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ADVANCING THE SUPRANATIONAL COMPLIANCE DEBATE – NEW DIRECTIONS IN THE ENFORCEMENT OF EUROPEAN UNION LAW

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Abstract: For a successful effectuation of the supranational rights of EU citizens and third country nationals, it is crucially important that the rules and principles flowing from the European Treaties and the associated legislation are ensured in full. The available methods of public enforcement (in particular the monitoring powers of the European Commission) are however insufficient to achieve that goal: compliance with the relevant EU rules and norms also depends to a considerable extent on the policy dynamics, public infrastructure and (styles of) administrative governance of the country concerned. This paper makes a modest attempt to fill a gap that is believed to lie between, on the one hand, leading political science theories on the reception of EU law in the Member States, and on the other, the main legal studies on the quality of legislation and the (in)adequacy of the existing procedural frameworks for effectuating citizens' rights. The main objective is to explore some possible alternative avenues for facilitating the interplay between the EU and the national legal orders. By providing illustrations of some existing bottlenecks, asymmetric centrifugal/centripetal forces and avoidable feedback-loops, it points out how current practices may be enhanced, and outlines possible new directions for securing a more structural domestic compliance record.

Keywords: compliance, European Union Law, citizens' rights, enforcement procedure, soft law, private enforcement, regulatory fitness checks, quality of legislation

1. INTRODUCTION

1.1 Citizens' Rights in the Area of Freedom, Security and Justice

Ever since the entry into force of the Treaty of Amsterdam (1999), the realisation of an 'Area of Freedom, Security and Justice' (AFSJ) has been one of the many objectives of the European Union. With the entry into force of the Lisbon Treaty (2009), the EU is actually proclaimed to be such an area.¹ However, it appears to be still insufficiently realised nowadays that since 2009, this ambition is no longer restricted to a particular field or sub-domain of EU law, but that the proclamation rather extends to the entire framework, thus encompassing the European would-be polity in its totality.²

The threefold objectives that have been identified, freedom, security and justice, cover various different topics and dossiers. In this paper, for a moment we shall consciously sidestep the traditional, more specific legal content of the AFSJ project that is already amply debated elsewhere.³ Taken in its modern broader sense, the notion of 'freedom' can be said to pertain to the free movement of persons across the board, 'security' to the safeguarding of those persons' rights and shielding them from harm, and 'justice' to ideas of inclusion, equal treatment, and the placing at their disposal of effective judicial remedies.

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¹ Article 67(1) TFEU.

² Hence its novel inclusion among the Union's main objectives, listed in Article 3(2) TEU.

³ See e.g., with further references, Cian Murphy, Diego Acosta Arcorazo (eds.). *The Area of Freedom, Security and Justice after Lisbon and Stockholm*. Oxford: Hart Publishing 2013.

Hereby, various types of rights from various different sources accrue to EU citizens, with the ground rules originating from so-called ‘primary law’ (the founding treaties and attached protocols⁴), and more detailed provisions being contained in ‘secondary law’ (mostly regulations, directives and decisions). Notwithstanding the fact that it officially does not form part of either primary or secondary law, the newly binding Charter of Fundamental Rights, somewhat clumsily tucked away in the Union’s Official Journal, occupies a prominent place, by virtue of a cross-reference in the EU Treaty.⁵

As a second preliminary point, it should be duly noted that Member State nationals are not the sole beneficiaries of the rights contained in these documents, but that some of these extend to persons with the nationality of a third country (TCNs) as well. Furthermore, though not officially legally binding, due tribute should be paid to the ever-greater importance of soft law, be it in the form of guidelines, notices, recommendations, statements, resolutions, opinions or action plans.⁶

1.2 Compliance: A Crucial Concept

It is, of course, an excruciatingly bland truism to state that rules remain wholly ineffective if they are not being complied with. Likewise, the modern AFSJ concept would ultimately falter if, e.g., due to legal- administrative obstacles, migration from one country to another turns out to be highly cumbersome or nigh impossible. Similarly, if the established common frameworks in e.g. the field of criminal law are (accidentally or intentionally) ignored or disrespected, this inevitably puts the security of native and non-native inhabitants at risk. Likewise, citizens traversing the Union are treated to a cold and nasty shower in case the basic laws demanding their equal treatment are being patently disrespected in reality. Clearly then, in spite of the lofty trumpeting of freedom, security and justice, the EU may ultimately only constitute a genuine AFSJ if the words on paper are actually being lived up to. Public authorities carry a special responsibility here, as they are bound to implement and enforce the relevant norms faithfully, timely, structurally and in their entirety.

Compliance has been a central topic of research in legal and governance studies for several decades already. In the abstract, the term denotes a state of conformity or identity between an actor’s behaviour and a specified rule.⁷ The compliance perspective thus starts from a given norm and asks whether the addressees thereof actually conform to it.⁸

For the EU as such, ensuring Member State compliance continues to pose a major challenge. In the peculiar, hybrid constitutional settlement, the application of Union law is mostly placed in the hands of the Member States’ authorities. This renders the compliance

⁴ Most importantly, the Treaty on European Union (TEU) and the Treaty concerning the Functioning of the European Union (TFEU).

⁵ Article 6(1) TEU.

⁶ The enumeration is not exhaustive. For a comprehensive analysis, see SENDEN, L. *Soft Law in European Community Law*. Oxford: Hart Publishing 2004.

⁷ RAUSTIALA, K. SLAUGHTER, A. M. International Law, International Relations, and Compliance. In: Walther Carlinaes, Thomas Risse, Beth Simmons (eds.). *The Handbook of International Relations*. London: Sage Publishers 2001, p. 539.

⁸ TREIB, O. Implementing and Complying with EU Governance Outputs. 3 *Living Reviews in European Governance*, lreg-2008-5 (available at: <<http://europeangovernance.livingreviews.org/Articles/lreg-2008-5>>, last visited 10 December 2013), p. 4.

issue even more complex, as those who have created the pertinent rules are often different from those who are expected to execute and abide by those rules. Obviously then, a structural, correct and uniform application requires some real dedication from national public administrations, courts and potential litigators. It can however be considerably stymied or facilitated by parameters inherent to the particular political system or culture. Non-compliance can thus occur all too easily, and takes various forms. Krislov, Ehlermann and Weiler have identified numerous different manifestations, among which: lack of implementation, lack of application, lack of enforcement, incorrect implementation, application or enforcement, pre- and post-litigation non-compliance, defiance, and evasion.⁹

Unfortunately, there has yet to emerge a methodological consensus on how compliance can best be measured. Some prefer a qualitative approach, focusing on a small number of directives in a single policy field and studying compliance in a select number of Member States. Others engage in quantitative studies, comparing compliance across countries and policy sectors. The involvement of both too many and too few EU legal instruments hampers the possibility to draw general conclusions – yet, it is unclear what number of instruments would be ‘about right’ to focus on. In all likelihood, cross-sectoral studies are more helpful than single-sector ones, but each sector is characterised by its own idiosyncrasies, and it remains tricky to pick out those sectors that are truly suitable to be compared. Consequently, the theories on compliance developed so far have turned out to be ‘sometimes true theories’ at most, valid for some countries, but certainly not for all.¹⁰ However, the empirical results do convincingly show that, while there are huge inter-country disparities, strong similarities exist nonetheless among (members of) different groups of countries. Overall, Falkner and Treib have distinguished four ‘world of compliance’: the world of law observance (predominated by a culture of respect for the rule of law), the world of neglect (where such a culture is absent), the world of domestic politics (where political preferences of government parties and other powerful players determine compliance) and the world of dead letters (where obligations are met on paper, but not put into actual practice).¹¹

Overall then, in this field of research, the certainties are few and far between. For the time being, the size of the compliance deficit and the correct methodology with which it could be assessed belong to the category of the unknowns. The knowns are, firstly, that there definitely does exist a deficit, and secondly, that several patterns of compliance persist among the Member States. Since every legal system is familiar with the gap between the law in the books and the law in action, there is no greater cause for concern here than elsewhere; long delays and attempts at shirking the rules are a matter of everyday business.¹² As Francis Snyder asserted, it would be rather more remarkable if, in this re-

⁹ KRISLOV, S., EHLERMANN, C. D., WEILER, J. The Political Organs and the Decision-Making Process in the United States and the European Community. In: Mauro Cappelletti, Monica Seccombe, Joseph Weiler (eds.). *Integration Through Law, Methods, Tools and Institutions: Political Organs, Integration Techniques and Judicial Process*. Berlin: Walter de Gruyter 1986, p. 61 ff.

