Contemplating compliance: European compliance mechanisms in international perspective
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CHAPTER 3
EU Infringement Procedures
“I would say it’s only in a national system that you can have forced compliance. In a totally international system like the WTO or something in-between like the EU, at the end of the day you implement, because you want to implement. And you believe that the cost of not implementing is worse than the cost of implementing.”

Respondent #3.
1. INTRODUCTION

This chapter provides an overview of the development and workings of the European infringement procedures. First an overview is given of how these procedures function, setting out the legal as well as the practical aspects. Second, the character of the infringement procedures is discussed, with a focus on the development of the system from a highly political one in its early days – with ample room for diplomacy and Commission discretion – to a more judicial system up until and after the ratification of the Lisbon Treaty. Furthermore, two additional elements of the system are explained – the articles concerning the possibility of asking for sanctions against a non-compliant Member State, as well as the option under Article 259 TFEU, where a Member State can itself start an infringement procedure against another Member State without further involvement of the Commission. Finally, an analysis is made of the effectiveness of the infringement procedure, following the steps of the theoretical model as set out in Part I.

2. ARTICLE 258 TFEU

Article 17(1) TEU confers the responsibility of the correct application of the Treaty onto the Commission:

The Commission shall promote the general interest of the EU and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of EU law under the control of the Court of Justice of the European Union. [...]¹

The manner in which the Commission can fulfill this responsibility as ‘Guardian of the Treaty’ is laid down in Article 258 TFEU, which states the following:

If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, 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

¹ This article is the replacement (in substance) of Article 211 EC “The Commission shall ... ensure that the provisions of this Treaty and the measures taken by institutions pursuant thereto are applied”.
As is clear from the text of Article 258, the infringement procedure consists of two stages: first, the administrative (or preliminary) stage where the alleged infringement is handled between the Member State and the Commission; second, the judicial (or litigation) stage, when the Commission decides to take the case before the Court of Justice. In practice, only 5% of all infringement procedures make it to the judicial phase – all other cases are closed before referral to the Court of Justice. The way the infringement system works is outlined in the following sections. The section starts by determining the scope and aim of the procedures before turning toward the actual process.

2.1. Scope and Aim of the Procedures

Both the scope and the aim of the procedures are determined by the wording of Article 258 TFEU. The next subsections elaborate on the content of this article regarding the scope and aim of the procedures, as well as the modes of detection of alleged cases of non-compliance available to the Commission.

2.1.1. Detecting Infringements

First, the Commission needs to establish that there is or has indeed been an infringement of EU law. An infringement is defined in Article 258 TFEU as the “failure to fulfill an obligation under the Treaties”. This very general description of a Member State violation covers two elements: “obligation under the Treaties” and the “failure to fulfill”.

Obligation under the Treaties
This refers to any obligation under European Union Law, covering all rules of EU law that are binding on the Member States: primary legislation, secondary legislation and supplementary legislation.

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3 See ibid. for details on how and why individual cases are started by the Commission.
A. Primary law
- Treaty on European Union (TEU)
- Treaty on the Functioning of the European Union (TFEU)
- Charter of Fundamental Rights of the European Union
- Protocols attached to TEU and TFEU

B. Secondary law
- Regulations (binding and directly applicable in all Member States)
- Directives (binding upon each Member State to which it is addressed as to the result to be achieved (but leaves the choice of form and methods of implementation to the national authorities))
- Decisions (binding in its entirety on those to whom they are addressed)
- Recommendations (no binding force)
- Opinions (no binding force)
- International agreements (a Member State cannot act against an international agreement concluded between the Union and a third party, as per Article 218 TFEU; while a Member State cannot conclude an international agreement with a third party, if this were to interfere with the exclusive competence of the EU)

C. Supplementary law
- Case law of the European Court of Justice
- International law
- General principles of law (e.g. the principles of proportionality, legitimate expectation or the guarantee of basic rights)

The term “obligation” equally covers both acts (such as, for example, the impositions of customs duties by a Member State, contrary to Article 34 TFEU where all quantitative restrictions on imports between Member States are prohibited) and omissions (such as, for example, the omission to implement a directive within the required timeframe).

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4 The legal basis for these legal instruments (regulations, directives, decisions, recommendations and opinions) is found in Article 288 TFEU.

5 Recommendations and opinions are not binding on the Member States, and are therefore not enforceable in a court of law. However, national courts do have to interpret EU law and national laws in light of these recommendations and opinions (cf. Case C-322/88, Grimaldi v Fonds des Maladies Professionnelles, [1989] ECR 4407).

6 See also Case C-266/03, Commission v Luxembourg, [2005] ECR 4805, paras. 34-52: if the EU has established competence in a certain area, the Member States lose their right to conclude agreements with third parties in this area.

7 In 2009, the areas in which most new infringement procedures were started were Environment (15%), Energy and Transport (15%), Justice, Freedom and Security (14%), and Internal Market and
Failure to fulfill
From the wording of Article 258 it is apparent that the action for the failure to fulfill obligations is objective in nature, and thus any shortcoming by a Member State with regard to its obligations under the rules of European Union Law would be sufficient grounds for a claim that it is in breach of its obligations under the Treaties. It thus makes no difference if the action (or omission) had adverse effects, nor how long, how often or when it took place. Whether it is appropriate to bring an action for a “small” infringement, for example, rests solely with the Commission, who has complete discretion in this matter.

An infringement can theoretically be made by any part of the national system. In *Belgian Wood* the Belgian government stated it could not be held responsible for the actions undertaken (or rather not undertaken) by the Belgian Parliament. The Belgian Parliament had been out of session, which caused it to be late in implementing a certain Directive. The Court of Justice held that “Obligations arise whatever the agency of the state whose action or inaction is the cause of the failure to fulfill its obligation even in the case of a constitutionally independent institution”.

More recently, in regard to a case involving Sweden, it was debated whether the failure of national courts to comply with EU law could also be the basis of an Article 258 procedure, since national governments cannot force their independent courts to act in a certain manner. This would go against the idea familiar from general international law of the separation of powers and *Trias Politica*. However, in the infringement procedures it is not the national government that stands before the court, but the Member State in its entirety, thus including the judiciary. Generally speaking, where there is a conflict between national and EU law, the courts of the Member States shall set aside national law and apply EU law. Furthermore, when a question regarding, for example, the interpretation of the Treaties is raised before national courts, a lower court may, and a national court of final instance must refer the matter to the CJEU under Article 267 TFEU (the preliminary reference procedure). In practice, many cases involving issues of EU law have been solved in national supreme courts without a reference to the

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Services (13%). Almost half of all cases originated from a complaint made to the Commission by citizens or businesses. 20% were own-initiative cases (including five petitions and parliamentary questions) and 30% were non-communication cases (see also section 2.1.2 on non-communication).

Under Article 260(3) regarding sanctions, some of these elements do play a role. See also section 6 in this chapter.

More on the Commission’s discretion in section 2.2 et seq.

CJEU. According to the so-called Due Report\(^\text{11}\) by a group of ‘wise men’ on issues of reform for the EU Court system, it is however theoretically possible to take actions against a Member State for failing its obligation to refer.

In 2004, the Commission sent a reasoned opinion under Article 258 to the Swedish government observing that the Swedish courts of final instance seldom referred cases to the CJEU for a preliminary ruling. It noted in particular that there was no regulation in Swedish law on the procedure for referring cases, and found it questionable whether the Swedish practice was in line with its obligations under Article 267 TFEU.\(^\text{12}\) The matter never came before the CJEU, and was settled during the preliminary (prejudicial) phase since the Swedish government had meanwhile passed a law changing the code of procedure, obligating the national courts to state their reasons for not referring to the CJEU. Nevertheless, this action by the Commission indicates it might be possible for Article 258 procedures to be opened on the basis of (in)actions by the national courts of the Member States.\(^\text{13}\)

In practice, most infringement procedures concern the incorrect or late implementation of directives.\(^\text{14}\) Börzel outlines the following five infringement categories that can be identified from case law: i) Violations of treaty provisions, regulations, and decisions; ii) Non-transposition of directives or no notification; iii) Incorrect legal implementation of directives; iv) Improper application of directives; v) Non-compliance with CJEU judgments.\(^\text{15}\)

As can be seen from these five categories, directives play an important role in the infringement procedures – which is not surprising, given the fact that 80% of all EU legislation is made up of this type of legislation. Furthermore, directives are only binding as to the result to be achieved, which leaves room for the Member States as to how they will implement the directives. This in consequence leaves room for mistakes to be made in the implementation of the legisla-


\(^{13}\) Two cases where the Court addressed the possibility of Member State liability for breaches of EU law by the judiciary are Case C-224/01, Köbler, [2003] ECR 10239; and Case C-173/03, Traghetti del Mediterraneo, [2006] ECR 5177.

\(^{14}\) As was learned from examining the infringement reports, available at http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.

tion, thereby leading to a higher probability of infringements. With regulations, which make up the bulk of the rest of EU legislation, this problem is partly solved since a regulation is binding on the Member State in its entirety and is directly applicable. By skipping the implementation stage, therefore, there is less opportunity for mistakes to be made by the Member States.

A second reason why directives play an important role in the infringement procedures is that non-compliance with EU directives is the most visible and easily detectable of all infringements of EU law. First, directives need to be implemented in national law within a certain timeframe – which can be checked by the Commission. Second, anyone can check national legislation against the original directive to determine whether it is in line with the directive. With regulations, for example, one need only look towards practice in the Member States or national secondary legislation (which is often less easily accessible) to see whether the Member State is in compliance with EU law in this regard. Moreover, where cases are based on complaints from individuals or others, the complaints often stem from the incorrect implementation or application of directives as well.

2.1.2. Modes of Detection

It was pointed out above that infringement procedures involve directives more often than other types of legislation. One of the explanations for this is the fact that infringements concerning directives are more easily detectable. Nevertheless, the Commission cannot detect all infringements by itself and counts on other parties for information as well. The Commission has three modes of detection: complaints, own initiative and non-communication.

Complaints

Anyone may lodge a complaint with the Commission against a Member State for any measure or practice attributable to that Member State which they consider incompatible with a provision or a principle of EU law. It must concern a specific breach of EU law by a Member State and therefore cannot concern a private dispute. However, the complainant does not have to demonstrate his or her formal interest in the proceedings, or that he or she is directly concerned. The threshold for lodging a complaint is very low – one can simply download a form from the Commission website or send a letter or e-mail to the Commission. Anyone may lodge a complaint with the Commission without the need to prove a personal interest in the case. Complainants can thus be private citizens, businesses, NGOs
or other entities. Once the infringement procedures have started, however, the complainant no longer stays actively involved in the procedures.\textsuperscript{16}

**Own-initiative cases**

Since the Commission has limited investigation services, it largely depends on outside information for the detection of infringements, for example following parliamentary questions or petitions or through the press. Given the amount of information available through these channels, however, the non-existence of an investigative service is not a serious problem – even more so since Member States are obliged to cooperate with the Commission and provide all information necessary to fulfill the Commission’s task as Guardian of the Treaty in its investigations under Article 4(3) TEU:

\begin{quote}
Pursuant to the principle of sincere cooperation, the EU and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
\end{quote}

\begin{quote}
The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.
\end{quote}

\begin{quote}
The Member States shall facilitate the achievement of the EU’s tasks and refrain from any measure which could jeopardize the attainment of the EU’s objectives.\textsuperscript{17}
\end{quote}

This “duty of sincere cooperation” under Article 4(3) can itself also be the reason for starting infringement procedures against a Member State if the Member State fails to cooperate. Non-cooperation would constitute a failure to fulfill an obligation under the Treaties.\textsuperscript{18} In a way, this Article thus obliges Member States to work towards their own conviction if they are indeed infringers.

Another important source of information for the Commission is the preliminary reference procedure under Article 267 TFEU. Questions that come up in these procedures can often alert the Commission to problems with or infringements regarding the application of EU law, irrespective of the outcome of the preliminary or national procedure.

\textsuperscript{16} But is kept informed on steps taken in the procedures by the Commission. More on the role of the complainant in infringement procedures below in section 2.2.

\textsuperscript{17} This is in part the text as could previously be found in Article 10 EC.

Although the Commission does not have a general investigation unit of its own, some of the Directorates General (DGs) can avail themselves of such an investigation possibility. These units regularly report to the Commission on instances of non-compliance. However, most DGs do not have this option. Moreover, on-the-spot-checks are quite costly and labor intensive, and can also be blocked by the Member States. This happens quite often, specifically in politically sensitive areas. The Member State in question can then of course be forced to cooperate with the Commission and provide the Commission with the information it requires due to the principle of sincere cooperation. However, given the forced nature of this track the information rendered is probably less transparent and objective. Because of its limited capacities therefore, the Commission remains dependent on monitoring and information gathering by external agents, including industries and NGOs.

Non-communication
Non-communication of measures refers to the breach of the obligation for Member States to notify the Commission of the measures they have undertaken to properly transpose a certain directive. A directive is in principle only binding upon Member States as to the results to be achieved, but leaves the choice of form and methods to achieve these results up to the Member States. A directive can, however, have a vertical direct effect once the deadline for transposition has passed. Usually one of the last articles of a Directive contains the following text, in which it demands communication from the Member States on the measures they have taken in implementing the Directive before a certain deadline:

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19 One example is the Food and Veterinary Office, that produces inspection reports not only on compliance in certain priority areas to inform the Commission, but also to highlight areas where the Commission may need to consider clarifying or adapting legislation, or to propose new legislation. This Office was established in 1997 as a Commission service under the Directorate General Health and Consumers and can carry out on the spot inspections.

20 Article 288 TFEU.

21 It can thus be relied upon by individuals against a Member State in court (it cannot be relied upon by individuals against other individuals in court (horizontal direct effect)), based upon the established case-law of Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Brasserie du Pêcheur and Factortame), [1996] ECR 1029, para. 51; Case C-5/94, Hedley Lomas, [1996] ECR 2553, para. 25; Case C-424/97, Salomone Haim v Kassenärztliche Vereinigung Nordrhein (Haim), [2000] ECR 5123, para. 36 and para. 83.

22 The CJEU has judged that a Member State should not be permitted to take advantage of its own wrongdoing by non-implementation, which would deny individuals the rights they were intended to enjoy under Union law (see Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic, [1991] ECR I-05357, as well as e.g. Dougan, M., ‘The “disguised” Vertical Direct Effect of Directives?’ (2000) 59 (3) The Cambridge Law Journal).
“Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [date]. They shall forthwith inform the Commission thereof.”

