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COMMISSION COMMUNICATION

BETTER MONITORING OF THE APPLICATION OF COMMUNITY LAW

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COMMISSION COMMUNICATION ON BETTER MONITORING OF THE APPLICATION OF COMMUNITY LAW

1. INTRODUCTION

To ensure that Community policies are effectively implemented and have the desired effect, thereby gaining the public's confidence, the institutions must now try not just to improve the quality of legislation but also to ensure further downstream that its application is efficiently monitored. In this regard, the discussion on the *White Paper on European Governance*,¹ focuses on the quality of Community legislation and the improvement of monitoring.

The two issues are clearly linked. The quality of legislation drafting, which was the subject of the Commission communication *Better lawmaking*,² is of vital importance, influencing both the capacity of Member States to implement Community law and the effectiveness of Community legislation and its monitoring by Community institutions. Potential difficulties with the application and monitoring of Community law should be taken more into account at the stage at which legislative proposals are drafted, particularly by giving greater thought to the choice of legislative instrument (directive or regulation) and assessing in advance foreseeable difficulties with incorporation into national law and potential litigation.

However, this communication addresses the second aspect – the monitoring task entrusted exclusively to the European Commission in its exclusive role as “guardian of the Treaty”. The importance of this function is not widely known, even though it is essential to the interests of European citizens, as is regularly pointed out by the European Parliament's Committee on Petitions and the European Ombudsman.

The Commission's responsibility for monitoring the application of Community law is set out in Article 211 of the EC Treaty. Article 226 provides that the Commission may take action against a Member State for failing to fulfil an obligation under the Treaty. Over the years the Commission has significantly developed the pre-litigation phase, commonly known as the “infringement procedure”.³ Action in respect of failure to fulfil Treaty obligations and the infringement procedure which precedes it are non-exclusive parts of the same objective, that of enforcing Community law. As the Treaty does not stipulate a specific choice of these means, it is up to the Commission to continually adapt them to carry out its mission effectively and, where necessary, make innovations designed to improve the application of Community law.

While the current control and referral procedure has proved its effectiveness with a rate of referral to the Court of Justice of only 10% of suspected infringements (see box on p. 4), an automatic increase in this work following enlargement is to be expected and account must also be taken of the extension of the Community *acquis*. This communication sets out various actions to improve the monitoring of the application of Community law.

¹ COM(2001)428 final.

² Communication from the Commission on an action plan for *Simplifying and improving the regulatory environment*, COM(2002)278 final.

³ This communication is concerned solely with the application of Article 226 of the EC Treaty and its corresponding article in the Euratom Treaty, Article 141. It does not cover infringement actions under other provisions of Community law such as competition cases.

It first distinguishes between preventive measures carried out in sincere and reciprocal cooperation between the Commission and the Member States to avoid infringements (Article 10 of the EC Treaty)⁴. It then sets out the conditions for effective management of controls and action against infringements. This action is based on experience built up over the years. The communication brings together and highlights a series of measures resulting from practical experience. In doing so, it complies with its duty of education and openness in a complex area of exclusive responsibility of the Commission.

An efficient procedure⁵

The prosecution of suspected infringements of Community legislation is conducted in several stages, intended to dispel any doubts or put an end to the infringement in question.

Potential infringements are first recorded in a single register, irrespective of how they were identified; they can be complaints made directly to the Commission or forwarded from the European Parliament's Committee on Petitions or from the European Ombudsman or cases detected by the Commission's own ex-ante or proactive work.

As the examination of each case proceeds, the Commission sends the Member State concerned, first, a "letter of formal notice", then a "reasoned opinion" and, as a last resort, if the alleged infringement continues, the Commission refers the case to the Court of Justice bringing infringement proceedings. These successive stages make maximum use of information and cooperation, leading in many cases to the infringement being terminated and the case closed.

According to the statistics for 2001, approximately half (49%) of the suspected infringements recorded gave rise to a letter of formal notice; slightly more than half (54%) of the letters of formal notice were followed by reasoned opinions and approximately a fifth (21%) came to court. In the end, only about a tenth (10.3%) of the suspected infringements originally recorded culminated in infringement proceedings.

Registrations of new cases currently lie at around 2000 a year; for technical reasons the 2001 figure was a little above the average at 2179. The caseload is comparable with the number of cases finally concluded either by closure or by referral to the Court, with the result that the ongoing caseload is stable at around 4000 (3868 cases on 10 June 2002). This figure seems relatively small in the end in view of the number of Member States and the size of the Community *acquis*, which is made up of several thousand items of secondary legislation in addition to the Treaty. The rapid turnover of cases in hand is reflected in the short handling time of procedures, three-quarters of which have either been closed or have reached the reasoned opinion stage within the first year following their registration.

2. PREVENTION OF INFRINGEMENTS

The prime responsibility for implementing Community law, both the Treaty and secondary legislation (regulations, directives and decisions), lies with the Member States. However,

⁴ The Court of Justice has established the reciprocal nature of the sincere cooperation imposed by Article 10 on both the Member States and the Community institutions.

⁵ For further details on the statistical aspects of the procedure, please see the annual report on monitoring the application of Community law (2001) (OOPEC).

cooperation between the Commission and the Member States is a crucial element in the effective monitoring of the application of Community law.