¹⁰ FALKNER, G., HARTLAPP, M., TREIB, O. Worlds of Compliance: Why Leading Approaches to the Implementation of EU Legislation are only ‘Sometimes-True Theories’. *European Journal of Political Research*. 2007, No. 46, pp. 395–416.

¹¹ FALKNER, G., TREIB, O. Three Worlds of Compliance or Four? The EU-15 compared to New Member States. *Journal of Common Market Studies*. 2008, No. 46, pp. 293–313.

¹² TREIB, O. *supra* n. 8, at p. 5.

spect, the EU would be any different from other systems.¹³ This is however not to say that no efforts should be made to minimise the discrepancy and tackle those obstacles that are capable of being overcome.

While top-down enforcement, i.e. action undertaken by the European Commission against defaulting Member States, serves as one of the main vehicles for ensuring compliance, as will be highlighted in the next section of this paper, this approach is hampered by a plethora of defects. Also, in the near future, its importance and overall effectiveness is likely to decline further, as the EU is at some point foreseen to encompass over thirty Member States. Moreover, the effectiveness of top-down sanctions ought to be questioned *in abstracto*, since political entities are incomparable to human beings, and therewith less likely prone to alter their behaviour in response to punishment. Finally, since compliance with rules and norms originating from outside a legal system depends to a considerable extent on the policy dynamics, public infrastructure and (style of) administrative governance of the respective country, more constructive tactics might be devised that tease out the desired outcomes with greater speed and success. All this is thought to warrant a meticulous analysis of the alternative strategies that could be pursued, and an extensive gauging of their added value. To be sure, some of these are already being pursued; others are relatively new and more original. What all have in common is that they are worthy of more detailed reflection, as the tried-and-tested approaches could be polished further, and serious consideration given to those alternatives that are not yet (fully) deployed.

To be sure, while increased compliance is essential to make the grand ambition of turning the entire EU into an Area of Freedom, Security and Justice, there are sundry other issues that need to be addressed in order to arrive at that destination. But one bone of contention might be the concept of ‘procedural autonomy’, which allows Member States quite considerable room for maintaining unhelpful legal peculiarities in their organisation of their judiciary and in the system of available remedies.¹⁴ Consequently, in the absence of European harmonisation, those attempting to effectuate their rights in the AFSJ may be surprised to find that the chances of success for their identical claims and lawsuits may still vary greatly from one country to another. By consequence, if litigants experience difficulties from such divergences in the effectuation of their rights, non-compliant Member States more easily get away with being negligent. Novel initiatives to counteract this situation are therefore to be welcomed, yet what is required may be little short of a paradigm shift. Unfortunately, neither the launch of the AFSJ, nor the wholesale reform of the EU legal system resulting from the enactment of the Treaty of Lisbon, have so far produced an all-pervasive sense of urgency.¹⁵

¹³ SNYDER, F. The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques. *The Modern Law Review*. 1993, No. 56, p. 26.

¹⁴ For a more complete discussion, see JANS, J., DE LANGE, R., PRECHAL, S., WIDDERSHOVEN, R. *Europeanisation of Public Law*. Groningen: Europa Law Publishing 2007, pp. 40–59.

¹⁵ For earlier calls for reconsideration and proposals for procedural harmonisation, see e.g. HIMSWORTH, CH. Things Fall Apart: The Harmonisation of Community Judicial Protection Revisited. *European Law Journal*. 1997, No. 22, pp. 291–311; STORME, M. (ed.). *Rapprochement du droit judiciaire de l’Union européenne – Approximation of Judiciary Law in the European Union*. Antwerp: Kluwer 1994.

1.3 The Aims and Structure of this Paper

The objectives of this paper are twofold. In the next section, we will commence by drawing up a concise sketch of the central pathway for enforcing European Union law, the ‘infringement procedure’, which represents the primary legal tool to ensure Member State compliance (paragraph 2.1).¹⁶ Separate attention will be devoted to a recent adjustment to its *modus operandi* (paragraph 2.2). Immediately hereafter, we will take a look at the proliferous downsides and shortcomings of this approach, which have, after all the experiences accumulated in the past decades, become increasingly evident (paragraph 2.3).

The second objective of this paper is to explore the alternatives routes for ensuring compliance in considerable detail, review their merits, and assess how they might be deployed to greater effect. After a short introduction (paragraph 3.1), we will in subsequent order be taking a look at the feasibility of improvements to the quality of EU legislation (paragraph 3.2), increased guidance for national public authorities through soft law measures (paragraph 3.3), encouraging domestic actors to engage more actively in private enforcement (paragraph 3.4), the creation of novel incentive schemes or facilitating mechanisms at the EU level (paragraph 3.5), and improved monitoring and control at Member State level, optionally with the aid of special regulatory frameworks (paragraph 3.6). The idea is to identify in the process some factors that may currently inhibit a more complete adherence to the demands of EU law, produce administrative bottlenecks or avoidable feedback-loops, and may simultaneously render the central means of redress (top-down enforcement) less effective. As remarked above, some of the options highlighted in this section are at present already being pursued, yet may need to be given a second thought, or put up for a thorough recalibration fairly soon.

At this point, it should be stressed that this paper by no means intends to offer an exhaustive survey of all possible alternatives.¹⁷ Rather, the aforementioned avenues have been selected on the basis of the fact that they appear to have received insufficient attention in academic studies so far, and in the belief that the viability of some of these has, up until now, not yet been explored sufficiently. In the final section (paragraph 4), we therefore conclude by highlighting how these alternatives map onto the current legal architecture, and which steps would need to be undertaken in order to further advance the Member States’ compliancy potential.

2. TOP-DOWN ENFORCEMENT: THE INFRINGEMENT PROCEDURE AND ITS FAILINGS

2.1 Set-Up and Workings

The infringement procedure, nowadays premised on Articles 258 and 260 TFEU, has been a cornerstone of the EU legal system since the inception of the integration process

¹⁶ Separate top-down sanctioning mechanisms exist for e.g. persistent violations of fundamental rights in the Member States, and for transgressions of the ‘Stability Pact’ (i.e. the rules governing the Economic and Monetary Union), but in what follows, these other regimes will only be incidentally brought to the fore.

¹⁷ In particular, it consciously evades the recent discussions on a possible recalibration of the means to deal with structural infringements of the Union’s values, listed in Article 2 TEU. On that issue, see further e.g. DAWSON, M., MUJIR, E. Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania. *Maastricht Journal of European and Comparative Law*. 2012, pp. 469–476.

in the early 1950s. Over time, it has easily eclipsed its sibling procedure, located in Article 259 TFEU, basically an instrument for Member States to take on one another. Over sixty years of practice have resulted in no more than a handful of cases, and on fairly marginal issues at that; regrettable as the situation may be, on this ground alone, we may confidently leave it aside.