If no communication is made to the Commission on whether or how the Member State has implemented the directive within this deadline, the Commission automatically starts the first informal phase of investigation under Article 258 TFEU. In 2008, almost half of all new infringement cases were detected due to the non-communication of Member States. Given the important role played by non-communication cases, and the fact that these cases are quite easily detectable and automatically lead to the start of infringement procedures, the implementation of directives within the EU has been the focus of much research over the past years, especially in the fields of social and political science.²³

Figure 3.1 below shows the relative importance of these three modes of detection.²⁴ In the past, complaints usually amounted to the largest source of detection, with non-communication coming a close second. Strikingly however, a decline in the number of complaints leading to infringement procedures is evident. Especially in 2010, the last data available at the time of writing, a large decrease in the number of complaints leading to infringement procedures can be seen. Cases detected by the Commission (own-initiative cases) play only a relatively minor role, probably due to the aforementioned reasons.²⁵

The figure shows an increase in the total volume of cases up until 2004, after which the numbers decline (except for 2007), with the last year for which

²⁵ However, one can also see that surges in non-communication are found in the years 1995/1996, 2004/2005 and 2007, meaning the years following the fourth (1994) and fifth (2004), and sixth (2007) EU enlargement. One explanation could be therefore that the new Member States have some start-up problems with notifications, but gradually adapt. More on this below.
statistics are available (2010) as the lowest point in the last 15 years. Especially interesting is the fall in the number of cases based on complaints, which was the largest mode of detection until 2008, but in the last statistics has been reduced to the same numbers as the Commission’s own-initiative cases. In addition, the accession of Member States between 1995 and 2008, with an increase from 15 to 27 Member States, needs to be taken into account when looking at the total amount of cases. This means that the real amount of infringement procedures per Member State in that period may actually have fallen, since the Union doubled in size, thereby doubling the possible amount of infringements.26 One of the explanations for this reduction in infringement procedures can be found in the introduction of the alternative, ‘softer’ compliance mechanisms such as the IMS, SOLVIT and EU Pilot.27 The influence of these mechanisms on the workings and effectiveness of the infringement procedures will be discussed in more detail in the next chapter.

26 The number per Member State has fallen, clearly, but this does not mean the number of infringements has fallen for each Member State. The amount has risen or stayed equal for some of the “old” MS, while some of the “new” Member States have a relatively low number of infringements (ibid.).

27 Another explanation that has been given is that under President Barroso, the Commission has become averse from pursuing infringement cases, especially against the larger members. Interviews with Commission Officials have brought forward that for some time this has indeed been the case. However, that reluctance seems to have been dropped by now (respondents #2 and #3).
2.1.3. Aim of the Procedures

According to Article 258 TFEU, the primary aim of the infringement procedures is to make Member States comply with and fulfill their obligations under the Treaties. As is shown in the next sections, the way of making Member States comply with Union law differs per stage in the procedures. The procedures start with informal contacts between the Commission and the Member States, gradually building up pressure from the Commission until the final measure of sanctions. The primary aim of the procedures is not to punish Member States for their non-compliant behavior, but to ensure that the behavior is ended as quickly and effectively as possible.

2.2. The Preliminary Phase

When the Commission has been alerted to the possible existence of an infringement, it will subsequently need to investigate the circumstances of the suspected infringement through fact-finding, discussions with the Member State or, when possible, on-the-ground investigations in the preliminary phase (or pre-258 phase). Contacts with the Member State are usually initiated by a letter from the Director-General responsible for the sector in question to the Permanent Representative of the Member State in Brussels. The Member State is given a certain timeframe during which it can reply to the letter (but not always does), usually two months. This phase is an informal phase, where communications between the Commission and the Member State are mostly kept confidential. Here, the Commission needs to rely heavily on cooperation with the Member State, as in most cases it is not possible for the Commission to send its own inspectors to sites to determine whether an infringement exists. Due to the duty of sincere cooperation, the Commission is able to obtain much information through the Member States themselves.\(^{28}\)

If the case has been brought to the attention of the Commission through an individual complaint, the Member State and the complainant are informed of the Commission’s decision on whether or not it believes there is indeed an infringement. The way in which individuals are informed of the closure of the case in this (or a subsequent) stage has evolved somewhat over the past years due to the influence of the European Ombudsman. Since it is left to the discretion of

\(^{28}\) As pointed out earlier in section 2.1.2, Member States can also be forced to cooperate if needed. However, information obtained in this manner is less transparent and objective, and therefore not the preferred route.
the Commission whether or not it will continue with the case, the Commission did not feel the necessity to explain the reasoning behind its decision to complainants. This was also acknowledged by the Court, for example in Commission v Germany [1995] C-431/92 or Commission v Belgium [2002] C-471/98. In the latter case, the Court stated:

The Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and on account of which conduct or omission attributable to the Member State concerned those proceedings should be brought.

However, due to an investigation by the European Ombudsman in 1997, the Commission changed its procedures on this point. The Ombudsman’s own initiative inquiry focused on the administrative procedures used by the Commission to handle complaints. Since the Commission relies for a large part on information of complainants in detecting infringements, the legitimacy of the process in the eyes of these complainants is essential. If a complainant believes the Commission might not deal with its complaint seriously, he may decide not to complain at all. This would undermine the infringement system as it currently functions.

The topics the Ombudsman investigated in its inquiry related to the duration of complaint handling, the lack of information vis-à-vis the complainant and

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29 This follows from the wording of Article 258 TFEU (‘If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion [...]. 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.’ (emphasis added)), also acknowledged e.g. in Case C-247/87, France v Commission, [1989] ECR 291, where the court said the Commission is not obliged to commence proceedings but has a discretionary power in this regard. More on Commission discretion in section 4.

30 Case C-431/92, Commission v Germany, [1995] ECR 2189.

31 Case C-471/98, Commission v Belgium, [2002] ECR 9681. This discretionary power has actually increased again with the 2012 amendments to the code of procedure, impacting the rights of complainants. The changes to the rules mean that the College of Commissioners are no longer automatically involved at every step of the procedure, leaving the responsibility at the level of the DGs and individual Commissioners.

32 This article is the replacement (in substance) of Article 211 EC “The Commission shall … ensure that the provisions of this Treaty and the measures taken by institutions pursuant thereto are applied”.

33 Possible under Article 228 TFEU, according to which the Ombudsman, elected by the European Parliament, can conduct inquiries concerning cases of maladministration in the activities of the EU institutions (except the CJEU in its judicial role) either on his own initiative or on the basis of complaints submitted to him, except if these are or have been the subject of legal proceedings.
the failure to give reasons for not starting or closing a procedure to the complainant.\(^{34}\) In its conclusions,

The Ombudsman therefore suggested that the Commission might communicate to registered complainants a provisional conclusion that there was no breach of Community law and its findings in support of that conclusion, with an invitation to submit observations within a defined period, before making its final decision.\(^{35}\)

In its response, the Commission acknowledged that “complainants have a place in the infringement proceedings and that, in the period before judicial proceedings may begin, they enjoy procedural safeguards”.\(^{36}\) It also outlined what its procedures are for dealing with complainants with regard to when a complainant is informed of decisions taken in the process, and what deadlines it applies (e.g. a decision for opening a case or to take no action to be made within one year from the receipt of the complaint). Furthermore the Commission declared it would extend its practice to inform complainants of its reasons for rejecting a complaint, before the actual decision for rejection is taken.

Over the years, the European Ombudsman has been able to change the Commission’s attitude towards complainants in infringement procedures not only through the above-mentioned own-initiative inquiry but also through dealing with complaints brought to the Ombudsman concerning infringement procedures. In this way, the Ombudsman has extracted commitments from the Commission regarding the registering of complaints, obtaining replies from Member States, proposed deadlines for handling complaints, stating adequate, clear and sufficient reasons for its decisions, and providing the complainants with enough time and information to prepare and submit observations before a certain case is closed.\(^{37}\)

The influence of the Ombudsman’s inquiries and subsequent changes in the Commission’s dealing with complainants confirm the (albeit limited) role of individuals in the centralized enforcement procedures, despite the discretionary power of the Commission. Shortly after the Ombudsman’s decision in its own-initiative inquiry in 2002, the Commission published a code of procedure regarding relations with complainants.\(^{38}\) Given the introduction of the

\(^{34}\) The European Ombudsman Annual Report for 1997 own initiative inquiry 303/97/PD, p. 271.

\(^{35}\) As quoted in ibid.

\(^{36}\) Ibid., p. 272.


\(^{38}\) European Commission Commission communication to the european parliament and the european ombudsman on relations with the complainant in respect of infringements of community law COM(2002) 141 final.
Commission’s electronic complaint handling system CHAP\(^{39}\) (Complaint Handling/Accueil des Plaignants) in 2009, this code of procedure was amended in 2012.\(^{40}\) This document sets out detailed procedures with regard to acknowledgement of receipt of complaints, the methods for submitting a complaint, protection of the complainant and personal data, communication with complainants, time limits for investigating complaints, the outcome of such investigations, closure of the case, publicizing of infringement decisions, the access to documents, and the possibility of complaining to the European Ombudsman. It now seems, given the developments above, as though the complainant has a firmly established and protected position in the infringement procedures. Nevertheless, the Commission reiterates in its code of procedure the fact that it alone enjoys a discretionary power to decide whether or not and when to commence infringement proceedings or to refer a case to Court.\(^{41}\)

2.3. The Official Phase

When the existence of an infringement has indeed been established, and the Member State concerned has not shown that a quick resolution to the problem is possible in the preliminary phase, the Commission can decide to start the (first official) formal phase of the procedure by sending a formal request for observations (‘letter of formal notice’) to the Member State.\(^{42}\) In this letter, the Member State is officially offered the option to submit its own observations on the matter to the Commission. Again, the Member State is given a reasonable time limit for the

\(^{39}\) CHAP handles the assignment of complaints to the relevant Commission departments as well as the feedback to the complainants. In 2010, a total of 4035 cases were created in CHAP, of which 83% were based on complaints and 17% on enquiries. Of these cases, 52.5% were closed in CHAP after a response by the Commission, 14% were closed due to lack of EU competence, 17% went on to be entered into EU Pilot and 9% were transferred into infringement proceedings (2010 Infringement Report, pp. 7-8).

\(^{40}\) European Commission Communication from the Commission to the Council and the European Parliament Updating the handling of relations with the complainant in respect of the application of Union Law COM(2012) 154 final.

\(^{41}\) Ibid., p. 3. This discretionary power has actually increased again with the 2012 amendments to the code of procedure, impacting the rights of complainants. The changes to the rules mean that the College of Commissioners is no longer automatically involved at every step of the procedure, leaving the responsibility at the level of the DGs and individual Commissioners.

\(^{42}\) In practice, 30% of the suspected infringements can already be dealt with in this pre-258 phase. It has previously also been found that the preliminary phase is often the last and final phase for many of the investigations. See e.g. Tallberg (2002), or for an older analysis (that remains applicable in many respects) Audretsch, H.A.H., *Supervision in Community Law* (2nd edn Elsevier, Amsterdam: North-Holland 1986).
submission of observations in a reply to the Commission, usually two months. This element of the preliminary procedure has its basis in Article 258, second sentence, where it is stated that the Commission “shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations” (emphasis added).

If no (satisfactory) reply is received from the Member State, the Commission can decide to turn to the second formal stage, the sending of a ‘reasoned opinion’, in which it sets out a detailed reasoning for its suspicion of an infringement. This stage of the preliminary phase is obligatory. The wording of Article 258 is very precise in this regard: if the Commission considers a breach of obligations to exist, and after it has given the Member State concerned the opportunity to deliver its opinion, the Commission “shall deliver a reasoned opinion” (emphasis added).\(^43\)

The reasoned opinion has four purposes: 1) It serves to specify exactly what (according to the Commission) the Member State has done wrong; 2) it can outline what action a Member State can take to rectify the situation;\(^44\) 3) it sets a time limit within which the violation must be ended; and 4) it serves as procedural protection for the Member State. This last element implies that the Commission cannot amend the substantive content of the submission if and when it brings its application to the CJEU. If new grounds have arisen after the sending of the reasoned opinion, or if the parties wish to bring new elements to the attention of the Court, the Article 258 procedure must be re-initiated. However, this is not the case when the Commission’s submissions are more limited than those contained in the reasoned opinion, or when later evidence is of the same kind as earlier evidence and is included only to support the original argument.\(^45\)

\(^43\) Another 46% of all cases are solved before the sending of the reasoned opinion.

\(^44\) However, suggestions are not always included. Especially when directives are concerned, the Commission could also merely point out in what way the Member State does not comply with EU law, leaving the way in which the Member State can comply up to that State. The Member State is always free in its choice of what measures should be taken to comply with EU law. If, for example, the Member State decides to delegate its enforcement powers to private or other parties, it has the right to do so. The only obligation of the Member State vis-à-vis the EU is to ensure compliance. However, the Court has somewhat conditioned the free choice of the Member State as to how they ensure this in the Greek Maize case – here the obligation to ensure compliance was determined to include sanctions should that be necessary to ensure full compliance (Case C-68/88, Commission v Greece (Greek Maize), [1989] ECR 2965).

\(^45\) This last element was seen for example in Case C-494/01, Commission v Ireland, [2005] ECR 3331, where the Commission was allowed to produce new evidence which went to show that the earlier breach concerning the application of the Waste water directive (Directive 2006/12/EC of the European Parliament and of the Council of April 2006 on waste (Waste Directive)), was part of a general and persistent pattern of breaches. See also Schrauwen, A., ‘Fishery, Waste Management and Persistent
As stated before, the Commission has the discretion to decide whether or not to start proceedings under Article 258 (as the text states: “if the Commission considers that a Member State has failed to fulfill an obligation ...”). The text of Article 258 relevant for the reasoned opinion, however, now suggests that this discretion in the prejudicial phase is limited to decisions on concluding whether a violation has taken place and on sending the letter of formal notice or not. Nevertheless, the word “shall” (in “shall deliver a reasoned opinion”) does not imply an actual obligation for the Commission in practice. Since the sending of a reasoned opinion depends wholly on the considerations of the Commission during the stages that come before the reasoned opinion (communications with the MS, the sending of the letter of formal notice, the interaction with the Member State afterward and the conclusions to be drawn from the exchange of observations during all phases), the appreciation of the Commission remains the decisive element in sending the reasoned opinion or not. Moreover, no individual, Member State or institution can force the Commission to start the proceedings at any point in time.

Reasoned opinions, as well as letters of formal notice or other communications between the Commission and the Member State concerned, are usually kept confidential. The Commission, after deliberation with the Member State, may sometimes decide to publish a reasoned opinion or issue a press release. However, the Commission cannot be forced to do so, as confirmed by case law and codified by Regulation 1049/2001 on access to EU documents. Article 4(2) of this regulation states: “The institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits”.

46 This discretionary power was also acknowledged by the Court in several instances, e.g. Commission v Germany (1995) or Commission v Belgium (2002), where the Court stated that the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfill its obligations.


48 Case C-317/92, Commission v Germany, [1994] ECR 2039 and Case C-422/92, Commission v Germany, [1995] ECR 1097. However, the Commission has set out certain priority criteria to ascertain which cases will be pursued to enhance effectiveness and fairness (European Commission (2001) European Governance: A White Paper COM(2001) 428 final).


