



# Selective Enforcement of EU Law

## Explaining Institutional Choice

Karolina Boiret

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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European University Institute  
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# ABSTRACT

The Commission's policy of selective enforcement rests on four pillars: confidentiality, bilateralism, flexibility, and autonomy. For years, the European Parliament, the Ombudsman and stakeholders have put pressure on the Commission to reform its enforcement policy in order to increase its legitimacy in the eyes of EU citizens by, inter alia, allowing complainants access to documentation from its investigations and securing their rights by means of legally-binding measures. They have sought to replace the Commission's existing discretionary model of enforcement with a new approach characterized by such standards as transparency, trilateralism, objectivity, and accountability. The Commission, however, supported by the Court of Justice, has in most part resisted these challenges, changing its policy of selective enforcement only to such a degree that does not substantially interfere with its four pillars.

This thesis seeks to explain the reasons for the Commission's commitment to the existing discretionary model of enforcement. By means of the Comparative Institutional Analysis, it is argued that the proposed reforms would distort the balance between the Commission's demand and supply sides. The Commission's capacity to enforce EU law is limited, and burdening it with new responsibilities in order to introduce transparency or objectivity to its operation would lead to the formalization of enforcement measures, increasing its administrative burden and decreasing its efficiency. It would skew its attention towards complainant-relevant violations and transform its enforcement into a vehicle for individual grievances running counter to the Commission's understanding of its enforcement function as guardian of the Treaties. The Commission's opposition to the accountability approach does not, however, mean a rejection of its demands. The EU Pilot is an example of the Commission's effort to address some of these expectations while maintaining the balance between the forces of supply and demand. Selective enforcement thus may not be as much about prioritizing cases as it is about assigning appropriate enforcement measures.





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*To my parents Barbara and Leszek*

*My husband Alexandre*

*And our son Adrian*



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# 1 Selective enforcement of EU law against Member States

This thesis offers an approach to the Commission's enforcement of EU law against Member States under Articles 17(1) TEU<sup>1</sup> and 258 TFEU<sup>2</sup> which concentrates on the policy of selective enforcement. It seeks to explain the levers behind this policy which induce the Commission to protect its discretionary powers. It adopts a broad understanding of selective enforcement which encompasses the entire process of dealing with state infractions from the elaboration of an enforcement strategy and priority criteria, through the allocation of resources and decisions on monitoring, to the choice of appropriate instruments and the actual employment of criteria. The availability and application of priority criteria and alternative and complementary instruments (e.g. the EU Pilot)<sup>3</sup> imply that a certain selection does take place within the Commission with respect to the choice of cases to pursue as a priority and the choice of the most appropriate enforcement tools. It is the existence of this 'choice' that leads me to consider the Commission's handling of infringement cases in terms of selective enforcement where the Commission's discretion plays a vital role, allowing it to not just select the cases which receive increased attention over others or instruments which are the most suitable for specific violations, but also to influence the shape of the entire enforcement process.<sup>4</sup>

This thesis seeks to demonstrate that the existence and application of the Commission's selective enforcement permitted by Article 258 TFEU is grounded in four pillars: confidentiality, bilateralism, flexibility, and autonomy. While reflecting the original approach to centralized enforcement with heavy reliance on the Commission's discretion, selective enforcement stands in contrast to contemporary expectations which revolve around such concepts as legitimacy and good administration and which can be best summarized as the accountability approach. With the European Parliament at the forefront,<sup>5</sup> pressure is put on the Commission to amend its enforcement policy and practice in order to replace the four pillars with the following counterparts: transparency, trilateralism, objectivity, and accountability (chapter 5). However, whereas the Commission's policy

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<sup>1</sup> Treaty on European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>2</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>3</sup> Commission Communication A Europe of Results – Applying Community Law, COM(2007)502, 7-9; Commission Communication Better Monitoring of the Application of Community Law, COM(2002)725, 15-16.

<sup>4</sup> Further explanation of the concept of selective enforcement is presented in section 1.1.

<sup>5</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring the Application of Union Law: 2014 Annual Report, 2015/2326(INI); European Parliament Resolution of 10 September 2015 on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring the Application of EU Law (2012-2013), 2014/2253/(INI).

of selective enforcement has evolved over the years and adapted to new challenges, the original pillars have prevailed with the Commission's and the Court's of Justice continuous commitment to protect the discretionary approach to enforcement.

This thesis proposes a model for the analysis of the Commission's centralized enforcement which puts at the forefront selective enforcement claiming that the Commission's unyielding devotion to the four pillars that sustain it can be explained by means of Comparative Institutional Analysis and, more specifically, the interaction between the forces of supply and demand. Specific limitations restrict the Commission's capacity to respond to everything that is expected of it, forcing it to make enforcement choices. These choices, lying at the core of the Commission's selective enforcement, are taken according to a set of guidelines or priority criteria and reflect the difficult compromise between the Commission's supply and demand sides. The Commission protects these four pillars because they allow it to maintain a balance between supply and demand and pursue its main objective of ensuring compliance. At the same time, the Commission resists the accountability model because it would distort this balance and transform its enforcement into a vehicle for individual grievances running counter to the Commission's understanding of its enforcement role as guardian of the Treaties. The Commission's opposition against the accountability approach does not, however, mean that it blindly rejects its expectations. The EU Pilot is an example of how it seeks to address some of these expectations while maintaining the balance between supply and demand. In the end, selective enforcement may be not so much about choosing priority cases as it is about choosing appropriate enforcement instruments.

The purpose of this thesis is to present a holistic and realist approach to the Commission's enforcement, one that goes beyond purely legal analysis, attempting to show the practical aspects of its operation and complexity and demonstrating that there is more to the Commission's enforcement choices than just arbitrary preferences. It is intended to explain that there are substantial reasons for the current shape of the Commission's selective enforcement and its unyielding commitment to its discretionary model. The thesis, therefore, concentrates on the examination of the Commission's both formal and practical capacity and limitations to better understand its supply, as well as situates the infringement procedure in the greater system of EU compliance instruments to portray the interplay with other measures and narrow down the demand that is placed on the Commission. By illustrating the interaction between the Commission's supply and demand sides, this thesis not only aims to explain its institutional choice by identifying the levers behind selective enforcement and the Commission's maintenance of the four discretion-based pillars but it also seeks to submit that supply and demand constitute an indispensable part of the Commission's functioning influencing institutional

behavior and choice, and their understanding is necessary for taking a position on issues related to the Commission's enforcement policy.

## 1.1 Concept of selective enforcement

The Commission avoids phrasing its operations in the infringement procedure in terms of 'selective enforcement' which is a concept derived solely from the academic literature.<sup>6</sup> Instead, the Commission relies on the term 'prioritization' which does not have the same definite and discerning connotation. The phrase 'selective enforcement' can, after all, be understood as having a negative undertone implying that law is enforced selectively or discriminately and suggesting that certain provisions are not enforced at all or that certain cases are overlooked. The Commission thus prefers to use the term 'prioritization' which implies that cases are divided into two groups: priority and non-priority with the latter not being avoided nor disregarded but simply dealt with secondarily.

The difference between the literature's and the Commission's perception of its enforcement practice suggests that it is a matter of debate whether this practice constitutes prioritization or selective enforcement, the substantial difference coming down to the question whether the Commission does, in fact, ignore certain violations or not. While the confidentiality of the Commission's case-handling does not allow for a conclusive determination, the existence of complaints to the European Ombudsman which challenge the Commission's determination of infringements' non-existence<sup>7</sup> suggests that we cannot reject the possibility that the Commission is sometimes dismissing certain cases. While the Ombudsman can, in principle, investigate only issues concerning the Commission's maladministration and, therefore, should not inquire into the merits of infringement complaints nor can categorically determine how substantiated was the Commission's decision to close a case,<sup>8</sup> the Ombudsman's decisions can nonetheless give a hint as to whether the Commission's closure of complaints did not, in fact, constitute dismissal. This was, for example, the case when the Commission closed an infringement complaint concerning an Irish law which did not recognize experience obtained in other Member States for the purpose of allowing foreign nationals to use the title of 'architect' without formal qualifications. The Ombudsman first made a draft

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<sup>6</sup> E.g. Valero, *Administrative Procedure in Environment Files Linked with Article 258 TFEU Proceedings: A Lawyer's Perspective*, briefing note requested by the European Parliament, 2011, 21; Rawlings, *Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement*, 2000 *European Law Journal* 6, 28; Ibáñez, *The Administrative Supervision and Enforcement of EC Law* (Hart Publishing, 1999), 231.

<sup>7</sup> E.g. Decision of the European Ombudsman closing the inquiry into complaint 332/2013/AN against the Commission (13 January 2014); Decision of the European Ombudsman on complaints 206/27.10.95/HS/UK et al. against the European Commission (29 October 1996).

<sup>8</sup> See section 5.6 and 8.1.2.

recommendation to the Commission insisting that it “should recognize that [the contested Irish provisions] are discriminatory and should recognize that the sole justification for closing the infringement complaint was that it would be disproportionate to pursue the matter.”<sup>9</sup> When this failed, she issued a critical remark stating that “the Commission erred by closing the complainant’s infringement complaint without fully examining whether [the contested Irish provisions] are discriminatory.”<sup>10</sup> While, as will be elaborated in section 8.1.2, these Ombudsman’s decisions went a little too far with disputing the Commission’s assessment of state (non-)compliance, stakeholders’ complaints like this one indicate that the Commission may sometimes dismiss cases and, as this thesis seeks to demonstrate, we should not expect the Commission to deal with every case of identified non-compliance either (chapters 7-8). However, coming back to the problem of terminology, complaints to the European Ombudsman imply that some degree of dismissal does take place within the Commission even if just because its involvement would be disproportionate to the violation and there are other more suitable instruments available to individuals.<sup>11</sup> However, the fact that the Commission has, for example, launched the EU Pilot procedure to conclude that there was no infringement indicates that it did not ignore the case in its entirety but it does not guarantee that the infringement was not dismissed in the end. In such situations, the Commission claims a lack of infringement and the complainant claims to the contrary but, since the case does not find its way to the Court of Justice, we cannot verify the correctness of either side.<sup>12</sup>

What, however, further suggests that the Commission does, in fact, sometimes overlook certain cases is its - identified in the literature<sup>13</sup> - practice of avoiding the pursuit of violations committed by national judiciaries, only in recent years the Commission taking a more proactive stance in that area.<sup>14</sup> While the data on infringement proceedings does not allow to make decisive conclusions regarding the Commission’s handling of state violations,<sup>15</sup> the analysis of CJEU’s infringement judgments for the years 2000, 2005 and 2010 shows that only 1 on 285 cases had to do with a violation by national courts (and still indirectly),<sup>16</sup> and that specific case constituted one of the

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<sup>9</sup> Draft recommendation of the European Ombudsman in his inquiry into complaint 503/2012/RA against the Commission (7 May 2013).

<sup>10</sup> Decision of the European Ombudsman closing the inquiry into complaint 503/2012/DK against the European Commission (9 June 2015).

<sup>11</sup> E.g. private enforcement before national courts. The discussion on the decentralized enforcement mechanism and its availability and appeal to stakeholders can be found in chapter 6.

<sup>12</sup> E.g. Decision of the European Ombudsman closing the inquiry into complaint 332/2013/AN against the Commission (13 January 2014).

<sup>13</sup> Schermers, Waelbroeck, *Judicial Protection in the European Union*, 6th ed. (Kluwer Law International 2001), 630.

<sup>14</sup> Violations by national courts are discussed in section 3.4.2.

<sup>15</sup> Empirical research and its limitations are discussed in section 1.4.4.

<sup>16</sup> Judgment in *Commission v Italy*, C-129/00, EU:C:2003:656.

few which marked a mild shift in the Commission's approach. It can be deliberated whether the Commission does not use other informal methods of addressing such violations (e.g. consultation, information) but the lack of data on such practices prevents us from finding evidence to support this. On the other hand, however, as will be shown at the end of this thesis in section 8.5, the Commission does nowadays give the impression of seeking to address as many state infractions as it can and, for that purpose, creates new enforcement tools that allow it to respond to the existing demand with its limited supply.

The result of this conflict of opinion is such that, while the Commission's practice seems to nowadays move away from dismissing state violations, there is no way to categorically ascertain that such incidents no longer take place. However, whereas the question of the Commission's discretion to overlook certain cases will be the subject of section 2.2.1, deciding unequivocally to what extent the Commission's enforcement practice involves dismissal is not crucial for this thesis as the definition of selective enforcement adopted here includes more than just this frowned-upon practice.

The decision to approach the Commission's enforcement practice in terms of selective enforcement is not just dictated by the probability that it does overlook certain cases but it is also intended to underline the freedom of choice present in the Commission's operation and the process of selection that constitutes its integral part. To explain, the concept of selective enforcement adopted in this thesis has two sides. On the one hand, it refers to the 'selectivity' in the pursuit of state violations whereby the Commission on the basis of more-or-less predetermined priorities chooses which cases to engage in as a priority and which to leave for later (or potentially ignore). This is the most palpable meaning and it is closely intertwined with the application of the infringement procedure. On the other hand, however, selective enforcement can also be understood as 'selectivity' in the choice of instruments. Having a number of enforcement tools at its disposal, the Commission chooses which measures are suitable for which violations and does so on the basis of each instrument's estimated area of effectiveness as well as on specific traits and circumstances of each violation.

The Commission's selective enforcement is thus taken in this thesis to mean that it not only determines the priority of different categories of state violations but also attributes them appropriate enforcement instruments, conducting a selection both in theory and practice between cases and tools. Selective enforcement is seen here as a strategy by means of which the Commission decides the 'fate' of detected violations, arranging them in the order of importance and ascribing them specific formal and informal enforcement tools that rest within the sphere of its direct control. And since it cannot be denied that this process must involve some degree of overlooking, dismissing or forgoing certain

violations, denoting this strategy as selective enforcement rather than just prioritization seems the more appropriate choice.

Furthermore, selective enforcement as seen in this thesis does not just come down to the Commission's practice. It is also its policy. It does not only involve the Commission prioritizing its cases in its day-to-day work and the choice among alternative compliance measures but it also includes it setting its enforcement agenda and defining its general strategy which is broken down into individual guidelines and later applied in practice. It is about the allocation of resources with respect to monitoring and supervision which already involves a great measure of selection and choice, only later followed by the stage of actual prioritization of detected violations where the future of each individual case is determined, and ending with the phase of the execution of taken decisions.

The concept of selective enforcement assumed in this thesis does, however, have its limitations. Although it includes processes that take place within the European Commission with respect to violations that physically have not yet occurred like the setting of the enforcement agenda or the prioritization in the allocation of monitoring resources, it is ultimately concerned only with post-violation situations. In other words, 'selective enforcement' is taken to understand the Commission's strategy and conduct directed against state violations after they have taken place, and it does not include preventive action aimed at helping Member States avoid future, potential violations. While preemptive instruments do play a role in the Commission's post-violation enforcement and they will be addressed whenever necessary, the concept of selective enforcement assumed in this thesis refers to measures which the Commission employs to deal with existing infractions. This does not mean, however, that selective enforcement is considered to be just about 'enforcement' the way it is understood by political science.

### 1.1.1 Enforcement and management

Enforcement and management are two approaches produced by the political science literature on international legal systems and their effectiveness concerned with the issue of sources of (non-)compliance. Depending on the understanding of those sources, each approach suggests different strategies to address state non-compliance and, until not so long ago, the supporters of both approaches considered the two sides contradictory.<sup>17</sup>

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<sup>17</sup> Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 2002 International Organization 56.

The enforcement approach<sup>18</sup> assumes that states make cost-benefit analysis with respect to their international duties and when the costs of compliance offset the benefits, they choose to defect. The majority of states' infractions are, therefore, the result of their intentional choice and coercive measures constitute the most appropriate means of inducing compliance. The idea behind this reasoning is that signing an international agreement and actually obeying its stipulations are two distinct situations which can draw different behaviors from states. It is one thing to see the benefit in signing a treaty, and yet another to see the benefit in observing every of its provisions. As a result, states create and adhere to international agreements to achieve a particular gain and their observance of such agreements depends on how much of that gain they can achieve with as little effort. Enforcement is, therefore, perceived as a means of guaranteeing state conformity against intentional violations, allowing parties to an agreement to benefit from its stipulations. It encompasses two notions: monitoring and sanctions. Monitoring allows for the identification of defecting states while sanctions increase the costs of non-compliance. With an enforcement system in place, states are more motivated to respect their obligations as they weigh the benefits of defecting with the costs of sanctions. Consequently, enforcement theorists insist that, since the majority of state infractions are intentional, coercive measures constitute the most effective means of addressing non-compliance.

The managerial theorists,<sup>19</sup> on the other hand, assume that states have a natural inclination towards compliance because they strive for efficiency, rules and the furthering of commonly-agreed interests. As a result, the majority of international violations are not intentional but they mostly stem from unclear norms as well as political and economic capacity limitations. Not all legal norms are clear, precise and easy to apply. Some provisions can be so ambiguous that they lead to contradictory interpretations. States can also suffer from insufficient financial or human resources or they may lack the means to compel their private or even public entities to comply. Consequently, since managerial theorists believe that the majority of state infractions are unintentional, then they do not consider coercive measures an effective method of addressing non-compliance. They rather rely on managerial techniques which, instead of punishing, are aimed at problem-solving by concentrating on three methods: capacity-building, interpretation and transparency. Also, they perceive the purpose of international dispute settlement mechanisms as serving not the penalization but the clarification of ambiguous and complicated norms and, assuming national governments' natural tendency to comply, they believe that for those mechanisms to achieve their goals, they do not have to constitute formal and obligatory legal procedures but can be limited to informal and non-binding mediation.

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<sup>18</sup> See Olson, *The Logic of Collective Action* (Harvard University Press, 1971); Downs, Rocke, Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 1996 International Organization 50.

<sup>19</sup> See Chayes, Chayes, *Compliance with International Regulatory Agreements* (Harvard University Press, 1995).

Although initially both approaches were seen as contradictory, they were eventually reconciled when it was proven that they can be merged into one system and have a higher success rate than separately, the EU being the flag example of such fusion.<sup>20</sup> The distinction, however, remains noteworthy because it underlines different categories of tools that can be used to deal with state violations: coercive and problem-solving. It also allows to differentiate instruments between those meant to address violations that have already taken place and those that are intended to prevent future infractions. Perceived in this light, it can be said that managerial techniques are present in both instances where some are intended to prevent state non-compliance from occurring (e.g. capacity-building) and others are meant to address it once it occurred (e.g. interpretation clarifications). Enforcement techniques, on the other hand, are mostly concerned with detecting and pursuing already existing violations and, therefore, they are utilized with respect to infractions that have already taken place. Sanctions could be considered also a preventive method because they are not only intended to punish but also to deter but, at the end of the day, they are an instrument that is triggered only once a violation took place.

The notion of selective enforcement assumed in this thesis does, therefore, have a lot to do with the concept of 'enforcement' the way it is understood by political scientists. It does not only refer to post-violation situations but it also involves such notions as monitoring, prosecution, coercion and, ultimately, sanctions present in Article 260 TFEU. However, as will be shown further, the Commission's selective enforcement is likely more about managerial techniques than coercive considering that the entire pre-litigation stage of Article 258 TFEU is a managerial method aimed at achieving an amicable solution.<sup>21</sup> Moreover, since selective enforcement is all about prioritization and the choice of instruments, a number of informal managerial measures constitute an alternative or complement to the use of the infringement procedure. As a result, the Commission's selective enforcement does not only include the essence of 'enforcement' but it also, or even mostly, involves techniques of managerial nature. This, however, suggests a problem of terminology.

### 1.1.2 Enforcement, management and compliance

If selective enforcement combines both, enforcement and managerial concepts, then it would seem that it should not be entitled selective '*enforcement*' but something else entirely; something to do with 'compliance'. The difficulty lies in the fact that identical terms have diverging meaning in

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<sup>20</sup> Cremona, *Introduction*, in Cremona, *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), xi; Conant, *Compliance and What EU Member States Make of It*, in Cremona, *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 8; Tallberg (2002), 609.

<sup>21</sup> Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press, 2012), 86-88.



different disciplines. While legal research refers to the problem of combating state violations mostly in terms of enforcement without any large differentiation between different categories of instruments, political scientists, influenced by their distinction between managerial and enforcement approaches, perceive the concept of enforcement as denoting mostly coercive measures as opposed to managerial. For that reason, political scientists prefer to use the term 'compliance' which they - most of the time - consider to have a more general application, including not only enforcement but also managerial strategies.<sup>22</sup> 'Compliance' can be understood simply as conformity of state behavior and 'enforcement' as a process "by which the law is made effective and by which actors are compelled to comply with the law."<sup>23</sup>

Following this line of thought, it does seem that the concepts of enforcement and compliance have differing connotations. Whereas on the outset they both can portray the process of bringing violations to a state of conformity, they do ultimately appear to signify different types of that process. Enforcement, in line with the presented enforcement approach, feels rather a negative notion because it concentrates on the fact that a violation took place and describes the act of ensuring that the violation is remedied by means of formal and penalizing measures. It approaches the problem of violations from the perspective of the authority and, although not necessarily a key feature, it rings of resistance and intentionality on the part of the violator who has to be forced into obedience, compelled to respect the law by the said authority. Compliance, on the other hand, describes more a positive state of affairs without automatically leaping to the conclusion that a violation took place and that it was intentional. It approaches the issue from the perspective of the violator and concentrates rather on the goal to be achieved, the objective of conformity which is to be attained by available means, whether they are coercive or not. While enforcement revolves around the key concepts of laws, obligations and sanctions, compliance has a more general undertone, including in its scope all situations of entities doing what is required of them, whether they are compelled to it or not and whether it is preemptive or reactive.

The distinction between the notions of enforcement, management and compliance does have its benefits, especially in the analysis of the wide assortment of tools available to combat state violations. Clearly, since the European Union's network of measures includes both enforcement and managerial strategies, this network should be considered only in terms of a system of compliance, and not just a system of enforcement. The political scientists' understanding of the concept of compliance

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<sup>22</sup> Cremona (2012), x.

<sup>23</sup> Nollkaemper, *The Role of National Courts in Inducing Compliance with International and European Law – A Comparison*, in Cremona, *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 160-161.

is, therefore, useful to describe measures of differing nature but with the matching purpose of achieving conformity. On the other hand, however, it is difficult to agree with the political scientists' rigid understanding of the concept of enforcement.

Although the term 'enforcement' seems to have quite a negative and constricted connotation when contrasted with the notion of compliance or with the overall managerial approach, it is not necessary to narrow down its definition only to the concepts of intentionality, coercion and sanctions, rigidly upholding the somewhat outdated distinction. Enforcement can also be perceived as having a broader connotation and applying to all actions taken by the Commission to remedy an infringement situation. As Harlow and Rawlings note, the concept of enforcement can be understood as "all activities designed to ensure appropriate compliance with legal norms"<sup>24</sup> or "techniques available to ensure that implementation takes place."<sup>25</sup> Instead of binding it to the assumption of intentionality and restricting it only to coercive measures, the understanding of enforcement can rather be based on the status of the violation to be addressed, that is whether it has occurred or not. With such a distinction in mind, the Commission's conduct aimed at avoiding future violations can be considered in terms of prevention while its actions aimed at bringing existing violations to an end can be considered in terms of enforcement. Such an understanding implies that - for the purpose of definition - the measure used or the violating organ's mindset do not so much matter as the factual circumstance of the violation's occurrence. In other words, it is the very fact that the Commission acts against an existing violation that denotes it as 'enforcement' irrespective of whether the measures applied are coercive or problem-solving. By acting, the Commission aims to 'enforce' fulfillment of EU obligations even if it does so by means of dialogue and technical assistance. In a way, certain managerial techniques are endorsed by the concept of enforcement.

Following this reasoning, the entirety of the infringement procedure's operation can be perceived in terms of 'enforcement'.<sup>26</sup> Furthermore, selective enforcement which the Commission employs in its practice can also remain an act of 'enforcement' as it is a method designed to deal with violations that have already taken place even though many of the tools used and conjectures made are managerial in nature. Overall, selective enforcement is assumed in this thesis to signify the reactive process intended to deal with existing state violations by means of either coercive or problem-solving measures, which is characterized by prioritization in the Commission's caseload and in the choice of applicable instruments.

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<sup>24</sup> Harlow, Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), 172.

<sup>25</sup> Rawlings (2000), 7 footnote 14.

<sup>26</sup> Koops, *EU Compliance Mechanisms: The Interaction Between the Infringement Procedure, IMS, SOLVIT and EU-Pilot*, 2011 Amsterdam Centre for European Law and Governance, Working Paper Series 8, 5.

## 1.2 European system of compliance measures

The European Union's system of compliance measures with its preventive and reactive strategies is what makes it exceptional in the international sphere. As Conant summarizes, there is a unison among most political scientists with respect to the remarkable effectiveness of the EU compliance network when contrasted with the international regime to the point where the EU legal system appears to resemble more national legal orders than international.<sup>27</sup> The apparent success of the EU compliance system is not only attributed to the variety of existing measures but also to the Commission's and the Court's of Justice ability to compel Member States to respect their obligations. The supranational element of the EU compliance system makes it more successful than systems where states themselves are equipped with monitoring, prosecuting or even enforcing functions which leaves them reluctant to challenge each other on a regular basis.<sup>28</sup> In the EU, however, not only a Treaty mechanism is set up to target almost all state violations of EU law but it is also successfully utilized by supranational institutions.

Upon the creation of the European Economic Community,<sup>29</sup> the old Article 169 EEC (new 258 TFEU) constituted the 'normal' infringement procedure and, although unpopular and shunned, it was the main official mechanism applicable to almost all cases of state non-conformity with the exception of the 'dead letter' Article 170 EEC (new 259 TFEU), a few sectoral compliance measures relevant only for specific, narrowly-designed issues like state aid (article 108(2) TFEU) and the widely used informal negotiations method.<sup>30</sup> Since those initial years of early integration, Europe has witnessed a steady growth of the EU compliance system albeit mostly by means of either Court-made or soft-law measures. And although the infringement procedure has retained its general application, experienced a considerable growth in case-law and coercive effect and it can still be considered the main EU compliance mechanism,<sup>31</sup> it no longer constitutes a dominating formalized measure to effectively combat the multitude of state violations of European law. In fact, the EU legal system is nowadays so rich in an assortment of various formal and informal compliance methods that it not only includes measures of both, enforcement and managerial quality, but it also operates on as many as three

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<sup>27</sup> Conant (2012), 1.

<sup>28</sup> Tallberg (2002), 611.

<sup>29</sup> Treaty establishing the European Economic Community (1957).

<sup>30</sup> Schermers, Waelbroeck, (2001), 595.

<sup>31</sup> Wilman, *Private Enforcement of EU Law before National Courts* (Edward Elgar Publishing, 2015), 4; Prete, Smulders, *The Coming of Age of Infringement Proceedings*, 2010 *Common Market Law Review* 47, 10.

different levels: from above, from below and horizontally.<sup>32</sup> The category ‘from above’ refers to centralized instruments operated by the Commission such as the infringement procedure, the EU Pilot or confidential negotiations. The category ‘from below’ refers to decentralized measures which, in most part, function at the national level via stakeholders and without the Commission’s active participation. Finally, the category of horizontal measures mostly involves Article 259 TFEU where Member States can challenge each other’s performance of EU obligations before the Court of Justice.

Such a multi-tier structure proves that the enforcement and managerial approaches need not be contradictory and that they can function together in one setting.<sup>33</sup> It also makes the European Union an example of an international organization which is particularly effective in terms of combating state violations.<sup>34</sup> Most of all, however, it demonstrates that the Commission’s enforcement cannot be analyzed and evaluated separately from remaining compliance instruments. Whether they are coercive or problem-solving, preventive or reactive, centralized or decentralized, they influence the Commission’s conduct where its selective enforcement not only includes the use of some of these measures but it is also impacted by mechanisms that remain outside the Commission’s control. As a result, while this thesis concentrates on the Commission’s selective enforcement understood as centralized and reactive management of state violations, it does not deny the influence decentralized measures have on the Commission’s enforcement policy. Nor does it diminish the importance that preventive instruments have on state compliance. For those reasons, it is necessary to present key measures that make up the EU compliance system in order to provide the grounds for further analysis.

### 1.2.1 Infringement procedure’s particular nature

Article 258 TFEU<sup>35</sup>

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”

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<sup>32</sup> Cremona (2012), xli.

<sup>33</sup> Tallberg (2002), 632.

<sup>34</sup> Conant (2012), 6; Tallberg (2002), 609.

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The centralized enforcement mechanism constitutes the classic, well-known, wide-ranging and almost all-purpose enforcement instrument in the EU. It is a measure operating 'from above' because it is exercised by the European Commission and the Court of Justice. It is also a Treaty-based enforcement instrument (Article 258 TFEU) and consists of the pre-judicial phase where the Commission seeks to persuade Member States to voluntarily comply, as well as the judicial phase where the case is referred to the Court of Justice that issues a declaratory judgment.

The centralized enforcement mechanism is, however, considered in this thesis as encompassing not just the infringement procedure under Article 258 TFEU but also the second procedure under Article 260 TFEU<sup>36</sup> because, whilst the former constitutes the core of the mechanism where all the important decisions are made and where the substance of selective enforcement takes place, the later forms nothing more than a tool of back-up enforcement, an aftermath of initial decisions, albeit a powerful one with severe consequences and a strong deterrent effect. As the Court of Justice declared, "[t]he procedure established under [Article 258 TFEU] is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct [...], while the procedure provided for under [Article 260 TFEU] has a much narrower ambit, being designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations."<sup>37</sup> Even though separate in legal terms, the second procedure is de facto an extension of the first and its specific, penalizing nature strengthens the mechanism as a whole, adding another layer to the operation of the first.

What is notable about Article 260 TFEU is that it brings sanctions into the operation of the centralized enforcement mechanism, strengthening the coercive aspect of it. However, as Andersen ascertains, the infringement procedure is, in fact, more about problem-solving than coercion. Although the judicial stage of the procedure does, in most part, carry the mark of a coercive measure, Article 258 itself is construed in a way to delay Court involvement. It strengthens the pre-litigation stage, awarding the Commission extensive discretionary powers to choose the most suitable means. As a result, the pre-litigation phase is all about the interpretation of problematic rules, bilateral discourse and assistance in their implementation with the assumption that Member States violate EU law unintentionally and are usually willing to remedy their errors, while judicial proceedings are seen as the Commission's last resort. This distinction is also visible in the Commission's attitude towards

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<sup>36</sup> More on Article 260(2) TFEU in Kilbey, *Financial Penalties under Article 228(2) EC: Excessive Complexity?* 2007 Common Market Law Review 44; Theodossiou, *An Analysis of the Recent Response of the Community to Non-Compliance with Court of Justice Judgments: Article 228(2) EC*, 2002 European Law Review 27; Bonnie, *Commission Discretion under Article 171(2) EC*, 1998 European Law Review 23.

<sup>37</sup> Judgment in *Sweden v API*, C-514/07 P, C-528/07 P, and C-537/07 PS, EU:C:2010:541, paragraph 119.

Article 258 TFEU which it openly perceives as a cooperative mechanism designed to achieve voluntary compliance and where Member States are offered multiple avenues of remedying their infractions in an atmosphere of dialogue and confidentiality.<sup>38</sup> This is confirmed by the statistics of the Commission's activity where the majority of cases are closed before they reach the Court. For example, in 2015 as many as 669 infringement cases were closed during the pre-litigation procedure while the CJEU delivered 25 judgments under Article 258 TFEU.<sup>39</sup> In 2014, 781 cases were closed and 38 judgments delivered.<sup>40</sup>

Further, even the judicial part of the infringement procedure can be considered to have a strong managerial quality. In a way, it is a forum for interpretation where the judgment is declaratory in nature (with one exception)<sup>41</sup> and relies on the assumption that Member States will adhere to it voluntarily.<sup>42</sup> It clarifies the law and establishes precedence for future, similar cases, thus contributing to greater clarity in the understanding of various intricacies of EU obligations.<sup>43</sup> At the same time, it strengthens the Commission's bargaining position in the pre-litigation stage, putting additional pressure on Member States to find amicable solutions before their infractions are made public and subjected to judicial review.<sup>44</sup> Similarly, the 'naming and shaming' of Member States by means of press releases, scoreboards and annual reports on state infringements also has an effect on their performance.<sup>45</sup>

The centralized enforcement mechanism is therefore "primarily based on non-coercive problem-solving."<sup>46</sup> Coercion takes place only with respect to repetitive infringements where the Court has the power to impose sanctions or with respect to the implementation of directives. At the same time, sanctions complement and strengthen the managerial methods by constituting a threat that Member States have to take into account during earlier stages of friendly, problem-solving dialogue.<sup>47</sup> The infringement procedure is thus constructed in such a way as to assume Member States' lack of intentionality in violating EU law. Sanctions, on the other hand, fill in the gap left by the

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<sup>38</sup> Andersen (2012), 86-95.

<sup>39</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 25.

<sup>40</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring the Application of EU Law (2014), COM(2015)329, 15.

<sup>41</sup> Article 260(3) TFEU: non-notification of directives adopted under a legislative procedure if the Commission applies for sanctions.

<sup>42</sup> Andersen (2012), 86-95.

<sup>43</sup> Tallberg (2002), 618.

<sup>44</sup> Andersen (2012), 86-95.

<sup>45</sup> Tallberg (2002), 617.

<sup>46</sup> Andersen (2012), 3.

<sup>47</sup> *Ibid.*, 117-123.

managerial approach by constituting an answer to those state infractions which were committed intentionally or where Member States unnecessarily delay.<sup>48</sup>

Despite the fact that much of the infringement procedure can be explained by means of the managerial theory, it can be ultimately considered a mechanism of enforcement, the primary objective of which is to ensure compliance in situations where it is lacking. Even to Andersen, the concept of 'enforcement' comprises all of the Commission's actions under Articles 258 and 260 TFEU regardless of the nature of employed measures.<sup>49</sup> According to the author, the infringement procedure is simply a "managerial type of enforcement."<sup>50</sup>

### 1.2.2 Centralized compliance measures

What is typical for the centralized enforcement mechanism is its very broad application that covers a large portion of EU law and which, together with the Commission's watchdog function, accounts for its special place in the EU compliance system as the general enforcement procedure.<sup>51</sup> However, this is not the only formalized and codified measure that operates 'from above.' While chapter 2 of the TEU concerning the Common Foreign and Security Policy is largely excluded from the CJEU's jurisdiction and thereby from the scope of the infringement procedure, there is a number of smaller derogations which also do not fall under Article 258 TFEU but which have their own infringement mechanisms established. State aid (Article 108(2) TFEU), obligations of national central banks (Article 271 TFEU), derogations from measures for the approximation of laws on internal market (Article 114(9) TFEU) or derogations from fundamental EU rules (Article 348 TFEU) all constitute areas which are subjected to their own special, simplified infringement procedures where the Commission, Member States or even the Governing Council of the European Central Bank perform the function of watchdog. Similarly, EU regulations and directives can also establish special procedures applicable to violations of their provisions in derogation of the centralized enforcement mechanism.<sup>52</sup> What is typical of these sectoral measures is that they constitute exceptions to the use of the main infringement procedure and do not take part in the Commission's selective enforcement. They have strictly defined areas of application that do not overlap with Article 258 TFEU and thus cannot be used

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<sup>48</sup> Ibid., 222-223.

<sup>49</sup> Ibid., 39.

<sup>50</sup> Ibid., 122.

<sup>51</sup> Wilman (2015), 4.

<sup>52</sup> E.g. Article 7 of Council Regulation (EEC) No 2409/92 of 23 July 1992 on Fares and Rates for Air Services, OJ L 240, 24.8.1992, 15-17.

interchangeably with the main infringement procedure. For that reason, they remain outside this thesis's area of analysis.

The majority of the remaining compliance measures operating from above can be considered to be centralized in nature for they essentially remain within the hands of the European Commission or are coordinated by it. They are also mostly problem-solving because they seek to aid instead of punish. Within this group, a number of reactive tools can be distinguished which are meant to respond to already existing violations by means of dialogue instead of coercion. These are mostly established by the European Commission in soft-law measures with the intention of creating a set of tools complementary to the centralized enforcement mechanism: tools which are better equipped to respond to specific problems and demands. These include not only the general practice of informal dialogue tagged by the Commission as "overall negotiations" with Member State's officials in cases of frequent and repetitive violations in particular policy areas, but also package meetings where 'packages' of cases are discussed and solved with relevant authorities outside legal proceedings. Such measures are designed with a clear purpose of explaining, educating and solving problems in policy areas which prove difficult for Member States to implement.<sup>53</sup> They are also useful instruments for the Commission to learn more about state performance problems and about areas to potentially concentrate its monitoring powers on.<sup>54</sup>

The bulk of the Commission's enforcement is, however, held nowadays by a mechanism launched in 2008 which constitutes something of a mix between the formal and informal solution, centralized and decentralized method: the EU Pilot. Initially envisaged as an instrument for complainants to resolve their compliance issues with Member States with little involvement from the Commission, it has eventually become a regular pre-infringement procedure which the Commission utilizes in almost all violation cases (with few exceptions).<sup>55</sup> It is shorter and less formalized than Article 258 TFEU procedure but also more formalized than alternative problem-solving, reactive instruments, involving a series of procedural steps and short deadlines. Despite stricter rules, it remains bilateral and confidential in nature and is aimed at finding a satisfactory solution in a friendly, cooperative setting. Together with the remaining post-violation and problem-solving tools, it constitutes an alternative to the use of the infringement procedure whereby the Commission decides to help instead of prosecute. A choice between such alternatives is what selective enforcement is precisely about.

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<sup>53</sup> Commission Communication Better Monitoring, COM(2002)725, 15-16.

<sup>54</sup> Harlow, Rawlings (2014), 177.

<sup>55</sup> Commission Communication A Europe of Results, COM(2007)502; EU Pilot Evaluation Report, COM(2010)70; Second Evaluation Report on EU Pilot, COM(2011)930.



Setting reactive measures aside, the Commission - understanding that violations sometimes stem from the lack of foresight on the part of drafters and politicians who produce unclear and complex rules - has also taken up a commitment to seek the prevention of state violations already at an early stage of the EU proposals' development. Thus the choice of legal instruments, implementation options, their implications and, finally, the content and formulation of legal norms are nowadays considered from the point of their "clarity, simplicity, operability and enforceability."<sup>56</sup> Undoubtedly, the Commission is not always successful in yielding expected results but it at least aspires to limit the likelihood of non-compliance by appropriately shaping legal measures themselves. A lot of managerial work is, however, done once the instrument is adopted. When an EU measure is expected to result in difficulties, the Commission employs a number of preventive techniques in order to facilitate Member States' conformity. It produces explanatory guidelines, sets up expert group meetings on transposition, initiates administrative cooperation and has Member States establish appropriate contact points.<sup>57</sup> Sometimes, it publishes transposition and implementation plans (TIPS) which anticipate main problems and risks that may lead to delays in transposition and offer solutions to lessening their effect.<sup>58</sup> The Commission asks for correlation tables where Member States explain how each provision of an EU directive is transposed into national legal systems which helps it monitor compliance and identify problems. Different economic funds (e.g. LIFE, ESF) exist in order to facilitate Member States' adjustment to EU policies in regions which suffer most from capacity limitations.<sup>59</sup> Transnational agreements are used in order to ease new Member States' accession by granting them additional time to adjust their laws to EU policies when either there is a big disparity in regulation or when there is a serious difference in policy interests. A network of coordination centers and contact points is meant to improve national administrations' knowledge of EU rules.<sup>60</sup> The Internal Market Scoreboard - being a "statistical tool" that allows Member States to monitor their implementation of Internal Market rules - creates peer pressure among governments.<sup>61</sup> Finally, the Commission has launched the Regulatory Fitness and Performance Program (REFIT) with the intention of ensuring that legislation is "fit for purpose". It involves the process of examining the entire EU acquis in order to identify redundant or needlessly complex rules and repeal or simplify them.<sup>62</sup>

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<sup>56</sup> Commission Communication A Europe of Results, COM(2007)502, 5.

<sup>57</sup> *Ibid.*, 5.

<sup>58</sup> Harlow, Rawlings (2014), 178.

<sup>59</sup> *Ibid.*, 177.

<sup>60</sup> Tallberg (2002), 615.

<sup>61</sup> Harlow, Rawlings (2014), 175.

<sup>62</sup> Commission 31st Annual Report on Monitoring the Application of EU Law (2013), COM(2014)612, 13.

Such different preemptive measures clearly involve a degree of selection on the part of the Commission which decides which legal provisions can cause implementation problems and which areas require its assistance. This, however, involves a different type of prioritization than selective enforcement and, due to its preventive nature, is not included in the considerations of this thesis. Nonetheless, it is worth mentioning that preemptive instruments require the use of the Commission's human and financial resources which can have an impact on the resources devoted to enforcement. Most of all, however, such preemptive methods diminish the number of non-compliance problems and decrease the amount of violations left for reactive instruments to address. They treat 'causes' and not effects of non-compliance.

Finally, while remaining outside the scope of present analysis, it is necessary to mention Article 7 TEU special "preventive and sanctioning mechanisms" which are intended to deal with breaches of fundamental values under Article 2 TEU. While never used, recent events in Poland and Hungary with euro-skeptical governments disregarding core democratic standards, prompted the European Commission to adopt in 2014 a new EU Framework to Strengthen the Rule of Law.<sup>63</sup> A managerial type of instrument based on dialogue and negotiation was thus created, designed to deal with "emerging systemic threats" to the rule of law in Member States and intended to precede Article 7 TEU coercive and sanctioning mechanisms with the view of amicably resolving the crisis beforehand. Both the framework and Article 7 TEU remain, however, outside this thesis's analysis for they deal with situations which, as the Commission puts it, "fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law."<sup>64</sup>

### 1.2.3 Horizontal compliance measures

EU law contains provisions where Member States can bring actions against other Member States for failures in their EU obligations, for instance with respect to derogations from measures for the approximation of laws on internal market under Article 114 TFEU. Such horizontal procedures resemble classic dispute settlement instruments where it is the contracting parties that monitor each other's respect for obligations. The main EU horizontal mechanism constitutes, however, the procedure under Article 259 TFEU where Member States can initiate infringement proceedings before the Court of Justice in all cases which do not fall under any special derogations, provided they had informed the Commission beforehand and given it time to act. The scope of application of this

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<sup>63</sup> Commission Communication A New EU Framework to Strengthen the Rule of Law, COM(2014)158.

<sup>64</sup> *Ibid.*, 5.

procedure is identical to that from Article 258 TFEU with the difference that it is Member States that go before the Court of Justice. But unlike many other international organizations (e.g. WTO) where it is only natural that governments resolve their problems among themselves and where such state-v-state solutions are either the only existing or the most common instruments, in the European Union it is a mechanism barely employed at all. It did happen that one Member State instituted proceedings against another<sup>65</sup> but these occurrences are so rare that they render the procedure almost a dead letter.<sup>66</sup> As Tallberg explains, it is easier for Member States to rely on the European Commission to do the job for them as the neutral party in the conflict, thus avoiding any potential diplomatic problems or retaliation, or simply escaping litigation costs.<sup>67</sup> The effect, however, is such that the bulk of state violations is left for the Commission to tackle. By not using Article 259 TFEU, Member States leave more infractions un-remedied, increasing the demand for compliance tools and the Commission's enforcement.

#### 1.2.4 Decentralized compliance measures

What is distinctive about the EU legal order is that Member States fall under the scrutiny of their citizens, and the way they chose to deal with their obligations is subjected to control 'from below' that is executed by means of instruments operating at the national level. As will be demonstrated in chapter 6, the formulation of the principles of direct effect<sup>68</sup> and primacy<sup>69</sup> transformed the preliminary reference procedure (Article 267 TFEU) from a mechanism of interpretation into a mechanism of enforcement, allowing litigation before national courts raising issues of state non-conformity to become - what is now called - the decentralized enforcement mechanism. Since domestic courts have at their disposal sanctions and other coercive tools and are capable of enforcing their own rulings, the decentralized mechanism constitutes a measure of EU enforcement. It rests on the shoulders of individuals and national courts which, although burdened with weaknesses and limitations that are unfamiliar to the European Commission, still presents an entirely different avenue of enforcement against Member States, discovering violations that are likely to escape the Commission's attention. It should be underlined, however, that as much as the core of this mechanism operates on the national level, the fact that it can involve the Court of Justice by means of the preliminary reference procedure gives it a degree of uniformity and brings the involvement of central

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<sup>65</sup> E.g. Judgment in *United Kingdom v Spain*, C-145/04, EU:C:2012:630; Judgment in *Hungary v Slovakia*, C-364/10, EU:C:2006:543.

<sup>66</sup> Cremona (2012), xli-xlii.

<sup>67</sup> Tallberg (2002), 616.

<sup>68</sup> Judgment in *Van Gend en Loos*, 26/62, EU:C:1963:1.

<sup>69</sup> Judgment in *Costa v. ENEL*, 6/64, EU:C:1964:66.

institutions, anchoring itself in reasoning that is performed ‘from above’. The Court’s involvement also brings a managerial aspect to the mechanism’s functioning by having the effect of interpreting the law, clarifying its stipulations, creating precedent and thus reducing the possibilities of non-intentional violations.<sup>70</sup>

The scope of application of the decentralized enforcement mechanism is very broad and, to a great extent, it overlaps with the infringement procedure, producing the strongest counterbalance to Article 258 TFEU. It is a mechanism that is capable of effectively combating at least some types of state violations and, therefore, it diminishes the demand for the Commission’s enforcement which will be the subject of chapter 6.

Another measure of enforcement that operates ‘from below’ can be found in the principle of state liability construed by the Court of Justice in its case-law<sup>71</sup> that allows individuals to demand compensation before national courts for damages suffered due to state non-compliance. Although considered a separate instrument, the fact that it rests as much on individuals, domestic courts and national procedures as the decentralized enforcement mechanism and that it has the same effect of questioning state conformity implies that, although primarily aiming only to compensate, it can be included in the scope of this mechanism. After all, it ultimately serves to punish Member States for their existing violations, encouraging them to remedy their failures and dissuading them from committing infractions in the future.

While private litigation before national courts is clearly a measure of enforcement reliant on traditional means of coercion and sanctions, SOLVIT (Internal Market Problem Solving Network) constitutes a compliance instrument of dominantly informal, problem-solving character. It is a network of centers available to stakeholders and designed to find solutions to their difficulties in the cross-border application of internal market provisions.<sup>72</sup> It is intended to constitute an alternative for individuals who suffered consequences of state non-compliance; an alternative which is stripped of formal legal constraints so often attached to national legal proceedings but which, accordingly, does not use coercive tools to remedy state violations. While the Commission retains a degree of control over SOLVIT’s operation, it is a compliance measure primarily dependent on the will of stakeholders and, since it operates through a network of local centers, it is considered in this thesis a decentralized rather than centralized instrument of post-violation enforcement. Together with private litigation

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<sup>70</sup> Tallberg (2002), 620-621.

<sup>71</sup> Judgment in *Francovich*, C-6/90 and C-9/90, EU:C:1991:428.

<sup>72</sup> Commission Communication Effective Problem Solving in the Internal Market (SOLVIT), COM(2001)0702; Commission Recommendation of 17 September 2013 on the Principles Governing SOLVIT, C(2013)5869.

before national courts, it influences the demand side of the Commission's enforcement as will be elaborated in chapter 6.

Finally, aside from SOLVIT, individuals can also have at their disposal other means of asserting their rights such as *ad hoc* contact points for "case-by-case handling and resolution," used in situations of directives establishing rights for many citizens where they can turn when faced with state infringements<sup>73</sup> (for example, in the area of diploma recognition<sup>74</sup>).

As for purely preventive techniques, not so many operate 'from below.' Tallberg enumerates two most prominent initiatives meant to raise individuals' awareness of their EU rights, familiarize them with their local options of enforcement and train national judges: the Citizens First initiative and the Robert Schuman program.<sup>75</sup> Such initiatives, although not exactly intended to prevent violations from occurring, are more concerned with future, potential state violations than with concrete, already existing infractions. However, due to their specific objectives, they do have a bearing on the decentralized enforcement mechanism by increasing individuals' knowledge of EU law and thus reducing their costs of litigation, making it more likely that they will use the mechanism to defend their rights. This, in turn, affects the infringement procedure's demand and will be discussed as such in the thesis.

The mapping of the most significant compliance measures demonstrates that the EU compliance system encompasses a variety of different instruments of preventive and reactive nature, problem-solving and coercive, out of which some have more general application while others are limited only to specific situations. It is a fact that no other compliance measure can achieve as much as the infringement procedure with its centralized coordination, broad application and substantial financial penalties, but they do have their own impact in terms of combating state violations. Most of all, however, they all influence the Commission's enforcement conduct by either helping it diminish the overall amount of state non-compliance, providing it with different means of inducing conformity or, finally, taking over some of the enforcement burden. The Commission's formulation and practice of its policy of selective enforcement is, therefore, not without influence from the various existing conformity measures that make the EU compliance system, and any analysis should not stray from considering those effects. As a result, while not all presented instruments are of relevance for this thesis because they do not deal with post-violation situations, research into the Commission's selective enforcement not only necessitates the exploration of the infringement procedure's or the

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<sup>73</sup> Commission Communication Better Monitoring, COM(2002)725, 16.

<sup>74</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the Recognition of Professional Qualifications, OJ L 255 30.9.2005, 22-142.

<sup>75</sup> Tallberg (2002), 622.

EU Pilot's operation but it also requires the consideration of decentralized enforcement instruments which, as will be developed in chapter 6, constitute a substantial counterbalance to the infringement procedure and shape the demand for the Commission's enforcement.

The Commission, who is responsible for crafting many of the new compliance tools, appears to be weaving a net of compliance measures that - imperfect that they are - cover as many types of state violations as possible. Much of its work, however, is not received with optimistic voices and the Commission is often accused of attempting to narrow down its own burden of responsibilities which, to an extent, is true.<sup>76</sup> Rarely, however, the question is asked: why? The academia's attitude towards the centralized enforcement mechanism and the Commission's role in it has evolved over the years and, although the literature is not lacking in words of appreciation, many (including the European Parliament) feel nowadays that the mechanism is outdated and ought to be revised to fit the contemporary standards that govern the European Union.<sup>77</sup> Such suggestions necessarily have a bearing on the Commission's selective enforcement, steering it in sometimes contradictory directions.

### 1.3 Evolving approaches to the Commission's enforcement

It can be said that selective enforcement has been present since the early years of the European Community when the Commission, equipped with extensive discretionary powers of enforcement, made choices with respect to which state violations to pursue and how to address them. The result was that only a few cases were subjected to the infringement procedure while some were entirely neglected and many resolved by means of secretive bargaining. Although it was all done behind closed doors, prioritization was clearly taking place and with the tacit support or, in any case, tolerance by the academia. Back then, there was less legislation to enforce, fewer Member States to monitor and, consequently, fewer violations to deal with while the Commission could remain quiet about the particulars of its practices without so much as an explanation of principles that governed its operation. The European Economic Community was considered a classic international organization focused solely on economic integration and the infringement procedure an élite, bilateral process<sup>78</sup> deeply rooted in the Commission's extensive discretion and with no consideration for third parties but with the belief that putting too much publicized pressure on defendant Member States was not going to serve the future of the European project. Political consensus was more important than meticulous

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<sup>76</sup> Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2010), 156-157.

<sup>77</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI); European Parliament Resolution of 10 September 2015 on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring the Application of EU Law (2012-2013), 2014/2253/(INI).

<sup>78</sup> Rawlings (2000), 7-13.

devotion to formal solutions and the Commission prioritized its caseload taking into account interests that went beyond the specifics of cases at hand.

The majority of both theorists and practitioners such as Evans, Barav, Everling or Roemer,<sup>79</sup> did not see anything wrong in such an approach, considering results and compromises worth the arbitrary, flexible and secretive aspects of the Commission's enforcement choices. They did not yet perceive the Commission's practice in terms of selective enforcement although they did take notice of its differing treatment of cases. The Community's sphere of influence was still narrow and the question of its legitimacy was not yet an issue. As a result, the first few decades of the Community's existence did not bring much to challenge the Commission's practice of selective enforcement and the majority of early works predominantly concentrated on the nuances of the Commission's enforcement conduct, enumerating the strengths and weaknesses of the existing compliance system.

Years passed and the Commission's selective enforcement continued but the world around it gradually changed. The Community evolved into a much larger entity, in terms of both numbers and volume spilling over to new policy areas, and new challenges sprang into light leaving the Community searching for its frail democratic credentials. There were more policy sectors to regulate, more laws to enforce, more countries to monitor and more violations to pursue while new values were demanding attention; values that had not been so significant those many years ago but which begun infiltrating every aspect of the EC's functioning, such as transparency or legitimacy. This is when the attention of such authors as Ibáñez<sup>80</sup> was drawn to the problem of the Commission's and the procedure's effectiveness underlining, on the one hand, the lack of any real means of coercion and, on the other, the unnecessarily elongated pre-litigation stage and the Commission's complicated internal administrative structure.

As a result, pecuniary sanctions were introduced and the Commission's internal procedures streamlined, but the core of centralized enforcement remained in great part unchanged. The infringement procedure remained a bilateral mechanism with an elongated administrative phase that left an opening for informal negotiations, and where complainants still had no real recognition nor was there space for any actual control exerted by other institutions. This lack of the procedure's substantial evolution is what preserved the Commission's original discretionary model of enforcement and which, coupled with an increase in workload, allowed and demanded for selective enforcement

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<sup>79</sup> Everling, *The Member States of the European Community before their Court of Justice*, 1984 *European Law Review* 9; Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 1979 *European Law Review* 4; Barav, *Failure of Member States to Fulfil Their Obligations under Community Law*, 1975 *Common Market Law Review* 12; Opinion of AG Roemer in case *Commission v France*, 7/71, EU:C:1971:121.

<sup>80</sup> Ibáñez, *A Deeper Insight Into Article 169 EC Treaty*, 1996 Harvard Jean Monnet Working Paper 11.

to continue. The only difference was that the Commission could no longer hide behind closed doors and rely on the indulgence of the academia and the citizens alike.

Already in 1986, Audretsch underlined in his comprehensive and meticulous study of the Commission's supervision the lack of information on the rules that governed its practice, hinting at the growing role of complainants and the need to put a cap on the Commission's broad discretion.<sup>81</sup> A decade later Mastroianni asked 'who guards the guardian?'<sup>82</sup> and theorists began concentrating on the Commission's lack of accountability and legitimacy, criticizing its attitude towards complainants and disputing its motives and commitment (especially in the environmental sector), calling for a degree of transparency and supervision over the discharge of the Commission's powers.<sup>83</sup> While the Commission slowly expanded its spectrum of alternative and complementary compliance measures strengthening its policy of selective enforcement by furnishing it with new, mostly informal and confidential tools, the very basis for this policy came into question, challenging the Commission's discretionary model of enforcement. The Santer's Commission crisis did not help to put those concerns to rest.

It was also around this time that political scientists such as Borzel or Tallberg turned their eyes to the infringement procedure but, instead of searching for weaknesses, they focused on the question whether there was a problem of non-compliance to begin with. Unlike lawyers who were concentrating on the deficiencies of the Commission's discretionary model of enforcement, the political scientists' general supposition was that, although the lack of sufficient data precluded conclusive deductions, the Union did not have a problem with state violations that would require concrete new action.<sup>84</sup> Simultaneously, political scientists attempted to understand the reasons behind state non-conformity. By applying the enforcement and managerial approaches to the EU's setting, they underlined the complexity of the system of compliance measures, stressing how the EU was unique among contemporary international systems.<sup>85</sup> Thus, while lawyers were focusing on

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<sup>81</sup> Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986).

<sup>82</sup> Mastroianni, *The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?*, 1995 *European Public Law* 1.

<sup>83</sup> E.g. Kunzlik, Jacobson, *The Enforcement of EU Environmental Law: Article 169, the Ombudsman and the Parliament*, 1997 *European Energy and Environmental Law Review* 6; Maselis, Gilliams, *Rights of Complainants in Community Law*, 1997 *European Law Review* 22; Weatherill, *Reflections on EC Law's 'Implementation Imbalance' in the Light of the Ruling in Hedley Lomas*, in Krämer, Micklitz, Tonner (eds.), *Law and Diffuse Interests in the European Legal Order* (Baden-Baden, 1997).

<sup>84</sup> Nicolaidis, Suren, *The Rule of Law in the EU: What the Numbers Say*, 2007 *EIPASCOPE* 1; Börzel, *Non-Compliance in the European Union: Pathology or Statistical Artefact?*, 2001 *Journal of European Public Policy* 8; Bossche, *In Search of Remedies for Non-Compliance: The Experience of the European Community*, 1996 *Maastricht Journal of European and Comparative Law* 3.

<sup>85</sup> Börzel, *Guarding the Treaty: The Compliance Strategies of the European Commission*, in Börzel, Cichowski, *The State of the European Union* (Oxford University Press, 2003); Tallberg (2002); Downs et al. (1996).



deficiencies in the Commission's archaic conduct of its enforcement function, political scientists did not see anything wrong with it *per se*, instead considering it a rather effective mechanism and simply searching for explanations to the already-existing phenomena. The turn of the century still saw a degree of lawyers' positive opinions when a few attempted to briefly draw the attention to the rationale behind the Commission's broad discretion<sup>86</sup> but these were eventually confronted with the emerging current of criticism, raising issues of effectiveness, control, legitimacy and transparency.

It was to bring a degree of such transparency that the Commission decided in 2001 to disclose the priority criteria which were supposed to govern its enforcement choices in the infringement procedure. The publication of the criteria was to shed light on how the Commission discharged its enforcement functions by revealing the main rules that determined which state violations received most of its attention. But although the priorities did divulge a bit of information as to how the Commission reasoned in the infringement procedure, they also failed to provide citizens with the kind of clear and detailed information they expected. The Commission revised the criteria on several more occasions and each time received contradictory responses but the overall effect was rather negative. The Commission's policy of prioritization was questioned because of where it originates from, how it is executed, that it is executed at all and if it is executed in line with what it actually says.<sup>87</sup> However, not a single study approached it as a stand-alone issue nor devoted it more than a few paragraphs, most of it being more inferred than explicit and always presented in the shade of some other, more important problem. While the second aspect of the Commission's selective enforcement, namely its reliance on alternative and complementary measures did draw the attention of the academia, producing a number of studies on the Commission's use of those tools,<sup>88</sup> its second, inherent face in the form of prioritization has never received much consideration beyond a commentary here and there.

Overall, however, while the Commission attempted to address some of the existing concerns by not only amending and streamlining its internal procedures but also granting several non-binding

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<sup>86</sup> Hartley, *The Foundations of European Community Law* (Oxford University Press, 2003); Harlow, *Accountability in the European Union* (Oxford University Press, 2002); Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 1993 *The Modern Law Review* 56.

<sup>87</sup> E.g. Hedemann-Robinson, *Enforcement of European Union Environmental Law*, 2<sup>nd</sup> ed. (Routledge, 2015), 206, 211; Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing, 2010), 718, 720; Smith (2010), 137, 206-207.

<sup>88</sup> Ballesteros, Mehdi, Eliantonio, Petrovic, *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness* (Study commissioned by the European Parliament, 2013); Andersen (2012); Chiti, *Decentralization and Integration into the Community Administrations: A New Perspective on European Agencies*, 2004 *European Law Journal* 10; Ibáñez, *Commission Tools for the Supervision and Enforcement of EC Law Other than Article 169 EC Treaty: An Attempt at Systematization*, 1998 Harvard Jean Monnet Working Paper 12.

guarantees to complainants, the pressure on its discretionary model of enforcement continued to grow. This was partially due to the returning issue of the Commission's effectiveness which was particularly questioned with respect to the environmental sector. Authors such as Macrory, Wennerås, Hedemann-Robinson and Borzsák<sup>89</sup> demonstrated the uniqueness of this policy area, emphasizing the Commission's limited monitoring, investigating and enforcement powers when compared to other EU sectors. Environmental concerns led some of those authors to also bring issues of the Commission's lacking transparency, accountability and its inadequate handling of complaints as those contributing to problems of ensuring compliance in environmental matters.

At the same time, the European Union underwent an evolution, seeking to enhance its democratic credentials and accordingly boost its own legitimacy in the eyes of its citizens. From its very establishment, the Maastricht Treaty<sup>90</sup> contained provisions which aimed to increase the "democratic nature" of the European project by enhancing the role of the European Parliament in the decision-making process, introducing the subsidiarity principle and EU citizenship, and finally bringing in administrative accountability to the institutions' operation by creating the European Ombudsman.<sup>91</sup> The Treaty of Amsterdam<sup>92</sup> further continued the project of the EU's democratization and the strengthening of the administrative accountability of its institutions by, inter alia, introducing the transparency principle into the EC Treaty which involved the EU citizens' right of access to EC documents.<sup>93</sup> Notwithstanding, the democratic deficit remained a concern of EU institutions and every new major project sought to address it in some way. From the Laeken Declaration which set out the objectives for the democratization of the EU through the failed constitutionalization project<sup>94</sup> which contained procedures and symbols traditionally accompanying constitutional democracies,<sup>95</sup> to the Lisbon Treaty<sup>96</sup> which added in Article 6(1) TEU a phrase about "[t]he Union [recognizing] the rights, freedoms and principles set out in the Charter of Fundamental Rights"<sup>97</sup> and contained therein Article

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<sup>89</sup> Hedemann-Robinson (2015); Borzsák, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU Law* (Wolters Kluwer 2011); Macrory (2010); Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007).

<sup>90</sup> Treaty on European Union (original version), OJ C 191, 29.7.1992.

<sup>91</sup> Article 5 TEU (subsidiarity); Article 9 TEU (EU citizenship); Article 228 TFEU (European Ombudsman); Article 294 TFEU (ordinary legislative procedure); Chalmers, Davies, Monti, *European Union Law*, 2nd ed. (Cambridge University Press, 2010), 25-26.

<sup>92</sup> Treaty of Amsterdam, OJ C 340, 10.11.1997.

<sup>93</sup> Article 15(3) TFEU; Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents, OJ L 145, 31/05/2001; Chalmers et al. (2010), 29.

<sup>94</sup> Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004.

<sup>95</sup> Chalmers et al. (2010), 42.

<sup>96</sup> Treaty of Lisbon, OJ C 306, 17.12.2007.

<sup>97</sup> Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007.

41 (right to good administration). While the German Constitutional Court pointed out that the EU is not and never will be a full democracy for it is not a unitary state and lacks the elements that a representative democracy entails,<sup>98</sup> the Union nonetheless has gone far in integrating democratic values into its operation as much as its specific international and supranational makeup allows it. The European Commission was not excluded from this objective but rather actively participated in its attainment, the White Paper on Governance being an example of the Commission's commitment to incorporate such standards as openness, participation, accountability, effectiveness and coherence into its operation.<sup>99</sup> Most recently, the Commission adopted the communication Better Regulation for Better Results<sup>100</sup> which seeks to increase its openness and transparency while being conveniently limited to the decision-making process.

The Union's ongoing expansion and quest for strong democratic foundations and legitimization in the eyes of EU citizens as well as the Commission's own commitments resulted in works assuming a predominantly administrative approach to the Commission's enforcement function. Authors such as Smith, Rawlings or Harlow<sup>101</sup> saw the Commission not only as the guardian of the Treaties but also as a public institution dealing with citizens. They analyzed its enforcement conduct in terms of its adherence to standards such as transparency, accountability or good administration, and concluded that its discretionary model of enforcement was archaic and no longer corresponded to expectations of the contemporary European Union. However, while Rawlings and Harlow also took note of the conflict between the accountability-based requirements and the Commission's original role of the guardian and were rather wary with claiming the absolute primacy of their multi-faced vision of the Commission's enforcement, Smith insisted on the importance of guaranteeing that the Commission lived up to the standards it pronounced commitment to,<sup>102</sup> believing, alongside other authors,<sup>103</sup> that the reformulation of its enforcement function not only did not contradict its guardian's role but it was also necessary to match the Union's strive towards ensuring its own legitimacy.