Conceptually, the infringement procedure is predicated on a classic *separation des pouvoirs* theorem; though the European Commission is placed squarely in the hot-seat, the power to sanction Member States for infringements has been reserved for the judiciary, the European Court of Justice (ECJ).¹⁸ In its role as ‘guardian of EU law’, the Commission is to investigate possible transgressions of any type or gravity, and it does so either of its own motion, on the basis of a complaint from individuals, or following information submitted by Member States or Members of the European Parliament. Since the Commission bears the cost of litigation and is capable of acting for those who do not have the resources or standing to take legal action themselves, at least in theory, the procedure is rather egalitarian.¹⁹

The procedure consists firstly of an administrative stage: the sending of a letter of formal notice, and if this yields no results, a reasoned opinion to the country concerned; both specify and corroborate the perceived malpractice, and will demand that it be rectified.²⁰ If the matter is not satisfactorily resolved at the administrative stage, the Commission may subsequently initiate proceedings before the ECJ.²¹ Member States only risk to be sanctioned financially (in the form of a lump sum and/or periodic penalty payment – a novelty introduced by the Maastricht Treaty in 1993) when they refuse to abide by an ECJ judgment condemning their position, do not bow to the demands of the Commission in a novel letter of formal notice, and are then taken to Court for a second time.²² Understandably, this eats up a considerable amount of time, but in reality, cases are only rarely pushed that far, with issues most often being settled at a much earlier point in time.²³

¹⁸ The term ‘ECJ’ can be used for either the official institution, encompassing the Court of Justice, the General Court and the Civil Service Tribunal, or in a more narrow sense, only referring to its ‘first limb’ (the Court of Justice). In accordance with Articles 256 and 258–260 TFEU, it is only the ECJ in this narrow sense that deals with infringement cases.

¹⁹ CHALMERS, D., DAVIES, G., MONTI, G. *European Union Law: Text and Materials*. Cambridge: Cambridge University Press 2010, p. 319.

²⁰ The administrative stage is ordinarily preceded by informal contacts between Commission and Member States officials, attempting to resolve the matter or clear up possible misunderstandings, so that further official steps become unnecessary.

²¹ It should be noted that under the Treaty establishing the European Coal and Steel Community (1951; expired in 2002), the High Authority (the precursor to the European Commission) was itself empowered to pursue infringements and impose sanctions on Member States. The current procedure does not follow this template, but is based on the model set up under the Treaty establishing the European Economic Community (1957) and the Treaty establishing the European Atomic Energy Community (1957).

²² See Article 260 TFEU. Exceptionally however, in accordance with Article 260 (3) TFEU, when the Commission brings a case before the ECJ on the grounds that a Member State has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may immediately request for the imposition of a lump sum or penalty payment. The Court may then proceed to impose a financial penalty not exceeding the amount specified by the Commission (while ordinarily, the ECJ enjoys discretion in this regard).

²³ For example, at the end of 2009, almost 90 % of all investigated cases were closed during the informal and administrative stage; see the 27th *Annual Report on Monitoring the Application of EU law*, COM(2010) 538 final, p. 3.

2.2 The New Fast-Track Scheme

In 2007, the Commission introduced an experimental modification in its case-handling. The overriding ambition was to improve the communication and cooperation between the Commission and Member State authorities on issues concerning the application of EU law, providing quicker and fuller answers to questions, and solutions to problems arising in the application of EU law that require confirmation of the factual or legal position.²⁴

The key idea of the new ‘fast-track scheme’ has been to make a distinction between different types of cases, as certain of these (own initiative inquiries) would deserve to be given extra priority, whereas certain others (those based on complaints from third parties) were perfectly suited to be resolved in ‘triangular traffic’ between the Commission, the complainant and the Member State indicted. In the latter cases, the issue raised is initially still examined by the responsible service in the Commission. Thereafter, the matter will be forwarded to the Member State authority concerned, accompanied by any questions or indications identified by that service.²⁵ Unless urgency requires immediate action or when the Commission considers that contact with the Member State can contribute to an efficient solution, a short deadline is given to provide the necessary clarifications, information and solutions directly to the citizens or businesses concerned, and inform the Commission thereof. The ordinary response-deadline has been set at ten weeks.²⁶ When the issue amounts to a breach of EU law, Member States are expected to remedy, or offer a remedy, within fixed timetables. When no solution is proposed, the Commission is to provide a follow-up and take further action, notably by firing up the infringement procedure in the regular manner. Since April 2008, the scheme has been gradually expanded, and it currently operates smoothly in twenty-five of the current twenty-eight Member States (with Luxembourg, Malta and Croatia somewhat belatedly joining the pack).

2.3 Downsides and Shortcomings

In fifty-odd years, the infringement procedure has become a well-known quantity, serving as a linchpin for a rich and colourful series of judgments, and for that reason alone, some lawyers may hold it in high esteem. At the same time, its long pedigree should not tempt one to turn a blind eye to its defects, since over the course of time, multiple reasons have cropped up for questioning its style of operation, as well as its overall efficacy.²⁷

2.3.1 Informational Deficit

A first troublesome aspect relates to the fact that the Commission is unable to register each and every violation of EU law, for lack of the necessary investigative resources. As re-

²⁴ See *Communication from the Commission – A Europe of Results: Applying Community Law*, COM(2007) 502, p. 7.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See also, inter alia, HARLOW, C., RAWLINGS, R. Accountability and Law Enforcement: The Centralised EU Infringement Procedure. *European Law Review*. 2006, No. 31, pp. 447–475; SMITH, M. Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Procedure. *European Law Review*. 2008, No. 33, pp. 777–802.

marked, it derives its information mainly from individual complaints, tip-offs from other Member States or MEPs.²⁸ There are only limited ways in which it can gain comprehensive knowledge of deviant rules and practices at the national level, or procure additional incriminating evidence if it does not yet dispose of more than hazy indications, since most countries strive to keep their internal policy dynamics covered under the traditional cloak of national sovereign prerogative. Nowadays, there do exist various offices, bodies and agencies that can supply and channel helpful information; but one example is the European Environment Agency (est. 1993). Nonetheless, Member States are not anxious to endow such entities with any general powers of inspection so that they might roam freely and undertake on-the-spot investigations. It is equally unlikely that the Commission itself would one day be attributed a competence such as the one it possesses in competition law, viz. to trace unlawful conduct of undertakings, in any other domain of European law, so that it could counteract any normative divergences or transgressions caused or committed by national public authorities.

As could be predicted, the upshot of the absence of a more developed armamentarium is a funnelling-effect, whereby dossiers end up on the desks in Brussels on a fairly random basis. Moreover, in specialised areas of law, the influx of cases and complaints is dependent on the vigilance of the stakeholders concerned. Moreover, little can be expected of the public officials active in that domain that are employed by bungling Member States themselves. However, it should be added that the foregoing does not hold true for one particular type of infringements, namely the non-transposition of directives; for by virtue of a refined digital repository, the so-called MNE database, the Commission is able to pursue deficiencies in this regard in a structured and symmetrical manner.²⁹ Yet, even when there exists no deficit of information here, a related bottleneck (to which we will return below) continues to make itself felt, namely the lack of operational resources to go after every case of non-transposition.

2.3.2 Longevity of Procedures

A substantial and unmistakable downside of the infringement procedure resides in the temporal dimension. For if a Member State steadfastly refuses to change course, acquiesce to the Commission's demands and abandon its illicit rules or practices, it may be necessary to walk through all the administrative and judicial stages, ultimately resulting in a Court judgment imposing a lump sum or penalty payment. This takes up a protracted period of time. For example, in the *Spanish bathing water* dossier, the first inquiry was initiated in 1988, with the administrative stage opening up in 1989, Court proceedings being initiated in 1996, Spain being condemned in 1998, a second procedure commencing that same year, a second referral to the judiciary taking place in 2001, and financial sanctions being imposed in 2003.³⁰ In the 1999–2003 period, the average time taken to process infringe-

²⁸ As known, for political reasons, Member States have rarely been willing to initiate proceedings against one of their equals on the basis of Article 259 TFEU, preferring to relay the details of the offense to the Commission.