Since the ultimate goal of the entire Article 258 procedure is to resolve the dispute between the Commission and the Member State and achieve compliance, Member States have the possibility to comply voluntarily until the judgment of the Court of Justice is delivered. As the CJEU stated in Bavarian Lager:

The disclosure of documents relating to the investigation stage of the procedure laid down in Article 169 of the Treaty (now Article 258 TFEU), during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure inasmuch as its purpose – to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position - could be jeopardised.\(^{51}\)

Third party access could thus be refused to documents produced in the administrative phase of the procedures according to Regulation 1049/2001, since disclosure of these documents could jeopardize the purpose of the infringement procedures.

2.4. The Judicial Phase

If the Member State has not complied after the time limit included in the reasoned opinion has passed, the Commission can decide to take the non-compliant Member State before the CJEU (submission to the court – saisine). Here again, the Commission has discretionary power. The wording of Article 258 is unambiguous concerning referral to the CJEU: The Commission “may bring the matter before the Court of Justice” (emphasis added). This wording offers the Commission the possibility to go to court, but not the obligation. The Court has made clear that as regards the Commission’s reasons for starting enforcement actions, the proceedings have an entirely objective character.\(^{52}\) The Court will thus only examine whether or not an infringement does in fact exist, as claimed by the Commission, and will not look into the Commission’s reasons for bringing the action. The Commission is thus not required to show it has an interest in bringing the proceedings. By referring to the Commission’s role as Guardian of the Treaties,\(^{53}\) the Court has stated that

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\(^{51}\) See Bavarian Lager Company v Commission (1999), para. 46.

\(^{52}\) As the Court held in Commission v United Kingdom, “it is not for the Court to consider what objectives are pursued in an action brought under Article 169 of the Treaty” (Case C-416/85, Commission v UK, [1988] ECR 3127. (Article 169 EEC is now Article 258 TFEU.)

\(^{53}\) Commission v Germany (1995), para. 22.
Art 258 is not intended to protect the Commission’s own rights. The Commission’s function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfill the obligations deriving therefrom with a view to bringing it to an end.\textsuperscript{54}

The Commission’s application must adhere to the requirement of coherence and precision. According to Article 38(1)(c) of the Rules of Procedure of the CJEU, “an application […] shall state the subject matter of the proceedings and a summary of the pleas in law on which the application is based”. Established case law has confirmed that the application to the Court must

set out the complaints coherently and precisely in order that the Member State and the court may appreciate exactly the scope of the infringement of Community law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged.\textsuperscript{55}

However, while the grounds of complaints must be precise and clear, the Commission is not required to indicate what steps the Member State concerned should take to remedy the alleged infringement, except when the subject-matter of the action is the failure to adopt measures to stop the established infringement.\textsuperscript{56}

It is essential that the subject matter of the Court proceedings be the same as the one defined during the pre-judicial stage, meaning the application must be based on the same grounds and claims as contained in the letter of formal notice and the reasoned opinion. Moreover, proceedings cannot be brought before the CJEU if the Member State concerned has ended its breach before the deadline laid down in the reasoned opinion. However, once this deadline has passed the Commission can bring the proceedings even when the Member State asserts it has remedied the violation in the meantime.\textsuperscript{57} The question that matters for the CJEU is whether the Member State was in breach of its obligations at the time the Commission initiated proceedings before the court, as is shown by the wording of Article 258 TFEU, “If the State concerned does not comply with the opinion

\textsuperscript{54} Ibid., para. 21.


\textsuperscript{56} Case C-349/02, Commission v Greece, [2005] ECR 4713, paras. 21-23.

\textsuperscript{57} See e.g. Case C-7/61, Commission v Italy, [1964] ECR 317.
within the period laid down by the Commission, the latter may bring the matter before the Court of Justice” (emphasis added), and reaffirmed by established case law: “The Court has consistently held that the question whether there has been a failure to fulfill obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion”.

An exception to this rule is found when the Commission can show there is an imminent risk of the infringement re-occurring, or other specific reasons for which the establishment of an infringement may be necessary. Reasons could be, for example, the limited duration or seasonal nature of the infringements.

In those cases the Commission could prove it would not have been able to stop the infringements from having any negative effects even when acting without undue delay. In that case the Commission can ask for a judgment even when compliance was achieved within the time limit set out in the reasoned opinion. Otherwise infringements could take place that could escape review by the EU judicature given their limited or seasonal nature.

There are several reasons why the Commission would want to continue with a case before the CJEU despite the fact that the Member State concerned has complied with EU law, albeit late. First, to prevent a Member State from abusing the system by bringing their conduct into compliance just before a ruling is made, and possibly start with the same or similar conduct once the infringement procedure is officially ended. This way there could be an endless cycle of infringements without the court ever being able to pronounce on the conduct. Second, the judgment can establish a basis for liability on the part of a Member State. A declaration by the CJEU that the conduct of a Member State was in breach of its

59 Case C-276/99, Commission v Germany, [2001] ECR 8055, para. 32.
60 Prete and Smulders (2010), p. 33.
61 The fact that the Commission could not prove this in the Commission v Italy, supra note 139 was a reason for the Court not to admit the action brought by the Commission (para. 12): It should be stated, moreover, that the Commission did not act in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects and did not even invoke the existence of circumstances preventing it from concluding the pre-litigation procedure laid down in Article 169 of the Treaty before the infringement ceased to exist.”
62 In Article 260 cases the Commission also pursues the case before the Court, even when the infringement has been remedied before the Court procedure but after the deadline in the reasoned opinion. More on this Article below in section 6.
64 Ibid.
Treaty obligations might help an individual’s action for redress when he or she brings a case before national courts.

The judgment of the CJEU in infringement procedures has a declaratory character: The court does not have the power to order a Member State to (not) do something, nor to declare invalid the national legislation that was at stake. It can merely pronounce on the compatibility of a Member State’s actions with EU law. In determining whether a breach of obligations exists, no subjective factors are taken into account, such as those invoked to justify the Member State’s conduct such as domestic (legislative/administrative/economic) difficulties, force majeure, the fact that other Member States are also in breach, illegality of the EU measure, a Member State complying in practice but not according to the law, or the lack of intentional wrongdoing. Furthermore, the proceedings are not a review of the reasoned opinion; they are rather a de novo consideration of the facts at hand. However, the scope of the proceedings is restricted to the infringements laid out in the reasoned opinion – as stated previously, the Commission cannot raise new allegations before the Court at this stage.

A Member State whose conduct has been declared incompatible with EU law by the CJEU is obliged to “take the necessary measures to comply with the judgment of the Court of Justice”. Thus, notwithstanding the declaratory character of the judgment by the Court under Article 258, a Member State is obliged to comply with the binding judgment. If the state subsequently does not comply, the Commission can take recourse to Article 260 TFEU to ask the CJEU to impose sanctions on the Member State concerned, as explained further in section 6 below.

2.5. Interim Measures

One of the problems often mentioned regarding the infringement procedures is their duration. It can take years before a final judgment is reached, and in some cases irreversible damage may have been done in the meantime by the Member

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65 Ibid., pp. 443-451; Lenaerts, K. et al., Procedural Law of the European Union (2 edn Sweet & Maxwell, London 2006), pp. 128-129. Some examples of the Court rejecting defenses based on these arguments can be found e.g. in Commission v Belgium (Belgian Wood) (1970), Case C-101/84, Commission v Italy, [1985] ECR 2629 (both examples of force majeure), Case C-128/78, Commission v UK (Tachographs), [1979] ECR 419 (economic difficulties), Case C-232/78, Commission v France, [1979] ECR 2729 (where other Member States were also in breach), Case C-167/73, Commission v France, [1974] ECR 359 (where a conflicting national law was in fact not applied), Case C-265/95, Commission v France (Spanish Strawberries), [1997] ECR 6959 (threat to public order).

66 Article 260(1) EC.
State’s non-compliant behavior. According to Article 279 TFEU, therefore, “The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.” This provision has no reservations or limitations, which has led the Court to consider ordering interim measures in the context of infringement procedures as well.\(^67\) The measures usually asked for are suspension of the continued operation of the contested measure.\(^68\) As the Court stated: “For a measure of this type to be ordered, applications for the adoption of interim measures must [...] state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measures applied for.”\(^69\) This urgency requirement is strictly adhered to, as can be seen for example in Commission v. Malta, where the Court granted the measure, which was requested for the years 2008 and 2009, for 2008 only, since there appeared to be no urgency for the following year.\(^70\)

The application of interim measures in the context of infringement procedures has been quite rare, and stems mostly from the 70s and 80s.\(^71\) This low number of cases can be explained by the fact that the order of an interim measure can interfere quite strongly with the powers of the Member State concerned. However, it is necessary for the possibility for interim relief to exist, given the long duration of infringement procedures and the possibility for irreparable damage to occur to private or public interests without a rapid intervention. It sometimes seems to be the only effective way to remedy serious breaches of EU law.\(^72\)

It has been argued that the necessity for the Commission to allow Member States reasonable periods of time to respond during the several phases of the infringement procedures might present a problem in Court.\(^73\) If the Commission applies too short periods in the preliminary stages, it may run the risk of having its case declared inadmissible by the Court. On the other hand, if it does not, it may not fulfill the urgency requirement necessary to have interim measures im-

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\(^68\) Lenaerts et al. (2006), p. 423.

\(^69\) Case C-57/89 R, Commission v Germany, [1989] ECR 2849, para. 15.

\(^70\) Case C-76/08 R, Commission v Malta, [2008] ECR I-0064.

\(^71\) See Lenaerts et al. (2006), as well as Prete and Smulders (2010), p. 40. A few recent cases involving the request for interim measures are Case C-320/03 R, Commission v Austria, [2003] ECR I-11665 (in the area of transport), Commission v Malta (2008), Case C-573/08 R, Commission v Italy, [2009] ECR I-00217 (both in the area of environment).

\(^72\) Prete and Smulders (2010); Lenaerts et al. (2006), pp. 423-424.

posed. Whether this is an actual problem, though, is not obvious. There is quite a margin available in practice between response periods that are reasonable and an overly long period needed to request interim measures.

2.6. Conclusions on Article 258

Figure 3.2 shows the different steps in the infringement procedures as discussed in the previous sections, from the detection of a possible infringement up until the imposition of sanctions by the CJEU. The next section will address two elements of the procedures that were recognized in several, if not all, steps: first, the fixation on remedying the non-compliant situation as opposed to sanctioning or punishing; and second, the element of discretion.

3. THE CHARACTER OF THE INFRINGEMENT PROCEDURES

The previous sections have outlined the set-up of the “classic” infringement procedures, that is, the procedures as they originally functioned. Over the years certain changes have been introduced, altering the so-called “character” or nature of the infringement procedures. The next two subsections will address, first, the focus of the procedures on remedying non-compliance, and second, the element of discretion. The final subsections will draw an overall conclusion on the character of the infringement procedures.

3.1. Remedy or Sanctions

The theoretical model developed in part I included the step of sanctions as part of the compliance pyramid. Until now, sanctions as such have not yet come into play. As was stated earlier, the aim of the procedures according to Article 258 TFEU is to make Member States comply with their obligations under the Treaties. The objective nature of the procedures means that no account is taken of the reasons for non-compliance, whether intentional or unintentional. The pro-

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Ibid. This happened in for example Commission v Germany (1989). In this case the Commission took almost three years before sending a letter of formal notice, and the reasoned opinion was sent almost a year later. The application for interim measures took another year – in total the Commission had known of the situation for five years before requesting interim measures.
Chapter 3  EU Infringement Procedures

Figure 3.2. The European Infringement Procedures in Stages

Commission own initiative
- expert reports
- questions through the European Parliament
- own inspectors (only some DGs)
- interventions in pre-judicial cases
- through the press

Complaints
- individuals
- NGOs
- Industry groups

Non-Communication
(automatic)

Administrative letter to Member State

The Member State provides no or unsatisfactory additional information

Commission decides to continue with the infringement procedure

Letter of formal notice

No or unsatisfactory measures taken by Member State to comply

Reasoned Opinion

Commission decides not to continue with the infringement procedure

Measures taken by Member State to comply - satisfactory

The Member State provides satisfactory additional information

Commission decides to continue with the infringement procedure

Commission decides not to continue with the infringement procedure

No or unsatisfactory measures taken by Member State to comply

Saisine / Application to the Court by the Commission

Declaratory judgment ECJ

Non-compliance

Judgment on Penalties

Commission decides not to continue with the infringement procedure

Measures taken by Member State to comply - satisfactory

The Member State provides no or unsatisfactory additional information

Letter of formal notice

Dismissal by ECJ

Compliance

Figure 3.2. The European Infringement Procedures in Stages
cences are meant to remedy non-compliant behavior, not to punish or sanction such behavior. The same underlying thought is encountered in the application of interim measures. Interim measures target the suspension of the continued operation of the contested measure only.

The application of the Court judgment is always ex tunc, but has no retroactive effect further than the end of the time-limit set in the reasoned opinion. Like part of the measures taken in the different phases of the procedures, there is thus no real pecuniary incentive to remedy the non-compliant behavior as soon as possible. The only costs associated with non-compliance before a declaratory judgment of the CJEU are, for example, the costs of and resources for responding to Commission correspondence and litigation, or the costs associated with loss of reputation. Given the fact that most correspondence between the Member State and the Commission in the preliminary stages is kept confidential, however, these reputational costs will be rather limited.

The lack of pecuniary sanctions for non-compliance at these stages of the procedure influences the effectiveness of the compliance mechanism. Later in this chapter the effectiveness of the procedures will be discussed at length, but it is important to note here that the incentive to follow the Commission in the stages of the procedure under Article 258 depends almost fully on managerial efforts, without fear for repercussions for non-compliance in later stages. The introduction of the possibility of sanctions in Article 260, which is discussed in section 6 of this chapter, has not fundamentally changed the central purpose of inducing compliance. These sanctions apply only to non-compliance with the declaratory judgment based on Article 258, and are meant to induce compliance as soon as possible after the CJEU has declared the existence of non-compliant behavior.

3.2. Discretion

One of the compliance questions formulated in chapter 2.1 (B: the compliance) relates to the determination of non-compliant behavior, given the element of discretion. Discretion plays an important and explicit role in the infringement procedures.