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<sup>98</sup> Judgment of the German Constitutional Court from 30 June 2009, 2 BvE 2/08 *Gauweiler v Treaty of Lisbon*, paragraph 280-294, after Chalmers et al. (2010), 42-46.

<sup>99</sup> Commission White Paper on European Governance, COM(2001)428, 10.

<sup>100</sup> Commission Communication Better Regulation for Better Results - An EU agenda, COM(2015)215.

<sup>101</sup> Harlow, Rawlings (2014); Smith (2010); Smith, *Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process*, 2008 *European Law Review*, 33; Harlow, Rawlings, *Accountability and Law Enforcement: The Centralized EU Infringement Procedure*, 2006 *European Law Review* 31.

<sup>102</sup> Commission White Paper on European Governance, COM(2001)428.

<sup>103</sup> Ballesteros et al. (2013).

Not all recent works advocate the Commission's departure from the discretionary model of enforcement,<sup>104</sup> but the European Parliament's continued insistence<sup>105</sup> on injecting the Commission with stronger transparency and accountability demonstrates that the question of the Commission's adherence to the contemporary standards of legitimacy remains an issue and, if anything, it only gains momentum. The emergence of a new movement can thus be observed where problems of the Commission's flexibility and autonomy as well as its unfavorable attitude towards citizens receive intensified attention and where the confidentiality and bilateralism of its relations with Member States is considered a weakness. As will be elaborated in chapter 5, this movement can be considered to advocate the accountability model of enforcement since it seeks to put caps on the Commission's broad discretion in the area of enforcement and subject it to genuine control.

From early studies to recent literature, the topic of the Commission's discretion has been extensively analyzed and not only because of its uniqueness and central role in the Commission's enforcement. The extent of this discretion remains something of a debatable issue as will be shown in chapter 2 and authors have repeatedly discussed the boundaries of the Commission's freedom to pursue state infractions and create new compliance tools.<sup>106</sup> However, while initial works were predominantly concerned with identifying the limits to the Commission's discretion without challenging the very idea behind it, questions of the Commission's effectiveness and fragile legitimacy made authors lose sight of motives behind such extensive discretion or, alternatively, no longer convinced researchers with the Commission's old explanations repeated ad nauseam. On the one hand, studies concentrating on the enforcement in the environmental sector exposed deficiencies and potential bias<sup>107</sup> in the Commission's powers and attitude and, on the other, the emergence of public administration-focused works brought into light the negative effects of the Commission's broad discretion. They gave life to the accountability movement to not only improve the Commission's handling of complaints (especially in the environmental sector) but also to constrain its discretion in favor of a more accountability-based model with the underlying premise that there is no longer space

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<sup>104</sup> E.g. Bieber, Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 2014 *Common Market Law Review* 51; Andersen (2012).

<sup>105</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI); European Parliament Resolution of 4 February 2014 on the 29<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2011), 2013/2119(INI); European Parliament Resolution of 21 November 2012 on the 28<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2010), 2011/2275(INI); European Parliament Resolution of 14 September 2011 on the 27<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2009), 2011/2027(INI).

<sup>106</sup> E.g. Andersen (2012); Ibáñez (1999); Bonnie, *Commission Discretion under Article 171(2) EC*, 1998 *European Law Review* 23; Audretsch (1986).

<sup>107</sup> Krämer, *The Environmental Complaint in EU Law*, 2009 *Journal for European Environmental and Planning Law* 6, 35.

for such unrestrained freedom and pursuit of political objectives in an organization proclaiming commitment to fundamental rights, including the right to good administration.

While recent literature does not lack in statements underlining the benefits of the discretionary model, studies concentrating on questions of the Commission's accountability or legitimacy, seem to all tilt towards its transformation. Further, works concerning the Commission's enforcement or the infringement procedure have to nowadays, at the very least, acknowledge the existence of challenges to the discretionary model of enforcement such as complainants' rights. Issues raised by Smith, Rawlings and Harlow became an inherent element of the debate over the Commission's enforcement and this is confirmed in textbooks of EU law which take the time to explain to law students the main premises of the accountability-based claims.<sup>108</sup> While it is not yet discussed in the general literature in terms of a new approach to law enforcement, the European Parliament's<sup>109</sup> unrelenting pressure and the European Ombudsman's<sup>110</sup> continued investigations suggest that it is well on its way to becoming a full-fledged movement and, for that reason, this thesis treats it as such. What is, however, surprising about it, is its lack of significant impact on the Commission's enforcement policy and practice.

Chapter 4 will discuss the evolution of the Commission's enforcement and, together with chapter 5, it will demonstrate that the Commission does hear the expectations of the accountability approach and it has actually taken strides to bring its policy and practice closer to presented demands. However, it has also been very careful with its alterations, allowing for only so much change that does not fracture the core of - what can be considered as - the four pillars of its enforcement model: confidentiality, flexibility, bilateralism and autonomy. The Commission's policy of selective enforcement has thus been evolving but it is a controlled, minimalistic evolution which, supported by the Court of Justice, resists the main premises of the accountability approach. To turn it the other way round, the accountability approach, despite the support in the European Parliament and the European Ombudsman, has overall failed to inject the Commission with its more significant postulates and replace the four pillars with such standards as transparency, objectivity or accountability.

The question is: why? In spite of the continuous pressure not only from the academia and EU institutions but also from dissatisfied citizens, why does the Commission and the Court insist on

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<sup>108</sup> E. g. Craig, De Búrca, *EU Law*, 5<sup>th</sup> ed. (Oxford University Press, 2011), 412.

<sup>109</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI); European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253/(INI); European Parliament Resolution on the 29<sup>th</sup> Annual Report on Monitoring (2011), 2013/2119(INI).

<sup>110</sup> European Ombudsman Annual Report for 2013, Good Administration in Practice: The European Ombudsman's Decisions in 2013, 23-24.

protecting the confidentiality and bilateralism of relations with Member States and strive to maintain autonomy and flexibility in its enforcement practice? This is the question this thesis aims to answer. It seeks to explain why, regardless of powerful evidence which seems to indicate the benefits of the accountability model (presented in chapter 5), the Commission refuses to introduce any significant alterations to its enforcement policy that would bring actual transparency to its operations as well as guarantee objectivity and accountability, and ensure its legitimacy in the eyes of EU citizens.

### 1.3.1 Two sides of legal analysis or two paths towards improvement

Article 4(3) TEU imposes on Member States the duty to take any measures necessary to fulfill EU obligations, to facilitate the achievement of EU's goals, and to refrain from measures that could endanger the realization of those goals. It thus binds Member States with the principle of loyal cooperation, out of which the Court of Justice has derived a number of principles and measures to govern the process of conforming with EU law, involving not only rules for the incorporation of EU norms but also - or maybe mostly - for the application and enforcement of these norms by national organs. Starting with the establishment of the principle of primacy through the elaboration of the duty to ensure full and effective protection of individual rights, the Court of Justice has extended the scope of responsibilities that rest on state organs, expecting more of them than just rudimentary incorporation and going as far as requiring the application of measures that do not exist in national legal systems.<sup>111</sup> To name just a few: state liability, indirect effect, legal certainty, effective, equivalent and proportionate protection of EU rights all constitute rules which the Court of Justice has derived from Article 4(3) TEU to govern Member States' fulfillment of EU obligations. As a result, although only binding legal acts can impose obligations on Member States,<sup>112</sup> Article 4(3) TEU determines how national organs are to ensure compliance and what they are allowed to do (or prohibited from doing) even with respect to issues that do not bring direct and legally-binding obligations for them.<sup>113</sup>

The process of conforming to EU law is thus a complicated endeavor that involves a score of specific duties and refers to all of state bodies. Member States are complex entities consisting of a multitude of executive, legislative and judicial, national and regional institutions and organs, as well as a variety of state agencies and quasi-private bodies that qualify as "emanations" of state, each

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<sup>111</sup> Judgment in *Factortame*, C-213/89, EU:C:1990:257.

<sup>112</sup> Audretsch (1986), 15.

<sup>113</sup> Chalmers et al. (2010), 224. For example, Member States cannot enact laws that go against the objectives of a directive before the deadline for its implementation has passed, Judgment in *Inter-Environnement Wallonie ASBL*, C-129/96, EU:C:1997:628, paragraph 44-45.

bound by EU obligations and having an impact on that state's (non-)compliance. On top of this, entities resting outside state control such as natural and legal persons which are also bound by EU law and EU institutions which draft and adopt EU measures all contribute to state (non-)compliance as will be elaborated in chapter 3. While Member States implement EU law (Article 291(1) TFEU), EU institutions and, in particular, the European Commission and the Court of Justice, ensure that they implement it correctly (Articles 17(1) and 19(1) TEU).<sup>114</sup> As a result, when Member States fail to comply with their obligations, we naturally expect the Commission and the Court to remedy these situations. In other words, when institutions such as the national legislature fail in their duties, we presume that the Commission and the Court should take steps in order to ensure that they fix these mistakes.

Legal research tends to take a similar approach where the role of courts is often shaped by problems in other institutions (decision-making bodies, administrative agencies, markets etc.). The discovery or confirmation of the existence of various malfunctions in these institutions prompts scholars to refer to courts and the adjudicative process as natural solutions to these problems.<sup>115</sup> Similarly, in works concerning issues of EU law enforcement, the European Commission, infringement procedure and the Court of Justice are often seen as easy remedies to problems of state non-compliance. Considering that Member States do and will continue to infringe EU law and that decentralized enforcement mechanisms have their limitations, it is not so hard to find cases where enforcement coverage is scarce or inadequate, and presuppose that the Commission and the infringement procedure should fill in those gaps since, after all, it is the Commission's role as guardian to ensure that Member States comply. Komesar qualifies such works as demand-oriented<sup>116</sup> because they concentrate mostly on the 'demand' side of institutional behavior by identifying failures or malfunctions of other institutions and calling on courts to remedy them. A lot of research advocating the accountability model of enforcement has its roots in such demand-oriented premises, drawing conclusions for the Commission's enforcement policy from the analysis of failures in state compliance, weak position of individuals vis-à-vis non-conforming state organs or the EU's frail legitimacy. However, while it is crucial to understand the problems experienced by these institutions for they have a bearing on the Commission's enforcement (as will be shown further), what is often lacking in such research is the appropriate consideration of the 'supply' side of institutional behavior, that is how much burden the Commission, the Court and the infringement procedure can actually carry. It is

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<sup>114</sup> Cremona (2012), xl.

<sup>115</sup> Komesar, *Law's Limits* (Cambridge University Press, 2001), 26.

<sup>116</sup> E.g. Hedemann-Robinson (2015); Valero (2011); Smith, *Administrative Procedures Linked with Article 258 TFEU Proceedings: An Academic Perspective*, briefing note requested by the European Parliament, 2011; Smith (2010); Krämer (2009); Wennerås, (2007).

easy to rely on courts as solutions to failings of other institutions but neither the Commission nor the Court are a bottomless pot that can absorb new obligations without suffering the consequences.<sup>117</sup> As a result, legal research into the Commission's enforcement is often focused too much on demand, expecting it to take in a variety of seemingly harmless alterations that serve contradictory objectives or principles. These alterations would influence the Commission's selective enforcement by forcing it to accommodate different criteria, each opinion defining its goals in contrast to others, without enough thought given to the question of the Commission's capacity and to the problem of the sheer feasibility of these alterations.

In contrast to the demand-oriented research, it is also possible to distinguish works which focus predominantly on the Commission's and the infringement procedure's characteristics and deficiencies.<sup>118</sup> Such studies are mainly supply-oriented because they concentrate on institutions' effectiveness and capacity limitations and from that draw conclusions for their betterment.<sup>119</sup> However, by failing to pay enough attention to the Commission's demand, they focus too much on identified constraints putting forward propositions regarding the Commission's enhancement and resource allocation which fail to answer the actual need for the Commission's enforcement. In other words, they may improve the Commission's functioning but fail to respond to areas or violations where the Commission's attention is mostly required.

The classification of legal research into demand- and supply-oriented analysis is ultimately superficial because authors generally take notice of both sides of institutional behavior. Nonetheless, the majority of works on the Commission's enforcement tends to misbalance the two sides of institutional behavior, concentrating more on one than the other and drawing conclusions primarily based on either supply and demand when both forces influence the conduct of institutions in equal measure. No study, however, approaches the Commission's enforcement from the perspective of the economics' principles of supply and demand and of the subsequent necessity of balancing both forces against each other. While books are written about both, the Commission's capacity limitations and malfunctions of surrounding institutions, these studies do not perceive the Commission in terms of the balance between its supply and demand sides.

What is, however, common for the majority of legal works on the Commission's enforcement is that they usually tend to head in the same direction: towards improvement. Whether it is about increasing the Commission's effectiveness or remedying the failings of other institutions, legal literature tends to concentrate on improving existing structures in order to achieve preset goals. This

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<sup>117</sup> Komesar (2001), 26.

<sup>118</sup> E.g. Ibáñez (1999); Audretsch (1986).

<sup>119</sup> Komesar (2001), 3.



is different from the political science literature which aims to explain instead of advise. However, despite the focus on the same phenomena, legal studies do not reach often enough for political science sources in order to comprehend the mechanisms and motives behind the operation of analyzed institutions before they propose their solutions. We do present historical backgrounds but rarely understand the backgrounds to institutional choice. The fact, however, is that by proposing new solutions, we aspire to initiate shifts in institutions' structure or operation which may be beneficial for the goal we assumed but detrimental to equally-valid goals of others. Without the understanding of reasons and motives that drive institutions and influence their decisions, we operate in an abstract and somewhat idealistic sphere existing mostly on the basis of our own assumptions, and risk proposing solutions that may ultimately prove unworkable or naïve when contrasted with the reality of institutional behavior. Understanding the true levers behind institution's operation can, however, open us to alternative objectives and actually make us realize the futility of our suggestions or, more likely, allow us to reformulate claims in a way that takes into account conflicting goals. For that reason, this thesis seeks to identify the reasons behind the Commission's persistent resistance against the accountability model of enforcement advocated for years by inter alia the European Parliament. Only if we understand the true levers behind the Commission's selective enforcement, can a discussion commence over the primacy of conflicting goals and methods to accommodate two disagreeing visions of enforcement.

#### 1.4 Comparative Institutional Analysis

This thesis assumes a realist approach to institutions. It seeks to determine the reasons for the Commission's protection of its discretionary powers that enable and reinforce selective enforcement by identifying the true levers behind its conduct and choices. To achieve that, this thesis relies on Komesar's Comparative Institutional Analysis<sup>120</sup> which draws from the economics' concepts of supply and demand in order to explain institutional choice. By analyzing the Commission's supply and demand sides, this thesis not only explores the reality of institutional behavior which is often overlooked in works promoting the injection of new goals and principles into the Commission's operation but it also aspires to demonstrate how the forces of supply and demand influence the Commission's enforcement policy choices and how the need to keep them in a balance motivates the Commission to safeguard the four pillars of its discretionary model of enforcement. This work therefore concentrates on the practical aspects of the Commission's operation where its institutional

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<sup>120</sup> Ibid.

choice regarding the paths for selective enforcement is driven by considerations of supply and demand. The idea behind it is that realizing the existence of these levers allows us to better comprehend the Commission's enforcement policy. Constituting an essential part of institutional behavior, the analysis of supply and demand provides a foundation for future normative research.

#### 1.4.1 Supply and demand

Komesar says that "[l]aw and rights cannot be understood by methods of legal analysis that focus attention solely on goals and values or at most discuss the horrors of present systems. The first is totally indeterminate, and the second leaves us in continuous and costly cycling among highly imperfect alternatives."<sup>121</sup> While the promotion of values is an indispensable element of legal research, it tends to skew academic focus concealing more down-to-earth aspects of institutional behavior which generally constitute the core of institutions' supply and have a large if not decisive impact on institutional choice. In his *Comparative Institutional Analysis*, Komesar puts forward a claim that the choices that institutions make, and thus the content of law and rights which are the product of such choices, are not so much influenced by the pursuit of goals and values as they are influenced by considerations of institutions' supply and demand. When adjudicating bodies (such as the Court of Justice) are in a position of choice between equally-valid competing options (e.g. data access v data protection), their final decisions are not driven by principles they choose over others but stem from their desire to maintain the forces of supply and demand in a balance. The Commission's and the Court's recurring decisions to favor confidentiality over transparency, flexibility over objectivity or autonomy over accountability can thus be seen as resulting from their consideration of the supply and demand sides. The choice whether to expand the rights of complainants or risk alienating the European Parliament, European Ombudsman and citizens can be driven by mundane concerns of limited capacity and scarce resources. Komesar says that "[l]egal rights are forged by the forces of supply and demand."<sup>122</sup> This thesis seeks to demonstrate that these same forces drive the Commission's choices in its policy of selective enforcement.

The concept of supply and demand is inherent to Economics where it is used to describe the "forces that make market economies work."<sup>123</sup> It explains the relationship between the quantity of produced goods and their selling price, and demonstrates how the actions of buyers who demand a certain good and sellers who supply this good influence each other in order to find a point where their

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<sup>121</sup> Ibid., 9.

<sup>122</sup> Ibid., 4.

<sup>123</sup> Mankiw, *Principles of Economics* (Cengage Learning, 2015), 65.

expectations meet. Sellers make choices regarding how much to produce and at what price to sell depending on the buyers' demand, while buyers decide whether and how much to buy depending on the sellers' supply. They therefore increase or decrease their supply and demand until they find a point where both sides are satisfied: sellers sell exactly as much as they can and are willing to, and buyers buy exactly as much as they can and are willing to. This point constitutes an equilibrium of supply and demand and the activities of buyers and sellers naturally push markets towards this equilibrium.<sup>124</sup>

The Economics theory of supply and demand demonstrates how the two forces interact with each other, influencing the behavior of sellers and buyers and producing results for markets. The same concept can be also employed by lawyers but, instead of referring to operations of markets, it can be used to describe the workings of institutions. Komesar, in his *Comparative Institutional Analysis*, places the theory of supply and demand at the core of his research into the adjudicative process and the resulting law and legal rights. According to the author, supply signifies courts' ability to deliver legal protections, and demand signifies the need for those protections.<sup>125</sup> Courts, by definition, have a restricted capacity to respond to demand due to their limited numbers, scarce resources, complex procedures and narrow competences. The demand for legal protections, on the other hand, is high whenever other institutions such as political processes, markets and communities fail to deliver those protections. This is especially visible in situations where law-makers adopt vague and ambiguous provisions in order to avoid the controversies of specifying their content, leaving their interpretation to courts and expecting them to resolve the problems they escaped. The result, however, is such that the more the adjudicative process is expected to deliver legal protections, the less it can deliver due to its limited capacity. An increase in demand thus diminishes its ability to provide results.<sup>126</sup>

Komesar argues that there is an obvious correlation between the level of protection provided by courts and such systemic factors as numbers and complexity.<sup>127</sup> Institutions work well when few persons are affected by decisions and when these decisions are simple and clear. In such situations guaranteed rights are unambiguous, certain and strong and courts deal with easy issues and apply simple rules. They have little work to do for there is little need for their intervention. As numbers and complexity increase, however, issues become more convoluted and obscure and the political process, faced with conflicting alternatives, produces more complex and ambiguous rules. Rights are weaker and unclear. Courts have more work to do and the responsibility of balancing the costs and benefits

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<sup>124</sup> *Ibid.*, 65-85.

<sup>125</sup> Komesar (2001), 3.

<sup>126</sup> *Ibid.*, 4.

<sup>127</sup> *Ibid.*

of alternative legal solutions becomes theirs to make. This is when judges find themselves really needed and where they operate best.

Problems start when numbers and complexity increase even further. Legal issues become more difficult and vague, increasing the costs of their investigation, legislation and implementation while involving a wide disparity of stakes because of a larger number of persons concerned. As a result, the political process's ability to provide solution deteriorates, decreasing their output and increasing the demand for rights. More pressure is put on courts but their capacity to provide legal protection decreases. They do not have the competence to deal with highly technical or extensively obscure issues nor the physical capacity to rule over a larger influx of cases. At that point, courts, aware of their own limitations in properly balancing the costs and benefits of alternative solutions, send issues back to the political process to do the balancing. They resolve cases in a way that prevents disproportions between their demand and supply sides while ensuring that more capable institutions address the complex and obscure problems. Out of different, alternative solutions to cases, judges choose those that avoid considerable increases to their demand, sending the task back to the political process that had failed in the first place. This way they protect themselves from situations where their supply cannot meet the demand, striving towards an equilibrium: a point where they can respond to the demand with their limited capacity.<sup>128</sup>

Komesar thus explains that courts' decisions are not so much made in the pursuit of abstract values such as equality or justice but that they rather serve the goal of resource allocation efficiency. Just as politicians, markets and communities, judges balance the costs and benefits of alternative legal solutions and make choices that maintain an equilibrium between their demand and supply sides. As a result, Komesar reveals that institutional behavior can be explained by the forces of supply and demand as well as such systemic factors as numbers and complexity. By looking at these two sides of institutions, it is possible to find explanations for the decisions they make and the results they produce. Supply and demand constitute "quintessential institutional choices," the product of which are law and rights.<sup>129</sup>

This thesis will thus not only analyze the demand and supply sides of the Commission's enforcement in order to show their mutual interconnectedness and impact on the shape of the Commission's enforcement, but it will also explore the task of the forces' balancing and identify the consequences of a potential misbalance. It will be shown that the accountability model of enforcement is likely to destabilize the equilibrium between the forces of supply and demand which,

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<sup>128</sup> Ibid., 4, 19-20, 22.

<sup>129</sup> Ibid., 3-10.

in turn, would prevent the Commission from pursuing its enforcement role as formulated in the Treaty.

#### 1.4.2 Comparative dimension

Komesar's Comparative Institutional Analysis is based on the premise that to fully understand the role of an institution one has to look at the institutions that surround it because they "tend to move together" and mutually affect each other.<sup>130</sup> His approach is thus inherently comparative where he identifies the various neighboring institutions such as the political process, courts, markets, and communities, and explores their modes of impact. Issues of state compliance can be seen from a similar perspective. Member States' correct fulfillment of their EU obligations is not just a matter of their willingness and capacity. The European Commission, the Council and the European Parliament are the primary institutions responsible for the shape and content of EU norms. As they draft, adopt and amend legal measures, the responsibility for the clarity and precision of these norms is theirs. The EU decision-making process thus influences the Member States' performance of their obligations because the more vague and complex are EU norms, the harder it is for national bodies to understand and properly conform to them. Similarly, natural and legal persons that participate in an innumerable amount of transactions involving EU rules impact state compliance by either respecting these rules or not and, in the latter case, requiring appropriate action on the part of state organs. Within markets and communities, individuals interact with each other in areas regulated by EU norms but also follow established rules and practices (e.g. cultural) as well as respond to changes to their position or to their environment which can sometimes result in violations of states responsible for monitoring, verifying and enforcing respect for EU norms within their legal systems.

The reasons behind state violations will be addressed in chapter 3 demonstrating that the conduct of state organs is the result of a multitude of different motives, incentives and circumstances that go further than just the quality of EU norms or behavior of market participants. However, what is important to already underline is the fact that the state process of conforming to EU law does not happen disconnected from the outside world but it is impacted by the conduct of other institutions with the basic premise that the deterioration in the operation of those institutions brings in the deterioration in state compliance (and the other way round).<sup>131</sup> The more institutions such as the EU political process malfunction by, for example, producing incoherent rules, the more Member States

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<sup>130</sup> Ibid., 176.

<sup>131</sup> Ibid., 23-26.

have to work to comply and the less they are capable of properly complying. For that reason, the clarification of obligations, technical aid and problem-solving assistance as well as the education of national organs and market participants are crucial preventive measures that have a positive effect on state compliance. While such pre-emptive instruments are not considered here as constituting an element of the Commission's selective enforcement and, as such, are not the subject of this thesis, their importance cannot be understated. The Commission's focus on such preventive techniques demonstrates that it is well aware of how state (non-)compliance is ultimately the product of a variety of factors.

Most of all, however, just as these outside institutions such as the EU decision-making process or markets influence state conformity, so do they impact yet another institution: enforcement. It goes without saying that the more Member States respect EU law, the less is left for EU enforcement to address, but the correlation between these institutions and the Commission's function of the guardian goes further than this simple dependency. The more these institutions malfunction in their tasks, the heavier is the burden placed on the Commission (and potentially the Court). Enforcement is, therefore, not just a matter of Member States falling short of their obligations. The more the decision-making process fails to provide clear rules and the less markets and communities are capable of correcting these failings, the more is expected of the Commission and the Court to find a solution to. At the same time, the Commission's and the Court's supply is limited which means that they have only so much physical capacity and substantive ability to enforce EU law, and the heavier the workload is placed on them, the more they lose the ability to deliver the expected result.

However, the infringement procedure, the EU Pilot and the Commission's remaining centralized informal tools constitute merely a part of the overall EU compliance system. As was already emphasized, the EU also has at its disposal decentralized compliance measures, with private enforcement at its center, which are capable of addressing state non-conformity problems. These instruments have their own boundaries and limits on their capacity and legal tools which means that they can do only so much to remedy state non-compliance, as will be elaborated in chapter 6. Their successes and failings thus impact the Commission's enforcement for they accordingly either increase or decrease its enforcement burden. In fact, their influence on the Commission's performance of its function of guardian is decisive because, unlike the decision-making process which has only an indirect impact by potentially leading to state infractions if laws are ambiguous, the activity of decentralized measures directly increases or diminishes the amount of violations left for the Commission to remedy. The role that decentralized enforcement measures perform and how this performance impacts the Commission's selective enforcement cannot thus be neglected and, in line with Komesar's

Comparative Institutional Analysis, has to be taken into account in order to explain the levers behind the Commission's commitment to the four pillars of its discretionary model of enforcement. The limitations of these measures are what impacts the Commission's enforcement. Areas where they lack the capacity to deal with state infractions is what requires the Commission's attention, creating demand. As a result, it will be argued that the Commission, in formulating its policy of selective enforcement and in creating new compliance tools, pays attention to more than just the amount of state infractions, their dominating categories or infringed policy areas. It is aware of the strengths and weaknesses of decentralized enforcement measures and, on these basis, shapes accordingly its policy of selective enforcement and safeguards its discretionary powers which allow for such responsiveness and flexibility.

To explain the levers behind the Commission's selective enforcement this thesis relies on Komesar's Comparative Institutional Analysis which underlines the role that the forces of supply and demand play in institutional behavior and institutional choice. As a result, both the supply and demand sides of the Commission's enforcement will be explored. In line with Komesar's theory, supply - understood as an institution's ability to deliver a prescribed result<sup>132</sup> - will be investigated by analyzing three elements: the Commission's physical capacity, substantive ability and dynamics. Demand, on the other hand, understood as the need for that result shaped by failings of other institutions,<sup>133</sup> will be taken to signify the need for the Commission's enforcement determined by the weaknesses and limitations of decentralized enforcement measures. These weaknesses and limitations will, in turn, be identified by assuming Komesar's participation-centered, bottom-up approach which indicates that institutions' operation and successes are molded by actions of their participants.<sup>134</sup> Since decentralized enforcement measures are first and foremost dependent on the vigilance and willingness of stakeholders, it is stakeholders' individual choice whether to take action or not that decides the usage of these measures and determines their dynamics. These choices are not, however, arbitrary or irrational. The economics analysis of costs and benefits is used in this thesis in order to show that a pattern can be observed with respect to individuals' choices. Different factors influence the costs and benefits of action, pushing stakeholders towards or against litigation which ultimately allows to identify situations when decentralized instruments are most and least likely to be utilized as enforcement measures against state violations. This reveals their weaknesses and limitations which, in turn, make the Commission's demand. The idea behind this is such that, knowing where and when

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<sup>132</sup> Ibid., 3.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid., 30.

such measures are least likely to correct state non-conforming conduct, allows us to determine what remains for centralized enforcement to tackle.

### 1.4.3 Complementary nature of centralized enforcement

The assumption that the Commission's demand is shaped by the weaknesses of other compliance measures, and not the other way round, stems from the infringement procedure's general application, centralized nature and the Commission's extensive discretionary and monitoring powers. The infringement procedure's broad application allows it to potentially deal with a variety of state infractions. Almost no other EU compliance instrument is capable of such a wide coverage of different violations. In fact, the only other measure that could hypothetically compete with this procedure is Article 259 TFEU which allows Member States to challenge other Member States for breaches of EU law. However, the fact that this Article has been used only a few times in the entire history of the European integration proves how little it matters in the overall EU compliance system.

Of course, it cannot be questioned that litigation before domestic courts is influenced by the infringement procedure's operation. After all, if the Commission fails to ensure that Member States respect EU law, then stakeholders may take matters into their own hands and initiate procedures that fill in the gaps left by the Commission. As a result, there may be those who believe that the Commission should execute its enforcement policy according to one or other important principle without consideration being paid to the potential of the remaining compliance measures, leaving them to patch up, if they can, the enforcement gaps it creates. This, however, ought to be seen as a positive consequence or side-effect of a multitude of enforcement tools rather than a rule dominating the Commission's enforcement policy mostly because the other compliance measures do not have the advantages that the Commission and the infringement procedure possess. The infringement procedure is a centralized mechanism controlled by a single body that can decide on its strategy and actually carry it out. The Commission is not only an institution formally unlimited in the cases it can pursue but it also has the power to decide how it employs its powers. The decentralized enforcement mechanism and SOLVIT depend on the will of individual parties whose conduct cannot be controlled in the way the Commission decides its own actions. These measures operating 'from below' are more like 'forces' that can be nudged in a particular direction but which cannot be really controlled. The Commission, on the other hand, decides its own priorities and, being unconstrained by the locus standi rules, has the power and ability to adapt to the conditions left by other measures. As will be demonstrated on multiple occasions throughout this thesis, the Commission with its infringement procedure also has its limitations, and its capacity to deal with state violations is constrained by those



limitations (supply). This does not, however, change the fact that it does possess the ability to adapt which gives it a wider margin of maneuverability if necessary. Finally, aside from the infringement procedure being controlled by a single institution and a repeat player at that (the legal experience of which cannot be paralleled), the Commission is equipped with means and tools that transcend these of any other litigants, being furnished with the capacity to singularly, uniformly and from above decide its enforcement objectives while the effects of its conduct have far more reaching results and carry the threat of the Court's involvement whose rulings are generally binding. All those advantages allow the Commission to adapt to the situation left by other mechanisms and, despite its own limitations, to at least partially fill in the gaps made by others. It should therefore be perceived not as the dominant measure that arbitrarily decides its own priorities but as a supporting mechanism that patches the gaps left by other instruments.

#### 1.4.4 Methodology

This thesis presents a new approach to the Commission's enforcement. It is predominantly descriptive and analytical for it seeks to explain rather than change the Commission's policy of selective enforcement. Beyond containing the legal analysis of existing rules, it is interdisciplinary and comparative because it relies on concepts inherent to political science and economics in order to answer the presented questions, and perceives the Commission's enforcement in the larger system of existing enforcement measures. Inspired by the political science's desire to understand, it strives to identify the levers behind the Commission's selective enforcement by explaining why the Commission is committed to the discretionary model of enforcement. This is achieved by employing Komesar's Comparative Institutional Analysis and by examining - inherent to his method - the economics concepts of supply and demand situated in the realm of EU enforcement. Moreover, this thesis draws from the political science's approach to sources of non-compliance and its theories of European integration and constitutionalization, as well as from the literature on litigation strategies in the decentralized enforcement mechanism and the economics of suit and settlement, in order to inter alia understand the evolution and nature of the EU compliance system, develop the stakeholders' cost-benefit analysis and indicate the variables that affect litigants in their choices.

Due to the complexity of the Commission's selective enforcement where, as was shown in section 1.2, the EU compliance system consists of a variety of centralized, decentralized and horizontal measures, empirical research falls short of delivering reliable data. Not only is it impossible to verify the Commission's enforcement practice since its monitoring reports do not take into account

enforcement methods other than the infringement procedure and the EU Pilot (e.g. negotiations, package meetings), it is also unfeasible to evaluate the functioning of the decentralized enforcement mechanism due to its widespread and fragmented nature where the bulk of compliance work is done at national level and only a fraction is referred to the CJEU. Additionally, this thesis seeks to look further into the problem of state non-compliance and to not only show the complexity of state violations (chapter 3) but to also delve into the process of application of EU law by national courts (chapter 6). Such analysis requires not only broad-scale quantitative research but also - or mostly - qualitative inquiries where the substance of cases is examined in order to answer such questions as who litigates, what are the stakes in litigated cases, etc. However, the data for such research is not readily available and, as Conant emphasizes, it can be properly carried out only with respect to analysis of limited scope<sup>135</sup> by, for example, constraining it to a specific policy area or a Member State and, even then, the analysis of the decentralized enforcement mechanism's functioning could prove to exceed the scope of assumed research due to the multiplicity of national rulings. Such analysis would, however, have the effect of limiting the subject-matter of this thesis by bringing it down to, for example, the Commission's selective enforcement in a specific policy area. While each sector is particular and it is imperative to underline the differences in the Commission's enforcement powers and practice with respect to different policy sectors (as it is often done with environmental protection), this is not the purpose of this thesis. On the contrary, this thesis seeks to explain the current shape of the Commission's selective enforcement taken as a whole where, instead of concentrating only on a segment of its practice, we see the interplay between different enforcement measures which, in turn, allows us to notice the Commission's commitment to the discretionary model of enforcement and the prevailing role of confidentiality, bilateralism, flexibility, and autonomy in its policy. Further, by drawing attention to the forces of supply and demand that shape the Commission's institutional choice, this thesis proposes a baseline formula for future normative research both general and specialized. As a result, while this work does aspire to look deeper into issues of state non-compliance and the dynamics of the decentralized enforcement mechanism, its main objective is to, nonetheless, approach the Commission's selective enforcement as a whole: a large process consisting of a multiplicity of priorities and enforcement measures characterized by four main pillars of the discretionary model of enforcement.

The discrepancy between the purpose of this thesis and the constraints of data analysis does not, however, prevent some empirical research from being conducted in order to help illustrate the presented claims. Nonetheless, due to the enumerated limitations of such research in the field of the

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<sup>135</sup> Conant (2012), 2, 26.

Commission's selective enforcement, the analyzed data can only perform a subsidiary function. Such a general approach as the one assumed in this thesis lacks sufficient information to evaluate the operation of the centralized and decentralized enforcement mechanisms, having access only to the Commission's incomplete annual reports and the CJEU's case-law, allowing for multiple mutually exclusive interpretations.

This thesis contains quantitative empirical research which is largely based on the Commission's annual monitoring reports, giving general ideas regarding the Commission's enforcement activity, the operation of the infringement procedure and the EU Pilot or the dominating policy sectors. Additionally, this thesis contains empirical research of three sample years (2000, 2005, 2010) of infringement cases and preliminary reference rulings. The first group mostly serves to help depict the complexity of state non-compliance in the EU which will be the subject of chapter 3, and the other seeks to identify some basic litigation patterns before national courts which will be the subject of chapter 6. However, since the CJEU's analyzed infringement judgments and preliminary reference rulings from the sample years constitute only a fraction of cases that reach the Commission and which are litigated before national courts, they cannot be presumed to tell too much about all state violations or all domestic litigations raising issues of state non-compliance. Instead, they can only be treated as merely examples of cases that are subject to the infringement procedure or the decentralized enforcement mechanism and as such they will be presented in this thesis.

Setting empirical research aside, this thesis is an illustration of Komesar's methodology but it is more than just a descriptive work. By using Comparative Institutional Analysis, it explores the way in which concepts such as supply and demand can help comprehend the Commission's institutional choice. As a result, it is a tool not only devised to present a deeper and more realistic understanding of the European Commission's functioning, but one that also offers a framework for future analysis that exceeds the limitations of legal research and provides both a holistic and realist approach. My position is that supply and demand constitute the reality of institutional behavior and anyone who proposes amendments to the Commission's enforcement policy should face this reality. Only by understanding the true levers behind the Commission's selective enforcement, can we put forward normative claims that have an actual chance at succeeding when translated into practice.

#### 1.4.5 Structure

This thesis seeks to identify the levers behind the Commission's selective enforcement and its protection of its discretionary powers. Before, however, these levers are presented, it is first necessary to set out in chapter 2 the legal framework for the Commission's selective enforcement by analyzing

both the grounds and limits to its discretion. It will be shown that, despite certain imprecisions in Treaty phrasing, both the Treaty and the Court of Justice allow the Commission to both prioritize its caseload and use whatever means the Commission considers necessary, thus empowering and reinforcing its policy of selective enforcement.

Chapter 3 addresses the complexity of state non-conformity in the EU. Inspired by the political science's inquiries into the sources of non-compliance, it seeks to demonstrate that infringements of EU law which the European Commission has to deal with in its enforcement work do not just come down to several main types but that multiple elements make up state violations, impacting their nature and overall 'significance' and bringing questions concerning the appropriateness of tools. Chapter 3 thus maps out different categories of state violations, classifying them according to the measures they infringe, intentional and unintentional reasons behind them, differences in responsible state organs and a wide spectrum of consequences. This allows to see how state non-compliance in the EU is a complex phenomenon that requires a variety of compliance instruments, the choice among which constitutes the essence of the Commission's selective enforcement.

Chapter 4 explores the evolution of the Commission's selective enforcement, not only indicating how it has always been present in the Commission's practice but also how it has expanded over the years, incorporating new compliance tools and going through several sets of priorities. Most of all, however, this chapter seeks to demonstrate how the said evolution is a controlled process which, despite the changes regularly brought by the Commission, remains in the end surprisingly the same. The details have changed but the principles have persisted.

These principles are the subject of chapter 5 where it is submitted that they constitute four pillars of the Commission's discretionary model of enforcement, providing the foundations for its selective enforcement: confidentiality, bilateralism, flexibility, and autonomy. At the same time, the new approach to the Commission's enforcement is presented and identified as the accountability model of enforcement based on four main principles: transparency, trilateralism, objectivity, and accountability. Chapter 5 explores the conflict between the pillars of the Commission's model and their counterparts from the accountability approach, confirming how, despite the pressure from the latter and ensuing changes, the Commission and the Court of Justice continue protecting the core of the discretionary model. While a number of amendments have been accepted and introduced, the Commission's enforcement practice still relies on the four discretion-based pillars.

Chapter 6 begins the task of answering the questions concerning the levers behind the Commission's selective enforcement and its commitment to the four pillars. It is focused around the Commission's demand side and analyzes it through the lens of decentralized enforcement measures,

mainly private litigation before national courts and SOLVIT. This chapter seeks to assess the dynamics of private enforcement and, to achieve that, it analyzes factors that influence the costs and benefits of stakeholders' action against state authorities. By distinguishing conditions when these decentralized measures are least likely to be employed by individuals, it identifies their weaknesses which are, in turn, considered to translate into the Commission's demand.

Supply is the subject-matter of chapter 7 where it is approached from the perspective of the Commission's (and partially the Court's of Justice) physical capacity, substantive ability and dynamics. It is revealed how the Commission's capacity is, in fact, limited and how it has no choice but to prioritize its caseload and seek alternative solutions to time-consuming formalistic measures. This chapter presents a different approach to the limitations of the Commission's enforcement where their consequences reveal dependencies which, albeit quite simple, are not instantly evident and can change our perception of the Commission's and the infringement procedure's ability to enforce EU law.

Finally, chapter 8 constitutes the conclusion to the thesis where the necessity of balancing the demand and supply sides is presented. By exploring the potential effects of the accountability-based approach on this balance, it is submitted that the Commission resists its incorporation because it would not only destabilize the equilibrium between the forces of supply and demand but it would also transform the Commission into a vehicle for individual grievances which is incompatible with the Commission's understanding of its role as guardian of the Treaties.

This thesis's answer to the posed question concerning the levers behind the Commission's selective enforcement may, in the end, prove simple and even obvious. The reasons behind the Commission's protection of its discretionary model of enforcement are quite straightforward and, for that reason, somewhat dissatisfying. There is no shocking revelation or hidden agenda. The Commission simply strives to guarantee that it continues to ensure state compliance instead of becoming a vehicle for individual grievances. However, this answer, as simple as it is, is not immediately apparent and it puts the accountability-focused approach in a different perspective, pushing us to question the validity of its premises and principles. It underlines the consequences of this model of enforcement, allowing us to evaluate it with a critical eye and forcing to see the conflicting objectives that demand different solutions. Only once these objectives are understood, can there be a discussion over the potential primacy of conflicting goals. For that reason, this thesis seeks to create a framework for future analysis, drawing attention to the reality of institutional choice. Hopefully, it will help us better understand the European Commission and allow to put forward claims which will prove useful to the European officials.



## 2 Grounds and limitations of selective enforcement

The concept of selective enforcement embraces more than just prioritization. First, the Commission sets its own enforcement strategy, decides on the priorities' content and the availability and applicability of alternative tools. Only later, does it apply these priorities in practice and makes choices regarding the most appropriate measures. Thus, a part of the Commission's selective enforcement takes place before actual state infractions are detected, that is when the Commission prepares its enforcement plan in an abstract environment of future and potential cases. The actual practice of prioritization and the use of available compliance instruments constitute, in turn, the application of the assumed strategy within some margin of discretion that allows to adapt it to the specificities of individual cases. During this stage of enforcement, the future of each detected case is determined ranging from informal negotiations, infringement procedure to potential dismissal. Such broad freedom stems from the specific enforcement powers attributed to the Commission by the Treaty and upheld by the Court of Justice in its case-law. This chapter sets out the legal framework for the Commission's selective enforcement by analyzing the extent of its discretion. It discusses the imprecisions of Article 258 TFEU<sup>1</sup> and supplements them with the opinions of the Court of Justice and the academia in order to explore the grounds and limitations of the Commission's selective enforcement.

### 2.1 Grounds for the Commission's policy of selective enforcement

The Commission's selective enforcement of EU law against Member States is based on an enforcement strategy which includes choices regarding the Commission's overall objectives, the formulation of the priority criteria, establishment of alternative and complementary instruments, and the determination of rules on their applicability. It is disputable how much of its enforcement strategy the Commission discloses to the public with a rather secretive approach to its internal operations. However, it is undeniable that the Commission must rely on an enforcement plan whether formal, informal or both, general, individualized for each DG or mixed, which directs individual officials in performing their enforcement functions in a bureaucracy as enormous as the European Commission. Its communications and annual reports with their shifting enforcement goals and new solutions prove the presence of coordination with respect to the Commission's monitoring and enforcement role

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<sup>1</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

whereby its approach towards state infractions is decided. The existence of enforcement priorities and complementary measures suggests as much, the priorities being the flag element of such a strategy. However, while the Commission's communications and annual reports reveal an amount of information regarding the Commission's maintained or amended enforcement strategy, its openness with respect to the details of such a strategy tends to fluctuate with each published document. How much does the disclosed information correspond to the actual practice is a question that can hardly be verified due to the insufficiency of data but it is quite clear that the Commission decides on its own how it performs its function as the guardian of the Treaties. This means that the choice to selectively enforce EU law is its own, just as the content of the priority criteria and the rules concerning alternative measures are all construed by the Commission itself.

To find the source of the Commission's enforcement powers, one has to look to Article 17(1) TEU.<sup>2</sup> This provision, amongst various Commission's competences, confers on it the general power of ensuring the correct application of EU law in cooperation with the Court of Justice. It makes the Commission the guardian of the Treaties, granting it its enforcement and monitoring functions. The details, however, of the Commission's enforcement role and its capacity to, from above, regulate its approach towards state non-compliance, formulate priority criteria and establish complementary measures have to be searched in the principle of institutional autonomy, the unique nature of soft-law measures and in the rules concerning the practical aspects of the Commission's operation in the infringement procedure under Article 258 TFEU supplemented, clarified and delimited by the Court of Justice case-law.

Article 13(2) TEU stipulates that each EU institution is to "act within the limits of the powers conferred on it in the Treaties." Article 249 TFEU allows them to adopt their own rules of procedure that regulate their internal operation. The principles of institutional autonomy and institutional balance assert that EU institutions have the autonomy necessary to perform their functions. This autonomy includes *inter alia* the freedom to construct rules concerning their organization and modes of conduct, adopt soft-law measures, and create auxiliary bodies.<sup>3</sup> Most of all, however, Article 258 TFEU, which constitutes the legal basis for the infringement procedure, affords the Commission a substantial extent of discretion in deciding how to proceed with state infractions, furnishing it with the freedom to decide on the most appropriate compliance method which allows it to maintain and customize its enforcement policy, including the practice of prioritization and its reliance on alternative tools. The Court of Justice case-law - by shedding light on some of the confusing parts of the procedure

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<sup>2</sup> Treaty on European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>3</sup> Rewizorski, *Zasady system instytucjonalnego Unii Europejskiej*, 2013 Studia Europejskie 1, 33.



and elaborating the rather scant Treaty norms -further secures and delimits the Commission's broad freedom in the management of state violations (elaborated in the following section). At the same time, the unclear nature and uncertain effects of soft-law measures provide a means for the Commission to unilaterally and in a seemingly non-binding fashion supplement Treaty procedures, establish complementary instruments and tailor the details of its enforcement role. This was confirmed in case T-518/12<sup>4</sup> where the General Court was asked to address the legal status of the EU Pilot, a soft-law, semi-formalized, cooperative pre- pre-litigation procedure. The General Court stated that, although the EU Pilot was not expressly provided for in the Treaty, this did not mean that it lacked legal basis. These stemmed from the Commission's duty to monitor compliance with EU law by Member States, serving the purpose of, on the one hand, procuring information concerning potential infringements and, on the other, formalizing this initial exchange of information and structuring the steps the Commission had traditionally taken when investigating potential infractions.<sup>5</sup>

The EU Courts are rather favorable to the Commission and, in most cases, their rulings align with the Commission's years of ongoing practice. Yet, the leeway the Court of Justice leaves the Commission does have its limitations. Not only is the Commission prohibited from exceeding the competences it is afforded by the Treaties, but the Court is also of the opinion that the Commission is not allowed to handle state violations without paying attention to certain requirements.<sup>6</sup> This means that while the Commission is permitted to create its own enforcement agenda based on prioritization and complementary tools, this agenda has to fit within specific boundaries and correspond to the amount of discretion the Commission is afforded by the Treaty.

## 2.2 Normative limitations of the Commission's selective enforcement

To understand the Commission's general powers of the guardian of the Treaties with its heavy reliance on prioritization and complementary measures, one has to look at particular aspects of the infringement procedure's functioning. By analyzing the Commission's specific discretionary powers that stem from both, Article 258 TFEU and the CJEU's case-law, it is possible to tell how far the Commission's autonomy reaches in its selective enforcement. The following section will, therefore, examine specific features of the infringement procedure in order to evaluate the Commission's discretion and measure the extent and limitations of what it can do with its enforcement strategy.

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<sup>4</sup> Order of 10 March 2014, *Spirlea v Commission*, T-518/12, EU:T:2014:131.

<sup>5</sup> *Ibid.*, paragraph 32.

<sup>6</sup> Judgment in *Commission v Germany*, C-20/01 and C-28/01, EU:C:2003:220, paragraph 29-30.

Article 258 TFEU distinguishes several moments in the procedure that explicitly involve the issue of discretion and they all are encompassed by two sentences:

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”

This Article not only delimit the Commission's scope of conduct but also determine and influence its range of maneuverability in its selective enforcement.

### 2.2.1 Consideration of Member State's failure

Already at an early stage of a violation's 'life-span' the Commission has the discretion to assess and determine its existence. Article 258 TFEU stipulates that the Commission acts only if it “*considers* that a Member State has failed to fulfil an obligation” which implies that the Commission has the freedom to decide whether an infringement took place.<sup>7</sup> In other words, the Commission performs a confidential evaluation of state conduct during which it decides whether to qualify it as an infringement. Such Commission's 'consideration' is different from the legal determination the Court of Justice performs in its judgments. The Court's declaration of an infringement's existence brings effects for the Member State concerned in the form of Article 260(1) TFEU obligation to rectify the breach while the Commission's internal consideration of an infringement's existence in itself does not trigger any state obligations. It does, however, have the effect of influencing the choice regarding the future of the case in question and, similarly to the Court's reasoning, it involves a degree of appraisal on the part of the Commission allowing it to control the remainder of the process, distinguishing between alleged infringements that it follows up on and those that it dismisses.

Although questionable on the outset, such broad freedom can be justified. It links to the Commission's overall power as the guardian of the Treaties and the fact that it acts in the greater interest of the EU. The EU's watchdog need not demonstrate any interest in pursuing state infractions.<sup>8</sup> It merely needs to 'consider' that a violation took place. Additionally, article 258 TFEU leaves the Commission room to verify in each individual complaint whether there is anything to pursue or if the stakeholder was mistaken in their assessment or the acquired information incorrect. It also

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<sup>7</sup> Schermers, Waelbroeck, *Judicial Protection in the European Union*, 6th ed (Kluwer Law International, 2001), 633.

<sup>8</sup> Judgment in *Commission v Spain*, C-562/07, EU:C:2009:614, paragraph 25.

gives the Commission space to potentially investigate the violation and accumulate some evidence before it verifies the infringement's existence and decides to pursue it.

However, the way Article 258 TFEU is phrased, it also gives the Commission the power to determine on its own which situations qualify as infringements. Practically speaking, the result is such that if the Commission does not consider a particular conduct to be an infringement then, formally, it is not an infringement and any potential obligations the Commission could have at the later stages of the procedure do not apply. As a result, the stipulation about the Commission's 'consideration' - although justified - provides it with a leeway to avoid cases it does not wish to pursue.

According to Smith, this power of the Commission is not really discretion per se but rather "subjective judgment" since it signifies the Commission's unlimited choice and not a choice between limited and clear options that would imply discretion. After all, it is the Commission's individual choice whether to qualify specific conduct as an infringement, and this freedom is only strengthened by the fact that such considerations are not subject to any control or review.<sup>9</sup> Interestingly, the Court of Justice has a bi-polar attitude to this issue. On the one hand, it protects the Commission's discretion when it decides on an infringement's existence but, on the other, it does not condone the Commission single-handedly deciding to ignore cases.

In case 247/87 *Star Fruit v Commission*,<sup>10</sup> a Belgian company specializing in import and export of bananas, initiated proceedings under *inter alia* [new] Article 265(3) TFEU for a declaration that the Commission had failed to initiate the infringement procedure against France. According to the company, the French system of supplying the banana market was incompatible with [new] Article 34 TFEU. The company had requested the Commission to commence infringement proceedings but since all the Commission did was acknowledge the letter and assure Star Fruit that it would adopt appropriate measures, the company initiated proceedings for failure to act against the Commission. The Court of Justice did not agree with Star Fruit. Not only did it mention the lack of standing of the applicant in the procedure for failure to act, it also underlined the Commission's discretion to commence the infringement procedure. "[I]t is clear from the scheme of [Article 258 TFEU] that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position."<sup>11</sup>

However, it is one thing to rely on different tools to address state infractions and yet another to dismiss them altogether. According to Evans, the Commission had always followed the policy of

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<sup>9</sup> Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU*, (Routledge, 2010), 87.

<sup>10</sup> Judgment in *Star Fruit*, 247/87, EU:C:1989:58.

<sup>11</sup> *Ibid.*, paragraph 11.

overlooking certain violations. In some areas, it even adopted a practice where formal proceedings was barely ever utilized no matter how obvious and undeniable the breach was. Evans enumerated three such areas: 1) isolated individual breaches by national officials where the legislation and general administrative practice conform, 2) violations by national judiciary, and 3) politically sensitive cases.<sup>12</sup> Evans was not entirely sure whether the Commission's policy of disregarding certain types of infringements fitted within the limits of its discretion but he believed that action in any of the three enumerated areas could not be considered "unequivocally necessary to ensure the application of Community law" and thus the Commission remained within the boundaries set by the Treaty.<sup>13</sup>

In general, however, Evans claimed that it was rooted in [new] Article 17(1) TEU that the Commission's discretion was not absolute. On the contrary, it was restricted by its duty to ensure the correct application of the Treaty.<sup>14</sup> In other words, the infringement procedure constitutes a measure by which the Commission's obligation to ensure the correct application could be realized.<sup>15</sup> As a result, Evans argued that the Commission's discretion does not mean that it could ignore certain state violations but that it does not always have to proceed with the infringement procedure, choosing instead other appropriate measures.<sup>16</sup>

The academia agrees with Evans, believing that the Commission is free to decide which measures and when to employ to remedy an infringement but it has to "work actively" for its elimination.<sup>17</sup> Hartley underlines that there are two sides to the Commission's function as the guardian of the Treaties: on the one hand, it has discretion and, on the other, it is subject to a duty. "The duty is to take the most appropriate action to ensure that Community law is obeyed; the discretion concerns the determination of what is most appropriate in the circumstances."<sup>18</sup>

The Court of Justice agrees with the academia. As it stated in its Joint Cases C-20/01 and C-28/01,

It is settled case-law that in exercising its powers under [Article 258 TFEU] the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end.

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<sup>12</sup> Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 1979 *European Law Review* 4, 451-454.

<sup>13</sup> *Ibid.*, 455.

<sup>14</sup> *Ibid.*, 447-449.

<sup>15</sup> *Ibid.*, 455.

<sup>16</sup> *Ibid.*, 448-449.

<sup>17</sup> Dashwood, White, *Enforcement Actions under Articles 169 and 170 EEC*, 1989 *European Law Review* 14, 399.

<sup>18</sup> Hartley, *The Foundations of European Community Law* (Oxford University Press, 2003), 313.

Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought...<sup>19</sup>

The Court of Justice clearly embraces the Commission's freedom to "decide whether it is appropriate" to initiate the infringement procedure but it also refers to the Commission's duty to ensure that Member States comply. In other words, it does not matter how the Commission does it as long as it does it. The Court thus endorses the Commission's selective enforcement by allowing it to choose among alternative solutions but it also puts a cap on this selectivity by explicitly prohibiting the Commission from dismissing cases.

The Commission's discretion is thus, in theory, broad but not absolute. However, the Court's restrictive attitude may not have much bearing on the Commission's practice. Important here is the ambiguous wording of the Treaty and the lack of substantial control over the Commission's selective enforcement which make it virtually impossible to challenge it on grounds of failure to pursue violations by either individual or institution. As a result, theorists observe that, in practice, the Commission has complete discretion in every of the stages of the infringement procedure.<sup>20</sup> And it uses this discretion especially in politically sensitive cases.<sup>21</sup> This is one of the main problems raised in their studies of Article 258 TFEU and it is one of the challenges brought by the accountability approach which will be discussed in chapter 5.

Finally, the fact that the Commission decides on the existence of the infringement naturally means that it also determines its extent and nature. It is the Commission's job to investigate the potential violation, accumulate the evidence and formulate claims. It can, for example, narrow down allegations simply because of the lack of evidence, or accuse a Member State of conduct that does not correspond to the factual situation. The Court of Justice does not interfere with the Commission's choice. In case C-200/88<sup>22</sup> where the Commission accused Greece of omitting to forward certain information relating to the market of fish, the Court held: "...under the scheme established by [Article 258 TFEU], the Commission enjoys a discretionary power in deciding whether to institute proceedings for a declaration that a Member State has failed to fulfil obligations and that it is not for the Court to decide whether that discretion was wisely exercised."<sup>23</sup> The substance, extent and legal qualification

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<sup>19</sup> Judgment in *Commission v Germany* EU:C:2003:220, paragraph 29-30.

<sup>20</sup> Schermers, Waelbroeck (2001), 633.

<sup>21</sup> Krämer, *Public Interest Litigation in Environmental Matters before European Courts*, 1996 *Journal of Environmental Law* 8, 3.

<sup>22</sup> Judgment in *Commission v Greece*, C-200/88, EU:C:1990:422.

<sup>23</sup> *Ibid.*, paragraph 9.

of a breach are, therefore, subject to the Commission's own assessment within the boundaries set by the conduct of the state. Thus, for the purpose of selective enforcement, Article 258 TFEU and the Court's favorable case-law leave the Commission room for maneuverability to manipulate claims in order to avoid topics it wishes to leave out.

The Commission's 'consideration' of the violation's existence constitutes the first - albeit already imprecise and controversial - step when the Commission's selective enforcement can come into focus, allowing it to segregate cases according to its own set of criteria. At that stage, the applied guidelines can be various: from the general criteria which determine the priority of cases through the practical, factual and political hindrances. There may simply be no violation to pursue, the Commission's officials may have failed to accumulate enough evidence, or competing objectives urge the Commission to look away or choose other methods of resolution. As a result, already during such an early step of a presumed infringement, a degree of leeway is provided for the Commission to make choices regarding the violations it wishes to pursue.<sup>24</sup> Such discretion not only makes room for the Commission's selective enforcement where different tools are applied to combat state infringements, but also the requirement of the Commission's initial 'consideration' of a violation's existence tacitly allows it to turn a blind-eye to certain non-compatible situations despite the Court's opinion to the contrary.

### 2.2.2 Opportunity to submit observations

When the Commission chooses to pursue a violation, Article 258 TFEU obliges it to give the Member State an opportunity to submit its observations before it issues a reasoned opinion. The letter of formal notice serves this purpose,<sup>25</sup> as well as outlines and delimits the subject-matter of the dispute. It, therefore, protects the Member States' right of defense, allowing it to familiarize itself with the Commission's claims, rectify the violation or prepare its line of defense. Failure to issue the letter before the reasoned opinion leads to the cases' inadmissibility before the Court.

In practice, however, the Commission does not move immediately from its consideration of a violation's existence to the letter of formal notice (except in non-communication cases). The letter is often preceded with complementary measures. The most commonly used are the Commission's informal contacts with national authorities which constitute an inherent yet parallel compliance tool to the infringement procedure but which are also one of the most challenged aspects of the procedure. Negotiations with their confidential, bilateral nature can continue all the way up to a

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<sup>24</sup> Hedemann-Robinson, *Enforcement of European Union Environmental Law*, 2nd ed. (Routledge, 2015), 220.

<sup>25</sup> Harlow, Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), 179.

'satisfactory' resolution, permit the Commission to cooperate with the Member States according to its own rules, and provide an opportunity for states to potentially bargain with the Commission. Similarly, the EU Pilot, although more proceduralized, also relies on a friendly and confidential relationship with Member States and provides space for amicable solutions achieved before the launch of the infringement procedure. With a few exceptions, the EU Pilot constitutes nowadays a regular pre-procedural step.

Not only does the Court endorse selective enforcement by permitting the Commission to use whatever means necessary, Article 258 TFEU itself provides the grounds for the existence and use of bilateral and cooperative instruments by requiring that the Commission gives each Member State the "opportunity to submit its observations." After all, the Treaty does not specify in which form and how frequently is the Commission obliged to provide this opportunity. The letter of formal notice, although long established, originates from the Commission's practice accepted by the Court of Justice<sup>26</sup> and it does not preclude other compliance tools from being utilized before, during or after the letter in order to allow Member States to submit their observations and rectify their infringement. If these complementary instruments are successful, then there is no need to initiate or continue with the Treaty procedure. As the Court has repeatedly underlined, "[i]t is for the Commission, when it considers that a Member State has failed to fulfil its obligations, to assess whether it is appropriate to act against that State, to ascertain the provisions which it has infringed and to choose when it will open the infringement procedure against it."<sup>27</sup>

### 2.2.3 Reasoned opinion

According to Article 258 TFEU, after the Commission initiated the infringement procedure and sent the letter of formal notice, comes the stage of reasoned opinion. This is where the issue of the Commission's discretion returns together with Article's 258 TFEU unclear use of the word 'shall': once the Commission has determined that an infringement exists and given the opportunity to national authorities to submit their observations "it shall deliver a reasoned opinion." To some, the wording of the Treaty could signify the Commission's obligation to proceed with the formal pre-litigation phase and, within it, to produce a reasoned opinion.<sup>28</sup> Even the European Ombudsman has declared in one of its investigations where the Commission chose to close the Newbury Bypass case<sup>29</sup> without

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<sup>26</sup> Grohs, *Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 65.

<sup>27</sup> Judgment in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 63.

<sup>28</sup> Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986), 35, 415.

<sup>29</sup> Decision of the European Ombudsman on complaint 206/27.10.95/HS/UK et al. against the Commission (29 October 1996).

continuing with the procedure, that if the Commission considered that an infringement took place, it was under the obligation to proceed with a reasoned opinion. In that case, the Ombudsman eventually concluded that there had been no infringement and thus the Commission was right to close it. Nevertheless, the Ombudsman went as far as interpreting the Commission's powers and challenging its decisions, claiming that the use of the word 'must' signified an obligation on the part of the Commission to always issue a reasoned opinion.<sup>30</sup>

In contrast to the Ombudsman's opinion, the wording of Article 258 TFEU can also be understood as implying that rather than an obligation, the duty to issue a reasoned opinion is merely a procedural condition similar to that of providing the state with the opportunity to submit observations. The Commission cannot progress with the action and initiate Court proceedings unless it first issues a reasoned opinion which gives the Member State concerned a chance to familiarize itself with the final version of the Commission's claims, prepare a response and its overall defense. The reasoned opinion can, therefore, be considered merely as a procedural measure intended to protect the defendant rather than an obligation on the part of the Commission to abide by whenever it determines that an infringement exists.<sup>31</sup> This is also confirmed in the Court of Justice case-law where it declared that the reasoned opinion protects "the rights of the Member State to put forward its arguments in defense based on complaints formulated".<sup>32</sup> The Commission is simply prohibited from doing shortcuts and leaping from discovering an infringement to Court proceedings.

The Commission's discretionary powers in the administrative stage of the infringement procedure were confirmed in case 48/65 *Lütticke v Commission*<sup>33</sup> where the Court stated:

"The object of the procedure under Article 169 is to prevent Member States from failing in their obligations under the Treaty.

For this purpose, the said Article empowers the Commission to set in motion a procedure which may lead to an action before the Court of Justice to determine the existence of such a failure by a Member State; under the terms of Article 171 of the Treaty the state concerned would then be required to take the necessary measures to comply with the judgment of the Court.

The part of the procedure which precedes reference of the matter to the Court constitutes an administrative stage intended to give the Member State concerned the opportunity of conforming with the Treaty. During this stage, the Commission makes known its view by way

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<sup>30</sup> Smith (2010), 169-170.

<sup>31</sup> Evans (1979), 446.

<sup>32</sup> Judgment in *Commission v Italy*, 7/69, EU:C:1970:15, paragraph 5.

<sup>33</sup> Judgment in *Lütticke*, 48/65, EU:C:1966:8.



of an opinion only after giving the Member State concerned the opportunity to submit its observations.

No measure taken by the Commission during this stage has any binding force. Consequently, an application for the annulment of the measure by which the Commission arrived at a decision on the application is inadmissible.”<sup>34</sup>

The same reasoning was employed by the Court of First Instance precisely with respect to reasoned opinions. In case T-47/96 *SDDDA v Commission*,<sup>35</sup> SDDDA demanded that the Commission issued a reasoned opinion against France for failing to apply certain directives, claiming *inter alia* that the Commission had already sent a letter of formal notice. The Court of First Instance replied:

“The Commission is not bound to initiate an infringement procedure against a Member State; on the contrary, it has a discretionary power of assessment, which rules out any right for individuals to require it to adopt a particular position.”<sup>36</sup>

The use of the word 'shall' does not, therefore, indicate that the Commission is obliged to issue a reasoned opinion whenever it decides an infringement took place but that it should respect Member States' right of defense. Furthermore, since the existence of an infringement is dependent on the Commission's own subjective consideration and it cannot be challenged by any party, then, in reality, the obligation on the part of Commission to issue a reasoned opinion does not exist and the Treaty 'shall' becomes 'may'.<sup>37</sup> Finally, the duty to send a reasoned opinion rests on the Commission only if it expects or plans to proceed with the case to the Court of Justice where the opinion constitutes a condition of admissibility. If, however, the Commission chooses to rely on another dispute resolution tool then it has no obligation to issue the opinion. The end result is such that the Commission is under no duty to utilize the infringement procedure whenever it considers that a violation took place, instead having the freedom to rely on alternative means.