²⁹ 'MNE' stands for 'mesures nationales d'exécution des directives'. Upon completing their implementation process, all Member States are bound to feed a transcript of their transposition measures into this database. It thereby requests them to indicate whether they transposed the contents of the directive in full (if there existed no prior national law on the topics concerned) or in part (always allowed in case of 'optional' harmonisation).

ments, from opening the file to sending the application to the ECJ, took twenty-seven months. Somewhat peculiarly, this figure has recently been contrasted with the average duration in the 1999–2008 so as to underline the progress that has been made.³¹ Yet, even if this skewed presentation is considered to make sense, the total decrease amounts to scarcely three months, and even then, it should be kept in mind that the number only pertains to the first round of the struggle, with a possible (additional time consuming) follow-up being necessary to make penalisation possible.³²

Of course, it must not be overlooked that in reality, many disputes are resolved in one of the earlier phases of the dispute, so that it is rarely necessary for proceedings to span the entire gamut. At the same time, for those situations where (either in good or in bad faith) a country decides to drag its heels, or entirely put its foot in, a maximum of time will have to be invested in order to make it see the error of its ways, and put the matter beyond dispute.³³ Far from providing relief, the new fast-track scheme, outlined above, actually appears counterproductive, for if a Member State does not satisfactory deal with a complaint during a more protracted first phase (comprising some two to three months), the infringement procedure will still have to be deployed. In those cases, the earlier period of time has basically been wasted.³⁴ The consequence of all this longevity is that complainants may give up pursuing the alleged infraction at some point, or even decide against lodging a complaint altogether; for all too often, justice delayed remains justice denied. The excessive duration of the infringement procedure is equally awkward from a more general perspective, since it means that even in cases of serious violations of EU law, the detrimental effects can keep spreading for years.

2.3.3 Unpropitious Commission Discretion

Although the literal wording of the key provisions may appear to oblige the Commission to undertake action against each and every infringement of European norms and principles, in reality, it enjoys a discretionary power to initiate proceedings. Thus, whenever there are compelling reasons for keeping its eyes shut or regarding a transgression as insignificant, nothing prevents it from letting the malefactor walk free. Even in an ongoing procedure, it remains entirely at liberty to close the file and let the incriminated Member State off the hook, without disclosing the reasons for its decision.³⁵

The reasons for taking a discretionary approach in the exercise of its competence are well-known: the Commission simply does not dispose of the resources to pursue every single violation of EU law, and therefore it should remain unfettered to pick, choose, ignore

³⁰ See Case C-92/96, *Commission v Spain* [1998] ECR I-505, and Case C-278/01, *Commission v Spain*, [2003] ECR I-14141.

³¹ 27th *Annual Report on Monitoring the Application of EU law*, COM(2010) 538 final, p. 2.

³² Unless the case revolves around the non-transposition of a legislative directive; cf. supra, fn. 22. However, if a Member State has duly notified its measures transposing such a directive, yet the latter are defective or incomplete, Art. 260(3) TFEU cannot be applied, and follow-up action has to be based on Art. 260(1) TFEU.

³³ The Commission emerges victoriously in more than 90 % percent of the cases that end up on the Courts' docket; see CHALMERS, D. Judicial Authority and the Constitutional Treaty. *International Journal of Constitutional Law*. 2005, No. 4, pp. 452–453.

³⁴ SMITH, M. supra n. 27, p. 798.

³⁵ The ECJ has so far made no bones about this; see e.g. Case 247/87, *Star Fruit v Commission*, [1989] ECR 291.

and prioritise. The fact that not all transgressors will be hunted down is similarly agreeable for the Union's already gravely encumbered judiciary. Moreover, an obvious analogy can be drawn with national public prosecutors, who are often explicitly instructed to focus on those offenses that cannot possibly be condoned; even if they are bound to pursue every transgression, practical constraints will render it impossible to live up to that ideal.³⁶

However understandable the discretionary approach may be, the resulting problems do not become any less poignant. To begin with, it leads to a situation of inequality, since some Member States may be reprimanded for trespasses that others are tacitly allowed to commit; even if the offense can be regarded as a minor one, it is up to the Commission to decide (or feign) that there is a compelling reason to press ahead. Consequently, the choices made cannot help but suffer from a certain arbitrariness, which lies at odds with the demands of the rule of law and the idea of legal certainty. To point out but one example, reference may be made to the pernicious reticence displayed in the early 2000s, with regard to violations of the Stability and Growth Pact by some of the larger Member States.

In the same vein, it is hard to digest that the underlying motives for (not) pursuing a case can remain completely covered in secrecy; in fact, all documents relating to the investigative procedure, including the reasoned opinion, are kept confidential – a remarkable feat, as transparency is otherwise considered to be one of the general principles of EU law.³⁷ In addition, contrary to the assertion made earlier, the egalitarian character of the infringement procedure seems largely cosmetic, as not every plaintiff can be certain that its case will actually be pursued. Among the detrimental ramifications we can therefore also count the dashing of the hopes raised among complainants, and the collateral damage caused to the popular perception of the European Union and its institutions.

Overall then, the Commission's discretion gives rise to yet another unhelpful funnel-effect, whereby norms and practices are left unaddressed despite their being irrefutably deviant. Among the casualties are legal certainty, equality and transparency, and the clash with central tenets of good governance and sound administration are readily evident as well. Nevertheless, it is a characteristic of the infringement procedure that is unlikely to be overcome; even if it were pressured to steer a different course or one day spontaneously change tack, it would be unable to raise its performance, as it could not possibly be granted unlimited means.

2.3.4 Misguided Reliance on Negative Stimuli

Another major downside is a more ideological one that we have already touched upon above. As insights gathered from modern psychological research underscore, punishment, or the mere threat thereof, forms in itself a far from ideal trigger to stimulate behavioural altercations. Instead, intrinsically positive tactics are preferable to attain the desired outcome, and frequently even succeed to deliver the goods within a shorter span of time. Put differently, the donning of velvet gloves may often yield more productive results than lashing out with the iron fist. In the same vein, one may criticise the infringement procedure for being too much stick and too little carrot, whereas the two could work to better effect

³⁶ The two extremes match the situation in respectively the Dutch and the German criminal law system.

³⁷ Both the European Parliament and the European Ombudsman have repeatedly placed emphasis on this aspect.

when combined. Yet, in utilising either velvet gloves, iron fists, stick- or carrot-tactics, it should be recognised that what works for individuals cannot so carelessly be transposed to a legal context wherein the overriding aim is to spark a regulatory change or executive action in a public administration.

Overall then, it is far too simplistic to assume that Member States can be goaded in a certain direction for fear of incurring a financial penalty, for ‘deterrence’ simply does not operate in the same way for legal contraptions as it does for human beings.³⁸ Of course, it is true that the infringement procedure is not predominantly concerned with sanctioning, and that it primarily operates as a conduit for resolving conflicts and preventing unnecessary escalations. Moreover, it displays sufficient flexibility to allow for problems to be resolved on the basis of dialogue, reasoning and mutual understanding. All the same, this does not take the sting out of our qualms entirely: for in itself, dishing out punishment remains an overly negative strategy, and it is especially misguided to assume financial sanctions are most efficacious.³⁹

To add insult to injury, the effects of such sanctions, even the mere threat of their imposition, vary greatly depending on the size, political and economic power of the country concerned. As a result, it may be considered exceedingly naïve to expect Commission action to exert an equal compliance pull on all Member States – with the protracted reticence displayed with regard to violations of the Stability and Growth Pact by some of the larger Member States once again forming a case in point.

2.3.5 Persistency of Paper Realities

As indicated above, political scientists researching patterns of compliance have distinguished several different worlds of compliance: one in which rule observance is a matter of course, because the rule of law is taken extremely seriously; one in which this is hardly the case, and deficiencies in adhering to supranational rules are a regular occurrence; one in which EU requirements are generally met due to the favourable collaboration of key players.⁴⁰ A relatively new discovery has been the existence of a fourth type, in which the legal codes are integrally attuned to the European demands in theory, but where the relevant rules are not being upheld in reality.⁴¹ Unsurprisingly, the results achieved in enforcing EU law in a top-down manner vary in these different contexts.⁴² A decisive weakness of this approach is its inability to ascertain the factual situation in a Member State

³⁸ Cf. HARLOW, C. Francovich and the Problem of the Disobedient State. *European Law Journal*. 1996, No. 1, p. 199.