The procedures are objective in nature. The Court decides whether the alleged breach has indeed occurred or not – it is an objective assessment of a Member State’s conduct with EU law, and is not aimed at establishing guilt or liability.\(^{75}\) Moreover, neither the Commission nor the Member State has to show that it

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\(^{75}\) Prete and Smulders (2010).
has an interest in bringing the proceedings. It is the Commission’s duty to ensure that Member States give effect to the treaty and to obtain a declaration of any failure to fulfill the obligations deriving from these Treaties.76

The infringement procedure is the centralized enforcement or dispute settlement system where compliance with EU rules is concerned.77 However, only a fraction of all expected infringements makes it to the litigation phase. The majority of all cases are settled in the preliminary phase, where the Commission negotiates with the parties concerned. As stated before, the goal of the preliminary phase is to induce voluntary compliance by the Member State, which can be done in a non-adversarial manner before the matter reaches the CJEU. As Snyder put it: “the main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process.”78

When examining the statistics for the years 2004 to 2010, for example, it is found that on average 95% of all cases can be closed before the case actually comes before the CJEU (see Figure 3.3).79 The fact that a large portion of all cases is solved before reaching the litigation stage can in part be explained by the diplomatic or political80 nature of the preliminary stage, which is characterized by

76 Hence the Commission’s role as Guardian of the Treaty, as stated by the Court in Commission v Germany (1995), paras. 21-22.
77 Regarding the European infringement procedures, the term “dispute settlement system” does not cover the system’s complete remit. It indeed serves to solve disputes between Member States and the Commission (Article 258 TFEU), or between Member States (Article 260 TFEU), but it surpasses the question of disputes. The Commission is meant to be a neutral and objective administrator of justice in order to serve as Guardian of the Treaty. However, as soon as the litigation stage is reached it could be said that there is very much a dispute between the Commission and the Member State concerned (where the Commission believes the Member State is not in compliance with EU law, and the Member State at that stage usually believes it is). As Noortmann puts it: “from an objective point of view, the member state allegedly infringes Union law: from a subjective point of view, the member state has a dispute with the Commission.” (Noortmann, M., Enforcing International Law (Ashgate Publishing Limited, Farnham 2005), p. 152).
80 The decision of the Commission to bring or not to bring a case against an allegedly non-compliant state will often be influenced by political considerations. Political here refers to the fact that it is unclear what elements other than a state’s non-compliant behavior will bring the Commission to open a case or not. If these considerations are not purely legal considerations, the term “political” is applied.
the discretionary power of the Commission and a certain lack of transparency. The combination of these two elements in particular, discretion and a lack of transparency, has been heavily criticized over the years. As the European Parliament put it: “Discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law”.

The political character of the system can be felt at all stages of the procedure: The Commission determines whether an infringement has occurred, defines the extent and nature of the infringement, determines the course of action to be undertaken by the Member State to remedy that

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Figure 3.3: Closures per Stage (in cumulative percentages of total closures – average 2004-2010)

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114
infringement, and decides on all relevant time-limits [...] It also decides whether or not to refer the case to the ECJ. To compound this unchecked power, all of these acts or decisions are not amenable to judicial review and are not subject to the legislation on transparency, which renders external regulation of the infringement process impossible.\footnote{Ibid., p. 784.}

Moreover, the procedures were perceived by the Member States as having a strong political dimension. In the early years of the procedures, this meant that the Commission used the procedures as an \textit{ultima ratio}:

Recourse to the formal infringement procedure and initiating proceedings before the Court against a Member State was to be avoided as much as possible. Indeed, already the act of sending a warning letter was considered as an (unfriendly) political act, and even more so was the issue of a reasoned opinion or decision, and, ultimately, recourse to the Court. Only after it had been proved that all informal efforts remained without effect was a formal step to be taken. That step, as such, was considered as an \textit{ultima ratio}. For that reason, every formal act was decided upon separately, since it was considered as a political act, having political consequences.\footnote{Audretsch (1986), p. 279.}

In fact, the mechanism was applied quite sparsely in the early years, with the first action for infringement brought three years after the EEC Treaty entered into force in 1961. Until 1967, only two actions were brought per year; between 1970 and 1975, only 15 judgments were given.\footnote{Varnay, E., ‘The Institutionalisation of infringement procedures in EC law - the birth of a community sanction’ (2006) 5 (2) European Integration Studies, p. 6.} The character of the system changed with the establishment of the Single European Act in 1987. The need for Member States to implement hundreds of directives within five years made the infringement procedures a tool for helping this implementation process. This meant the Commission started using the procedures in case of non-implementation without any special consideration. Another feature was the introduction of the possibility to submit complaints, and a complaint form was introduced for this purpose.\footnote{Ibid., p. 7.}

With the maturing of the system, and influenced by the process of European integration and an increased drive towards good governance and legitimacy, the infringement procedures underwent more changes. In 2001 the Commission published its White Paper on Governance,\footnote{European Governance: A White Paper add further publication details} where it recognized the importance of the enforcement mechanism in the light of good governance by stating that it
will “pursue infringements with vigor”, and “maximize the impact of the Commission’s actions as guardian of the Treaty”. More detailed ideas on how to incorporate the concept of good governance in the infringement procedure system came with two Commission Communications in 2002 and 2007. The next sections will discuss these two communications in some detail, as they form an essential element of the centralized infringement system of the Union.

3.2.1. The 2002 Communication
The 2002 Communication focuses on ways to improve the monitoring of the application of EU law, since due to EU enlargement to 27 states and an ever-increasing amount of legislation the Commission can no longer take recourse to the centralized enforcement system alone. The communication is divided in two parts: First, it addresses preventive measures that can be used to avoid infringements. Second, it sets out conditions for effective management of controls and actions against infringements. It does this through the prioritization of cases.

In principle, the prime responsibility for the correct application of EU Law is placed on the Member States. As mentioned before, the duty of sincere cooperation based on Article 4(3) TEU calls upon the Member State to take all appropriate measures to ensure fulfillment of all obligations arising out of the Treaty as well as actions taken by institutions of the EU. It is when a Member State fails to fulfill its obligations that the Commission can take action. Although not explicit in the article itself, this duty is reciprocal in that it calls for cooperation not only by the Member State with the EU institutions, but by the institutions (and especially the Commission) with the Member State as well. This duty was first explicitly recognized by the ECJ in Luxembourg v European Parliament, where the court stated that the rule embodied in Article 4(3) imposes mutual duties of sincere cooperation on Member States and the EU institutions.

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89 Ibid., pp 25-30.
92 As explained in chapter 1, the reasons for non-compliance can differ greatly. Non-compliance could be due to e.g. a lack of information, a misunderstanding or a lack of administrative capacity. Sometimes non-compliance is intentional. However, as was mentioned in earlier sections of the current chapter, the CJEU makes an objective, declaratory statement and will not take into account such explanations. Either there is compliance, or there is not.
As can be deduced from the fact that up to 95% of all cases are resolved in the stage before referral to the CJEU, this cooperation is a crucial element in the pre-litigation stage. It is in the best interest of the Commission as well as the Member States to try and solve the problems quickly and effectively during this stage. Infringements, especially in the case of misapplication of EU law, often do not come about because of malevolence on the part of the Member State. Member States may not even be aware of the misapplication due to misunderstandings or misinformation. The pre-litigation stage provides an opportunity for the Member States to rectify the problems without the additional costs that come with litigation.

The 2002 Communication calls for improvements in this cooperation between the Commission and the Member State before any actual infringement proceedings are initiated. The mechanisms aimed at preventing infringements mentioned in this document include:

- Interpretative communications on EU law
- The Internal Market Scoreboard
- Annual monitoring reports to create peer pressure
- Training, information and transparency campaigns
- Expert committees and networks assisting the Commission for the purpose of exchanging information and good practice

The Communication also recommends more attention be paid to monitoring and facilitating the proper transposition of directives. This, according to the Commission, could be achieved by improving transparency and knowledge of EU law, increasing cooperation before expiry of the transposition deadline, and improving the notification of transposition measures. Furthermore, more information on EU law should be provided to the public in order to increase public participation and thereby the quality of decisions.

The implications of this part of the Communication for the character of the preliminary stage are not as important as they might seem on first sight. Rather than focusing on the transparency of the system itself, it outlines ways to prevent the procedure from starting at all. What happens once the procedure has been set in motion is not affected by these new preventive mechanisms.

Whereas the first part of the Communication is thus aimed at preventing situations of non-compliance with EU law, the second part concentrates on improving the methods used for inducing compliance once an infringement has been detected. One of the most important aspects of this Communication is that
PART II  EU Compliance Mechanisms

it sets out priorities in addressing infringements of EU law. Priority will, according to this Communication, be given to the following “serious” infringements:
- Infringements that undermine *the foundations of the rule of law* (e.g. breaches of the principles of primacy and uniform application of EU law, violations of human rights or serious damage to the EU’s financial interests)
- Infringements that undermine *the smooth functioning of the EU legal system* (e.g. violation of an exclusive EU power, repetition of an earlier infringement within a certain timeframe or cross-border infringements)
- Infringements consisting in the *failure to transpose or the incorrect transposition of directives*

Since the Commission has discretionary powers over whether or not to bring infringement procedures, the publication of this prioritization helps greatly in dispensing with a certain sense of arbitrariness in the opening of cases and in improving transparency. It gives the procedure a more objective rather than political character. This was the first time the Commission had tried to explain which cases it would pursue and why. However, the political character has not been dispensed with altogether.

First, the Commission states in its Communication that when infringements meet the priority criteria, infringement proceedings will be commenced immediately, *unless the situation can be remedied more rapidly by some other means.* 94 How it is determined when a situation can be remedied more rapidly, and what “some other means” indicates, remains unclear.

Second, it is stated that other cases of lower priority will be handled on the basis of complementary mechanisms, 95 but can still be subjected to infringement procedures. When and how these cases are handled remains unclear as well.

Third, the interpretation of the criteria is not unambiguous. The determination of when infringements undermine the foundations of the rule of law or the smooth functioning of the EU legal system is still left to the Commission. Nevertheless, there is now at least some sort of benchmark for the Member States.

3.2.2. The 2007 Communication
The 2007 Communication on “A Europe of Results” deals not with improving the *monitoring* of EU law application, as the 2002 Communication did, but focuses on

95 These complementary mechanisms refer to systems such as SOLVIT or EU Pilot – which will be discussed in depth in chapter 4.
improving the *application* of EU law itself. It once again emphasizes that it is the Member State that has the primary responsibility for the correct and timely application of EU Treaties and legislation, with referral to the principle of sincere cooperation of Article 4(3) TEU. The role of the Commission in the application of EU law is outlined as being threefold: i) proposing new acts and amending acts, ii) partnering with Member States to manage the application of the law, and if need be, iii) fulfill its role as Guardian of the Treaty by starting the infringement proceedings.

To improve the working of the current system in which the Member States and the Commission interact, the Commission proposed four areas for improvement:

1. *Prevention*: improve the clarity, simplicity, operability and enforceability of legislation (corresponds to i) above);
2. *Efficient and effective response*: improve information exchange between Commission and MS, especially where citizens’ enquiries and complaints have raised the question of the correct application of EU law (corresponds to ii) above);
3. *Improving working methods*: improve efficiency of management and resolution of infringement cases; this is to be achieved through prioritization of cases (highest priority given to non-communication of transposition measures, breaches of EU law raising issues of principle, and respect for Court judgments with the help of the Article 260 procedure)\(^{96}\) and keeping the different stages within certain time limits (corresponds to iii) above: the Commission as Guardian of the Treaty);
4. *Enhancing dialogue and transparency*: improve information made available to the public.

Both the 2002 and the 2007 Communications focus on two elements: the prevention of the need for actual infringement procedures, and enhancing the efficiency of the infringement procedures by prioritizing certain cases. The prioritization of the 2007 Communication differs somewhat from that in the 2002 Communication, but can be regarded as a more precise summing up of priorities. Moreover, the Commission has added a time limit for non-communication procedures (12 months between the sending of a letter of formal notice and closure) and for Article 260 procedures (12 to 24 months between the 258 CJEU decision and the proceedings under Article 260).

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\(^{96}\) More on Article 260 in section 5.
PART II EU Compliance Mechanisms

It seems as though the 2007 Communication does indeed improve the transparency of the procedures by an increased availability of information for the Member States as well as individuals, while also intensifying contacts with the Member States regarding the implementation of directives. Similarly to the 2002 Communication, however, most of the proposed changes are aimed at preventing the occurrence of infringements, rather than making the various stages of the actual procedures more transparent. The Commission does commit itself to publishing summary information on all stages of the infringement procedures, but will continue to maintain confidentiality on the content and timing of contacts with the Member States, as it has always done. Of particular interest is the proposal for a pilot project where certain complaints by individuals are forwarded to the Member State concerned, to offer the Member State the opportunity to solve the alleged problem more quickly and efficiently through contact with the complainant without going through the stages of the official infringement procedures. This EU Pilot project and its interaction with the infringement procedures will be discussed in more detail in the next chapter, as will its impact on transparency and timeliness in solving individual complaints.

3.2.3. Today
What can now be said about the element of discretion in the character of the infringement procedures – has it changed in recent years, especially after the publication of the two Commission communications? It has, but only to a certain extent. Recognizing the importance of citizen involvement and providing the greater public with more information during the different stages of the procedure goes a long way toward improving transparency and lessening the political character of the procedures. Prioritizing certain infringements also explains some of the choices the Commission makes under its discretionary powers both to the Member States and as the public, and diminishes its arbitrariness somewhat. Of course, these priorities may shift over the years, but after these two communications the Commission may be expected to inform the public on changes to this hierarchy.

Nevertheless, the system has retained much of its secretive and political character. It was pointed out earlier that the Commission has discretion in deciding on whether or not to pursue a case at almost all stages of the procedure.\footnote{See supra, fn 46.} However, this character may serve an important purpose – in fact, Member State breaches may be mended more effectively and efficiently precisely \emph{because} of this...
political character. If Member States feel free in their communications with the Commission and need fear the scrutiny neither of this political body nor of the greater public, non-compliance may be addressed more easily. Due to the system’s political character, however, it is difficult to assess whether this is truly the case.

Moreover, although improving the access to information for individuals and the greater public is part of improving the transparency of the procedures, it may not be essential to involve individuals to a great extent. The centralized infringement procedures are not meant as an option for individual redress. Individuals benefit from the principles of direct effect and the primacy of EU law, and can act in national courts obtaining indirect control on the compatibility of national laws through preliminary references, for example (Article 267 TFEU). Furthermore, they can make use of many of the complementary systems targeted specifically at individuals set up over the past decades.

There are, however, limits to the Commission’s discretion besides those rules outlined by the Commission itself. The Court has established that an excessive duration of the pre-litigation procedure may render the Commission’s action inadmissible. This holds only insofar as this duration has “made it more difficult for the Member State in question to refute the Commission’s arguments thereby infringing its rights of the defence”. Moreover, the Commission is also bound by certain rules in bringing applications, such as the obligation to inform the Member State in question precisely of the grievances laid before them, or the obligation to allow the Member State enough time to respond to the grievances or to remedy them. In any case, the Commission’s discretion is neither absolute nor to be exercised arbitrarily.

98 The Commission Communication on the application of Article 260(3) does mention the importance of the prompt transposition of directives by Member States for the protection of the individual rights of European citizens. However, the procedures remain targeted at the Member States and the Commission, as they are the ones who need to ensure adherence to EU legislation (see European Commission Commission Communication on the Implementation of Article 260(3) of the Treaty SEC(2010) 1371 final, para. 7).