By requiring the Commission to respect a pre-litigation administrative stage prior to the infringement proceedings, Article 226 of the EC Treaty enshrines the adversarial nature of this procedure and the duty of sincere cooperation between the Member States and the Community institutions. Since the purpose of this pre-litigation stage is to enable the Member State to conform voluntarily with the requirements of the Treaty, its effectiveness is closely linked with contacts between the Commission and the Member State. *Further progress must be made in improving this cooperation, well before any initiation of infringement proceedings.*

This implies a general upgrading or extension of a number of structures for cooperation with the Member States (2.1). Particular attention should be paid here to monitoring the transposal of directives (2.2). The network of contacts recommended by the White Paper on Governance and the Commission Communication *Better Lawmaking* would provide a framework for publicising and discussing these improvements.

2.1. Improving cooperation between the Commission and the Member States in the field of prevention

Preventive action to enforce Community law begins with selecting the best instrument. But once a selection has been made, it continues with cooperation on the implementation of the legislation. A variety of practical cooperation instruments have already been tried out with a view to preventing infringements. These include:

- (1) Interpretative communications on a specific matter of Community law (both the Treaty and secondary legislation)⁶.
- (2) The obligation to notify the Commission of draft technical regulations arising from Directives 98/34/EC (goods) and 98/48/EC (information society services)⁷ in the non-harmonised sector of the internal market.
- (3) The regular publication of statistics by the Commission in the internal market scoreboard; the annual report on monitoring the application of Community law which aims to promote peer pressure between the Member States by creating a form of mutual monitoring of efforts to apply European legislation. Commission reports on the application of directives provided for by certain of them play a similar role.⁸
- (4) Anticipation of major events, linked, for example, to infrastructure projects: experience shows that when investments have to be made on a national scale the

⁶ For example, interpretative communications on the major freedoms in the internal market and public procurement or on the removal of tax barriers to the cross-border provision of occupational pensions (OJ C165, 8.6.2001, p. 4).

⁷ The application of these directives makes it possible, through prior notification of draft national technical rules, to identify possible barriers to trade before they enter into force and thus to avoid the need to initiate many infringement procedures. This procedure also enables a particular emphasis to be placed on the principle of mutual recognition (by the introduction of mutual recognition clauses). The Court of Justice has also ruled that failure to notify a technical regulation can be invoked in a dispute between individuals; it is then for the national judge to refuse to apply this provision and to establish the consequences for the contract brought before him in the light of national law.

⁸ Example: report on the application of Council Directive 98/49/EC of 29.6.1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

national authorities involved are occasionally inclined to take insufficient account of Community regulations.⁹ This approach has been followed in the field of public procurement, in the case of both the Treaty and secondary legislation, and could usefully be extended to the prevention of infringements in the area of the environment¹⁰ and, if appropriate to other sectors.

- (5) Training, information and transparency campaigns intended for national administrations and judges, along the lines of the Grotius II civil and criminal programmes,¹¹ or, in connection with enlargement, twinning arrangements between national administrations.¹²
- (6) For the purposes of the exchange of information and good practice, regarding both the Treaty and secondary legislation, the use of expert committees and networks to assist the Commission, or the setting up of *ad hoc* groups of experts in particular fields.¹³

Actions

- The Commission will draw lessons from the best instruments and practices set up over the years, developing them and extending them to other areas of Community law, in order to boost the preventive stage of monitoring.
- The Commission will consider the need for a training programme in Community law for national administrations and the judiciary (which could be called the “Justinian” or “Irnerio” programme)¹⁴.

2.2. Monitoring and facilitating the proper transposal of directives

For the purposes of monitoring the application of Community law, directives require particular attention because of the specific requirements for transposal incumbent on the

⁹ In its *Green Paper on public procurement*, the Commission was thus able to state that the anticipation of certain events was an effective preventive element, limiting considerably the risk of incorrect application (e.g.: dialogue with the Greek authorities about the major works for the 2004 Olympic Games and with the Italian authorities for the Winter Olympics).

¹⁰ In particular, to fulfilment of obligations deriving from the environmental impact Directive 85/337/EC on the assessment of the effects of certain public and private projects.

¹¹ Council Regulation (EC) No 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters and Council Decision of 28 June 2001 establishing a second phase of the programme of incentives and exchanges, training and cooperation for legal practitioners (Grotius II Criminal).

¹² *European Governance - A white paper*, COM(2001)428, p.49. The possibility of extending such twinning arrangements to all Member States' administrations had already been mentioned in the Governance White Paper.

¹³ The Commission has set up such groups of government experts in the field of the directives on the posting of workers (96/71/EC) and the “anti-discrimination” directives (2000/43/EC and 2000/78/EC). These groups met before the transposal date and provided a forum for discussion and the exchange of best practice. In the same way, Regulation (EC) 1408/71 set up the Advisory Committee on Social Security for Migrant Workers, made up of government experts, which is playing a very active role before the Commission presents its proposals for updating this Regulation. Another example is the network of contact points on professional qualifications.

¹⁴ Named after the celebrated lawyer from the University of Bologna who at the beginning of the 12th Century introduced the concept of “common law”, based on the traditions of “Roman law”, which was common to many countries of Medieval Europe.

Member States.¹⁵ Cooperation between the Commission and the national authorities must therefore be developed at a very early stage.

2.2.1. *Improving transparency and knowledge of Community law*

By 31 December 2001, the Member States had on average notified 97.4% of national implementing measures necessary for the implementation of directives (in all sectors), an improvement over 2000 (96.6%). This average score is the highest since 1992, although it remains below the target of 98.5% set by the Stockholm European Council for the transposal of legislation relating to the single market alone.