³⁹ This could be more readily acknowledged in the debate on strengthening economic governance, and the recently enacted measures that aim to counter violations of the EMU Stability Pact (the vaunted ‘Six-Pack’). After all, Member States that are unable to balance their own budgets are unlikely to respond to extra financial pressure; moreover, their already dire budgetary situation makes it highly unlikely that they would be able to cough up the funds to pay any meaningful fine.

⁴⁰ FALKNER, G., HARTLAPP, M., TREIB, O. Worlds of Compliance: Why Leading Approaches to the Implementation of EU Legislation are only Sometimes-True Theories’. *European Journal of Political Research*. 2007, No. 46, pp. 395–416.

⁴¹ See FALKNER, G., HARTLAPP, M., TREIB, O., *supra* n. 10.

⁴² It should be noted that the inferences in the cited studies were actually based on statistics with regard to the infringement procedure.

with complete accuracy; consequently, where countries would deserve to be chided, they may be officially commended for attaining the set objectives instead.

Naturally, the Commission does not content itself with paper realities, and neither does the ECJ; for example in the field of environmental law, whereas in the eyes of the Court, it cannot principally and directly be inferred from the fact that a factual situation is not in conformity with the objectives laid down in a rule of EU law that a Member State has failed to fulfil its obligations, if that situation is considered to persist and, in particular, if it leads to a significant deterioration in the environment over a prolonged period, without any action being taken by the competent authorities, this should be taken as an indication of a breach of the applicable legal standards.⁴³ Moreover, misleading information may well be fed into the MNE-database about directive provisions which are in fact improperly implemented or hardly applied. This does not preclude more detailed inquiries from taking place by the competent European authorities, but at the same time, it will be up to the latter to come up with the necessary evidence to demonstrate the presence of a discrepancy between the norm and the reality. As outlined above, for the Commission, this remains especially problematic, for want of proper investigative powers, pervasive monitoring tools and technical-administrative resources. Moreover, as explained earlier, the risk of incurring financial penalties is insufficiently dissuasive, and even wholly ineffective for bringing about the necessary social-cultural change.

All this is not to say that the propensity among Member States to indulge in paper promises is omnipresent, and nor is such a disposition absolutely immutable. Yet, it is unlikely to be stamped out by assiduous and incremental deployment of the infringement procedure alone. Unfortunately, the novel fast-track scheme only appears to have added insult to injury, as in a great number of cases, it has outsourced the responsibility to deal with complaints and complainants to the very entity accused of infringing the law.⁴⁴ Unwittingly, this design has diminished the chances for a more rapid resolution of the dispute in three out of four worlds of compliance to a formidable extent, rendering the restyled first phase of the proceedings virtually useless.

3. THE ALTERNATIVES TO TOP-DOWN ENFORCEMENT

3.1 On the Need to Look Further

When the European Communities were launched in the 1950s, the infringement procedure was the only codified instrument for keeping the Member States in check. In the celebrated *Van Gend & Loos* case, the Dutch and the Belgian government famously stressed the centrality of the infringement procedure, in an attempt to stave off any judge-made alternatives.⁴⁵ Yet, this could not prevent the Court from launching a first new remedy, the principle of direct effect, entailing that citizens would be able to claim the rights flowing from EU law in their domestic courts, irrespective of how the reception of international norms in the national legal order was regulated in the Member State concerned

⁴³ See e.g. Case C-365/97, *Commission v Italy*, [1999] ECR I-7773.

⁴⁴ SMITH, M., *supra* n. 27, p. 798.

⁴⁵ Case 26/62, *Van Gend & Loos v Nederlandse Administratie der Belastingen*, [1963] ECR I.

(in a ‘monist’ or ‘dualist’ fashion). The ECJ has broadened the scope for judicial enforcement further, e.g. by enabling citizens to submit liability claims in national courts in case they suffer damages, as a result of a sufficiently serious breach of EU law by the Member State concerned.⁴⁶ Over the course of time, several other innovations facilitating the effectuation of European rights within the domestic legal order have been put into effect through the ordinary legislative channels.⁴⁷

Notwithstanding the drawbacks and defects highlighted in the preceding section, the infringement procedure does remain a valuable weapon in the supranational armoury. If it had never been put into place, the compliance record of the Member States would have displayed a very grim picture indeed, and the habit of obedience with regard to EU law would no doubt have been extremely poor nowadays. All the same, the fact that new routes and strategies for enhancing Member State compliance have been developed over the years underscores that, apparently, a need has been felt for drawing up alternatives to top-down enforcement. Furthermore, a tandem approach is perfectly sensible, whereby countries are cornered in from more than one side; exclusive reliance on the central means would surely prove inadequate, yet this anything but means that the approach ought to be abandoned altogether. Indeed, Member States may well be neatly sandwiched by deploying all the available infranational and supranational tools. Curiously, several options would so far appear to have been either consistently overlooked or grossly underappreciated. However, as will be illustrated below, most of these can go hand-in-hand with the instruments that are already being utilised.

At this point, it deserves mentioning that the total number of infringement actions has been decreasing over the past few years.⁴⁸ It is difficult to assert with any degree of certainty whether the statistics reflect a growing level of compliance in the EU, or merely an inability for the Commission to keep up with the repeated enlargements and related strain on its resources. A corollary of the growing membership might also be an increased politicization of the infringement procedure, whereby the Commission’s discretion is exercised with ever greater pragmatism, which has additionally brought down the number of initiated actions. It may also be still too early to posit that the new fast-track scheme is paying off in this regard. The cautious trends do indicate clearly though that the efforts taken so far are in any case not enough, since violations of EU law continue to be committed. Hence, the need for pursuing them has certainly not disappeared altogether, nor has the interest in devising alternative means for countering them.

3.2 Improving the Quality of EU Legislation

It is no secret that the complex, convoluted, often outright byzantine character often causes the work of national civil servants tasked with implementing and enforcing EU law

⁴⁶ Joined Cases C-6 & 9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5375.

⁴⁷ See e.g. *Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts*, O.J. [2007] L 335/31.

⁴⁸ As becomes evident from the Commission’s 28th, 29th and 30th annual report on the implementation of EU law (available at <http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm>), as well as the latest annual report of the European Court of Justice (available at <http://curia.europa.eu/jcms/jcms/Jo2_7000/>).

to be extremely burdensome. The time and effort necessary to plumb the depths of a new piece of European legislation has led to a classic bottleneck problem, with too many rules needing to be fathomed, within timeframes that almost always prove too stringent, making delays, mistakes, or both almost inevitable. The remedy seems simple: improve the quality of EU legislation, and the problems evaporate like snow in summer. In itself, this solution is as clear as day. Yet, it calls for an in-depth reflection from several different angles.

In the past decades, various plans and schemes have already been concocted to improve legislative drafting. The 1992 Sutherland Report proposed that every new legislative initiative be scrutinised on the basis of five criteria, namely 1) the need for action 2) the choice of the most effective course of action 3) the proportionality of the measure 4) the consistency with existing measures 5) wider consultation of the circles concerned during the preparatory stages.⁴⁹ The Edinburgh European Council taking place that same year emphasised the importance of ensuring that new laws would be transparent and intelligible.⁵⁰ 1993 saw the Council adopting a resolution on the quality of drafting legislation.⁵¹ In 1994, the Council, Commission and Parliament concluded an inter-institutional agreement on the codification of legislative texts, and shortly thereafter, an independent expert group published a follow-up paper to the Sutherland proposals.⁵² From 1995 onwards, the Commission started to issue regular reports on 'Better Lawmaking', and advanced a number of pilot projects.⁵³

It was only in 1998 that the Council, Commission and Parliament managed to reach agreement on a set of comprehensive guidelines, specifying that new acts should be clear and precise, that the drafting should be appropriate to the type of measure concerned, that the persons to whom the act is addressed should be taken into account, that provisions need to be concise and their content homogeneous, and that the translation implications of the chosen structure has to be taken into account. More detailed pointers were, inter alia, that the terminology employed is expected to be consistent, in the act itself and vis-à-vis the entire body of EU law, that the titles give a full indication of the subject matter, that internal and external references are kept to a minimum, and repeals are expressly introduced.⁵⁴ Additionally, for several years now, the Commission has embarked on a quest to codify, recast and consolidate the existing legal texts, and it recently announced its intention to engage in 'Smart Regulation', whereby increased importance would be attached to assessing the impact of proposed new rules at both the European and the national level, and the voice of citizens and stakeholders is to be strengthened.⁵⁵

⁴⁹ *The Internal Market after 1992: Meeting the Challenge – Report to the European Commission by the High Level Group on the Operation of the Internal Market*, SEC(92) 2044.