99 Such as SOLVIT, to be discussed in the next chapter.


3.3. Conclusions on Character

The infringement procedures are characterized by two elements: the fact that the procedures are meant for remedying and not punishing situations of non-compliance, and the fact that Commission discretion plays an important role throughout the infringement process. Over the years, changes have been made to the procedures that have diminished Commission discretion to some extent and have made the procedures somewhat more transparent and open. However, discretion still surfaces at almost every stage of the procedure. Moreover, the attempts to lessen the workload of the Commission have included the introduction of newer, managerial-type systems such as SOLVIT or EU Pilot, which – as the next chapter will show – have as a consequence that many cases are not scrutinized as closely by the Commission as before. On the one hand the influence of Commission discretion may thus be less due to this outsourcing (so to speak) of solving certain cases. On the other hand, however, supervision of compliance with EU law may also be weaker.

The other element refers to the the limited ex tunc character of Court judgments and the effect this has on the incentive for early compliance. One consequence of this element is the greater reliance on managerial-type efforts in the infringement procedures. What this means for the effectiveness of the procedures will be examined later in this chapter.

4. ARTICLE 259 TFEU

The previous sections explained the set-up and character of the infringement procedures where the Commission decides to open a case against a Member State, under 258 TFEU. A second part of the procedures, although rarely used in practice, provides the Member States themselves with the opportunity to take other Member States to Court. Article 259 TFEU states: “A Member State which considers that another Member State has failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice.”

Before it can do so, however, according to Article 259(2) TFEU the complaining Member State needs to first ask the Commission to take action. The Commission then has to deliver a reasoned opinion on the matter within three months of the date on which the matter was brought before it (259(3) TFEU). When the Commission fails to do so within the set time limit, however, the Member State itself may then bring the matter before the Court of Justice.
The Article 259 TFEU reasoned opinion to be delivered by the Commission is not the same as the reasoned opinion under Article 258 TFEU. Prior to issuing this opinion, both Member States concerned are given the opportunity to present their own case, as well as comment on the case presented by the other party. Furthermore, these observations are presented both in writing and orally.

If the Commission has not delivered a reasoned opinion within three months, the applicant Member State can take the matter before the CJEU. However, this is a route not often taken by the Member States, since they prefer settling their disputes in a more diplomatic manner or through the Commission, while the Commission also prefers to keep things in its own hands. In fact, only three cases have come before the Court of Justice through action by a Member State, France v. UK in 1979, Belgium v Spain in 2000, and Spain v UK in 2006.

The French case concerned French fishermen who were convicted of infringing a particular UK order on, among other things, the size of fishing nets. France was of the opinion that (the adoption of) this UK order was in violation of the regulations under the Common Structural Policy for the Fishing Industry. The Commission had delivered a reasoned opinion in favor of the French arguments. However, as the UK did not comply after the reasoned opinion, France went to the Court. This is thus a case where, even when the Commission has acted, it remains possible for the grieved Member State to start procedures. Here, France started its case against the United Kingdom three months after the Commission had issued its reasoned opinion, while during the proceedings the Commission intervened in support of the French authorities. The Court ruled in favor of France.

Belgium v Spain concerned a Spanish decree on the rules of origin and denomination of wines (either denominación de origen (designation of origin) or, if certain additional conditions are complied with, a denominación de origen calificada (controlled designation of origin)) and the Rioja rules adopted under that decree. In an earlier case (the so-called Delhaize case) the Court held that “national provisions applicable to wine of designated origin which limited the quantity of wine that might be exported in bulk but otherwise permitted sales of wine in bulk within the region of production constituted measures having equivalent effect to a quantitative restriction on exports which were prohibited by Article 34 of the Treaty”. In Belgium v Spain, then, Belgium claimed that Spain had not

103 See Tallberg (2002).
104 Case C-141/78, France v UK, [1979] ECR 2923.
105 Case C-388/95, Belgium v Spain, [2000] ECR 3123.
106 Case C-145/04, Spain v UK, [2006] ECR 7917.
107 France v UK (1979).
complied with the judgment in the *Delhaize* case and that the contested rules were still in force. In the end, Belgium went to the Court as the Commission had not issued a reasoned opinion, since it considered an infringement procedure “inappropriate”:

In 1994, the Belgian Government drew the Commission’s attention to the fact that the Spanish rules at issue in Delhaize were still in force, despite the interpretation of Article 34 of the Treaty given by the Court in that judgment, and called on it to act. On 14 November 1994, the competent member of the Commission replied that the Commission considered it inappropriate to persist with Treaty-infringement cases.109

The Court found that in this case, where during the proceedings the Commission intervened in support of Spain, the rules applied by the Spanish government were justified.

In the case of *Spain v UK* the Commission also did not deliver a reasoned opinion, stating that: “given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 259 [EC] and invites the parties to find an amicable solution”.110

In this case, however, no amicable solution was found and in the end the CJEU had to pass judgment. The “underlying bilateral issue” referred to in the above citation was the sensitive issue of Gibraltar.111 The case was about the fact that citizens of Gibraltar were, despite specific UK legislation, able to vote and to stand for elections for the European Parliament. Spain contended that the citizens of Gibraltar, which is not a part of the UK, cannot be recognized as having the right to vote in the elections. The Court in the end followed the UK’s argumentation (supported by the Commission) that it is for the Member States to define the persons entitled to vote and to stand as candidate in the elections for the European Parliament. The Treaties do not preclude the Member States from granting that right to persons who have close links to them other than their own nationals or EU citizens resident in their territory. Moreover, no clear link between citizenship and the right to vote is to be discerned in the Treaty provisions.

The sheer lack of cases under Article 259 shows that action by the Commission is much preferred to individual Member State action, both by the Member States and the Commission. Apart from the three aforementioned cases, there

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109 Ibid., para 27.
110 *Spain v UK* (2006), para 32.
111 The island had once been part of Spain, but was ceded by the King of Spain to the British Crown in 1713 as part of one of the treaties that put an end to the Spanish Succession War. It is currently a British Crown Colony and not part of the United Kingdom.
have been three other times that a Member State has requested the Commission to act under Article 259 without leading to an action before the CJEU. In 1984, the Commission issued a reasoned opinion under Article 259 in a dispute between France and the Netherlands, after which the Netherlands abolished the tariff structure that was deemed contrary to EU law.\textsuperscript{112} It was thus unnecessary to take the case to Court. Two other cases, Ireland v France and Spain v United Kingdom, were withdrawn and removed from the register before the delivery of a reasoned opinion.\textsuperscript{113} A total of six actions, therefore, is all that this article has produced in its fifty years of existence. Two reasons can be found for this low number of cases.

First, Member States believe the Commission is better equipped and more effective in handling such cases, and prefer to notify the Commission of alleged breaches in other ways than through Article 259 – and are satisfied by the outcome. Since an action by the Commission under Article 258 does not prevent procedures under Article 259, as stated in Article 260, unsatisfied Member States could still go to court even when the Commission also decides to start an Article 258 case against a Member State. Second, Member States might prefer to solve their differences in other ways than taking their neighbor states to Court. Reasons for this could be the high costs of litigation, a certain risk of retaliation (not necessarily through courts), diplomatic inconvenience and the greater acceptability of proceedings initiated by a neutral institution. The real reason can probably be found in a combination of the two – Member States prefer not to start adversarial proceedings before a Court against one of the other Members, and do not have to do so, generally, because the Commission is eager enough to do it for them. As worded nicely by one author:

> Interpolation of the Commission as delegate between Member States serves to deflect their wrath and defuse inter-state battles at the political level.\textsuperscript{114}

What does happen quite regularly is that States intervene in the judicial proceedings, as allowed by Article 40 of the Statute of the Court, in support of either the Commission or the accused Member State.

\textsuperscript{112} This case was referred to in Case C-169/84, Cofaz v Commission, [1986] ECR 391.

\textsuperscript{113} Order of 15 February 1977 in Case C-58/77 Ireland v France NOT REPORTED ; and order of 27 November 1992 in Case C-349/92; Ireland v France NOT REPORTED .

\textsuperscript{114} Harlow and Rawlings (2006), p. 452.
5. ARTICLE 260 TFEU

Of the three articles comprising the infringement procedures, it is Article 260 that has evolved the most over the course of its existence. Prior to the Treaty on European Union, there were no real options for the Commission to force a Member State to comply with a court judgment under Article 258. Article 260 (then Article 171EEC) provided only that

If the Court of Justice finds that a Member State has failed to fulfill 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.

The sole option open to the Commission when Member States did not comply after the CJEU had given its judgment was to go back to court and request a judgment based on a breach of Article 260 – the requirement to take all necessary measures to comply with the previous judgment. However, no further sanctioning possibilities existed. This lack of enforcement capabilities other than a declaratory judgment by the Court has in the past sometimes led to Member States taking considerably long periods to comply with judgments, or complying only after something was promised in return. For years, academics and politicians alike had requested the introduction of sanctions, including the European institutions. However, for a long time the national governments had little interest in the introduction of sanctions, leading one author to comment: “It may be questioned whether proposals for sanctions will not remain purely academic, at any rate for many years to come.” This remark was soon proven wrong, as is shown in the next sections.

5.1. Treaty on European Union

The Treaty on European Union in the early nineties brought the introduction of sanctions in Article 260(2) (then Article 228(2) EC). This article provides the Commission with the eventual possibility to “specify the amount of the lump sum or

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115 For example, it was only after six years that France complied with the judgment in Case C-152/78, Commission v France (Advertising of Alcoholic Beverages), [1980] ECR 2299.

116 As in the infamous case of Commission v France, where France refused to lift its ban on lamb and mutton from other Member States after a CJEU judgment. In the end, they had their way and a Union regime for lamb and mutton was established (Commission v France (1979)).

penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances" before the CJEU, upon which the Court of Justice may impose a lump sum or penalty payment on the non-compliant Member State. Although the Commission has not often asked for it, it has proven to be highly effective in inducing compliance. In most cases, Member States complied before the Commission had actually requested the CJEU for a judgment under Article 260.

The way the Commission can ask for the imposition of penalties is as follows: As with the Article 258 procedure, the Commission will need to send a letter of formal notice, requesting the Member State to submit its observations, including a warning to the Member State that penalties may ensue if compliance is not accomplished within a certain time-limit (Article 260(2)). If the Commission is not satisfied with the Member State’s observations or if the State does not reply, the Commission may bring the case before the CJEU and specify the amount of lump sum or penalty payments it considers appropriate. Before the introduction of the Lisbon Treaty in 2009, this article included an obligatory pre-litigation stage (the reasoned opinion) for the Commission. The removal of this stage means a reduction in the average duration of this procedure to between eight and 18 months.119

The Commission stated in the past that it prefers penalty (penalty by day of delay after delivery of the Article 260 judgment) to lump sum payments (penalizing the continuation of the infringement between the first judgment on non-compliance and the judgment delivered under Article 260). In a 1996 Communication, the Commission stated: “the basic objective of the whole infringement procedure is to secure compliance as rapidly as possible ... [therefore] a penalty payment is the most appropriate instrument for achieving it”.120 This again demonstrates the focus of the procedures on remedying situations of non-compliance, rather than sanctioning them.

The Commission has an elaborate system for calculating the amounts it requests. This calculation for penalties takes into account the seriousness of the

118 Once again subject to the Commission’s discretion.
120 European Commission Memorandum on applying Article 171 of the EC Treaty C 242/07.
matter, the duration of the non-compliance, the need to ensure deterrence, and the ability to pay of the Member State concerned.

Although the Commission had originally expressed a preference for penalty payments as mentioned above, it changed its opinion due to the outcome of *Commission v France* in 2005. The case concerned the non-implementation of a 1991 Court judgment by France. In that case the Court had found that France had failed to fulfill its obligations under certain control regulations for ensuring compliance with technical measures for the conservation of fishery resources. For eleven years France claimed it was doing everything in its power to comply with the judgment, however, despite the sending of a letter of formal notice, a reasoned opinion, and another supplementary reasoned opinion by the Commission, compliance was not reached. By the time the case came before the court in 2002, it had become obvious to the Advocate-General Geelhoed as well as the Court that France had structurally failed to comply with its obligations. In its judgment, the CJEU imposed a lump sum payment of its own accord for the first time, even though the Commission had recommended periodic penalty payments only. The idea behind the lump-sum payment was to impose a purely punitive measure, as well as to deter further non-compliance.

Subsequently the Commission stated it would propose a lump sum payment in every Article 260 case to specifically target cases of persistent non-compliance, which it views as “an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction”. The judgment in *Commission v France* confirmed that penalties and lump sum payments can be applied cumulatively for the same infringement. One consequence of the inclusion of lump sum payments in the applications by the Commission is that it will no longer automatically withdraw its application when a Member State has recti-

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121 This includes the importance of the Community rules breached (especially infringements affecting fundamental rights or the four fundamental freedoms protected by the Treaty) and the impact of the infringement on general and particular interests (e.g. the loss of Community own resources, serious or irreparable damage to human health or the environment, etc.) on a scale of 1 to 20 (see European Commission *Commission Communication on the updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings COM(2012) 6106 final*).

122 On a scale of 1 to 3, calculated by 0.10 per month that passed after the delivery of the 258 judgment (ibid.).

123 A daily multiplier of currently €630,- (ibid.).

124 Based on the Member State’s GDP and its voting rights in the Council (ibid.).


126 Opinion of Advocate General Geelhoed, delivered on 29 April 2004 in Case C-304/02.

fied the non-compliant situation after referral to the Court but before judgment is delivered under Article 260. The imposition of a lump sum payment may still serve as a deterrent for future cases and an incentive for Member States to correct infringements more quickly.

As with the penalty payments, the calculation for lump sum payments also includes a factor for seriousness (on a scale of 1 to 20), the Member State’s capacity to pay, a basic multiplier (of 208), and a multiplier for the number of days elapsed between the date of the first judgment of the Court, pronouncing on the Member State’s non-compliance, and the date on which the Commission brings the action. The Commission has also set a minimum amount for lump sum payments in order to avoid the proposal of purely symbolic amounts that would have no deterrent effect. Lump sum payments may thus vary from (at least) €177,000 for Malta to €11,120,000 for Germany.

The Court of Justice is not under an obligation to impose these payments (“it may impose”), and if it does is not held to the amounts stipulated by the Commission in its request. The Court has stated to this effect: “it must … be pointed out that the Commission’s suggestions cannot bind the Court and merely constitute a useful point of reference. […] Similarly, while guidelines such as those in the notices of the Commission do not bind the Court, they do help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty.”