#### 2.2.4 Referral to the Court

The one explicit and unquestionable discretionary power conferred on the Commission by Article 258 TFEU concerns the last stage of the procedure where the Commission refers the case to the Court of Justice. According to the Article, once the Commission delivers a reasoned opinion, it 'may' refer the case to the Court. The usage of the word 'may' signifies that the Commission is under no obligation to initiate Court proceedings and that the Court does not constitute an indispensable

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<sup>34</sup> Ibid., paragraph 27.

<sup>35</sup> Order of 12 November 1996, *SDDDA v Commission*, T-47/96, ECR, EU:T:1996:164.

<sup>36</sup> Ibid., paragraph 42.

<sup>37</sup> Smith (2010), 88.

element of EU enforcement. The Commission on the other hand is, once more, presented with an opportunity to avoid judicial proceedings while its selective enforcement reinforced.

The most obvious situation when the Commission refrains from referring the case would be if a Member State has rectified the infringement during the pre-litigation stage. Interestingly, the Commission can and has the habit of referring cases even if a Member State has remedied the breach (as long as it did so after the deadline). This is useful from the point of establishing the infringement's existence which can later serve individuals before national courts.<sup>38</sup> It undoubtedly also has a shaming effect. Overall, however, a Member State's reaction to the reasoned opinion does not seem to matter for the Commission's discretion in referral according to Article 258 TFEU. Whether the Member State did remedy the infringement or not after the reasoned opinion was issued, the Commission is under no obligation to launch the Court proceedings.<sup>39</sup> Nor does it have to supply an explanation for its choice to refrain from referring the case to the Court.<sup>40</sup> The Commission cannot, however, widen the subject-matter of the referral as compared to the reasoned opinion.<sup>41</sup>

### 2.3 Discretion equals selective enforcement

While the Treaty grants the Commission powers of monitoring and enforcement and the principle of institutional balance affords it institutional autonomy to execute these powers, Article 258 TFEU further furnishes it with a considerable amount of discretion that allows it to practice selective enforcement of EU law. Although scant, imprecise and open for conflicting interpretation, Article 258 TFEU does not oblige the Commission to launch the infringement procedure in every case of non-compliance but leaves it ample room for subjective appraisal, prioritization and alternative solutions. The Court of Justice requires that the Commission remains precise,<sup>42</sup> respects procedural steps<sup>43</sup> and sets reasonable time-limits<sup>44</sup> but it does not interfere with the details of its enforcement policy, allowing it to use whatever tools necessary to achieve compliance as long as it finds solutions to all detected cases. Selective enforcement is, therefore, strongly grounded in the Commission's broad

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<sup>38</sup> Harlow, Rawlings, *Accountability and Law Enforcement: The Centralized EU Infringement Procedure*, 2006 *European Law Review* 31, 461.

<sup>39</sup> Schermers, Waelbroeck (2001), 633.

<sup>40</sup> Mastroianni, *The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?*, 1995 *European Public Law* 1, 536.

<sup>41</sup> Judgment in *Commission v United Kingdom*, C-530/11, EU:C:2014:67, paragraph 39-40.

<sup>42</sup> Judgment in *Commission v Greece*, C-180/14, EU:C:2015:840, paragraph 60; Judgment in *Commission v Germany*, C-525/12, EU:C:2014:2202, paragraph 25; Judgment in *Commission v Belgium*, C-150/11, EU:C:2012:539, paragraph 24-27.

<sup>43</sup> Judgment in *Commission v Slovakia*, C-433/13, EU:C:2015:602, paragraph 39-40.

<sup>44</sup> Judgment in *Commission v Germany*, C-591/13, EU:C:2015:230, paragraph 14.

discretion and its main constraint comes down to the prohibition from dismissing infringements which, in practice, is - as things stand nowadays - difficult to verify.



### 3 Complexity of state non-compliance in the EU

Frequently, state violations are brought down to just three general categories: non-transposed directives, bad application cases and failures to respect Court of Justice judgments. The Commission only strengthens such simplified perceptions by publicly relying on a similar categorization in its articulation of claims in infringement actions. Perceived in such light, it is not surprising that the Commission's enforcement practice is easily criticized and subject to different propositions of reform. If one considers state non-compliance through the lens of just a few basic types of violations, then it is not difficult to point to neglected areas or propose shifts in policy. If we do not see the amount of different state infractions the Commission has to choose from when performing its enforcement function, then we believe these choices to be easy, and cannot understand why it does not do what is expected of it. If, on the other hand, we look past the few most obvious infractions and delve into their particular components, then we begin to understand how difficult the process of selective enforcement is, and we are no longer so easy in passing opinions on what should constitute the Commission's priority. The choice between different categories of state violations becomes a little more complex.

The identification of many forms that state infractions can take helps to see the range of options the Commission is faced with in its enforcement practice. State violations are not 'raw' acts but constitute complex combinations of different components. Political scientists interested in various correlations that determine state conduct approach non-compliance from the perspective of its sources, showing us, lawyers, that there is more to state violations than just the satisfaction of conditions of responsibility which qualifies incompatible conduct as an infringement. The Court of Justice, however, contributes to the lawyers' narrow perception of non-compliance with its, albeit strongly justifiable, uniform line of case-law where, for the purpose of state responsibility, all that matters is the question of the infringement's establishment and the content of the norm breached. Various particulars such as the type of organ responsible or infringements' consequences, not mentioning the reasons behind state infractions, are easily swept away by the Court's detailed analysis of legal provisions and only the most typical and reoccurring or, alternatively, exceptional elements stand out. It is possible that the Court does take such additional components into consideration when choosing between alternative solutions to pending cases but its formal reasoning avoids such references.

Even though we recognize that Member States are responsible only for the conduct of their authorities and take notice of various defenses they put forward before the Court, we often do not consider these components as defining, qualifying or even affecting violations' value or character. And even if we do pay attention to more than just the content of the norm breached, we still have the tendency to concentrate only on one dominating component (e.g. consequences). Obviously, such research has its own reasoning but in terms of selective enforcement disregard of those components can lead the Commission to inappropriately assigned compliance mechanisms, wasted resources in unnecessary areas and, finally, neglected violations despite their 'importance', not to mention potential political conflicts.

Despite the categorization of state violations into just three main types, the Commission does, in fact, pay attention in its enforcement practice to individual components of state infractions. In its enforcement priorities (examined in detail in chapter 4), it refers to the value and nature of the breached obligation as well as to violations' consequences. In its choice of appropriate instruments, it pays attention to the type of organ responsible as well as to reasons behind state infractions. Whether officially or unofficially, the Commission - according to those components - makes choices regarding violations' 'ranking' and decides on the applicability of appropriate measures.

To demonstrate the complexity of state non-compliance in the EU, this chapter will explore five main components of state infractions which the Commission takes into account in its selective enforcement. Starting with the type of duty imposed on Member States which can, in itself, qualify for the immediate launch of the infringement procedure, the subject-matter and value of EU norms will also be addressed as a factor determining violations' order of importance. A substantial part of this chapter will, however, be devoted to the variety of organs' responsible, multiplicity of reasons behind state infractions and their differing effects. Due to the diversity of obligations that rest on Member States in the process of legislating and application, these three components will be presented separately for each process. The distinction between them is based on the nature of the legal act/conduct that constitutes a violation: the legislation process is mostly concerned with national legislative or regulatory measures while the application process mostly refers to domestic measures of individual administrative or judicial nature. While a distinction between the two processes is not always that obvious and they are often heavily intertwined with each other, their prevailing differences warrant a separate analysis that underlines the specificities of their breaches.

By drawing the attention to the peculiarities of state infractions, this chapter seeks to emphasize not only how difficult the state process of conforming to EU law is which can help justify the Commission's heavy reliance on managerial techniques whereby it strives to aid instead of

prosecute. This chapter also seeks to highlight how difficult selective enforcement is with multiple components competing for priority and the Commission having to choose among complicated configurations of cases' components. As will be shown in chapter 5, the accountability approach to the Commission's enforcement draws much of its criticism from the dissatisfaction of stakeholders who complain about the Commission's disregard of state violations or its deliberately drawn-out or inadequate handling of cases. Understanding the complexity of state non-compliance in the EU should aid in putting these complaints in perspective but it should also contribute to the supply and demand analysis from chapters 6, 7 and 8 by helping to not only define the demand side of the Commission's enforcement but also to notice how problems of limited supply collide with such a complex and large body of non-compliance cases. Before, however, the analysis of violations' individual components can begin, it is first necessary to attempt to grasp the size of non-compliance in the EU and address the question whether the Union has a problem with non-compliance to begin with.

### 3.1 Sum of state violations

It is impossible to determine how many state violations of EU law actually take place. The Commission's statistics on the application of the infringement procedure can give some indication as to the extent of non-compliance in the EU but they cannot provide exhaustive information concerning the absolute number of state infractions. Nor can they inform of the number of violations subject to the Commission's assessment as the published data does not include overlooked violations<sup>1</sup> or informal methods of resolution.<sup>2</sup> Additionally, the Commission's annual reports tend to be convoluted and inconsistent.<sup>3</sup> According to Börzel, cases that the Commission includes in its statistics ultimately constitute a random example of actual violations that take place in the EU and, therefore, they denote only relative levels of non-conformity.<sup>4</sup>

The Court's of Justice data on preliminary references can add insight into the question of the extent of non-compliance in the EU since the majority of such referrals involve issues of state (non-)conformity. For example, in the sample years of 2000, 2005 and 2010, 76% of preliminary reference rulings concerned matters of state non-compliance. Nonetheless, such statistics constitute only the tip of the iceberg because they include only those cases which national courts chose to refer to the

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<sup>1</sup> Börzel, *Non-compliance in the European Union: pathology or statistical artefact?*, 2001 *Journal of European Public Policy* 8, 808.

<sup>2</sup> Conant, *Compliance and What EU Member States Make of It*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 20.

<sup>3</sup> Börzel (2001), 804, 808, 810-813.

<sup>4</sup> *Ibid.*, 808.

Court of Justice. Similarly, data on complaints the Commission's receives as well as on SOLVIT cases can all complement the overall sum but they may also overlap with other mechanism, and not all of them involve actual violations but rather assumptions of violations made by individuals concerned.

Many cases simply never get detected by the European Commission nor find their way to any of the other enforcement mechanisms in the EU. In the end, whatever data we compile and whichever statistics we rely on, they will always fail to provide reliable and complete information as to the absolute sum of state violations that take place in the EU. That being said, it does not mean that we should not look at the tip of the iceberg even if we cannot see the iceberg itself. Imperfect that this may be, the Commission's and the Court's data can at least give some idea on what is going on in Member States.

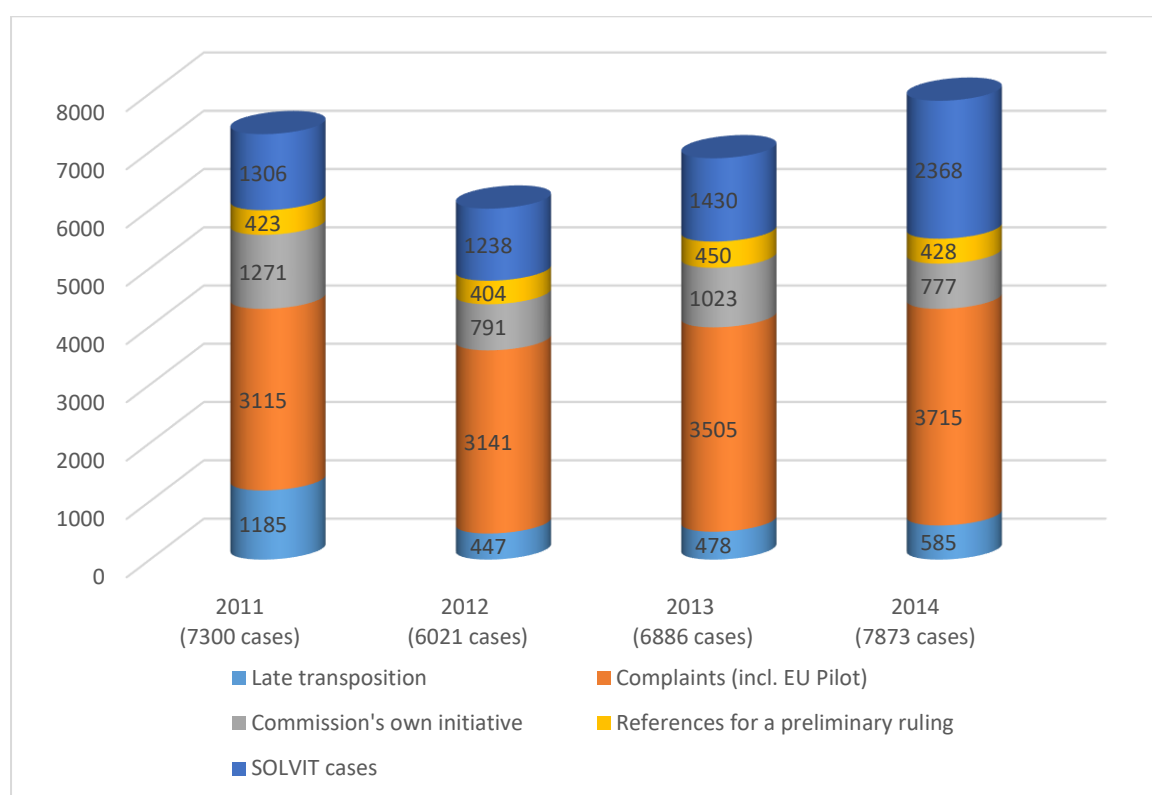


Chart 1. Estimated sum of state violations that took place in years 2011-2014.

Chart 1 shows the estimated sum of state violations that are likely taking place in the EU each year. It is measured by collating data from available sources, such as the Commission's<sup>5</sup> and the Court

<sup>5</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring the Application of EU Law (2014), COM(2015)329; Commission 31<sup>st</sup> Annual Report on Monitoring the Application of EU Law (2013), COM(2014)612; Commission 30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012), COM(2013)726; Commission 29<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2011), COM(2012)714.



of Justice<sup>6</sup> annual reports as well as the Single Market Scoreboard.<sup>7</sup> The total suggested number of state violations is calculated by adding the Commission's own initiative inquiries, automatically detected late transposition cases, complaints, references to the Court for a preliminary ruling and SOLVIT cases (that fall within its remit). The result is such that in 2011, at least 7300 violations took place, in 2012 – 6021, in 2013 – 6886 and in 2014 - 7873, which on average makes around 7020 infractions a year. Clearly, not all complainants were correct about their estimation of non-compliance, not all cases involved actual infractions of EU law and at least some of them had to overlap. Nonetheless, taking into account the fact that the absolute number of state violations must necessarily be larger than what was detected, processed or complained about, then it can be assumed that such non-violation or overlapping cases should not have any bearing on the overall result, and that the obtained numbers can be considered to represent the lower threshold of the actual sum of state violations that take place in the EU.

Notwithstanding, it is difficult to determine whether 7020 violations a year is actually a lot considering that the EU consists of as many as 28 Member States which makes about 250 violations per state per year. In a way, the answer depends on the perspective we assume. If we look at the Court's of Justice overall yearly output then we can see that, every year, it closes on average about 530 cases. In the impossible scenario of it ever having to rule on all the detected alleged violations, it would be able to address only 7,5% of the yearly quota of state non-compliance (and without any space left for remaining actions that can be brought before the Court).

Does this mean that the EU has a problem of non-compliance? It is a fact that there are variations in levels of conformity across Member States which Falkner et al. define as four worlds of compliance,<sup>8</sup> each with specific problems and resulting differences in conformity record that will be addressed further in this chapter. As for the question of the EU's overall problem of non-compliance, it has been frequently raised that state non-conformity is a growing and persistent phenomenon because the number of infringement proceedings is steadily increasing.<sup>9</sup> Börzel, however, argues that

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<sup>6</sup> Court of Justice of the European Union Annual Report for 2014.

<sup>7</sup> The Single Market Score Board,  
[http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/solvit/](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/).

<sup>8</sup> Falkner, Treib, Hartlapp, Leiber, *Complying with Europe* (Cambridge University Press, 2005); Falkner, Treib, *Three Worlds of Compliance or Four? The EU-15 Compared to New Member States*, 2008 *Journal of Common Market Studies* 46, 308.

<sup>9</sup> Falkner, Treib (2008), 294; Bossche Van den, *In Search of Remedies for Non-Compliance: The Experience of the European Community*, 1996 *Maastricht Journal of European and Comparative Law* 3, Mendrinou, *Non-Compliance and the European Commission's Role in Integration*, 1996 *Journal of European Public Policy* 3, 2; Timmermans, *Judicial Protection against the Member States: Articles 169 and 177 Revisited*, in Curtin, Heukels (eds.), *Institutional Dynamics of European Integration* (Martinus Nijhoff Publishers, 1994), 393-394; Snyder, *The Effectiveness of European Community Law*, 1993 *The Modern Law Review* 56, 23; Weiler, *The Transformation of Europe*, 1991 *The Yale Law Journal* 100, 2464.

non-compliance, albeit present, does not constitute a pathology nor does it have a growing tendency. On the contrary, she claims that, when taking into account the increasing number of Member States and EU legislation, the rate of non-conformity remains rather stable, especially that it is mostly several Member States that are responsible for the bulk of detected violations.<sup>10</sup> Mendrinou indicates that non-compliance should not be treated as a symbol of failing integration but rather as a natural occurrence that unavoidably accompanies the operation of such close-knitted, heavily-regulated international communities as the EU.<sup>11</sup>

At the end of the day, the available data is simply too incomplete and inconsistent to allow for a correct estimation of the absolute number of state violations and it does not suffice to unequivocally determine whether the EU has a problem of non-compliance. Weiler has once called our knowledge on state non-conformity a "black hole"<sup>12</sup> and, to a degree, this statement still holds true and will remain so even if the Commission drafts better statistics, reveals more information on its internal practices or academics perform increasingly detailed research. In an organization as big as the EU, no study can account for those state violations that are never discovered.

Ultimately, however, whether state non-conformity is increasing or not and irrespective of how much of it is actually taking place, it is undeniable that the more compliance EU measures can secure, the better it is for the Union as a whole, its citizens and economic operators.<sup>13</sup> The increasing amount of state infractions - even if they are only the result of a growing number of Member States and EU legislation and do not constitute a pathology - do have an impact on the Commission's enforcement function putting it in a situation where it has more and more cases to deal with every year.

### 3.2 State duty

One of the most apparent distinctions the Commission makes in its enforcement practice is based on the type of EU measure and the specific duty that this measure entails either by its very nature, due to its specific stipulations or, finally, as a result of obligations stemming from the loyalty principle enshrined in Article 4(3) TEU. The quality of EU measures is such that they require from states specific conduct or prohibit such conduct while their detailed provisions can modify this requirement or supplement it. Thus, nowadays directives necessitate the communication of transposing measures

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<sup>10</sup> Börzel, *Guarding the Treaty: The Compliance Strategies of the European Commission*, in Börzel, Cichowski (eds.), *The State of the European Union* (Oxford University Press, 2003), 215, 217; Börzel (2001), 804, 820.

<sup>11</sup> Mendrinou (1996), 2.

<sup>12</sup> Weiler (1991), 2465.

<sup>13</sup> Timmermans (1994), 391.

while regulations may be construed in such a way as to require implementation.<sup>14</sup> The process of legislation mostly involves the duty to adopt new national and regional measures but Member States are also obliged to adjust existing, repeal incompatible or refrain from enacting conflicting provisions. They are under the duty to apply EU norms in their legal systems and, for this purpose, they have to enact laws, create procedures, designate authorities and provide sanctions. Once these are in place, Member States have to ensure that their domestic organs apply and enforce EU norms in their practice. This means that they have to supervise the fulfillment of EU obligations by both, individuals and domestic bodies, execute checks, controls and inspections, then pursue, prosecute and impose penalties while it all has to be carried out in an effective way. The preliminary reference mechanism has to function properly, Member States are to give priority to conflicting EU norms, comply with the Court of Justice rulings and draft management plans, submit reports, designate areas, prepare statistical returns, etc. A wide spectrum of duties rest on Member States which, when unfulfilled, result in state infractions.

An important part of the Commission's selective enforcement is thus based on the type of EU measure and the duty it entails. According to Grohs, the Commission distinguishes three categories of infringement cases: non-communication, non-conformity and bad application. The first category mostly refers to late transposition of directives. The second category comprises instances of bad or incomplete transposition while the third includes cases of incorrect application of EU norms.<sup>15</sup> Although such a classification is clearly a simplification and does not give justice to the complexity of Member States' duties that can lead to state infractions, these are the main categories that can be found on the Commission's list of priorities.

Directives and the quality of their transposition have always been the Commission's focus.<sup>16</sup> In the sample years of 2000, 2005 and 2010, as many as 71% of the CJEU's judgments in infringement cases concerned non-compliance with EU directives. Within this number, 33% constituted non-transposition cases, 21% incorrect or incomplete transpositions and the remaining 46% involved the performance of specific duties stemming from EU directives, including application problems. Such high concentration of cases concerning directives can be explained by both, the directives' wide array of freedom left to Member States which results in time-consuming duties of transposition,

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<sup>14</sup> "The fact that a regulation is directly applicable does not prevent the provisions of that regulation from empowering a Community institution or a Member State to take implementing measures," Judgment in *Eridania*, 230/78, EU:C:1979:216, paragraph 34.

<sup>15</sup> Grohs, *Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 62-63.

<sup>16</sup> Commission Communication A Europe of Results – Applying Community Law, COM(2007)502, 9; Commission Communication Better Monitoring of the Application of Community Law, COM(2002)725, 12; Commission White Paper on European Governance, COM(2001)428, 26.

misunderstandings and wrongful implementation as well as the Commission's focus on this specific type of EU measure. Directives constitute the only instrument that is on the Commission's list of priorities on account of its specific nature and without any additional qualifying factors such as value or effects. The Commission's justification of this choice is mostly based on the fact that violations of directives may prevent entire sections of EU law from being operational in Member States.<sup>17</sup> This means that, according to the Commission, late transposition cases, by directives' very nature, result in systemic violations and have serious consequences which warrants their special place on its list of priorities while their immediate pursuit helps avoid application violations in the future.<sup>18</sup> This special role of directives is further underlined by new Article 260(3) TFEU which permits the Commission to apply for financial penalties in late transposition cases already in the first infringement procedure. In 2015, the Commission brought 5 cases to the Court with a request for daily penalties<sup>19</sup> (in 2014, it brought 4 such cases, all related to energy policy directives<sup>20</sup>). Interestingly, all such cases brought since 2011 were always eventually withdrawn after Member States complied. Their late conformity had to be influenced by the deterrent effect of pending penalties but it was also likely because - as the Commission underlines - Member States tend to intentionally delay transposition to the last possible moment.<sup>21</sup> A particularly late transposition of Poland during the final stages of the Court procedure,<sup>22</sup> although withdrawn by the Commission, prompted it to revise its policy on Article 260(3) TFEU in the future.<sup>23</sup>

Similarly to directives does the Commission treat failures to abide by the Court's judgments under Article 260 TFEU. Also barred of any qualifying factors, this type of infraction constitutes a priority in itself. This is not surprising considering that such failures symbolize disrespect for the authority of the Court of Justice and constitute challenges to the entire enforcement system in the EU. Such cases reaching the second judgment of the Court are, however, rare, likely due to the threat of financial penalties ensuring that Member States rectify their violations before the penalties are imposed. In the sample years of 2000, 2005 and 2010 only one case was brought under Article 260(1) TFEU. In 2015, the Court of Justice delivered 3 judgments under Article 260(2) TFEU while 7 were still pending at the end of the year. At the same time, the Commission had 85 second-time infringement procedures opened.<sup>24</sup> In 2014, the Court delivered 5 judgments, 7 were pending and the Commission

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<sup>17</sup> Commission Communication on Better Monitoring, COM(2002)725, 12.

<sup>18</sup> Commission White Paper on European Governance, COM(2001)428, 26.

<sup>19</sup> Commission 33rd Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 29.

<sup>20</sup> Commission 32nd Annual Report on Monitoring (2014), COM(2015)329, 20.

<sup>21</sup> *Ibid.*

<sup>22</sup> Case removed from the register, *Commission v Poland*, C-320/13, EU:C:2015:221.

<sup>23</sup> Commission 33rd Annual Report on Monitoring (2015), COM(2016)463, 30.

<sup>24</sup> *Ibid.*, 26.

had 61 second-time procedures opened.<sup>25</sup> Such a low number of judgments delivered under Article 260(2) TFEU compared to the Commission's second-time procedures is likely because as in - late transposition cases - Member States tend to delay the process of conformity until the last moment.<sup>26</sup>

While non-transposition violations are easily identifiable and have maintained a special place on the Commission's list of priorities, non-conformity and bad application categories are neither as easily definable nor have the Commission remained consistent in its attitude towards them. Theoretically, non-conformity cases include incorrect or incomplete transposition issues while bad application cases refer to the stage of actual application.<sup>27</sup> In reality, however, non-conformity violations sometimes include application problems while bad application infractions are occasionally the result of insufficient transposition. Macrory gives the example of a Member State's failure to adopt all implementing laws necessary to carry out an Environmental Impact Assessment. It is unclear whether, in such a case, the resulting lack of EIA with respect to a specific project should be categorized as non-conformity (incomplete transposition) or non-application (non-implementation in practice).<sup>28</sup> Unlike with non-communication cases, however, non-conformity cases have conditional priority on the Commission's agenda, dependent on such qualifying factors as the value of the infringed norm, frequency and effects discussed further.

Aside from non-transposition cases and failures to comply with CJEU's judgments, the Commission refrains in its priorities from concentrating on other specific EU measures or types of duties they entail, and the same is reflected in its practice. While in the sample years of 2000, 2005 and 2010, 71% of infringement judgments concerned directives, only 10% concerned regulations and 16% Treaty articles. Apparently, to the Commission, the type of violated measure or the duty it entails does not so much matter as the violations' remaining characteristics such as the subject-matter and value of breached norm.

### 3.3 Subject-matter and value of EU norms

Another component that the Commission takes into account when formulating its enforcement policy is based on the subject-matter and value of violated norms. Certain EU provisions are considered more significant than others and their violations take priority in the Commission's order of caseload. For example, in 2001, the Commission enumerated two such priority categories:

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<sup>25</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 15-16.

<sup>26</sup> *Ibid*, 16.

<sup>27</sup> Grohs (2012), 63.

<sup>28</sup> Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing, 2010), 742-743.

breaches of fundamental Community principles and Community financing rules.<sup>29</sup> In 2002, the Commission concentrated on violations of human rights and fundamental freedoms such as the right to vote, access to employment or social welfare. It also took the commitment to pursue violations impacting the Community's financial interests and EU exclusive powers.<sup>30</sup> In 2007, among other priorities the Commission focused on breaches that raised issues of principle such as those concerning the application of Treaty principles and main elements of framework regulations and directives, the definition and the evaluation of which was decided on a sectoral basis by each DG.<sup>31</sup>

This subject-matter and value that the Commission takes into account when formulating its enforcement strategy involves its subjective appraisal of EU norms, measures and policy areas, carried out within individual sectors. Each DG attributes higher or lower significance to EU norms which, alongside reflecting the overall importance of certain provisions over others, is also dependent on factors such as current political goals or the level of encountered opposition in Member States, evolving together with EU policy objectives. However, in 2015 the Commission took on a different approach and, aside from prioritizing within each policy sector, it also begun prioritizing among sectors according to Juncker's policy priorities, enumerating a list of areas subject to intensified enforcement.<sup>32</sup> As a result, EU Pilot files opened in 2015 concerned mostly mobility and transport (14%), internal market, industry, entrepreneurship and SMEs (12%), justice and consumers (11,5%), environment (11.5%) and, finally, taxation and customs (10%).<sup>33</sup>

### 3.4 Organ responsible

According to the Court of Justice, a Member State is responsible for an infringement of EU law irrespective of the state agency whose conduct has caused it, even if it is a constitutionally independent institution.<sup>34</sup> This means that, theoretically, it is of no consequence which organ has breached the EU obligation for its conduct to constitute the subject-matter of Article 258 TFEU proceedings. Practically speaking, however, it does matter which national body has committed the infraction. Not only is the individuals' capacity and will to challenge state non-compliance before national courts influenced by the type of organ they would litigate against, but also national governments' ability to influence such organs varies. Mostly, however, different state bodies perform

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<sup>29</sup> Commission White Paper on European Governance, COM(2001)428, 26.

<sup>30</sup> Commission Communication Better Monitoring, COM(2002)725, 11.

<sup>31</sup> Commission Communication A Europe of Results, COM(2007)502, 9.

<sup>32</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 4-12.

<sup>33</sup> *Ibid.*, 20.

<sup>34</sup> Judgment in *Commission v Belgium*, 77/69, EU:C:1970:34, paragraph 15.

different tasks and thus they encounter different problems when dealing with EU law. Not surprisingly, neither of the Commission's priorities mentions the type of organ responsible as a factor present in its selective enforcement. Yet, the Commission's practice demonstrates that it does pay attention to the organ behind the violation when deciding the appropriate course of action which is mostly visible with respect to infractions of national judiciaries.

### 3.4.1 Legislation process

It is mostly the national legislature and executive which have the power to adopt legislative and regulatory acts and which are responsible for fulfilling many EU obligations. However, in some Member States, central institutions delegate their tasks to their local or regional authorities.<sup>35</sup> This is especially relevant in countries where local or regional entities are furnished with political autonomy such as federations (e.g. Germany, Austria, Belgium) or which have autonomous regions (e.g. Spain, Italy) or dependencies, if these fall under the application of the Treaties (e.g. UK).<sup>36</sup> Whether local or regional authorities participate in the legislative process ultimately depends on the constitutional division of competences. This, however, makes the process of conforming to EU obligations all that much harder, where one directive has to be transposed by multiple organs, increasing the chance that someone somewhere will err. It also makes it harder for the Commission to check the quality of such complex, multi-tier transpositions. Mostly, however, it can cause troubles for national governments which, being directly responsible for national failures before the Court of Justice, may not have the means to compel their independent entities to comply with their EU obligations.<sup>37</sup> Germany was, for example, held responsible for incomplete transposition of an EU directive due to the delay of a number of its *Länder* which the government had, on several occasions, urged to conform but had no power to coerce.<sup>38</sup>

Many Member States have established independent regulatory agencies and delegated to them regulatory powers with respect to particular policy domains. Such agencies have thus become specialized authorities with the power to adopt regulatory measures within their policy areas.<sup>39</sup> Their nature differs from one country to another and according to the subject-matter of their competences<sup>40</sup> but it cannot be excluded that such agencies can also have influence over Member

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<sup>35</sup> Brealey, Hoskins, *Remedies in EC law* (Sweet and Maxwell 1998), 13.

<sup>36</sup> Hartley, *The Foundations of European Community Law* (Oxford University Press, 2003), 310.

<sup>37</sup> A Ibáñez, *A Deeper Insight Into Article 169 EC Treaty*, 1996 Harvard Jean Monnet Working Paper 11, 23.

<sup>38</sup> Judgment in *Commission v Germany*, C-383/00, EU:C:2002:289, 15.

<sup>39</sup> Gilardi, *Delegation in the Regulatory State* (Edward Elgar, 2008), 13.

<sup>40</sup> *Ibid.*, 1.

States' fulfillment of EU obligations. The fact that they are furnished with regulatory powers means that they can, for example, adopt standards within their policy areas which, in turn, may turn out to be incompatible with EU provisions. Independent regulatory agencies are generally considered as a part of the executive's branch but what is typical for them is that governments can control them only partially if at all<sup>41</sup> and may find it difficult to exert compliance from such agencies.

### 3.4.2 Application process

The process of application of European law lies primarily in the hands of national administrations and courts.<sup>42</sup> They guarantee that EU law does not remain a dead letter but has actual effects within their legal systems. The result, however, is such that the process of application is characterized by high individualization and fragmentation since it is rooted in individual and concrete decisions taken by administrative officials and judges.

While the responsibility for violations of EU law of national administrations as branches of central or regional authorities is not really an issue, the responsibility of national courts is something of a grey area. The national judiciary's role in the process of application and, in particular, enforcement is crucial because "faced with the final stage of the rule's execution, it is the guarantor of compliance with that rule."<sup>43</sup> A number of specific duties rest on national courts such as direct effect or preliminary references under Article 267(3) TFEU but, most of all, they are obliged to ensure the effective protection of individuals against state non-compliance, guaranteeing the operability and effectiveness of the decentralized enforcement mechanism. Their role is, therefore, crucial not just for the attainment of EU objectives but also for the effectiveness of the EU compliance system as a whole. National courts' violations are, however, rarely the subject of the Commission's investigations and this practice has its roots in the early years of the European Integration.

As early as in 1967 a Member of the European Parliament asked the Commission whether the infringement procedure could be commenced against breaches of European law by national courts, and the Commission answered in the affirmative.<sup>44</sup> In 1970, the Court of Justice ruled that violations by constitutionally independent institutions were capable of giving rise to state responsibility.<sup>45</sup> In practice, however, the Commission was more than reluctant to commence infringement proceedings

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<sup>41</sup> Ibid., 3.

<sup>42</sup> S Krislov, Ehlermann, Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, in Cappelletti, Secombe, Weiler, *Integration Through Law*, Volume 1. Book 2 (Walter de Gruyter, 1986), 68.

<sup>43</sup> Opinion of AG Geelhoed in *Commission v Italy*, C-129/00, EU:C:2003:656, paragraph 59.

<sup>44</sup> H Schermers, Waelbroeck, *Judicial Protection in the European Union*, 6th ed. (Kluwer Law International, 2001), 630.

<sup>45</sup> Judgment in *Commission v Belgium* EU:C:1970:34, paragraph 15.



against such breaches. For example, it did not institute proceedings against France for the decisions of Conseil d'Etat in the *Semoules* case<sup>46</sup> which was taken in breach of the old Article 177(3) EEC (new 267(3) TFEU). Faced with a wave of questions from the EP, the Commission replied that although Conseil d'Etat's ruling could constitute the subject-matter of the infringement procedure, this was not the appropriate solution since it could affect the independence of the judiciary. Instead, the Commission decided to deal with the matter by way of persuasion, providing better information to national judges and conducting mutual consultations.<sup>47</sup>

The independence of the judiciary is, therefore, an important argument for avoiding the application of the infringement procedure in relation to violations of national courts. Since it is the central government that represents the state before the CJEU, a negative judgment puts it in a position where it has to put pressure on the domestic court to remedy its breach, which is against the principle of the division of powers within the state.<sup>48</sup> Such an action affects the independence of the judiciary and can even result in a constitutional crisis.<sup>49</sup> Additionally, national courts' decisions become *res judicata* and neither a judgment of the CJEU nor any degree of pressure from the national government can overrule the national court's decision, which leads some authors to question the necessity of instituting infringement proceedings in such cases.<sup>50</sup> Finally, the uniform application and observance of EU law is dependent on the close co-operation between the Court of Justice and national courts. Close scrutiny of the judiciary could affect this cooperation if not undermine it.<sup>51</sup>

This is why Advocate General Warner stated in his opinion in case 9/75<sup>52</sup> that, although the duty to comply is also binding upon the national judiciary and the infringement action can be brought against a failure of a national court to refer a preliminary question to the CJEU, this possibility should, nonetheless, not be taken "lightly" by the Commission.<sup>53</sup> And, in another case,<sup>54</sup> AG Warner observed that "a Member State cannot be held to have failed to fulfil an obligation under the Treaty simply because one of its courts has reached a wrong decision." A judicial error cannot constitute an infringement of European law irrespective of whether it results from misapprehension of facts or

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<sup>46</sup> Conseil d'Etat, 1.03.1968, *Syndicat Général des Fabricants de Semoules de France*, Rec. 149.

<sup>47</sup> Schermers, Waelbroeck (2001), 630.

<sup>48</sup> *Ibid.*, 630-631.

<sup>49</sup> Chalmers, Hadjiemmanuil, Monti, Tomkins, *European Union Law* (Cambridge University Press, 2006), 359.

<sup>50</sup> Schermers, Waelbroeck (2001), 631.

<sup>51</sup> Hartley (2003), 310.

<sup>52</sup> Judgment in *Meyer-Burckhardt v Commission*, 9/75, EU:C:1975:131.

<sup>53</sup> Brealey, Hoskins (1998), 249.

<sup>54</sup> Judgment in *Régina v Bouchereau*, 30/77, EU:C:1977:172.

misapprehension of the law. According to AG Warner, the infringement procedure should be used only in cases when a national court deliberately ignores or disregards Community law.<sup>55</sup>

Following its policy of restraint, the Commission had - for most of the European integration - practiced the avoidance of violations by national judiciaries. Once in 1974 it launched the infringement procedure as a consequence of the decision of the German Constitutional Court in the *Internationale Handelsgesellschaft* but this never led to the Court's ruling.<sup>56</sup> The turn of the century, however, witnessed a change in the Commission's attitude. In 2003, the Commission initiated an infringement procedure against Sweden claiming a breach of [new] 267(3) TFEU. This case was not directed against a precise ruling of a Swedish court but, instead, concentrated on - what looked like - a persistent refusal by Swedish courts to refer questions for preliminary rulings to the Court of Justice. The Commission, aware of an alarmingly low number of preliminary references from Sweden, claimed failure on the part of the Swedish state to adopt measures against the practice of its high courts not to make references to the CJEU.<sup>57</sup> The Commission's claims were formulated in such a way that they did not directly challenge the existence of systemic incompatible court practice but rather referred to the process of legislation and claimed the lack of appropriate national measures. The pre-litigation stage in this case reached as far as the reasoned opinion but once Sweden adopted the law concerning the handling of requests for preliminary rulings, the case was dropped. It is worth mentioning, however, that the Swedish courts were not satisfied with the new law, rejecting the existence of the infringement in the first place and accusing the government for interfering with their internal working order even though, according to Schmauch, the new law had, in any case, failed to appropriately address all the problems that the Commission had put forward.<sup>58</sup>

In 2000 the Commission brought an action against Italy, claiming that the Italian law on the provisions for the fulfilment of obligations deriving from Italy's membership in the EC "as construed and applied by the administrative authorities and the courts" was against the Treaty in the sense that the exercise of the right to repayment of charges illegally levied was either virtually impossible or excessively difficult. The CJEU replied that the provision in question was by itself neutral with respect to EU law but its compatibility had to be assessed in the light of the interpretation that national courts afforded it. This interpretation led to such a construction of this provision that did not conform to EU law. If, according to the Court, such a wrongful construction came from "isolated or numerically

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<sup>55</sup> Brealey, Hoskins (1998), 249-250.

<sup>56</sup> Hartley (2003), 310.

<sup>57</sup> Schmauch, *Lack of preliminary rulings as an infringement of Article 234 EC?*, 2005 European Law Reporter 11, 445-446.

<sup>58</sup> *Ibid.*, 452.

insignificant” judicial decisions or if it was “disowned” by the national Supreme Court, then it would not have been taken into account. However, since it constituted a “widely-held judicial construction which [had] not been disowned by the Supreme Court but rather confirmed by it,” the CJEU had to take it into account. The provision “at the very least” was “not sufficiently clear to ensure its application in compliance” with EU law. Consequently, the Court held Italy responsible for failing to amend the provision in question.<sup>59</sup> This allowed it to avoid a direct challenge to the decisions of the Italian Corte suprema di cassazione and to circumvent the problems that the duty to remedy a breach by the national supreme court would bring, while still permitting it to proclaim on the incompatibility of the Italian Supreme Court’s decisions.

Advocate General Geelhoed went a little further in this case and specified the conditions of state responsibility for infringements of national judiciary under Article 258 TFEU. According to him, Member States can be held responsible for violations of their national courts dependent on whether, firstly, incompatible case-law of a national supreme court or other higher courts has judicial authority over lower courts which derive guidance from it; secondly, to which degree a violation is a structural phenomenon, that is whether it is an incidental or isolated case or whether a particular trend can be observed as regards national case-law, and if it is a new development which can still be corrected or whether it is maintained over a long period of time; and thirdly, what are the effects of non-conforming judgments on the attainment of the objectives of breached provisions, that is whether such judgements have harmful effects on economic operators who have to perform their activities under conditions which are different from those in other Member States.<sup>60</sup>

These conditions of state responsibility were applied by the Court of Justice in a later case when the Commission brought in 2008 before an action this time specifically targeted against a violation by the national judiciary, without cloaking it in the pretext of another infringement. The case concerned the Spanish Supreme Court’s erroneous interpretation of the Sixth VAT Directive (77/388) which was adopted without a reference to the CJEU.<sup>61</sup> The Court of Justice stated in this case that the Supreme Court’s erroneous interpretation constituted an infringement of EU law since it was followed by lower courts and national tax administrations, and had the effect of negatively impacting economic operators in Spain. The Spanish argument based on the independence of national judiciary and its inability to remedy the breach was rejected. It was the first time when the Court of Justice held a

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<sup>59</sup> Judgment in *Commission v Italy*, C-129/00, EU:C:2003:656, paragraph 29-33.

<sup>60</sup> Opinion of AG Geelhoed in *Commission v Italy* EU:C:2003:656, paragraph 63-65.

<sup>61</sup> Judgment in *Commission v Spain*, C-154/08, EU:C:2009:695.

Member State responsible for an infringement of its judiciary in the course of the infringement procedure.<sup>62</sup>

The Commission has thus revised its policy of avoiding violations by national courts but it still treats this as an exception rather than a rule. Its attitude towards such infraction constitutes the essence of selective enforcement whereby it resorts to gentle and non-imposing means of consultation and information, and only in clear cases of persistent non-compliance does it seek more decisive enforcement measures. However, the usual evasion of the majority of such infractions, while having its own justifications, goes beyond the framework of selective enforcement delimited by the Court of Justice. Interestingly, the Commission is also known for being selective towards violations of national administrations (whose issues of responsibility are not so problematic) by focusing mostly on systemic infractions. As will be shown in the section concerning the effects of state infractions, individual wrongful decisions that do not reflect a general state practice rarely find their way to the Commission's agenda. The reasons for such practice will become clearer in chapter 7 where the limitations of the Commission's supply will be explored.

The obligation to apply EU law can also rest on bodies which are neither strictly administrative nor judicial but whose conduct can cause a violation that may be attributable to the state. Independent regulatory agencies may have competences in the process of application within their respective fields. Moreover, actions or inactions of state-owned undertakings are considered as ascribable to the state and can result in violations of EU law, especially in public procurement procedures.<sup>63</sup> This is also possible in relation to undertakings that are not, strictly-speaking state owned but can be considered as the "emanation of the state"<sup>64</sup> such as universities,<sup>65</sup> hospitals<sup>66</sup> or the police.<sup>67</sup> Finally, Member States can be held indirectly responsible for actions of private parties as in the case of France which infringed [new] Article 34 TFEU by failing to take appropriate action against farmers destroying fruits and vegetables from Spain.<sup>68</sup>

### 3.5 Reasons behind a violation

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<sup>62</sup> Kaczorowska, *European Union Law*. 2nd ed. (Routledge, 2011),392.

<sup>63</sup> Schermers, Waelbroeck (2001), 632.

<sup>64</sup> Judgment in *Foster*, C-188/89, EU:C:1990:313, paragraph 18.

<sup>65</sup> Judgment in *Georgiev*, C-250/09 and C-268/09, EU:C:2010:699, paragraph 71.

<sup>66</sup> Judgment in *Vassallo*, C-180/04, EU:C:2006:518, paragraph 26.

<sup>67</sup> Judgment in *Johnston*, 222/84, EU:C:1986:206, paragraph 56.

<sup>68</sup> Judgment in *Commission v France*, C-265/95, EU:C:1997:595.

The infringement procedure is objective in character because it relies on the objective establishment of an infringement's existence and does not explore matters of fault.<sup>69</sup> The Court of Justice rigid refusal to accept the majority of Member States' explanations strengthens the perception of state violations as dry facts with irrelevant backgrounds. The normative analysis of a violation's existence, its extent and legal basis is what makes most of the Court's reasoning while any attempts at explanation are dismissed as irrelevant (unless they fall under derogation clauses). From a purely legal point of view, in an organization based on the rule of law where all Member States are equal, it does make sense that no difference is made according to a violation's background which is often difficult to determine and leaves ample space for manipulation. Considering that the infringement procedure is often preceded by the EU Pilot and has a long pre-litigation phase which gives multiple occasions for voluntary compliance, it is further justifiable that, at the point of judicial proceedings when a Member State has persistently failed to use the opportunity to rectify its violation, the Court of Justice ignores the circumstances within which non-compliance has occurred. The situation, however, is not so clear-cut with respect to the Commission's management of state infractions that constitutes a filter through which only a fraction of violations reach the Court. Considering that the Commission has influence over the content and formulation of legal norms as well as the discretion to create and apply various 'aiding' tools while its capacity and resources to enforce EU law (supply) are limited, it makes sense that it actually pays attention to reasons behind state infractions in its enforcement practice. This not only allows it to decrease the amount of state non-compliance by eliminating violations before they occur. While rarely underlined, the fact that the Commission can identify the reasons behind state infractions and has recourse to a wide array of different enforcement instruments, allows it to choose the most appropriate methods to target infractions as well as ensure that its limited resources are distributed in an efficient way.

### 3.5.1 Main political science theories

The political science research into the particulars of Member States' participation in the European Union has produced a number of different questions that are relevant for the analysis of motives behind state non-compliance. Studies of the phenomenon of European integration have, for example, led political scientists to explore two major ideas concerning the role that Member States play in the EU. Inter-governmentalists believe that it is Member States who control and drive the integration process for its economic gains and cede only so much power that is necessary to achieve

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<sup>69</sup> Bieber, Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 2014 Common Market Law Review 51, 1060.

their objectives but without compromising their core prerogatives. Neo-functionalists, on the other hand, believe that Member States do not control the integration process but they have rather found themselves 'trapped' in a system driven by international institutions, courts and lawyers where the Court of Justice reasoning is rooted in convincing legal arguments allowing it to gradually expand the EU's reach, entrapping states even further in rules that govern their behavior and which they find themselves accepting.<sup>70</sup> As a result, to inter-governmentalists, compliance is a necessary element of European integration but it loses its importance the moment it collides with national interests and objectives. Neo-functionalists, on the other hand, perceive compliance as a natural objective for states to pursue, strengthened by the role national courts play in the EU system.<sup>71</sup> Both theories show somewhat contesting versions of Member States' attitude towards compliance but ultimately they are more concerned with explaining European integration than understanding the nuances of state violations. More information can be derived from the political science's research into the sources of state (non-)compliance which seeks to understand, accumulate and catalogue the circumstances that affect Member States' observance of their EU obligations.

The academic research concerning state non-compliance in the international arena has developed several approaches to this issue,<sup>72</sup> out of which two are of particular significance: the enforcement and management theories, already presented in chapter 1. The enforcement approach regards states as rational entities which make their choices by balancing the costs and benefits of future action. It is based on the idea of incentives. Member States choose to violate law when the benefits of non-conformity surpass the costs of detection and punishment.<sup>73</sup> In contrast, the management approach suggests that state violations take place because of "capacity limitations and rule ambiguity" or unmanageable social or economic changes. Member States either misinterpret legal norms or lack the capacity to comply.<sup>74</sup> The distinction between two schools involves the differentiation between the most appropriate methods of treating non-compliance. While enforcement theorists rely on coercion and sanctions, managerial theorists believe that problem-solving and preventive mechanisms constitute the correct means of addressing state defections. As was shown in chapter 1, the EU contains measures that are of both reactive and preemptive nature, coercive and problem-solving. By introducing and applying managerial tools alongside the

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<sup>70</sup> Conant (2012), 2-5.

<sup>71</sup> Ibid., 4-5.

<sup>72</sup> Börzel (2003), 198.

<sup>73</sup> Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 2002 International Organization 56, 611.

<sup>74</sup> Börzel (2003), 200; Tallberg (2002), 613; Downs, Rocke, Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 1996 International Organization 50, 380.

infringement procedure, the Commission demonstrates that the reasons behind state infractions constitute one of the criteria that it takes into account in its selective enforcement.

Finally, there is yet another take on backgrounds to state non-compliance which, in turn, relates to differences in patterns observed in the behavior of Member States. One of the more standing-out works presents the theory of the "Four Worlds of Compliance". "The world of law observance" is characterized by a culture of compliance where the society expects the observance of EU rules, Member States recognize the importance of conformity, and where laws are well thought-through and properly adapted to national circumstances. Non-compliance is sporadic and happens only when the most important national traditions and values are in the balance (Denmark, Finland and Sweden). "The world of domestic politics" is strongly concerned with internal interests and influenced by political objectives. When there is a clash, Member States are likely to fail their obligations and they may even openly admit it. As a result, violations of EU law in this group are most often a consequence of misfit between the prescribed EU objectives and the specific interests of different political and interest groups. Once the legislation is adopted, however, the application and enforcement run rather smoothly (Austria, Belgium, Germany, the Netherlands, Spain and the UK). The same cannot be said of "the world of transposition neglect". This group is characterized by "national arrogance" where conformity is not an important objective and where Member States are slow, inefficient and uncaring in their performance of their obligations, leading to a high rate of transposition violations and poorly drafted laws that are difficult to apply and enforce by national organs (France, Greece, Luxemburg and Portugal). Finally, "the world of dead letters" typical of the new Member States involves a rather good compliance record at the legislative stage but, due to shortcomings in the operation of domestic organs, suffers from application and enforcement deficiencies. Well transposed measures encounter barriers at the application stage (Ireland, Italy, Czech Republic, Hungary, Slovakia, Slovenia).<sup>75</sup> Falkner's et al. research does not provide a self-contained and foolproof list of explanations to the phenomenon of state non-compliance but rather constitutes a general typology of implementation styles deduced from variations in compliance observed among Member States. As the authors describe it, their typology serves as a 'filter' to help determine which particular factors are at play in influencing state conduct in specific Member States.<sup>76</sup> It mostly shows that national traditions and attitudes play a role in (non-)compliance.

A number of studies inspired by Falkner et al. produced conflicting results which is likely due to the difference in the analyzed samples of EU measures.<sup>77</sup> Due to the limitations of qualitative

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<sup>75</sup> Falkner et al. (2005), 317; Falkner, Treib (2008), 296-298, 308.

<sup>76</sup> Falkner, Treib (2008), 296.

<sup>77</sup> Conant (2012), 16-17.

research, different examinations reveal different patterns in state behavior and relying on one study can be easily challenged by findings from another. This does not have to mean, however, that such studies are contradictory and, therefore, unreliable. State non-compliance is a complex phenomenon which involves a multitude of different actors and circumstances. Member States evolve, their governments and parliaments change composition and political affiliation, national interests and goals shift and diverge while internal and external conditions vary. It is, therefore, not surprising that Member States are not so easy to categorize. Their conduct may follow certain patterns but these patterns are just 'patterns': examples of behavior that have their own exceptions or even contesting alternative models. The undisputable benefit that research into state non-compliance brings is that it broadens our understanding of processes that take place in Member States when they fulfill EU obligations, allowing us to notice some regularities and thus predict certain results even if we cannot conclusively attribute these regularities to specific states. Such knowledge, in turn, helps in the elaboration of new compliance measures and in the effective application of the old. The Commission's ongoing practice of targeting state non-compliance from the perspective of both problem-solving and coercive techniques proves as much. Lawyers, however, rarely pay much attention to reasons behind state non-compliance.

The different presented approaches with their competing theories can, in most part, be brought down to another distinction present in the literature. If one looks closer to portrayed opinions, it is possible to observe a line dividing violations into intentional and unintentional.<sup>78</sup> Inter-governmentalists and enforcement theorists see state compliance mostly in terms of intentional violations while neo-functionalists and managerial theorists perceive it more in terms of unintentional violations. As a result, it is this distinction that will constitute the framework for the remainder of this section.

Understanding factors which lead to non-compliance helps the Commission in its enforcement functions, increasing its effectiveness. At the same time, by relying on both managerial and enforcement instruments, the Commission demonstrates that reasons behind state violations constitute one of the criteria it utilizes in its practice of selective enforcement when deciding the most appropriate approaches to specific cases. The application of this criterion is, however, not as easy as it would seem. The division between intentional and unintentional violations cannot be strictly transposed into the distinction between coercive and problem-solving measures as will be shown below.

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<sup>78</sup> Krislov et al. (1986), 63.



### 3.5.2 Legislation process

Since the fulfillment of EU obligations rests on numerous state organs from central parliaments to regional administrations and national courts, the reasons behind their infractions vary accordingly.

#### 3.5.2.1 Unintentional violations

An unintentional violation takes place when a Member State breaches one of its obligations under EU law without any deliberate decision on its part. Many scholars call this type of violation “benign non-compliance” and it can stem from state’s negligence, misinterpretation, communication problems or inability to fulfill EU obligations.<sup>79</sup> It can also be a consequence of the quality and content of EU measures, or the complexity of domestic procedures and internal difficulties. Such unintentional violations are usually remedied once the Member State’s attention is drawn to the problem.<sup>80</sup>

Poorly drafted EU measures result in poor compliance. If they are vague, open-ended or incoherent, Member States may experience troubles in understanding their obligations which, in turn, may lead to diverging interpretations and, eventually, to violations despite states’ most sincere will to comply.<sup>81</sup> Since the content of EU law is the result of compromises which are sometimes difficult to achieve, it is not surprising that certain norms lack precision or coherence, avoiding sensitive issues that could not be agreed on, and leaving their clarification for future interpretation.<sup>82</sup> Additionally, same EU expressions can have differing meaning in the EU and in (or among) Member States leading to diverging results.<sup>83</sup>

EU measures may be so detailed and complex that their incorporation requires from Member States time and effort in order to embrace every nuance which, combined with a short deadline, can lead up to a violation.<sup>84</sup> The more implementing discretion a Member State is awarded, the more space it has for maneuverability and the more it may misinterpret the limits of this discretion.<sup>85</sup>

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<sup>79</sup> Falkner et al. (2005), 13; Bossche Van den (1996), 375; Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986), 23; Krislov et al. (1986), 64.

<sup>80</sup> Krislov et al. (1986), 64.

<sup>81</sup> Munoz, *The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate*, 2006 Jean Monnet Working Paper 4, 25; Bossche Van den (1996), 383; Schwarze, Becker, Pollak, *The Implementation of Community Law* (Baden-Baden, 1994), 56; Krislov et al. (1986), 83.

<sup>82</sup> Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press, 2012), 126.

<sup>83</sup> Schwarze et al. (1994), 57.

<sup>84</sup> Bossche Van den (1996), 373; Schwarze et al. (1994), 57; Krislov et al. (1986), 82.

<sup>85</sup> Andersen (2012), 126.

Unintentional violations of EU law can result not only from problems of EU institutions but also from deficiencies that can be attributed to Member States. One of such obstacles lies in the shape and quality of national legislative procedures which are often complex and time-consuming.<sup>86</sup> The more detailed and broad-scoped the EU measure, the longer the procedure and the higher the number of involved parliamentary committees.<sup>87</sup> To combat this specific obstacle, certain Member States adopted accelerated procedures and/or delegated implementing powers to the executive. Similar problems may occur in countries where local or regional entities are granted with legislative or regulatory powers, prolonging and complicating the implementing process. Moreover, some federal countries do not have a clear division of competences between the central and regional level which makes the transposition all the more complicated.<sup>88</sup> The lack of participation of local or regional representatives in the formulation of EU norms can diminish their readiness to accept and implement such norms. However, according to the Court, not even troubles resulting from the federal organization of a state can justify a failure to comply with EU obligations.<sup>89</sup>

Violations of EU law may result from problems inside national governments. When a new EU measure requires follow-up legislation, the proper fulfillment of this duty often depends on the cooperation of different governmental departments.<sup>90</sup> Almost every EU measure is of importance at least to foreign affairs, finance and justice.<sup>91</sup> Different ministries have diverse interests and they may disagree as to the content and scope of national regulation, especially when the EU measure affords them considerable discretion in transposition. For example, the ministry of environment is likely to pursue conflicting objectives than the ministries of economy, finance or agriculture. Finally, governmental procedures can also be cumbersome or overloaded. For example, Spain failed to transpose Directive 98/8 concerning the placing of biocidal products on the market not only because two ministries were responsible for drawing up a royal decree but also because the procedure itself was especially complicated since the decree could not be enacted before various reports, opinions, consultations and a public hearing took place.<sup>92</sup> Last but not least, new elections or a governmental crisis may just as well hinder the executive's ability to comply with EU law.<sup>93</sup>

It is also possible, although rare, that violations of EU law may result from incidents or circumstances which are beyond the control of the state. If they create 'insurmountable difficulties'

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<sup>86</sup> Tallberg (2002), 630; Bossche Van den (1996), 373; Krislov et al. (1986), 80.

<sup>87</sup> Schwarze et al. (1994), 57.

<sup>88</sup> Tallberg (2002), 631; Bossche Van den (1996), 382; Schwarze et al. (1994), 59.

<sup>89</sup> Judgment in *Commission v Austria*, C-111/00, EU:C:2001:539, paragraph 12.

<sup>90</sup> Munoz (2006), 21; Schwarze et al. (1994), 59.

<sup>91</sup> Krislov et al. (1986), 79.

<sup>92</sup> Judgment in *Commission v Spain*, C-352/01, EU:C:2002:648.

<sup>93</sup> Falkner et al. (2005), 24.

for Member States and were neither foreseen nor foreseeable then they constitute cases of force majeure which amounts to a derogation from state's responsibility under Article 258 TFEU, unless the non-conformity persists beyond the time necessary to be remedied.<sup>94</sup> In most cases, however, Member States are not able to establish a case of force majeure. The dissolution of a national parliament does not constitute it<sup>95</sup> nor does any other similar internal problem that delays the performance of state's obligations in the process of legislation.<sup>96</sup> Neither does a "state of war and constant tension" in a third country or the "complexity of the situation resulting from the disintegration" of a third country justify a Member State's failure to denounce or adjust an international agreement. This was the case in two actions against Portugal concerning its agreements with, respectively, Angola and the Federal Republic of Yugoslavia where, in both cases, the Court stated that a "difficult political situation in a third State which is a contracting party ... cannot justify a continuing failure on the part of a Member State to fulfill its obligations."<sup>97</sup>

### 3.5.2.2 *Intentional violations*

Member States' intentional violations stem from their opposition against particular effects or processes. They may, for example, go against the content or effects of EU measures in order to protect the existing domestic institutions, because of high economic costs of adjusting national legislation or structures, or for ideological reasons. They can also oppose the European decision-making process in order to, for instance, contest the qualified majority voting or social partner agreements. On the other hand, opposition against national processes may be the result of parliaments, regions or social partners feeling sidelined or because of inter- or intra-ministerial conflicts over competences.<sup>98</sup> Finally, Member States may simply see a benefit in non-compliance either by prolonging the state of non-conformity or intentionally misinterpreting a directive's provisions in order to widen the scope of its exceptions. Such an approach is particularly visible in such policy sectors as competition, environment and internal market.<sup>99</sup>

According to Downs et al. "depth of cooperation" theory the bigger the changes a state has to make, the higher are the incentives not to comply.<sup>100</sup> If a Member State is expected to carry out large

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<sup>94</sup> Judgment in *Commission v Italy*, 101/84, EU:C:1985:330, paragraph 16.

<sup>95</sup> Judgment in *Commission v Belgium* EU:C:1970:34, paragraph 15.

<sup>96</sup> Judgment in *Commission v Ireland*, C-213/98, EU:C:1999:496, paragraph 11.

<sup>97</sup> Judgment in *Commission v Portugal*, C-84/98, EU:C:2000:359, paragraph 47-48; Judgment in *Commission v Portugal*, C-62/98, EU:C:2000:358, paragraph 38-39.

<sup>98</sup> Falkner et al. (2005), 13.

<sup>99</sup> Spence, *The Directorates General and the Services: Structures, Functions and Procedures*, in Spence, Edwards, *The European Commission*, 3rd ed. (John Harper Publishing, 2006), 145.

<sup>100</sup> Downs et al. (1996), 383-387.

structural changes in its policies and legislation, the incentives to deflect are relatively high. The likelihood of non-compliance depends, therefore, on the degree of conformity between the existing domestic rules and new EU norms.<sup>101</sup> It also depends on the importance of adjustments, costs both for the state and the economy, different incentives, compliance pressures, package deals lessening the impact, and national traditions but, in general, the bigger the gap ('misfit') between national and European rules, the more Member States are inclined to violate their obligations.<sup>102</sup> This theory can be illustrated by high discrepancies in the levels of compliance with environmental law directives. The European environmental policy is driven by countries whose level of environmental protection is considerably high (e.g. Germany, Denmark). The result is such that those states which are not so progressive, are obliged to carry out deep and wide-spread adjustments which lead to a high rate of non-compliance cases (Spain, Italy).<sup>103</sup> However, such violations may, just as well, be unintentional, due to the overload of adjustments Member States have to carry out in a short period of time.

A Member State may choose to go against a particular EU obligation or delay its fulfillment because it considers it to be contrary to its national interest or because of particular political benefits. Sometimes, this can be the result of the government's own assessment but often it will be due to other actors who either have formal blocking power via the right of veto (e.g. political opposition) or who formally do not carry any weight but whose opinions the government is reluctant to disregard.<sup>104</sup> National interest groups (e.g. employers' associations) may exercise pressure on the government and so can national bureaucracies when they resist modifications of administrative structures and practices.<sup>105</sup> There is also the matter of the public opinion which the government may strive to satisfy, particularly around the time of new elections. France, for example, failed to fully transpose Directive 2001/18 on the deliberate release into the environment of genetically modified organisms because GMOs became a major subject of debate and resulted in a violent conflict involving numerous instances of crop destruction. This inclined France to establish a parliamentary fact-finding mission in order to analyze the challenges presented by GMOs' trials and use. The French delay resulted in two successive judgments of the Court, the last one imposing a lump sum of 10 million EUROS.<sup>106</sup>

Depending on how straight-forward and open Member States are regards their intention to violate EU law, they may either engage in defiant or evasive behavior. Defiance takes place when one

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<sup>101</sup> Tallberg (2002), 627, 628.

<sup>102</sup> Falkner et al. (2005), 25, 27; Tallberg (2002), 628.

<sup>103</sup> Tallberg (2002), 628.

<sup>104</sup> Falkner et al. (2005), 25.

<sup>105</sup> Tallberg (2002), 628.

<sup>106</sup> Judgment in *Commission v France*, C-121/07, EU:C:2008:695; Judgment in *Commission v France*, C-419/03, EU:C:2004:467.

of the national organs disregards an EU obligation and admits that it does so deliberately.<sup>107</sup> For example, France had refused to lift the ban for marketing bovine products coming from the UK due to the danger of BSE disease. Not only had France consulted the French Food Safety Agency which had doubts as to the safety of such products and established safeguards, but also, following its opinion, the French Prime Minister issued a press release clearly stating that France was not planning to lift the ban as long as certain problems existed in relation to the traceability of bovine products. What is noteworthy in this case, is that the Court of Justice partially agreed with France but only in relation to products that were not correctly marked and labeled.<sup>108</sup>

Evasion, on the other hand, takes place when a Member State also deliberately disregards an EU obligation but does not openly acknowledge it and, once it is challenged by the Commission and/or the Court, it claims that the violation was unintentional. Cases of evasion take place often in relation to such articles as 34 and 36 TFEU when Member States deliberately enact or maintain measures which impose unjustified restrictions on the freedoms of internal market but, when confronted by the Commission, they act as if they were not aware of the incompatibility or as if they believed that their protectionist measures were justified on the basis of derogation clauses.<sup>109</sup> When Member States conceal their true intentions, such evasive cases are much harder to classify, making it difficult for the Commission to decide on the most appropriate compliance tools.