⁵⁰ *Presidency Conclusions – Edinburgh European Council*, Bull. EC 12-1992, pp. 7–40.

⁵¹ *Resolution of the Council of 8 June 1993 on the Quality of Drafting Community Legislation*, O. J. [1993] C 166/1.

⁵² *Inter-Institutional Agreement between the Council, the Commission and the Parliament of 20 December 1993 – Accelerated Working Method for Official Codification of Legislative Texts*, O. J. [1995] C 293/2.

⁵³ See e.g. *Better Lawmaking 1997 – Commission Report to the European Council*, COM(97) 626 final; *Simpler Legislation for the Internal Market – A Pilot Project*, COM(96) 204 final; *Communication from the Commission to the European Parliament and the Council – Making Simple Market Rules More Effective*, COM(1998) 296 final.

⁵⁴ *Inter-institutional Agreement between the Council, the Commission and the Parliament of 22 December 1998 – Common Guidelines for the Quality of Drafting of Community Legislation*, O. J. [1999], C 73/1.

⁵⁵ *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Smart Regulation in the European Union*, COM(2010) 543 final.

As will be understood from this rough overview, the issue has been on the agenda for quite some time now, and there has been no dearth of ideas on how it ought to be tackled. All the same, the schemes and proposals appear to be repeating the same familiar points over and over again, while in reality, many legal instruments continue to cause difficulties at the implementation or enforcement stage, due to fuzzy wording, a puzzling structure, incidental impreciseness or structural ambiguity. A familiar response is that these shortcomings are far from accidental, but the direct outcome of a policy-making process in which the actors deliberately choose to insert equivocal terms. On many dossiers, hard-wrought compromises need to be reached, while each party involved will try hard to see its own point of view prevail. Even if one needs to give in to some extent, as long as the final text turns out to be ambiguous enough, decision-makers will have been able to secure sufficient flexibility for the protection of their own non-negotiable policy preferences. In short, EU law is a *droit diplomatique*, and in this unusually sensitive arena, quality concerns are inevitably secondary.⁵⁶ While this insight has obtained a classic status, it simultaneously possesses a mythical dimension. To begin with, as regards those measures that are adopted through procedures that involve only a small number of institutions or bodies, the struggles to find common ground are hardly as fierce.⁵⁷ Also, while it runs entirely counter to the popular idea, of some EU legislation, the clarity is in fact patently greater than that of similar national rules; this e.g. holds true for the sophisticated definitions of key concepts in European environmental rules.⁵⁸ Furthermore, the idea that supranational rules are often deliberately vague so as to ensure that Member States are better able to align them with their domestic preferences could certainly hold true for directives; there is however an abundance of EU legislation that does not require additional national action, and those texts ultimately cannot remain so open-ended, since that would empty them of their basic utility – rendering useless the whole drafting-and-adopting exercise.

The immanency of the problem is, in other words, overstated, making it definitely worthwhile to explore how quality improvements can be realised. As far as possible, legal texts should be accessible and unambiguous, especially in light of the fact that they are to be translated into different languages. Clarity includes the use of plain language, a minimum of jargon and avoidance of excessively long sentences; unambiguity a sufficient level of detail, and consistent use of the same phraseology. Ascertainable variations between Member States need to be kept well in mind, and in the same light, the scope of rules needs to be made as explicit as possible, as well as the relation to other instruments. Alternative forms of regulation are to be encouraged, and abstention from rule-making to be preferred in domains that cannot claim special priority (for example, tourism, sports, education, and outer space).

⁵⁶ The argument is rehearsed in Alfred Kellermann, Giuseppe Ciavarini-Azzi, Francis Jacobs, Rex Deighton-Smith (eds.), *Improving the Quality of Legislation in Europe*. The Hague: Kluwer Law International 1998.

⁵⁷ This especially holds true for the adoption of executive measures, the majority of which is devised by technical experts through comitology procedures (cf. Article 291 TFEU). Moreover, smooth progress can equally be made in the Council, owing to small-company negotiations in the COREPER, or in the Parliament, where leading MEPs of the parties may convene to swiftly hammer out the details of a text amongst themselves.

⁵⁸ An extensive analysis offers BEIJEN, B. A. *De kwaliteit van milieuriichtlijnen. Europese wetgeving als oorzaak van implementatieproblemen*. Den Haag: Boom Juridische uitgevers 2010, chapter 4.

For sure, these precepts are straightforward enough, but they require constant monitoring. Thus, the present institutional architecture might call for an extra check or special oversight body at the final stages of the regulatory trajectory at supranational level. The practice of preliminary impact assessments indeed requires to be intensified, for with each new proposal, it must first be beyond doubt that legislation is the essential and most suitable means to achieve the stated objective.⁵⁹ In view of the impressive stockpile that has recently amassed, there is surely no need for any novel guidelines, but the composition and liberal distribution of a succinct précis could be very welcome. By the same token, although many drafters have accumulated a vast expertise and are frequently able to demonstrate they possess the skills required, they might well benefit from extra training to sharpen their focus.

While the quality problem is not totally insurmountable, EU legislation is of course unlikely to ever reach perfection; the traditional difference of opinion in every democratic polity, and the natural impossibility of language to convey meaning without uncertainties will see to that. Poorly drafted European rules however risk giving rise to under- or overregulation, vague, conflicting or inaccurate provisions within twenty-eight national legal orders, damaging the credibility of the EU and wounding public support for further integration.⁶⁰ Holding Member States to account for non-compliance, even when at least part of the responsibility for the default may lie with the Union legislature, sparks off a vicious feedback-loop. Every effort should be taken to avoid such endless shifting-the-blame-games.

3.3 Additional Guidance through Soft Law

Even when the quality of the supranational rules to be applied in the domestic systems is up to scratch, it might still be excruciatingly hard to determine where and how to fit them into the domestic system so that they come out best. Soft law instruments, especially when specifically geared towards the regulatory styles of particular Member States, offer one way to alleviate such hardships.⁶¹ Of course if, conversely, the supranational rules at stake lack the quality for national civil servants to understand how to proceed, such instruments are just as welcome. Since soft law is generally not subject to any conspicuous legislative procedure, it may be comparatively easier to outfit them with useful pointers concerning the scope and purpose of the ‘hard law’ measures in the field concerned, and in so doing, supply some incomparably direct answers to controversial questions.

At face value, this suggestion appears anything but ground-breaking, since the EU already subscribes to this strategy. Indeed, a growing tendency to resort to soft law can be witnessed that has reinforced its prominence as a topic of academic debate and reflection.⁶² In the previous section, reference was made to communications, guidelines and

⁵⁹ By the same token, the European Court of Auditors has pointed out that the interests protected in the so-called ‘policy-linking clauses’ could be more evenly balanced; see European Court of Auditors. *Impact Assessments in the EU Institutions: Do they Support Decision-Making?* Luxembourg: Publications Office of the European Union 2010.

⁶⁰ XANTHAKI, H. The Problem of Quality in EU Legislation: What on Earth is Really Wrong? *Common Market Law Review*. 2001, No. 38, p. 652.

⁶¹ Cf. VAN WAARDEN, F. European Harmonization of National Regulatory Styles? In: John Vervaele et al. (eds.). *Compliance and Enforcement of European Community Law*. Deventer: Kluwer Law International, 1999, pp. 95–124.