The regular publication by the Commission of transposal rates has a beneficial effect by establishing a control point and imposing peer pressure. The incentive effect of this information *erga omnes* could be further enhanced by the on-line publication of deadlines for the transposal of each directive. Sending out reminders two months before reaching such deadlines, using whatever means are most likely to get through to the target public, will be a useful device.

Action

- The Commission will publish on-line, via a Community law portal, all the transposal deadlines, the rates of transposal by sector and by Member State, and national transposal measures. The most appropriate media will be used to keep the public up to date with transposal deadlines.

2.2.2. *Increasing cooperation before expiry of the transposal deadline*

The quest for better governance in the application of Community law demands better evaluation and better use of the transposal period for directives. This period is necessary to allow the adaptation of national rules and give economic and social operators time to prepare. However, the Commission and the Member States, who are jointly responsible for the proper application of Community law, should also make use of this time to step up cooperation to ensure the swift and effective adaptation of national legislation.

Delays in transposing directives are all too often not the result of a deliberate refusal to act on the part of the Member State but of domestic administrative problems and in particular problems of understanding often complex Community legislative texts.

Moreover, the Court of Justice has formally confirmed in its case law on Article 10 of the EC Treaty the existence of an obligation of cooperation in the event of problems with the implementation of Community law, an obligation which for the Member State includes the possibility of submitting these problems for assessment by the Commission.¹⁶

To this end the Commission has for several years been developing the practice of “package meetings”, so called because they provide an opportunity to discuss with the competent national authorities any problems with transposal and all infringements detected or suspected in a Member State for a given sector. At present, package meetings are held as a rule only

¹⁵ It should be pointed out that in this communication the term “transposal” refers only to directives, although some regulations and decisions occasionally require national implementing measures.

¹⁶ Judgements of 15 January 1986, Case C-52/84 *Commission v Belgium*, [1986] ECR 89, point 16, and 2 February 1989, Case C-94/87 *Commission v Germany*, [1989] ECR 175.

after an infringement procedure has been initiated against the Member State. It would be helpful if such meetings were held at an earlier stage.

Although greater attention is now paid to the quality of legislative proposals and Community texts in force are periodically reviewed, Community law can still be complex. The Commission is therefore willing to provide Member States with “technical assistance” in transposing legislative texts. Package meetings could be used to examine with the Member State concerned any problems it might be encountering in transposing Community texts and to shed light on the matter. In the same spirit, some of the the committees established by Community legislation could provide an adequate forum. Such assistance could also include prior examination by the services of the Commission, at the request of the Member State, of the transposal measures proposed; this prior examination would not affect the Commission’s right to raise any errors of transposal at a later stage.

Another approach to cooperation at an early stage could be based on the drafting by the services of the Commission, in certain specific cases, of guidelines for transposal, which would be recommended to the national authorities. The Member States could be involved in drafting them, though this would have to be made clear in the basic document.

Nevertheless, it is sometimes difficult for the Commission to identify the appropriate contact(s) with whom to liaise in further discussions. The bodies in the Member States with responsibility for transposing Community directives vary depending on the subject under consideration and the way in which the individual Member State is organised. Often, too, transposal requires action by more than one administrative and/or judicial body. This proliferation of actors is more pronounced in the case of federal or decentralised States. The setting up of appropriate coordination points in Member States which do not already have them would enable these difficulties to be overcome by providing the Commission with a single point of contact for questions concerning transposal, for the application of Community law and for coordination with national ministries and regional or local authorities. These “horizontal” contacts would serve as the network of correspondents desired by the Commission (see introduction, paragraph 2). The unified chairmanship of the package meetings in the Member States is a kind of precursor for such a scheme.

Actions

- The Commission intends to make more generalised use of “package meetings”. It will do its best to encourage the creation within the Member States of single coordination points responsible for the application of Community law.
- The services of the Commission will contact the Member States concerned in the month in which the directive is to be adopted and in particular will offer “technical assistance” in the event of transposal problems; they will declare themselves willing to examine preliminary draft transposal measures and if necessary will organise a package meeting.
- Where appropriate, the services of the Commission, in liaison with the national authorities, will draw up “transposal guidelines”.

2.2.3. *Improving the notification of transposal measures*

The practical arrangements for notifying transposal measures have never as yet been specified, the only obligation on the Member States being to notify the Commission of them. This situation has long been a source of unnecessary delays and difficulties.¹⁷

As part of the quest for greater effectiveness in monitoring both the transposal itself and the conformity of the national transposal measures, the procedures for this communication should be defined and restated systematically in each proposal for a directive, including the obligation to establish a “concordance table.”

Access to Community law and monitoring of conformity will also be made easier by the electronic communication of transposal measures which will be developed as part of the “EULEX III” project, the aim of which is to interconnect the national official publications databases by using a single portal for access to Community law.

Actions

- The Commission will include in proposals for a directive:
 - an obligation on Member States to include a “concordance table” with the communication of transposal measures (at national and/or regional or local level);
 - a standard method of electronic communication of transposal measures (single electronic form);
 - a reference to the Commission’s Secretariat-General as a central communication point.
- The Commission will successfully conclude the “Eulex III” project aimed at networking national databases to allow electronic communication of transposal measures.