Finally, it should be underlined that certain violations can be the result of a combination of different factors, making it even harder to assess their background. There is a certain “interconnectedness of all elements” which lead to state violations of EU law.<sup>110</sup> As a result, the practical verification of actual reasons behind state violations and the determination of the intents' existence is often based on mere assumptions and can lead to unintended results such as wasted resources or a political conflict. Such lack of precision in the assessment of reasons thus diminishes the value of this criterion as one of the factors playing a role in the Commission's selective enforcement. The unquestionable benefit that it brings, however, lies in the Commission understanding of the variety of reasons behind state infractions, helping it in devising and applying a score of managerial tools to improve the quality and precision of EU legislation and to combat Member States' capacity limitations. In the end, the Commission approaches non-compliance as a predominantly unintentional phenomenon as will be elaborated in chapter 4 and chooses to play it safe, relying mostly on managerial techniques in its selective enforcement. The knowledge of state

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<sup>107</sup> Krislov et al. (1986), 63.

<sup>108</sup> Judgment in *Commission v France*, C-1/00, EU:C:2001:687..

<sup>109</sup> Krislov et al. (1986), 64.

<sup>110</sup> Falkner et al. (2005), 26; Krislov et al. (1986), 84.

premeditated conduct can, however, incline the Commission to skip over the EU Pilot phase and immediately launch the infringement procedure. Alternatively, suspicion regarding a Member State's intent can steer the Commission towards a more unsympathetic than cooperative approach marked by shorter deadlines and fewer opportunities for dialogue.

### 3.5.3 Application process

What is significant about the process of application is that compliance is often conditioned by the conduct of the national legislature or executive which either fail to comply with their own obligations or ensure only "formal, minimalist legal compliance" allowing the process of application to operate on the side of adopted rules.<sup>111</sup> Aside from this relative dependency, application is firmly lodged on the ground, operating with respect to actual problems instead of floating in the abstract sphere of potential concerns. The specificities of non-compliance in the process of application are, therefore, conditioned by the special function this process performs as well as the different category of organs that are involved in it. It appears that while the process of legislation is, by its very definition, strongly penetrated by political objectives and considerations (be they pro- or anti-compliance), the process of application is positioned a little further from such matters and is more influenced by individual and subjective interests, problems and prejudices.

#### 3.5.3.1 Unintentional violations

The correct application of EU law is conditioned by the level of awareness of domestic organs as regards both, the obligations that rest upon them and the substantive content of European rules. Proper training in EU law is, therefore, an indispensable factor in the correct application of European provisions. As it is, however, public officials sometimes lack the knowledge regarding applicable EU rules and have difficulty with the actual comprehension of their detailed and often complicated particulars.

AG Maduro in his opinion to case *Transportes Urbanos*<sup>112</sup> wrote that state administrative authorities are used to the "presumption of constitutionality." They operate under the assumption that national legislation is constitutional. They are not accustomed to hearing challenges to administrative decisions on grounds of the unconstitutionality of national legislation because such challenges in purely domestic matters do not really take place. EU law, however, requires that administrative officials assess the compatibility of not only administrative decisions but also of

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<sup>111</sup> Conant (2012), 28.

<sup>112</sup> Judgment in *Transportes Urbanos*, C-118/08, EU:C:2010:39.

national legislation that constitutes the legal basis for the adoption of those decisions. Further, they are obliged to set aside such incompatible national laws and uphold any appeals against administrative decisions taken on their basis. Administrative authorities are therefore confronted with the equivalent presumption of the validity of EU law which, in matters of conflict, has priority over the presumption of constitutionality of national measures.<sup>113</sup> The application of EU law requires from administrative authorities the rethinking of their role in the EU legal system. Mechanical application of national laws no longer constitutes the norm.

The same concerns national judiciaries which constitute the core of the decentralized enforcement mechanism and are bound by numerous EU duties. Domestic judges may not be familiar with the practice of judicial review<sup>114</sup> and have difficulty assessing the compatibility of national laws with EU measures due to their inadequate training or uncertainty, while incompatible decisions of their supreme courts guide them in the wrong direction.

Further, both administrative and judicial staff may lack specialists who are adequately qualified to deal with particulars of European law, especially when provisions are complex, detailed and technical. Some sectors of EU law (e.g. environment) may contain rules which are so technical that they require the support of professional expertise.<sup>115</sup> The data provided by scientists may, in turn, be flawed, insufficient, or conflict with the data submitted by other experts, possibly most favorable to their ends, putting the public official in a confusing situation and leaving room for mistakes. Irrespective of the national officials' expertise, some areas of EU law such as the common fisheries policy are simply more complex than others and require the performance of so many different and complicated activities that national administrations may have troubles fulfilling them correctly.<sup>116</sup>

Just as the national government or parliament can experience troubles in the process of legislation when incorporating vague and open-ended rules into the domestic legal system, so can national administrative and judicial bodies experience problems when applying those rules. The difficulties that they encounter can, however, be even greater than legislators': a regulation of a particular issue may, on the outside, seem clear and consistent but, once it is adopted, its application to the particulars of specific cases can reveal inherent discrepancies or deficiencies. In addition, national transposing measures may, even more, lack consistency, precision and clarity. Such ambiguous measures, whether European, national or both, can lead to interpretation problems

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<sup>113</sup> Opinion of AG Maduro to case *Transportes Urbanos*, C-118/08, EU:C:2009:437, paragraph 37-38.

<sup>114</sup> Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in Saughter, Stone Sweet, Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing, 1998), 231.

<sup>115</sup> Falkner et al. (2005), 37.

<sup>116</sup> Nugent, *The European Commission* (Palgrave, 2001), 277.

resulting in outcomes not intended by EU law.<sup>117</sup> The same concerns mistakes in translation, inept or clumsy translations,<sup>118</sup> or the application of concepts which, by now, have acquired their own European definitions, different from those attributed to them by national legal orders, but which may still be understood by domestic organs according to their national meaning or, at the very least, lead to interpretational uncertainty. Domestic organs may decide not to even attempt to understand and interpret vague, unclear or complex measures thus intentionally ignoring them in the course of performing their functions.<sup>119</sup>

It is also possible that some state violations of EU law are the result of insufficient technical or financial resources.<sup>120</sup> Since the duty to enforce not only requires the actual sanctioning of persons responsible but also involves the monitoring and control of the performance of obligations by such persons, this can be quite a multifaceted process necessitating the usage of vast technical and financial resources on an often broad scale.

One of the underlying reasons provided in the literature in order to explain why national administrations and the judiciary violate EU law is based on the fact that these organs usually do not participate in the preparation of measures they are tasked with applying. Being detached from the drafting process and not privy to the debates and deliberations over the legal project, they may simply misunderstand its objective.<sup>121</sup> Further, once a measure is adopted, national organs have to adapt it to the economic and social realities of Member States.<sup>122</sup> They interpret and, to an extent, manipulate EU norms in a way that will conform to the realities of their legal systems. Finally, there is also the problem of the growing decentralization and fragmentation of national administrative systems with an increasing reliance on outside agencies which makes it harder for governments to control them and ensure their compliance.<sup>123</sup>

Finally, incidents or circumstances outside the control of domestic organs can also result in state violations. Case C-297/08 concerned the Italian region of Campania which suffered from problems with the management and disposal of urban waste. In order to address the 'waste crisis,' a

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<sup>117</sup> Bossche Van den (1996), 383.

<sup>118</sup> The Polish version of the Birds Directive translates "Special Protection Areas" into *Areas of Special Protection* (obszary specjalnej ochrony) while the Polish version of the Habitats Directive translates "Special Areas of Conservation" into *Special Areas of Protection* (specjalne obszary ochrony). Both Polish translations (areas of special protection and special areas of protection) are so similar that mistakes are inevitable.

<sup>119</sup> Schwarze et al. (1994), 85-86.

<sup>120</sup> Ibid., 79-80.

<sup>121</sup> Schwarze et al. (1994), 62, 82; Ionescu, *The Application of Law and the Community Perspective*, in Siedentopf, Ziller, *Making European Policies Work*, Vol. 1 (European Institute of Public Administration, 1988), 207; Krislov et al. (1986), 77.

<sup>122</sup> Schwarze et al. (1994), 81.

<sup>123</sup> Nugent (2001), 277.



state of emergency was declared in 1994 and a tendering procedure organized for the purpose of entrusting private operators with waste treatment operations, which would also construct appropriate plants. All together nine installations were supposed to be built but soon difficulties arose due to the opposition from the inhabitants of areas chosen for the sites, flaws detected in the design of the plants, and as a result of an investigation into the potential fraud in the award of public procurement contract which made it impossible to finish the installations. Any new tendering procedures failed due to the insufficient number of tenders. In 2008, the Commission brought an action against Italy, claiming that it had failed to establish an integrated and adequate network of waste disposal installations. Italy argued that the infringement was a result of force majeure. It had not established the required disposal installations due to the opposition of local inhabitants, because of the presence of criminal activity in the region and, finally, as a result of failure on the part of public contractors to construct the required installations. The Court disagreed stating that “although the notion of force majeure is not predicated on absolute impossibility, it nevertheless requires the non-performance of the act in question to be attributable to circumstances, beyond the control of the party claiming force majeure, which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence.” A diligent authority should have taken precautions against contractual non-performance or in order to ensure that installations were completed on time.<sup>124</sup>

Lastly, attention should be drawn to the fact that the process of application is highly fragmented. While the legislation process can be either centralized or decentralized, it is still limited to the conduct of only a few institutions. It rests mostly on easily-identifiable decision-making bodies, the actions of which reach a wider array of individuals and, thus, can be monitored relatively easily. Although these are often constitutionally independent actors which makes it difficult for other institutions to influence their conduct, they are politically responsible before their citizens and remain under constant scrutiny of their political opposition and mass-media which helps keep them in check. These characteristics clearly do not prevent domestic legislative and regulatory bodies from infringing EU law but they do differentiate them from the highly fragmented process of application. This process relies on thousands of administrative officials and judges with differing backgrounds, education and expertise spread all over the country and locked in their multiple offices and court rooms away from EU institutions and national central bodies but with limited resources and close to actual legal problems that require the practical application of rules which can sometimes be vague and contradictory. Although their numbers are limited, they are not as easily identifiable as the few

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<sup>124</sup> Judgment in *Commission v Italy*, C-297/08, EU:C:2010:115, paragraph 80-86.

decision-making organs and, while administrative officials fall under the control of their superiors, national judges are independent and their rulings can only be challenged by means of strictly-regulated appeal procedures. Their actions can draw the attention of mass-media but they are more likely to drown in the pool of hundreds of administrative and judicial decisions taken every day in 28 Member States. Finally, whereas legal acts of general and abstract nature are often the result of group work and voting and are formally published, many administrative and judicial decisions are taken by individual persons whose level of knowledge and proficiency can differ substantially and who are likely to be influenced by their subjective perceptions and prejudices.

It is this fragmentation that contributes to non-compliance in the process of application. It not only leaves space for insufficiently trained officials, legal uncertainties, difficulties in interpretation and comprehension as well as lacking resources but it also allows for a degree of discretion and subjectivity in matters which involve unwelcome EU measures. While any legislative action is likely to stand out and draw the attention of at least some individuals be they journalists, researchers, political opposition, concerned citizens and businesses or, finally, the European Commission, administrative or judicial decisions are likely to draw the attention mostly of persons to whom they are addressed. This does not mean that it is always the rule but, to generalize, issues of application are bound to draw less attention than issues of legislation and, therefore, leave more space for intentional violations.

### *3.5.3.2 Intentional violations*

One of the explanations given to state non-compliance in the process of application is that domestic organs rarely participate in the drafting process of measures which can result in situations when they simply misunderstand their objectives. This sort of misconception being, by itself, not intentional may, however, lead to deliberate violations of EU law. It may result in negative attitudes towards obligations stemming from EU measures and affect domestic organs' motivation to apply and enforce it.<sup>125</sup> For example, national administrations may consider EU measures as being at odds with national priorities.<sup>126</sup> They may also feel like they need to guard their legal system and domestic structures against foreign influence which does not recognize and appreciate national peculiarities. They may believe that national law affords better regulation or protection.<sup>127</sup> They may also oppose certain EU rules due to their high financial costs (e.g. water quality standards).<sup>128</sup> Some authors even

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<sup>125</sup> Schwarze et al. (1994), 62, 82; Krislov et al. (1986), 77.

<sup>126</sup> Krislov et al. (1986), 77.

<sup>127</sup> Schwarze et al. (1994), 82.

<sup>128</sup> Nugent (2001), 276.

talk of almost “automatic measure of national protectionist reflex emanating from the administrations of Member States.”<sup>129</sup>

Sometimes, Member States will make deals at the European forum, accept certain legislative projects despite the opposition from their domestic administrations or in spite of predictable application problems, in exchange for other more important concessions. This may also affect the motivation of national administrations and the judiciary which, unsatisfied with the result obtained, may be reluctant to apply measures which, in their view, are unfavorable.<sup>130</sup>

The neo-realism theory of legal integration suggests that national courts are driven in their rulings by political and economic calculations. Depending on the degree of discretion they are afforded, they can shape their decisions to fit specific national interests.<sup>131</sup> It was also suggested that when national courts fail to refer cases to the Court of Justice for a preliminary ruling, they may aim to prevent the Court from interfering with specific issues. They may question their duty to consider the validity of national measures and may be reluctant to disregard such measures in situations of conflict.<sup>132</sup> On the other hand, the neo-functionalist theory of legal integration emphasizes national courts' acceptance of their new role as European judges where the doctrine of primacy 'empowered' them by granting the authority to conduct judicial review. According to Alter's theory of inter-court competition, however, while lower courts were empowered by the primacy principle, the higher courts' powers have been respectively decreased. Their prerogatives were, in a way, snatched away from them and shared with not only a 'foreign' institution but also with their lower counterparts. Higher courts do not enjoy the CJEU's interfering with national matters and within the spheres of their jurisdiction, and this is why they are rarely seen to refer requests for preliminary rulings, give decisions which are sometimes openly defying EU rules and try to reduce national courts' references if they threaten to result in unwelcome decisions.<sup>133</sup> They perceive their own opposition as a means of defending their own competences, national interest, constitution and sovereignty. The debate over primacy of EU law over national constitutions which in some Member States has not gone according to the European Court's expectations shows how national higher courts intentionally and openly refuse to unconditionally accept certain EU doctrines.

Finally, just as governments, parliaments and regional authorities can succumb to the pressure of various interest groups in the process of legislation, so can administrative or even judicial organs in

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<sup>129</sup> Krislov et al. (1986), 87.

<sup>130</sup> Ibid., 83.

<sup>131</sup> Alter (1998), 234-235.

<sup>132</sup> Conant (2012), 24.

<sup>133</sup> Alter (1998), 241-243.

the process of application.<sup>134</sup> Being, to a degree, excluded from the formulation of broader goals of European or even state policies and operating on a case-by-case basis close to actual individual problems, the possibility of such organs being influenced by the demands of interest groups is considerable. Clearly, such pressure groups can pull public organs in both ways: in favor and against EU rules. Environmental protection NGOs can actually do a lot of good by influencing state bodies in matters concerning state compliance. However, interest groups can just as well pressure the authorities to disregard disliked EU norms and, for example, oppose staid aid rules in order to protect a local undertaking that involves a large number of jobs.<sup>135</sup> Accordingly, when state organs feel that they have to choose between - what they consider - the external and national interest, they may be inclined to bend in favor of the latter. Further, unlike in the process of legislation where a violation is, by its nature, of broad scope and affects a wide number of persons, a one-time disregard of an EU obligation in the process of application may feel 'easy' because it often has limited effects, namely to the persons directly concerned, and can be much harder to detect and pursue.

To summarize, despite the similarities with the process of legislation, the process of application has its peculiarities which stem from its specific nature, high fragmentation and the different category of authorities involved. It is less politicized than the process of legislation but this does not mean that it does not pursue its own more-or-less political goals and interests. It is more dependent on the expertise, diligence and consideration of individual officials and is more exposed to the downsides of EU norms, the complexity or inconsistency of which can sometimes be discovered only during their actual application.

### 3.6 Effects of a violation

The European Commission has long recognized that the consequences of Member States' infractions differ substantially and that the nature of those consequences should play a part in its policy of selective enforcement. As a result, in its application of the infringement procedure, it has committed itself to focusing on such infractions which pose the greatest risks, have the most widespread impact on citizens and businesses and are most persistent. Aside from cases of non-communication and failures to respect CJEU's judgments, this involves cases that raise issues of principle and those which have "particularly far-reaching negative impact for citizens."<sup>136</sup> This is a rather general, vague and simplistic way of formulating an enforcement priority since 'citizens' are not

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<sup>134</sup> Tallberg (2002), 628-629.

<sup>135</sup> Nugent (2001), 276.

<sup>136</sup> Commission Communication A Europe of Results, COM(2007)502, 9.

a uniform group nor can a "particularly far-reaching negative impact" be easily defined either. The rationale behind such framing, however, is that each DG ought to formulate its own hierarchy of infractions according to this criterion. This allows priorities to remain flexible by adapting them to specific circumstances of each sector. The result is such that different policy areas have their own understanding of negative effects that require the engagement of the infringement procedure.

When a Member State does not comply with an EU norm, its violation has the result of negating or hindering its outcome. Since, according to the principles of conferred powers, proportionality and subsidiarity, European legislation ought to serve particular justifiable goals, it can be assumed that each rule or provision serves a concrete interest of achieving a specific objective. Thus, a Member State's violation of an EU provision has the effect of negatively impacting the interest that arises from it: the interest in the attainment of this particular objective. Such an adverse effect can be considered as damage sustained by entities who were to benefit from the realization of a particular objective.

Damage, however, cannot be understood only in the narrow sense of actual "loss or injury to persons or property"<sup>137</sup>. On the contrary, Member States' violations of EU law can result in all sorts of negative consequences for various entities which cannot be easily qualified. These consequences can be either material or non-material, reversible or irreversible. They may take place immediately or only after some time and this can also be merely potential. They can occur directly or indirectly and can have only internal effects (towards citizens of the Member State and its own territory), or external effects towards other Member States, their individuals or territory, and, finally, even towards third countries. Additionally, such adverse effects may concern only particular, individual entities or groups as a whole, diffuse or concentrated interests. Finally, they may be limited to a one-time effect or persist over a long period of time.

### 3.6.1 Legislation process

Non-compliance in the process of legislation basically has the effect of the existence of national legislative or regulatory acts which do not conform to EU law, or the lack of regulation of a particular issue. The process of legislation is, therefore, most likely to involve infractions which, due to their general and abstract nature, affect entire groups of individuals, have consequences for whole state territories or regions and which are rather long-term because they persist until laws are repealed. However, the consequences of state infractions depend not only on the kind of process they take place in but mostly on the substance of the violated provision.

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<sup>137</sup> Garner (ed.), *Black's Law Dictionary*, West Group, 2004, 416.

When an EU provision is of such nature that it confers rights on individuals, a state violation may have the result of denying them those particular rights or imposing on them obligations which are incompatible with EU law, thus directly affecting their interests. For example, if national legislation provides for lower overtime remuneration for part-time workers who, in the majority of cases, are women,<sup>138</sup> the damage that such women suffer is material in the sense of financial loss, immediate in the sense that it takes place after the incompatible provisions came into force, and reversible since, once a violation is established, persons affected will receive higher pay and can claim compensation for remunerations which were unjustifiably lower.

Certain provisions of EU law do not, however, confer any rights on individuals but merely impose obligations on Member States to achieve a particular result. It does not mean, however, that the attainment of such objectives is not in the interest of individuals nor that their violations cannot result in actual damage. For example, when a national regulation exempts certain activities like fishing or hunting from the need for an assessment of the implications for a special areas of conservation under the Habitats Directive,<sup>139</sup> this constitutes incorrect transposition<sup>140</sup> since it may cause significant disturbances for the integrity of the protected sites but it does not cause damage to stakeholders per se. The type of damage that takes place due to such a violation can be immediate but it can just as well be future and also merely potential. It can be both material and non-material: material in the sense of the destruction of habitats which can result in the extinction of a particular species, and non-material in the sense of loss of biodiversity and environmental natural heritage; each of those results being irreversible.

As regards state violations which have only potential effects, in the *Buy Irish* case Ireland was held responsible for an advertising campaign intended to promote the purchase of Irish products, even though it had no significant effect on winning the Irish market. It was enough for the Court that the activities in question were liable to influence the flow of trade between Member States.<sup>141</sup>

The nature of European integration is such that many state obligations exist for the benefit of other Member States and their citizens and businesses, such as Article 34 TFEU. If a Member State's law subjects imported second-hand vehicles previously registered in other Member States to a roadworthiness test, this is liable to discourage the imports of such cars constituting an impediment on the free movement of goods.<sup>142</sup> The Polish law in that case had negative consequences for both,

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<sup>138</sup> Judgment in *Voß*, C-300/06, EU:C:2007:757.

<sup>139</sup> Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, 22.7.1992, 7–50.

<sup>140</sup> Judgment in *Commission v France*, C-241/08, EU:C:2010:114, paragraph 26-39.

<sup>141</sup> Judgment in *Commission v Ireland*, 249/81, EU:C:1982:402, paragraph 25.

<sup>142</sup> Judgment in *Commission v Poland*, C-170/07, EU:C:2008:322.

exporters from other Member States and importers from Poland but they were also only indirect and potential.

Sometimes, Member States' violations may have negative consequences for third countries. This was the case of Italy which introduced an environmental tax on methane gas from Algeria which was a charge having equivalent effect to customs duties and constituted an infringement of the Cooperation Agreement between the EEC and Algeria.<sup>143</sup> The damage sustained was material (financial loss) and directly resulted from the incompatible Italian legislation.

One could claim that damages often do not so much stem from the existence of incompatible measures but they are actually the result of the application of those measures. In the case of women receiving lower remuneration for overtime hours, the damage was the result of the employer's policy towards its employees. Similarly, in the case of the Habitats Directive, the damage was liable to occur because assessments of implications of certain activities were not being carried out. This, however, should not lead to the conclusion that these damages were not the direct result of state incompatible legislation. It is, first and foremost, the action or inaction of state organs that had allowed such non-conforming measures to exist that led to their application and damages.

It is, nonetheless, worth distinguishing situations when the actual application of domestic provisions differs from the existing law. The effects of state violations in the process of legislation may, in practice, be limited when domestic organs do not apply incompatible national provisions or when they apply them in accordance with EU law. However, according to the Court of Justice, the fact that non-conforming national measures exist constitutes an infringement of EU law irrespective of conforming national practice.<sup>144</sup> In the case of the French Code de travail maritime which imposed limitations on the employment of non-French nationals on French merchant vessels, France was held responsible for an infringement of [new] Article 45 TFEU despite the fact that French naval authorities had received verbal instructions to treat Community nationals as French. This resulted in a state of uncertainty regarding stakeholders' legal position because it could be easily changed, was not publicized wide enough and depended on the will of administrative authorities.<sup>145</sup> In other words, even if there were no adverse effects due to correct national practice, these were still liable to occur so long as incompatible domestic provisions were in force.

State violations in the process of legislation are rather long-term by their nature since their correction requires either repeal, amendment or the adoption of new measures. Depending on the

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<sup>143</sup> Judgment in *Commission v Italy*, C-173/05, EU:C:2007:362.

<sup>144</sup> Judgment in *Commission v Luxemburg*, C-75/01, EU:C:2003:95; Judgment in *Commission v Ireland*, C-354/99, EU:C:2001:550; Judgment in *Commission v Greece*, C-187/98, EU:C:1999:535.

<sup>145</sup> Judgment in *Commission v France*, 167/73, EU:C:1974:35, paragraph 41-42.

breached norms' area of regulation, the consequences of state infractions can affect businesses, citizens or both. They can go against concentrated interest (e.g. free movement of goods) which are represented by limited amounts of easily identifiable stakeholders with high per capita stakes that are likely to easily organize to combat state encroachment. Or they can impact diffuse interests (environmental and consumer law) represented by wider unidentifiable publics with low per capita stakes which suffer from mobilization problems.<sup>146</sup>

State violations may have no practical effects at all, existing only 'on paper.'<sup>147</sup> In a case concerning Italian legislation imposing an excise duty on imported cocoa powder, the Court decided that there was no breach because Italy did not import cocoa powder.<sup>148</sup> However, quite differently ended the case against Ireland which was held responsible for failure to transpose a directive<sup>149</sup> concerning trans-European high-speed rail system even though there was no high-speed train operational at the time in Ireland nor would there be in the foreseeable future.<sup>150</sup> Similarly when the Czech Republic incompletely transposed a directive<sup>151</sup> concerning institutions for occupational retirement because it had no such institutions in its territory, the Court relied in its reasoning on Member States' duty to ensure that all legal persons "know with clarity and precision, what are, in all circumstances, their rights and obligations."<sup>152</sup>

It can be concluded, that Member States' violations in the process of legislation can have various effects from those resulting in direct, immediate, material and reversible damages to those that have indirect, non-material, merely potential but irreversible consequences. Due to the broad number of EU policies and their depth of regulation, state violations can impinge on a wide spectrum of interests of private and legal persons, affecting them either directly or indirectly, as full groups (collective interests) or only as particular individuals (private interests). It does not mean, however, that certain differences between the consequences of infractions in the legislation process and those in the process of application. Although it is a simplification and exceptions regularly occur, the legislation process mostly results in violations which have broad, long-lasting consequences. They generally affect entire groups of natural or legal persons who fall within the scope of regulation of the

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<sup>146</sup> Olson, *The Logic of Collective Action* (Harvard University Press, 1971).

<sup>147</sup> Dashwood, White, *Enforcement Actions under Articles 169 and 170 EEC*, 1989 *European Law Review* 14, 393.

<sup>148</sup> Judgment in *Commission v Italy*, 28/69, EU:C:1970:26, paragraph 11-17.

<sup>149</sup> Council Directive 96/48/EC of 23 July 1996 on the Interoperability of the Trans-European High-Speed Rail System, OJ L 235, 17.09.1996, 6-24.

<sup>150</sup> Judgment in *Commission v Ireland*, C-372/00, EU:C:2001:702, paragraph 11-13.

<sup>151</sup> Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision, OJ L 235, 23.9.2003, 10-21.

<sup>152</sup> Judgment in *Commission v Czech Republic*, C-343/08, EU:C:2010:14, paragraph 39/42.



breached provision, resulting in many individual cases of suffered damages. Such violations, if they are reversible, take time to rectify because they require the running of domestic legal procedures while the material damages they involve are generally on a wider scale. They are, however, easier to pursue by the Commission than application cases, and easier to investigate and establish before the Court (chapter 7).

### 3.6.2 Application process

Due to the fact that the fulfillment of EU obligations in the process of application is mostly dependent on individual decisions of state organs, many such violations constitute isolated instances of failures. They can, however, have consequences for individual entities or entire groups. If identical or similar violations tend to reoccur across different organs than they stop being isolated instances of failures and become systemic violations that represents a general state practice.

According to the Court of Justice, there is no reason why the Commission cannot initiate proceedings against isolated violations.<sup>153</sup> However, because this type of a violation results from a single, individual decision and affects only the private interest of a specific party, it is rather unlikely that the Commission would take interest in pursuing it, especially if national legal avenues are available. This was the Commission's answer to an incident that occurred when several German Amnesty International delegates, who wished to have a meal in a French restaurant, were refused entry into the country. The refusal qualified as a violation of the free movement of services (delegates as recipients of services) but the individual and limited nature of the violation prevented the Commission from initiating infringement proceedings, stating that the delegates should have sought redress before French courts.<sup>154</sup>

Certain isolated violations can, however, find themselves on the Commission's agenda if their consequences exceed those of individual persons. When a Danish state-owned company specified in its invitation for tenders for the construction of a bridge the requirement that mostly Danish materials, goods, labor and equipment were used,<sup>155</sup> this constituted an isolated violation but its negative effects concerned the concentrated interests of a number of consortiums and undertakings which were discouraged by the unlawful requirement from participating in the tender. Depending on the nature of the obligation that rests on state authorities and the substantial content of the norm breached,

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<sup>153</sup> Judgment in *Commission v Germany*, C-431/92, EU:C:1995:260, paragraph 22.

<sup>154</sup> Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 1979 *European Law Review* 4, 451.

<sup>155</sup> Judgment in *Commission v Denmark*, C-243/89, EU:C:1993:257, paragraph 23-31.

isolated violations can not only impact private interests of particular parties but they can also have effects for a wider number of entities.

Similarly, when Greece infringed the directive<sup>156</sup> on waste by failing to take measures in order to safely dispose of waste which was illegally discharged at the mouth of river Kouroupitos in Chania region,<sup>157</sup> this was an isolated violation in the sense that it concerned a particular site, but the effects of this violation went beyond the private interests of specific parties. The illegal discharge of waste had a negative effect on both, the environment and human health, thus affecting the diffuse interest of all individuals who inhabited the area. The nature of diffuse interests is such that members of a group sharing an interest do not necessarily agree as to its level of importance or as regards methods and costs of furthering it, irrespective of whether this, objectively speaking, can be reasonably justified or not. In the Greek case, the government argued that the inhabitants of Chania region actually opposed the plan to create new sites for the burial of waste.<sup>158</sup> If the mouth of the river was in an isolated area, the population probably preferred to have waste discharged there illegally and without respect for any norms or standards than legally anywhere nearer their homes. In this case, the population considered the state violation to be actually in their favor although, in reality, the illegal discharge was more likely to bring negative consequences to them than the creation of legal disposal sites.

A violation can be the subject-matter of the infringement procedure regardless of its frequency or scale<sup>159</sup> but the likelihood of an isolated violation drawing the Commission's attention depends mostly on whether it has negative consequences only for precise parties or "widespread impact for citizens and businesses."<sup>160</sup>

Systemic violations occur repetitively throughout state territory or region and as a result of conduct of different organs with respect to similar but different cases. Such systemic violations are more than likely to occur when domestic organs apply non-conforming national legislation but they can also take place when national measures are compatible with EU law. If national measures conform to EU requirements, than the repetitive and wide-spread nature of systemic violations suggests that an administrative practice of non-compliance has developed in a Member State. Unlike in situations of isolated violations which are, in a way, exceptional and can be, to a degree, considered as falling within the margin of error of state bodies, the systemic nature of state violations indicates that the

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<sup>156</sup> Council Directive 75/442/EEC of 15 July 1975 on Waste, OJ L 194, 25.7.1975, 39-41.

<sup>157</sup> Judgment in *Commission v Greece*, C-45/91, EU:C:1992:164.

<sup>158</sup> *Ibid.*, paragraph 12.

<sup>159</sup> Judgment in *Commission v France*, C-404/99, EU:C:2001:192, paragraph 51.

<sup>160</sup> Commission Communication A Europe of Results, COM(2007)502, 9.

system is inherently flawed reflecting an underlying problem in the way national bodies regard and approach a particular issue in their practice. As stated by the Court of Justice, an “administrative practice can be the subject-matter of an action for failure to fulfill obligations when it is, to some degree, of a consistent and general nature.”<sup>161</sup> In a case against Greece, where its hospitals rejected tenders in respect of medical devices bearing the CE certification marking, the Commission proved at least 16 such cases where the hospitals in question were of a varied size (large and medium), concerned different fields of competence (general hospitals, a children’s hospital, maternity hospital) and were established in different parts of the Greek territory.<sup>162</sup>

The importance of establishing a systemic violation based on state non-conforming practice as opposed to incidental would seem to lie in the consequences of the Court’s ruling declaring an infringement, more precisely in the scope of state obligation to comply with the judgment under Article 260 TFEU. When a Member State is held responsible for an isolated case of non-compliance, it is obliged to take rectifying measures only with respect to this particular case. But when a non-conforming practice is established, then the state is under the duty to make sure that all its organs adapt their practice to the requirements of EU law.

In 2001 the Commission brought a case against Ireland where it claimed twelve separate infringements of the directive on waste<sup>163</sup> regarding inter alia landfills operating without permits and the existence of illegal waste sites. It relied on those cases merely as representative examples, insisting that they reflected an underlying failure on the part of the Irish organs to comply with their obligations under the Waste Directive. It claimed that Ireland was under the duty to ensure full implementation of the “seamless chain of responsibility for waste” established by the directive and that examples cited gave proof of a “general and persistent” unlawful practice in Ireland (GAP). The Court replied that “nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State’s authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate.” Next, the Court analyzed twelve presented cases and in each found an infringement. This led it to the conclusion that Ireland was indeed responsible for a general and persistent infringement of the Waste Directive.<sup>164</sup> This declaration meant that Ireland was not only held responsible for other similar cases that either already existed or could occur in Ireland, but

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<sup>161</sup> Judgment in *Commission v Germany*, C-387/99, EU:C:2004:235, paragraph 42.

<sup>162</sup> Judgment in *Commission v Greece*, C-489/06, EU:C:2009:165.

<sup>163</sup> Council Directive 75/442/EEC on Waste, 39-41.

<sup>164</sup> Judgment in *Commission v Ireland*, C-494/01, EU:C:2005:250.

also for failure to ensure the performance of other obligations imposed by the Waste Directive such as safe disposal or recovery of waste, the establishment of an integrated and adequate network of disposal installations, or inspections of waste operators and holders which, all together, constituted a fragment of an effective permit system which Ireland lacked.<sup>165</sup> The mere improvement of an administrative practice would no longer suffice to comply with the judgment. Ireland had to address a wider problem and create an effective administrative system to secure proper application and enforcement of national transposing measures.<sup>166</sup>

Systemic state violations are, due to their wide-spread and recurring nature, of higher interest for the Commission as compared to isolated cases of non-compliance. Additionally, more often than not, such violations have effects for more than one party, impacting the interests of a number of entities. In the Irish example, the general and persistent infringement had negative effects for diffuse interests, which were not limited to a particular site or even region but engulfed the entire country. Moreover, systemic violations of EU law may have the effect of impacting certain interests in a persistent and regular manner by, for example, repetitively preventing persons affected from claiming a right attributed to them by EU law, while isolated cases may simply consist of a one-time effect with respect to a specific situation by, for example, barring them from claiming a right in a specific case which, however, can still be claimed before another body. In any case, both isolated and systemic violations can have consequences for individual, concentrated and diffuse interests, but the number of entities concerned will be higher and the scope of the violation's effects wider in systemic cases of non-compliance.

Similarly to the process of legislation, state violations in the process of application can have direct and immediate adverse effects for particular interests or only indirect, future and also merely potential. These effects can, in turn, be reversible or irreversible, material or non-material. For example, when several foreign-language assistants became linguistic associates in Italy and their employing universities did not recognize their length of service for the purpose of pay,<sup>167</sup> this constituted a violation the effects of which were material, immediate and reversible. On the other hand, when Spanish authorities failed to draw up external emergency plans for all establishments where high quantities of dangerous substances were present,<sup>168</sup> this constituted a violation which

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<sup>165</sup> Press Release No 37/05 of the Court of Justice, 26.04.2005.

<sup>166</sup> Wennerås, *A New Dawn for Commission Enforcement under Article 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments*, 2006 Common Market Law Review 43, 42-48.

<sup>167</sup> Judgment in *Commission v Italy*, C-212/99, EU:C:2001:357.

<sup>168</sup> Judgment in *Commission v Spain*, C-392/08, EU:C:2010:164.

could have serious irreversible and non-material consequences but, at the same time, only indirect, future and potential.

To sum-up, violations in the process of application can be divided into two main types: isolated and systemic. The latter type can be compared to violations in the process of legislation because they often affect entire groups of persons or businesses. The Commission makes a difference between both types and concentrates in its enforcement policy mostly on systemic violations.<sup>169</sup> They constitute the general practice of state organs and have the effect of repeatedly and on a wide scale preventing EU norms from operating 'on the ground' and achieving their intended goals. The Commission sometimes also brings cases against isolated violations but only if they have serious, broad-scale consequences. The Commission's priorities suggest that the determining factors in such cases are: the number of affected individuals, the risk the violations present and the 'weight' of breached provisions in the EU system. On the other hand, isolated, incidental violations are excluded from the Commission's area of interest.

### 3.7 Material grounds for selective enforcement

This chapter has shown that non-compliance in the EU is a complex phenomenon that involves a large amount of state infractions, each consisting of five different components which, in turn, can take a variety of forms, the examples of which are summed-up in Table 1. It is these components that increase or decrease the significance of each violation in the Commission's order of importance. The Commission formulates priorities in order to make sense of this large body of infractions and to guide its individual officials in their day-to-day enforcement work as will be elaborated in chapter 4. We may agree or disagree with the Commission's choice of priorities but, seeing the diversity of backgrounds to state violations or the wide scale of their effects, it is difficult to deny the need for both, prioritization and the availability of alternative measures. The limitations of the Commission's supply will be analyzed in chapter 7, strengthening the argument for the Commission's selectivity in enforcement. For now, it can be said that while the previous chapter analyzed the legal grounds for selective enforcement, this chapter explored its material grounds. By surveying the diversity of non-compliance issues and demonstrating the complexity of their components, it has provided material reasons for the existence of the Commission's selective enforcement based on prioritization and the choice of alternative solutions.

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<sup>169</sup> Commission 26<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2008), COM(2009)675, 8.

<b>VIOLATION</b>	<b>Legislation</b>	<b>Application</b>
<b>STATE DUTY</b>	Source: Treaties, regulations, directives, decisions, international agreements, general principles of EU law	
	Transposition: Adopt new laws, adjust existing, repeal incompatible, refrain from enacting, create procedures, designate authorities, provide sanctions, communicate measures Compliance with Article 260 TFEU CJEU's rulings	Application and enforcement: Supervision, checks, controls, inspections, prosecution, penalties Effectiveness, proportionality and equivalence Direct and indirect effect, priority, state liability
<b>SUBJECT-MATTER</b>	Fundamental EU principles, human rights, issues of principle, main elements of framework regulations and directives	
<b>ORGAN</b>	National and regional legislature and executive Regulatory agencies	National and regional administrations National courts "Emanation of the state" bodies
<b>REASONS</b>	Unintentional: vague, incoherent or complex EU measures, capacity limitations, lengthy and complex procedures, internal conflicts	Unintentional: limited knowledge and awareness, presumption of constitutionality, vague, incoherent or complex EU measures, limited resources, detachment from decision-making processes
	Intentional: opposition against EU policies, conflict of interest, protectionist attitudes, misfit between national and EU rules, pressure and lobbying	Intentional: opposition, protectionist attitudes, pressure and lobbying, misinterpretation of goals
<b>EFFECTS</b>	Material or non-material, reversible or irreversible, immediate or delayed or potential, internal or external, one-time or persistent, impact on concentrated or diffuse interests	
	Entire groups of stakeholders, entire territories or regions, long-term	Incidental and isolated instances Systemic reflecting a general practice

Table 1. State violations' five main components, and examples of their contents.

## 4 Evolution of the Commission's selective enforcement

The Commission's selective enforcement and its approach to non-compliance have undergone an evolution that was influenced not only by Treaty amendments but also by the progressing, 'ever-closer' integration, shifting scholarly attitudes and, finally, the Commission's own developments and pursuit of efficiency. Initially, the EU compliance system consisted of only few tools, and as a rule the infringement procedure gave way to informal negotiations. The progress of European integration, however, strengthened formalized and coercive methods of resolution by intensifying infringement proceedings and introducing pecuniary sanctions, while concentrating on the managerial approach to non-compliance through the construction of various pre-emptive and reactive tools and the elaboration of the priority criteria. The Commission's selective enforcement thus has taken on a two-tier approach where the Commission gained a wide array of enforcement tools, ranging from friendly problem-solving measures such as the EU Pilot to burdensome penalty payments and lump sums. However, a closer look at the evolution of the Commission's selective enforcement reveals that a lot has changed only so that things could stay the same. This chapter will show how the Commission has developed its policy of selective enforcement by introducing new rules and tools only so that, in the end, it can avoid infringement proceedings, circumvent the more-invasive demands of the European Parliament and continue enforcing EU law by means of a confidential and bilateral dialogue.

### 4.1 Choice between formal and informal solutions

In the beginning of the European Communities, the Commission was rather reluctant to use the infringement procedure against Member States.<sup>1</sup> In fact, its early attitude towards Treaty enforcement could be described as careful if not wary, where formal action was perceived as a means of last resort employed only after informal negotiations failed. Strict enforcement of Community law was simply not seen as the appropriate method of encouraging European integration.<sup>2</sup> As a result, very few cases reached the Court and, even when they did, its declaratory judgments did not always

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<sup>1</sup> The first case that ended with the Court's judgment was *Commission v Italy*, 7/61, EU:C:1961:31. In the 1960s, only sixteen cases were brought to the Court of Justice which makes an average of 1,6 case a year for six Member States, and in the 1970s only fifty cases were brought which makes 5 cases a year for nine Member States. The European Community had clearly fewer members back then and considerably less legislation to enforce but these numbers still demonstrate the Commission's position on the infringement procedure, [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>2</sup> Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001), 11, 14.

suffice to persuade Member States to comply, except maybe shaming them into conformity.<sup>3</sup> According to Smith, the procedure functioned not as an enforcement mechanism but rather as “negotiated enforcement” where negotiations played a vital role, and referrals to the Court were avoided.<sup>4</sup> The Commission’s caution with the infringement procedure went even as far as avoiding the reasoned opinion which - back then - was considered controversial and signified a problem in negotiations.<sup>5</sup>

The Commission’s early reliance on negotiations not only corresponded to the general practice of international organizations where states as contracting parties perceive themselves as leading players and do not enjoy the idea of a supranational body bringing them before a supranational court whenever there is a problem in compliance. It was also in line with Treaty provisions (new Article 258 TFEU<sup>6</sup>) which oblige the Commission to give Member States “the opportunity to submit [their] observations.” Nowhere is it determined how long this opportunity is to last or which form it is to take. If the Commission felt it was beneficial to continue the informal dialogue, then there were no legal provisions to say the contrary.

According to Rawlings, everything about the enforcement mechanism was designed to reinforce the classic model of international procedure with the view of achieving compliance by means of confidential “dialogue and mutual accommodation”. The procedure was stretched by the Commission in order to provide as many opportunities for prolonged negotiations and hushed settlement as was possible. In addition, the Commission’s practice of suggesting Member States how to rectify their violations and the lack the obligation to refer cases to the Court encouraged confidential negotiations and out-of-court settlement.<sup>7</sup>

Advocate General Roemer stated in 1971 with regard to the identical infringement mechanism under the Euratom Treaty<sup>8</sup> that the “procedure is of particularly radical nature, an ultima ratio” and that “it would not be reasonable to initiate it immediately on every occasion.” According to him, excessive use could negatively impact both the efficacy of the procedure and the prestige of Member States. He thus suggested that the Commission was left to decide whether and when to launch the procedure without any “automatic application” or “compulsion to initiate.” AG Roemer then gave examples of factors which could warrant the Commission’s exercise of its discretion: 1)

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<sup>3</sup> Alter (2001), 16.

<sup>4</sup> Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU*, (Routledge, 2010), 86.

<sup>5</sup> Smith (2010), 88.

<sup>6</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>7</sup> Rawlings, *Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement*, 2000 *European Law Journal* 6, 8-9.

<sup>8</sup> Treaty establishing the European Atomic Energy Community (1957).



when an “amicable settlement” can be reached, 2) with respect to violations that have only minor effects or 3) which can aggravate a politically difficult situation and, finally, 4) when an amendment to the law in question is expected.<sup>9</sup> Academics reasoned in similar lines as AG Roemer. It was argued that the Commission’s policy of ‘last-resort’ enforcement was justified by reasons of expediency because it decreased the Commission’s workload and shielded Member States from the embarrassment of the infringement procedure allowing the Community to develop in a positive atmosphere.<sup>10</sup>

The Commission thus resorted to the Court of Justice only in exceptional cases, otherwise resolving compliance issues without the attention of the press and remaining Member States. However, as the Community evolved establishing the internal market and growing in size, legislation, complexity and technicality, the Commission found itself in need of more coercive enforcement, increasing its reliance on the infringement procedure and turning it into a more regular response to non-compliance (but without abandoning confidential negotiations either).<sup>11</sup> This change was partially due to the Court’s of Justice delicate remodeling of the infringement procedure from a diplomatic and bureaucratic process which usually ended before legal proceedings into a two-staged procedure with a strong judicial part. The Court slowly but progressively brought in the picture that the administrative stage was actually only a pre-litigation phase of a judicial process. It changed the Commission’s and the general public’s perception of the enforcement mechanism which, combined with the Commission’s reforms accelerating its internal procedures, eventually led to its stronger reliance on the Court.<sup>12</sup> The introduction in the Maastricht Treaty<sup>13</sup> of financial penalties to Article 260 TFEU further strengthened the infringement procedure’s coercive and deterrent effects, turning it into a mechanism of actual enforcement, boosting the power of the Court’s rulings and providing Member States with a stronger incentive to comply.

While the infringement procedure’s relevance increased over the years, confidential negotiations and amicable settlements continued playing a role in the Commission’s selective enforcement<sup>14</sup> and not without the support of the academia. Snyder, for example, insisted that the use of informal negotiations should not be considered in terms of an alternative to adjudication.

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<sup>9</sup> Opinion of AG Roemer in case *Commission v France*, 7/71, EU:C:1971:121.

<sup>10</sup> Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 1979 *European Law Review* 4, 450.

<sup>11</sup> Craig, De Búrca, *EU Law*, 5th ed. (Oxford University Press, 2011), 413; Mastroianni, *The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?*, 1995 *European Public Law* 1, 537.

<sup>12</sup> Harlow, Rawlings, *Accountability and law enforcement: the centralized EU infringement procedure*, 2006 *European Law Review* 31, 455.

<sup>13</sup> Treaty on European Union (original version), OJ C 191, 29.7.1992.

<sup>14</sup> Spence, *The Directorates General and the Services: Structures, Functions and Procedures*, 3rd ed. (John Harper Publishing, 2006), 145.

According to him, the main Commission's method of resolving compliance issues was negotiation while litigation was merely a small part of it, sometimes inevitable but often avoidable. To him, the negotiating nature of the infringement procedure was as (or even more) important as litigation and he considered these two elements of the same process complementary.<sup>15</sup> He did, however, mention that reliance on negotiations had its shortcomings and that the infringement procedure should be approached also from the perspective of legitimacy if it was to ensure effectiveness of EU law.<sup>16</sup>

Hartley pointed to the Commission's limited resources, Member States' dislike of the infringement procedure with its shaming effect and the fact that the Community functions best on the basis of "mutual trust and goodwill", concluding that "excessive resort to enforcement actions might do more harm than good." According to him, the Commission should consider, on the one hand, the damage resulting from the violation and, on the other, the "embarrassment and inconvenience" that the infringement proceedings can bring.<sup>17</sup> Harlow, on the other hand, stated that the Commission, being as much a regulator as it is an enforcer, had to have the freedom to rely on negotiations and choose long-term objectives over short-term since Member States' violations of EU law are not always deliberate symbols of defiance. Harlow advocated alongside managerial theorists that not all cases required legal action. Quite the opposite, she argued that "legal enforcement procedures, in short, are not always as effective as might be imagined."<sup>18</sup>

Even if academics had certain objections to the Commission's exercise of its discretion, they still generally found justifications for it. Everling, for example, as early as in 1984, was not convinced whether avoiding litigation in every politically-sensitive, consensus-threatened case was the right choice considering Member States' tendency to delay and, thus, endanger the consensus anyway. He did, however, submit that, in the end, there was only so much that could be achieved by judicial proceedings and that some issues simply needed to be resolved by a "basic political understanding between the constituent States on the continuance of the process of integration."<sup>19</sup> All in all, the Commission's wide discretion and its reliance on negotiations were justified by the political (and not juridical) nature of the infringement procedure and the fragile relationship with Member States.<sup>20</sup>

Overall, however, support for the Commission's practice of confidential negotiations diminished over the years. Rawlings submitted that the time for the "élite model of regulatory

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<sup>15</sup> Snyder, *The Effectiveness of European Community Law*, 1993 *The Modern Law Review* 56, 30.

<sup>16</sup> *Ibid.*, 48.

<sup>17</sup> Hartley, *The Foundations of European Community Law* (Oxford University Press, 2003), 312-313.

<sup>18</sup> Harlow, *Accountability in the European Union* (Oxford University Press, 2002), 73.

<sup>19</sup> Everling, *The Member States of the European Community before their Court of Justice*, 1984 *European Law Review* 9, 219.

<sup>20</sup> Mastroianni (1995), 536.

bargaining” based on close cooperation, confidential negotiations and informal settlement, had come and gone.<sup>21</sup> He talked of the Commission’s “hidden jurisprudence” in the administrative stage and claimed that it operated “in the shadow of the law” by resolving cases through “negotiation, bargaining and threats.” Rawlings saw the Commission’s reliance on negotiations as a tool for advancing institutional self-interest but he also took notice of the need to combine the Commission’s enforcement competences with its agenda-setting function and recognized that by means of “test-casing” it could attempt to establish some main principles. This did not mean, however, that he condoned the Commission’s heavy reliance on negotiations to resolve non-compliance cases. According to Rawlings, the infringement procedure has taken up new functions that should be integrated by moving away from informal, secretive negotiations.<sup>22</sup>

Smith considered the enforcement mechanism an “arena of secretive deal-making, riddled with a lack of transparency and accountability for those actors claiming to promote legitimate European governance.”<sup>23</sup> The negotiating characteristics of the infringement procedure were justified when no system of coercion or penalty existed, leaving confidential dialogue as the only means of inducing Member States’ compliance.<sup>24</sup> Also, according to Smith, such an informal approach had been feasible in a community of six Member States and with a small amount of legislation to enforce but that was no longer a possibility in a Union where the number of members has more than quadrupled.<sup>25</sup> Nowadays, reliance on negotiations could actually be a hindrance to the successful resolution of the dispute because Member States are not always eager to cooperate, ignoring the Commission’s queries and deliberately drawing out the state of non-conformity, which ultimately impacts the Commission’s effectiveness.<sup>26</sup> Smith explained how the relationship between the Commission and Member States was a ‘power struggle’ where the latter advocated stronger enforcement when it suited their interests and then opposed it when it went against their goals.<sup>27</sup> She described negotiations as a “frustrating task” for the Commission, insisting that it both decreased the effectiveness of the enforcement mechanism and squandered the Commission’s limited resources.<sup>28</sup> If negotiations were stretched out in time, often lasting longer than a full Court procedure, or if they involved some form of compromise on the part of the Commission in order to reach a settlement, then they lost their purpose as a

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<sup>21</sup> Rawlings (2000), 7.

<sup>22</sup> *Ibid.*, 10.

<sup>23</sup> Smith (2010), 10.

<sup>24</sup> *Ibid.*, 29.

<sup>25</sup> *Ibid.*, 209.

<sup>26</sup> *Ibid.*, 117.

<sup>27</sup> *Ibid.*, 149.

<sup>28</sup> *Ibid.*, 205.

measure more effective than judicial proceedings.<sup>29</sup> Smith did recognize that negotiations could bring certain benefits like flexibility to a system of small resources and irregular information but she did not believe good governance and legitimacy should be compromised to maintain this flexibility.<sup>30</sup>

The EU's search for democratic credentials thus brought into view principles (e.g. legitimacy and accountability) that clashed with the Commission's extensive discretion in its role of guardian. Article 258 TFEU, on account of its Treaty basis and formalized procedure, gradually gained - in the stakeholders' eyes - the value of a more appropriate mechanism for combating state non-compliance in contrast to the Commission's informal and secretive negotiations.<sup>31</sup> Individuals became more active in their intolerance of state non-compliance, regularly complaining to the Commission and expecting the launch of infringement proceedings which the Commission was unable or unwilling to provide. This brought questions concerning its exercise of discretion and selective use of the infringement procedure. The Commission's response was the publication of its enforcement priorities to shed light on the intricacies of its practice. Nonetheless, it has remained faithful in its devotion to amicable solutions, with its every annual report underlining voluntary compliance as a primary objective of infringement proceedings.<sup>32</sup> Even nowadays the Commission continues to talk of partnership and assistance that helps resolve compliance problems.<sup>33</sup>

## 4.2 Prioritization

It can be said that the Commission was prioritizing its caseload from the early days of the European Communities when it made choices regarding the most appropriate approaches to identified infractions. Back then it was likely based on one rule: avoid infringement proceedings at all cost, but Maduro emphasizes that the Commission sought to create a "habit of obedience" among Member States. It carefully chose violations it wished to pursue by concentrating on less sensitive or important cases and thus making it more likely that Member States complied.<sup>34</sup> As years passed and the number of legislation and corresponding violations grew, the Commission had to develop its policy of prioritization and extended its set of priorities to incorporate new laws, circumstances and types of infractions. How definite, coherent and respected these priorities were cannot be determined due to

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<sup>29</sup> Ibid., 216.

<sup>30</sup> Ibid., 210.

<sup>31</sup> See European Parliament Resolution of 16 May 2006 on the Commission's 21<sup>st</sup> and 22<sup>nd</sup> Annual Reports on Monitoring the Application of Community Law (2003 and 2004), 2005/2150(INI), paragraph 11.

<sup>32</sup> Commission 24<sup>th</sup> Annual Report on Monitoring the Application of Community Law (2006), COM(2007)398, 1.

<sup>33</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 3;

Commission 25<sup>th</sup> Annual Report on Monitoring the Application of Community Law (2007), COM(2008)777, 1.

<sup>34</sup> Maduro, *We the Court* (Hart Publishing, 1998), 9-10.

the secrecy that veiled and still partially veils the Commission's internal modes of operation. In the end, however, the Commission chose to reveal some information regarding its policy of prioritization although how much this information corresponded to its actual practice cannot be definitely determined nor can the presented priorities be fully trusted to be exhaustive.

All in all, the European Commission's era of 'open' prioritization can be marked by three main attempts at publically formulating its enforcement priorities. In the White Paper on European Governance<sup>35</sup> from 2001, it published 'orientations' that were to serve the elaboration of actual priorities in the future. A year later in the Communication on Better Monitoring,<sup>36</sup> the Commission presented a long and detailed list which was replaced in the communication of 2007 A Europe of Results<sup>37</sup> with a much shorter catalog and a shift from horizontal to sectoral policy. The nomenclature of prioritization was temporarily sidelined around 2012 when the Commission increased the role of the EU Pilot and established criteria regulating its applicability only to return with the political priorities of the Juncker Commission in 2015.

#### 4.2.1 Purpose of prioritization

The publication of the Commission's priority criteria can be interpreted as a reaction to the European Union's policy of strengthening its democratic characteristics. The priorities introduced, even if only partially, a degree of transparency to the Commission's operation by explaining how it made its choices regarding non-compliance cases. In the end, however, even though some information was revealed, it was an insufficient attempt at genuine openness because, on the one hand, provided data could not be verified, and on the other, it was scarce, vague and incoherent, with each successive communication contradicting the previous. The fact that the Commission amended its priority criteria is not surprising and can be explained in terms of priorities' flexible adjustments to new laws and circumstances. However, the Commission's initial inability to commit to a specific understanding of the rationale behind its prioritization and the role the priority criteria play in its enforcement policy suggest that it was either partially insincere about the details of its actual practice or it was unable to find the appropriate path to tackle the problem of selectivity in a world that expects clear, unified and formalized rules. Or both, as the case may be.

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<sup>35</sup> Commission White Paper on European Governance, COM(2001)428.

<sup>36</sup> Commission Communication Better Monitoring of the Application of Community Law, COM(2002)725.

<sup>37</sup> Commission Communication A Europe of Results – Applying Community Law, COM(2007)502.

The Commission had mentioned its practice of prioritization in its annual reports before it decided to address the issue comprehensively.<sup>38</sup> However, only in 2001 in its White Paper on European Governance did the Commission officially introduce the concept of priority criteria. It stressed how complainants were important and how their situation was not always favorable, requiring from them legal action before national courts. Therefore, “in order to maximize the impact of its work in dealing with complaints” the Commission intended to present the criteria for prioritizing Member States’ infringements.<sup>39</sup>

The highlighted complainants’ role in the Commission’s justification fitted neatly within the White Paper’s objectives which dealt with the reform of European governance, talking of transparency, coherence and “connect[ing] Europe with its citizens.”<sup>40</sup> It was also a response to the general dissatisfaction with the Commission’s handling of complaints that could be observed prior to its White Paper. In 1997 the European Ombudsman carried out its own investigation into the Commission’s management of cases<sup>41</sup> provoked by a series of complaints received from citizens who had claimed bad treatment in the pre-litigation procedure, stressing the need for time-limits as well as protesting against the lack of information and justification as to, respectively, the processing of complaints and the closure of cases.<sup>42</sup> The Ombudsman’s inquiry confirmed citizens’ allegations and it made a number of suggestions to the Commission asking it to guarantee procedural rights for individuals.<sup>43</sup> This later led to the Commission publishing a separate communication in 2002 on handling complaints<sup>44</sup> but already in the White Paper on Governance from 2001 the Commission did not shy away from underlining the importance of stakeholders. Influenced by the general demand to recognize complainants’ role in the infringement procedure, the Commission chose to strengthen its policy of prioritization by emphasizing that it would benefit complainants if it was more efficient in the management of its case-load. Mostly, however, the publication of its prioritization practice served the bettering of stakeholders’ situation by informing them where the Commission’s priorities lay so that they could, when considering their litigating alternatives, take it into account.

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<sup>38</sup> E.g. Commission 14<sup>th</sup> Annual Report on Monitoring the Application of EU Law (1996), after Rawlings (2000), 23.

<sup>39</sup> Commission White Paper on European Governance, COM(2001)428, 25.

<sup>40</sup> *Ibid.*, 3.

<sup>41</sup> European Ombudsman Annual Report for 1997.

<sup>42</sup> *Ibid.*, 271.

<sup>43</sup> *Ibid.*, 271-274.

<sup>44</sup> Commission Communication on Relations with the Complainant in Respect of Infringements of Community Law, COM(2002)141.

A year later the Commission published the Communication on Better Monitoring of the Application of Community Law,<sup>45</sup> specifically intended to address enforcement issues and deliver on the promises made in the White Paper. This time, however, any mention of complainants in relation to prioritization was abandoned, the Commission assuming a more down-to-earth vision. It named prioritization an “internal organization measure” that served effective and impartial execution of its tasks.<sup>46</sup> It, therefore, reduced the significance of the priority criteria by insisting that, ultimately, they were needed for a very basic purpose: the Commission’s internal management of cases. The adoption of the criteria was to increase the effectiveness of the Commission’s operation and bring equality in its treatment of Member States.<sup>47</sup> Since the Communication on Better Monitoring was a document intended to provide a first comprehensive presentation of the Commission’s selective enforcement, it had a general feel of innocent enthusiasm to it (especially when contrasted with the following communication), characterized by the manifesting belief that the more information the better.

The Commission’s following communication from 2007 A Europe of Results<sup>48</sup> took a different approach which can be generally described as scarce and somber or even ‘disillusioned’, including its explanation of reasons for the reliance on priority criteria. It mostly concentrated on various preventive methods stressing how they should improve the “efficient management and resolution of infringement cases,” and only somewhat by-the-way the Commission stated that “[t]he correct application of the law can also be improved by prioritizing in the management of cases.”<sup>49</sup> It, therefore, minimized the importance of the priority criteria, presenting them merely as something additional to its preventive methods. It also further acknowledged that prioritization was about its internal management of cases but, mostly, it eliminated the reference to effectiveness and impartiality replacing it with a very broad, all-encompassing “correct application of the law.”<sup>50</sup>

The Commission couldn’t be vaguer in describing the purpose of prioritization in A Europe of Results. Article 17 TEU<sup>51</sup> talks of the Commission’s function as the guardian of the Treaties by stating that it “shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them,” and the Commission notoriously repeats this statement whenever it talks of its role in the infringement procedure. It seems that the Commission’s choice to once more rely on its motto of “correct application of the law” while, simultaneously, avoiding effectiveness and

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<sup>45</sup> Commission Communication Better Monitoring, COM(2002)725.

<sup>46</sup> *Ibid.*, 10-11.

<sup>47</sup> *Ibid.*, 11.

<sup>48</sup> Commission Communication A Europe of Results, COM(2007)502.

<sup>49</sup> *Ibid.*, 9.

<sup>50</sup> *Ibid.*, 9.

<sup>51</sup> Treaty on European Union (consolidated version), OJ C 202, 7.06.2016.

impartiality which were present in the previous communication, was a deliberate maneuver. Effectiveness and impartiality are notions that can be used as benchmarks against which to assess (for better or worse) the Commission's priority criteria and practice. Instead, the Commission chose a 'better-less-than-too-much' approach where it moved away from commitments that encouraged too many inquiries and replaced them with general, all-encompassing statements.

Altogether, it can be observed that the Commission, in explaining the purpose of its priority criteria, went through three stages: talking of hopes and goals (White Paper<sup>52</sup>), through an idealistic attempt at comprehensiveness (Better Monitoring<sup>53</sup>), to the point of generalizing it all and assuming a protective stance of defending its discretionary power to prioritize (A Europe of Results<sup>54</sup>). When the European Union began searching for ways to connect with European citizens, so did the Commission attempt to, at least partially, lift the curtain on its internal operation as a sign of good will and desire to change. Later, however, it saw the need to underline the priorities' role as an internal management method, moving from principles to more practical aspects of its functioning but with the underlying purpose of presenting more-or-less comprehensive data. Finally, the Commission became very ambiguous but also pragmatic by stating that priorities, being a necessary internal measure, simply served to ensure the correct application of EU law.<sup>55</sup>

It cannot be negated that the practice of prioritization served a very pragmatic purpose of the management of the Commission's workload. However, it also had a political aspect of manipulating the process by carefully choosing violations to pursue and shaping the Court's agenda.<sup>56</sup> Hidden objectives behind prioritization can be various: to avoid particular issues, to draw the attention to something important or away from something else, to elaborate on existing but insufficient norms, or to even create new measures or mechanisms. The infringement procedure can also be a bargaining chip in the Commission's hands,<sup>57</sup> its employment or avoidance helping it achieve specific goals that go beyond its enforcement function. The Commission has been frequently accused of relying on political considerations in its enforcement practice and there are cases that prove as much.<sup>58</sup> It had, however, consistently avoided mentioning political aspects to explain the purpose of its prioritization.

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<sup>52</sup> Commission White Paper on European Governance, COM(2001)428.

<sup>53</sup> Commission Communication Better Monitoring, COM(2002)725.

<sup>54</sup> Commission Communication A Europe of Results, COM(2007)502.

<sup>55</sup> The idea of priorities aiming to "maximize the benefit for citizens and businesses" returned later in the Commission's annual reports: Commission 25<sup>th</sup> Annual Report on Monitoring (2007), COM(2008)777, 7; Commission 26<sup>th</sup> Annual Report on Monitoring the Application of Community Law (2008), COM(2009)675, 10.

<sup>56</sup> Maduro (1998), 9-10.

<sup>57</sup> E.g. Open Skies cases such as *Commission v United Kingdom*, C-466/98, EU:C:2002:624.

<sup>58</sup> For example, the Commission is said to have closed an infringement case against Germany over the Wild Birds Directive as a result of the German Chancellor's intervention: Hedemann-Robinson, *Enforcement of European Union Environmental Law*, 2nd ed. (Routledge, 2015), 222.