⁶² An overview offers SENDEN, L., *supra* n. 6.

inter-institutional agreements; among the many other manifestations that have emerged are notices, declarations, resolutions, recommendations, and action plans. The common denominator is that they officially all lack binding effect; nevertheless, soft law has been found to frame institutional expectations and open actors to diverse forms of peer pressure.⁶³ Consequently, it has been criticised for permitting the normal systems of accountability to be bypassed, for circumventing the limits to the competence to issue hard law and eroding the Union's overall legitimacy. It is debatable though whether the benefits do not carry greater weight, notably, that hard law fosters and promotes uniformity, while deviations at national level may require a tailor-made approach, and that hard law proceeds on the basis of a fixed situation, whereas changing conditions may call for continuous refining and adjusting.⁶⁴

If a greater reliance on soft law means may indeed enhance compliance, this does not mean the strategy should be allowed to spin out of control. In any case, the nature of the policy field ought to determine its viability, and it only deserves special consideration in those areas where there are good indications that Member States could profit from extra guidance. Additionally, as remarked, it is wise to conduct a meticulous inquiry in order to establish the precise necessities of actors and stakeholders in the national context before proceeding to draw up the package, since it has been asserted that soft law most frequently tends to be complied with when the norms concerned are in line with their vested interests.⁶⁵ Finally, it is worthwhile to ruminate more extensively on the possibility of a tailor-made, instead of a 'one size fits all' approach, i.e. issuing detailed rules for selected (groups of) EU countries. This option appears all the more credible precisely because the rules are soft, and thus flexible.⁶⁶

3.4 Increased Private Enforcement

Over the past years, both the Commission and the Court have come out as avid supporters of private enforcement of EU norms, particularly with regard to the rules of competition law.⁶⁷ As referred above, this approach has been strongly facilitated by the ECJ's revolutionary decision to launch the 'direct effect' remedy in the 1960s, handing private citizens a powerful means to effectuate their rights in a 'vertical fashion' (i.e. against public

⁶³ See LÓPEZ-SANTANA, M. The Domestic Implications of European Soft Law: Framing and Transmitting Change in Employment Policy. *Journal of European Public Policy*. 2006, No. 13, pp. 481–499.

⁶⁴ See, in more detail, TRUBEK, D., COTTRELL, P., NANCE, M. Hard and Soft Law in European Integration. In: Joanne Scott, Gráinne de Búrca (eds.). *New Governance and Constitutionalism*. Oxford: Hart Publishing 2006, pp. 65–94.

⁶⁵ See SENDEN, L. *supra* n. 6, pp. 477–498.

⁶⁶ Besides, it is already accepted practice for (hard law) directives to target not all, but one or more specific Member States.

⁶⁷ See, in particular, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final, and the ensuing *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, COM(2013) 404 final. National competition authorities can impose penalty payments and (administrative) fines on undertakings violating the competition rules, yet actions for damages against those undertakings, brought by private parties before national civil courts, are likely to be equally (if not more) deterrent. It is generally assumed that increased litigation in national courts by individual consumers and (rival) undertakings encourages a stricter observance of the rules concerned, while simultaneously diminishing the enforcement burden for public authorities.

authorities). At the same time however, by turning to national courts with their demands that national authorities take their European obligations seriously, knowingly or unknowingly, they act rather neatly in the broader interest of the EU institutions. In the early 1990s, seeking to enhance compliance further, the ECJ opened up the possibility for financial claims against Member States in case of gross and harmful deficiencies, progressively moving on in recent times to galvanise the possibilities for ‘horizontal’ litigation (actions by private parties against other individuals for not complying with EU rules).⁶⁸

To be sure, in order to increase private enforcement, the awareness of the available remedies among potential litigants would need to be raised. For starters, this calls for intense, wide-ranging but consciously targeted information campaigns, possibly coupled with accessible schemes for financing the necessary legal aid. Moreover, much depends on the aptitude, prowess and vigilance of national judges. Presently, the judiciaries of the Member States are already very actively enhancing their knowledge base with regard to European law. The year 2000 witnessed the launch of a new general platform, the ‘European Judicial Training Network’, which deserves unconditional support for broadening and expanding its activities, especially in the newly acceded countries.⁶⁹ In the past, the EU stimulated and subsidised the setting up of specialised programmes, and if the resources are available, such concentrated schemes could be reinstated as well.

At this point though, confronted with the prospect of incrementally multiplying court actions, a slight hesitancy might creep up. For indeed, if all those negatively affected by non-compliance were to take matters into their own hands more quickly, compliance is likely to increase and, consequently, top-down enforcement becomes less necessary. Yet, it would reinforce a ‘litigation culture’ and promote an already growing judicialisation of society. In light of the experiences in the United States, this may well incite ever greater public distrust and more wide-spread discontent.⁷⁰ Also, any extra stimulus on private enforcement is bound to result in higher administrative and logistic burdens for the judiciary, calling for extra expenditure which, in times of crisis, probably not all Member States are able to afford.

These doubts notwithstanding, from a formal perspective, the EU is perfectly entitled to proceed further along this road. Hereby, one final thing that should be kept in mind is that it has so far been willing to condone a basic heterogeneity with regard to Member States’ domestic procedural law, thus allowing for centrifugal tendencies to simmer on.⁷¹ In contrast, the objective of top-down enforcement is to ensure uniformity in the application of EU law, thus strengthening the centripetal forces. In the long run, this asymmet-

⁶⁸ See, inter alia, Joined Cases C-6 & 9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5375; Case C-253/00, *Antonio Muñoz y Cia SA and Superior Fruitticola SA v Frumar Ltd and Redbridge Produce Marketing*, [2002] ECR I-7289; Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano*, [2000] ECR I-4139; Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-6297.

⁶⁹ See <<http://www.ejtn.net>>, last visited 10 December 2013.

⁷⁰ Similarly, it should not be forgotten that it are lawyers who benefit mostly from an increase in court cases, whereas after lengthy and costly litigation, client satisfaction is far from assured. Cf. also WIGGER, A., NÖLKE, A. The Privatisation of EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement. *Journal of Common Market Studies*. 2007, No. 45, pp. 487–513.

⁷¹ Cf. supra n. 14, and the accompanying main text.

ric pattern might prove untenable, necessitating a full-swing harmonisation of national judicial remedies.

3.5 Other Tools and Incentives at the Supranational Level

Apart from the probing, intrinsically assertive infringement procedure, other institutionalised but less intrusive responses are thinkable to ‘tickle’ Member States that have gone astray back in line. These are thought to chime nicely with our earlier argument that positive tactics, ‘carrot’ or ‘velvet gloves’ tactics might be more conducive to a good result than sticks or iron fists.

Firstly, in combination with improved quality controls and the more expansive use of soft law advocated above, the Commission can facilitate the reception of EU rules by more intensively reviewing whether they are totally fit for purpose. In 2010, the Commission already decided to undertake such ‘fitness checks’ in four areas, and ultimately, it ought to be rolled out to all other policy areas.⁷² This endeavour received a further impetus with the ‘REFIT’ initiative in 2013, which set out concrete areas where it means to take concrete action in order to evaluate, revise, simplify and/or withdraw European laws.⁷³ The Commission undertakes other sorts of ‘preventive action’, performing impact assessments and offering assistance to Member States during implementation to anticipate problems (e.g. in the form of transposition workshops), but it is suggested here that a more comprehensive effort could be thought out. As the time-limits for the transposition of directives frequently turn out to be too optimistic, this effort should include a further inquiry on this topic, in an attempt to uncover the optimal criteria for determining the deadline.⁷⁴ Secondly, if (hard or soft) follow-up rules are essential for national public authorities to proceed with implementing the legislation at stake, the EU institutions must stick to a rigid time-schedule in issuing and/or communicating these as well, with every care being taken that the quality of those rules does not suffer as a result.⁷⁵ Lastly, new communication initiatives and targeted information campaigns may stimulate a more spontaneous observance of the rules in force. This too should help to stave off a second feedback loop, wherein the Member States are once again held responsible for defaults and deficiencies as a matter of principle, whereas with due diligence and slightly more focus, the EU institutions could just as well have prevented the incriminated practices from occurring.