The Court has stated that the imposition of the payments is meant to place the Member State “under economic pressure which induces it to put an end to the infringement established”, and the penalties are therefore based on the degree of persuasion needed for the Member State to alter its conduct. The calculating method by the Court itself of penalty/lump-sum payments is similar to that of the Commission, including the same elements of seriousness, duration and the Member State’s ability to pay, although the outcomes do differ. In Commission v Greece, for example, the Commission requested daily penalty payments of €31,798.80, based on a seriousness coefficient of 11, duration coefficient of 1.1, and an ability to pay coefficient of 4.38, multiplied by a factor 600 to ensure

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128 Commission Communication 2012, p. 5.
130 Before this revision, the standard multiplier was 600 (now 630) for penalty payments and 200 (now 208) for lump sum payments.
deterrence. The Court in the end imposed penalty payments of €31,536.-, with factors of 8 for seriousness, 1.5 for duration, 4.38 for the capacity to pay, and a multiplier factor of 600. The explanation for the similarity in outcome, despite the difference in factors used, lies in the fact that the duration of the non-compliance had increased from 11 months at the time of request by the Commission, to more than 2 years at the time of the delivery of the judgment by the Court.

In the same case, the Court imposed a lump sum payment of €3,000,000.- where the Commission had requested €3,420,780.-. Here the Court did not refer to the use of any factors or calculation method, although it did mention as relevant factors the duration of the infringement, the public and private interests involved, as well as the fact that the amount must be appropriate to the circumstances and proportionate to the breach and the capacity to pay of the Member State concerned.

The introduction of the possibility of penalty or lump-sum payments was seen as a way to improve the effectiveness of the infringement procedures, and especially prevent persistent non-compliance by Member States that otherwise may last for years. In practice it is felt that the introduction of sanctions has indeed had this effect.\textsuperscript{132} However, the possibility is not often used: In 2011, only two Court judgments were delivered under Article 260(2), one against Greece\textsuperscript{133} and the other against Italy.\textsuperscript{134} Moreover, some argue that the article has not yet reached its full potential, where one author compares it with a struggling teenager.\textsuperscript{135} It still offers the Member States the possibility of continued non-compliance, given the fact that several years will pass until the Court can impose penalty payments. Moreover, the Commission often chooses to bring several sets of cases under Article 258, instead of asking for penalties under Article 260 TFEU. Whether this is due to tactful behavior or doubt as to whether an earlier judgment has indeed been infringed, this may possibly weaken the effectiveness of Article 260.\textsuperscript{136} Moreover, the introduction of sanctions has not fundamentally changed the character of the remedies. There still is no compensation for past losses, but only punishment for non-execution of a Court judgment. Furthermore, Court judgments remain \textit{ex nunc} and have no retrospective effect further than the origi-
nal declaration of non-compliance by the Court. There is thus no punishment for the original non-compliant behavior.

Nevertheless, the article itself still offers the possibility of increased effectiveness of the infringement procedures. Commission sources indicate they believe the possibility of asking for sanctions has indeed increased the procedures’ effectiveness. Fines and penalties are paid within the deadlines, while relatively few 260(3) cases need to be started by the Commission at all.\footnote{Commission v France (2005).} This may indicate that Article 260(3) has an effect in the actual application of the sanctions,\footnote{In 2011, 77 cases were referred to the Court under Article 260(2), of which, in that year, a total of two judgments were rendered (European Commission 29th Report on monitoring the application of EU law (2011) COM(2012) 714).} but also especially in the deterrent effect that the possibility of application has on Member State behavior, just as Advocate General Geelhoed intended in his opinion in \textit{Commission v France}.\footnote{Respondents #4, #5 and #6.}

5.2. Changes Introduced by Lisbon

The Lisbon Treaty introduced changes to the infringement procedures in two respects: \textit{procedure} and \textit{scope}.

\textit{Procedurally} two significant changes were made to Article 260 TFEU. First, as already mentioned above, the necessity for the pre-litigation stage of the reasoned opinion was removed from Article 260(2). The letter of formal notice, offering the Member State concerned the opportunity to submit its observations, is the only step required before the Commission is able to turn directly to the Court. Second, the Lisbon Treaty has added a new paragraph to Article 260:

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 fulfill 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.
This paragraph effectively gives the Commission the opportunity to already ask the Court at the time of its application to the Court under Article 258 to impose a lump sum or penalty payment in the same judgment. However, this applies only to cases concerning the failure of the Member State to notify measures transposing a directive (which constitute around 1/3 of all active infringement procedures in a year).\textsuperscript{140} These payments are not meant as punishment, but as an incentive for the Member State concerned to comply as soon as possible.

The introduction of sanctions has given a sharper edge to the enforcement capabilities of the Commission under the infringement procedures. Moreover, it has somewhat diminished the influence of diplomacy and negotiation, which is such an important part of the first Article 258 stages. As an old Dutch proverb says: “Wie niet horen wil, moet voelen” (He who does not listen, must feel (the consequences)). Although the decision to start an Article 260 procedure falls under the Commission’s discretion, once it has taken the decision, the Member States had better listen, or feel the consequences. This possibility under Article 260(3) was used for the first time in 2011, with five Member States involved in nine cases.\textsuperscript{141} As noted earlier, Commission officials have indicated that the introduction of 260(3) has the potential of increasing the effectiveness of the infringement procedures.\textsuperscript{142}

The second important change introduced by the Lisbon Treaty concerns the scope of application of the procedures. Before Lisbon the infringement procedures could only apply to the Community side of legislation (the pre-Lisbon so-called first pillar), while the Lisbon Treaty has introduced the possibility of application of the procedures to the field of judicial cooperation in criminal matters and police cooperation as well (the former third pillar). However, the Court has “no jurisdiction to review the validity or proportionality of operations carried out by the police and other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States regarding the maintenance of law and order and the safeguarding of internal security” (Article 276 TFEU). Moreover, there is a five-year transitional period during which regarding the third pillar acquis already in force on the day the Lisbon Treaty came into force, the powers of the Commission and the Court remain as before, unless the act is amended or replaced after Lisbon.\textsuperscript{143}

\textsuperscript{140} In 2010 non-communication cases accounted for 35 percent of all active cases at the end of the year (2010 Infringement Report, Statistical Annex).
\textsuperscript{141} Austria, Germany, Greece, Italy, and Poland. The proposed penalty payments (lump-sum payments were not requested) amounted to a maximum of €215,409.60 (2011 Infringement Report).
\textsuperscript{142} Respondents #3, #4 and #5.
\textsuperscript{143} Article 10(1) to (3) of Protocol 36 on transitional provisions.
5.3. Conclusions on Article 260

The introduction of sanctioning possibilities under Article 260 has hardened the infringement procedures to a considerable extent. Although the aim of the procedures is still to induce compliance with EU law as soon as possible and the penalties are not meant as sanctions for non-compliant behavior under Article 258, they do function as punishment for non-compliant behavior after the 258 phase. Persistent non-compliance with court judgments as in the case of Commission v France\(^{144}\) will not likely reoccur soon, now that the Court has shown unwillingness to accept this type of behavior. In this phase of the procedure, non-compliance is more likely due to intentional behavior rather than unintentional. Ample time is given to Member States to remedy non-compliant behavior before the request of an Article 260 court judgment.

Despite the fact that sanctions do not work retroactively, meaning they do not apply to non-compliance before an Article 258 judgment, they probably do have a deterrent effect in that phase as well. Knowing that the possibility of sanctioning exists, intentional non-compliance may be remedied sooner than without this option. Rather than awaiting a Court judgment to the same effect, Member States may choose to implement Commission suggestions sooner in order to avoid sanctions. However, the possibility of continued non-compliance remains, given the lengths of time involved in the Court procedures. Although Commission officials indicate they believe the introduction of sanctioning possibilities has a positive effect on compliance,\(^{145}\) this assertion has not yet been borne out by the available data to date, as closure rates at the different stages of the procedure have not changed significantly from before the introduction of the sanctions.\(^{146}\)

6. EXCEPTIONS TO THE INFRINGEMENT PROCEDURES

The procedure just outlined (Article 258 – 259 – 260 TFEU) is the official EU procedure aimed at inducing Member State compliance with Union Law. There are, however, a few exceptions to the application of the general procedure. Ibáñez has divided the exceptions in three categories: 1) where direct access to the CJEU is granted without a previous administrative procedure (a “fast-track” procedure),

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\(^{144}\) Commission v France (2005).

\(^{145}\) Respondents #3 and #5.

2) where CJEU intervention follows a different kind of administrative procedure than the one laid down in Article 258, and 3) where under a different administrative procedure the role of the Commission has in part been taken over by the Council.\textsuperscript{147}

Treaty Exceptions to Article 258 can be found in Articles 106 (on competition rules), 108 (on State-aid), 114 (on the approximation of laws), 126 (on the Excessive Deficit Procedure), 271 (on the European Investment Bank and European Central Bank) and 348 (on the improper use of the articles on national security). This section will discuss these exceptions and how they work as compared to the Article 258 procedure. First the section focuses on the best-known and most elaborate exception to the procedures – the Excessive Deficit Procedure, after which the other exceptions are briefly explained.

6.1. The Excessive Deficit Procedure

Article 3 TEU states: “The Union shall establish an economic and monetary union whose currency is the euro”. The Economic and Monetary Union (EMU)\textsuperscript{148} policy framework comprises a set of detailed Treaty provisions, which a) establish the European Central Bank (ECB) as an independent monetary authority for the euro area; b) elaborate a set of rules governing the conduct of national budgetary policies; and c) govern these surveillance of economic policies more generally in the Member States.\textsuperscript{149} EMU combines a centralized monetary policy with decentralized responsibility (with the Member States) for most economic policies. There is neither a centralized fiscal policy function nor a federal budget.\textsuperscript{150} This means


\textsuperscript{148} EMU consists of three stages:
1) movement of capital between Member States, closer coordination of economic policies and closer cooperation between central banks (complete in 1993);
2) convergence of the economic and monetary policies of the Member States (complete in 1998); and
3) irrevocable fixing of exchange rates and introduction of the single currency on the foreign markets and for electronic payments. Introduction of euro notes and coins (partly complete, with the exception of the UK and Denmark, who did not adopt the single currency under the opt-out clause; Sweden, following a referendum in 2003; and the new Members who joined the EU in 2004 and 2007 but have not yet met the convergence criteria required for joining the euro.)

\textsuperscript{149} Commission Communication: A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate, pp. 1-3.

\textsuperscript{150} The EU budget is primarily funded from own resources (customs duties on imports from outside the EU, VAT (Value Added Tax), and own resources based on the gross national income of each Member State. 1% of the budget comes from other sources, such as taxes on EU staff salaries, contributions
that sound budgetary and economic policies are of particular importance in this area. The Stability and Growth Pact (SGP) of 1997 sets out the rules governing the coordination of budgetary policies.

The SGP consists of two parts, the so-called preventive arm (involving mutual surveillance of Member States), and the corrective (or dissuasive) arm (the Excessive Deficit Procedure (EDP)). The preventive arm (based on Article 121 TFEU) involves mutual surveillance on states. Member States must submit annual stability or convergence programs outlining medium-term objectives for a budgetary position close to balance or in surplus and for an adjustment path. Article 121 TFEU outlines how Member States shall coordinate their economic policies with the Council, which on recommendation from the Commission and after conclusions from the European Council, adopts recommendations outlining broad economic guidelines for the Member States. The Council subsequently monitors the economic developments in the Member States, as well as the consistency with the broad economic guidelines. When inconsistencies are identified, the Council, again on a recommendation of the Commission, may address recommendations to the Member State concerned and may decide to make its recommendations public. This multilateral surveillance procedure is in fact a mechanism working through the soft instruments of peer pressure and recommendations.

When a Member State has, despite the application of the preventive arm, reached a budgetary position that is not in line with the SGP, the corrective
PaRT II EU Compliance Mechanisms

arm comes into play. The basic aim of the EDP is for Member States to avoid excessive government deficits, in order to maintain stability and growth in the Member States under EMU. Article 126(10) TFEU prohibits the use of the Article 258 or 259 procedures when a Member State is in breach of this commitment: “The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article”.

Instead, Article 126(11) provides several measures the Council,156 not the Commission, may take in order to ensure compliance with the article. Since economic policy is seen as a politically sensitive area, the drafters of the Treaty have chosen for the intergovernmental Council to take decisions in this area instead of the supra-national Commission.

Although it is the Commission that monitors and examines compliance with budgetary discipline (Article 126(2)) and addresses opinions and recommendations on the situation to the Council, it is the Council that determines whether an excessive deficit actually exists and what action should be taken. First, the Commission prepares a report (Article 126(3)) when it considers a Member State is not capable of avoiding or already has an excessive deficit (with a reference value of 3% of GDP). Second, the Economic and Financial Committee provided for in Article 134 TFEU formulates its opinion on the report (Article 126(4)). Third, the Commission is obliged to address an opinion to the Council when it believes an excessive deficit exists or may occur (Article 126(5)). Fourth, the Council must consider any observations the Member State concerned wishes to make, and is subsequently obliged to make a decision on the existence of the deficit (Article 126(6)). The Council needs to make recommendations to the Member State with the excessive deficit, so the Member State has the opportunity to rectify the situation within a certain time limit (Article 126(7)). When the Member State fails to abide by these recommendations, the Council may make its recommendations public (Article 126(8)). Fifth, the Council may give notice to the Member State to take certain measures to remedy the deficit, and it may request the Member State to submit reports to examine the adjustment process (Article 126(9)). Finally, the Council may decide to apply one or more of the measures outlined in Article 126(11), the strongest of which is the imposition of fines. To this date such

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156 According to Article 16 TEU, the Council consists of a representative of each Member State at ministerial level who may commit the government of that State and cast its vote. In contrast to the Commission, its members are thus not politically independent of their national governments.

sanctions have yet to be imposed.\textsuperscript{157} The only actions that are allowed under the infringement procedures (Article 258 and 259 TFEU concern the failure to comply with sanctions imposed by the Council pursuant to Article 126(11).\textsuperscript{158}

This procedure leaves much to the discretion of the Council, and thus to the Member States as represented in the Council. The Council decides whether there is an excessive deficit, whether it will request the Member State to take measures, and whether it will impose fines. This set-up caused significant problems at first and led to subsequent changes to the SGP, starting in 2003. In that year, the ECOFIN Council decided to put on hold the ongoing excessive deficit procedures for France and Germany, which led to a dispute between the Council and the Commission, eventually leading to a case before the Court of Justice. This situation led to the adoption of two Council Regulations in 2005, one altering the preventive arm (most importantly including a more precise definition of the medium-term objectives taking into account a country’s individual economic characteristics, while also taking into account its structural reforms)\textsuperscript{159}, and one altering the corrective arm (including changes concerning the exceptional circumstances clause and deadlines for correcting excessive deficits). However, the Council emphasized that the EDP’s function was to assist rather than punish, as well as to provide incentives for pursuing budgetary discipline through “enhanced surveillance, peer support and peer pressure”.\textsuperscript{160} The enforcement of the corrective arm thus remained as soft as before.