A shift came in 2015 with the Commission's 33<sup>rd</sup> Annual Report on Monitoring which openly referred to the Juncker Commission's political priorities as grounds for stronger enforcement and as a reason for prioritizing chosen political sectors.<sup>59</sup>

#### 4.2.2 Meaning of prioritization

The Commission's explanations regarding the purpose of prioritization shifted with every communication, revealing how the Commission struggled with the presentation of priorities from ideology and enthusiasm to pragmatism and minimalism. The same learning curve can be observed with respect to its understanding of what the act of prioritization entails. Prioritization does not come down only to the process of arranging cases in the order of importance. It also involves choices regarding the methods applicable to priority and non-priority categories. This choice in methods is especially relevant seeing that the Commission has at its disposal various more-or-less informal and rather simple compliance instruments and an infringement procedure with its formal and cumbersome administrative phase and a standard timeframe of two years before a resolution is reached in the Court of Justice. With such an array of potential instruments, it is no easy task to decide which of those measures the Commission should use for which cases.

The analysis of the Commission's communications demonstrates that it had a hard time deciding what a 'priority tag' should mean for a case and, in the end, failed to convincingly answer this question, while recent changes produced by the success of the EU Pilot brought only so much clarity to the issue. The Commission may have been unable to find a satisfactory solution, or it wished to present its practice of prioritization in rather simple and comprehensible terms without many exceptions that take into account the intricacies of state violations which, in the end, made its communications appear weak and illogical. It is also possible that the Commission's reasoning was feeble because, in its practice, prioritization simply meant that priority violations were dealt with by whatever means appropriate while non-priority violations were - as a rule - excluded from its interest which was not something the Commission wanted to advertise. Mostly, however, the analysis of the Commission's communications suggests that the Commission suffered from the lingering presumption that the infringement procedure had gained the quality of the 'right' method to address non-compliance, being the official Treaty measure devised for this purpose. It, therefore, phrased its communications in a way that implied the priority of Article 258 TFEU over other mechanisms while, in practice, it recognized the limitations of the procedure and its ineffectiveness in dealing with all priority situations.

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<sup>59</sup> Commission 33rd Annual Report on Monitoring (2015), COM(2016)463, 3.

In its 2001 White Paper on Governance, the Commission made the distinction between priority cases that would be tackled “as a priority” by means of the infringement procedure, and non-priority cases that would involve other methods before resorting to the enforcement mechanism. Thus, the Commission announced that alternative methods formed an indispensable part of its policy on enforcement and that prioritization divided state violations into two groups, each subject to different methods of resolution. The distinction was simple but out-front disputable. Did the infringement procedure actually allow for a quicker resolution in priority cases as compared to the exploration of alternative instruments in non-priority cases? It is doubtful, seeing how the procedure has always been perceived as cumbersome when compared to easy, flexible and unofficial alternative solutions. This looked more like the Commission wished to satisfy the expectations of the public by - officially - committing priority cases to the infringement procedure and thus choosing the formal and legal approach over informal soft-law methods that escape scrutiny and presented multiple opportunities for secretive bargaining. However, since the White Paper was simply a commitment to produce the priority criteria in the future, its stipulations can be considered as merely seeds of ideas that, in practice, have proven not as straightforward.

In its 2002 Communication on Better Monitoring, the Commission stated that the presented priority “criteria [would] 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.”<sup>60</sup> It, therefore, embraced even further the possibility of utilizing alternative methods and made it very clear that “cases - of lower priority - would be handled on the basis of complementary mechanisms” before commencing the formal infringement procedure. This time, however, the Commission did not limit alternative mechanisms to just non-priority cases. The Commission said, “[i]n 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.” It thus declared that even priority cases could be addressed by instruments other than the infringement procedure. According to the Commission, such a two-tier approach was justified by considerations of efficiency which guaranteed “more rapid and effective intervention [...] while ensuring equal treatment for the Member States and for the different channels for identifying presumed infringements.”<sup>61</sup>

The 2002 Communication on Better Monitoring essentially maintained the distinction from the White Paper but with the difference that it did foresee the possibility that priority cases could also

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<sup>60</sup> Commission Communication Better Monitoring, COM(2002)725, 12.

<sup>61</sup> Ibid.

be addressed by means of alternative methods if these allowed for a quicker resolution. The Commission even identified a number of mechanisms that would complement the infringement procedure. This time, it talked a lot about efficiency as if answering the gap from the White Paper, by basically concentrating on the time it took to see a case to the end and making it a determining factor in the choice of methods. As a result, the 2002 communication could be seen as a step forward where the Commission recognized the limitations of the infringement procedure and allowed for exceptions decided according to the criterion of efficiency. Yet, the new rules could still be questioned for maintaining the general precedence of the procedure when contrasted with the criterion of efficiency. Article 258 TFEU and efficiency have never been considered to go in pair and it feels as if the Commission continued talking of the procedure's priority because it believed that it was expected to do so. As a result, although it could be considered a step forward from the White Paper on Governance, the 2002 communication could also be seen as bringing confusion to what prioritization actually meant.

Whatever rules the Commission established in its White Paper and the following communication, they were all replaced in the communication of 2007 A Europe of Results by a single generic statement. There, the Commission ignored the distinction between the infringement procedure and alternative methods with respect to prioritization, bringing everything down to a somber sentence: "All complaints and infringements will be dealt with. Prioritization means that some cases will be dealt with by the Commission more immediately and more intensively than others."<sup>62</sup>

The Commission clearly chose to become scarce with words. It left aside all of its previous rules and became enigmatic about what prioritization entailed, cutting short any criticism that followed previous communications. It did mention how its problem-solving and preventive measures contributed to reducing the need for the infringement procedure and how they improved the management of its case-load, and it even created a new complementary method, the EU Pilot, that was to considerably lessen the Commission's burden. However, when talking of what prioritization entailed, it chose to remain rather tacit about alternative measures' connection to the infringement procedure. This did not, however, mean that it had stopped utilizing them. On the contrary, the phrase it used in its statement was that infringements would be "dealt with." The Commission simply no longer specified how they would be dealt with.

The Commission thus refrained from clarifying what 'priority' meant for cases, apart from promising to give them more of its attention when compared to non-priority. While previous communications at least tried explaining which mechanisms would be used for priority and non-

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<sup>62</sup> Commission Communication A Europe of Results, COM(2007)502, 9.

priority cases, the exercise was entirely abandoned in the 2007 communication, leaving the choice of measures to the Commission's discretion without any criteria or rules to regulate it. Most of all, however, since it did not specify which method would be employed to priority violations, it allowed for complementary mechanisms to take on priority cases indiscriminately and in parallel to the infringement procedure. This, in turn, effectively put an end to any exhaustive comparative study of the Commission's priorities with the purpose of assessing how it was following them in its practice. The concept of prioritization, however scarce its characterization was, contained a commitment to deal with all state infractions. While the Commission barely said anything else, it made it very clear that it was planning to tackle all cases irrespective of their 'rank.'

Looking at the evolution of the Commission's approach to prioritization marked by three consecutive communications, it can be summarized that it started off by making a clear distinction between different resolution methods with respect to priority and non-priority cases. This, being too rigid and unrealistic, was amended by rules that brought flexibility and allowed for alternative measures to deal with priority cases as an exception to the infringement procedure. Since this attempt at clarity was not successful either, the Commission decided to replace it with a single enigmatic commitment to address all state violations, where any preference for resolution methods was abandoned, aligning both the infringement procedure and alternative measures in their capacity and suitability to address priority cases without giving any of them precedence over others or explaining the criteria to regulate their applicability. However enigmatic and non-informative A Europe of Results was, the Commission at least finally acknowledged that it was time to knock the infringement procedure off from its pedestal.

The Commission's difficulty and ultimate failure in clarifying what prioritization entailed can be explained by the fact that selective enforcement, due to its complexity, cannot be summarized by a few simple statements. The concept of priority implies that some violations are more important than others and it involves a subjective and easily questionable assessment of this importance. As was underlined in chapter 3, a lot depends on cases' particulars such as Member States' attitude or violations' consequences. Each component is important in the way that it can increase or reduce the violation's reception. It might also be so specific that it alone steers the Commission in the direction of a precise, most suitable compliance measure (e.g. violations of the judiciary: information and consultation). Attributing exact compliance instruments to priority groups is therefore bound to appear too artificial and rigid to pass the practice test, leaving the Commission the choice of either producing a very long, detailed and exhaustive communication with all the interconnections included

and exceptions enumerated but at the loss of flexibility, or remaining flexible but at the loss of precision.

The Commission's vagueness regarding the meaning of prioritization could also stem from the fact that this concept may not only refer to the Commission's choice regarding which violations to pursue by means of which measure, but to its decisions taken within its monitoring and supervisory powers. Before the Commission pursues specific violations, it first has to make choices regarding areas to monitor and resources to allocate for this purpose. As the Commission stated in its 2002 Communication on Better Monitoring, by applying priority criteria "it would conduct surveillance and bring proceeding against infringements."<sup>63</sup> Prioritization in the management of cases can be thus considered merely a secondary exercise, one that is preceded by prioritization in the process of monitoring. This does not negate the existence of prioritization in management, but it does bring another dimension to the analysis. Prioritization in monitoring has larger consequences. While prioritization in management implies a choice between several, already known violations, the former means that entire areas of regulation fall outside the scope of priorities and that consequently the Commission, choosing to refrain from monitoring those areas, does not know what is happening in these fields (and thus needs complainants to monitor those areas in its stead). Seeing how limited the Commission's resources are, how the process of monitoring and supervision can be complicated and time-consuming, how much work the Commission has to put into investigating a violation (chapter 7), it is ultimately not surprising that it has to prioritize so early on. This, however, is rarely mentioned in the Commission's communications and annual reports. The White Paper on Governance talked only of "prioritizing cases". The 2002 Communication on Better Monitoring which was the most descriptive of all documents did mention "surveillance." However, the latest communication A Europe of Results talked specifically only of "prioritizing in the management of cases."<sup>64</sup>

Setting the problem of prioritization in monitoring aside, the Commission's difficulties in explaining the meaning of prioritization mostly seem to stem from its struggle to reconcile two outlooks: the Commission's awareness of the procedure's limitations and weakness with the general public's opinion that the procedure constitutes the 'right' method of dealing with state non-compliance. The analysis of the Commission's communications displays its slow but progressive development as it freed itself from the belief that Article 258 TFEU and priority cases are expected to go in pair. While it had started off by giving the procedure absolute primacy in priority cases, it eventually levelled it with alternative and complementary measures. Yet, neither of these attempts

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<sup>63</sup> Commission Communication Better Monitoring, COM(2002)725, 11.

<sup>64</sup> Commission Communication A Europe of Results, COM(2007)502, 9; Commission Communication Better Monitoring, COM(2002)725, 11; Commission White Paper on European Governance, COM(2001)428, 25.

succeeded in terms of clarity. The Commission's approach to prioritization and what this process entailed for priority and non-priority cases remained somewhat convoluted and elusive with little information given and an overall feel of the Commission's reluctance to share the details of its work with the public.

The Commission's step towards greater clarity started in 2008, a year after the introduction of the EU Pilot. In its annual report for 2007, the Commission underlined the need to prioritize the most important cases and focused on the objective of effectiveness, leaving the choice of methods to a simple test: which mechanism provided the most effective means to the problem at hand? It emphasized how beneficial complementary and alternative solutions could be to individuals while maintaining the possibility of recourse to the infringement procedure.<sup>65</sup> The Commission thus further underlined the growing role of compliance tools as an alternative to Article 258 TFEU and introduced the criterion of effectiveness to determine the applicability of measures in individual cases. It refrained from simplifying the issue of prioritization and straightforwardly attributing specific measures to priority and non-priority cases, instead recognizing the distinctiveness of each violation and the need to address it on an individual basis.

In 2009, the Commission took a firmer commitment to become more transparent about its use of alternative and complementary instruments in order to bring better understanding, clarity and effectiveness of EU law.<sup>66</sup> In its 26<sup>th</sup> annual report, it enumerated the criteria or - as it called it - 'considerations' that it took into account when choosing whether to launch the infringement procedure or rely on a complementary mechanism. These considerations included such questions as: the existence of quicker and more effective tools, the sector's overall legal certainty, and the existence of similar issues in other Member States "giving rise to considerations of due and fair process and the most efficient means of achieving the overall objectives of Community law." The Commission also underlined that the infringement procedure should never be considered nor turned into an "automatic function" since each case is different and Article 258 TFEU may not always offer the quickest and most effective way of resolving compliance problems.<sup>67</sup>

Finally, the increase in role of the EU Pilot gave the Commission the opportunity to create simpler rules by explaining the distinction between the infringement procedure's and the EU Pilot's applicability. Firstly, the Commission somewhat withdrew from the nomenclature of prioritization which is not surprising since it brought confusion regarding objective value of state infractions while the division into priority and non-priority cases was too simplistic and failed to reflect the complexity

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<sup>65</sup> Commission 25<sup>th</sup> Annual Report on Monitoring (2007), COM(2008)777, 7.

<sup>66</sup> Commission 26<sup>th</sup> Annual Report on Monitoring (2008), COM(2009)675, 10.

<sup>67</sup> *Ibid.*, 9.

of state non-compliance in the EU and the difficulty regarding the corresponding primacy of compliance tools. Secondly, the Commission divided state infractions into two groups: those that qualify for the EU Pilot which include the majority of violations, and those that qualify for the infringement procedure which include late transposition cases, failures to respect CJEU's judgments, urgent instances and those where an "overriding interest" demands the application of Article 258 TFEU.<sup>68</sup> While it no longer described its conduct in terms of prioritization and reduced its talk of priority cases, the Commission made it a rather simple and straightforward matter to discern instruments applicable to specific cases. Interestingly, the result of this transformation was such that the infringement procedure has, in practical terms, lost its broad application, becoming either an exception to the EU Pilot or supplementing it when it failed to reach a satisfactory solution. Thus, complementary measures - to a degree - took precedent over Article 258 TFEU which, in turn, became an instrument mostly reserved for cases that require coercive action as opposed to cooperation. The category of "urgent matters" still does not lie well with the infringement procedure but it can be explained in terms of the need for the Court-imposed instrument of interim relief. After all, it may sometimes be more beneficial to institute infringement proceedings and ask for interim relief than attempt to bring a Member State to compliance by means of friendly dialogue. These criteria will be discussed in greater detail in the following section.

New rules refer only to the applicability of the infringement procedure and the EU Pilot and fail to take into account the remaining complementary measures such as package meetings, which are utilized with respect to problematic directives.<sup>69</sup> The new criteria, however, mark a transformation in the Commission's attitude to its selective enforcement whereby it not only decided to limit its own secrecy and ambiguity but it also freed itself even further from the conception that the infringement procedure is the main enforcement mechanism and, as such, should be used in priority cases or, alternatively, in the majority of state infractions. Its decision to withdraw from the nomenclature of prioritization further removed the artificial and subjective distinction between important and unimportant cases. The Commission did not abandon its practice of prioritization but it did considerably reform its policy of selective enforcement, becoming more straightforward about it and freeing itself from the artificial primacy of the infringement procedure. The nomenclature of prioritization returned with the latest annual report but without changing the rules on the applicability of enforcement measures. The Commission confirmed the dominating position of the EU Pilot and

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<sup>68</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 2; EU Pilot Evaluation Report, Facts on the Functioning of the System to the Beginning of February 2010, accompanying document, COM(2010)70, 8.

<sup>69</sup> Commission Communication Better Monitoring, COM(2002)725, 15-16.

underlined that it “uses a wide array of tools, including infringement procedures, to achieve the objectives of EU policies.”<sup>70</sup>

### 4.2.3 Priority criteria

Similarly to the meaning and purpose of prioritization, priorities themselves evolved with every communication, underlining the Commission’s indecision regarding their shape and contents as well as its difficulty in meeting the expectations of clear and comprehensible rules. The first time the Commission attempted an enumeration was in its 2001 White Paper on Governance. There, it committed itself to developing priorities in the future according to these 'orientations':

- “The effectiveness and quality of transposition of directives as the most effective way of avoiding individual problems arising at a later stage.
- Situations involving the compatibility of national law with fundamental Community principles.
- Cases that seriously affect the Community interest (e.g. cases with cross-border implications) or the interests that the legislation intended to protect.
- Cases where a particular piece of European legislation creates repeated implementation problems in a Member State.
- Cases that involve Community financing.”<sup>71</sup>

These were merely orientations but they already showed the direction the Commission planned to take in its prioritization. Five issues were seen as requiring priority treatment: delays in the transposition of directives, systemic application problems, infractions involving fundamental principles and financing as well as those affecting the EC interests. The assumed classification concentrated on different features of state violations. While directives gained a special place in the Commission’s list of priorities, other violations depended on their frequency and the value of norms they infringed or the interests at stake. They were rather generally phrased but gave the appearance of corresponding to what-would-seem was the Commission’s internal practice back then. They were therefore received as rather transparent but their primary focus on Community interest was criticized and contrasted with the understated interests of private parties.<sup>72</sup>

The Communication on Better Monitoring from 2002 contained a list of priorities that, according to the Commission, were based on “accumulated experience” and reflected the seriousness

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<sup>70</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring, COM(2016)463, 4, 16.

<sup>71</sup> Commission White Paper on European Governance, COM(2001)428, 26.

<sup>72</sup> Harlow, Rawlings (2006), 454.



of state violations.<sup>73</sup> The list was separated into several main categories and, within each group, further divided into particular priorities:

- 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 budget).
- 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.
  - 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."<sup>74</sup>

Whereas the 2001 White Paper contained a short, laconic and incomplete set of orientations, the 2002 communication delivered a long, detailed but somewhat heavy and convoluted list of priorities. The division into three separate groups suggested a questionable order of importance while the groups themselves were assembled in a rather confusing and unconvincing way. The Commission continued to distinguish violations depending on their specific components such as the type of state

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<sup>73</sup> Commission Communication Better Monitoring, COM(2002)725, 11.

<sup>74</sup> *Ibid.*, 12.

duty (transposition), frequency, and value of violated norms or interests at stake. It also incorporated individuals' rights into its list of priorities (e.g.: violations of human rights and fundamental freedoms) but this was still considered insufficient.<sup>75</sup>

A look at the Commission's convoluted list of priorities indicates a somewhat naïve belief that a long list would satisfy the public. However, despite their detail, the priorities were mostly criticized for being formulated in a loose and unclear way to the point where it decreased coherence and allowed for different interpretations of the same priority, leaving too much freedom to the Commission's officials. The priorities were not seen as bringing fairness and equality to the treatment of Member States as the Commission hoped, nor did they create legitimate expectations for complainants.<sup>76</sup> Krämer underlined the priorities' focus on large-scale, critical violations to the detriment of individual cases of bad application so typical of the environmental sector.<sup>77</sup> Smith criticized the Commission's horizontal approach<sup>78</sup> and claimed that the priorities failed to meet new challenges because they did not "stand up to close scrutiny, either from the perspective of increasing good governance or from developing a legitimate policy approach to enforcement."<sup>79</sup>

With the 2002 communication, the discussion over the Commission's list of priorities became, to a degree, paradoxical. Since initial orientations from 2001 were criticized for neglecting complainants, the Commission produced priorities in 2002 that did take them into account in more than one way, providing overall a long and detailed, albeit still imperfect, list. This, however, was met with new criticism and more comprehensible priorities were advocated that would better involve complainants and explain in greater detail which areas and violations constituted priorities. At the same time, others suddenly began to worry about the very concept of priorities, both sides of this disparity reasoning equally in the interest of complainants. The European Parliament questioned whether the application of priorities was "really needed and [did] not risk reducing excessively the scope of the infringement procedures, for which the Treaty does not provide any hierarchy." The Parliament was worried that the Commission would only concentrate on the most important infringements according to its priorities and thus neglect other, less important violations, limiting the actual application of the enforcement mechanism.<sup>80</sup> The Parliament thus questioned the very idea of prioritization while, at the same time, ceaselessly striving for greater transparency in the

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<sup>75</sup> Smith (2010), 136.

<sup>76</sup> *Ibid.*, 136.

<sup>77</sup> Krämer, *The environmental complaint in EU law*, 2009 *Journal for European Environmental and Planning Law* 6, 27.

<sup>78</sup> Smith (2010), 137.

<sup>79</sup> *Ibid.*, 206-207.

<sup>80</sup> European Parliament Resolution on the Commission's 21<sup>st</sup> and 22<sup>nd</sup> Annual Reports on Monitoring (2003 and 2004), 2005/2150(INI), paragraph 11.

Commission's operation. This was a demand-oriented approach where the EP sought not only to increase the use of Article 258 TFEU but also to impose on the Commission additional obligations of transparency without consideration given to its limited capacity and resources (supply).

The disparity in such contradictory requirements demonstrates how difficult the issue of publicized priorities was. On the one hand, priorities were expected to be clear and precise so as to be informative of the Commission's conduct and provide grounds for its scrutiny. On the other hand, they needed to be flexible to adapt to shifting circumstances, abstract and indefinite to prevent Member States from unequivocally determining and abusing the 'unprotected' areas and, finally, open and unconstrained to allow the Commission to remain vigilant in those 'unprotected' areas and take action outside the scope of priorities if such appeared necessary. Seeing how these objectives were contradictory, it is not surprising that the Commission had a hard time producing satisfactory priorities.

The criticism of the Commission's attempt at a long, comprehensive list of priorities had an impact because the Commission took a very different approach when it published priorities again in 2007. In its communication A Europe of Results, which constituted a response to the Parliament's concerns regarding, inter alia, the Commission's disregard for complainants and the duration of the procedure,<sup>81</sup> the Commission considerably narrowed down its list of priorities. The Commission distinguished two somewhat overlapping groups which it chose to name "categories" as if they were all part of one list of priorities. Here, one group of "categories" covered/enveloped the other group while the lack of any further explanation did not help understand what the author really meant by this distinction and nomenclature. According to the Commission, "priority should be attached to" (1<sup>st</sup> group):

- 1) Infringements that present the greatest risk
- 2) Infringements that present widespread impact for citizens and businesses
- 3) The most persistent infringements confirmed by the Court.<sup>82</sup>

These categories cover (2<sup>nd</sup> group):

- 1) "Non-communication of national measures transposing directives or other notification obligations
- 2) Breaches of Community law, including non-conformity cases, raising issues of principle or having particularly far-reaching negative impact for citizens, such as those concerning the application of Treaty principles and main elements of framework regulations and directives
- 3) Respect for Court judgments declaring the existence of infringements (Article 228 EC Treaty)."<sup>83</sup>

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<sup>81</sup> Prete, Smulders, *The Coming of Age of Infringement Proceedings*, 2010 Common Market Law Review 47, 57.

<sup>82</sup> Commission Communication A Europe of Results, COM(2007)502, 9.

<sup>83</sup> *Ibid.*, 9.

From the content of the two groups it would appear that the first constituted the criteria: particular characteristics or features that make a violation a priority and which replaces the vague term of “seriousness” from the previous communication. The second group constituted actual priorities: the enumeration of types of cases which fell within at least one of the above criteria. With such a supposition in mind, the new communication offered only three priorities.

Two of the three categories were rather straightforward. Non-communication cases and failures to respect the Court’s judgments constituted clear and easy priorities. The third category, however, was much broader in scope, vague and open for interpretation. Within this priority, the Commission compiled different priorities from previous communications:

- 1) Regarding the mode of violations, it concerned violations mostly occurring in the processes of legislation.
- 2) Regarding the effects, the violation had to either raise the issue of principle or have particular far-reaching negative impact for citizens.
- 3) Regarding the subject-matter and value of the norm breached, the priority involved violations that concerned the application of Treaty principles or main elements of framework regulations and directives.

The third category thus covered various types of cases and referred to different components of state infractions, making it difficult to understand it, evaluate and verify with the Commission’s practice. Its imprecise phrasing, conciseness, lack of further explanation and all-encompassing nature made it, in the end, an open priority that could be pulled in all possible directions. The Commission, however, recognized that it was far from obvious which violations fell within this category and made it clear that the definition of principles and the assessment of the scope of effects could only be carried out on a sectoral basis. The priority was merely a general guideline to be interpreted and applied differently in each DG, specific sectoral priorities to be published in annual reports.<sup>84</sup> The commitment was kept and soon after the communication, the Commission began informing in its annual reports on new priorities for the main policy sectors. It was rather specific about it too, pointing to precise EU measures or even going as far as identifying concrete problems that those measures produced and which needed special attention.<sup>85</sup> The Commission continues this practice still nowadays, each of the major policy sectors having a section in annual reports about “important implementation work” for

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<sup>84</sup> Commission 25<sup>th</sup> Annual Report on Monitoring (2007), COM(2008)777, 7.

<sup>85</sup> *Ibid.*, 7-8.

the following year, which enumerates concrete issues or types of cases that will be prioritized by a specific DG, making it easy to know where the Commission's attention will be focused.<sup>86</sup>

The 2007 communication thus introduced a new, more pragmatic approach to priorities where the Commission abandoned the idea of horizontal regulation in favor of sectoral. The shift was received well, the new formulation of priorities considered more comprehensive and better corresponding to the reality of the Commission's operation. The admittance that the clarification of priorities was possible only within each policy sector was applauded.<sup>87</sup> In the end, it was a reasonable move due to the fact that the nature, content and scope of EU policies differ from one another and one rule cannot possibly cover all the intricacies of all sectors. It brought more transparency to the process because - from then on - the European Parliament could evaluate sector-specific priorities on an annual basis. Additionally, the Commission's commitment to revise them regularly removed the problem of them becoming obsolete. However, the more detailed such priorities were, the higher the risk that Member States would deliberately violate areas laying outside the scope of the Commission's interest.

The Commission's consecutive communications showed progress and the desire to learn on past mistakes but it was a slow process, marked by many difficulties and pitfalls. Initiated by loosely-defined goals, it went from a somewhat over-zealous attempt at completeness and detail to a very simplistic but also pragmatic approach whereby horizontal prioritization was replaced by sectoral. The most recent change, however, was brought by the EU Pilot which proved to be a rather successful and efficient compliance instrument, capable of competing with the infringement procedure. The Commission transformed it into a pre-procedure mechanism and slowly retreated from talking about priorities, concentrating instead on the interconnectedness between the EU Pilot and Article 258 TFEU, the applicability of which was established by a set of criteria.

According to the new criteria specified in the Commission's first EU Pilot Evaluation Report, all the cases are to be processed by the EU Pilot with a few exceptions that require the immediate launch of the infringement procedure: non-communication of directives, failures to respect CJEU judgments under Article 260 TFEU and cases "where urgency requires formal legal action."<sup>88</sup> Interestingly, the first two presented exceptions align with the priorities from the latest communication of 2007 A Europe of Results, having always maintained a special place in the Commission's area of focus. They are also straightforward cases with not much to discuss or negotiate,

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<sup>86</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring the Application of EU Law (2014), COM(2015)329: Commission Staff Working Document, Part I, accompanying document.

<sup>87</sup> Smith (2010), 151.

<sup>88</sup> EU Pilot Evaluation Report, COM(2010)70, 9.

making the use of the EU Pilot unnecessary.<sup>89</sup> The category of urgent cases does not exactly sit well with the infringement procedure but, as was already explained, this criterion seems to be about the urgency to institute legal proceedings (and potentially apply for interim relief) and, although unspecified, rings of grave infringements and Member States' intentionality, where friendly, informal solutions may not provide the quick, expected result. Finally, the EU Pilot Second Evaluation Report, mentioned another criterion: "where urgency or another overriding interest requires the immediate launching of an infringement procedure under Article 258 TFEU, exceptions may be authorized and infringement procedures can be launched without previous contacts through EU Pilot."<sup>90</sup> This seems to constitute a window for the Commission to choose cases for the procedure which, although they do not fall under any of the other criteria, should - in the Commission's view - be processed by relying on formal means. It guarantees flexibility that the Commission's discretion implies and that is needed in enforcement while its underlined exceptional nature promises that the Commission will treat it as such.

The presented criteria are simple, precise and coherent. They are formulated similarly to priorities by describing specific types of violations but, instead of deciding on the hierarchy of priorities, they decide on the applicability of measures. They are, however, overall difficult to access. The first three criteria were swamped in the details of the EU Pilot's working method, contained in the Commission's staff working document accompanying the first EU Pilot Evaluation Report without even an appropriate title to suggest as much.<sup>91</sup> The latest criterion was mentioned in the report itself but it also lacked the emphasis that such an explanation should have. While the criterion of urgency and overriding interest was reiterated in the latest Annual Report on Monitoring,<sup>92</sup> the two traditional Commission's priorities of late transposition and failure to respect the Court's judgments were not mentioned again. However, the way the Commission structures its latest annual reports<sup>93</sup> suggests that late transposition cases and failures to respect CJEU's judgments gained an even higher significance in its enforcement practice for these violations are now treated as 'special' categories, separated from chapters on the application of the EU Pilot and the infringement procedure. This indicates the persistent lack of clarity on the part of the Commission which offers all the answers but still fails to convey them in an accessible, comprehensive form.

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<sup>89</sup> Szapiro, *The European Commission* (John Harper Publishing, 2013), 229.

<sup>90</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 2.

<sup>91</sup> *Ibid.*; EU Pilot Evaluation Report: Staff Working Document, COM(2010)70, 8.

<sup>92</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 16.

<sup>93</sup> *Ibid.*; Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329.

Despite their flaws, the new criteria can be seen as supplementing the Commission's priorities. The Commission did not address the issue of their mutual dependency but, once the EU Pilot took up speed involving all Member States and becoming a full-fledged pre-procedural step, the Commission withdrew from talking of priorities as a means of addressing state non-compliance, thus moving away from its subjective division into important and non-important violations. The only proof that priorities were still present in its enforcement practice could be found in its staff working documents attached to annual reports which enumerate topics or issues that the Commission planned to concentrate on in the coming year with respect to specific policy sectors.<sup>94</sup> A turn in policy came, however, in 2015 when the Commission not only returned to its nomenclature of prioritization but also underlined the importance of political priorities of the Juncker Commission, beginning to prioritize among policy sectors. It basically provided a list of prioritized policy areas which corresponded to the Juncker's priorities for the EU<sup>95</sup> and explained why it considers them important and sometimes narrowing down its focus to specific issues and measures. Thus, under the priority "A new boost for jobs, growth and investment," it took the commitment to focus its enforcement activities on the following acquis: competition, health and safety at work, education, environment, agriculture, and maritime affairs and fisheries. Under the priority "A deeper and fairer internal market with a strengthened industrial base," it enumerated: single market, industry, entrepreneurship and SMEs, consumer protection, health and food safety, mobility and transport, and direct taxation. Remaining priorities included: digital single market, energy and climate change, economic and monetary union, area of justice and fundamental rights, and migration,<sup>96</sup> which altogether makes for a rather large list of priorities and prioritized policy sectors.

When looking at the Commission's evolving approach to the meaning, purpose and content of its prioritization, it becomes apparent that its policy of selective enforcement has, to a degree, come full circle. While the Commission initially avoided the infringement procedure, the latter's significance gradually increased to the point where its supremacy over remaining enforcement measures became something of a common conviction. However, the conflict between the needs of priority cases and Article's 258 TFEU formality and cumbersomeness led the Commission to slowly free itself from the preconception of the infringement procedure's dominating position. It successively diminished Article's 258 TFEU significance for priority cases, reserving it for specific types of violations

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<sup>94</sup> Commission 30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012): Staff Working Document, Part II, accompanying document, COM(2013)726.

<sup>95</sup> [https://ec.europa.eu/priorities/index\\_en](https://ec.europa.eu/priorities/index_en); <http://juncker.epp.eu/my-priorities>.

<sup>96</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 4-12.

and otherwise making it an instrument of last resort in order to, in the end, give primacy back to alternative and complementary measures with the EU Pilot at the forefront.

### 4.3 Search for alternative solutions

Having the capacity to create new instruments while, at the same time, not being able to entirely depend on the infringement procedure as the most effective and efficient method of ensuring compliance, the Commission has always relied on alternative and complementary solutions. Its initial recourse to confidential negotiations constituted an early example of this trend but the bulk of such soft-law measures was developed only later, the significance of which increased in parallel to the decreasing role of the infringement procedure, as was emphasized in the previous section. The result of this process was the establishment of a system of compliance measures so complex, convoluted and evolving at such speed that it is difficult, if not impossible, to recount all instruments, especially that the Commission is neither coherent nor comprehensive in the information it reveals. Chapter 1 enumerated some of these measures, making a distinction between managerial and enforcement approaches, problem-solving and coercive instruments, horizontal, centralized and decentralized levels of compliance, pre-emptive and reactive solutions. This thesis concentrates only on the evolution of the Commission's reactive tools but to underline the increasing significance of soft-law solutions when compared to the sidetracked role of Article 258 TFEU, it is beneficial to give a few examples which confirm the wide range of the Commission's alternative and complementary instruments.

The main reactive soft-law measure which has had the largest impact on the role of the infringement procedure is the EU Pilot which will be the subject of the following section. Aside from it, however, the Commission relies on other informal instruments in order to deal with existing violations. For example, in its 2002 Communication on Better Monitoring, the Commission - aside from talking of traditional negotiations - also enumerated package meetings.<sup>97</sup> These allow for an examination with competent authorities of packages of cases from a particular sector and provide a forum for resolving compliance problems outside legal proceedings. They are considered a "key element of EU enforcement process," especially in environmental matters.<sup>98</sup>

Many of the Commission's soft-law tools of both preemptive and reactive nature are, however, aimed at dealing with the Commission's nemesis: the implementation of directives. For that purpose, the Commission has developed such instruments as correlation tables, conformity

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<sup>97</sup> Commission Communication Better Monitoring, COM(2002)725, 15-16.

<sup>98</sup> Harlow, Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), 175.



evaluations, expert groups, questionnaires, inspections, implementation reports, fact-finding missions, advance notification of draft new technical regulations, studies and analyses.<sup>99</sup> It further created contact networks for directive transposition and Internet-based question-and-answer tools.<sup>100</sup> With respect to initiatives of strategic nature, the Commission started drafting implementation plans, as well as regularly releasing guidelines, handbooks, interpretive notes and working papers.<sup>101</sup> In 2012, the Commission launched Internal Market Scoreboards intended to assess how Member States fulfill their implementation quotas of Single Market laws.<sup>102</sup> Further, the Commission extended the use of implementation plans and explanatory documents by means of which Member States inform it on how they transpose EU directives.<sup>103</sup>

Regarding purely preventive methods, in its 2007 communication A Europe of Results, aside from amending its enforcement priorities, the Commission also emphasized the need to pay attention to the “clarity, simplicity, operability and enforceability” of drafted laws.<sup>104</sup> In 2010, it introduced the “smart regulation” agenda as a new approach to regulation with the idea of “getting legislation right” by ensuring that it delivers intended benefits in a way that is least burdensome. Unlike the “better regulation” project, smart regulation refers to “the whole policy cycle - from the design of a piece of legislation, to implementation, enforcement, evaluation and revision.” It is, therefore, not only concerned with the quality of produced legislation but also with its management and implementation.<sup>105</sup> Smart regulation thus strengthens the Commission’s commitment to preventive compliance tools by underlining the necessity to help Member States guarantee proper implementation and ensure the attainment of set goals. At the same time, smart regulation involves “improving enforcement by prioritizing and accelerating infringement proceedings.”<sup>106</sup> As a part of its smart regulation project, the Commission has also turned its attention to the existing EU legislation and created the Regulatory Fitness and Performance Program (REFIT) to screen the laws in force in order to identify, amend, repeal or, in general, simplify provisions that are causing unnecessarily burdens and problems.<sup>107</sup>

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<sup>99</sup> Commission 25<sup>th</sup> Annual Report on Monitoring (2007), COM(2008)777, 6.

<sup>100</sup> Commission 27<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2009), COM(2010)538, 4.

<sup>101</sup> Commission 29<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2011), COM(2012)714, 12.

<sup>102</sup> Commission 30<sup>th</sup> Annual Report on Monitoring (2012), COM(2013)726, 10.

<sup>103</sup> Commission 31<sup>st</sup> Annual Report on Monitoring (2013), COM(2014)612, 14-15.

<sup>104</sup> Commission Communication A Europe of Results, COM(2007)502, 5.

<sup>105</sup> Commission Communication Smart Regulation in the European Union, COM(2010)543, paragraph 1; Harlow and Rawlings (2014), 55-60.

<sup>106</sup> Commission Communication Smart Regulation, COM(2010)543, paragraph 2.3.

<sup>107</sup> Commission 30<sup>th</sup> Annual Report on Monitoring (2012), COM(2013)726, 10.

The Commission has also developed a number of reactive and “cooperative problem-solving” instruments through which it responds to citizens’ queries such as Europe Direct, ECC-Net, Euro-jus, and Citizens’ Signpost Service.<sup>108</sup> The SOLVIT network provides an alternative instrument for individuals to seek resolution to their internal market cases while ‘Your Europe’ web portal informs and helps citizens with respect to their rights and opportunities.<sup>109</sup> Finally, CHAP, an IT tool, serves the better handling of complaints by registering and managing all issues and enquiries raised by individuals with respect to the correct application of EU law by national authorities.<sup>110</sup>

While the enumerated measures constitute merely examples of a broad spectrum of conformity tools, they show how the Commission seeks to address state non-compliance from a multitude of angles. From improving the quality of legislation, through consultations and various verifying tables to aiding citizens in their problems with national authorities, the Commission does much more than just pursue Member States for their violations of EU law. Many of these instruments are, however, preventive in nature but they do have an impact on the Commission’s selective enforcement for they decrease the overall number of non-compliance cases, provide the Commission with useful information, expand its role of guardian but also consume its resources. It can be said that they draw the Commission’s attention away from enforcement but, in the end, it is the EU Pilot that has effectively ‘sidelined’ the infringement procedure, allowing the Commission to return precedence in its selective enforcement to the long-established practice of confidential negotiations albeit in a new, much improved form.

#### 4.4 EU Pilot

The Commission has introduced the EU Pilot in its communication A Europe of Results, devising it as a tool for handling compliance issues brought by complainants. It was launched in 2008 with fifteen volunteering Member States,<sup>111</sup> and intended to deal with issues that required “clarification of the factual or legal position” through the establishment of national contact points. It also served to “provide more rapid answers to citizens and businesses and solutions to problems, including correction of infringements” as well as increase efficiency in the Commission’s management of state infractions.<sup>112</sup> The EU Pilot was thus a response to, on the one hand, the Commission’s general problem of acquiring information from national authorities concerning their alleged infractions and,

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<sup>108</sup> Commission 25<sup>th</sup> Annual Report on Monitoring (2007), COM(2008)777, 7.

<sup>109</sup> Commission 27<sup>th</sup> Annual Report on Monitoring (2009), COM(2010)538, 6.

<sup>110</sup> Commission 28<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2010), COM(2011)588, 6.

<sup>111</sup> EU Pilot Evaluation Report, COM(2010)70, 2.

<sup>112</sup> Commission Communication A Europe of Results, COM(2007)502, 7-8.

on the other, the Commission's overload of cases, the general dissatisfaction with its selectivity in the handling of complaints as well as its reservations towards their increasing role. Although the Commission subsequently changed its rationale behind the EU Pilot, the initial procedural shape of the measure, the Commission's frequent references to complainants as well as its emphasizes on how Member States would have the opportunity to resolve their compliance problems by "operating at the point closest to the citizen" demonstrate that it had envisaged the EU Pilot as a tool intended to manage individual grievances against Member States with little own involvement.<sup>113</sup> According to the original version of the procedure from the 2007 communication A Europe of Results the Commission, after the registration of a complaint, was to launch the EU Pilot but the subsequent interactions with national officials were to be carried by the complainant themselves, and only the final resolution communicated back to the Commission.<sup>114</sup>

By creating the EU Pilot, the Commission attempted to respond to the criticism of its treatment of stakeholders with a tool that would effectively take over the task of handling complaints. This, however, was received as a step backwards. It was argued that the EU Pilot shifted the burden of pursuing Member States on stakeholders, abandoning them in disputes against national authorities. The Commission was "outsourcing its responsibility to deal with complainants to the very entity committing the alleged infraction." Its decision regarding the EU Pilot was thus seen as avoiding the problem of insufficient complainants' rights and escaping the issue of its own accountability and legitimacy by creating a barrier between itself and stakeholders.<sup>115</sup> In fact, some argued that the Commission wanted to simply "get rid of" complaints (especially in the environmental sector, dominated by individual instances of bad application) by sub-delegating enforcement or, in other words, "trust[ing] the cat to keep the cream."<sup>116</sup>

Whether it was the criticism of the EU Pilot, the actual non-functionality of the new measure or both, in its first EU Pilot Evaluation Report a little less than two years after its commencement, the Commission ambiguously concluded that "this method of communication has not proved appropriate for all files."<sup>117</sup> Interestingly, the Commission was overall satisfied with the EU Pilot, claiming that it allowed for early resolution of compliance issues and, alternatively, prepared good grounds for infringement proceedings, considering it a "very effective complement to the range of means dedicated to ensuring the application of EU law."<sup>118</sup> Yet, the 'outsourcing' appeared to be a problem

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<sup>113</sup> Ibid., 7-8.

<sup>114</sup> Ibid., 7.

<sup>115</sup> Smith (2010), 156-157; Krämer (2009), 29-30.

<sup>116</sup> Krämer (2009), 31.

<sup>117</sup> EU Pilot Evaluation Report: Facts on the Functioning of the System, COM(2010)70, 8.

<sup>118</sup> Commission 27<sup>th</sup> Annual Report on Monitoring (2009), COM(2010)538, 7.

because the Commission revised the operation of the EU Pilot by introducing the possibility that, if a Member State “feels it appropriate” it can communicate its response to the Commission which, in turn, will further it to the complainant as well as provide the state and complainant with its own evaluation of the response. At the same time, the Commission extended the scope of application of the EU Pilot by including in it not only complaints but also own-initiative cases.<sup>119</sup> The Commission thus retook from stakeholders the burden of pursuing Member States in cases initiated by complaints and, once it involved itself again, it allowed for own-initiative cases to be processed by means of the EU Pilot too. This was when the Commission shifted the order of procedures, underlining the priority of the EU Pilot before the infringement procedure.<sup>120</sup>

Such a transformation of the EU Pilot proved, in the Commission’s view, a successful solution and, a year later, in its Second Evaluation Report, the Commission made the EU Pilot’s optional nature obligatory, making its application a “general rule” whenever there might be recourse to the infringement procedure.<sup>121</sup> By 2012, the Commission changed the way it talked of the procedure under Article 258 TFEU, underlining how it first cooperated in a partnership with Member States to resolve compliance issues and how the infringement procedure was becoming a possibility only if these efforts failed.<sup>122</sup> It also progressively extended the use of the EU Pilot to other members and, by mid-2012, all Member States participated in the new measure.<sup>123</sup> From then on, whenever an issue concerning state non-compliance arises, the relevant Commission department sends a request to the Member State for clarification and a solution to the presented problem. The competent authority has 10 weeks to respond and suggest a solution, and the Commission has another 10 weeks to assess this response during which it closes the case when the reply is satisfactory, asks for further information or launches the infringement procedure.<sup>124</sup> Interestingly, the Commission is very specific about its discretionary power to initiate proceedings when the EU Pilot fails to provide a result. In its 2014 Annual Report on Monitoring, the Commission explicitly stated that “[i]f no solution is found, the Commission pursues the bilateral discussion and may launch infringement proceedings.” Thus the EU Pilot does not prevent the Commission from launching negotiations or resorting to other enforcement measures.<sup>125</sup>

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<sup>119</sup> EU Pilot Evaluation Report: Facts on the Functioning of the System, COM(2010)70, 8.

<sup>120</sup> Commission 28<sup>th</sup> Annual Report on Monitoring (2010), COM(2011)588, 8.

<sup>121</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 2, 5.

<sup>122</sup> Commission 29<sup>th</sup> Annual Report on Monitoring (2011), COM(2012)714, 2.

<sup>123</sup> Commission 30<sup>th</sup> Annual Report on monitoring (2012), COM(2013)726, 7.

<sup>124</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 3; EU Pilot Evaluation Report: Facts on the Functioning of the System, COM(2010)70, 4-7.

<sup>125</sup> Ballesteros, Mehdi, Eliantonio, Petrovic, *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness*, Study commissioned by the European Parliament, 2013, 19.

While the initial version of the EU Pilot was met with criticism, its amended shape was considered an improvement, mostly because the Commission eventually took back the handling of complaints from national authorities.<sup>126</sup> However, the introduction of changes from the two evaluation reports not only transformed the EU Pilot into an obligatory first step in the management of state infractions but it also resulted in the Commission's seizure of the procedure and the practical exclusion of stakeholders. While maintaining complainants' administrative guarantees from the infringement procedure, the EU Pilot became less about aiding citizens and businesses and more about friendly cooperation between the Commission and Member States outside the scope of Article 258 TFEU with the purpose of finding solutions to state violations in a manner that, in the end, is also confidential. Nowadays, it is an EU-wide enforcement instrument that precedes infringement proceedings by default. Its main objective is voluntary compliance by means of "bilateral dialogue" obtained quickly and without recourse to Article 258 TFEU (within 12 months from the registration or creation of the file).<sup>127</sup> It applies to all sorts of problems concerning state non-compliance with EU law with the practical exclusion of non-communication cases and failures to respect CJEU judgments as well as urgent instances and those where an overriding interest requires an immediate launch of the infringement procedure.<sup>128</sup> Its success rate is spectacular. In 2013, out of 1330 processed files, 945 were closed with a "satisfactory response" from Member States and 385 proceeded to the infringement procedure which makes its success rate 71%.<sup>129</sup>

A study from 2013 commissioned by the European Parliament on the effectiveness of tools for ensuring compliance conducted a series of interviews with the Commission's and national officials as well as stakeholders at national level regarding the functioning of the EU Pilot. While both the Commission's and national officials were rather satisfied with its operation, complainants felt excluded and disappointed. National officials saw the EU Pilot "as a way to form a constructive, collaborative and problem-solving dialogue with the Commission, in a confidential bilateral relationship excluding complainants." They enjoyed the clarity and predictability of the EU Pilot's rules and considered it a good incentive to effectively bring cases to an end because it created a partnership between the state and the Commission without involving the element of coercion and pressure that

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<sup>126</sup> Hadroušek, *Speeding up Infringement Procedures: Recent Developments Designed to Make Infringement Procedures More Effective*, 2012 *Journal for European Environmental and Planning Law* 9, 251.

<sup>127</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 4; Second Evaluation Report on EU Pilot, COM(2011)930, 3; EU Pilot Evaluation Report, COM(2010)70, 2.

<sup>128</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 2; EU Pilot Evaluation Report: Facts on the Functioning of the System, COM(2010)70, 8-9.

<sup>129</sup> Single Market Scoreboard. Performance per governance tool. EU pilot (Reporting period: 01/2013 – 12/2013), [http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/eu\\_pilot/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm).

the infringement procedure entails.<sup>130</sup> Stakeholders, on the other hand, saw the EU Pilot as a new, rather unsuccessful attempt at improving the position of complainants vis-à-vis the Commission and defaulting Member States. Their superficial participation in the EU Pilot procedure with no access to arguments exchanged between the Commission and Member States was said to result in stakeholders' loss of confidence in the new measure. They questioned the Commission's practice of measuring the success of the EU Pilot on the basis of the number of closed cases and pointed to formalistic, shallow justifications of the Commission's 'satisfactory' closures,<sup>131</sup> which is further strengthened by the Commission's nomenclature where it talks of "acceptable" state responses that suffice to close cases.<sup>132</sup> Similarly, the European Parliament doubts whether the high success rate is, in fact, the result of increased state compliance or rather of compromised solutions.<sup>133</sup> Complainants wished to be more involved in the procedure believing their participation would increase the effectiveness in finding the best solutions.<sup>134</sup> Unsatisfied with the Commission's attitude, they brought cases before the General Court seeking to challenge the Commission's decisions in the EU Pilot<sup>135</sup> and complained to the European Ombudsman raising such claims as the Commission's negligent handling of their files<sup>136</sup> or excessive delays.<sup>137</sup> The European Ombudsman also launched an own-initiative inquiry<sup>138</sup> in order to encourage the Commission to inter alia include the EU Pilot in its Communication on Handling Complaints<sup>139</sup> and have it published in the Official Journal. The Commission did revise the communication<sup>140</sup> but resisted the publishing idea.<sup>141</sup>

It is difficult not to see a parallel between the EU Pilot and secretive negotiations as the Commission's alternative methods of addressing non-compliance. Both measures are - in the end - based on confidential relations between the Commission and Member States with stakeholders having little acknowledgement in the procedure which brings questions of transparency and

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<sup>130</sup> Ballesteros et al. (2013), 70-71.

<sup>131</sup> Ibid., 71.

<sup>132</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 3.

<sup>133</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring the Application of Union Law: 2014 Annual Report, 2015/2326(INI), Explanatory Statement of the Committee on Legal Affairs.

<sup>134</sup> Ballesteros et al. (2013), 71.

<sup>135</sup> Order of 10 March 2014, *Spirlea v Commission*, T-518/12, EU:T:2014:131.

<sup>136</sup> Decision of the European Ombudsman closing the inquiry into complaint 943/2014/MHZ against the Commission (23 June 2014).

<sup>137</sup> Decision of the European Ombudsman closing the inquiry into complaint 332/2013/AN against the Commission (13 January 2014).

<sup>138</sup> European Ombudsman own-initiative investigation, OI/2/2011/OV (28 March 2012).

<sup>139</sup> Commission Communication on Relations with the Complainant, COM(2002)141.

<sup>140</sup> Commission Communication Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law, COM(2012)154.

<sup>141</sup> Decision of the European Ombudsman closing own initiative inquiry OI/2/2011/OV against the Commission (10 April 2014).

complainants' rights into view. The main difference, however, is that the EU Pilot is more of a structured measure following a pre-set series of steps fixed by specific time-limits and it does recognize the existence of complainants by allowing them some minimal participation and insight into the procedure which cannot be said of entirely confidential negotiations. The EU Pilot is, therefore, an improved but nonetheless similar method of dealing with state non-compliance by means other than the infringement procedure itself.

On the other hand, when compared to the infringement procedure, the EU Pilot is considerably less costly in terms of money, time and overall capacity.<sup>142</sup> Since it is a soft-law measure consisting of only several easy procedural steps, it is less demanding for both national authorities and the Commission. As a result, it processes complaints which would normally not qualify for Article 258 TFEU.<sup>143</sup> For example, in 2015, the Commission opened 881 new EU Pilot files out of which 295 were triggered by complainants. It also processed 969 files out of which 243 were closed due to satisfactory state replies and another 201 were followed by infringement proceedings.<sup>144</sup> In 2014, in comparison, the Commission had opened 1208 new EU Pilot files (423 complaints) and processed 1336 (out of which 996 were closed and 325 followed by infringement proceedings).<sup>145</sup> Due to the EU Pilot's expansion, Article 258 TFEU has thus become an exception and something of an appeal procedure. It no longer deals with the bulk of non-compliance but is rather reserved for specific situations. A decrease in amount of infringement proceedings is noticeable. In the years from before the launch of the EU Pilot, the Commission opened approximately 2,500 infringement proceedings annually (in 2005: 2,653, in 2006: 2,518, in 2007: 2,518).<sup>146</sup> Nowadays, this number has dropped well below a 1,000 (in 2013: 761, in 2014: 893, in 2015: 742).<sup>147</sup> As a result, it can be said that the EU Pilot, being an obligatory pre-procedural step, alters the nature or rather the reception of the infringement procedure, giving its formal administrative stage - regardless of its highly managerial characteristics - a more coercive than cooperative connotation when contrasted with its conciliatory, informal characteristics.

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<sup>142</sup> Koops, *EU Compliance Mechanisms: The Interaction Between the Infringement Procedure, IMS, SOLVIT and EU-Pilot*, 2011 Amsterdam Centre for European Law and Governance, Working Paper Series 8, 4.

<sup>143</sup> *Ibid.*, 24.

<sup>144</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 20.

<sup>145</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 11.

<sup>146</sup> Commission 25<sup>th</sup> Annual Report on Monitoring (2007), COM(2008)777, 3; Commission 24<sup>th</sup> Annual Report on Monitoring (2006), COM(2007)398, 3; Commission 23<sup>rd</sup> Annual Report on Monitoring the Application of Community Law (2005), COM(2006)416.

<sup>147</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 22; Commission 32<sup>nd</sup> Annual Report on Monitoring the Application of EU Law (2014), COM(2015)329, 13; Commission 31<sup>st</sup> Annual Report on Monitoring (2013), COM(2014)612, 11.

The EU Pilot certainly simplifies the Commission's selective enforcement by - in most part - disposing of the nomenclature of prioritization, introducing coherent and straightforward criteria and defining the applicability of at least two enforcement mechanisms. Not just the amount of infringement actions is diminished but also the amount of informal negotiations which are now replaced (but not entirely eradicated)<sup>148</sup> with a more structured and quicker but still friendly and relaxed contacts within the EU Pilot, overall allowing to process more files. Yet, the EU Pilot is a measure that was remolded quite intensively, becoming something very different than what had been originally devised. This has led to the situation where its defining and definite characteristics have to be searched in a number of the Commission's documents, making it difficult to determine its final shape and nature. In fact, the way the Commission presented the most important changes somehow by-the-way less important evaluations of the EU Pilot's functioning, suggests that it did not intend to draw too much attention to the transformation it was devising. It did not stray from admitting new changes and every annual report underlines the obligatory nature of the EU Pilot, but the lack of a single document that would assemble and organize all the operating rules and underline the EU Pilot's and infringement procedure's altered roles, contributes to the overall lack of transparency so typical of the Commission's selective enforcement. As a result, we can observe a limited interest of the academia, the EU Pilot being rarely mentioned in studies of the infringement procedure. Finally, while the Commission no longer considers the EU Pilot "a project in its early and experimental phase, but a well-established working method", it persists with the name 'EU Pilot' which suggests the contrary and is non-informative.<sup>149</sup> A consolidating document and a change in name would therefore be welcome.

The Commission is clearly quite satisfied with the operation and success rate of the EU Pilot which allows it to achieve the same objective of voluntary compliance by means of friendly, confidential cooperation as frowned-upon secretive negotiations. At the same time, the dialogue with Member States is more structured and systematic allowing for greater efficiency in the handling of state violations and, apparently, it even has the effect of influencing national administrative systems which transform in order to increase their own efficiency with respect to the EU Pilot.<sup>150</sup> It cannot be denied that the Commission also sees the benefits in stronger enforcement via coercion by applying for financial penalties in non-communication cases under the special penalty provision of Article 260(3) TFEU, or that it regularly continues to have recourse to the infringement procedure either when cases fall under one of the exceptions or when the EU Pilot fails to provide a solution. However, this

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<sup>148</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 5; Ballesteros et al. (2013), 19.

<sup>149</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 7.

<sup>150</sup> Ballesteros et al. (2013), 81.



does not negate the fact that the Commission has indeed replaced Article 258 TFEU with a self-created, soft-law measure which marks a turning point in its selective enforcement and a further step towards a more managerial form of enforcement.<sup>151</sup> Instead of struggling to conceal certain truths about its operation under the guise of vague and incoherent priorities, the EU Pilot and the positive response the Commission received from national authorities allowed it to admit that the infringement procedure does not constitute the most efficient method of resolution but should rather be reserved for special cases. While the EU Pilot is not the only instrument intended to precede the launch of the procedure and the Commission has at its disposal “alternative pre-infringement mechanisms” in, for example, budget-related matters,<sup>152</sup> the EU Pilot has now effectively taken over the role of Article 258 TFEU, becoming the ‘main’ enforcement measure. The end result, however, is such that - although complainants now have certain minimal rights and the Commission is more open about its practices - the basic rules behind its selective enforcement have remained the same. The Commission’s enforcement policy has evolved in order to, in the end, be once more dominated by the practice of confidential and bilateral dialogue.

#### 4.5 Controlled evolution

The infringement procedure, despite its general scope of application and Treaty foundation, has never been the only solution for combating state non-compliance in the EU, constituting merely one of several options that made the Commission’s selective enforcement. On the one hand, the procedure’s formal, coercive characteristics with the Court of Justice at the end of the process reminded too much of an adversarial trial but without the benefits of sanctioning to be advantageous. On the other hand, its cumbersomeness and time-consumption made it inefficient in situations that required rapid action, as well as did not prove effective in areas of capacity limitations. As a result, the Commission initially kept its distance with the formalized stages of the procedure, relying heavily on confidential negotiations to induce conformity. Overtime, as its reservation towards the procedure dwindled, it nonetheless continued searching for alternative and complementary solutions, both preventive and reactive, in order to find simpler, more effective and accessible avenues for states to comply as well as to address the spectrum of problems that lead to or make state infractions. At the same time, Articles 258 and 260 TFEU underwent a small but vital transformation where, alongside various soft-law managerial solutions, the coercive effect of the infringement procedure was increased together with the introduction of financial penalties. Questions, however, begun arising

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<sup>151</sup> Koops (2011), 5.

<sup>152</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), Part I, COM(2015)329, 10.

concerning the Commission's exercise of its enforcement powers with its contested practice of selective enforcement, and the Commission attempted to explain its policy by means of priority criteria which, despite its efforts, eventually failed to provide the information that was expected of an institution striving for transparency.

The problem stemmed *inter alia* from the contradictory expectations placed on the infringement procedure by the public and the Commission's inability to find the middle ground between openness regarding its practice of prioritization and the flexibility necessary to achieve its enforcement objective. While the public desired clear and transparent rules that would allow to scrutinize the Commission's conduct, the Commission insisted on maintaining the discretion, autonomy and flexibility of its operations. Eventually, it introduced the EU Pilot which, in a world of firmly set standards such as transparency and accountability, was ultimately a new, proceduralized version of confidential negotiations. Even though the standard rights for complainants were secured in the operation of the EU Pilot, stakeholders had much to protest against, being once more removed from the Commission's dialogue with Member States and having no binding guarantees to fall back on. Instead of embracing more legitimacy and accountability in its operations, the Commission chose a path that maintains the confidentiality and bilateralism of relations with Member States. Granted, it has constrained secretive negotiations by a procedural, predictable frame but the core of its discretion has remained unaltered. The new change can therefore be considered a step towards greater transparency but it failed to respond to the criticism that the Commission has been facing for years. Finally, instead of devoting more of its attention to the infringement procedure, the Commission chose to precede it with an instrument very similar to pre-procedural confidential negotiations while itself remaining the unquestionable guardian of the Treaties that is unilaterally formulating its enforcement policy by means of soft-law measures. The EU Pilot has demonstrated that the Commission's approach to selective enforcement has surely evolved over the years but, despite the apparent changes, it has also remained surprisingly the same.

The similarity lies in the Commission's broad flexibility and autonomy in its enforcement function as well as in its heavy reliance on confidential and bilateral measures to ensure conformity. These features can be considered pillars of the Commission's enforcement and have been subjected to critique, undergoing changes, as will be shown in the following chapter. Nonetheless, despite all the alterations that the Commission accepted to their content, it has directed its policy of selective enforcement in a way that maintained the pillars' core unaltered and operational. The Commission has thus kept control over the evolution process, whereby it committed to baby-steps that improved its working methods, increased efficiency and demonstrated engagement, but without crossing

certain boundaries that could destabilize the pillars. This does not mean that the Commission had had a masterplan set out a long time ago and meticulously followed it. Its struggle with the formulation of satisfactory priorities and only recent official and obligatory substitution of the infringement procedure with another instrument demonstrate that it did not adhere to any secretly-devised strategy. Instead, it reveals that the Commission, while trying to meet the expectations placed on it by the public, tends to keep itself firmly lodged within certain margins or rails. It can move forward but it cannot step outside its main path and every alteration it makes to its policy of selective enforcement is guaranteed to stay within the set track.

Four pillars delimit the margins of this track: confidentiality, bilateralism, flexibility, and autonomy. The Commission keeps their core unaltered despite the growing pressure to substantially revise them. The following chapter will introduce these four pillars, tracking the changes they incurred and the pressure they are subjected to, in order to demonstrate not only how little the Commission's policy of selective enforcement has changed, but also how the core of these pillars has remained unaltered. Only later, the effort will be made to explain the Commission's choices with respect to its policy of selective enforcement with its avoidance of infringement proceedings and unwavering protection of the four pillars.



## 5 Four pillars of the Commission's selective enforcement

The Commission's selective enforcement has evolved over the years together with the creation of new compliance instruments, Treaty amendments of the infringement procedure, shifts in prioritization and the eventual establishment of the EU Pilot. However, a closer look reveals that, despite these developments, not much has changed with respect to rules underlining the Commission's enforcement policy. While nowadays the Commission has at its disposal several enforcement instruments, they are still characterized by four features: confidentiality, bilateralism, flexibility, and autonomy. These features, or rather pillars, of the Commission's enforcement policy stem from Treaty rules, constitute the expression of the Commission's discretion and determine its maneuverability in the infringement procedure. Most of all, they enable and facilitate the Commission's selective enforcement with its concentration on prioritization, complementary solutions and avoidance of infringement proceedings, amounting to - what can be called - the discretionary model of enforcement. At the same time, they are the product of a different age where international organizations had little to do with democratic values and where secrecy and bargaining constituted the accepted practice. They are, therefore, considered incompatible with contemporary standards such as transparency, neutrality or accountability and lead to challenges on the grounds of their *raison d'être* in the modern world. Yet, the Commission persistently defends these features, yielding in exceptional situations and only to a minimal degree while finding continuous support in the almost unwavering case-law of the Court of Justice.

The contemporary movement towards the alteration of the Commission's enforcement role and limitation of its discretion which advocates - what can be best summarized as - the accountability model of enforcement came in part from complainants. While confidentiality, bilateralism, flexibility and the Commission's autonomy were considered incompatible with the EU's search for democratic credentials, they had negative effects mostly for complainants as informers on state non-compatible conduct. Slowly, academics and other EU institutions took notice of the Commission's insufficient attention to stakeholders, scrutinizing its enforcement conduct through the lens of principles governing the functioning of public institutions, giving voice to complaints and formulating challenges to the Commission's operation. The result was such that certain limitations were introduced to the Commission's enforcement practice, the buffer layers of its four pillars peeled off one by one in order to bring them closer to the accountability model. The core of the features has, however, remained unaltered, drawing conflicting opinions from academics, citizens and EU institutions. Despite the

presented evolution of the Commission's selective enforcement and various expectations placed on its policy and practice, the Commission and the Court of Justice have so far managed to resist many of the demands, and preserve the core of the four pillars that characterize and delimit the Commission's selective enforcement.

This chapter presents the four pillars of the Commission's selective enforcement and contrasts them with standards represented by the accountability approach, the former supported by the Commission and the Court of Justice and the latter advocated mostly by the European Parliament and the European Ombudsman. The purpose of this chapter is two-fold. On the one hand, it aims to explore the objectives of the accountability approach, demonstrating that the postulates put forward by the Parliament, Ombudsman and some of the academia indeed seek to install in the Commission a new model of enforcement and replace its original four pillars. On the other hand, it also endeavors to show how the Commission and the Court have agreed to certain small changes only so that they could give some satisfaction to the advocates of the accountability model but, at the end of the day, protect the core of the four pillars from their encroachment. Since both the discretionary and accountability approaches are rooted in conflicting visions of the Commission's enforcement role, it is first necessary to explore the issue of its enforcement objective.