⁷² See *Communication from the Commission*, supra n. 55, p. 5.

⁷³ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Regulatory Fitness and Performance (REFIT): Results and Next Steps*, COM(2013) 685 final.

⁷⁴ Cf. HAVERLAND, M., STEUNENBERG, B., VAN WAARDEN, F. Sectors at Different Speeds: Analysing Transposition Deficits in the European Union. *Journal of Common Market Studies*. 2011, No. 49, p. 286.

⁷⁵ Take e.g. *Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities*, O.J. [2009] L 302/32, which could not be fully transposed without the implementing directives adopted in July 2010, or *Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide*, O.J. [2009] L 140/114, the proper transposition of which required specific Commission guidelines that were adopted as late as March 2011.

3.6 Other Tools and Incentives at the National Level

In 1998, the Commission emphasised that the Member States had an own role to play in the process of improving the quality of legislation.⁷⁶ There are a number of other changes and innovations they could decide to introduce of their own motion, the background idea being that monitoring and control of compliance is indeed a shared responsibility of the competent European and national authorities.⁷⁷ As we have seen, the Union has adopted several plans to enhance the content and accessibility of EU law. A High Level Group of Better Regulation Experts, in which Commission and national officials confer and exchange views and best practices, is also up and running. Yet, only a few countries have put in place a system of better regulation that is as wide-ranging as that of the Commission.⁷⁸ Pursuant to their legal duty of active and sincere cooperation, it is not too far-fetched to ask Member States to undertake supplementary action and proceed to launch a dedicated programme as well.

A comparable national initiative, recently drawn up in the Netherlands, might also be usefully introduced in other parts of the EU. Translated into English, the Dutch abbreviation 'NErpe' stands for 'compliance with European rules by public entities' (Naleving Europese regels door publieke entiteiten). This regulatory framework, which was adopted in June 2012, should be read to the background of the rather dire Dutch compliance record, which can at least partly be attributed to weak coordination between the responsible public authorities.⁷⁹ The Services Directive provided a related stimulus for its development, particularly due to its high complexity, and the likelihood of multiple legal challenges and problems.⁸⁰ The objective of the NErpe is to strengthen the hold of the central authorities in The Hague over all other public sector actors that are involved, at any stage, in the implementation trajectory of European rules. In case of deficiencies, whether deliberate or inadvertent, it provides for a capacious tool-box that enables a swift (though fairly authoritarian) form of resolution. The general practise will be that a cabinet minister, sometimes after conferral with one of his equals at a different department, issues a binding instruction to the public entity concerned when it does not live up to its EU law obligations, or when it does so untimely. The entity concerned may explain itself and give its views on the matter, but if it fails to convince and the instruction is still not complied with within the time-limit specified, the required remedy shall be put in place immediately on the order of the central government.⁸¹ On the one hand, this 'power grab' ought to ensure a short-circuiting of the previous (lengthy) foot-dragging exercises and tiresome coordination conflicts. On the other, the severe impact of direct intervention, subordinating the entity concerned to a higher command, irrespective of competences specifically attributed

⁷⁶ See *Commission Report to the European Council – Better Lawmaking 1998: A Shared Responsibility*, COM(1998) 715 final.

⁷⁷ A successful initiative, shouldered by both, that cannot go unmentioned is the creation of the so-called 'SOLMIT centres' in all Member States, which aim to provide direct solution to legal problems of citizens through a direct contacting and counseling of the competent domestic authorities.

⁷⁸ For a survey of the legislative drafting rules in various Member States, see XANTHAKI, H. *supra* n. 61, pp. 660–666.

⁷⁹ On which see e.g. MASTENBROEK, E. *The Politics of Compliance. Explaining the Transposition of EC Directives in The Netherlands*. Wageningen: Ponsen & Looijen 2007.

⁸⁰ For further discussion, see e.g. WAELE, H. *The Transposition and Enforcement of the Services Directive: A Challenge for the European and the National Legal Orders*. *European Public Law*. 2009, No. 15, pp. 523–531.

⁸¹ Thus Articles 2 and 5 of the NErpe (the full Dutch text can be consulted on <<https://zoek.officielebekendmakingen.nl/kst-32157-3.html>>, last visited 10 December 2013).

to it, entails that it should be employed with extreme caution.⁸² The NERpe also rules out interference with court practise and correction of errors of judges, which appears wholly sensible in light of the vested separation of powers concept.

In line with the principle of sincere cooperation, all Member States are to make sure that they possess the means to guarantee a situation of optimal compliance. The Netherlands already possesses a generic legal framework for supervision and control in inter alia the municipal and provincial law (the ‘Gemeentewet’ and the ‘Provinciewet’), but the NERpe offers an ultimate and extremely powerful means, which could be emulated by other Member States. Belgium and Germany already have similar systems in place. In France however, the competences of decentralised authorities have expanded greatly since the 1980s, yet they are merely obliged to inform the central government of important decisions, and there exist only specialised and fairly weak control mechanisms in case of omissions or gross negligence.⁸³ The same goes mutatis mutandis for Spain, and for the United Kingdom in the post-devolution area. If they were indeed to align themselves voluntarily with the new Dutch scheme, at least in those countries, compliance with European norms might be ensured with greater vigour, and consequently, there may be much less need for top-down enforcement.

4. IN CONCLUSION: THE ROAD AHEAD

While the defects of the infringement procedure, outlined in this paper, are certainly not crippling, it is questionable whether they can be remedied in a way that makes it unnecessary to look for alternatives. The attribution of similar monitoring and sanctioning powers to other bodies and agencies would be prone to suffer from the same defects, strengthening the case for more positive tactics and bottom-up initiatives. In the preceding paragraphs, we have engaged in a (non-exhaustive) survey of several such alternatives which seem not to have received sufficient consideration yet. Their benefits may be underestimated or seen as not to outweigh the potential costs. In fact however, not that many changes would have to be made to the Union’s current legal architecture to put them in practice. At the EU level, improved quality controls for legislation can be installed rather swiftly, and the dominant approach to soft law may be tweaked in the suggested direction without much effort. The compiling of a comprehensive package to facilitate the reception of European law in the national legal order could take more time, but there are no foreseeable legal impediments. The promotion of private enforcement in the Member States is rather more tricky, for even if every potential litigant could be mobilised, judiciaries could eventually be swamped with cases, while judgments underscoring the errors, omissions or wholesale default of a Member State do not provide an automatic cure for the non-compliance (which may be persistent and difficult to bring to an end).⁸⁴ Moreover,

⁸² As might be expected, similar critiques were voiced in The Netherlands in the run-up to the law’s adoption.

⁸³ See e.g. VERHOEVEN, M. The Costanzo Obligation and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap? *Review of European Administrative Law*. 2010, No. 3, pp. 42–47.

⁸⁴ In the same vein, in some countries courts consider themselves incompetent to instruct the legislature with regard to the actions that need to be taken; see e.g. the Dutch *Waterpakt* case, discussed by Leonard Besselink. *Common Market Law Review*. 2004, No. 41, pp. 1429–1455.

in so doing, the EU would be contributing to an increased and undesirable judicialisation of society⁸⁵.

A greater awareness of the viability of the alternatives to top-down enforcement is a key priority anyhow. A special 'compliance taskforce' could be entrusted with their operationalisation, and all actions taken would naturally need to be periodically reviewed and adjusted. Even in the long run, this is unlikely to lead to full compliance, as it is impossible to obtain total control over every determinative factor. Also, legislation will always retain a certain ambiguity, public authorities will continue to make mistakes, and the deeply-rooted constitutional structure of Member States will remain a regular cause for delay. There are nonetheless still opportunities abound to advance the potential for correctly applying European rules and principles. The EU cannot afford to neglect these if its objective is seriously to realize a genuine Area of Freedom, Security and Justice; and in due time, to embrace the true meaning of that attractive, but perhaps all too boldly proclaimed notion.

⁸⁵ Compare also KELEMEN, R.D. *Eurolegalism*. Cambridge (Mass.): Harvard University Press 2011.