2.3. Providing more information on Community law

Better public information or improved participation in the decision-making processes improve the quality of decisions. They also help to prevent difficulties of interpretation or subsequent disputes. That is the purpose of the press releases issued by the Commission on ongoing infringement proceedings, which provide information to all sorts of people concerned by same problem as the complainant. The Community law portal connected to the EUR-LEX database (see paragraph 2.2.1) will be designed in such a way as to be accessible to a wide audience and to provide continuous information on decisions and discussions relating to the application of Community law in the Member States.

Various areas of Community policy-making are conducive to specific possibilities for informing the public on the policies established and involving them in their application. The Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters provides a comprehensive example of this approach. The Commission has already presented proposals for directives to the European Parliament and the Council on the first two “pillars” of this Convention, dealing with access

¹⁷ For example, unjustified initiation or continuation of the infringement procedure, difficulty of access to transposal measures, problems in monitoring conformity.

to information and public participation in decision-making respectively.¹⁸ The practical application of such directives by the Member States after they have been enacted should be evaluated so as to serve, if appropriate, as an inspiration for subsequent Community legislation.

Action

- The Community law portal will offer general information on the application of the law and access to it, in a layman-friendly form, linked to the EUR-LEX database.
- The application of directives for the implementation of the Aarhus Convention will be evaluated in terms of information for and effective involvement of the public.

3. MONITORING THE APPLICATION OF COMMUNITY LAW AND TAKING ACTION AGAINST INFRINGEMENTS

The development of cooperation between the Commission and the Member States to prevent situations of non-compliance with Community law does not replace the Commission's responsibility for monitoring the application of Community law, initiating proceedings against infringements and, if necessary, bringing legal action for failure to fulfil an obligation. This Communication sets out the priorities that the Commission will apply with a view to optimising management of the instruments provided for in the Treaty (3.1). It also covers the handling of complaints, a vital means of detecting infringements (3.2), and the necessary cooperation of the Member States in investigating cases (3.3). Concrete action against infringements is then addressed, with separate sections covering first situations of non-compliance with Community legislation, whether directly or indirectly applicable (3.4), and second the specific situation of non-notification and non-conformity in relation to directives (3.5).

3.1. Effective use of the available instruments in accordance with the seriousness of the infringements

It is established case law of the Court of Justice that the Commission has discretionary power in relation to infringements and is the sole judge of when to bring proceedings concerning the application of Community law.¹⁹ While stressing that this power cannot be exercised arbitrarily,²⁰ the European Ombudsman has also repeatedly referred in his opinions to the Commission's discretionary power.²¹

The task of acting as "guardian" of the Community legal system entrusted to the Commission by Article 211 of the EC Treaty means that it is responsible for adopting the necessary

¹⁸ Proposal for the revision of Directive 90/313/EC which includes provision in Article 6 that Member States must establish judicial or administrative remedies in the event of refusal of access. Proposals for a Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC. See COM(2002)839 final.

¹⁹ Judgment of 1 June 1994 in Case C-317/92 *Commission v Germany* [1994] ECR I-2039; judgment of 10 May 1995 in Case C-422/92 *Commission v Germany* [1995] ECR I-1097.

²⁰ Critical remarks relating to the P.S. Emfietzoglou – Macedonian Metro Joint Venture complaint (995/98/OV).

²¹ See European Ombudsman's 1997 own-initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law.

internal organisation measures to allow it to carry out its task effectively and impartially, in accordance with the Treaty.

With this in mind, the Commission, in its White Paper on Governance, announced that it would conduct surveillance and bring proceedings against infringements effectively and fairly by applying priority criteria reflecting the seriousness of the potential or known failure to comply with the legislation.²² Filling in the framework sketched out by the White Paper, the criteria are based on accumulated experience. They rank the following infringements as serious:

(a) Infringements that undermine the foundations of the rule of law

- Breaches of the principles of the primacy and uniform application of Community law (systemic infringements that impede the procedure for preliminary rulings by the Court of Justice or prevent the national courts from acknowledging the primacy of Community law, or provide for no redress procedures in national law: examples include the failure to apply the redress procedures in a Member State and national court rulings that conflict with Community law as interpreted by the Court of Justice).
- Violations of the human rights or fundamental freedoms enshrined in substantive Community law (e.g. interference with the exercise by European citizens of their right to vote, refusal of access to employment or social welfare rights conferred by Community law, threats to human health and damage to the environment with implications for human health).
- Serious damage to the Community's financial interests (fraud with implications for the Community budget, or violation of Community law in relation to a project receiving financial support from the Community budget²³).

(b) Infringements that undermine the smooth functioning of the Community legal system

- Action in violation of an exclusive European Union power in an area such as the common commercial policy; serious obstruction of the implementation of a common policy.
- Repetition of an infringement in the same Member State within a given period or in relation to the same piece of Community legislation; these are mainly cases of systematic incorrect application detected by a series of separate complaints by individuals.
- Cross-border infringements, where this aspect makes it more complicated for European citizens to assert their rights.

²² White Paper on European Governance, p. 45: Priority attached to treatment of possible breaches of Community law.

²³ In such cases, the new Financial Regulation in force from January 2003 will oblige the Commission to suspend the financial assistance to the project concerned.

- Failure to comply with a judgment given by the Court of Justice against a Member State on an application from the Commission for failure to comply with Community law (Article 228 of the EC Treaty).

(c) Infringements consisting in the failure to transpose or the incorrect transposal of directives, which can in reality deprive large segments of the public of access to Community law and actually are a common source of infringements.