## 5.1 Commission's enforcement objective

According to Article 17(1) TEU,<sup>1</sup> the European Commission's objective in its enforcement role is to ensure and oversee the application of EU measures by Member States. For this purpose, the Commission was furnished with the infringement procedure from Article 258 TFEU.<sup>2</sup> Looking at its original formulation (169 EEC) still preserved in the new Treaty on the Functioning of the EU, what stands out is this Article's emphasis on the administrative stage where the reasoned opinion plays a key role and only later mentioned, somewhat in conclusion, the possibility of referral to the Court of Justice. On the other hand, unlike in most international organizations where Member States supervise each other, the drafters devised the Commission as a supranational institution furnished with extensive enforcement powers while the infringement procedure itself was granted a large scope of application. However, this unique supranational and (almost) unconditional nature of the infringement procedure does not mean that it was designed as an instrument of strict enforcement (understood as coercion and punishment) but that - as Maduro puts it - it was intended to combat the

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<sup>1</sup> Treaty on European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>2</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

risk of “free riders”.<sup>3</sup> The Commission, as a supranational body, was charged with the task of ensuring that violating Member States do not rip the benefits of integration. As a result, the infringement procedure can be seen as a product of a compromise between the enforcement and managerial solutions where a system was put in place with the powers of counteracting the phenomenon of free-riding but one that recognizes Member States’ special position as contracting parties that ought to be given the benefit of a doubt. The Commission was thus designed as the guardian of the Treaties that seeks to ensure conformity by, first, voluntary and, later, coercive means.

Such understanding of its function was upheld by the Commission in its practice. As was shown in the previous chapter, it avoided judicial proceedings and reinforced the administrative phase by further extending it and putting additional emphasis on cooperation, dialogue and voluntary conformity.<sup>4</sup> And while its reliance on the infringement procedure increased, the Commission’s perception of its role of guardian remained focused on ensuring compliance by conciliatory means. Eventually, however, theorists begun questioning the Commission’s discretionary exercise of its enforcement powers and with the introduction of pecuniary sanctions and a rise in complainants’ dissatisfaction, new readings of the infringement procedure were brought into light with the purpose of amending the Commission’s enforcement policy and practice.

These new approaches to Article 258 TFEU are best summarized in Rawlings’ and Smith’s contributions. Believing in the changing role of the infringement procedure, Rawlings indicates that Article 258 TFEU has nowadays three different faces. He distinguishes between 1) the old perception of the procedure, seen as a secretive, informal and cooperative process or, as he calls it, the “élite model of regulatory bargaining,” 2) the new concept of complainants’ rights, which brings the demand for openness, accountability and redress for individual grievances, and 3) the technocratic nature of Article 258 TFEU, with streamlined procedures, pecuniary sanctions and an emphasizes on effectiveness. Rawlings underlines that these three faces involve different demands of, respectively, political cooperation, citizen participation and effective law enforcement and these demands compete against each other with the effect that concentration on one ‘disfigures’ the others.<sup>5</sup>

Smith develops on Rawlings’ three faces and goes further by putting forward a suggestion that the infringement procedure performs nowadays as many as five different functions. Although she acknowledges that Article 258 TFEU was envisaged as a two-sided relationship aimed at achieving

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<sup>3</sup> Maduro, *We the Court* (Hart Publishing, 1998), 112.

<sup>4</sup> Harlow, Rawlings, *Accountability and law enforcement: the centralized EU infringement procedure*, 2006 *European Law Review* 31, 454.

<sup>5</sup> Rawlings, *Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement*, 2000 *European Law Journal* 6, 7-8.

compliance, she claims that such a description no longer fits the reality.<sup>6</sup> Instead she advocates that, aside from the outdated reading limited to 1) the basic concept of ensuring compliance, the infringement procedure also constitutes 2) an "executive policy choice" when the Commission decides its enforcement strategy, formulates the priority criteria and makes choices accommodating different policy interests; 3) a "forum for citizen-institution interaction" with respect to its relationship with complainants in the process of monitoring, investigation and the management of violations; 4) an "institutional forum for debate, control and accountability" in relation to the supervision that different EU institutions try to exert over the Commission's discretion; and finally 5) an "administrative/regulatory tool" that refers to its operation as an efficient administration bound by administrative rules of conduct.<sup>7</sup> According to Smith, all these five functions are characteristic of Article 258 TFEU but it does not mean that they sit well together. On the contrary, Smith admits that they often conflict with one another, each function sometimes bringing different, contradictory objectives into consideration, and the Commission struggles to accommodate them, assuming conflicting roles of guardian, administrator and executive which ultimately diminishes the procedure's efficiency and effectiveness.<sup>8</sup>

Rawlings' and Smith's distinction between different faces/functions of the infringement procedure takes into account various expectations that are nowadays put forward with respect to the procedure's and the Commission's operation.<sup>9</sup> The authors' analysis in a way compromises, systematizes and also inspires different challenges to the enforcement mechanism and, on the basis of those challenges, formulates a new approach to the Commission's enforcement role that can be best described as the accountability approach, explored in the following section. Believing that the Commission's enforcement function is nowadays about more than just ensuring compliance, Rawlings and Smith draw our attention to different aspects of the Commission's functioning that it has so far failed to properly address such as the Commission's interactions with citizens or issues of its accountability. The new vision of the infringement procedure calling for the expansion of the Commission's enforcement role is useful to present the contemporary challenges to the existing Commission's practices which the latter continues to disregard when formulating its enforcement policy. However, since this thesis seeks to explain the reasons behind the Commission's selective

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<sup>6</sup> Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU*, (Routledge, 2010), 86.

<sup>7</sup> *Ibid.*, 15-16, 110-116.

<sup>8</sup> *Ibid.*, 110-111, 117-118.

<sup>9</sup> E.g. European Parliament Resolution of 4 February 2014 on the 29<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2011), 2013/2119(INI).



enforcement, what is of key importance here is the Commission's own understanding of its enforcement objective.

According to the Commission, the centralized enforcement mechanism still serves the primary purpose of ensuring state compliance with EU law. While regularly challenged, the Commission persistently underlines how it "has to monitor the Member States' efforts and ensure their legislation complies with EU law."<sup>10</sup> Further, compliance is understood as effective application of EU law whereby effectiveness does not equal formal compliance<sup>11</sup> nor does it mean absolute, rigid adherence to legal rules. The Commission's notion of effectiveness seems to be more about, on the one hand, dispute resolution and, on the other, "making law[s] operative"<sup>12</sup> rather than literal obedience and sanctioning, which fits neatly with its methods of dialogue and assistance. The Court of Justice supports this claim, arguing that "[t]he Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfill the obligations deriving therefrom with a view to bringing it to an end."<sup>13</sup>

Support for the Commission's understanding of its enforcement objective can also be found in the literature.<sup>14</sup> Timmermans argues, for example, that the centralized enforcement mechanism is an international procedure with the goal of resolving disputes concerning the observance of EU law between the Union and a Member State. The fact that it is unable to effectively protect individual interests stems from its very nature and purpose<sup>15</sup> and its inability to secure individual rights is not a weakness that needs to be remedied. "The Commission simply cannot act as a public prosecutor against [all] Member States on behalf of Community citizens."<sup>16</sup> Going even further, Grohs observes that the purpose of the infringement procedure is not to bring Member States before the Court of Justice but to encourage their compliance before the case reaches the stage of judicial proceedings. This results in the Commission's conduct which differs from that of national prosecutors where it does not press with the action but, instead, tries to give Member States many opportunities to remedy their violations. Grohs recognizes that this is often upsetting to complainants who do not understand the

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<sup>10</sup> Commission 30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012), COM(2013)726, 2.

<sup>11</sup> Dashwood, White, *Enforcement Actions under Articles 169 and 170 EEC*, 1989 *European Law Review* 14, 392.

<sup>12</sup> Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press, 2012), 42-43.

<sup>13</sup> Judgment in *Commission v Germany*, C-456/05, EU:C:2007:755, paragraph 25.

<sup>14</sup> E.g. Koops, *EU Compliance Mechanisms: The Interaction Between the Infringement Procedure, IMS, SOLVIT and EU-Pilot*, 2011 Amsterdam Centre for European Law and Governance, Working Paper Series 8, 18; Spence, *The Directorates General and the Services: Structures, Functions and Procedures*, 3rd ed. (John Harper Publishing, 2006), 145.

<sup>15</sup> Timmermans, *Judicial Protection against the Member States: Articles 169 and 177 Revisited*, in Curtin, Heukels (eds.), *Institutional Dynamics of European Integration* (Martinus Nijhoff Publishers, 1994), 397.

<sup>16</sup> *Ibid.*, 400.

Commission's motivations.<sup>17</sup> Even in a study commissioned by the European Parliament which, in principle, advocates the accountability model of enforcement, underlines that the "primary goal of infringement proceedings is not to reach the Court or sanction the State but rather to give the Member State concerned an opportunity either to justify its position or, if it so wishes, to comply of its own accord with the requirements of the Treaty."<sup>18</sup>

## 5.2 Two models of enforcement

The analysis of the literature on the Commission's enforcement reveals a divide between two conflicting visions of enforcement which can be best described as the discretionary and accountability approaches, each advocating its own model of enforcement, differentiated by their inherently incompatible attitudes regarding the Commission's discretion. The discretionary model is still employed by the Commission, has the support of the Court of Justice and constitutes the grounds for the current shape of the Commission's policy of selective enforcement, basically seeking to preserve the existing extent of the Commission's discretionary powers. The accountability model is advocated by the European Parliament and some of the academia. It seeks to replace existing solutions with a more democratic and legitimate model of enforcement by, in most part, constraining the Commission's discretion.

The discretionary model favored by the Commission and the Court revolves around the Member States' special status as sovereign contracting parties, the cooperation of which is considered crucial for the furthering of common goals and which has to be ensured by means that do not excessively encroach on their superior position. It recognizes that certain long-term objectives can transcend short-term and that it has to make compromises to achieve the former. It, therefore, predominantly relies on managerial methods of ensuring compliance, favoring bilateral, informal and confidential contacts with Member States, where coercion and penalties are employed only in specific situations. It is rooted in the premise that the majority of state infractions are unintentional and that Member States are more inclined to rectify their infringements if they are approached in a friendly, cooperative atmosphere but it also gives the Commission the opportunity to look beyond the case at hand and take into account external considerations such as alternative objectives or political interests without any outside scrutiny to prevent such practices. This model of enforcement thus relies on and protects the Commission's broad discretion which allows it to carry out its policy of selective

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<sup>17</sup> Grohs, *Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 66.

<sup>18</sup> Ballesteros, Mehdi, Eliantonio, Petrovic, *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness*, Study commissioned by the European Parliament, 2013, 84.

enforcement by maintaining special relationships with Member States and using various enforcement instruments in order to find the most effective but also least conflictual solutions. It will be shown that the Commission has already incorporated a number of rules that piece-by-piece peel off layers of its discretion but the underlying premise is that, whatever changes it undergoes, it always strives to safeguard the core of the four pillars on which this enforcement model rests: confidentiality, bilateralism, flexibility and autonomy. However, as Hademann-Robinson puts it, the Commission's extensive discretion is a "double-edged sword" because it brings problems of accountability and inefficiency.<sup>19</sup>

Rawlings, in 2000, named the Commission's type of enforcement "the elite model of regulatory bargaining" because it reflected the classic model of international procedure and was concentrated on diplomatic, secretive and informal negotiations with Member States. It ignored complainants and fell short of such contemporary standards as transparency and accountability and, therefore, it "[lacked] credibility in the light of the trajectory of European Integration".<sup>20</sup> Since the author wrote his article those sixteen years ago, the Commission's selective enforcement has considerably evolved while the four pillars of its enforcement powers have also undergone change during which a degree of transparency was injected into the Commission's operations, the complainants' role recognized and their minimal rights guaranteed. Yet, as was already underlined, the core of the Commission's powers has remained unaltered and is still nowadays challenged on the grounds of failing to fully embrace the contemporary standards: transparency, trilateralism, objectivity and accountability. Since the first three standards are capsuled by the concept of accountability and their existence and success is dependent on its existence, then this model will be considered in this thesis as the accountability model of enforcement.

The accountability model supported mostly by the European Parliament and the European Ombudsman is driven by three interconnected wheels. Its sources can be traced as far back as the European Community's 'spillover' of competences which transformed it from a purely economic union into a political construction and revealed the problem of the European institutions' lacking legitimacy. The democratic deficit became an issue and the solution was sought in the increased role of the European Parliament. While it brought more legitimacy and accountability to the Community's operation, the Commission's role was called into question with its remaining weak democratic credentials, decreasing efficiency and observed 'management deficit'. The dissatisfaction with the Commission was further deepened by the crisis of the Santer Commission from 1999 which revealed

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<sup>19</sup> Hademann-Robinson, *Enforcement of European Union Environmental Law*, 2nd ed. (Routledge, 2015), 79.

<sup>20</sup> Rawlings (2000), 8-13.

fraud and irregularities. This, in turn, led to the Commission's broad reorganization in order to make it a democratic, legitimated, citizen-friendly and accountable institution. The key concept of the reorganization concentrated on good governance.<sup>21</sup> The second wheel driving the accountability model of enforcement can be found in the growing role of the European Parliament with the expansion of its competences and its quest to assert more control over the Commission. Finally, the last wheel refers specifically to the link between the Commission and complainants. The accountability model's supporters advocate, on the one hand, greater recognition of the complainants' role by furnishing them with more rights secured in a binding document and, on the other, more accountability by granting complainants or the European Parliament some form of review over the Commission's enforcement decisions. They expect that the Commission will make its decisions only on grounds of law and facts and be transparent about its motivations. They dislike the confidentiality of the Commission's contacts with Member States with no one else to witness the deals made and seek to ensure that the Commission remains objective and neutral in its assessment and management of cases.

Smith is one of the main supporters of this model with her, already mentioned, theory of the infringement procedure's five functions which include inter alia a "forum for citizen-institution interaction" and an "institutional forum for debate, control and accountability."<sup>22</sup> To strengthen the accountability approach, she draws attention to the Laeken Declaration from 2001 which set out the objectives for the democratization of EU, talking of scrutiny and openness and of bringing institutions closer to citizens.<sup>23</sup> She analyzes the Commission's White Paper on Governance<sup>24</sup> where it committed itself to increasing democracy and legitimacy by incorporating five principles of good governance into its operations (openness, participation, accountability, effectiveness and coherence),<sup>25</sup> as well as performs her own evaluation of the Commission's enforcement conduct, scrutinizing it according to the principles of good administration, good governance and legitimacy in order to conclude that the Commission is still far from embracing these principles failing to live up to its own commitments.<sup>26</sup> She is thus a strong opponent of the discretionary model and offers a number of solutions to transform existing pillars in order to inject the accountability approach into the Commission's policy and practice.

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<sup>21</sup> Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive* (Oxford University Press, 2013), 2-3, 33-34, 42-46.

<sup>22</sup> Smith (2010), 15-16, 110-116.

<sup>23</sup> *Ibid.*, 2-3.

<sup>24</sup> Commission White Paper on European Governance, COM(2001)428.

<sup>25</sup> Smith (2010), 64-76.

<sup>26</sup> *Ibid.*, 77-81.

Since the discretionary and accountability models are both concepts created for the purpose of this thesis in order to underline the differences in conflicting approaches, their characteristics can be rather fluid and, in most part, depend on concrete postulates of individual commentators. As a result, the particulars of the accountability model can differ noticeably from opinions advocating rather minor improvements of the complainants' position to those talking of the absolute codification of their guarantees.<sup>27</sup> Nonetheless, such differences do not negate the common premise of the accountability model which seeks to, above all, considerably limit the Commission's discretion. And, although the 'devil's in the detail,' the general distinction into two models helps systematize and underline the disparity between alternative visions of the Commission's enforcement.

What is noteworthy, however, is that the accountability model does not stand in complete opposition to the discretionary. On the contrary, advocates of the accountability approach tend to recognize the benefits of constructive dialogue or the need to maintain the efficiency of the Commission's compliance measures.<sup>28</sup> They simply believe that there is another way to conduct such dialogue or maintain efficiency while constraining the Commission's discretion. The main difference between the two models can thus be brought down to four main features. The discretionary model is rooted in the confidentiality and bilateralism of relations with Member States and the Commission's flexibility and autonomy in its selective enforcement. The accountability model, on the other hand, seeks to establish the transparency and trilateralism of relation with Member States as well as ensure the Commission's objectivity and accountability in its enforcement function. It, therefore, assumes that the replacement of the Commission's four pillars with the accountability standards will improve its enforcement practice and boost its legitimacy while maintaining the benefits of the discretionary model such as incentives for state voluntary compliance. This thesis seeks to demonstrate that the consequences of such transformation would go further than that even if just because the four pillars are closely intertwined, and a shift in one can have serious consequences on the others. However, for now, it is important to concentrate on the four features which delimit each model by constituting its defining characteristics. It is through their lens that we cannot only explore the particulars of each model of enforcement but we can also witness how the Commission and the Court have made compromises while ensuring that the discretionary model of enforcement is safeguarded.

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<sup>27</sup> European Parliament Resolution of 10 September 2015 on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring the Application of EU Law (2012-2013), 2014/2253/(INI), paragraph 19.

<sup>28</sup> E.g. *Ibid.*, paragraph 31; Ballesteros et al. (2013), 78.

### 5.3 Confidentiality v transparency

One of the cornerstones of the Commission's selective enforcement is the prevailing confidentiality of relations with Member States. Initial informal contacts, bilateral negotiations, parties' statements and claims, or even the content of the letter of formal notice and reasoned opinion are all veiled by the curtain of secrecy. It is possible to learn of the launching of the infringement procedure as well as get a general overview of the case because the College's decisions are published by means of press releases and their summaries can be accessed in the Commission's database on infringements. However, even such scarce information is not easily available because the database is not regularly updated nor are justifications for the College's decisions revealed.<sup>29</sup>

The Commission believes that maintaining its confidentiality serves the purpose of achieving voluntary compliance because Member States are more eager to cooperate before the naming and shaming effect is in place.<sup>30</sup> On the other hand, however, confidentiality means that we do not know how the Commission is conducting its selective enforcement and whether it is not abusing its powers. This applies not only to the secrecy of its relations with Member States but also to its overall enforcement policy and internal modes of operation.

In 1995, Mastroianni asked the question: "quis custodiet custodes?" criticizing the lack of transparency in the Commission's operation as leading to an "arbitrary exercise of power".<sup>31</sup> Back then the first European Ombudsman was just assuming its position and a few more years had to pass before it would take interest in the Commission's management of the procedure and induce it to introduce a degree of transparency into its operation. As a result, when Mastroianni was asking the question: 'who guards the guardian?' the Commission was not yet in the habit of providing reasons for its decisions.<sup>32</sup> Its discretion in the infringement procedure was wider than it is nowadays, allowing it to maintain secretive relations with Member States without having to worry about justifying its choices. At the same time, the Declaration on Democracy, Transparency and Subsidiarity<sup>33</sup> was just adopted by means of which the European Parliament, the Council and the Commission committed themselves to the observance of the principle of transparency, while explicitly excluding the Commission's enforcement functions.<sup>34</sup> This made Mastroianni distrust the Commission's operation in the infringement procedure, suspecting that it was biased and interest-oriented in its handling of cases which, in turn,

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<sup>29</sup> Ibid., 86.

<sup>30</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 3.

<sup>31</sup> Mastroianni, *The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?*, 1995 European Public Law 1.

<sup>32</sup> Ibid., 536.

<sup>33</sup> Interinstitutional Declaration on Democracy, Transparency and Subsidiarity, OJ C 329, 6.12.1993, 133-135.

<sup>34</sup> Mastroianni (1995), 535.

impeded the uniform application of EC law. He believed that the injection of transparency into the Commission's operation would bring a degree of control over its actions, preventing it from abusing its extensive power. He advocated that only if the Commission exercised its enforcement functions with the "maximum of impartiality and disinterest" could the objective of uniform application be achieved.<sup>35</sup> To this end, he suggested a number of reforms, out of which some did make their way into the Commission's practice such as time-limits and the setting of grounds.<sup>36</sup> Nowadays, the Commission is obliged to inform the complainant of reasons for closing infringement cases which forces it to explain its choices and makes it harder to conduct the procedure in ways that do not conform to set standards.<sup>37</sup> This, however, does not mean that the Commission is effectively prohibited from straying from limits imposed on its discretion by the Treaty and the Court of Justice. It is simply a matter of creatively justifying its contestable decisions. Since individuals are prevented from challenging these decisions, they have no means of verifying the Commission's justifications nor of compelling it to alter its choices. As a result, the bilateral dialogue with Member States remains cloaked by confidentiality and Mastroianni's transparency challenge to the Commission's operation in the infringement procedure remains.

Transparency constitutes one of the main principles of good governance and the European Ombudsman considers it crucial for the EU public administration alongside integrity or objectivity.<sup>38</sup> However, in an organization consisting of 28 legal systems, the concept is not unanimous and there are differences to its understanding both among Member States and EU institutions.<sup>39</sup> Overall, transparency can be understood as: 1) access to documents/information, 2) knowledge of who makes decisions, 3) comprehensibility and accessibility of the decision-making process, 4) consultation and 5) duty to give reasons.<sup>40</sup> Out of these five notions, two are most commonly indicated with respect to the Commission's exercise of its enforcement powers: access to documentation and the duty to give reasons. The later, confirmed by the Court already in the early 1960s<sup>41</sup> has its bases in Article 296 TFEU but only with respect to the decision-making process. Advocated by Mastroianni and others with respect to the infringement procedure, it is nowadays no longer a problematic issue due to the Commission's commitment to state the grounds for its decisions on closure although the

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<sup>35</sup> Ibid., 538.

<sup>36</sup> Ibid., 539.

<sup>37</sup> Commission Communication Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law, COM(2012)154, 7.

<sup>38</sup> Harlow, Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), 119, 138.

<sup>39</sup> Ibid., 119.

<sup>40</sup> Tomkins, *Transparency and the Emergence of a European Administrative Law*, 1999 Yearbook of European Law 19, 220.

<sup>41</sup> Judgment in *Germany v Commission*, 24/62, EU:C:1963:14.

Commission's diligence in adhering to this rule can be questioned. Access to documentation, however, constitutes a matter that is still strongly problematic for complainants and academics alike.

Access to documentation is regulated in the European Union by Regulation 1049/2001.<sup>42</sup> Out of a number of exceptions to the general rule, one is of particular relevance to the Commission. Article 4(2) allows EU institutions to refuse access to documents drawn in the course of "inspections, investigations and audits." These include not only the sum of letters and documents informally exchanged between the Commission and Member States in the course of unofficial investigations and conducted negotiations but also the Commission's letter of formal notice and reasoned opinion which form an official part of the infringement procedure's pre-litigation stage, delimit the subject-matter of the dispute and define the Commission's claims. To Krämer, whereas confidentiality of initial contacts is justifiable, there is no reason both legally and practically why access to letters of formal notice and reasoned opinions cannot be made public since, in his opinion, it can actually facilitate voluntary compliance while these documents already tend to regularly leak to the public in such sectors as competition, internal market, fisheries or agriculture.<sup>43</sup> While non-binding and subject to revision, letters of formal notice and reasoned opinions are of particular interest to individuals and academics because a lot can be learnt from their content as regards the Commission's handling of the case, its assessment of the violation's extent as well as any alterations to its charges. Yet, under the mentioned regulation, the Commission cannot be obliged to reveal the content of any documents drawn in the course of its investigations.

One of the most famous cases in that regard was *Bavarian Lager*<sup>44</sup> in which an importer of German beer into the UK complained to the Commission because a British order prevented it from selling beer in British public houses, a measure having equivalent effect to quantitative restrictions. The Commission initiated the infringement procedure against the UK but in the light of pending amendments to British law, it had never sent the reasoned opinion. Bavarian Lager repeatedly asked the Commission to see the opinion which the Commission consequently turned down, relying on the confidentiality of infringement proceedings and "sincere cooperation and a climate of mutual confidence between the Commission and the Member State concerned [which allowed] both parties to engage in a process of negotiation and compromise with the search for a settlement to a dispute

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<sup>42</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents, OJ L 145, 31.05.2001, 43-48.

<sup>43</sup> Krämer, *The environmental complaint in EU law*, 2009 *Journal for European Environmental and Planning Law* 6, 25-26; Krämer, *Access to letters of formal notice and reasoned opinions in environmental matters*, 2003 *European Environmental Law Review* 12.

<sup>44</sup> Judgment of 14 October 1999, *Bavarian Lager*, T-309/97, EU:T:1999:257.



at a preliminary stage”.<sup>45</sup> Eventually Bavarian Lager brought the case before the Court of First Instance which upheld the Commission’s refusal, declaring that Member States expected confidentiality in the infringement procedure, and the disclosure of documents could jeopardize the purpose of the procedure which is voluntary compliance.<sup>46</sup> However, when Bavarian Lager brought a new action<sup>47</sup> before the Court of First Instance, still unable to gain access to the Commission’s documentation six years after the closure of the first case, the CFI ruled that such documents no longer constituted a part of an ongoing investigation and did not qualify under the exception of Article 4(2) of Regulation 1049/2001.<sup>48</sup> The Commission challenged the Court of First Instance ruling and brought the case to the Court of Justice which partially overruled the earlier judgment on the grounds of data-protection.<sup>49</sup> However, it did eventually uphold the new reasoning in 2007<sup>50</sup> when it announced that, once the Court ruled on an infringement, the possibility for an amicable solution was no longer valid and thus the exception no longer applied to the Commission’s documents from a closed procedure.<sup>51</sup> Later, the General Court ruled that the exception also did not apply to documentation from an investigation closed by the Commission during the pre-litigation stage unless related investigations were still underway and their goal was not yet achieved.<sup>52</sup> Interestingly, the Court of Justice, although underlining the bilateral nature of infringement proceedings, allowed for the possibility that such documents could be released also during a pending case if an interested party provided proof that the disclosure of a particular document would not undermine court proceedings.<sup>53</sup> However, the Court also held that the Commission can refuse a general request for access to all documents from the pre-litigation procedure relying on the general presumption that disclosure would undermine the protection of the purpose of the investigation. Documents from the pre-litigation procedure constitute a single category of documents and while the Commission may always carry out their specific examination in order to determine if they are not covered by the presumption or if an overriding public interest justifies their disclosure, it nonetheless cannot be compelled to examine individually each document requested in the case. In other words, the Commission is permitted to “reply to a global request for access in a manner equally global.”<sup>54</sup> The analysis of the EU courts’

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<sup>45</sup> Ibid., paragraph 19.

<sup>46</sup> Ibid., paragraph 46.

<sup>47</sup> Judgment of 8 November 2007, *Bavarian Lager v Commission*, T-194/04, EU:T:2007:334.

<sup>48</sup> Ibid., paragraph 149.

<sup>49</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378.

<sup>50</sup> Judgment in *Sweden v API*, C-514/07 P, C-528/07 P, and C-537/07 PS, EU:C:2010:541.

<sup>51</sup> Ibid., paragraph 120-122.

<sup>52</sup> Judgment of 14 February 2012, *Germany v Commission*, T-59/09, EU:T:2012:75. paragraph 74-81.

<sup>53</sup> Judgment in *Sweden v API* EU:C:2010:541, paragraph 102-104.

<sup>54</sup> Judgment in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 64-70.

judgments reveals that they seek to accommodate the objective of openness with the need for confidentiality, allowing certain exceptions while ensuring the continuing predominant secrecy of the Commission's enforcement practice. This clash is visible with respect to all the derogation clauses enumerated in Regulation 1049/2001 and applies also to remaining institutions such as the Council which is said to, on the one hand, strongly favor openness and, on the other, behave somewhat contrary to its commitments.<sup>55</sup>

Overall, despite the exceptions introduced by EU Courts, the confidentiality of the Commission's relations with Member States continues to be in most part protected to the dissatisfaction of the European Parliament and the Ombudsman.<sup>56</sup> Since the Commission is adamant at maintaining the secrecy of its dialogue with Member States, complainants also do not have access to most of the information in the EU Pilot procedure with the exception of the Commission's formal letters which mostly come down to reports and queries regarding the processing of the case and not its contents. Stakeholders lack access to the EU Pilot database, parties' arguments or the Commission's motivations to close cases.<sup>57</sup> They are not allowed to view state replies to the Commission's inquiries nor the grounds on which the Commission considers such replies as satisfactory.<sup>58</sup> Nevertheless, the Court-made exceptions to the confidentiality rule of infringement proceedings are considered to apply to the operation of the EU Pilot as well. According to Ballesteros et al., the closure of a file in the EU Pilot is analogous to the closure of a case in the infringement procedure and the Commission should disclose documentation from the EU Pilot investigation after its closure if such a request is made.<sup>59</sup>

While the Commission has guaranteed by means of a communication<sup>60</sup> basic complainants' rights in the EU Pilot analogous to those from the infringement procedure, their position is nonetheless considered unsatisfactory. It is advocated that their role is increased by granting them access to the EU Pilot database, informing them of arguments presented by national authorities and allowing to comment on these too.<sup>61</sup> Regarding both the EU Pilot and the infringement procedure, supporters of the accountability approach, including the European Ombudsman, believe that the objective of preserving the Commission's discretion does not stand in the way of increasing

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<sup>55</sup> Harlow, Rawlings (2014), 131-133.

<sup>56</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring the Application of Union Law: 2014 Annual Report, 2015/2326(INI), paragraph 6; European Ombudsman Annual Report for 2013, Good Administration in Practice: The European Ombudsman's Decisions in 2013, 24.

<sup>57</sup> Ballesteros et al. (2013), 73-74.

<sup>58</sup> Ibid., 77.

<sup>59</sup> Ibid., 76.

<sup>60</sup> Commission Communication Updating the Handling of Relations with the Complainant, COM(2012)154.

<sup>61</sup> Ballesteros et al. (2013), 108.

complainants' participation in the procedure by granting them access to its documentation, the parties' arguments and the Commission's justifications as well as by improving its generally-accessible database on infringements<sup>62</sup> which is criticized for being particularly complex, incomplete and inconsistent, making it difficult to search and track cases.<sup>63</sup> Some claim further that the lack of access to the content of reasoned opinions and letters of formal notice does not serve the Commission's image as the guardian of the Treaties dedicated to pursuing state infringements, nor does it help its strategy of involving other actors in the pursuit of Member States.<sup>64</sup> It is thus believed that if individuals had access to the Commission's documentation, they could lighten its workload by bringing cases before national courts and thus relieving its caseload burden. The Commission would then have "more to gain than ... to lose."<sup>65</sup> Finally, transparency means control. Although "a certain discretion and a certain courtesy towards the States is fitting," the disclosure of the Commission's documentation serves the purpose of control and allows for a quicker response from supervising bodies.<sup>66</sup> The lack of transparency in the infringement procedure allows the Commission to rely on considerations that escape legal boundaries and enter the political realm.<sup>67</sup> The prevailing confidentiality of the Commission's contacts with Member States thus strengthens the remaining pillars of bilateralism, flexibility and autonomy.

Granting individuals access to the Commission's documentation would indeed bring in more openness into its operation. The Commission could no longer escape public eye and negotiate deals with Member States as feared by the supporters of the accountability approach. Member States' failures would be routinely revealed to the public which would have a deterrent effect, encouraging reconsideration before action. This, however, could work only with respect to intentional violations. Publicizing every unintentional infraction could have a negative impact on Member States which would consider it unfair, unwarranted and unhelpful in the resolution of their problems. Additionally, transparency means economic costs to Member States.<sup>68</sup> If stakeholders learn of the details of ongoing cases they initiate national proceedings, increasing financial costs. It is, therefore, in the interest of states to rectify their unintentional violations in a confidential manner and as soon as possible. If such benefits of secretive discussions and amicable solutions are eliminated, then the state may feel as if it has nothing to lose, potentially choosing judicial proceedings over swift resolutions

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<sup>62</sup> European Ombudsman Annual Report for 2013, Good Administration in Practice: The European Ombudsman's Decisions in 2013, 24; Ballesteros et al. (2013), 86.

<sup>63</sup> Ballesteros et al. (2013), 89.

<sup>64</sup> Smith (2010), 144.

<sup>65</sup> Ibid., 215.

<sup>66</sup> Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986), 434.

<sup>67</sup> Ballesteros et al. (2013), 87.

<sup>68</sup> Andersen (2012), 79.

because they bring in a third, impartial party to judge a disputable violation and, in cases of specific prevailing interests, allow for the prolonged state of non-compliance.

It is, therefore, in the Member States' interest not to have their violations made public.<sup>69</sup> However, it can also be in the interests of the uniform application of EU law and the Commission's effectiveness and efficiency to keep information on non-compliance confidential. Transparency means that stakeholders can scrutinize every of the Commission's choices and see how it alters its charges or narrows down its claims, having the power to make their cases the subject of prolonged debates and political disputes before Member States have the opportunity to rectify their infractions or the Court to rule on them. While this can put positive pressure on the Commission, drawing the attention of the media to specific violations can also have the effect of forcing it to concentrate on selected infractions when, in fact, they may not be as important and may unnecessarily occupy its attention and resources at the cost of other, more pressing cases.<sup>70</sup> Mostly, however, publicizing a case takes on a political dimension which may prevent the Commission from solving it on the basis of factual and legal merits alone. While the Commission's confidentiality is seen as an allowance for political bias, transparency can have the same effect by broadcasting cases and subjecting them to political disputes that cannot always be reconciled with solutions based solely on professional, substantial merits. Finally, there is the problem of conflicting EU and national interests. Once the issue is made public, the state - to appease its voters - may have to actually resist the Commission and deliberately delay conformity to demonstrate that it is fighting for the interests of its citizens or businesses. If the matter is kept confidential, the government may silently conform, avoiding the need to justify its compliance to the public.

Confidentiality of relations with Member States allows the Commission to not only search for friendly solutions but to also apply pressure on them. When a violation is kept confidential, the shaming effect is not yet at play, which motivates Member States to rectify their infringements.<sup>71</sup> Revealing such information at an appropriate moment not only has the effect of naming and shaming but also informs citizens and businesses of their violated rights and potential court claims.<sup>72</sup> Public pressure can therefore induce Member States into compliance but, applied prematurely, it may discourage them from conforming by making them feel as if they have nothing to gain.

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<sup>69</sup> Borzsák, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU Law* (Wolters Kluwer, 2011), 51.

<sup>70</sup> *Ibid.*, 46.

<sup>71</sup> *Ibid.*, 52.

<sup>72</sup> Andersen (2012), 69.

Revealing the Commission's confidential documentation could surely give more arguments in national proceedings to citizens, companies and NGOs but it would not necessarily help them either considering that the Commission's documents contain merely charges and do not have the value of judgments. Since sometimes parallel litigations are taking place before national courts with conflicting opinions concerning the interpretation of contested norms, a premature exposure of the content of negotiations could actually lead to legal uncertainty for parties.<sup>73</sup>

The problem of the Commission's lack of transparency goes, however, further than just the inaccessibility of its documentation. The Commission's internal organization and working methods in the processing of state infringement are not really known to the public nor is it revealed who in fact is responsible for the elaboration of the Commission's enforcement policy with infringement decisions taken collegially and enforcement responsibilities spread between different DGs and services, each having its own internal rules.<sup>74</sup> These problems diminish the transparency of the Commission's enforcement practice understood as 1) knowledge of who makes decisions and 2) comprehensibility of the decision-making process. In contrast, the procedure under Article 260 TFEU where the Commission's management of penalties is considerably more transparent due to its communication<sup>75</sup> which explains how it calculates penalties and conducts the procedure. According to Smith, this openness is the result of a small power-struggle between the Commission and the Court of Justice, the latter assuming a more proactive approach towards financial penalties and elaborating in its judgments rules for their application, thus forcing the Commission to adopt a more active stance itself and publish its own rules on penalties within the limits set by the Court. Whatever the reasons, the Commission's openness in the procedure under Article 260 TFEU is seen as an improvement and a similar approach is advocated with respect to the infringement procedure under Article 258 TFEU.<sup>76</sup>

#### 5.4 Bilateralism v trilateralism

Since the beginning of European integration, the administrative phase of the infringement procedure has functioned as a bilateral dialogue between the Commission and infringing Member States. The launching of the judicial stage involved the Court of Justice while other Member States were allowed to intervene but, otherwise, no third parties participated nor were granted any rights. The pre-litigation phase was perceived and executed as a two-sided measure where the Commission

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<sup>73</sup> Ibid., 79.

<sup>74</sup> Smith (2010), 141.

<sup>75</sup> Commission Communication Application of Article 228 of the EC Treaty, SEC(2005)1658.

<sup>76</sup> Smith (2010), 205-206.

only cared for the Member States' right of defense, ignoring the expectations of whichever third parties that had an interest in the procedure's outcome. At the same time, the Commission has been relying on individuals for years as one of its major sources of information on state non-compliance, receiving yearly on average 3000 complaints.<sup>77</sup>

The Commission's reliance on complainants begun already in the late 1960s when it realized that there was a discrepancy between legislation and administrative practice especially in the sector of the free movement of goods. In order to establish a factual common market, the Commission sought the help of trade and transport associations to inform it of encountered difficulties while taking a commitment to resolve their problems.<sup>78</sup> Various stakeholders, from citizens to businesses and NGOs, unburdened with the requirement of exhausting national remedies and having to prove no interest or direct concern, begun resorting to this method either because they had no national recourse available or simply because it was an easier alternative. However, the infringement procedure's bilateral nature excluded them from its scope, barring them access to documents and preventing them from making observations of their own. Sometimes they were not even notified of the closure of the case which, to Harlow and Rawlings, was "an offence against civility."<sup>79</sup> Eventually, stakeholders sought the help of the European Ombudsman, asking it to have a closer look at the Commission's treatment of complainants and thus initiating the drive towards transforming the bilateral nature of the pre-litigation phase into a trilateral configuration.

One of the Ombudsman's first inquiries into the Commission's handling of the infringement procedure was in the *Newbury Bypass* case.<sup>80</sup> The complainant claimed that the UK had infringed Community law by allowing for the construction of a bypass without the required Environmental Impact Assessment (EIA) which, according to the complainant, should have resulted in infringement proceedings but which the Commission had failed to launch due to considerations of political nature. The complainant asked the Commission for clarification on the subject but all he ever received was scarce answers reiterating the usual Commission's jingle on its unconstrained discretion. Following an inquiry, the Ombudsman decided that the Commission was probably right to close the case but its handling of the complaint constituted maladministration due to its insufficient and greatly delayed reasoning.

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<sup>77</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 17; Commission 30<sup>th</sup> Annual Report on Monitoring (2012), COM(2013)726, 6; Commission 29<sup>th</sup> Annual Report on Monitoring (2011), COM(2012)714, 6.

<sup>78</sup> Krämer (2009), 17-18.

<sup>79</sup> Harlow, Rawlings (2006), 466.

<sup>80</sup> Decision of the European Ombudsman on complaint 206/27.10.95/HS/UK et al. against the Commission (29 October 1996).

This case, together with several other complaints, prompted the European Ombudsman to commence an own-initiative investigation into the Commission's enforcement conduct.<sup>81</sup> The Ombudsman did not, however, immerse itself in the vast and sensitive topic of the Commission's discretion but concentrated on introducing certain procedural rights for complainants. It, therefore, asked the Commission to always acknowledge the receipt of a complaint, keep the complainant informed, let it know of the closure of the case while allowing it to present its observations and finally to decide on a case within a year from its receipt.<sup>82</sup>

The Commission agreed to the Ombudsman's requirements but subsequent complaints proved that its commitment was not as serious as it was expected. Especially the reasoning of its decisions on closure was often vague, incomplete and even misleading.<sup>83</sup> The best example of the Commission's ignorance of complainants can be found in the *Parga* case<sup>84</sup> which, although commenced before the Ombudsman's own-initiative investigation, finished long after it was concluded. It involved the issue of abuse of power by a Commission's official who had a stake in letting the infringement persist because he belonged to a Greek political party supporting the illegal construction at issue. In that case a complainant claimed that Greece - in order to build a biological waste treatment plant - relied on misleading information to avoid a proper EIA. In the course of the following years, the complainant struggled to obtain exhaustive information from the Commission on the case, which had allowed for the construction to proceed and which provided him with either insufficient or deliberately misleading information or sometimes just not informing him at all. When the Ombudsman took interest in the case, it too was faced with the difficulty of extracting the information from the Commission which continually concealed, evaded or even refused to provide it. Upon conclusion of his investigation, the Ombudsman was dismayed by the Commission's conduct and its disregard of the few procedural guarantees agreed upon in the outcome of his own inquiry.<sup>85</sup>

Eventually, in 2002 the Commission published the Communication on Relations with the Complainant<sup>86</sup> where it mostly reiterated the procedural guarantees agreed on with the Ombudsman. From then on, the Commission would register every complaint, acknowledge the receipt and inform

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<sup>81</sup> Decision of the European Ombudsman in the own initiative inquiry 303/97/PD into the Commission's administrative procedures in relation to citizens' complaints about national authorities (13 October 1997); European Ombudsman Annual Report for 1997, 270-274.

<sup>82</sup> Decision of the European Ombudsman in the own initiative inquiry 303/97/PD.

<sup>83</sup> Smith (2010), 172-174.

<sup>84</sup> Decision of the European Ombudsman on complaint 1288/99/OV against the European Commission (18 July 2002).

<sup>85</sup> Ibid.; Smith (2010), 175-183.

<sup>86</sup> Commission Communication on Relations with the Complainant in Respect of Infringements of Community Law, COM(2002)141.

the complainant about every decision taken in the course of the infringement procedure. It bound itself with a time-limit of one year from registration to either issue a letter of formal notice or close the case. It would also allow the complainant to submit observations before closure and explain its decision. In 2012, the Commission issued another communication updating the previous,<sup>87</sup> mostly reaffirming the already-existing measures and adapting it to include the same guarantees for the EU Pilot. In 2009, the Commission created CHAP, a complaints registry system, which centralizes and simplifies the process of receiving, acknowledging and further managing the correspondence with complainants.

By issuing its communications, the Commission agreed to grant a third party some influence over its enforcement conduct but, although a step forward, it was not met with an enthusiastic response, constituting a half-measure that kept the accountability model at bay. First and foremost, the academia criticized the dominating confidentiality of relations with Member States which was discussed in the previous section. Aside from that, it did not like the non-binding nature of the Commission's communications nor the fact that nowhere did it actually commit itself to abiding by the enumerated measures, talking instead only of how it "undertakes to comply" with them.<sup>88</sup> The Commission's careful wording was underlined where it talks only of "set[ting] out the grounds" and not "fully reasoned decision."<sup>89</sup> The communications might look like they created legitimate expectations for complainants but no measure allowed stakeholders to rely on those expectations against the Commission if it did not respect any of the enumerated rules.<sup>90</sup> The Commission was thus considered to have fallen short of offering sufficient procedural rights to complainants. Its commitment to provide stakeholders some minimal guarantees was a concession on its part but one that failed to meet the expectations of the accountability approach which has its own vision of the complainants' role in the Commission's enforcement.

A study from 2013 commissioned by the European Parliament stated that the role the Commission attributed individuals is 'meager' and it is contrary to the White Paper on European Governance<sup>91</sup> and Article 1 TEU which talks of decisions taken as openly and as close to citizens as possible.<sup>92</sup> The Commission's right to close the case - which, in itself, ought to be safeguarded - is not irreconcilable with the introduction of a "legally binding regulatory framework for handling

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<sup>87</sup> Commission Communication Updating the Handling of Relations with the Complainant, COM(2012)154.

<sup>88</sup> Smith (2010), 186; European Parliament Resolution of 16 May 2006 on the Commission's 21<sup>st</sup> and 22<sup>nd</sup> Annual Reports on Monitoring the Application of Community Law (2003 and 2004), 2005/2150(INI), paragraph 26.

<sup>89</sup> Smith (2010), 186.

<sup>90</sup> Ibid., 192-193.

<sup>91</sup> Commission White Paper on European Governance, COM(2001)428.

<sup>92</sup> Ballesteros et al. (2013), 68.



complaints” and the individuals’ greater involvement in the infringement procedure.<sup>93</sup> According to the study, the procedure’s effectiveness would increase if the Commission secured individual rights in a clear and binding manner and gave them access to arguments presented in the case and the reasons for its decisions.<sup>94</sup>

In line with the accountability model, Krämer already in 1996 criticized the soft-law nature of complainants’ guarantees.<sup>95</sup> Smith advocates that affording complainants binding procedural rights should put constraints on the Commission, provided they were guaranteed by the scrutiny of the Ombudsman.<sup>96</sup> These - as she calls them - “very limited controls” would allow for better efficiency and equality in the handling of both, Member States and stakeholders, and would promote “a good administrative culture” manifesting itself by internal and external accountability.<sup>97</sup> Smith believes she does not advocate complainants becoming parties to the procedure nor that all of the administrative stage should be regulated by means of secondary legislation, but that the Commission ought to legally protect the very basic administrative rights of complainants such as the duty to give grounds for its decisions.<sup>98</sup>

Reasoning along similar lines but going a little further than Smith, the European Parliament also opposes the soft-law nature of individuals’ rights in the infringement procedure and it has been calling on the Commission for years to adopt a “procedural code” in the form of a regulation under Article 298 TFEU in order to strengthen rights attributed to individuals by tackling issues such as notifications, binding time-limits, the right to be heard and the right to access one’s files as well as the Commission’s obligation to state reasons.<sup>99</sup> This is part of the Parliament’s quest for a codified “European Law of Administrative Procedure” which would govern contacts between EU institutions and citizens.<sup>100</sup> Such a code is seen as a benefit because it would structure inter alia the Commission’s selective enforcement, compelling it to become uniform, consistent, transparent and objective in its decisions.<sup>101</sup> In other words, it would force the Commission to give up its discretionary model of

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<sup>93</sup> Ibid., 86.

<sup>94</sup> Ibid., 88.

<sup>95</sup> Krämer, *Public Interest Litigation in Environmental Matters before European Courts*, 1996 *Journal of Environmental Law* 8, 3.

<sup>96</sup> Smith (2010), 183.

<sup>97</sup> Ibid., 202.

<sup>98</sup> Ibid., 213.

<sup>99</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 8; European Parliament Resolution of 10 September 2015 on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253/(INI), paragraph 19; European Parliament Resolution on the 29<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2011), 2013/2119(INI), paragraph 17, 19-20; EP Resolution on the 21<sup>st</sup> and 22<sup>nd</sup> Annual Reports on Monitoring (2003 and 2004), 2005/2150(INI), paragraph 26.

<sup>100</sup> Harlow, Rawlings (2014), 333.

<sup>101</sup> Ibid., 331.

enforcement, replacing the four pillars with their counterparts: transparency, trilateralism, objectivity and accountability. Since the Commission has never heeded this particular demand, the Parliamentary Committee on Legal Affairs has recently set up a new Working Group on Administrative Law<sup>102</sup> in order to prepare a draft regulation on administrative law for EU administration as a “source of inspiration for the Commission, not in order to question the Commission’s right of initiative, but to show that such a regulation would be both useful and feasible to enact.”<sup>103</sup> By means of the new code, the Parliament seeks to impose *de minimis* rules (with no possibility of *lex specialis*), including the right to be heard, to access to one’s file, time-limits and duty to state reasons, form and notification of decisions.<sup>104</sup> The purpose is to regulate in a binding, uniform manner all contacts of EU institutions with citizens, strengthening their legitimacy and ensuring transparency and objectivity in case-handling.<sup>105</sup>

Aside from securing complainants’ rights by means of hard-law, academics also draw the attention to how the Commission uses its communications to set the line between administrative aspects of the procedure which fall under the Ombudsman’s examination and the substantial aspects that remain within the sole domain of the Commission’s discretion.<sup>106</sup> The Commission’s commitment to decide on a case within a year from the registration of a complaint is also criticized as well as the possibility to prolong this time-limit. Munoz would welcome the overall shortening of all the deadlines in the procedure, including the time it takes the Commission to process complaints.<sup>107</sup> Only large companies have the time and resources to await the successful completion of their cases in contrast to small and medium enterprises.<sup>108</sup> According to the European Ombudsman, the Commission ought to explain not only its decisions on closure but also its delays “in a clear and convincing manner.”<sup>109</sup>

Many authors contrast the infringement procedure with other mechanisms in order to emphasize how poorly individuals are treated by the Commission. For example, they stress that the regime under ECSC Treaty was more favorable to individuals who could bring an action for failure to act against the Commission because the latter, in the course of infringement proceedings, adopted

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<sup>102</sup> European Parliament Resolution of 15 January 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union, 2012/2024(INL).

<sup>103</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 9.

<sup>104</sup> European Parliament Resolution on a Law of Administrative Procedure, 2012/2024(INL), Annex: Detailed Recommendations as to the Content of the Proposal Requested.

<sup>105</sup> *Ibid.*

<sup>106</sup> Smith (2010), 187.

<sup>107</sup> Munoz, *The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate*, 2006 Jean Monnet Working Paper 4, 33.

<sup>108</sup> Munoz (2006), 16.

<sup>109</sup> Decision of the European Ombudsman closing his inquiry into complaint 412/2012/MHZ against the European Commission (25 September 2013), paragraph 39.

not a reasoned opinion but a reasoned decision which was a reviewable measure.<sup>110</sup> Others point to procedures in areas of competition and state aid where the rights of complainants are guaranteed by means of binding rules that are protected by EU courts.<sup>111</sup> Yet others do not advocate the introduction of individual challenges to the Commission's decisions in the infringement procedure but, instead, suggest the possibility of reopening of closed cases if an individual received a positive opinion from the Ombudsman and respected certain deadlines.<sup>112</sup> Finally, there were those who suggested that public interest groups ought to gain the right to submit non-compliance cases to the Court of Justice if the Commission failed to act within a specific deadline.<sup>113</sup>

Citizens are, therefore, often seen as a third but overlooked actor in the infringement procedure as well as a bringer of accountability and a potential discharger of control over the Commission's activities. Commentators concentrate on the important role EU citizens play in keeping the Commission informed about state non-compliance and cannot accept how it refuses to recognize this beyond mere few soft-law promises that are not followed by any binding commitments. They disagree with the Commission's insistence on the bilateral nature of the infringement procedure and regret the lack of binding procedural rights that would afford individuals a degree of influence over the Commission's conduct. In the end, even though commentators try to show restraint in advocating the Commission's greater consideration of stakeholders, they do come close to suggesting the transformation of the procedure's bilateral nature into trilateral, even if not explicitly then tacitly.

It is, therefore, not surprising that the Commission's eventual transformation of the EU Pilot into yet another confidential and bilateral instrument was not received well. Here too, complainants do not participate in the procedure nor are they granted any special rights beyond the general exchange of information regarding the processing of the file. Their minimal guarantees correspond to those in the infringement procedure and, not surprisingly, result in similar criticism.<sup>114</sup> At the same time - just as in the infringement procedure - the Commission does not always respect these minimal rights, provoking Ombudsman's new investigations.<sup>115</sup> In 2015, 20,2% of inquiries closed by the

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<sup>110</sup> Hartley, *The Foundations of European Community Law* (Oxford University Press, 2003), 317.

<sup>111</sup> Krämer (2009), 33-35; Maselis, Gilliams, *Rights of Complainants in Community Law*, 1997 *European Law Review* 22, 107-124.

<sup>112</sup> Munoz (2006), 37-38.

<sup>113</sup> Campaign "Greening the Treaty II" presented in 1995 by six environmental organizations at the Intergovernmental Conference on the amendment of the Maastricht Treaty, after Krämer (1996), 12-14.

<sup>114</sup> Ballesteros et al. (2013), 77.

<sup>115</sup> Decision of the European Ombudsman closing the inquiry into complaint 943/2014/MHZ against the Commission (23 June 2014); Decision of the European Ombudsman closing the inquiry into complaint 332/2013/AN against the Commission (13 January 2014).

Ombudsman concerned the Commission's performance of its guardian function. In 2014 it was 19,3%.<sup>116</sup>

On the other hand, national officials consider the EU Pilot a "privileged relationship" which - protected by its confidentiality - allows them to cooperate in a friendly manner and find an amicable settlement. They believe that granting complainants participatory rights would change the nature of this relationship and thwart the possibility of achieving compliance by means of cooperation.<sup>117</sup> According to national authorities, maintaining the EU Pilot's confidential, bilateral nature "enables the parties to negotiate solutions which are politically and legally acceptable."<sup>118</sup> Member States are, therefore, against turning the EU Pilot into a trilateral process but they do not object the Commission staying in touch with complainants who can clarify the information it receives.<sup>119</sup> Extending stakeholders' rights, however, would give the EU Pilot a more contradictory and less conciliatory nature.

The study commissioned by the European Parliament underlines the necessity of increasing the legitimacy and legality of the EU Pilot. The former can be achieved by introducing more transparency into its operation and granting more rights to complainants such as access to the database, parties' argumentation and the opportunity to comment on state replies. The latter can be realized by adopting a "legally binding regulatory framework" that would regulate the position of complainants and the operation of both the EU Pilot and the infringement procedure. It should take the form of a regulation, define the objective of the EU Pilot and contain clear rules regarding the role of the Commission, the national authority and complainant as well as that of the European Parliament. It should regulate the time-limits for each of the consecutive stages of both the EU Pilot and the infringement procedure and define participants' access to documentation as well as rules on the justification of the Commission's decisions. According to the study, the adoption of such an instrument should increase the effectiveness and efficiency of the Commission's resources and speed up the process by eliminating the Commission's leeway for informal negotiations.<sup>120</sup>

Not all commentators support the extension of complainants' rights, be it the infringement procedure or the EU Pilot, speaking in favor of the discretionary model of enforcement. Andersen, for example, says that the infringement procedure is not a "remedy for citizens and enterprises against Member State infringements"<sup>121</sup> nor is the Commission a "handmaiden of individual complainants,

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<sup>116</sup> European Ombudsman Annual Report for 2015, 35; European Ombudsman Annual Report for 2014, 20.

<sup>117</sup> Ballesteros et al. (2013), 74.

<sup>118</sup> Ibid., 104.

<sup>119</sup> Ibid., 78.

<sup>120</sup> Ibid., 109.

<sup>121</sup> Andersen (2012), 72.

Member States or institutions.”<sup>122</sup> Borzsák underlines the declaratory nature of the Court’s judgment pointing out that the infringement procedure simply does not provide the possibility of satisfying individual grievances which have to be sought before national courts.<sup>123</sup>

In the end, it should be underlined that the guarantees the Commission afforded complainants, although minimal, soft-law and not always abided by, had the outcome of limiting its discretion in the infringement procedure. They imposed on the Commission particular non-binding obligations with respect to complainants which, ultimately, had the result of constraining the Commission’s freedom even if the bilateral nature of the procedure as well as the Commission’s core discretionary powers were preserved. Nowadays, the Commission can no longer simply ignore complainants. As Rawlings put it already in 2000 “[a] more populist age in which the ‘People’ are demanding ‘Voice’ appears to be upon us.”<sup>124</sup> The Commission thus has to maintain stakeholders informed of all the steps taken in the procedure or the EU Pilot and, whenever it chooses to close the case before referral to the Court, it has to set out the grounds for the decision and allow the complainant to comment on it. This limits the Commission’s maneuverability in its selective enforcement where it can no longer perpetually postpone taking action or arbitrarily decide to close cases without finding some sort of justification for it. In the greater scheme of things where the entirety of the Commission’s discretion is considered, the few administrative measures the Commission committed itself to do not seem to constitute such a large burden but they did have a considerable effect on the Commission’s supply, an issue that is often overlooked in studies on the infringement procedure (chapters 7 and 8).

## 5.5 Flexibility v objectivity

One of the cornerstones of the Commission’s selective enforcement is its power to choose appropriate methods to deal with state infractions. In terms of the accountability model’s main premises, what is mostly relevant here is the Commission’s discretion to set aside the infringement procedure or even the EU Pilot and rely on some other method of resolution, such as confidential negotiations.<sup>125</sup> While the problem of the Commission’s confidentiality has already been addressed, what matters here is its capacity to choose or even create ad hoc enforcement tools in order to circumvent formalized measures. Such informal tools, despite their potential differences, can all be

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<sup>122</sup> Ibid., 82.

<sup>123</sup> Borzsák (2011), 44.

<sup>124</sup> Rawlings (2000), 5.

<sup>125</sup> Judgment in *Commission v Malta*, C-12/14, EU:C:2016:135, paragraph 24; Judgment in *Commission v Poland*, C-311/09, EU:C:2010:257, paragraph 19.

put in one bag with confidential negotiations on account of their dominating secrecy, lack of any rules or outside control. Despite all the reforms that the Commission's confidentiality and its handling of complainants have undergone, the new criteria which intensify the use of the EU Pilot and - to a degree - structure and formalize the Commission's selective enforcement still do not negate the possibility of confidential negotiations taking place and, for that reason, this method of enforcement remains an issue for supporters of the accountability approach.

Not everyone opposes the practice of confidential negotiations. Bieber and Maiani, for example, argue that it is "at the very least advisable" that each compliance instrument leaves space for cooperation and negotiations because, firstly, it permits to address unintentional cases of non-compliance and, secondly, avoids proceedings which are obviously more costly.<sup>126</sup> However, as shown in section 5.3, reservations towards secretive negotiations are quite common, remaining strongly connected to issues of the Commission's confidentiality. We do not know what is happening behind closed doors during the Commission's negotiations nor do we have access to cases that were resolved by means of this method. As a result, we have little knowledge regarding its actual application and cannot assess how many and which types of violations are subjected to it, making it impossible to analyze, evaluate and scrutinize the Commission's conduct. This leaves us with assumptions regarding its reliance on negotiations based on selected publicized cases that do not necessarily reflect its practice nor prove anything about its policy. In a world of transparency and accountability, we distrust anachronistic constructs veiled by the curtain of secrecy. Most of all, we fear that negotiations lead to bargaining and that bargaining leads to concessions made at the cost of something important, be it consumers, the environment or legitimacy. We suspect that the Commission relies on its own classified set of priorities where questionable, controversial objectives may replace those publicized and generally acceptable. Political considerations feature at the top of that list.

The issue of confidential negotiations is, therefore, closely connected to the problem of the Commission's flexibility understood as the power, or rather freedom, to make enforcement choices on grounds other than law and facts specific to the case at hand. Sometimes, the Commission's decisions are based on factors such as political considerations or serve the attainment of long-term objectives, and the Commission's 'opinions' or 'feelings' about a case can influence its choice of compliance instruments, priority order or set deadlines. As a result, not all violations and Member States are, in practice, treated equally. The Commission's broad discretion gives it some leeway to manage cases on the basis of more than just objective considerations, and serve goals that transcend

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<sup>126</sup> Bieber, Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 2014 Common Market Law Review 51, 1061.

immediate and categorical compliance, which can be often visible in politically sensitive situations. In the famous ‘empty-chair’ crisis, when France refused to participate in the Council’s meetings to demonstrate its disapproval for the Commission’s project on qualified-majority voting in agriculture matters, the latter chose not to institute infringement proceedings because it knew that France was likely to boycott them as it was already in open defiance. Instead, the Commission attempted to find an amicable solution by means of informal dialogue and, in the end, the Luxemburg Accords were adopted resolving the original crisis.<sup>127</sup>

The rationale behind the Commission’s role as the guardian of the Treaties seems to contradict such flexibility, emphasizing its neutrality and objectivity. Article 17(3) TEU states that “[i]n carrying out its responsibilities, the Commission shall be completely independent.” While this provision refers to its autonomy from Member States’ influences and it is mostly about preventing individual officials from pursuing national interests, it nonetheless brings into light the issue of the Commission’s neutrality in its treatment of Member States and its independence in its role of guardian.<sup>128</sup> According to Hedemann-Robinson the drafters of the Treaties sought to connect the Commission’s autonomy with its impartiality by ensuring that it could perform its enforcement powers without external pressure.<sup>129</sup> Not surprisingly the European Parliament understanding of the Commission’s enforcement role is that it ought to remain objective and fair and treat Member States equally.<sup>130</sup> In its recommendations to a potential EU administrative procedure law, it insists that EU administration ought to be “impartial and independent.”<sup>131</sup> Interestingly, the Commission itself talks of enforcing the law fairly.<sup>132</sup> Further, it is said that since the EU is founded on the rule of law, the Commission’s decisions ought to be based on legal and factual grounds and not on some other considerations that, in the end, bring in a differentiation in the treatment of infringement cases and among Member States.<sup>133</sup> Yet, does not the practice of national courts demonstrate that they take into account not only matters of law and fact but also intention, background or other special circumstances? Article 4(2) TEU underlines the EU’s duty to respect Member States’ equality. However, according to Bieber and Maiani, this rule prohibits unjustified treatment of comparable situations. Since Member States

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<sup>127</sup> Borzsák (2011), 64.

<sup>128</sup> Krämer (1996), 9.

<sup>129</sup> Hedemann-Robinson (2015), 240.

<sup>130</sup> European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253(INI), paragraph 8.

<sup>131</sup> European Parliament Resolution on a Law of Administrative Procedure, 2012/2024(INL), Annex, recommendation 3.

<sup>132</sup> Commission Communication Better Monitoring of the Application of Community Law, COM(2002)725, 11.

<sup>133</sup> European Parliament Resolution on a Law of Administrative Procedure, 2012/2024(INL), Annex, recommendation 3.

differ from one another in terms of their size, demographics, economic development and administrative capacity, “differences in treatment are indeed enshrined in the Treaties and may be mandated ... by the principle of equal treatment itself.”<sup>134</sup>

The difficulty with the Commission's enforcement role lies in the fact that it is not the only function that the Commission performs in the European Union. Its main objective is the promotion of the general interest of the EU and, to this end, it conducts a series of executive, administrative, legislative and even agenda setting functions. The result is such that, whilst it pursues Member States for their failures, it also has to cooperate with them on a number of levels, including the adoption of laws. This can sometimes lead to a clash of interests whereby the Commission's enforcement role collides with another function, putting it in a position of mutually exclusive choices.

The Commission's multi-functionality thus leaves it in a position where it has to make compromises or choose between alternative goals and values. The most obvious example can be found in the Commission's attitude towards violations of national judiciaries. As was shown in chapter 3, its policy has evolved in that area and nowadays the Commission sometimes institutes infringement proceedings with respect to such violations but, overall, pursuing national courts is still something it would rather avoid because it could jeopardize long-term objectives of mutual trust between the Court of Justice and national judges, necessary for the success of the decentralized enforcement mechanism.

The result, however, of the Commission's flexibility in its selective enforcement is such that it is considered - in its enforcement function - a semi-political body<sup>135</sup> with underlined “direct and substantial” political impact on its administrative procedure.<sup>136</sup> And reliance on political considerations, no matter how important, is a controversial issue that finds strong opposition in the academia.<sup>137</sup> Krämer believes that the Commission's exposure to the influence of different interests decreases the effectiveness of its enforcement.<sup>138</sup> Smith claims that such flexibility does not fit with the principle of good governance from the Commission's White Paper.<sup>139</sup> It can lead to abuse of power, reduces the efficiency of the administration of the procedure, shields Member States from having to fulfill their obligations and is simply not appropriate any more.<sup>140</sup> In fact, Smith believes that the infringement procedure functions as “a political process masquerading as a legal mechanism,” which

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<sup>134</sup> Bieber, Maiani (2014), 1062.

<sup>135</sup> Andersen (2012), 69.

<sup>136</sup> Harlow, Rawlings (2014), 329.

<sup>137</sup> Hedemann-Robinson (2015), 221; Smith (2010), 206.

<sup>138</sup> Krämer (1996), 9.

<sup>139</sup> Commission White Paper on European Governance, COM(2001)428.

<sup>140</sup> Smith (2010), 206.



ultimately prevents it from achieving its goals.<sup>141</sup> As a result, a large portion of the accountability approach is concerned specifically with the Commission's flexibility. The European Parliament's quest to codify rules on the Commission's handling of complainants seeks to ensure that the Commission's officials do not make decisions on the basis of personal, national or political interests.<sup>142</sup> In fact, it suspects that the EU Pilot's high success rate does not stem from Member States' better compliance with EU law but from "compromise solutions."<sup>143</sup> Similarly, already presented (section 5.3) attempts at introducing greater transparency to the Commission's selective enforcement seek to eliminate the opportunities for it to rely on external objectives and questionable grounds.