Due to the financial crisis that started in 2007, several important changes have been made in the area of the SGP and EDP. The crisis revealed the weaknesses of the SGP and especially its lack of enforcement possibilities. Two of the problems were 1) insufficient observance of the SGP by the Member States with the aforementioned weak enforcement of the preventive arm, and 2) a reliance on the soft instruments of peer pressure and recommendations for the coordination of national economic policies.\textsuperscript{161}

\textsuperscript{157} Although some countries came quite close: At the end of 2011, Olli Rehn, the European Commission vice-president for Economic and Monetary Affairs and the Euro, sent letters to the Finance ministers of five countries making clear that if they did not take measures to correct their excessive deficits soon, further steps including the possibility of sanctions would be undertaken. Four countries (Belgium, Cyprus, Malta and Poland) subsequently remedied the situation within two months. (See European Commission press release “Belgium, Cyprus, Malta and Poland took effective action to correct deficit while Hungary’s measures are insufficient” (http://europa.eu/rapid/press-release_IP-12-12_en.htm, last accessed January 2013).

\textsuperscript{158} Ibáñez (2000), p. 158.

\textsuperscript{159} Regulation 1055/05.

\textsuperscript{160} Presidency Conclusions European Council, Brussels 23 March 2005, 7619/1/05 REV 1, p. 31.

\textsuperscript{161} Commission Communication: A Blueprint for a deep and genuine economic and monetary
Reforms started in 2010 with the Task Force on Economic Governance and the European Commission discussing proposals that resulted in the so-called Six Pack, consisting of five regulations and one directive. The Six Pack reinforces both arms of the SGP by ensuring stricter application of the fiscal rules through precise quantitative definitions, an operationalization of the debt criterion as well as the gradual imposition of sanctions for Euro-area Member States to a maximum of 0.5% of GDP. Moreover, the Six Pack introduces reverse qualified majority voting in the Council of Ministers for sanctions, meaning the Commission can now impose sanctions on a Member State unless the Council decides through a reversed majority voting system to reject the Commission’s proposal. A minority of Member States can thus agree on the Commission’s proposals, while a qualified majority is needed to block it. However, the Council is still able to amend the Commission recommendation with a (normal) qualified majority.

In the wake of the Six Pack, the Member States negotiated the so-called Fiscal Compact as part of the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (TSCG). The TSCG was signed by all Member States except the Czech Republic and the UK in March 2012, and entered into force on 1 January, 2013 after ratification by 16 countries. The Treaty is an intergovern-
mental agreement (not EU law) that is binding on euro-area Member States only. Some provisions in the TSCG are more stringent than those of the Six Pack, requiring the signatories to enshrine the country-specific medium-term objectives in national binding law, while the Member States will support the Commission in its proposals or recommendations in the Council if a euro-area Member State is in breach of the deficit criterion, through a kind of reverse qualified majority voting applying to all stages of the EDP, even if not foreseen by the Six Pack.\[^{166}\]

In November 2011, a further two regulations were proposed by the Commission and subsequently negotiated by the Council, Commission and Parliament, complementing the SGP’s requirement for surveillance, for euro-area Member States only.\[^{167}\] This so-called Two Pack, which entered into force on May 30, 2013, entails strengthening the monitoring and enhanced surveillance procedures for Member States experiencing severe difficulties with financial stability. Strict deadlines were introduced at all steps of the EDP, while all relative reports are to be made public. Moreover, ahead of parliamentary adoption all Member States of the euro area have to present their draft budgetary plans for the forthcoming years to the Commission and their euro area partners, according to a common timetable.\[^{168}\]

Although the SGP and EDP cannot be subject to the Commission’s infringement procedures, the recent amendments under the Six Pack, Two Pack and the Fiscal Compact have hardened the procedure and increased the possibility of enforcement by the Commission, while strengthening its role as Guardian of the Treaty. The Commission has made proposals for hardening of the procedures even further and further deepening the EMU. It has, among other things, mentioned the extension of the competences of the Court of Justice – including the

\[^{166}\] For more details, see the explanatory page of the European Commission on Economic Governance: http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm, and the TSCG itself.


\[^{168}\] Commission Communication: A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate, p. 5.
option of deleting Article 126(10) TFEU, and thus admitting infringement proceedings in this area.\(^{169}\)

6.2. Other Treaty Exceptions

Aside from the extensive SGP and EDP and the recent developments in that area, there are a few other Treaty exceptions to the application of the infringement proceedings. Whereas the EDP provided a larger role for the Council, to the detriment of the Commission’s powers in that area, these other Treaty exceptions for the most part have the opposite effect. Except for Article 271, the Commission is either provided with a fast-track procedure or given more possibilities to supervise Member State compliance.

Article 106 on public undertakings offers an alternative procedure for the Commission when a Member State is not in compliance with the rules that govern Member State behavior toward undertakings under their influence.\(^{170}\) In 106(3), the Commission is given the possibility to address directives or decisions to Member States to ensure the applications of the provisions of the article.\(^{171}\) This article can thus be seen as an extra phase in ensuring compliance – if the Member State concerned does not comply with the decision or directive given under this article, an Article 258 procedure can be started to ensure compliance. However, it is not meant to ensure compliance with Article 106 itself, but with the decisions and directives issued under 106(3).

Article 108 TFEU on state aid provides a (frequently used) fast-track version of the procedure for States who do not comply with the Commission’s decision to abolish or alter state aid that has been found incompatible with the common market. Under this article, the Commission keeps under review all systems of state aid existing in the Member States. This review is carried out in cooperation with the Member States and the Commission can propose any appropriate measures required. When the Commission finds that state aid is not compatible with the common market (as specified in Article 107), it can give notice to the Member State concerned and subsequently decide that the State must abolish or alter such aid within a certain time limit. When the State does not comply with

\(^{169}\) Ibid., p. 39.

\(^{170}\) The influence of the public authorities of a Member State (State, regional, local, or other), can occur by virtue of either their ownership of these companies, their financial participation therein or the rules that govern them.

\(^{171}\) “The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States” (Article 106(3) TFEU).
this decision within the time limit, Article 108(2) provides a fast-track procedure (fast-track because it skips the reasoned opinion): “the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union directly”.

There are thus three conditions for this fast-track procedure: the Commission must i) establish the incompatibility of the aid, ii) give notice to Member States to submit their comments, and iii) decide on abolition or modification of the aid. When these three conditions are fulfilled, and the decision under iii has not been complied with, the Commission or any other interested State may refer the matter to the Court of Justice. The procedure is somewhat complicated with regard to Article 108(3). Here the Commission depends on notifications by the Member State as to any plans for new or alterations to existing aid. The CJEU decided, however, that when aid has been granted or altered without notification, the Commission may issue an interim decision prohibiting the aid for the period needed to examine the compatibility. The Member State must suspend payments during this period, and if it does not do so, the Commission may bring the matter directly before the CJEU.¹⁷²

Article 114 on the approximation of laws and Article 348 on national security have a similar procedure concerning the abuse of particular derogating provisions. Article 114(9) implies the possibility for derogation under certain circumstances,¹⁷³ while Article 348 addresses Commission supervision over the application of Articles 346 and 347 on the possibilities of derogation from Treaty articles on the basis of national security.¹⁷⁴ If these articles are misused by the


¹⁷³ “By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided in this Article” (Article 114(9) TFEU). The powers referred to in Article 114 include the power to maintain national provisions on grounds of major needs, or relating to the protection of the environment or the working environment. To date, Article 114(9) has never been applied.

¹⁷⁴ “By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any other Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347” (Article 348 TFEU). Only one case has been brought under this article, Case C-120/94, Commission v Greece, [1996] ECR I-1513. Here the Commission started a case against Greece concerning certain measures imposed by Greece against the Former Yugoslav Republic of Macedonia (FYROM). Greece had imposed an embargo against FYROM and justified this on the basis of Article 348, since it believed that certain elements in FYROM’s constitution, the appearance of the sun of Vergina in FYROM’s flag as well as the inclusion of the term “Macedonia” in FYROM’s name constituted a threat to national security, hinting at territorial claims. The Court in a preliminary ruling ruled against the Commission’s request for interim measures. The case was later discontinued. Greece protested
Part II  EU Compliance Mechanisms

Member States, Article 114 and 348 offer the possibility for the Commission to skip the administrative phases and bring the matter directly before the Court of Justice. With regard to Article 348, a provision is added that the ruling of the CJEU will be made in camera, since questions of national security are best not heard in public.

Article 271 concerns obligations under the Statute of the European Investment Bank. The powers normally conferred on the Commission under Article 258 are transferred to the Board of Directors of that bank by Article 271(a). The same goes in case of national central banks, where these powers are conferred upon the Council of the European Central Bank by Article 271(d). The rest of the procedure, however, is similar to the Article 258 procedure (except that Article 271(d) concerns the obligations of national central banks under the Treaty and the Statute of the ESCB, instead of Member States).

6.3. Conclusions on Treaty Exceptions

Several exceptions to the application of the infringement procedures in the Treaties were presented in the previous sections. It became clear that the largest exception, the SGP and EDP, originally involved softer procedures where the role of the Commission in the infringement procedures had been reduced to making a proposal on the breach of EU law and on sanctions to the Council. Recent developments have led to an increased role for the Commission in this area, greater possibilities for the direct imposition of fines by the Commission, and less reliance on soft instruments. The other Treaty exceptions for the most part involve a type of fast-track procedure for the Commission, or, in the case of the European Investment Bank and the national Central Banks, a transfer of the powers under the infringement procedures from the Commission to the Board of Directors of the EIB or the Council of the ECB, respectively. The procedures remain the same otherwise.

particularly heavily against the use of the sun of Vergina by FYROM, as it is regarded as a national symbol in Greece. FYROM used the symbol in its flag between 1991 and 1995, after which it agreed to change its flag due to Greece’s protest, while negotiations between the two countries were started under the auspices of the UN.

175 “... the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258” (Article 271(a) TFEU).

176 “... the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258” (Article 271(d) TFEU).

177 See also Article 35.6 ESCB Statute.
Of all the exceptions to the infringement procedures, the most interesting for the purpose of this study are the EDP and Article 108 on state aid. The EDP merits attention because of its elaborate separate procedure as well as the recent changes to the article, but even more so due to the frequent application of the procedure since the onset of the 2008 financial crisis. Article 108 is interesting, since it is applied all the time in practice. When all the exceptions are examined together, however, they can be divided into three categories: 1: a fast-track procedure (Article 108, 114, 348); 2: a different administrative procedure (Article 106); and 3: a more political procedure where the role of the Commission has been limited in favor of the Council or other bodies (EDP, Article 271). An explanation for the existence of these different procedures can be found in the character of the underlying obligations.

The possibility for fast-track procedures found in Articles 108, 114 and 348 can be explained by the importance of achieving expedited compliance, given the nature of the underlying obligations. For example, the Court has stated that Article 108 sees to the compatibility of state aid with the common market, which is a dynamic concept and to be examined in light of the ever-evolving common market.\textsuperscript{178} Similarly, the Court found that Article 114’s special procedure is warranted given the fact that the underlying problems in such cases concern “facts and conditions which may be both complex and liable to change rapidly”.\textsuperscript{179} Moreover, the article concerns derogation from an essential Treaty principle of free movement, warranting control by the Court through an expedited procedure.\textsuperscript{180} In contrast, the reason for Article 348’s expedited procedure is not found in the character of the underlying obligations as such, but in the fact that Articles 347 and 348 already provide the Member States with the opportunity to consult with each other and the Commission, as well as to take such steps as are necessary to prevent the internal market being affected by any measures taken under Article 346. The preliminary steps that are part of the official infringement procedures are thus replaced to a certain extent by these options under Articles 347 and 348.\textsuperscript{181}

The second category, where Article 106 TFEU is found, is not a real fast-track procedure as it is not possible for the Commission to skip any of the steps of the classic infringement procedure. This may mean that this exception may actually prolong the entire procedure, by adding an extra step. On the other hand,

\textsuperscript{178} Smit, H. and P.E. Herzog (eds), Smit & Herzog on the law of the European Union (Lexis Nexis, New York 2005), para 108.05[3].
\textsuperscript{179} Case C-301/87, France v Commission, [1990] ECR 307, paras. 15-16.
\textsuperscript{181} Ibid., p. 2577.
through this added administrative procedure it becomes possible to avoid the infringement procedures altogether. If the use of Article 106(3) is indeed successful, it may provide a faster way of solving the problem. Moreover, the procedure allows room to remedy more complex situations, it allows the Commission to clearly determine which measures the Member State has to adopt in order to conform with EU law, and, in contrast with the classic infringement procedure, it can also be used against national measures not yet in force.\footnote{Ibáñez (2000), p. 155.} The Court has pointed out that the purpose being achieved by an Article 106(3) procedure (adopting a directive defining a Member State’s obligations under Article 106) is in fact different from that of an infringement procedure (a finding of breach of Union law).\footnote{Case C-188-90/80, France v Commission, [1991] ECR 2545.} The reason for giving the Commission this possibility in Article 106(3), lies with the fact that this article aids the effective functioning of all other Treaty articles, with emphasis on competition rules as it is situated in the TFEU chapter on competition. It in fact concretizes the general duty of sincere cooperation as laid down in Article 4(3), and thus warrants providing the Commission with an extra opportunity to define Member State obligations in order to perform its function as Guardian of the Treaties.\footnote{Schwarze (ed) (2012), p. 1229. Member States cannot be allowed to circumvent their Treaty obligations through state enterprises and enterprises to which they have granted special or monopoly powers.}

The third and final category finds its rationale in the politically sensitive character of the underlying obligations combined with practical circumstances. The EDP, for example, concerns monetary and budgetary rules. Regarding any political considerations, it has been argued that in economic matters, especially when many member-states are involved, discretion becomes more important than rules. It is therefore politically speaking often more feasible to provide the Member States with such discretionary powers.\footnote{Padoa-Schioppa, as quoted in Ibáñez (2000), p. 52.} Moreover, at the time of drafting the EDP general economic policy and budgetary powers had not been transferred to the Union. It would have been unrealistic to endow the Commission with strong powers to oversee adherence to the SGP, given the linkages between monetary, economic and financial policies where competences are divided between the Member States and the Union. At the time it was a logical step to give this supervisory task to the Member States, collectively represented in the Council. The recent financial crisis has shown the drawbacks of assigning this task to the Member States, as was shown in the above section on the EDP.
Chapter 3 EU Infringement Procedures

The exceptions in this section will not be discussed any further, as they are precisely exceptions to the object of this study: the classic infringement procedures. However, they have shown that there is a certain link between the character of the underlying obligations (political, complex, urgent) and the set-up of a compliance system. This is an interesting observation, as the impact of this element is also found when studying the effectiveness of the infringement procedures. The next section will now perform that particular analysis.

7. THE EFFECTIVENESS OF THE INFRINGEMENT PROCEDURES

Now that the set-up, functioning, character and the exceptions of the infringement procedures have been outlined, an analysis of their effectiveness may be undertaken. In chapter 2.1 of this dissertation, four steps were formulated that will help determine the effectiveness of compliance mechanisms: A: the goal, B: the compliance, C: the effectiveness, and D: the comparison. In this current chapter steps A, B and C are examined, while D will be addressed for all mechanisms at the same time in the concluding chapter of this thesis.