The above criteria will help the Commission to make the best use of the various mechanisms designed to restore a situation in line with the Treaties as rapidly as possible, bearing in mind that the Commission's purpose in monitoring the application of Community law and bringing proceedings against infringements is not to "punish" a Member State, but to ensure that Community law is applied correctly.

In practice, where it is found that an infringement meets these priority criteria, infringement proceedings will be commenced immediately unless the situation can be remedied more rapidly by some other means. Other cases — of lower priority — will be handled on the basis of complementary mechanisms, detailed below, which does not rule out the possibility of bringing proceedings for failure to fulfil an obligation. This approach will meet a concern for efficiency — more rapid and effective intervention including where proceedings for failure to fulfil an obligation would not be the most appropriate mechanism — while ensuring equal treatment for the Member States and for the different channels for identifying presumed infringements (complaints, cases identified by the Commission itself, cases referred by the European Parliament or the European Ombudsman).

When the annual report on the application of Community law is discussed by the Commission, application of the priority criteria will be assessed. This will happen in June. The report will point the way for subsequent monitoring of Community law and action against infringements; lessons might be drawn with a view to improving the quality of legislation itself. Its conclusions will also be taken into account when the annual work programme is adopted in September of each year. They will be presented during the public debate at Parliament's plenary session.

Action

- The Commission will apply the priority criteria relating to the seriousness of breaches in order to manage its monitoring work and its action against infringements rapidly and fairly, in an open dialogue with citizens and with the Member States.
- The application of the priority criteria will be assessed annually, when the report on the monitoring of the application of Community law is discussed.

3.2. Complaints and their importance for monitoring the application of Community law

As the Commission has stressed on several occasions, complaints are a vital means of detecting infringements of Community law.

While the volume of complaints registered rose markedly between 1996 and 1999, 2000 saw a decline. The number rose again between 2000 and 2001, none the less remaining below the maximum reached in 1999.²⁴

Although most infringement cases registered come to the Commission's notice via complaints, such cases give rise only to a very small number of letters of formal notice. In 2001, only 7% of complaints registered by the Commission were followed by a letter of formal notice, and only 1% by a reasoned opinion²⁵ (see box, page 4). Complaints registered are thus sorted effectively so as to follow up those where action is justified and to resolve situations of alleged infringement quickly;²⁶ in many cases the pre-litigation examination of complaints is enough to prompt the Member States to put the situation right.

In a Communication to the European Parliament and European Ombudsman on relations with the complainant in respect of infringements of Community law (COM(2002) 141 final), the Commission confirmed its willingness to handle all complaints from citizens, by taking action, where appropriate, against the alleged infringement. All complaints received by the Commission are registered, without any selection, but the action to be taken in response to a complaint is determined on the basis of the priority criteria referred to under 3.1. and on the basis of whether it can be handled using complementary procedures. To make the action more effective, the Commission will combine in a single infringement proceeding all the complaints relating to the same violation of Community law.

More generally, the Commission conducts its relations with complainants in accordance with its code of good administrative conduct, under which complainants are entitled to receive a reply in line with their expectations, even if these exceed the Commission's prerogatives.

Individuals are frequently looking for simple, practical advice rather than denouncing an infringement. It is also frequent that complainants turn to the Commission to obtain financial redress for a breach of Community law, which can be granted only by a national court. Just as frequently, complainants approach the Commission to obtain amendment of a national provision where the Community has no powers to take mandatory action.

The obligation to reply under the code of good conduct should be applied in such a way that citizens are given careful and reasoned replies, with useful practical advice (e.g. remedies available at national level, conditions for obtaining redress, etc.). Since it cannot replace lawyers for the parties, the Commission must ensure that it remains neutral and objective in its replies. The Community law portal will contain valuable information and hints here.

²⁴ The statistical peak noted in 2001 is linked to the fact that it was decided that year, following the Ombudsman's opinion on maladministration in the Thessaloniki Metro case, to systematically register all correspondence from civil society relating to Community law as a complaint, irrespective of the viability of a potential investigation and until the consolidated version of the rules on handling complaints was adopted [COM(2002)141].

²⁵ Nineteenth annual report on monitoring the application of Community law, Annex 2.

²⁶ If we look at the origin of infringement proceedings (see 19th report annex, Tables 3 and 4), except in 2001, the proportion of proceedings initiated on the basis of a complaint is lower than that of proceedings initiated on the basis of investigations by Commission departments (cases detected on the Commission's own initiative). If we add cases of non-notification, complaints account for a minority of proceedings initiated. At the reasoned opinion stage, the proportion of proceedings initiated on the basis of complaints is lower, in all years, than the proportion initiated on the basis of the Commission's own investigations, excluding non-notification cases.

Actions

- Complainants will be given clear information about the action taken, in accordance with the commitments given in the Communication to the European Parliament and European Ombudsman. In particular, the grounds for decisions taken on the investigation of a breach of the law will be given on the most transparent basis.
- A clear administrative distinction will be drawn between correspondence likely to give rise to the opening of an infringement file and other correspondence. All correspondence will be processed in accordance with the code of good administrative conduct.

3.3. Closer cooperation between the Member States and the Commission in investigating infringements (strict application of Article 10 EC)

Cooperation between the Commission and national authorities must be constantly maintained, since it is vital to the effective monitoring of the application of Community law. Such cooperation can speed up the process of bringing a Member State into line and can thus more rapidly attain the desired result of compliance with Community law.

During the investigation of infringements, considerable delays are often caused by difficulties in gathering all the evidence relating to an infringement owing to a lack of cooperation or insufficient cooperation on the part of national authorities at all levels. The coordination fora already mentioned (see paragraph 2.2.2) should play a useful role in this respect .