It cannot be denied that this kind of flexibility in the Commission's enforcement choices can lead to serious abuses of power as was in the *Parga* case where a Commission's official continuously disregarded a Greek violation because he had a personal stake in allowing it to persist.<sup>144</sup> Nor can it be denied that the Commission can use its flexibility to further its own interests. In 1998, it brought a series of cases before the Court concerning the conclusion by eight Member States of bilateral open skies agreements with the United States on the grounds that they encroached on the Commission's external competence as regards air fares on intra-Community routes.<sup>145</sup> The Commission was at that time waging a battle with the Transport Council over an extended mandate to negotiate an open skies agreement with the US. By resorting to Article 258 TFEU, it used the procedure and the Court as a means of pressuring Member States and, ultimately, won.<sup>146</sup>

As a result, it is difficult not to agree with above criticism. In a world based on democratic values, situations where the factual and legal circumstances are not the only determinants of a case feel as an offence towards the rule of law while posing a threat of abuse by the Commission and Member States alike. On the other hand, the problem concerns issues of responsibility of wielders of international agreements which, despite many powers transferred to the EU level, are still sovereign states that are represented in the Council and have decisive impact on the shape and future of the EU. Their role cannot be underestimated and neither can their power to further or block the European integration be disregarded. Rawlings calls it the "élite model of bargaining" and claims that its time

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<sup>141</sup> *Ibid.*, 217.

<sup>142</sup> Harlow, Rawlings (2014), 333.

<sup>143</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), Explanatory Statement by the Committee on Legal Affairs.

<sup>144</sup> Decision of the European Ombudsman on complaint 1288/99/OV.

<sup>145</sup> Judgments in: *Commission v UK* (C-466/98, EU:C:2002:624), *Commission v Denmark* (C-467/98, EU:C:2002:625), *Commission v Sweden* (C-468/98, EU:C:2002:626), *Commission v Finland* (C-469/98, EU:C:2002:627), *Commission v Belgium* (C-471/98, EU:C:2002:628), *Commission v Luxembourg* (C-472/98, EU:C:2002:629), *Commission v Austria* (C-475/98, EU:C:2002:630), and *Commission v Germany* (C-476/98, EU:C:2002:631).

<sup>146</sup> Karagiannis, Héritier, *The New Institutions of Transatlantic Aviation*, 2010 IBEI Working Papers 32, 10-12.

has come and gone and, to a degree, he is right by demonstrating how individuals are gaining ground and how the infringement procedure itself is evolving into a more formalized mechanism.<sup>147</sup> Yet, certain aspects of this model still prevail even if just because the EU is not a federation but an organization assembling sovereign states. Thus, not all rules that apply to national proceedings or the rights and duties of their parties, prosecutors, administrative organs etc. should be directly transposed into the infringement procedure. Further, the European Union is an international organization and, although based on democratic values and having injected many of them into its operation, it is not a democratic state. But even setting this aside, it ought to be reminded that dialogue and political agreements constitute an inherent and indispensable feature of democracies. Consensus is not achieved by flawless argumentation that sways the political opposition to one's side. On the contrary, consensus is an agreement attained by means of negotiations that are political by nature and which result in an exchange of benefits and assistance. It is this exchange which motivates others to support one's goals and which constitutes the core of democratic systems that allow for multiple opinions to coexist as opposed to totalitarian systems which impose solutions without offering anything in return.

Consequently, there are those who believe that only a political institution with negotiation-based, politically-infused methods can induce Member States to comply.<sup>148</sup> "Political dialogue" can be seen as constituting the "essence of the pre-litigation stage" allowing parties to address issues which are more political than legal.<sup>149</sup> Most of all, however, the Court of Justice appears to be accepting the political aspect of the Commission's enforcement practice, recognizing the need for political settlements that the Commission is most qualified to make, while being aware of its own limitations in that matter.<sup>150</sup> It thus does not question the Commission's motivations in its enforcement practice, refusing to assess goals it pursues as long as it abides by procedural rules.<sup>151</sup>

As long as the Commission maintains its multiple roles in the EU legal system, it is difficult to imagine how it could abandon considerations of its cases' outcomes and their political implications. The introduction of the EU Pilot with its overall replacement of informal negotiations and its straightforward and clear criteria to decide the choice of compliance instruments does limit the Commission's freedom to take into consideration political objectives. However, due to its dominantly confidential nature, it does not prevent it altogether nor prohibits the Commission from resorting to other informal means of dialogue or bargaining if it considers it necessary. Instead of perceiving the

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<sup>147</sup> Rawlings (2000), 8-12.

<sup>148</sup> Audretsch (1986), 440.

<sup>149</sup> Prete, Smulders, *The Coming of Age of Infringement Proceedings*, 2010 Common Market Law Review 47, 11.

<sup>150</sup> Arnulf, *The European Union and its Court of Justice*, 2nd ed. (Oxford University Press, 2006), 36.

<sup>151</sup> Judgment in *Commission v Italy*, C-255/05, EU:C:2007:406, paragraph 38.

infringement procedure as a flawed mechanism due to its semi-political nature, this could be seen as a benefit, a way out of legal procedures that allows to mitigate difficult situations, fulfill long-term objectives and achieve results in more ways than one.

## 5.6 Autonomy v accountability

The Commission's extensive discretion, allowing it to maintain confidential and bilateral relations with Member States and to bargain its way to a compromise would mean nothing if there was an institution that would have the power, means, capacity, and will to genuinely scrutinize its enforcement conduct. As the situation stands, however, some institutions have the power and means but no will or capacity (CJEU), and others have the will, power and capacity but no means (EP). As a result, very little control is exercised over the Commission's selective enforcement. With no institution to truly supervise its conduct, the Commission's management of state infringements appears to some as "a regulatory black hole without adequate checks and balances on institutional power."<sup>152</sup> This defies the very idea behind the accountability approach that perceives institutions' accountability as an "essential element in democratic governance"<sup>153</sup> that guarantees their legitimacy in the eyes of citizens.

Autonomy, is one of the four key pillars of the Commission's selective enforcement but it is also a feature that encapsulates and determines the existence of the others (confidentiality, bilateralism and flexibility). As long as no actual control is exercised over the Commission, it can maintain its relations with Member States a secretive and bilateral dialogue during which long-term objectives and political considerations surpass the immediate goal of absolute compliance. While all pillars are dependent on each other, without autonomy there would be no confidentiality of relations with Member States and the Commission could no longer balance alternative goals and pursue long-term objectives, each of its enforcement decisions subject to external review. Autonomy is, therefore, crucial to the Commission's selective enforcement in its current shape but it is also a flag reform advocated by the supporters of the accountability model of enforcement.

The accountability approach is not, however, unified in its vision of the Commission's potential accountability, offering three solutions to the question of the appropriate supervising body: the Court of Justice, the European Parliament and the Ombudsman. Out of the three, the most obvious choice is the Court on account of its already-existing judicial powers of review. However, it is also the one institution that - aside from the Commission - supports the discretionary model of enforcement and

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<sup>152</sup> Smith (2010), 195.

<sup>153</sup> Harlow, Rawlings (2014), 338.

which has never been that eager to look into the Commission's exercise of its discretion. The only limits imposed by the Court on the Commission's autonomy in the infringement procedure are directly related to the protection of the Member States' right of defense and the few derogations from the rule on confidentiality already discussed in section 5.3. Otherwise, the Court has never really interfered with how the Commission exercises its powers, instead ensuring that the Commission's freedom of assessment is protected against encroachment from other sources, refusing to accept individual challenges to measures taken (or not taken) by the Commission in the procedure.<sup>154</sup> To initially explain its reservation the Court relied on the argument that measures adopted in the administrative stage were not binding and thus could not be challenged. Later, it grounded its reasoning in individuals' lack of locus standi or interest to sue.<sup>155</sup>

The Court's persistent declarations of inadmissibility even before any discussion on the merits of a case can begin whenever an individual attempts to challenge the Commission's measures, signify that it is determined to maintain the infringement procedure an arena reserved only for privileged actors with the elite model of accountability.<sup>156</sup> Not only is the Court not interested in supervising the Commission's exercise of its discretion beyond protecting Member States' rights but it is also effectively blocking the injection of other models of control.<sup>157</sup> In a way, it has created a "judicial firewall around Commission discretion".<sup>158</sup> Some authors claim that this has allowed "inappropriate administrative practices [to] flourish" in the Commission, which even the European Ombudsman was unable to eradicate.<sup>159</sup>

The Court's unwavering protection of the Commission's discretion stems not only from the wording of Article 258 TFEU which does not include any reference to third parties influencing the Commission's enforcement decision-making but also from the fact that - to the Court - the Commission "appears to be entitled to take into account ... not just the technical question whether an infringement has taken place but also the overall political context." In this respect, the Court of Justice feels it may lack the knowledge to properly assess all political aspects that the Commission sees and thus jeopardize any perspective for settlement that could be ongoing. Also, explaining such political considerations to individuals could prove to be a significant administrative burden and this is why the Court prefers to prevent subjecting the Commission's discretion to outside challenges.<sup>160</sup> The Court

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<sup>154</sup> Order of 10 March 2014, *Spirlea v Commission*, T-518/12, EU:T:2014:131, paragraph 19; Order in *API v Commission*, C-461/06 P, EU:C:2007:425, paragraph 24.

<sup>155</sup> Harlow, Rawlings (2006), 457.

<sup>156</sup> *Ibid.*, 458.

<sup>157</sup> *Ibid.*, 474.

<sup>158</sup> *Ibid.*, 185.

<sup>159</sup> Smith (2010), 208.

<sup>160</sup> Arnall (2006), 36.

thus sees its role of judicial review as that of verifying the legality of administrative decisions and it refrains from exploring issues of their correctness or deciding on their merits. It does not perceive itself as a substitute for an “appointed decision-maker.”<sup>161</sup>

Aside from the Court of Justice, the Commission’s accountability is also discussed with respect to the European Parliament before which the Commission is already politically responsible and which is an institution well suited to audit the Commission’s enforcement conduct. Most of all, it is an institution eager to assert more control over the Commission.<sup>162</sup> However, as things stand, the Parliament’s powers of ‘guarding the guardian’ are so narrow that it barely does anything more than discuss the Commission’s annual reports and give recommendations. It neither has the means nor the information to properly execute its control, even more so that the Commission is repeatedly withholding information from it.<sup>163</sup> As a result, the Parliament does not even know what are the Commission’s resources nor its internal procedures, and - without any system of coercion - it is unable to exercise any sort of actual scrutiny.<sup>164</sup> The European Parliament is frustrated with the insufficiency of received information about the EU Pilot and infringement cases and, as a result, doubts the Commission’s compliance rate, questioning whether it is due to Member States improved conformity or “compromise solutions.”<sup>165</sup> To Smith, who believes that “[t]he principle of accountability should be the very essence of [Article 258 TFEU]”, this is far from what accountability really signifies and what it should signify for the infringement procedure. What is lacking in the Parliament is “independence and the ability to coerce a change in behavior” and so she advocates greater parliamentary involvement and control over the Commission’s activities. The practice, however, is such that the Parliament, after discussing each of the Commission’s reports, enacts a resolution where it invites it to carry out certain improvements but these are not binding upon the Commission and, according to Smith, the Commission does not take such recommendations even the least bit seriously.<sup>166</sup>

The parliamentary Petitions Committee which, under Article 227 TFEU, receives petitions from individuals directly affected by matters falling within “the Union’s fields of activity,” helps the Parliament perform its minimal control over the Commission but its powers in that regard are also

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<sup>161</sup> Harlow, Rawlings (2014), 66.

<sup>162</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI); European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253/(INI); European Parliament Resolution of 21 November 2012 on the 28<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2010), 2011/2275(INI); European Parliament Resolution of 14 September 2011 on the 27<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2009), 2011/2027(INI).

<sup>163</sup> *Ibid.*, paragraph 10, 35.

<sup>164</sup> Smith (2010), 219.

<sup>165</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 6, Explanatory Statement of the Committee on Legal Affairs.

<sup>166</sup> *Ibid.*, 145-146.

very limited.<sup>167</sup> Aside from passing the petition further to the Ombudsman or preparing a report and presenting it to the Parliament, the Committee does not possess any coercive measures to influence the Commission's decisions. However, its role is slowly improving. In 2004, the Petitions Committee threatened the Commission with the possibility that, in case of a "significant difference of interpretation" with regard to the Commission's enforcement powers and "for the protection of citizen's rights," the Parliament could resort to the action under Article 263 TFEU. However, it is doubtful if such an action could at all be successful.<sup>168</sup> The Petitions Committee is tired of the Commission's continuous reluctance to provide it with information even with respect to instances of violations that it received via a petition. It insists that the Commission could - when requested by citizens - provide more information on its investigations without putting in danger the purpose of the infringement procedure. It believes that an overriding public interest can justify the disclosure of such documentation especially in cases concerning fundamental rights, human or animal health, the protection of the environment against irreversible damage, discrimination against a minority or violations of human dignity so long as sensitive data is protected.<sup>169</sup> Recently, the Commission has taken a commitment to improve the exchange of information with the Petitions Committee.<sup>170</sup>

The Commission is thus agreeing to small concessions which aim to improve, at least theoretically, its relations with the European Parliament while still maintaining its autonomy. According to the Framework Agreement<sup>171</sup> between the Commission and the Parliament decided initially in 2005 and then revised in 2010, aside from its annual reports on the application of EU law and other specific reports, the Commission has taken the commitment to provide the Parliament with summary information on all infringement procedures from the stage of the letter of formal notice but without violating the rules on confidentiality.<sup>172</sup> It also obliged itself to provide the Parliament with information on measures or provisions that cause transposition issues. However, the Commission, known for its reluctance towards the Parliament's demands in the area of enforcement,<sup>173</sup> even though it did increase the amount of data it publishes in its annual reports, it does not treat the agreement seriously and still does not furnish the Parliament with sufficient information. This puts the

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<sup>167</sup> Kunzlik, Jacobson, *The Enforcement of EU Environmental Law: Article 169, the Ombudsman and the Parliament*, 1997 *European Energy and Environmental Law Review* 6, 51-52.

<sup>168</sup> Harlow, Rawlings (2006), 472-473.

<sup>169</sup> Report on the Activities of the Committee on Petitions (2012), 2013/2013(INI), paragraph 31.

<sup>170</sup> European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253/(INI), paragraph 34.

<sup>171</sup> Framework Agreement on Relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010.

<sup>172</sup> *Ibid.*, Article 44.

<sup>173</sup> Harlow, Rawlings (2014), 190.

Parliament in an uncomfortable position where it has to regularly reprimand the Commission and ask it to apply the agreement,<sup>174</sup> which ultimately shows how little it can do to control the Commission's conduct and how the Commission's steps to limit its own autonomy are slow. Clearly, this is not considered enough for the accountability approach where it is underlined that the Parliament should additionally receive on a regular basis all complaints and have access to the EU Pilot procedure and database in order to monitor the Commission's enforcement.<sup>175</sup>

In accordance with Articles 17(8) TEU, 233 and 234 TFEU, the Commission is politically responsible before the European Parliament which can vote a motion of censure forcing it to resign as a body. Also, according to the mentioned framework agreement, the Parliament, losing confidence in one of the commissioners, can also ask the President of the Commission for the resignation of the official but the President is not bound by this request and can decide against it as long as he provides an explanation.<sup>176</sup> As a result, the strongest power the Parliament actually holds over the Commission is the motion of censure. This, however, has never been used and it is unlikely the Parliament would resort to it because of its dissatisfaction with the Commission exercise of its enforcement powers since even the crisis of Santer Commission from 1998 did not end with such a motion (although this was only because the Commission had resigned the day before the vote).<sup>177</sup> Still, it is difficult to believe that the Parliament would vote the motion of censure and lead to the dissolution of the entire college only because, despite all the other properly executed Commission's functions and the general successful rate of pursuing state infringements, the Commission failed to keep it well informed or was not exactly friendly towards complainants.

The Commission's general resistance against bringing more accountability into its enforcement practice is, in Smith's view, startling considering that the procedure itself is an instrument of accountability intended to compel Member States to fulfill their EU obligations.<sup>178</sup> She postulates that another accountability configuration is achievable within Article 258 TFEU procedure if only the deciding actors allowed it to come to the surface: the accountability of the Commission to citizens via the European Ombudsman.<sup>179</sup>

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<sup>174</sup> European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253/(INI), paragraph 35; European Parliament Resolution on the 29<sup>th</sup> Annual Reports on Monitoring (2011), 2013/2119/(INI), paragraph 21-22.

<sup>175</sup> Ballesteros et al. (2013), 106.

<sup>176</sup> Framework Agreement on Relations between the European Parliament and the European Commission, OJ L 304, Article 5.

<sup>177</sup> Chalmers, Hadjiemmanuil, Monti, Tomkins, *European Union Law* (Cambridge University Press, 2006), 87.

<sup>178</sup> Smith (2010), 221.

<sup>179</sup> *Ibid.*, 147, 221.

The Ombudsman has the power to investigate cases of the Commission's maladministration and, to that end, it mostly relies on general principles such as the right to good administration under Article 41 of the Charter of Fundamental Rights in order to scrutinize the Commission's conduct. In general, it can only investigate the administrative side of the Commission's selective enforcement with a special focus on its handling of complaints but there have been cases where it reviewed the Commission's enforcement decisions on their merits, interfering with the Commission's Court-secured discretion to decide whether to launch infringement proceedings. For example, in 2012, the Ombudsman analyzed the Commission's decision to close a case against Austria which had failed to perform the EIA before the expansion of the Vienna Airport, and concluded that the Commission had "erred" by failing to "fully examining whether [Austrian measures were] in compliance with EU law."<sup>180</sup> The Ombudsman believes that it can assess whether the Commission is not "acting outside its margin of discretion," which happens when the Commission's choices regarding the closure of a case is insufficiently justified.<sup>181</sup>

Nonetheless, the problem with the Ombudsman is that it has no genuine power to compel the Commission to conform to its instructions. It either investigates particular complaints of maladministration or performs inquiries of its own initiative, scrutinizing the Commission's conduct in the procedure, but it has no coercive measure to use against the Commission.<sup>182</sup> It therefore cannot force it to commit in full to the procedural guarantees that it has afforded complainants such as complete and honest reasoning for its decisions.<sup>183</sup> Further, the Ombudsman cannot decide on the validity of the Commission's measures nor can it compel it to reopen the infringement procedure nor, finally, to afford complainants any remedies.<sup>184</sup> It can report its findings to the European Parliament but, as was already mentioned, the Parliament does not have at its disposal any serious coercive measures either.<sup>185</sup> However, Harlow and Rawlings are of the opinion that the Ombudsman's decisions are not ineffective and that the pressure it exerts often suffices to push institutions to comply with its recommendations.<sup>186</sup> The administrative rights granted by the Commission to complainants demonstrate the influence the Ombudsman had on it. However, it also shows how the Commission agreed to a few soft-law guarantees only to later follow them selectively.

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<sup>180</sup> Draft recommendation of the EO in his inquiry into complaint 503/2012/RA against the Commission (7 May 2013).

<sup>181</sup> European Ombudsman Annual Report for 2013, Good Administration in Practice: The European Ombudsman's Decisions in 2013, 23.

<sup>182</sup> Kunzlik (1997), 52; Smith (2010), 164.

<sup>183</sup> Smith (2010), 172.

<sup>184</sup> *Ibid.*, 201.

<sup>185</sup> Kunzlik (1997), 52.

<sup>186</sup> Harlow, Rawlings (2014), 80.



In Smith's view, the fact that the Ombudsman can investigate the Commission's conduct at all is already an improvement because it brings into the enforcement mechanism another party with the ability to inspect and analyze the Commission's performance which ultimately contributes to a degree of accountability in the procedure, albeit small. The information that the Ombudsman gathers can also aid the European Parliament in discharging its supervisory function, otherwise difficult to extract from the Commission. Nonetheless, this machinery is but a shadow of the accountability that Smith would see in the infringement procedure.<sup>187</sup> According to her, the Ombudsman's powers "are not a sufficient substitute for effective judicial review of the Commission's administration."<sup>188</sup> Smith underlines the European Union's push for injecting more legitimacy into its processes that would allow to popularize the Union, insisting that the infringement procedure should not constitute an exception to this trend.<sup>189</sup> The Commission's enforcement policy is based on technocratic legitimacy while procedural legitimacy, which allows for greater involvement of the Parliament and the Ombudsman in scrutinizing the Commission, is left out.<sup>190</sup> To Smith, it is as simple as that: if the activities of an administration affect citizens that it is only natural to expect that - when exercising its discretion - it would conform to a "legitimate set of procedural rules."<sup>191</sup> However, Harlow and Rawlings recognize that it is doubtful whether the accountability model of enforcement could be successfully merged with the Commission's enforcement function without sacrificing the procedure's effectiveness while maintaining a high level of enforcement and, finally, "given the uncertainty whether accountability can flourish in situations of transnational governance."<sup>192</sup>

## 5.7 Triumph of the discretionary model of enforcement

It was shown in this chapter that the European Parliament, Ombudsman and some of the academia seek to replace the existing pillars of the Commission's selective enforcement with their contemporary counterparts. It was also demonstrated that the Commission is not entirely indifferent to the demands put forward by the accountability approach. Either on its own or as a result of the Court of Justice case-law, it has slowly reformed its enforcement policy in a way that brings a degree of transparency, objectivity and accountability to its operation. The Commission's selective enforcement is, therefore, no longer the same as it used to be with specific constraints binding its

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<sup>187</sup> Smith (2010), 176.

<sup>188</sup> *Ibid.*, 201.

<sup>189</sup> *Ibid.*, 7.

<sup>190</sup> *Ibid.*, 147.

<sup>191</sup> *Ibid.*, 201.

<sup>192</sup> Harlow, Rawlings (2006), 474-475.

discretion, forcing it to pay more attention to what it does and how it does it. Nevertheless, the main pillars which define the Commission's enforcement powers have remained intact. Its selective enforcement still revolves around the idea that compliance can be best achieved by means of informal problem-solving, and coercion should be employed only in situations that actually necessitate it. The core of the Commission's relations with Member States remains confidential, allowing it to take into account non-legal circumstances as it negotiates compliance, without really being held accountable for its methods and results, while individuals are given only a small peak at those negotiations, maintaining them in a role of external witnesses rather than full-fledged participants.

It can be summarized that the Commission and the Court of Justice try to find the middle ground between maintaining the original approach to the Commission's enforcement and the modern-world values. These attempts can, however, be best described as 'baby steps' for the balance clearly tilts in favor of the former. And while it is not impossible that one day stakeholders may finally gain legally-binding rights against the Commission which, in turn, may become more accountable, transparent and objective, it is unquestionable that, so far, the Commission has managed to resist major changes to its operation.

This chapter has thus set out the main premise for this thesis, indicating how the Commission has let certain changes into its enforcement practice in order to at least minimally respond to the expectations of the accountability approach while ensuring that the core of the four pillars of its selective enforcement remains intact. However, having explored the main premises of the accountability model it becomes obvious that the Commission has fallen far from satisfying these expectations. It is now time to turn to the question: why? Why does the Commission tirelessly continue to safeguard the discretionary model of enforcement despite its obviously old-school nature and the compelling argumentation of the accountability approach, the latter reflecting the EU's general path towards democracy and legitimacy?

It cannot be excluded that the Commission may be resisting the accountability model simply because it does not wish to constrain its broad discretion. However, the fact that it has the support of the Court of Justice suggests that there is more to its choice than just the desire to preserve its freedom. The analysis of the accountability approaches' main premises make it clear that their injection would increase the Commission's amount of responsibilities. Granting complainants access to documentation or installing an accountability procedure the Commission would not just decrease its discretion but would also bring in new tasks and strengthen the old. An increase in responsibilities, however, should not - by itself - suffice to justify the Commission's choice. It is time we turned to the Comparative Institutional Analysis.

## 6 Demand side of the Commission's enforcement

The movement towards the injection of contemporary standards into the Commission's operation has achieved certain results but it nonetheless has yet to transform its conduct into the accountability model of enforcement. While the Commission has to nowadays disclose at least some information concerning its operation in the infringement procedure, it nevertheless can still keep the core of its dialogue with Member States concealed from the public eye. The degree of injected transparency makes it harder to take decisions on grounds that escape law and facts, yet the confidentiality of the dialogue allows the Commission to reach amicable solutions by striking deals, negotiating compliance and taking into account various objectives. Complainants are furnished with a number of rights that recognize their special place in the Commission's enforcement but these rights do not guarantee their actual participation in the procedures nor are they secured by means of legally-binding acts. While the Commission is responsible before the European Parliament and subject to the Ombudsman's investigations, it nonetheless remains autonomous in its decisions concerning state infractions and its means of addressing them, having the freedom to stay flexible and maintain confidential and bilateral relations with Member States. Finally, instead of heeding various expectations and intensifying its use of the infringement procedure, the Commission chose to move away from Article 258 TFEU<sup>1</sup> by establishing the EU Pilot and strengthening its policy of selective enforcement grounded in voluntary compliance and friendly solutions. And while the EU Pilot's subsequent transformation into a regular pre-procedural step involves relatively clear rules on the infringement procedure's applicability supplementing the practice of prioritization with simple and straightforward criteria, it nonetheless does not live up to the expectations of the accountability approach. Instead of embracing contemporary standards and letting complainants in by allowing them 'voice' in the exchange with Member States and thus introducing actual transparency and accountability into its operations, the Commission has made the EU Pilot an instrument which, for the most part, allows for and upholds the four key pillars of its enforcement operation. The Commission's practice of selective enforcement continues to take place, based on the confidentiality and bilateralism of relations with Member States and the Commission's flexibility and autonomy in its management of state infractions.

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<sup>1</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

The analysis of the evolution of the Commission's selective enforcement reveals a pattern where change is allowed as long as it does not seriously affect any of the four pillars: confidentiality, bilateralism, flexibility, and autonomy. The reasons for such an approach can be different, including the most obvious: the Commission's self-centered attachment to its supranational role and the freedom it enjoys in relations with Member States. Yet, as likely as it is that any institution would rather remain autonomous than subject itself to outside control, it is doubtful that the Commission and the Court, presented with multiple arguments in favor of the accountability model that would legitimize the Commission's enforcement, and criticized not only by academics and citizens but also by the European Parliament and the Ombudsman, would - for years and irrespective of their changing composition - stubbornly resist the injection of modern values for reasons based solely on their comfort and self-interest. There must be other reasons why the two institutions protect the four features despite the ever-growing effort towards their replacement with their accountability-based counterparts.

Chapters 2-5 sought to outline this thesis's main problem by demonstrating how the Commission shapes its policy of selective enforcement in a way that resists the main premises of the accountability approach. Chapters 6-8 undertake to identify the reasons behind the Commission's commitment to the discretionary model of enforcement by relying on Komesar's Comparative Institutional Analysis<sup>2</sup> and, more precisely, by exploring the forces of supply and demand. This thesis seeks to demonstrate that the Commission's choice to maintain its selective enforcement grounded in four discretion-based pillars has its justification and this justification can be comprehended by investigating the demand and supply sides of the Commission's enforcement.

While chapter 7 will be devoted to the Commission's supply side, this chapter concentrates solely on issues of demand. Demand, understood as the need for enforcement, is determined here by identifying weak spots of enforcement mechanisms laying outside the Commission's control and, in particular, private enforcement and SOLVIT as decentralized measures having the largest impact on state compliance. Both of these instruments have their limitations and weaknesses which make them more suitable for certain types of violations and less for others. The Commission's enforcement is thus needed most in areas where decentralized measures are least likely to provide protection for stakeholders, so in areas where their ability to deliver these protections is constrained. Such weak areas can be determined by looking at the participants of decentralized measures and by studying the factors that encourage and discourage participation (dynamics). By understanding what makes stakeholders refrain from taking action against states, we can distinguish some basic litigation

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<sup>2</sup> Komesar, *Law's Limits* (Cambridge University Press, 2001).

patterns and identify weak spots of decentralized measures which, in turn, should allow to narrow down the concept of demand for the Commission's enforcement.

To achieve the presented objective, this chapter will concentrate mostly on the decentralized enforcement mechanism due to its scale. It will present its origins, evolution and objectives and explore various factors that influence stakeholders' litigating readiness, followed by a similar analysis of SOLVIT. By identifying different variables that impact stakeholders' participation, it will attempt to narrow down the demand for the Commission's enforcement by presenting some general conclusions on categories of violations which are least likely to find their way to decentralized enforcement measures and, for that reason, require the Commission's attention more than others.

## 6.1 Concept of demand

This thesis aims to explain the Commission's conduct of its selective enforcement by means of Komesar's Comparative Institutional Analysis with its concentration on the forces of supply and demand that shape the workings of institutions and influence the choices they make. The European Commission is not a court and does not decide on individual rights but its extensive enforcement powers give it the discretion to decide on the future of infraction cases as well as assess state conduct, suggest compliance solutions and pursue long-term goals. It can, therefore, be perceived as an enforcement institution of administrative, political and quasi-judicial nature that not only manages cases but also makes subjective judgments with effects for third parties. Its main objective, however, is that of ensuring compliance and, to achieve that, it relies on a number of solutions ranging from the infringement procedure and the EU Pilot through secretive bargaining and not-so-legal dismissal. It thus has the ability to ensure compliance but this ability is constrained and subject to such restrictions as limited resources, complex procedures or insufficient monitoring powers. At the same time, it is faced with the demand for compliance and enforcement but also for accountability, transparency and, most of all, the protection of complainants' rights vis-à-vis Member States. Complainants, frustrated with Member States' infractions, seek the Commission's help in securing their private, concentrated and diffuse interests, and the Commission partially responds to those requests by molding its supply in a way that could integrate the new demand. Yet, in most part, the Commission resists expectations placed on it, restricting itself to the objective of ensuring compliance and, even there, selecting cases and applicable measures. It guards the infringement procedure from the accountability model of enforcement, concealing it behind the fence of confidentiality, bilateralism and autonomy while, at the same time, safeguarding its special relationship with Member States.

Paying attention to the demand side of institutions is vital for the understanding of their operation and of decisions they make as well as for the determination of the distribution of their resources. It allows to identify areas which require the Commission's attention and can help decide the desired focus of its enforcement powers. The key behind the idea of demand, however, is the realization that, while the Commission's overall objective in its selective enforcement comes down to ensuring state compliance with EU law and thus its demand can be generally perceived as the need for ensuring compliance or rather enforcing compliance (since selective enforcement refers only to post violation situations), this is a very broad statement that virtually tells us nothing of where the Commission's attention is needed. To answer this question, it is necessary to break down the said need for enforcement into a more detailed formulation of the demand. However, it ought to be reminded that 'enforcement' is understood here as a general term denoting all forms of addressing post-violation situations.

The seemingly most apparent way to ascertain the need for enforcement would be to have a look at the overall state of non-compliance in Europe and determine which provisions of EU law are infringed most often. The purpose of such analysis would be to produce a list of implementation issues most problematic to Member States and assume that this is where the Commission's attention is required. Alternatively, such a list of problematic issues could be contrasted with the Commission's enforcement practice in order to determine the neglected but crucial provisions and thus draw different conclusions on areas where the largest need for the Commission's action exists. However, there are two main problems with such an approach. First of all, as was already pointed out in chapter 3, there is no way to conclusively determine the extent of non-compliance in the EU not only because of its sheer scale but mostly because not all infractions see the light of day and become subject of legal proceedings, disallowing for their accumulation and qualification. Second of all, such an approach constitutes single institutional analysis that perceives the European Commission as the sole remedy to state non-compliance in the EU, failing to take into account that there is more to the EU enforcement system than just Article 258 TFEU and that certain violations may be better or, at the very least, adequately addressed by means of measures lying outside the Commission's control.

The concept of the Commission's demand can thus be approached from a different perspective, where the Commission is perceived as one of many institutions responsible for ensuring state compliance. While the Commission with its Treaty based infringement procedure and inherent ultimate authority of the highest EU court continues to be considered the main institution to combat state infringements, it is unquestionable that there are instruments which are also capable of

influencing state conduct. And the more these remaining processes fail to diminish state non-compliance the more the Commission and the Court are expected to do the job.

Firstly, the political process contributes to state non-conformity by producing rules and provisions which are either vague and imprecise, complex and technical, politically controversial or characterized by a wide array of discretion left for Member States. Such provisions are likely to result in state violations to which the Commission responds by employing a number of preventive measures already discussed in chapters 1 and 4. Second of all, Member States themselves are primarily responsible for fulfilling their obligations and which - for either intentional or unintentional reasons - fail to perform this duty. It is their conduct that creates the demand for enforcement instruments. Finally, private persons and companies can also infringe EU law and contribute to state infractions when their violations are left without an adequate remedy. Most of all, however, alternative compliance measures, alongside the Commission's powers, are capable of addressing at least some state infractions. What matters here is measures that lie outside the Commission's control and which do not depend on its choice of solutions. Centralized instruments such as the infringement procedure or the EU Pilot rest within the Commission's hands, form a part of its policy of selective enforcement and this thesis aims to demonstrate that their application is determined *inter alia* by the Commission's demand. The concept of demand thus does not refer to centralized instruments but to horizontal and decentralized enforcement measures, the application of which the Commission does not control (directly) and which are capable of addressing some state infractions and thus limit the amount of cases left for the European Commission to tackle. It is when these alternative instruments fail that reliance on the Commission's enforcement increases. The result is such that, while Member States violate EU law and other entities contribute to those violations, it is the functioning and failings of those horizontal and decentralized compliance solutions that can be considered to have the strongest impact on the Commission's demand.<sup>3</sup>

Horizontal measures mostly come down to Article 259 TFEU which allows Member States to challenge each other before the Court of Justice in situations of EU law infringement. Although instances of governments relying on this provision have been recorded,<sup>4</sup> Article 259 TFEU can be considered an overall insignificant measure. This leaves decentralized instruments, the most important of which are the so-called decentralized enforcement mechanism and SOLVIT. It ought to be underlined, however, that compliance at the decentralized level is not always achieved before national courts but can also be a result of out-of-court settlements, mediation or other forms of non-

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<sup>3</sup> Komesar (2001), 3.

<sup>4</sup> Judgment in *Hungary v Slovakia*, C-364/10, EU:C:2006:543; Judgment in *UK v Spain*, C-145/04, EU:C:2012:630.

legal dispute resolution methods available to stakeholders<sup>5</sup> which usually constitute a less formalized, low-cost and more friendly alternative to litigation. However, due to the amount and variety of such instruments, the Commission's demand side will be perceived mostly through the lens of two largest decentralized measures: private enforcement and SOLVIT. These measures form an integral part of the EU compliance system and are successful with respect to at least certain violations of EU law. However, they also have their weaknesses and limits and can guarantee only so much compliance, requiring the Commission to step in and guarantee conformity in areas uncovered or insufficiently protected. It is through the lens of those decentralized measures that the Commission's demand side can be perceived.

It can be questioned whether it should be the European Commission to fill in the gaps left by decentralized instruments or the other way round. However, the purpose of the present analysis is to determine the demand placed on the Commission's enforcement and not the demand placed on alternative tools. While the Commission's overall objective is that of ensuring compliance, in practice the Commission need not pursue conformity in every case, particularly if the same or better result is achieved by means of decentralized measures. What is particularly needed is that the Commission guarantees compliance in situations where alternative solutions fail.

The Commission's demand side can be understood as the need for enforcement determined by the weaknesses of decentralized measures. 'Weaknesses' are identified here not nearly as flaws or defects of decentralized measures but rather as their failings or weak spots: areas or categories of violations where these measures are least likely to perform their enforcement functions. Here too, comes the question of how to ascertain these weaknesses. Once more, the first possible solution would be to analyze case-law in order to determine areas where decentralized measures operate least well. This would require, at the very least, qualitative evaluation of infringement-related preliminary reference rulings which could give an overview of the types of violations raised before national courts. It would, however, be inconclusive for it would include only cases that national judges chose to refer to the CJEU. More conclusive would be the qualitative analysis of infringement-related cases in national proceedings across Member States and policy areas because it would, in a more comprehensive manner, distinguish between successfully and unsuccessfully litigated violation cases. Qualitative research works best, however, when it is narrow in scope, limited to a specific state and policy area and, therefore, irrelevant for the general analysis of the Commission's policy of selective enforcement. Studies of large volumes of cases are therefore mostly quantitative but they lead to very broad deductions which are not only limited to specific periods of time but which also do not allow to

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<sup>5</sup> Wilman, *Private Enforcement of EU Law before National Courts* (Edward Elgar Publishing, 2015), 371-380.



draw any concrete conclusions for the Commission's enforcement beyond the much-too-general supposition that it should concentrate on issues other than heavily litigated areas. For those reasons, the empirical research conducted for the purpose of this chapter, consisting of the analysis of three sample years of the CJEU's preliminary rulings (2000, 2005, 2010), plays merely an informative role. Due to its limitations of, on the one hand, reflecting only a fraction of actual litigation taking place in national courts and, on the other, sometimes unclear, insufficient or difficult to categorize information and characteristics of litigated cases (such as their success rate), the presented data does not seek to substantiate the conclusions drawn in this chapter but merely serves as an example of cases where individuals used the decentralized enforcement mechanism as a means of combating state non-compliance.

Already in 1997, Weatherill wrote about the need for the Commission to pay attention to “the ability of individuals to bring and pursue cases”<sup>6</sup> and, in 2000, Rawlings said that “[t]he efforts of the Commission need to be more closely targeted on areas where the potential for action by ‘private attorneys general’ at national level is illusory or limited.”<sup>7</sup> Reasoning in similar lines, instead of seeking to identify the failings of decentralized enforcement measures by reference to specific policy sectors and EU provisions, this thesis focuses on the dynamics of these measures which are shaped by their participants. By exploring different variables that influence individuals’ willingness to participate and drawing general conclusions regarding factors that are least likely to trigger decentralized measures, we can identify their weak spots and formulate the Commission’s demand. Such an approach, while not exactly allowing to determine the decentralized measures’ effectiveness which is dependent on additional factors such as national courts’ willingness to comply with their EU obligations and refer cases to the CJEU, nonetheless allows to identify some basic litigation patterns before national courts and isolate problems experienced by decentralized measures that prevent stakeholders from taking action and which preclude these measures from performing their enforcement function. This is not only useful for future studies that would seek to find solutions for the improvement of these measures. This is also a more holistic, organic and fluid method because it reaches to the source of decentralized measures’ operation, transcending any single policy area or time-frame. Instead of enumerating currently-neglected provisions of EU law or limiting itself to a singular sector, it is independent of policy areas and years of study, constituting a baseline framework which can be used

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<sup>6</sup> Weatherill, *Reflections on EC Law's 'Implementation Imbalance' in the Light of the Ruling in Hedley Lomas*, in Krämer, Micklitz, Tonner (eds.), *Law and Diffuse Interests in the European Legal Order* (Baden-Baden, 1997), 45.

<sup>7</sup> Rawlings, *Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement*, 2000 *European Law Journal* 6, 28.

in more narrowly-focused research. It recognizes the vital role stakeholders play in enforcement and seeks to narrow down the Commission's demand by reference to situations where they are most likely to refrain from taking action, allowing state non-compliance to persist. This issue will be developed further in section 6.3. For now, it is necessary to have a closer look at the decentralized enforcement mechanism in order to understand its specificity as a compliance measure and its heavy reliance on individuals as the driving engines of its dynamics.

## 6.2 Objectives and functioning of the decentralized enforcement mechanism

Most authors agree nowadays that the preliminary reference procedure under Article 267 TFEU constitutes a channel through which individuals can challenge national law and through which the Court of Justice reviews the compatibility of national provisions with EU law.<sup>8</sup> Some authors call it the decentralized enforcement mechanism which, to a certain degree, has the outcome like a second procedure for assessing conformity of national law, next to the infringement procedure.<sup>9</sup> The wording of Article 267 TFEU has, however, barely changed over the course of European integration and it still does not say anything explicit about its particular reviewing function. Commentators may disagree whether those were the drafters who foresaw ex Article's 177 EEC special function or the Court of Justice who deducted from the spirit of the Treaty a bit more than had been intended, but it has become common knowledge that the preliminary reference procedure constitutes a vehicle for challenging the compatibility of state law and practice as much as it is a platform for assessing conformity of secondary EU law with the Treaties.<sup>10</sup>

If one looks closer, however, it becomes apparent that as much as the preliminary reference procedure can be considered a compliance mechanism, it is, in fact, merely a component of this mechanism and one that is not even essential. The principles of direct effect and primacy allow individuals to raise issues of state non-conformity and national courts to pronounce on them without any involvement of the Court of Justice. Those domestic courts against whose decisions a judicial remedy does exist, do not have an obligation to refer a question to the CJEU each time an issue of EU law arises. If they feel confident enough, they can review the compatibility of national provisions with

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<sup>8</sup> Börzel, *Non-Compliance in the European Union: Pathology or Statistical Artefact?*, 2001 *Journal of European Public Policy* 8, 204; Schermers, Waelbroeck, *Judicial Protection in the European Union*, 6th ed. (Kluwer Law International, 2001), 227, 236.

<sup>9</sup> Börzel (2001), 204; Stone Sweet, Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 1998 *The American Political Science Review* 92, 66; Everling, *The Member States of the European Community before their Court of Justice*, 1984 *European Law Review* 9, 223.

<sup>10</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 16.

EU law without the European Court's interpretative help, and they can set aside, of their own motion, those provisions which are conflicting. As a result, it can be said that what constitutes the core of the decentralized enforcement mechanism is not the preliminary reference procedure which is merely an additional method of control, but private enforcement, that is litigation operating on the national level before national courts which can but does not have to employ the Court of Justice.

The present section looks at private litigation and the supportive role of the preliminary reference procedure as constituting the decentralized enforcement mechanism, one that can, at least to a degree, carry the burden of controlling Member States' conformity with EU law. It, therefore, approaches the mechanism from the point of view of its origins, evolution and operation in order to demonstrate that it does perform the function of reviewing state compliance despite the conflicting views on its development.

### 6.2.1 Evolution and consequences of private litigation's enforcement function

The question of the origins and evolution of the preliminary reference procedure into the decentralized compliance mechanism brings a clash of two main theories: inter-governmentalist and neo-functionalist. The inter-governmentalist theory (otherwise, neorealism) positions Member States at the center of European integration and assumes that nothing happened without their knowledge and consent. It argues that the Member States were unable to control each other's performance of Community obligations and they needed a mechanism to monitor compliance based on the vigilance of stakeholders. Being unable to foresee and regulate every dispute that could arise, they delegated the authority to the Court of Justice to "apply and adapt" general rules to specific situations. As a result, it was their choice to allow national courts to monitor their compliance seeing as it served the internal market and that, when the Court of Justice derived new principles from the spirit of the Treaty, it did so in line with their preferences and especially in the interest of the strongest Member States (France and Germany).<sup>11</sup> The neo-functionalist theory, on the other hand, concentrates on the role of litigants, national courts and the Court of Justice in explaining European integration. It describes how the Court's new principles significantly strayed from preferences of Member States leading to outcomes unforeseen by them, and how they gave individuals and national courts an

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<sup>11</sup> Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 1992 International Organization 43, 556-559.

opportunity to directly participate in the shape of the law thus gaining necessary allies to for new developments to settle in and become a part of the Community legal order.<sup>12</sup>

The two theories show different perspectives on European integration and, at the same time, at the origins of the decentralized enforcement mechanism. Many more theories have been built on the basis of this conflict, and it is often raised nowadays that the original two approaches are flawed due to their oversimplification of the process of legal integration.<sup>13</sup> What can, however, be said with certainty is that the preliminary reference procedure was envisaged to prevent discrepancies in the application of Community law.<sup>14</sup> Its objective was the uniform application and interpretation of EU law in all Member States.<sup>15</sup> Whether it was also intended as a secondary compliance mechanism remains debatable. A look at the creation and the consequences of the doctrines of direct effect and primacy can shed light on the issue and help establish the enforcement function of private litigation.

Setting aside the problem of state intention in the creation of the decentralized enforcement mechanism, it is undeniable that the two main pillars of its functioning were introduced by means of the Court's of Justice case-law. In its famous judgment in *Van Gend en Loos*,<sup>16</sup> the Court pronounced the doctrine of direct effect indicating that Community law directly conferred rights on individuals, even if under certain conditions, and that individuals could rely on those rights before national courts. A year later, the Court introduced in *Costa v. ENEL*<sup>17</sup> the doctrine of primacy which gave priority to EC law in situations of collision with national law.

The first, most apparent consequence of the adoption of those doctrines was the change in the position of individuals. They not only became subjects of international treaties with directly conferred rights, but they also acquired the possibility to rely on those rights before national courts and to have them recognized in situations of conflict with national law. Stakeholders thus gained legal protection against Member States' violations of European law. They became the addressees of the EU

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<sup>12</sup> Burley, Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 1993 International Organization 47.

<sup>13</sup> E.g. Mattli and Slaughter's revised neo-functional theory: disaggregated state model in: Mattli, Slaughter, *Revisiting the European Court of Justice*, 1998 International Organization 52; Alter's Inter-court competition in: Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in Slaughter, Stone Sweet, Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing, 1998); Stone-Sweet and Brunell's theory of legal integration in: Stone Sweet, Brunell, *Constructing a Supranational Constitution*, in Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004).

<sup>14</sup> Schermers, Waelbroeck (2001), 218.

<sup>15</sup> *Ibid.*, 221; Weiler, *A Quite Revolution: The European Court of Justice and Its Interlocutors*, 1994 Comparative Political Studies 26, 515; Weiler, *The Transformation of Europe*, 1991 The Yale Law Journal 100, 300.

<sup>16</sup> Judgment in *Van Gend en Loos*, 26/62, EU:C:1963:1.

<sup>17</sup> Judgment in *Costa v. ENEL*, 6/64, EU:C:1964:66.

legal order and received a set of tools for influencing Member States' conduct and inducing respect for their individual rights.

Shifting the questions of validity of national law to the level of domestic courts also brought a significant change in the way Member States considered the Community and their own obligations. In the early years of the Community's existence, its legal order suffered from ineffectiveness in inducing Member States' conformity.<sup>18</sup> Non-compliance was not only a threat to the European integration but also to the Court's of Justice position within the Community legal order. As long as its judgments were not enforceable, Member States could freely ignore its rulings, and impede the advancement of Community policies.<sup>19</sup> The transformation of ex Article 177 EEC thus gave the Court's judgments the value of enforcement against Member States' violations. From then on, decisions against national conflicting provisions came not from the European Court but national courts, albeit as a consequence of the former's preliminary rulings, and thus they carried with them the binding and enforcement effects that they have in their national legal systems, as well as the value of neutrality and legitimacy of such decisions.<sup>20</sup> Defying a domestic court's decision, and thus indirectly defying a Court of Justice ruling, could only bring serious political and financial consequences for the state because, on the one hand, it would be ignoring its own courts which was bad enough and, on the other, the national court had the possibility of applying financial sanctions against its administration.<sup>21</sup> As Maduro put it, "[b]y enhancing the participation of individuals, the Court established a new source of legitimation both for itself and Community law."<sup>22</sup>

This important change meant that one of the weaknesses of the traditional public international law was eliminated.<sup>23</sup> Member States could no longer easily disregard unwanted decisions of the Court at the time when the infringement procedure still did not provide for any sanctions.<sup>24</sup> According to Weiler, this had a "prophylactic effect" by attaching to Community law, via the route of the national legal order, the general respect for the law.<sup>25</sup> In fact, Kilpatrick goes as far as saying that, aside from remedying the problem of no sanctions, private enforcement "solved" all the other problems of public enforcement such as sporadic action due to resource limitations or

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<sup>18</sup> Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001), 11.

<sup>19</sup> Alter, *The European Court's Political Power* (Oxford University Press, 2009), 106.

<sup>20</sup> Maduro, *We the Court* (Hart Publishing, 1998), 9; Weiler, *The Community System: the Dual Character of Supranationalism*, 1981 Yearbook of European Law 1, 301.

<sup>21</sup> Alter, *The European Court and National Courts Doctrine and Jurisprudence: Legal Change in its Social Context*, 1995 EUI Working Paper 27, 3.

<sup>22</sup> Maduro (1998), 27.

<sup>23</sup> Weiler (1981), 274.

<sup>24</sup> Alter (2009), 115.

<sup>25</sup> Weiler (1994), 519.

politicization leading to selective enforcement.<sup>26</sup> Private enforcement did not really ‘solve’ these problems but rather mitigated them by creating an enforcement tool resting outside the Commission’s control and avoiding the limitations of public enforcement. Kilpatrick does, however, make a point because the new mechanism did expand the number of cases concerning non-compliance issues that reached the Court of Justice. The majority of challenges to national laws that arrived at the Court’s calendar especially in the early years of the Community were, in fact, the result of references for preliminary rulings.<sup>27</sup> Accordingly, many minor breaches were indirectly established by the Court of Justice via the preliminary reference procedure; breaches that the Commission would not generally pursue of its own motion because of its lack of knowledge as to their existence, or due to their small importance or, finally, when Member States’ obligations were arguable.<sup>28</sup> Audretsch reflects that this broke the Commission’s “monopoly” to institute infringement proceedings and forced it to reassess its enforcement policy.<sup>29</sup>

The transformation of Article 267 TFEU into a compliance mechanism thus brought a significant difference in relation to the position of the Court of Justice in the Community legal order. Alter claims that it increased the Court’s “jurisdictional authority and political power” in several ways.<sup>30</sup> It diminished the Court’s dependence on the Commission and Member States to bring infringement actions by allowing individual challenges to national law. It reduced its dependence on voluntary compliance because its decisions became enforceable.<sup>31</sup> And finally, it weakened Member States’ ability to restrict cases that would reach the Court and, as a result, it weakened their ability to control the Court in general.<sup>32</sup> Accordingly, the Court of Justice could, from then on, influence national policies by commenting on them via the preliminary rulings procedure.<sup>33</sup> In introducing the doctrines of direct effect and supremacy, there was an element of “constitutional (self-) positioning of the Court”.<sup>34</sup>

Having established its strong place within the Community legal order, the Court of Justice was able to push towards stronger integration by increasing the reach and scope of Community law.<sup>35</sup> Alter

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<sup>26</sup> Kilpatrick, *The Future of Remedies in Europe*, in Kilpatrick, Novitz, Skidmore (eds.), *The Future of Remedies in Europe* (Hart Publishing, 2000), 2.

<sup>27</sup> Alter (2009), 187.

<sup>28</sup> *Ibid.*, 93; Schermers, Waelbroeck (2001), 646.

<sup>29</sup> Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986), 244.

<sup>30</sup> Alter (1995), 3.

<sup>31</sup> Alter (2009), 118.

<sup>32</sup> Alter (1995), 3.

<sup>33</sup> Alter (2001), 22.

<sup>34</sup> Weiler (1994), 516.

<sup>35</sup> Alter (2001), 22.

suggests that the Court's intention in its creative interpretation of the Rome Treaty<sup>36</sup> was to enhance one of the main, but weakest, functions of the Community legal system: policing Member States' compliance with Community law.<sup>37</sup> Maduro observes, however, that what also drove the Court in its reasoning was the ineffectiveness of the political process which, due to the rule of unanimity in EC decision-making and the multiplicity of interests, was unable to achieve consensus, freezing or impeding the progress of European integration. This shifted the responsibility for settling political disagreements to the judicial process and left the task of building up the Community system in the hands of the Court of Justice.<sup>38</sup>

With time, the doctrine of direct effect was further extended from negative obligations to positive, from vertical enforcement to horizontal, from primary to secondary law, thus gradually expanding the scope of Community law that individuals could invoke in their national courts.<sup>39</sup> Additionally, the Court derived from the loyalty principle the principle of effectiveness which indicates both, the more general Member States' obligation to fulfil their duties in a way that attains all the goals of EU law and allows it to have full force and effect within their national legal orders,<sup>40</sup> as well as the more precise obligation to construct and interpret both substantial and procedural rules in such a way that they provide effective protection of EU individual rights.<sup>41</sup> While the Court secured the principle of national procedural autonomy, it prohibited national rules that render individuals' exercise of EU rights virtually impossible or excessively difficult, and introduced the requirement that rules applicable to EU cases cannot be any less favorable than those governing similar national actions.<sup>42</sup> The Court also established the doctrine of indirect effect obliging national courts to interpret national law as far as possible in accordance with EU law<sup>43</sup> and the doctrine of state liability that required Member States to compensate damages sustained by individuals due to state violations of EU law.<sup>44</sup>

These new rules had the effect of expanding the scope of individuals' rights by strengthening the role of private litigation as a mechanism for enforcing state compliance, supported by the useful interpretative aid and moral power of the Court of Justice via the preliminary reference procedure.

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<sup>36</sup> Treaty establishing the European Economic Community (1957).

<sup>37</sup> Alter (2001), 5.

<sup>38</sup> Maduro (1998), 17.

<sup>39</sup> Burley, Mattli (1993), 61.

<sup>40</sup> Judgment in *INNO v ATAB*, 13/77, EU:C:1977:185.

<sup>41</sup> Judgment in *Dekker*, 177/88, EU:C:1990:383.

<sup>42</sup> Judgment in *Rewe*, 33/76, EU:C:1976:188.

<sup>43</sup> Judgment in *Von Colson*, 14/83, EU:C:1984:153.

<sup>44</sup> Judgment in *Francovich*, C-6/90 and C-9/90, EU:C:1991:428; Judgment in *Brasserie du Pêcheur*, C-46/93 and C-48/93, EU:C:1996:79.

The Court explained how Member States should fulfill their obligations and set substantial and procedural conditions for private litigation to maintain its particular function. Additionally, the EU legislator has adopted a number of directives to facilitate private enforcement of sector-specific substantive norms such as Procurement Remedies Directives,<sup>45</sup> Intellectual Property Rights Directive<sup>46</sup> or the Consumer Injunctions Directive<sup>47</sup> by setting out the remedies, rules and rights of individuals before national courts within their scope of application.<sup>48</sup> These measures have considerably strengthened the role of stakeholders in enforcement of EU law. As a result, although individuals still cannot rely on every EU act and challenge every state measure, their ability to invoke EU rules against state violations concerns a big portion of both EU and national laws. To give an example, sample years of 2000, 2005 and 2010 brought together around 730 preliminary references which led to either the Court's judgment or order. Out of these references, 560 cases raised issues of state non-compliance while only 170 were concerned with either the validity of EU secondary legislation or constituted matters of pure interpretation. This suggests that individuals utilize private litigation as a compliance mechanism in approximately 75% of cases where EU law was involved.

### 6.2.2 Strong and weak sides of private enforcement: some general remarks

The first most obvious feature of the decentralized enforcement mechanism which could constitute both its strength and weakness, is the fact that there is no control over it.<sup>49</sup> The mechanism functions by itself and is dependent only on the will of stakeholders and national courts. The Court of Justice can, of course, open new avenues of challenge to state conduct via its friendly interpretation and thus invite more litigation in a given area but this is as far as control goes. Consequently, this feature, when perceived as a weakness, indicates that only particular state violations can be subject to the decentralized enforcement mechanism which, in turn, has two dimensions. Firstly, there are actual limits to the functioning of this mechanism imposed by both, European and national rules.

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<sup>45</sup> Council Directive 89/665/EEC of 21 December 1989 on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts, OJ L 395, 30.12.1989, 33-35; Council Directive 92/13/EEC of 25 February 1992 Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, OJ L 76, 23.3.1992, 14–20.

<sup>46</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 157, 30.4.2004, 45–86.

<sup>47</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, OJ L 166, 11.6.1998, 51–55.

<sup>48</sup> Wilman (2015), 16.

<sup>49</sup> *Ibid.*, 555.



Individual rights can be successfully relied on in national courts only when they correspond to specific, clear and unconditional state obligations or, in other words, when EU law confers rights on private parties.<sup>50</sup> Secondly, individuals are most of the time concerned only with their own private interests and they rarely litigate out of altruistic reasons. However, the lack of control over private litigation and its reliance on individuals can be also perceived as a strength. Often, it is private parties who first learn of state violations being the addressees of state measures. In the sample years of 2000, 2005 and 2010, violations in application constitute around 90% of all cases litigated by individuals. Stakeholders are, consequently, mostly vigilant with respect to issues of application and can deal with matters that are too small or insignificant for the Commission to take action.

Another feature of the decentralized enforcement mechanism that can also constitute both a strength and a weakness is its reliance on the knowledge and good will of national courts.<sup>51</sup> Since it is devised as a tool to combat state conduct, the judiciary being the third power in the Montesquieu's division, it is not that obvious that national courts will be eager to rule against other state organs by relying on a set of rules that may feel foreign and intrusive. However, sixty years of European integration have rather shown a strong and lasting cooperation with the Court of Justice via the preliminary reference procedure, especially among lower level courts. As Alter points out, the new role the Court of Justice had ascribed them boosted their powers and position vis-à-vis the state and higher courts, giving them enough of an incentive to cooperate.<sup>52</sup> Nonetheless, it should still be observed that not all national courts are always willing participants in the decentralized enforcement mechanism and, as chapter 2 has shown, they can also make mistakes. The effectiveness of the mechanism is, however, strongly dependent on the cooperation of national courts.

The dependence of the decentralized enforcement mechanism on national courts brings yet another weakness: most national courts cannot rule on the validity of domestic acts (except e.g. supreme courts). In most cases, they can only decide to set aside national provisions which are in conflict with EU law. Such provisions do not lose their binding force but they are simply not applied to the specific case. Consequently, national courts in the majority of cases can remedy only singular instances of state violations and the effects of their judgments are quite limited. On the other hand, the positive side of the decentralize enforcement mechanism's reliance on national courts is that they can enforce their own judgments.

Some authors raise the issue of the lack of adequate legal protection of Member States in the preliminary reference procedure which neither provides for extensive initial negotiations nor for an

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<sup>50</sup> Ibid., 490-491.

<sup>51</sup> Stone Sweet, Brunell (2004), 70.

<sup>52</sup> Alter (1998), 241-244.

equivalent contradictory debate such as that in the infringement procedure under Article 258 TFEU.<sup>53</sup> It should be observed, however, that, although a Member State cannot sufficiently defend its conduct or present evidence to the Court of Justice,<sup>54</sup> it can do so before the national court where the substantive part of the proceedings takes place and where the final decision is made.

### 6.3 Dynamics of the decentralized enforcement mechanism

Since the Commission is a central body furnished with the competence and means to address a variety of state violations and to regulate from the top its enforcement policy, it is capable of adopting this policy to the reality and effects of the remaining EU enforcement measures. Already in the late nineties, Weatherill stated that the Commission ought to pay attention to the capacity of national procedures to effectively protect stakeholders' rights and the latter's ability to launch these procedures.<sup>55</sup> The demand placed on the Commission and, accordingly, areas where its attention is mostly required, can thus be perceived through the operation of relevant enforcement instruments such as private litigation and SOLVIT or, rather, on the basis of their failings. The categories of violations that these measures address effectively do not require the Commission's attention so much as those which decentralized measures fail to address. It is mostly the areas left out by these decentralized instruments that create the Commission's demand side.

The decentralized enforcement mechanism is not characterized by the same type of general application as the infringement procedure under Article 258 TFEU. Due to its fuzzy background and evolution through practice sewn together by irregular preliminary rulings of the Court of Justice, no Treaty provision determines the decentralized enforcement mechanism's scope of application. It is rather that the Court's case-law has laid out the basis for and set the limits to its application but the core of its functioning is determined by the nature of private litigation. Similarly to the infringement procedure, the decentralized enforcement mechanism requires that a violation of an existing EU legal rule takes place and that this violation can be attributed to a state organ. However, for private litigation to operate as an enforcement mechanism, the violated rule has to confer rights, be clear and precise and leave no discretion to national organs. It does not always have to be directly effective but this quality can facilitate the position of stakeholders by strengthening their claims.<sup>56</sup> Most of all,

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<sup>53</sup> Schermers, Waelbroeck (2001), 240.

<sup>54</sup> Audretsch (1986), 244; Everling (1984), 223.

<sup>55</sup> Weatherill (1997), 45.

<sup>56</sup> Cichowski, *The European Court and Civil Society* (Cambridge University Press, 2007), 34-36; Alter, Vargas, *Explaining Variation in the Use of European Litigation Strategies*, 2000 *Comparative Political Studies* 33, 456.

however, the violation has to result in a legal dispute involving an interested individual. Likewise, but limited only to cross-border disputes, SOLVIT also requires that there is a stakeholder whose “EU rights in the internal market are being denied by public authorities” of another Member State.<sup>57</sup>

The specific nature of decentralized measures is thus such that they are heavily dependent on stakeholders. It is them that initiate legal proceedings before national courts or file cases in the SOLVIT network, launching the operation of either enforcement mechanism. The functioning of those solutions is thus conditional upon individuals' will to take action. This constitutes a difficult to capture and measure variable in an otherwise defined system. It is the reason why some disputes - although fulfilling the conditions of admissibility - are never subject to its application. Stakeholders' individual choices whether to take action determine the dynamics of decentralized measures. The following section takes a closer look at the dynamics of the private enforcement while the dynamics of SOLVIT will be addressed in section 6.8.

### 6.3.1 Dynamics dependent on participants

Stakeholders shape the functioning of the decentralized enforcement mechanism. It is through the lens of their actions that the operation of this enforcement instrument can be understood. By analyzing which types of individuals utilize it, it is possible to realize the categories of state violations that it is best suited for. Only when it is clear who is most likely to rely on this measure, we can distinguish certain basic litigation patterns and identify private enforcement's weak spots, allowing to narrow down the concept of demand placed on the European Commission. This is in line with Komesar's participation-centered model which assumes that the actions of participants are a factor that "best account for how institutions function." It is a bottom-up approach which permits to determine the operation of institutions by analyzing the interactions between their participants.<sup>58</sup>

Reliance on individuals to explain different European phenomena is not new. Many scholars look nowadays at European integration as the process partially driven by litigants, or they refer to private enforcement as a strategy influencing institutional change and domestic shifts of power.<sup>59</sup> The role litigants play in the European Union is, therefore, more and more recognized as one of several forces that can influence change. What is, however, mostly important about this development is that it constitutes a departure from the generalized approach to the concept of 'individuals'. The

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<sup>57</sup> Commission Recommendation on the Principles Governing SOLVIT, C(2013)5869, 4.

<sup>58</sup> Komesar (2001), 30.

<sup>59</sup> Cichowski (2007); Stone Sweet, Brunell (2004); Alter, Vargas (2000); Maduro (1998), 28; Mattli, Slaughter (1998).

classification of all litigants as ‘individuals’ masks the differences among them in relation to their “legal understanding, resources and empowerment”.<sup>60</sup> The concept of ‘individuals’ comes down in legal studies to the distinction between natural and legal persons which is a simplification. Natural persons can have legal background (or not), various character traits and diverse resources. Legal persons include both small- and middle-size businesses as well as large corporations, but they also include various organizations and associations (governmental and non-governmental) that are established for the purpose of furthering a particular interest, be it public or private, concentrated or diffuse (e.g. consumer protection organizations, trade unions). Some individuals are more likely to initiate legal proceedings than others and this distinction is the result of their diverse attributes and factors specific to their cases and situation. However, not enough attention is still paid to the complex matrix of motives that drive stakeholders to make conclusions regarding the decentralized measures’ dynamics. Individuals may be seen as vehicles of pressure or enforcement but they are rarely afforded more than occasional attention which can lead to skewed conclusions.

The exploration of the Commission’s demand side requires a closer look at the decentralized enforcement mechanism and its dynamics that determine the types of cases it is most suited for. The dynamics of this measure are shaped by its participants who make choices whether to take action or abstain. These choices are, in turn, influenced by various variables that go beyond a simple distinction into natural and legal persons.

### 6.3.2 Costs, benefits and the probability of prevailing

“The character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation.”<sup>61</sup> In other words, it is the interaction between the costs and benefits of action that determines participation in the decentralized compliance mechanism.<sup>62</sup> The dynamics of decentralized measures depend on stakeholders’ activity which, in turn, is the result of their balancing of costs and benefits of potential action. This formula constitutes the basis for further analysis.

