.

[227] Munoz, *supra* note 7, p. 8-13.
[228] Ibánez, *supra* note 8, p. 162.
[229] Case C-194/94, *CIA Security International* E.C.R. I-2201.
[230] Munoz, *supra* note 7, p. 42.

However, the process under the Directive does not prevent the use of the procedure under Art 226 when an adopted national measure, even after having been notified, still is not in line with Community law.[231]

Advantages with such a system are that obstacles to the internal market due to a lack of or poor implementation are prevented before they arise. It also means that the enforcement procedure would be shorter, and it would ease the workload of the Court of Justice.[232] On the other hand, the implementation of such a system would mean an increase workload for the Commission. It could also mean that the adoption of measures would take longer and it does not solve the problem of Member States that entirely fail to notify measures. Finally, it may be politically difficult to persuade the Member States to accept such a system.[233]

The Commission seems to be well aware of the benefit of preventive measures, proof of which can be found in the Commission Communication on Better Monitoring of the Application of Community Law from 2003[234] and the following Commission Communication from 2007[235], with suggestion of improving the implementation process through, for example, offering developing guidelines and expert group meetings in order to facilitate the implementation in Member States and making sure that civil servants and judges can receive training in Community law. Additionally, by improving working methods and information exchange between the Commission and the Member States, the number of infringement proceedings could be reduced by settling questions or complaints of the correct application of Community law before reaching an infringement procedure.

[231] Ibánez, *supra* note 8, p. 162.
[232] Munoz, *supra* note 7, p. 43.
[233] Munoz, *supra* note 7, pp. 44-46.
[234] The European Commission, *Communication on Better Monitoring of the Application of Community Law* COM(2002)725.
[235] The European Commission, *supra* note 11.

6 Conclusion

The status of the compliance problem in the Community is hard to determine since the initiations of the infringement procedures are dependent upon complaints of the specific breaches and furthermore the Commission's discretion on when and whether the possible breach is going to be investigated and prosecuted. Despite the difficulties of determining the exact state of non-compliance in the Community, the fact that infringements are committed constantly cannot be ignored and the need for an effective enforcement procedure remains. The introduction of the financial sanctions in 1992 has, without a doubt, increased effectiveness but there are still some steps available to enhance it further.

In the latest Commission report a decrease of the number of detected infringement, however slight, may suggest that the enforcement procedure has become more effective. The ambiguity of how the amendments to Art 228, introduced in 1992 and used for the first time in 2000, would be put to use in practice has decreased somewhat through the increased use of the Article and could in itself suggest an enhanced deterrent effect.

The Community has recently expanded and now has 27 Member States. Still, the main enforcement procedure remains virtually the same as it was when the Member States were only 6. The full impact of the new Member States is yet to be seen and the main challenge for the enforcement procedure today is the expansion and increase of complaints and infringement that will doubtlessly put the procedure under strain.

In order to combat the strains the enlargement will mean the effectiveness of the main Community enforcement procedure should be done through *inter alia* increasing the openness of the different stages of the procedure. A more open procedure would not only enhance effectiveness, it would also be more in keeping with the concept of European citizenship. An increase in publicity would lead to quicker compliance through the 'shame-factor' since Member States would try to avoid non-flattering press. However, the infringement procedure under Arts 226-228 is not just a litigation procedure, but also a tool for dispute resolution. In fact, the majority of the infringement procedures initiated by the Commission are resolved before they reach the Court. In order for matters to be resolved between the Commission and the Member States through negotiations it is important that the procedure does not become too open. A certain level of leverage must be maintained and additionally, if the complainants were given the right to litigate against the Commission, that could mean even lengthier procedures since such a right would surely mean further delays.

Furthermore, it is crucial that the length of the infringement procedure is shortened. The latest statistics from the Commission seem promising in that aspect, but further improvements should be made by keeping tighter

deadlines; removing the Advocate General's opinion in simpler cases; and even by scrapping the first informal letter that is not mentioned in the Treaty.