Member States must therefore be reminded of their duty to cooperate in good faith under Article 10 EC. Manifest and persistent unwillingness to cooperate on the part of a Member State would make infringement proceedings for breach of Article 10 EC inevitable. For the sake of effectiveness targeted use should be made of this mechanism (for example by combining a given Member State's infringements in a given sector), proceedings should be accelerated to last no more than four months between the letter of formal notice and referral to the Court, and wider publicity should be given to decisions.

Action

- Where Member States fail to take measures to ensure fulfilment of their obligations or to facilitate the achievement of the Commission's tasks, and in particular where the Member State concerned is reluctant to cooperate in infringement proceedings, more systematic and effective recourse will be had to Article 10 EC in conjunction with other relevant legal bases in the Treaty.
- Where appropriate, this procedure could be underpinned by the Member responsible and/or President of the Commission contacting the Member State directly.

3.4. Better enforcement of Community law

Generally speaking, failure to comply with Community law consists of violating the Treaty, regulations or decisions or of incorrectly applying directives. Cases of the latter gave rise to the largest number of letters of formal notice, reasoned opinions and referrals in 2001, and were identified following complaints (in most cases), or on the Commission's own initiative. Special attention will be paid to cases of failure to notify measures and of measures incorrectly transposing directives (paragraph 3.5).

The White Paper on Governance stressed the fact that better compliance with Community law was the joint responsibility of the Member States and the European institutions, even if the Commission bore the ultimate responsibility for securing proper application. The emphasis was on the direct responsibility of the national courts and non-judicial procedures for rectifying infringements, and then consideration was given to ways of making the Commission's review more effective. The opposite order was followed in the discussion of the relationship between the different means of action: instruments that complement the infringement procedure will be implemented by the Commission to obtain rapid rectification of an infringement situation without necessarily involving immediate compensation for loss sustained, the purpose of extra-judicial instruments and direct actions in the national courts being to provide the citizen with compensation.

(a) Mechanisms that complement proceedings for failure to fulfil an obligation

A number of complementary mechanisms allowing effective and rapid handling of cases of non-compliance have been identified. A case handled under a complementary mechanism may at any time be taken up by the Commission, and proceedings may be initiated for failure to fulfil an obligation. The positive results obtained mean that more frequent use of such mechanisms can be recommended, as can their extension to other branches of Community law. The use of such mechanisms and the results obtained will be presented in the annual report on the monitoring of the application of Community law.

The following complementary mechanisms may be mentioned:

- (1) In cases of numerous and repetitive violations of the Community rules in a given sector, overall negotiation with the Member State concerned has sometimes proved more effective than infringement proceedings.²⁷
- (2) The SOLVIT problem-solving network²⁸ has proved its effectiveness in the internal market sphere. A Commission Recommendation²⁹ lays down the working principles for SOLVIT centres and sets out their respective responsibilities and the deadline for resolving cases (in principle, ten weeks). The network was reformed following an assessment by the Commission,³⁰ which identified ways of improving the system in order to turn it into a real Community tool for out-of-court resolution of everyday problems with the implementation of the internal market.³¹ At present, the system can be used only where a complaint has not been lodged with the Commission. There is therefore a choice between using SOLVIT or bringing a complaint to the Commission.

²⁷ For example, in the case of the problems with cross-border vehicle registration, negotiation with the national authorities concerned, supplemented by an interpretative notice, resolved the recurrent difficulties with registration that were encountered by individuals.

²⁸ "Effective problem solving in the internal market", Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(2001) 702, 27 November 2001.

²⁹ Commission Recommendation of 7.12.2001 on the principles for the use of the SOLVIT Network – the problem-solving network in the internal market.

³⁰ "Effective problem-solving in the Internal Market", a Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(2001) 702 of 27 November 2001.

³¹ Numerous information measures aim to raise awareness of the SOLVIT network among the European public and intermediaries likely to know of cases of incorrect application to submit to the SOLVIT network. Since 22 July 2002, a user-friendly on-line database allows SOLVIT centres (one per Member State) to enter details of cases brought to their notice and to exchange information.

- (3) The “package meetings”, as already pointed out, allow for constant dialogue and cooperation between the Commission and the relevant authorities in a Member State with a view to examining a “package” of cases and finding solutions outside legal proceedings. These meetings are a practical expression of the subsidiarity principle, performing an educational function vis-à-vis national (as well as regional and local) authorities.
- (4) As regards the application of directives which have established rights for a very large number of citizens and which require case-by-case handling and resolution,³² ad hoc contact points can prove effective.
- (5) Establishing independent and specialised national authorities contributes in some cases to facilitating achievement of the Commission’s tasks in its role as guardian of the Treaty.³³

(b) Out-of-court resolution of infringements

The attention of interested parties must also be drawn to the possibilities which exist at national level for resolving infringements of Community law out of court, such as using a local, regional or national mediator. In its White Paper on Governance, the Commission proposed that the Member States link up existing national or regional ombudsmen and mediators³⁴ in a network. Some could receive special training in hearing and in handling complaints in the fields of the environment and health protection.

(c) Bringing cases before national courts

All citizens may bring cases before national courts, the first guardians of Community law. The European institutions and the Member States themselves could do more to promote this possibility, in accordance with the principle of sincere cooperation.