7.1. The Goal of the Infringement Procedures

According to Article 258 TFEU, the primary aim of the infringement procedures is to make Member States comply with and fulfill their obligations under the Treaties. The aim of the procedures is not to punish Member States for their non-compliant behavior, but to ensure that the behavior is ended as quickly and effectively as possible. Moreover, the procedures are intended to remedy current and prevent future non-compliant behavior.

The wording of Articles 258 and 260 already show that the target is not perfect compliance in the Member States, but rather a state of compliance that is deemed acceptable by the Commission as Guardian of the Treaties. At all steps of the procedure it is left to the Commission’s discretion to decide whether or not to take action. Despite the changes made to the procedures over the past decades – such as the greater involvement of complainants, a greater divulging of information to the parties as well as the public in general, the involvement of the European Ombudsman or even the European Parliament – the Commission’s discretion is still an important element in the procedures, as the Commission as well as the Court of Justice (and the European Ombudsman and the European Parliament, for that matter) regularly remind us.
7.2. Compliance

Since the aim of the procedures is to induce compliance by Member States with EU law, four compliance questions need to be answered regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior.

Expected behavior
The first question asks which obligations Member States are expected to adhere to. An infringement is defined in Article 258 TFEU as the “failure to fulfill an obligation under the Treaties”. As was explained at the beginning of this chapter, an obligation under the Treaties refers to any obligation under European Union Law, covering all rules of EU law: primary legislation, secondary legislation and supplementary legislation. This includes both binding as well as non-binding acts (such as opinions or recommendations), and equally covers both acts and omissions.

Hard or soft obligations
The second question pertains to the character of these underlying obligations. As was mentioned above, an “obligation under the Treaties” encompasses both binding as well as non-binding acts, meaning that these obligations can be of a hard or a softer character. Infringement procedures, however, can only be started when there is alleged non-compliant behavior with respect to hard legal obligations, since non-binding or soft law can never be subject to judicial proceedings. The obligations that are relevant for the application of the infringement procedures are therefore necessarily of a hard character.

Actual behavior given the element of discretion
The third question, then, concerns the determination of non-compliant behavior – when is an EU Member State non-compliant? In this respect, the element of discretion plays an important role. As was explained, the Commission has discretion at all steps of the procedure to decide whether and when it will proceed with the next step or close the case. This means, practically speaking, that it is the Commission that decides whether or not there has been a breach of obligations under the Treaty that should be remedied. Ultimately, if and when the Commission has decided to lodge an application with the Court of Justice, it is the Court of Justice that makes an objective determination of the existence of non-compliant behavior.
Except for those cases concerning non-communication of transposition measures, where there is a quasi-automatic start of the procedures, this discretion often leads to the decision not to start or to discontinue infringement procedures. There are many reasons for not pursuing a certain case of non-compliance, either because the case at hand is not suitable for the application of an infringement procedure and may better be solved through other channels (“small infringements”), or because of capacity problems on the side of the Commission, which must prioritize certain cases over others due to financial, time or other restrictions, or maybe due to less transparent political reasons. The Commission has committed itself to informing complainants of their reasons for not pursuing a case, for example, but in practice this does not always mean that this information reflects the actual reasoning behind such decisions.\textsuperscript{186} The element of discretion therefore plays a large role in the application of the infringement procedures and the determination of the existence of non-compliant behavior.

**Intentional or non-intentional non-compliance**

The last compliance question refers to the underlying reasons for non-compliant behavior. As stated before, the decision by the Court of Justice under Article 260 is objective in nature, meaning the Court does not take into account the underlying reasons for the non-compliant behavior, intentional or unintentional. However, the procedures themselves implicitly do take this into account by means of gradually increasing the level of hardness of the steps leading up to the top of the pyramid. As described in the model in chapter 1, the pyramid shows there are four basic steps to compliance: prevention, monitoring, a legal framework and sanctions.

*Prevention* in terms of preventive capacity building and rule clarification that reduce the risk of violations due to incapacity or inadvertence (as defined by Tallberg)\textsuperscript{187} is as such not a part of the infringement procedures. The procedures come into play when non-compliant behavior has already occurred. Nevertheless, the procedures may have a preventive aspect since their mere existence will, at least to a certain extent, prevent states from showing non-compliant behavior. When states know that non-compliance may invoke judicial procedures that take

\textsuperscript{186} There was for example one inquiry by the European Ombudsman, which found that although the reason given by the Commission to the complainant stated that it found no breach of obligations, there was in fact documentation from within the Commission that acknowledged there was indeed a case of non-compliance. The reason for closing the case was therefore not the absence of non-compliance, but other non-disclosed reasons (for more on this inquiry, see the discussion in Varnay (2006)).

\textsuperscript{187} Tallberg (2002).
years, take up resources and may end in the imposition of sanctions, they might think twice before intentionally breaching their obligations. Moreover, the infringement procedures started against one Member State, when publicized, may alert another Member State to their possible (unintentional) non-compliant behavior as well and induce compliance in this way.

Monitoring in order to enhance the transparency of state behavior and expose violators is quite difficult under the infringement procedures. As was explained earlier, the Commission has no investigative units on the ground, so to speak, and monitoring therefore relies on complainants and other channels to ensure non-compliant behavior is caught. Monitoring with regard to non-communication of transposition measures is something that the Commission can do and does in an automated manner. However, once non-compliant behavior is detected, Commission monitoring is possible in some sense, since the Commission will monitor the compliance progress of the Member State that showed the non-compliant behavior.

In the early, pre-judicial stages of the infringement procedures, this monitoring step plays an important role. With a view to solving breaches of obligations under the Treaties in an amicable and non-adversarial manner, the early stages entail the exchange of information between the Commission and the Member States, and offer the opportunity for Member States to mend those breaches that were either unintentionally or intentionally made. The informal consultations with the Commission in the early stages of the procedure make it possible to weed out those cases that have arisen due to legal uncertainty or misunderstandings. The cases for which the more formal part of the proceedings are started are then usually those where non-compliant behavior is either intentional or where the Member State does not agree with the Commission as to whether its behavior is in fact non-compliant. In the prejudicial part of the procedures, the Commission uses both soft measures, such as naming-and-shaming through press releases, and hard measures, such as official reasoned opinions and the threat of imposing sanctions if necessary, to induce compliance. The fact that the Commission can in fact “back up” or increase its pressure with judicial proceedings and sanctions opens up the possibility for Member States to negotiate solutions with the Commission. This means that when a case is closed in the preliminary stages of the procedure, it is not always perfect compliance that has been reached, but rather an acceptable level of (non-)compliance. This is possible given the Commission’s discretion regarding the decision whether to take the case to the next level or not.

A legal system that permits cases to be brought against non-compliant states and that further clarifies existing rules is the hallmark of the infringement pro-
This is where the Court renders its objective judgment of whether or not a state of non-compliance exists. As stated above, this objective declaratory statement does not take reasons for non-compliance into account.

Sanctions, the last step to compliance, was added to the infringement procedures at quite a late stage, but is currently used more and more often by the Commission. The application of lump-sum as well as penalty payments, including the more direct route of asking for these sanctions in case of non-communication of transposition measures, have led to a sanctioning as well as a deterrent function of these sanctions.

The above elements demonstrate that the causes for non-compliance (intentional or non-intentional) are relevant only in the early stages of the infringement procedures. As a case goes through the different steps of the procedure, it becomes less important what the underlying reasons for non-compliance are. Throughout the infringement procedure ample opportunity is given to remedy those situations where non-compliance was unintentional. This explains the turn to the imposition of lump-sum payments on those states that have shown particular reluctance in complying with Court judgments, as was seen in Commission v France.\footnote{Commission v France (2005).} Non-compliance in this stage of the procedures is almost assumed to be intentional, for which a pecuniary sanction is deemed appropriate.

At the preliminary stage, it is the Commission that decides when there is a potential case for non-compliance, and whether or not to pursue this non-compliant behavior. Through clarifications, the exchange of information and discussions with the Commission, those cases where Member State’s non-compliance was unintentional can usually be eliminated. Of course some cases will not be solved, for example those where neither the time nor the financial capacity to solve the problem before the end of the deadline given by the Commission are available. On the other hand, by using different types of pressure (through e.g. naming-and-shaming or the threat of judicial proceedings) and through negotiation, many of the intentional cases of non-compliance can also be remedied. Those remaining cases concerning unintentional or intentional non-compliance, or where the belief exists that the behavior in fact does not constitute non-compliance, are solved through the application of the hard judicial proceedings up to and including the imposition of sanctions. At the judicial stage of the procedures, the causes for non-compliance become almost irrelevant given the objective nature of the Court’s decision. Then again, harsher measures are applied to those states that have failed to comply with the Court decision for a protracted
period, since this kind of behavior is seen to be intentional, or avoidable at the
least.

Concerning the character of the underlying obligations – these are necessar-
ily hard and binding, otherwise the infringement procedures could not be start-
ed. So, also in those cases where the Commission applies managerial methods to
induce compliance in the prejudicial stages, these methods are applied to hard
legal obligations. In conclusion: With the infringement procedures, manageri-
al-type efforts are indeed made to solve most non-compliance cases which were
unintentional, while enforcement-type mechanisms are applied to remedy inten-
tional non-compliance or otherwise unsolvable unintentional non-compliance.

7.3. Conclusions on Effectiveness

Now that the goal of the infringement procedures has been discussed as well as
the character of the underlying obligations and causes for non-compliance, the
effectiveness of the procedures can be analyzed.

In chapter 1 effectiveness was defined as the degree to which objectives are
achieved, relating the input or output to the final policy objective (the outcome).
The goal of the infringement procedures is compliance. This is not necessarily an
outcome of perfect compliance, but rather a state of compliance deemed accept-
able by the Commission as Guardian of the Treaties, given the level of discretion
left to this supranational institution. This level of discretion has in practice
led to the application of managerial-type mechanisms and the possibility for ne-
gotiations between the Member States and the Commission. These managerial
stages seem to work quite effectively in practice, since only five percent of all
opened infringement cases makes it to the judicial stage, where further determi-
nation of a state of non-compliance is left to the objective judgment of the Court.
This means that probably, according to the Commission, 95% of all cases are no
longer non-compliant, or are deemed to be acceptable cases of non-compliance.
However, without the existence of the judicial stage as well as the possibility of
sanctions, this percentage would probably be lower. This is also shown by the
fact that before the introduction of sanctions, for example, 10% or more of the
cases started would end up in court. Moreover, there has been a reduction in
the average length of time from the start of the procedures until compliance is

\[189\] And also a state of compliance that is deemed acceptable by other Member States; otherwise,
they could start an Article 259 procedure themselves.
achieved. The Commission believes that the newly added fast-track procedure of Article 260(3) will further speed up the average time of the infringement procedures.

The infringement procedures aim to induce compliance with EU law through a combination of management and enforcement (the front side of the compliance pyramid in chapter 1). This means: if possible in an informal setting of cooperation and communication (management in the preliminary stages), otherwise by enforcement through judicial proceedings and if necessary through the imposition of lump-sum and/or penalty payments.

Once again, the purpose of the infringement procedures is not to reach perfect compliance, but rather a level of compliance as deemed acceptable by the Commission. Given this level of discretion left to the Commission, conclusions cannot be drawn as to the capacity of the infringement procedures to induce compliance by Member States with EU law in general. This remains true even given the increased transparency and diminished secrecy surrounding Commission discretion over the past decades. When the effectiveness of the infringement procedures is compared to the alternative procedures in the next chapters, therefore, this element needs to be taken into account.

8. CONCLUSIONS

The EU infringement procedure is the central EU mechanism for inducing compliance with EU law. It can be set in motion when “the Commission considers that a Member State has failed to fulfill an obligation under the Treaties” (Article 258 TFEU), and includes obligations under EU primary, secondary or supplementary law. The fact that the Commission, a supranational institution, decides on a Member State’s compliance with its obligations is essential in the procedures. The infringement procedure is a unique example of a procedure that combines managerial and enforcement elements to induce compliance with a

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190 It is difficult to prove a one-on-one causal relationship between the introduction of the sanctions and the mentioned reductions. Moreover, the reductions may have been due to other, parallel developments in the application of the infringement procedures, such as the introduction of stricter deadlines as such by the Commission, and stricter adherence to them.

191 European Commission Commission Communication on the Application of Article 260 of the Treaty on the Functioning of the European Union. Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings. SEC(2010) 923/3.

192 And the CJEU in the judicial stage, of course. However, cases will never make it to this stage if the Commission does not declare initially and throughout all subsequent phases up until the judiciary phase that according to them the Member State is not in compliance.
Member State’s binding legal obligations under EU law. When the procedures are analyzed by applying the compliance model and pyramid that were developed in chapter 1, the following can be concluded.

First, although it is the Commission that determines whether there is a case of non-compliance, it is the Court of Justice that will make the final decision on the issue, if the procedure arrives at this final stage. In contrast to the Commission, which has discretion in its determination of the existence of a case of non-compliance, the Court will make an objective determination. Thus the reasons for the existence of non-compliance are not of importance to the Court – they will merely rule whether there is non-compliance or not. Whether the non-compliance is intentional or involuntary is irrelevant.

Second, it is interesting to note that the official infringement procedure has developed over the years into a much harder mechanism than it originally started out as. This can be deduced i) from the fact that there is a possibility for the Court of Justice to impose (financial) sanctions if non-compliance persists after the Court has established its existence, ii) the fact that the room for discretion for the Commission, although still there, has been limited somewhat over the years, not least by the Commission itself, and iii) from the fact that elements have been introduced into the system that are geared towards speeding up the process, such as shortening reaction deadlines, fast-track procedures such as Article 260(3) or the semi-automatic start of certain kind of procedures, thereby leaving less room or time for managerial solutions for certain problems.

Third, the procedures become “harder” throughout the entire process: first discussions, room for explanations and information dissemination, followed by official communications, eventually possibly leading to adjudication or even the imposition of penalties.

In short therefore, the infringement procedures represent a complete compliance pyramid where soft as well as hard steps are taken to induce compliance – apparently irrespective of the underlying softness of the obligations or the reasons for non-compliance. Although the procedures have become harder over the years, the importance of the managerial steps due *inter alia* to Commission discretion cannot be ignored, given the fact that 95% of all cases are solved before the CJEU renders judgment. The preliminary phase has become even more important especially *due to* the hardening of the procedures. With the threat of Court judgment and the possibility of sanctions looming in the background, Member States will sooner avail themselves of the possibility to solve problems amicably. The next chapter will show how the managerial aspects of the pyramid

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193 Those meant to target the non-communication of transposition measures for directives.
are much stronger for the softer mechanisms that function alongside the harder infringement procedures.