Between 1993 and 2006, 49 cases were referred to the Court under Art 228 EC, 35 of which were closed or withdrawn without a judgement being delivered by the Court since compliance had been achieved.[236] The statistics suggest that the mere existence of the procedure in Art 228 contributes to better compliance and greater effectiveness. However, this could be further enhanced though the systematic use of the lump sum in every case where a Member State has not complied with an Art 226 judgement. Such an improvement could prove to be vital in order to make use of the full potential of the financial sanctions and enhance the efficiency of the enforcement procedure to the uttermost. The Commission has stated, in the guidelines from 2005, that this will be its new approach, starting with every case referred to the Court under Art 228 from 1 January 2006. As there has still not been a judgement of a case delivered since that date, it remains to be seen if the Commission is going to stick to its stated approach. It is important to remember, however, that no matter what the Commission suggests, the Court does not consider itself bound by it. As a matter of fact, the Court stated in the first case against France[237] that under Art 228, the lump sum was only relevant in cases where the infringement had had an effect on public and private interests, particularly where a breach had persisted for a long time. That suggests that even though the Commission would put the new approach of always asking for a lump sum to use, that would not be reflected in the judgements. However, it is still valuable for the Commission to maintain its new approach since the mere suggestion of a lump sum may deter other Member States from non-compliance with a judgement under Art 226, as well as expedite the compliance of the Member State in the case at hand.

Additionally, a more rigorous approach by the Court could also contribute to enhancing effectiveness. After what was to many a surprisingly harsh judgement against France where the lump sum was used for the first time, the Court seems to have changed and grown softer in its approach against the Member States. For example, in the most recent case against Portugal a lump sum could have been appropriate. There had been three years between the two judgements and even though the breach in itself might not have reached the top part of the 'serious scale' it was nevertheless a breach that directly affected individuals trying to claim damages, making the process of doing so more costly and complicated, which was also recognised by the AG.[238]

The softened approach is also evident in the Art 228 judgements against Italy and Germany, where even though both of the Member States were

[236] The European Commission, *Application of Community Law, The Situation in the Different Sectors* SEC(2007)975, Annex, pp. 8-12.
[237] *Commission* v. *France*, *supra* note 130.
[238] AG Opinion to *Commission* v. *Portugal*, *supra* note 155, para. 51.

found not to have complied with the former judgement against them under Art 226 EC at the time of the expiry of the reasoned opinion, no sanction was imposed.

Using the British beef controversy as an example, where the Commission chose to eschew the court proceedings, two points of view becomes apparent: the resolution of the controversy could be seen as an indication of the deterrent effect of the financial sanctions in Art 228(2) EC, but on the other hand, the situation could be a sign that the Member State has a fairly wide scope for non-compliance.[239] I believe that the answer lies somewhere in between – if used correctly, the financial sanctions have a real potential of having a determining deterrent effect on a Member State's behaviour. However, for the more serious infringements where the Member State is knowingly committing a breach in order to protect a national interest, it is doubtful if the financial sanctions would have much impact. This is especially true since there is no collection mechanism for the sanctions and a Member State that does not fulfil its Community obligations by protecting a national interest can therefore simply refuse to pay the imposed sanctions.

Art 260 in the Lisbon Treaty, replacing Art 228 EC, entails a very welcome contribution to the further enhancement of the effectiveness of the enforcement procedure, even though limited in its practical use. Being able to impose a financial sanction under the first infringement procedure will enhance the deterrent effect as well as noticeably reducing the length of procedures. The scrapping of the reasoned opinion will also contribute to shortening the unnecessary lengthy procedures. Unfortunately, the effect of the change is very limited since it only applies to infringements concerning non-notification. If asking for a financial sanction in the first infringement proceeding would have been available to all types of breaches it would doubtlessly have resulted in a much greater change.

The limitations of the changes introduced in the Lisbon Treaty are, however, a sign of the Member States' desire not to make the effectiveness too effective. Even though there are still issues to be addressed, for example the length of the proceedings, the use of the sanctions by the Commission and the Court and the impact of the enlargement of the Community; there is a limit to how effective the procedure can become. The Member States would never accept an overly rigorous approach by the Commission and the Court and the limits to the changes introduced in the Lisbon Treaty are proof of that. The Member States must be able to feel that the door is still ever so slightly ajar for non-compliance, particular when it comes to the protection of certain national interests. Even though the purpose behind the enforcement procedure is to make sure the Member States comply with the Community law, if it is too effective it could, in a worst case scenario, lead to Member States leaving the Community if left to choose between the European Union and the national interests. In order to avoid that situation from arising it is vital that the Member States do not feel too constrained

[239] Arnull, *supra* note 58, p. 50.

and additionally it is important to keep some parts of the enforcement procedure form being too open, leaving room for certain conflicts to be negotiated without the involvement of the public. Remembering the inclination of the Member States when enhancing the effectiveness of the main Community enforcement procedure is therefore vital in order for the proper function of the procedure, and of the Community as a whole.

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