In this connection, it is worth mentioning two recent or upcoming legislative initiatives by the Commission:

- the proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings,³⁵
- the future proposal for a directive on access to justice in accordance with the Aarhus Convention, being prepared by the Commission, which contains rules on access to justice for non-governmental organisations in the event of environmental litigation.

³² An effective example in the internal market sphere concerns the recognition of diplomas, where there is a system of contact points or coordinators responsible for applying the directives on the regulated professions, to which citizens can turn when a Member State infringes their rights under Community law. The recent proposal for a Directive on professional qualifications, consolidating and simplifying the existing 15 directives on the regulated professions, establishes and lays down rules on these contact points, while also requiring them to inform the Commission of the enquiries with which they are dealing within two months of receiving them.

³³ For example, the independent national authorities in the fields of competition, data protection and public procurement set up by some Member States. A similar contribution is made by national and regional ombudsmen that now exist in most Member States.

³⁴ Cf. preceding footnote.

³⁵ COM(2002)13 final, 18.1.2002. This directive should be formally adopted by the end of December 2002.

In certain areas of the application of Community law where legal disputes are numerous, such as the environmental sphere, it should be possible to have more effective recourse to national courts, hence the need for the Commission to take legislative initiatives to facilitate such recourse.

Actions

- The Commission will promote the development of complementary systems for dealing with cases of non-compliance with Community law in cooperation with the Member States and in accordance with the specific characteristics of each sector. Where a case which does not meet the priority criteria (cf. 3.1) could be investigated rapidly and effectively using complementary mechanisms, the latter will be given preference.
- The Commission is considering adopting a proposal for a directive implementing at Community level the third pillar of the Aarhus Convention and will consider the possibility of a supplementary initiative to establish non-judicial procedures for the handling of complaints.

3.5. Improving notification and monitoring the conformity of national measures implementing directives

In the specific case of directives, an infringement can in theory result either from a delay in transposal (in which case citizens are totally deprived of their rights under the directive), or from the fact that the national legislation is not in conformity with the Community directive. A distinction is made between these two situations in infringement proceedings.

3.5.1. Faster notification where transposal is outstanding

Once the deadline for transposal has expired, although contacts between the Commission departments and the Member State must continue, it is possible for proceedings to be brought in respect of the infringement of failing to notify the national implementing measures.

In order to improve uniform application of Community law, the Commission has, since 1990, applied specific internal rules that allow it to systematically monitor notification of the transposal of directives.

The system is based on empowering the Member of the Commission responsible for the field concerned, together with the President, to send a letter of formal notice to the Member States that have failed to transpose directives for which the deadline has expired and have not notified the Commission of their national implementing measures. Since this system has been tried and tested, it could be extended to the reasoned opinion stage in the absence of a reply (and/or partial notification) from the Member State. In such cases, the infringement consists merely in exceeding the deadline for transposal or for replying to the letter of formal notice, leaving no room for assessing the substance of the case. This faster procedure should enable the Commission to decide whether to take the case to the Court of Justice within six months of the letter giving the Member State formal notice to act.

The database Asmodée II on the implementation of directives is used to analyse progress in the transposal of directives for which the deadline has expired. A system for notifying Member States electronically is being developed.

The Commission will look at the possibility of developing electronic contacts with the Member States in connection with proceedings for failing to notify.

Actions

- The Commission will maintain contacts with the Member State in the event of difficulties with transposal without suspending the infringement proceedings underway.
- The systematic nature of monitoring transposal in the event of a Member State's failing to respond to a letter of formal notice will be reinforced by extending the empowerment procedure within the Commission to the reasoned opinion stage. The referral decision will then be taken six months afterwards.
- The use of electronic communication between the Commission and the Member States will be extended.

3.5.2. Speeding up the process of bringing implementing legislation into line

The Commission may be made aware of national implementing measures that are not in line with the directive concerned either as a result of investigations by its own departments or via complaints. The fact that the case law of the Court of Justice has recognised the direct vertical effect of non-transposed or poorly transposed directives³⁶ helps to overcome this problem in part. However, it does not relieve the Commission of its monitoring role.

This type of infringement will be given priority by the Commission (c.f. 3.1, priority criteria based on seriousness). By violating the principles of the primacy and uniform application of Community law, they deprive citizens and businesses of the individual benefit they are supposed to gain from Community law. The risks inherent in non-conformity of national transposal measures will rise with the number of Member States, so the Commission will pay special attention to preventing and detecting them at an early stage (see paragraph 2.2.3 with the reference to concordance tables) in the post-enlargement situation.

For certain directives, the Commission already produces implementation reports, at the request of the European Parliament. This involves conducting a general review of implementing measures and techniques in all Member States. It thus provides a good opportunity for identifying incorrect transposal, as well as difficulties with transposal. Where certain Community rules pose recurring problems when transposed into national law, the Commission will examine the reasons for this and will propose appropriate solutions, including giving consideration to a legislative initiative, if necessary.

³⁶ Where the provisions of a directive, in terms of content, are sufficiently precise and unconditional, individuals may plead them against a Member State where the latter has failed to transpose the directive in time or has transposed it incorrectly, even if the deadline for bringing proceedings under national law has expired (judgment of 25 July 1991 in Case C-208/90 *Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-4269).

Actions

- The Commission considers that it must give priority to infringements of non-conformity in acting as guardian of the Treaty. Systematic and rapid action will be taken against such infringements.
- In some sectors, the practice of producing implementation reports will be made systematic. These reports will be submitted to Parliament.
- In the event of recurring difficulties with the application of the same directive, the Commission will consider introducing a legislative initiative to resolve the problem.

4. PREVENTING REPETITION OF INFRINGEMENTS

In its role as “guardian of the Treaty”, the Commission is also called upon to take all necessary steps to avoid repetition of infringements. Under the Treaty, the Commission may ask the Court of Justice to require a penalty payment or lump sum of a Member State which has failed to take the necessary measures to comply with a first judgment that it has failed to fulfil its obligations (Article 228 EC).³⁷ However, there is no general penalty for violating Community law, nor is it possible to impose a penalty likely to prevent repetition of the infringement under the EC Treaty.

Nevertheless, infringement proceedings themselves can limit the risk of re-offences. Minimum guarantees that it will not re-offend can be obtained from a Member State where it has not been possible to put an end to an infringement as it had already been committed when the Member State decided to come into line with the Commission’s argument (e.g. a public contract has already been awarded, the work has been performed, an import licence not required by Community law has been demanded and received from an importer), such as (a) recognition by the Member State concerned that an infringement has been committed; (b) commitment from the Member State to pursuing a proactive prevention and information policy (for example, by giving the necessary “instructions” to the authorities concerned, especially decentralised authorities, so that the latter correctly interpret and apply a provision of the Treaty or of secondary legislation).

The Commission also plans to publish a compendium of certain types of infringement case that have been established and closed (without mentioning the Member State concerned) so as to improve the information available to citizens and businesses about their rights but also that available to national authorities (central and local) about the correct application of Community law.

At the end of the day, one of the best ways of combating recidivism in cases where the Court of Justice has already given judgment against the offender is to inform the public of their rights to compensation under the law as stated by the Court of Justice.³⁸ The Court gives

³⁷ As regards the rules and method for calculating the penalty, the Commission has shown its preference for a lump sum (OJ C 63, 28.2.1997, p. 2).

³⁸ In Case C-6/60 *Humblet v Belgium* [1960] ECR 559 the Court held that “if the Court finds that a legislative or administrative measure adopted by the authorities of a Member State is contrary to

individuals the possibilities of applying to the national courts for damages to compensate for infringements of Community law or failure to transpose directives. The legal profession is by now familiar with this ruling and its consequences for litigants who suffer loss as a result of a Member State's failure to comply with Community law, but individuals and firms are less familiar.

Commission press releases announcing the termination of cases will accordingly restate the fact that the termination does not affect the rights of individuals who have sustained loss nor such actions for compensation as they may have brought in the national courts. It will publish an interpretative communication on the right to seek damages for loss sustained as a result of an infringement of Community law by a Member State.

Actions

- The Commission will make the closure of infringement proceedings in respect of an infringement that has been corrected subject to adoption by the Member State of commitments and measures to prevent repetition of the infringement.
- It will publish a compendium of certain types of infringement case established and closed.
- Press releases published on the termination of major infringement proceedings will mention the right of injured citizens to bring proceedings before national courts. An informative communication on the right to seek damages for loss sustained will be published.

5. CONCLUSIONS AND FINAL PROVISIONS

The action that the Commission is proposing to undertake to improve the monitoring of the application of Community law may appear as modest as any other implementation measure. But they will be decisive. Applying the legislation properly and complying with it are essential to a climate of trust between the Member States, who can be sure that the law will be fairly enforced and trust by the citizen in the ability of the Union to gain respect.

This will be all the more important in the post-enlargement situation. It must be borne in mind that in future the job will be to check if 25 different measures implementing the same directive are in line. More resources will have to be devoted to this, both in the Union and in the Member States. For the moment the Commission's plan with this communication is to prompt a change of enforcement culture. Merely enforcing the law against infringements is not enough; there is a need for prevention also. But cooperation will not release the Commission as guardian of the Treaties from its duty to remind the Member States of their commitments and to seek the best instruments at all times.

Community law, that state is obliged ... to rescind the measure in question and to make reparation for any unlawful consequences thereof". In Joined Cases C-6/90 and C-9/90 *Francovich et al v Italy* [1991] ECR I-5357 the Court of Justice reasserted in particular the possibility for an individual to seek reparation of damage sustained as a result of an infringement of Community law by a Member State. The Cases here concerned Italy's failure to transpose Directive 80/897/EEC on the protection of workers in the event of the employer's insolvency. It upheld and refined this ruling in 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* [1996] ECR I-1029.

But it is not only the European and national institutions that are concerned by all this. Ultimately this communication in many respects concerns the citizens themselves. Through information, participation and access to justice, they are to be the actors of a Community based on the rule of law. And in the spirit of the Governance White Paper, all the actions called for here can be undertaken without any need to amend the current Treaties. They do not preclude other improvements to the application of Community law, such as the Commission's recent proposal to the European Convention for changes to the infringement procedure whereby a Member State not wishing to act on a reasoned opinion could take the matter to the Court of Justice itself.

The Commission will give an account of the implementation of the measures set out in this Communication in its annual report to the European Parliament on monitoring the application of Community law. This report is published in the Official Journal and on the European Communities' "Europa" server at the following address:

http://europa.eu.int/comm/secretariat_general/sgb/infringements/19report_2001_en.htm

The report is also available on request from the Commission's departments, and in Info Points Europe and Euro Info Centres.

This Communication is addressed to the European Parliament, the Council, the Member States and the European Ombudsman . It will be published in the C series of the Official Journal, and on the European Communities' "Europa" server at the above address.