Komesar describes the cost side of participation as comprising the costs of information and the costs of organization where the latter is dependent on the former.<sup>63</sup> To put it in litigation terms, a

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<sup>60</sup> Rawlings (2000), 7.

<sup>61</sup> Komesar (2001), 30.

<sup>62</sup> Wilman mentions cost-benefit analysis specifically with respect to the decentralized enforcement mechanism in Wilman (2015), 555.

<sup>63</sup> Komesar (2001), 30.

potential plaintiff has to incur the costs of information with respect to the dispute at issue by either acquiring the knowledge themselves or hiring a lawyer, as well as they have to suffer the costs of organization by meeting all the costs connected to filing legal claims. But what are those costs exactly? According to Trubek et al., the costs of litigation or, as the authors call them, resources to be invested by the parties in order to attain a future result, constitute money and time.<sup>64</sup> A specific amount of funds has to be funneled into proceedings (e.g. lawyers' fees) and a considerable amount of time has to be spent in order to see the proceedings through. But, although Trubek's et al. analysis of the costs of litigation is limited only to costs that can be put in monetary terms, they do recognize that there is also a third, non-monetary cost of litigation: the psychological cost.<sup>65</sup> Litigation can simply be a demanding venture, one that can take a toll on the emotional and mental well-being of parties.<sup>66</sup> These costs as seen by Trubek et al. form constituent component of Komesar's costs of information and organization. It should, however, be observed that the costs of litigation have two dimensions. When an individual looks at the cost side of litigation, they see how many resources they have at their disposal and assess not only the costs they will actually have to spend on legal proceedings but also the potential lost opportunity. Litigation costs are not only a matter of the actual investment made but also of any other investment that could be made if the decision regarding the proceedings was negative. Such opportunity costs of money and time should, therefore, also be taken into account when assessing the cost side of litigation.

The costs of litigation are, therefore, understood here in the broadest sense as comprising all the expenditures and investments that are taken for the purpose of action, the opportunity costs of those investments, as well as any other material or non-material price or toll that is endured in order to proceed with this action. The reason for such a broad perception of costs is such that the decision whether to launch legal proceedings is ultimately a private, individual act and, although some costs can be considered as always present in litigation, others can occur only in particular circumstances and/or weigh in differently.

The benefit side of action is often associated with the concept of 'stakes' or 'incentives'. Trubek et al. perceive litigation as investments in "results to be achieved" which are either monetary or non-monetary in nature.<sup>67</sup> This reasoning could be expended further to include both material expected goals (e.g. compensation for damage) and non-material (e.g. satisfaction). Komesar, on the

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<sup>64</sup> Trubek, Sarat, Felstiner, Kritzer, Grossman, *The Costs of Ordinary Litigation*, 1983-1984 *UCLA Law Review* 31, 76.

<sup>65</sup> *Ibid.*, 120.

<sup>66</sup> Wilman (2015), 555.

<sup>67</sup> Trubek et al. (1983-84), 76.

other hand, approaches benefits from the point of view of their distribution across particular units.<sup>68</sup> Similarly, Cooter et al. perceive 'stakes' in a purely material way as "something to be divided".<sup>69</sup> Benefits of litigation can, therefore, have a narrow scope and serve or belong to only one party (e.g. compensation for a one-time wrongful application) or they can be distributed across a larger unit with varying degrees of per capita stakes and importance (e.g. compensation for recurring application of an incompatible national law). Finally, it can be said that benefits constitute the measure of the substance of the dispute (what is at stake), that is what is deprived or negated by a state violation, what the applicant requires restored or introduced and what the national court is asked to pronounce on (e.g. residence permit, tax exemption). Often, however, the benefits can go beyond this claim value and comprise additional stakes such as the psychological benefit from winning the case or from compensation that exceeds the damage. The benefit side is, like costs, influenced by particular variables which determine its nature and extent. It is, therefore, understood here in the broadest sense of comprising all the possible stakes an individual may have in participation, that is every gain that there is to achieve in legal proceedings.

According to Komesar's model, it is the interaction between these costs and benefits of litigation that determines participation in legal proceedings. An individual measures, consciously or not, costs against benefits, and on the basis of achieved result, determines whether to initiate legal proceedings. This balancing occurs, however, before the proceedings take place when the actual benefits and most of the costs can only be expected by the potential plaintiff. Although it is possible to foresee the extent of at least some litigation costs, others can only be assumed (e.g. psychological costs). Even more so, the acquisition of benefits and the insight into their extent being dependent on the final verdict, it is the subjective expectation of those benefits that is balanced against the costs. Consequently, individuals' readiness to engage in litigation is determined by the interaction between the expected costs and benefits of participation.

Alter and Vargas claim that there are many examples of cases in the EU sphere when, despite the surpassing benefits, litigation was not employed. They suggest that other factors beyond "cost and ideology" discourage individuals.<sup>70</sup> Alter and Vargas approach, however, litigation as a strategy for groups to influence policy change. Their claim refers to situations which involve long-term objectives and elaborate strategies and which constitute a distinct setup (or, as will be surmised further, a variable), narrower than the general approach taken here. It does not mean, however, that

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<sup>68</sup> Komesar (2001), 30.

<sup>69</sup> Cooter, Marks, Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 1982 *Journal of Legal Studies* 11, 227.

<sup>70</sup> Alter, Vargas (2000), 477.

their suggestion does not apply to other cost-benefit analysis. It is possible that sometimes, despite surpassing benefits, individuals choose not to lodge claims. Two reasons can be suggested to explain this discrepancy.

It is rare that the process of balancing of costs and benefits of potential action takes place in separation from other available means. As Galanter demonstrates, litigation is only one of several alternatives a would-be applicant has when faced with a legal dispute. The easiest but also least beneficial answer to a legal dispute is simple 'inaction' when a stakeholder chooses to do nothing and lets a wrongdoer go free. But often there is also a possibility of 'exit', that is "withdrawal from a situation or relationship" when, for example, a potential litigant chooses to resign his job or move to another Member State in order to avoid the legal problem. And finally, there are different dispute-settlement systems both official and unofficial, national and European (such as SOLVIT discussed further), which can provide an easier, faster and generally cheaper way of achieving one's goals.<sup>71</sup> Each of those alternatives, including inaction, have their own costs and benefits and an individual measures the result of their interaction with the result of balancing costs and benefits of other options. Consequently, even if the benefits of litigation exceed the costs, this difference can still be less attractive than in, for example, mediation.

The second reason why surpassing benefits do not always incline individuals to bring legal claims stems from the uncertainty that surrounds legal proceedings. Until the court pronounces on a case, an individual can only guess with higher or lower accuracy what will be the outcome of the trial. Basically, all they can do is try to estimate their probability of prevailing. If it appears that their chances of winning the case are close to zero then no amount of benefit will convince them to litigate.

The probability of prevailing can, therefore, be said to constitute an additional factor, one that influences the balance between the costs and benefits and allows a stakeholder to assess the difference between the two sides of expected action. It should be born in mind, however, that when an individual deliberates the possibility of litigation, it is their own subjective perception of their odds that they take into account and not the actual, objective probability.

#### 6.4 Factors influencing three sides of litigation choice

The costs and benefits of litigation as well as the likelihood of prevailing vary on a case-by-case basis. Whenever a question of launching legal proceedings arises, these three sides have diverse scope and substance and, as a result, differently interact with each other. This is because numerous

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<sup>71</sup> Galanter, *Why the 'Haves' Come out Ahead*, 1974 *Law and Society Review* 9, 124-126.

variables influence and shape them. These variables are specific to a particular case and their effects can also be different but the costs, benefits and the probability of prevailing are each a function of those variables.

The inspiration for the proposed set of variables can be found in Trubek's et al. model.<sup>72</sup> The authors approached litigation as an investment and, on the basis of empirical data, sought to answer the question of “what determines the amount of time and money invested in a case.”<sup>73</sup> To achieve that, they formulated a “model of the investment process” consisting of different variables that increase or decrease the time lawyers spend on a case. Their research was thus focused on factors that impact only the cost of time and, even more specifically, factors that influence the amount of time lawyers are willing to invest in cases. For that reasons, it was considerably narrower in scope than current analysis but it did provide an example of a structure for a model of litigation choice, with its method of grouping variables into several main clusters. Overall, Trubek's et al. model consisted of five clusters: case characteristics, events in the case, nature of participants, participant goals, and processing and management. Two of these clusters were mostly relevant for this thesis: case characteristics and nature of participants, as well as a little bit of participant goals. The remainder of the model proposed in this thesis was inspired by information found in the literature on litigation variations and strategies in the decentralized enforcement mechanism,<sup>74</sup> the economics of suit and settlement,<sup>75</sup> and, finally, in theories of European integration and constitutionalization which underline the role of litigants in the development of European integration.<sup>76</sup> None of these works presents as structured and comprehensive study as Trubek's et al. model of investment process but they generally offer a few suggestions regarding factors that induce or dissuade from litigation. This thesis's model of litigation choice is constructed on the basis of these suggestions and the Trubek's et al. model of the investment process.

The variables influencing three sides of litigation choice are divided into six clusters according to the source they originate from as shown in Table 1. They relate to access to justice issues, legal certainty and the availability of legal expertise. They can also stem from the particulars of the case,

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<sup>72</sup> Trubek et al. (1983-84).

<sup>73</sup> *Ibid.*, 76-77.

<sup>74</sup> Cichowski (2007); Alter, Vargas (2000); Harlow, *A Community of Interests? Making the Most of European Law*, 1992 *Modern Law Review* 55 (1992a); Harlow, *Towards a Theory of Access for the European Court of Justice*, 1992 *Yearbook of European Law* 12 (1992b).

<sup>75</sup> Reinganum, Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 1986 *Rand Journal of Economics* 17; Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 1973 *Journal of Legal Studies* 2; Cooter et al. (1982); Gould, *The Economics of Legal Conflict*, 1973 *Journal of Legal Studies* 2.

<sup>76</sup> Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004); Slaughter, Stone Sweet, Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing, 1998).



individual traits of litigants and be the result of legal culture. Each of those variables has a particular effect by impacting either the costs side of litigation, benefit side or the subjective perception of odds. Some of them, however, can affect two or even three of those elements. Also, while a number of them can have either a negative or positive effect depending on their increase or decrease, others - when present - can have only one. Not every decision whether to litigate is influenced by each and every variable though. This depends on the circumstances of each situation. The purpose is not to present a tight list of always-present, self-contained factors but to rather put together all variables that can impact individuals when they deliberate litigation, and to map out their effects. Also, many variables will interact with each other, one influencing another or constituting a 'counterbalance' to the effects of another by either mitigating or aggravating them. Table 1 shows the twenty-one variables grouped into six clusters as well as their potential effects.

Cluster	Variables	Impact on:		
		Costs	Benefits	Probability of prevailing
<b>Access to justice</b>	Legal standing rules	√		
	Other procedural rules	√		
	Litigation fees	√		
	Cost allocation rules	√	√	
<b>Legal expertise</b>	Legal counsel fees	√		√
	Legal aid	√		
	Support of an organization	√		√
<b>Legal certainty</b>	Clarity and precision of law	√		√
	Precedent	√		√
<b>Case characteristics</b>	Claim		√	
	Complexity of facts	√		√
	Legal complexity	√		√
	Duration	√		
<b>Individual characteristics</b>	Legal information	√		√
	Financial resources	√		
	Resource of time	√		
	Personal preferences		√	
	Self-esteem	√		√
<b>Legal culture</b>	Risk preferences	√	√	√
	Litigating society	√	√	√
	Trust in the justice system	√		√

Table 1. Model of variables influencing three sides of litigation choice.

#### 6.4.1 Access to justice

As the Court of Justice has repeatedly held, it is national procedural rules that govern the functioning of the decentralized enforcement mechanism (principle of national procedural autonomy), and Member States are free to shape them according to their own standards as long as they respect the principles of effectiveness and equivalence. Consequently, these rules can have differing impacts on individuals' decision to litigate. Four different variables can be distinguished within this cluster.<sup>77</sup>

##### *Legal standing rules*

Legal standing rules can be considered a condition for private litigation to perform the function of the decentralized enforcement mechanism. Lack of locus standi bars access to national courts and makes it impossible for excluded entities to rely on EU law against state violations. Only those individuals to whom national procedural rules grant legal standing can utilize private litigation as a compliance mechanism.

Notwithstanding, rules on access to justice can also be considered a variable that affects an individual's decision whether to litigate. These rules differ not only across Member States and policy areas but also with respect to different categories of applicants. They can either be open or restrictive, permitting only specific applicants and/or requiring a substantial amount of proof or legal exercise in order to demonstrate one's standing. Consequently, the more restrictive these rules are, the harder it is to establish locus standi and the higher are the costs of litigation in matters of time and money, decreasing the overall likelihood of litigation.

The issue of legal standing is problematic mostly for interest organizations, membership associations or with regard to collective action. Many Member States limit their legal standing either by denying them litigation rights all together or by imposing procedural constraints, permitting only specific exceptions.<sup>78</sup> This is even more a problem with respect to diffuse interest organizations which may not always be able to prove the existence of a 'right' or 'interest' to justify its claim before a national court.<sup>79</sup> As a result, when national rules prevent such organizations or groups from participating in legal proceedings, this limits the function of private litigation as an enforcement mechanism by excluding in particular Member States specific types of litigants. It should be noted, however, that there are ways of circumventing limitations on legal standing by, for example, organizations using frontmen: individuals whose legal standing is indisputable. Such frontmen may be

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<sup>77</sup> Judgment in *Q-Beef and Bosschaert*, C-89/10 and C-96/10, EU:C:2011:555, 32.

<sup>78</sup> Alter, Vargas (2000), 470.

<sup>79</sup> Wilman (2015), 490.

outsiders or belong to the organization and actively participate in its litigation strategy but, either way, although they are formally plaintiffs in legal proceedings, in practice it is the organization that the defendant is battling in court and that incurs the costs.<sup>80</sup> This sort of strategy is, however, used mostly when an organization or association is pursuing long-term objectives and where test cases and frontmen are an element of their strategy. An example of a successful use of such a strategy is presented by Harlow with respect to *Drake*<sup>81</sup> where a coalition of cause groups found a suitable plaintiff and used her as a frontman in a test action to influence a change in the British equality legislation.<sup>82</sup> Finally, various EU directives which seek to facilitate private enforcement in given sectors (e.g. public procurement) generally harmonize rules on legal standing by specifying who has the right to sue. However, according to Wilman, such EU measures mostly just confirm existing national rules instead of bringing anything new to the table.<sup>83</sup> NGOs in the environmental sector appear to be in the worst position. Not only has the EU so far failed to adopt measures harmonizing enforcement in this policy area, their legal standing is often limited and many environmental norms do not provide sufficiently clear, precise and unconditional rights to rely on before national courts.<sup>84</sup>

#### *Other procedural limitations*

Similarly to the effects of legal standing, such procedural rules as statutes of limitations, burden of proof or the legal standard of evidence can raise the costs of litigation. The more restrictive and/or unfavorable towards plaintiffs, the harder it is to establish a state violation and the higher are the costs of litigation in terms of money spent, time and psychological burden. Also, the more complex the procedure is, the more time and money is required to navigate it, further elevating litigation costs.

Certain EU measures which aim to harmonize private enforcement in specific sectors<sup>85</sup> establish their own limitation periods and rules of evidence.<sup>86</sup> However, in remaining policy sectors it is possible that Member States lay down provisions that, on the outside, seem compatible with European requirements but which, in fact, hinder access to justice of particular stakeholders when, for example, the decision-making process is biased in favor of their opponents.<sup>87</sup> This is against the principles of effectiveness and equivalence and, by itself, constitutes a violation of EU law. Notwithstanding, the effects of such provisions are such that private litigation is no longer capable of

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<sup>80</sup> Harlow (1992b), 232.

<sup>81</sup> Judgment in *Drake*, 150/85, EU:C:1986:257.

<sup>82</sup> Harlow (1992a), 345-346.

<sup>83</sup> Wilman (2015), 358.

<sup>84</sup> Hedemann-Robinson, *Enforcement of European Union Environmental Law*, 2nd ed. (Routledge, 2015), 229.

<sup>85</sup> In sectors such as: public procurement enforcement, consumer injunctions, competition damages, or intellectual property rights enforcement, supra note 45-47.

<sup>86</sup> Wilman (2015), 362-371.

<sup>87</sup> Galanter (1974), 123-124.

performing the function of the decentralized enforcement mechanism. Most of the time, however, procedural constraints do not constitute violations of EU law and pursue particular, justifiable objectives such as the principle of due process but they are, nonetheless, capable of discouraging individuals from pressing claims by raising the costs of litigation.

### *Litigation fees*

It is no surprise that plaintiffs' litigation fees constitute a variable that has influence on the costs of litigation. Applicants in national proceedings have to incur a number of fees such as filing claims fees or expert fees. Clearly, the higher the fees, the higher the costs of litigation in terms of plaintiffs' financial expenditures. Legal counsel's fees, although fitting within this variable, are excluded and shifted to the cluster of legal expertise where they form a constituent element of access to such expertise.

### *Cost allocation rules*

Every Member State is free to decide rules on the allocation of litigation costs: financial costs incurred in the course of legal proceedings enveloping both, litigation and legal counsel's fees, as well as costs sustained in relations to the preliminary reference procedure.<sup>88</sup> These rules constitute another variable that can influence the decision whether to litigate but which affects not only the overall costs of litigation but also the benefits of litigation as perceived by individuals. This triple impact depends, however, on the cost allocation system adopted in a particular Member State and is closely related to another variable: risk preferences.

Although each system has its own subtleties, the most obvious distinction can be found between the American and the British rule. In the American system, the parties usually bear their own financial costs while in the British system, the loser pays all. Under the American rule, the applicant knows the financial costs he will have to bear (provided that he has access to the necessary knowledge), because the costs are certain and he will incur them irrespective of the proceedings' outcome. The expected value of the trial is also more certain, amounting to the difference between the stakes and expenses if they can be put into monetary terms. The British system introduces a stronger element of uncertainty with respect to financial costs and benefits of litigation. The party may either incur no costs at all or may have to suffer more-or-less double costs. The expected value is higher but also less certain.<sup>89</sup> As a result, it is trickier under the British system to correctly predict the financial costs and benefits of litigation. This is where another variable comes into play, one that will be discussed further: risk preferences of a particular individual. The American system is more

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<sup>88</sup> Broberg, Fenger, *Preliminary References to the European Court of Justice*, 2nd ed. (Oxford University Press, 2014), 470.

<sup>89</sup> Posner (1973), 428.

attractive to risk-averse persons because the risk stemming from litigation is smaller while the British system is more attractive to risk-neutral persons.<sup>90</sup>

There can be variations on the American and British systems. Some favor the plaintiff where either the defendant bears all costs if the plaintiff wins or each party bears its own costs if the plaintiff loses, while others favor the defendant.<sup>91</sup> It needs to be remarked that this variable impacts only the financial costs and benefits of litigation. Consequently, even under the British system in cases when the defendant bears all costs as the losing party, the plaintiff (as the winner) still experiences other costs (e.g. invested time). He also suffers the opportunity costs of his financial expenditures because, no matter the final court verdict, he does have to first invest in the proceedings giving up on other ventures.

#### 6.4.2 Legal expertise

Legal expertise is the second cluster of variables that has influence on individuals' decision to litigate. It is built around the issue of the availability of professional aid and, although it could be considered an integral part of access to justice (first cluster), different means of acquiring professional aid as well as their varying effects suggest that it should be differentiated.

##### *Legal counsel fees*

Although legal counsel fees can be regarded as a component of general litigation fees, they are considered here as forming a stand-alone variable because they are closely connected to lawyers' availability and can be seen as one of the three factors that determine individuals' access to legal expertise. This variable is monetary in nature and affects the financial costs of litigation. However, it also has an impact on individuals' perception of the probability of prevailing. Although it is not always the case, individuals tend to associate high legal counsel fees with lawyers' expertise and improved service and thus expect to have higher chances at prevailing. It should also be observed that Member States generally allow for self-representation in national courts subject to particular conditions. If a stakeholder chooses to act without legal counsel and represent himself before a national court, his costs of litigation diminish. This, however, can sometimes have an unfavorable effect on his probability of prevailing, depending on his own expertise.

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<sup>90</sup> Cooter et al. (1982), 245.

<sup>91</sup> Reinganum, Wilde (1986), 563.

### *Legal aid*

The effect that legal counsel fees have on the costs of litigation can be mitigated or eliminated by means of legal aid. Every Member State has its own rules on legal aid and, consequently, legal aid has different forms, and different persons can be considered eligible. When, however, it is available, it has the effect of diminishing the material costs of litigation.

### *Support of an organization*

The availability of governmental or non-governmental organizations can also have an impact on an individual's litigation choice. Such entities can provide both material resources and expertise that litigation requires.<sup>92</sup> The extent of help a stakeholder may receive from such organizations necessarily differs depending on their nature, structure, means and objectives (e.g. governmental or not, public or private interest-oriented) but acquiring the support of an organization does have the effect of lowering the costs of litigation. Not only the plaintiff may obtain financial means for the purpose of legal proceedings diminishing his material costs but he can also receive professional advice and legal aid thus saving time and money he would need to spend on acquiring it himself. The involvement of such an organization can thus diminish both, the information and organization costs of litigation. Lastly, an organization's involvement can also lessen the psychological cost. An applicant may feel less anxious about the trial if they do not have to tread the meanders of legal procedure on their own. This can also influence their perception of the probability of prevailing. The fact that an organization agreed to provide its support may not only mean that its resources increase their chances of winning but that they are also in their right.

### 6.4.3 Legal certainty

This cluster refers to the quality of law applicable to the case at issue. Unlike the first cluster which was built around the procedural aspects of initiating and participating in legal proceedings, this one is concerned with substantive provisions. It involves questions of the law's content and formulation and takes into account the state of existing case-law. Only two variables are distinguished here: clarity and precision of law, and precedent, both having an impact on the costs of litigation as well as an on the probability of success.

#### *Clarity and precision of law*

Imprecision and complexity of law increase the time it takes to discern what the law states, prolong the proceedings and allow for multiple, equally valid or even contradictory interpretations.

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<sup>92</sup> Cichowski (2007), 33.

The more convoluted the provisions, the more likely are differing outcomes and the harder it is to predict the end result. As a consequence, the probability of the plaintiff's interpretation of the law prevailing over the defendant's diminishes.

#### *Precedent*

Irrespective of the previous variable, the existence of favorable case-law, and especially that of the Court of Justice, can considerably influence the plaintiff's probability of prevailing in court. So long as it is correctly applied to the case at issue, it can boost the chances of prevailing despite the imprecision or complexity of legal provisions. It can also lower the costs of litigation by allowing to limit the time necessary to prepare legal arguments.

#### 6.4.4 Case characteristics

The following cluster refers to the characteristics of the case at issue. Four variables can be distinguished here: claim, complexity of facts, legal complexity and duration.

#### *Claim*

The concept of 'claim' is adopted here to signify the core of the dispute. It is a measure of what is 'at stake' or due; what the two parties are conflicted over. In matters relating to state responsibility for violations of EU law, it is a measure of what is deprived or negated by a state violation. This variable represents, therefore, the rectification of that violation. This may include the return to the state from before the violation took place or, if this is not possible, different forms of compensation. The claim can also denote putting a halt to the violation in general (e.g. action for annulment of incompatible laws) but, due to the specific nature of private litigation, it will more often than not indicate putting an end only to the effects this violation has on a particular plaintiff. It is possible that the individual will expect to achieve more than just a rectification with respect to himself by, for example, seeking additional damages or pursuing a long-term strategy of influencing state policy but this sort of goal is understood here as falling within a different variable: personal preferences. The claim variable is considered here as symbolizing merely the actual, raw content of the *claim*, deprived of any additional, personal objectives a plaintiff may have in legal proceedings. This variable has effects for the benefit side of litigation and can be said to constitute the core of benefits an individual has in legal proceedings. The size of this claim can, however, be constrained by national procedural provisions. Such rules as the scope of damages or award caps set a limit to the size of return an individual can expect from legal proceedings, limiting the claim and hence his benefit in proceedings.

### *Complexity of facts*

The complexity of facts refers to the process of determining the factual content of the case. It comprises such elements as the availability of proof, causation or plurality of factors. If, for example, evidence is scarce or causation is not obvious, then it is likely that additional costs have to be incurred both money- and time-wise in order to provide sufficient factual background to the case. Also, the less these facts can be established, the more the probability of prevailing diminishes.

### *Legal complexity*

Legal complexity, on the other hand, denotes the process of determining the legal context of the case. For example, plurality of possible legal basis or fragmentation of responsibility increase such complexity. Just as with respect to the complexity of facts, an increase in legal complexity raises the costs of litigation and reduces the probability of prevailing.

### *Duration*

Finally, the duration of the case, that is the time needed to see the case through, can also have an impact on the decision whether to litigate. Case duration is affected by a number of other variables like national procedural rules or legal or factual complexity. Clearly, this variable has the most obvious impact on the cost side of litigation. The longer proceedings lasts, the higher the cost and the stronger the mental strain.

## 6.4.5 Individual characteristics

This cluster is based on individual and subjective characteristics of a potential plaintiff, comprising all factors that stem from personal attributes of litigants. Interestingly, this cluster comprises the largest number of variables which, in turn, have the most diverse effects. Many of those variables also have the quality of interacting with variables from other clusters.

### *Legal information*

Legal information refers to the basic concept of legal knowledge that a litigant possess. It can be considered a precondition for private litigation because only those individuals who are aware of their rights can realize that a violation took place.<sup>93</sup> Aside from that, this variable also signifies that the more an individual is acquainted with law and courts, the lower are his costs of litigation because he needs less time to understand and analyze the dispute. The same reasoning can be applied to the perception of the probability of prevailing. The more an individual knows the law, the more he is likely to feel confident about his own estimation of his chances. This variable favors individuals who either

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<sup>93</sup> Wilman (2015), 555.



have legal background themselves or who can easily obtain legal services such as lawyers or legal persons that entered into contracts with lawyers (e.g. corporations, interest organizations or membership associations). Additionally, the more they litigate, the lower those costs become.

#### *Financial resources*

Financial resources are one of the variables that automatically come to mind when searching for factors influencing litigants' choices when they deliberate whether to go to national courts. Although it is trickier to categorize them, it is a fact that certain individuals do have more financial resources than others. It can be, for example, assumed that corporations have at their disposal more funds than small and middle-size businesses, interest organizations or, even more so, natural persons. Certain membership associations can also have not so small capital depending on who they assemble and what are the terms of their membership (e.g. an association of pharmaceutical companies). The resources of interest organizations depend on which interest they represent (diffuse or concentrated) and if they receive external founding. It can be assumed that legal persons will be more likely to possess more capital than natural persons but it can also be proven the opposite, depending on an individuals' profession and family ties. CEOs, board members or shareholders can sometimes have more assets individually than a diffuse interest organization.

This variable is intertwined with litigation fees and lawyers' fees and has a threefold effect on the cost side of litigation. Firstly, the more financial resources an applicant possesses, the more the perception of the material costs of litigation diminishes. To be clear, the litigation costs do not change. It is the subjective assessment of those costs that differs. They appear lower to those who have more. Second, individuals who have more financial resources at their disposal, are able to spend more. They can hire more expensive lawyers or devote more resources to accumulating proof. This is when their costs of litigation actually rise. And finally, an individual may suffer higher opportunity costs. It can, therefore, be suggested that as the perception of the costs diminishes, their extent actually rises. The more an individual has at his disposal, the lower the costs appear and the more he is ready to invest.

#### *Resource of time*

Time can also be considered a resource. Some individuals have at their disposal more time to engage in legal proceedings than others. An interest organization or a membership association have more time to spend on litigation since it is one of their main objectives. A company, on the other hand, may have less time to invest in legal proceedings and more to invest in actual business but its lawyers will still have more time to prepare litigation than a natural person.

Similarly to financial assets, the resource of time can have a threefold effect on the cost side of litigation. It can impact the subjective perception of those costs. The less time one can dedicate to

litigation, the more costly it may appear. Those who have more time at their disposal, may, however, be more eager to spend more of it on litigation, raising the costs. They will also incur higher opportunity cost. The time invested in litigation could, after all, be devoted to something more profitable.

### *Personal preferences*

An individual going to court has an objective(s) to accomplish. He may wish to simply get a "fair amount" of what is due but he may also wish to get the most out of the proceedings by expecting more than he is due (e.g. compensation that exceeds the damage).<sup>94</sup> Aside from the material interest, a litigant may also be motivated by ideological commitment<sup>95</sup> seeking to obtain a sense of justice or accomplishment, or he may be driven by spitefulness<sup>96</sup> seeking to satiate an appetite for retaliation or punishment. It is possible that an applicant is motivated by more than one objective. Interest organizations and especially those that serve diffuse or public interests are, for example, often driven by ideological commitment. Undertakings, on the other hand, may sometimes wish to serve a blow to their competition but they may just as well seek to win a case for ideological purposes. These different preferences increase the benefit side of litigation, adding to or sometimes even replacing the substance of claim.

Such personal objectives can, however, have a twofold nature. They can be short-term when a litigant wishes to win the case, gain whatever they expect from it and move on, or they can be long-term when the litigant's goals go beyond the dispute at issue. The latter takes place when, for example, an individual wishes to generate a favorable line of case-law, provoke a revision in law, influence state policy or even simply delay the adoption or application of unfavorable legislation.<sup>97</sup> Long-term objectives are often pursued by interest organizations, membership associations, or corporations. Mattli and Slaughter give an example of how French import- and export-oriented companies dissatisfied with their unfavorable position compared to companies from other Member States, induced the French government and Conseil d'Etat to accept the doctrines of direct effect and primacy.<sup>98</sup>

Pursuing long-term objectives generally involves repeat litigation. The applicant engages in a number of legal proceedings with the expectation that, over time, it will allow him to achieve the anticipated result. In such cases, the litigant is less concerned with the outcome of the particular

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<sup>94</sup> Trubek et al. (1983-84), 98.

<sup>95</sup> Mattli, Slaughter (1998), 189.

<sup>96</sup> Cooter et al. (1982), 239.

<sup>97</sup> Stone Sweet, Brunell (2004), 75; Alter, Vargas (2000), 452, 462; Mattli, Slaughter (1998), 189.

<sup>98</sup> Mattli, Slaughter (1998), 188.

dispute in question but more with the overall product of a series of disputes. He is often willing to forfeit some cases in order to accomplish a long-term goal. This is when satisfying his claim in a specific case does not matter as long as each case brings him closer to fulfilling his greater plan. Such long-term preferences have, therefore, large influence over the benefit side of litigation. They can considerably boost it up to a degree where the claim variable is sidetracked.

### *Self-esteem*

Attention should also be paid to individual character traits and the difference between stakeholders with a higher and lower self-esteem. Those who are more confident tend to be more optimistic about their chances and, consequently, perceive their likelihood of prevailing as higher while those who are insecure and doubtful tend to be more pessimistic. The latter also suffer a larger psychological cost of distress.

This variable affects more strongly natural persons than legal. Although any undertaking or organization is governed by natural persons who also take decisions influenced by their inherent character traits, such units are, nonetheless, less likely to be impacted by this variable. Decisions are often taken by more than one member and, consequently, they stem from a compound source where the responsibility is fragmented, weight distributed and the influence of particular characteristics diluted. Such entities are thus more detached from individual traits of their members. Their objectives are generally more complex than those of natural persons and they often need to take into account a wider range of matters. Self-esteem of their members is thus considerably offset by other issues. Lastly, the existence and future of such legal persons often depends on them being confident and positive about their actions.

As a result, even in disputes involving challenges to state conduct, legal persons (or rather their members) are more prone to feel confident about launching litigation. Additionally, size can boost self-esteem. The larger the legal person, the stronger it can feel in proceedings against such an enormous machinery as the state. Natural persons, on the other hand, are more likely to feel insecure about facing the state in legal proceedings and doubtful of their chances of singlehandedly winning against such a large and powerful repeat player.

### *Risk preferences*

The literature distinguishes between risk-averse and risk-neutral persons. Risk-averse are those who prefer certainty over risk. They would rather take less than the expected value of a risky alternative than risk this alternative.<sup>99</sup> Risk-neutral persons do not prefer certainty over risk and are ready to choose a risky alternative for an uncertain but better outcome. Risk preferences constitute a

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<sup>99</sup> Gould (1973), 280.

variable that can have considerable influence over an individual's litigation choice. It impacts the subjective perception of costs, benefits and the probability of prevailing and has the quality of altering the balance between these three sides. Its strongest influence is when alternatives to litigation are present. Risk-averse individuals are likely to perceive legal proceedings as an unnecessary gamble which may tip the balance against litigation. On the other hand, risk-neutral stakeholders are less likely to perceive legal proceedings as an unwanted, hazardous venture and are more willing to engage in litigation.

Natural persons can be risk-averse or risk-neutral depending on their individual character traits. Legal persons, however, tend to be risk-neutral. Whether it is a large or small company, an interest organization or a membership association, they are more likely to have a positive attitude towards risk and be willing to invest in uncertain but profitable outcomes. Similarly to the self-esteem variable, the existence and future of such legal persons, and especially businesses, depends on their ability to take risky decisions. They are also more acquainted with situations that involve risk since it is often an inherent side of their operation. Finally, the fragmentation of responsibility within a legal person and the fact that risk is shared by all its constituent natural persons, makes it easier to take risky decisions.

#### 6.4.6 Legal culture

The final cluster is built around the concept of legal culture. Whether a Member State as a whole or just a particular region, they develop their own legal culture that, in turn, influences their residents.<sup>100</sup> This culture does not have to be shared by every person residing within a particular area but it will be common to most, even if they may not be aware of this effect.

##### *Litigating society*

This variable influences all three sides of litigation choice: cost, benefit and the perception of the probability of prevailing. It can also noticeably boost the strength of other variables. Its effect is, however, the strongest when the society is clearly tilted towards either side. When the society is neither exceptionally litigating or not, the influence of this variable is smaller.

If an individual is surrounded by a litigating society by witnessing others claim their rights in courts, he is more likely to believe that such conduct constitutes the appropriate method of resolving problems. Consequently, his costs of litigation decrease, benefits increase and his probability of prevailing appears higher. He believes that litigation is the natural, commonly taken path and that he

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<sup>100</sup> Wilman (2015), 555.

is not acting against the general trend in the society. Thus, his psychological cost is smaller. He also believes he is doing what is *right* and it gives him the additional benefit in terms of his personal satisfaction. Finally, the fact that litigation is a common phenomenon in a given society means that it was employed enough times for precedents to have long been established. The path is more open and plaintiff-friendly and gives the individual higher chances of succeeding. It also decreases his other litigation costs (money- and time-wise) because cases do not need as much preparation as in a system which is less exploited. If, on the other hand, the society is not litigating, an individual may feel less entitled as if he is acting against what is commonly practiced and accepted, and thus feel a greater psychological strain. Risk-neutral stakeholders find themselves better in a non-litigating society than risk-averse. So do organizations and businesses because they are complex bodies with tasks divided among multiple persons where litigation is often "handled impersonally."<sup>101</sup>

#### *Trust in the justice system*

Although this variable is intertwined with litigating society, the two should be distinguished. One's trust in the justice system or lack thereof is an inherent feeling. It is influenced by historical evolution, local legal culture and the conduct of others but, unlike litigating society, it also has an individual element based on one's own experience. Being surrounded by a litigating society does not always have to mean that one trusts in the justice system.

Trust in the justice system makes an individual more positive about his probability of prevailing. If they consider that they are the one *right* in the dispute then they are likely to believe that justice will prevail and that the court will resolve the problem in their favor. Their psychological cost will also be smaller because they will be less nervous about the outcome of the case. This is one of those variables the intensity of which is influenced by repetitive litigation. The more an individual participates in legal proceedings, the more they are likely to develop either trust or distrust towards the justice system on the basis of their own experience. This variable favors undertakings and organizations over natural persons due to their impersonal, business-like attitude towards litigation.

## 6.5 Litigating readiness of individuals

The analysis of different variables that affect stakeholders' decisions whether to litigate shows the complexity of the dynamics of private enforcement. An individual's choice whether to go to court relies on a number of factors that go beyond such obvious limitations as financial resources and

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<sup>101</sup> Galanter (1974), 105-106.

procedural conditions. Certain variables increase the likelihood of litigation while others decrease, influencing the cost and benefit side of litigation choice as well as the probability of prevailing.

<b>LITIGATION MOST LIKELY</b>		<b>LITIGATION LEAST LIKELY</b>	
<b>Decrease in litigation costs</b>	Flexible legal standing rules Flexible procedural rules Low litigation fees Low lawyers' fees Legal aid Support of an organization Clarity and precision of applicable law Existence of precedent Simple facts Simple legal qualification Short case duration Legal information Large financial resources Large time resources High self-esteem Risk-neutrality Litigating society Trust in the justice system	<b>Increase in litigation costs</b>	Restrictive legal standing rules Restrictive procedural rules High litigation fees High lawyers' fees Lack of legal aid Lack of support of an organization Complexity and imprecision of applicable law Lack of precedent Complex facts Legal complexity Long case duration Lack of legal information Small financial resources Small time resource Low self-esteem Risk-aversion Non-litigating society Lack of trust in the justice system
<b>Increase in benefits</b>	High claim value Additional objectives	<b>Decrease in benefits</b>	Small claim value Lack of additional objectives
<b>Increase in the subjective perception of the probability of prevailing</b>	Support of an organization Clarity and precision of applicable law Existence of precedent Simple facts Simple legal qualification Legal information High self-esteem Risk-neutrality Litigating society Trust in the justice system High lawyers' fees	<b>Decrease in the subjective perception of the probability of prevailing</b>	Lack of support of an organization Complexity and imprecision of applicable law Lack of precedent Complex facts Legal complexity Lack of legal information Small self-esteem Risk-aversion Non-litigating society Lack of trust in the justice system Small lawyers' fees

Table 2. Litigation likelihood: increase and decrease of the three sides of litigation choice

Table 2 contains a summary of variables' different effects by showing when costs, benefits and the probability of prevailing are either the highest or the lowest. The left column depicts the most favorable configuration when the costs are low while the benefits and the probability of prevailing high. The right column shows the least favorable configuration when the costs are high while the benefits and the probability of prevailing low. The interaction between three sides of litigation choice is a little more complicated because infringement cases are complex matters with a differing amount

of favorable and unfavorable factors, and Table 2 only serves to show when litigation is most or least likely to take place. The more of enumerated effects from the left column occur, the more likely is the balance to tip in favor of legal proceedings, and the more effects from the right column occur, the more likely is the balance to tip against legal proceedings.

The analysis of presented variables makes it apparent that the balance between the costs and benefits of litigation looks different for different types of stakeholders where some are more likely to launch legal proceedings than others. Let us, therefore, look now at how these variables are most likely to impact different types of stakeholders. It should be born in mind, however, that the following outline is necessarily a generalized one. Every individual is unique with specific characteristics that distinguish him from others even within his own group. Aside from listing and studying every individual that exists, it is impossible to give justice to their distinctiveness. This section aims to build a typical picture of each litigating group.

#### 6.5.1 Businesses

Businesses are, in principle, more likely to be risk-neutral and have large financial resources. They experience little troubles with legal standing rules and often either employ their own lawyers or have contracts with legal firms thus increasing their legal information. The value of their claims is relatively high because they tend to operate on a broader scale than natural persons, and state violations impact them more severely. They are also prone to pursuing long-term objectives where litigation is merely an element of their strategy, and they are less likely to be influenced by such factors as non-litigating society or self-esteem. Unlike natural persons, businesses tend to pursue one main goal: profit and growth, and when state infractions prevent them from furthering this goal, they are more prone to initiate litigation. They generally act in a “purposeful, rational, calculating fashion” and are less likely to make emotional decisions but they also suffer from distortion of information across units and hierarchy or “excessive optimism.”<sup>102</sup>

These attributes nonetheless put businesses in a position where their benefits of litigation are, in general, rather high and costs rather low. If the case at issue is a simple matter and the applicable law is unambiguous then their costs decrease even further. Simple cases also allow to properly assess the chances of prevailing which, if positive, add to the benefits' side. In such situations, businesses are likely to engage in litigation. If, however, the issue is complex and the applicable law

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<sup>102</sup> Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 2006 Buffalo Law Review 53, 1373-74.

imprecise then their costs rise while their chances of prevailing diminish. This may discourage them from litigation. The high value of their claim and any long-term objectives can, however, still easily surpass the high costs even when the probability of success is rather low. Sometimes, such additional objectives can be so important that businesses may wish to launch legal proceedings even if the value of the claim is low.

Additionally, the larger the business, the more likely it is to engage in litigation. Corporations have even more resources and legal information at their disposal and more often pursue long-term goals than small or medium-sized enterprises (SME). The balance between the benefits and costs can, therefore, look positive with respect of corporations and negative with respect to smaller undertakings. It should be observed, however, that the concept of 'businesses' encompasses all ventures no matter their size, ranging from large, multinational corporations to small units consisting of only one or two persons. The latter type of undertakings is more likely to resemble natural persons than full-fledged businesses. The resources of such ventures are generally smaller, they rarely have contracts with lawyers and are more likely to be affected by such variables as self-esteem or litigating society. And while it can be expected that they litigate rarely, their readiness to go to courts depends also on the benefits of the case at hand. If the violation touches upon their ability to make profit then it can have the effect of putting them out of business or bringing serious, irreparable damage. Litigation benefits of such small units can thus sometimes surpass high costs. This is even more likely with respect to violations that impact a number of small businesses, provoking them to come together in group action and diminish their individual costs while the benefit stays the same.

However, even large businesses sometimes tend to refrain from litigation. One such example is so-called golden shares: special rights that protect Member States' interests in privatized companies. Although contrary to the free movement of capital if they do not fulfill several rigid conditions of legality,<sup>103</sup> they do not generate any litigation via the preliminary reference procedure. It would seem that businesses would have a particular interest in combating state attributed unlawful rights which prevent foreign investors from acquiring equities or put limitations on share acquisitions but most of golden shares cases are initiated by the Commission. A possible explanation could be found in the opportunity cost of time and money. Golden share cases are generally quite complicated, costly and tend to take a long time which could be otherwise better invested.

It can be summarized that when undertakings launch the decentralized compliance mechanism, it is always business-oriented and aims to protect or further their own private and concentrated interests which can be brought down to one dominating goal: profit and growth. The

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<sup>103</sup> Kuznetsov, *The Legality of Golden Shares under EC Law*, 2005 *Hanse Law Review* 1, 22.



central issues of their disputes are closely linked to their main activities and are often of financial nature. In the sample years of 2000, 2005 and 2010, litigation before national courts initiated by businesses constituted approximately 52% of all preliminary references raising issues of state non-compliance sent to the CJEU. Unsurprisingly, it was dominated by issues of taxation (27%), agriculture and fisheries (21%), establishment and services (13%) and the free movement of goods (13%). Businesses won on average 45% of cases.

### 6.5.2 Natural persons

Unlike businesses, natural persons' goals tend to be multiple and fragmented. They do not only seek financial gain, they also seek unquantifiable ends and ideals such as happiness, family, professional career, or quality of life. They are, therefore, not as 'single-minded' as businesses, pursuing a variety of goals with different levels of importance where the hindrance of one can be easily overshadowed by the satisfaction of others. As a result, natural persons mostly litigate issues that have the strongest influence over goals that - in their view - dominate others. Dismissal from work - if resolved against the worker - can affect their ability to, for example, pursue a desired career or support their family. Similarly, the amount of pension a person receives can impact their ability to sustain themselves. Even more obvious is the case of third-state nationals whose disputes over residence permits can either allow them to remain in the EU or force them to leave. However, what is important to underline is the fact that natural persons also litigate business-related cases in their capacity as business owners. Plaintiffs in such disputes have at their disposal resources of their businesses and their balance between costs and benefits of litigation resembles that of undertakings rather than of natural persons.

In the sample years of 2000, 2005 and 2010, litigation initiated by natural persons constituted around 40% of preliminary references raising issues of state non-compliance which makes it less by 12% than in case of business litigation (52%). On the other hand, their success rate was considerably higher amounting to about 62% of litigated cases (businesses were at 45%) which suggests that natural persons are more driven by considerations of their probability of prevailing than businesses. Within the sample pool of cases initiated by natural persons, business-related litigation was most common (30%). It was followed by cases concerning employment matters (20%), benefits (19%), third-state nationals (10%) and cars (10%). By contrast, diffuse interests such as environment, consumers or public health amounted altogether only to 2,5% of all references initiated by natural persons in the sample years.

Aside from business owners, natural persons have, in principle, fewer financial resources and less legal knowledge than undertakings. Refugees often have almost no resources at all. The cost side of litigation must consequently be very high for them and yet, they litigate. This is because they receive the support of interest organizations or associations. For example, it is possible that at least some plaintiffs in employment cases are assisted by trade unions or that some refugees have the support of human rights organizations which provide them with means and legal support to litigate. But even in cases where plaintiffs have no support what-so-ever and can only use their own resources to participate in legal proceedings facing sometimes very high litigation costs, they may still decide to litigate. This is due to the very high benefit side they may see in legal proceedings where an infraction interferes with an individual's priority goal. As was explained above, a dismissed worker, a refugee facing deportation or a retired person with an insufficient pension all have a very high stake in litigation, each of their disputed issues having a strong impact on their ability to continue with their daily lives. If they do not initiate legal proceedings, their lives are bound to drastically change for the worse and at least some of them must feel like they have 'nothing to lose'. In such situations, their benefit side increases to such a degree that it surpasses high costs. Finally, it is also possible that some disputes are simply so easy that the probability of prevailing increases, considerably lowering the costs.

In principle, however, when compared to businesses, natural persons are in a less favorable position because, although they can be either risk-neutral or risk-averse, their decisions are more likely to be influenced by such factors as self-esteem, trust in the justice system or litigating society. The value of their claims is generally lower than that of businesses and they rarely pursue additional objectives. They are most of the time interested only in improving their own situation and defending their own interests, and the state of the law or the outcome of future disputes are of little concern to them. The decision whether to launch legal proceedings also depends on the particulars of cases but, in general, it is more likely that natural persons' costs surpass their benefits than in the case of businesses. Aside from easy and uncomplicated cases, for natural persons to opt for legal proceedings, they have to pose extensive resources decreasing their costs (e.g. business-owners) or have the support of interest organizations (e.g. workers) or the value of their claim has to be particularly high which, in turn, is dependent on their own priorities in life (e.g. refugees). However, just as in the case of businesses, they can assemble together and lower the costs by joining in group litigation as long as national procedures allow for such action.

### 6.5.3 Organizations

This section discusses the litigating activity of various legal persons (aside from businesses) that are established in order to defend and further particular interests in the name of their members or those they represent. For the purpose of simplification, these litigants are named ‘organizations’ but they encompasses various units of different legal status such as associations, unions, foundations, etc. They can be governmental or non-governmental, public or private.

Looking at different variables and at how they affect individuals, it can be said that organizations have generally fewer financial resources than corporations but more than natural persons. Their capital depends on their structure and financing but while diffuse interest organizations sometimes struggle with their resources, certain membership associations and especially those that assemble businesses experience no such troubles. Since they are generally established for the precise purpose of defending and furthering a particular interest, be it public or private, diffuse or concentrated, organizations tend to be risk-neutral, rational and calculating, have quite good legal information and almost always pursue long-term goals. The protection of their interests and/or members constitutes their main objective and they could be expected to have at least some legal means and resources to pursue this objective, litigation being one method among many of achieving it (e.g. lobbying). Depending on their resources, however, they may need to prioritize among different legal problems. Just as in the case of other litigants, the decision whether to engage in litigation also depends on the particulars of each case and applicable law. What is, however, unique for organizations is that their access to justice can be impinged by unfavorable locus standi rules. They have, however, ways to circumvent these restrictions by supporting businesses and citizens in legal proceedings (frontmen). For example, at least some workers and third-state nationals initiate legal proceedings with the financial and legal support of one organization or other. The result is such, however, that since organizations often do not participate in legal proceedings per se, their activity as well as their pursuit of long-term objectives and influence over state conduct is not as visible. Interestingly, the EU has been recently adopting measures such as the Free Movement of Workers Directive<sup>104</sup> or the Posting of Workers Enforcement Directive<sup>105</sup> which strengthen the position of

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<sup>104</sup> Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on Measures Facilitating the Exercise of Rights Conferred on Workers in the Context of Freedom of Movement for Workers, OJ L 128, 30.4.2014, 8–14.

<sup>105</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services and Amending Regulation (EU) No 1024/2012 on Administrative Cooperation through the Internal Market Information System, OJ L 159, 28.5.2014, 11–31.

certain associations (e.g. trade unions) by securing their right to litigate in the name of private parties.<sup>106</sup>

One of the most apparent differences is between diffuse and concentrated interest organizations. Those assembling concentrated interests generally have a precise, easy to identify number of members and often support themselves by obligatory financial contributions. This allows them to have quite extensive financial resources which - combined with legal knowledge - can considerably lower their litigation costs. Since they generally represent only the interest of their members, the amount of disputes they can involve themselves in is also limited. Diffuse interest organizations, on the other hand, assemble only a small fraction of all persons whose interest they represent. To give the most obvious example of environmental or consumer protection, these interests are distributed across such wide publics that, practically speaking, these organizations simply represent everyone. Consequently, stakeholders that such organizations speak for are often impossible to individually identify. At the same time, more persons may need their aid than in case of concentrated interest organizations. Additionally, they generally do not function on the basis of mandatory contributions but rather thanks to voluntary donations, unless they are governmental organizations and can rely on regular state assistance. As a result, their financial resources are rather limited when compared to concentrated interests organizations which, in turn, has a negative impact on their costs and allows them to litigate less often. Finally, as Hedemann-Robinson underlines, access to justice of such diffuse interest organizations can also be limited not only on account of restrictive national rules but also because EU norms in, for instance, environmental sector are often too vague to confer rights which could be relied on before national courts.<sup>107</sup>

Litigation initiated by organizations constituted merely 7% of all non-compliance cases referred to the CJEU in the sample years of 2000, 2005 and 2010. Within this 7%, as much as 77,5% of cases were launched by concentrated interest organizations such as trade unions, various associations of agricultural producers or organizations that represent authors, composers, performers etc. By contrast, diffuse interest litigation constituted a mere 22,5% and was dominated by environmental protection issues. Interestingly, the success rate of such organizations both concentrated and diffuse is considerably higher than that of businesses and natural persons amounting to 71% of litigated cases.

Lastly, while businesses and natural persons most of the time litigate against violations in the process of application, organizations are more likely to initiate proceedings in which they directly challenge the lawfulness of national measures. Since they are entities established to defend and

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<sup>106</sup> Wilman (2015), 17.

<sup>107</sup> Hedemann-Robinson (2015), 229.

further particular interests, they are often interested in the general state of law and practice, aspire to combat state violations as a whole and, for this purpose, pursue long-term objectives. This can be observed in the data from sample years (2000, 2005 and 2010) where there were as many direct actions for annulment of national laws as there were challenges to specific instances of wrongful application (50%-50%).

## 6.6 Repeat players v one-shotters

The dynamics of the decentralized enforcement mechanism are determined by the conduct of natural and legal persons and are conditional upon their will to litigate which, in turn, is dependent on the balance between three sides of litigation choice. In 1970s, Galanter introduced the distinction between repeat players (RP) that litigate repetitively, and one-shotters (OS) who litigate occasionally.<sup>108</sup> This distinction was later incorporated by European scholars and is nowadays applied to analyze litigation strategies and explain the influence of private litigation on different European phenomena with the general conclusion that it is repeat players who dominate litigation and who participate in the shaping of national and European policies, including the operation of the decentralized enforcement mechanism. The literature points to large corporate actors and powerful organizations as repeat players, focusing on their ability to launch long-term strategies and win wars instead of battles.<sup>109</sup> According to Galanter, repeat players “do better than [natural persons] in almost every kind of litigation, at almost every stage, and as both plaintiffs and defendants.”<sup>110</sup>

Repeat players generally involve large stakeholders whose stakes in any case are rather low, who possess the resources to pursue long-term objectives and who are likely to expect to litigate repetitively. One-shotters are, on the other hand, generally small stakeholders whose stakes are either too large (compared to their size) or too small (compared to the costs) to repeatedly participate in legal proceedings.<sup>111</sup> When they make the decision to go to court, it is because they aspire to win only one case while RPs often seek to achieve a long-term objective. The value of repeat players’ claim does not matter to them as much as what they can gain in the long run. The higher their chances of finding themselves in similar legal disputes in the future, the more important are the outcomes of those future cases. Consequently, they are willing to exchange tangible gain for long-term gains and litigate cases even with low probability of prevailing as long as each lost dispute brings them closer to

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<sup>108</sup> Galanter (1974), 97.

<sup>109</sup> E.g. Alter, Vargas (2000); Mattli, Slaughter (1998); Harlow (1992b).

<sup>110</sup> Galanter (2006), 1389.

<sup>111</sup> Galanter (1974), 98.

achieving their higher goal.<sup>112</sup> Repeat players are, therefore, mostly businesses and organizations.<sup>113</sup> The nature of such entities and their attributed objectives, be it trade or protection of social rights, mean that they can expect their specialization to repeatedly bring similar problems.

It should be emphasized, however, that repeat players do not always initiate litigation strategies and involve the Court of Justice in order to induce Member States' conformity. Instead, sometimes they seek to eliminate or weaken their competition or introduce new favorable laws. Such goals can touch upon the issue of state conformity and involve a challenge to state practice, laws or policy but they can also run counter to the purpose of enforcement when, for example, a violation is actually in a repeat player's interest and it wishes to postpone the process of conformity. At times, no violation may be taking place but repeat players will continue launching the decentralized enforcement mechanism because it allows them to further their own interests. This was the case in the Sunday trading saga when multiple large retailers continuously relied on European law in national courts, insisting that the prohibition on Sunday trading was contrary to ex. Article 30 EEC. As Rawlings demonstrates, the main effect of that strategy was not the abolition of national unfavorable rules but the freezing of their enforcement. In the end, the Court of Justice did declare that national law was in conformity with European law but, by then, retailers had already had a number of good trading years behind them while the people's habits had also changed, endorsing the concept of Sunday shopping.<sup>114</sup> Repeat players were, therefore, able to mount a litigation strategy for their own economic purposes and use the decentralized enforcement mechanism against conforming state conduct. This example shows, however, how repeat players function and what is their attitude to litigation. Businesses and organizations may have different and sometimes even opposing objectives but both have the knowledge to use the decentralized enforcement mechanism to their own ends. They employ strategies where "national governments typically win the battle and lose the war."<sup>115</sup>

What allows repeat players to pursue their long-term objectives is that they have extensive resources, easy access to legal expertise and low legal information and starting up costs, and the more they litigate, the more these costs decrease.<sup>116</sup> They generally have close and constant contacts with lawyers which allows them to develop optimizing, long-term strategies and make the most of litigation.<sup>117</sup> Additionally, they do not really experience psychological costs of litigation because they do not expect to win all cases, as well as because - due to their complex and fragmented structure -

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<sup>112</sup> Ibid., 100-103.

<sup>113</sup> Ibid., 106.

<sup>114</sup> Rawlings, *The Eurolaw Game: Some Deductions from a Saga*, 1993 *Journal of Law and Society* 20, 331-335.

<sup>115</sup> Mattli, *Slaughter* (1998), 189-190.

<sup>116</sup> Galanter (1974), 98.

<sup>117</sup> Ibid., 114-117.

decisions they take have mostly consequences for the business or organization as a whole and less for their particular members.<sup>118</sup> Consequently, some of the most burdensome costs of litigation are considerably low for repeat players. As for their benefit side, it is very much strengthened by long-term objectives, which may easily surpass the costs, allowing RPs to forfeit some disputes in order to bring a favorable future outcome. Such a strategy can be quite effective especially in cases when litigation is one of many techniques RPs employ in order to influence change, such as lobbying.<sup>119</sup>

But even only within the realm of legal proceedings, repeat players rely on a number of strategies that allow them to advance their interests. The first example is test cases which, according to Galanter, are litigations "deliberately designed to procure rule-change."<sup>120</sup> A RP engages in legal proceedings that are most likely to bring favorable long-term results. In a way, he *tests* the system to find the best access to what he wishes to achieve. Sometimes, the strategy of test cases is combined with using frontmen. In such cases, although formally it is a single individual who brings a claim before a national court, in fact it is the organization that litigates and whose resources are employed. For example, *Cassis de Dijon*<sup>121</sup> was, in fact, a test case chosen by a plaintiff's lawyer eager to induce harmonization in the alcohol industry.<sup>122</sup> The frontmen litigation technique is mostly used by organizations whose access to justice is impinged by restrictive legal standing rules. Out of many cases that come to their attention, they choose those which give most favorable forecasts for influencing change and support their litigants in legal proceedings.<sup>123</sup> They sometimes also intervene in litigation in order to provide and demonstrate their support for one of the parties, thus making intervention yet another method of circumventing limitations on legal standing.<sup>124</sup> As was shown earlier, organizations are not a particularly litigating group with respect to proceedings initiated on their own. It can be expected, however, that they are quite active when it comes to aiding other individuals and testing the system. It should also be observed that certain issues bring repeat litigation from many RPs at once such as the Sunday trading saga.<sup>125</sup> In such cases, their ability to influence state laws and policies is even stronger. The result is such that repeat players dominate litigation in national courts and, for that reason, not only the operation of the decentralized enforcement mechanism is somewhat biased

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<sup>118</sup> Guthrie, *Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 University of Illinois Law Review 1999, 82.

<sup>119</sup> Galanter (1974), 100.

<sup>120</sup> *Ibid.*, 136.

<sup>121</sup> Judgment in *Cassis de Dijon*, 120/78, EU:C:1979:42.

<sup>122</sup> Alter, Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, 1994 Comparative Political Studies 26, 535.

<sup>123</sup> Harlow (1992b), 232.

<sup>124</sup> *Ibid.*, 244.

<sup>125</sup> *Ibid.*, 236.

in their favor but also the EU's constitutional deficit is the result of their activity where they influence policies and steer the integration process in areas favorable to their interests, focusing on market integration rules.<sup>126</sup>

By litigating repetitively, repeat players such as multinational pharmaceutical corporations play an important role in the decentralized enforcement mechanism. In the years 1990-2011, as many as seven cases instituted by Merck figured on the Court of Justice agenda via the preliminary reference procedure, not counting those which raised issues of EU measures' compatibility with the Treaties. Novartis litigated five times while Atrazeneca, Bayer, Abbott and Sanofi three more each. The issues they mostly raised concerned the granting of supplementary protection certificates for medicinal products and limitations on the free movement of goods. To give another example, Hewlett-Packard (a multinational information technology corporation) had five preliminary reference cases while British American Tobacco and Shell each four. And these are only the cases that were referred to the Court of Justice.

Not every undertaking or organization is, however, a repeat player. Only those for which this long-term benefit exceeds the recurring costs of litigation will engage in repeat proceedings. Many organizations and businesses simply do not have enough resources to funnel them in multiple proceedings in order to gain a future benefit. Sometimes the legal problem at issue or the applicable law may be so complex that the costs of litigation considerably rise and surpass long-term benefit. Finally, what also matters is the probability of prevailing and not with respect to each legal dispute but with respect to the chances of attaining that long-term objective. If this probability is low and the costs high, it is unlikely to result in repeat litigation. A good example of individuals having troubles in utilizing the decentralized enforcement mechanism on a repetitive basis despite their natural predisposition to be repeat players is with respect to two typical diffuse interest types of organizations: environmental and consumer protection. There is no question that organizations devoted to protecting these interests exist and litigate but their resources are generally scarce, their access to justice limited and their balance between costs and benefits of litigation often comes out negative. Since the operation of private enforcement is predominantly based on the existence of an 'interest' or 'right' on the part of the applicant, the vigilance and commitment of diffuse interest organizations may mean nothing if there is no 'right' or 'interest' to rely on before a national court.<sup>127</sup>

Finally, it should be emphasized that Member States themselves are repeat players. The decentralized enforcement mechanism, whenever it is employed in proceedings directed against state

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<sup>126</sup> Maduro (1998), 30.

<sup>127</sup> Wilman (2015), 490.



organs, involves a dispute with an exceptionally strong and special repeat player who is very much interested in the state of law and practice.<sup>128</sup>

One-shotters are most likely to be natural persons.<sup>129</sup> Due to their characteristics, they generally do not expect to repeatedly engage in legal proceedings and if they choose to bring a claim, it is only in order to resolve a single dispute. Whether it is a discriminated employee or a third-country national seeking a residence permit, they are not concerned with how similar future cases are resolved.<sup>130</sup> The state of the law with respect to similar disputes is, consequently, of little interest to them and they hardly ever pursue long-term objectives in litigation. The benefits they see may include additional goals like satisfaction from winning but these are most of the time limited only to a particular case. Most of all, however, OSs are more likely than repeat players to pursue a variety of goals, and the value they attribute their benefits in litigation depends on whether a state infraction has interfered with a goal they consider a priority over others.

The costs of litigation are, on the other hand, considerably high for them. They generally have small resources and high legal information and starting up costs. Their choices affect mostly only them and the consequences of potential 'bad' decisions seem particularly high to them increasing their overall psychological cost.<sup>131</sup> Additionally, the relationship between OSs and their lawyers is generally loose and does not allow for the development of optimizing strategies as is in the case of repeat players.<sup>132</sup> The costs of litigation, therefore, often discourage them from pressing claims, let alone attempting to influence a change in law and policy. They tend to remain passive and chose to refrain from engaging in legal proceedings by either opting for another dispute resolution method (e.g. SOLVIT or complain to the Commission) or simply give up. It should be stressed, however, that natural persons are not always only one-shotters or passive individuals. Lawyers are a good example of persons who are interested in future outcomes of similar cases and who litigate repeatedly.<sup>133</sup> Many Court of Justice rules on the free movement of services and the freedom of establishment have their sources in litigation initiated by lawyers (such as *Reyners*<sup>134</sup> or *Gebhard*<sup>135</sup>) over problems with the performance of legal services, lawyers' admittance to other Member States' bars or the setting up of legal practice. Lawyers are not only able to influence change but they can also use strategies that repeat players employ (test cases, frontmen). A good example is Vogel-Polsky, a Belgian lawyer, who

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<sup>128</sup> Galanter (1974), 110-113.

<sup>129</sup> *Ibid.*, 106.

<sup>130</sup> *Ibid.*, 100.

<sup>131</sup> Guthrie (1999), 82.

<sup>132</sup> Galanter (1974), 116-117.

<sup>133</sup> *Ibid.*, 114.

<sup>134</sup> Judgment in *Reyners*, 2/74, EU:C:1974:68.

<sup>135</sup> Judgment in *Gebhard*, C-55/94, EU:C:1995:411.

stood behind the three *Defrenne*<sup>136</sup> cases which challenged the compatibility of Belgian law with ex Article 119 EEC (Article 157 TFEU), bringing a "ripple effect" with similar test cases springing in other Member States.<sup>137</sup>

It is also possible for one-shotters to become repeat players when, for example, they join or create an organization or association (e.g. trade union, associations of farmers) or when a number of individuals come together in collective action.<sup>138</sup> Such an endeavor considerably lowers the litigation costs for each member by reducing litigation and lawyers' fees, as well as legal information and psychological costs.<sup>139</sup> According to Galanter, such an organized group is not only capable of bringing rule change but also of monitoring its implementation. In effect, it becomes a repeat player because it enjoys the advantages of low costs and can even run test cases.<sup>140</sup> Small businesses are a good example of one-shotters that come together in order to defend their common interests in the form of trade associations.<sup>141</sup> However, as Galanter points out, not all OSs are capable of organization.<sup>142</sup> Diffuse and unorganized publics are, in general, much less interested in affecting change than organized and attentive publics.<sup>143</sup>

With respect to diffuse interests such as consumer or environmental protection, the stakes are generally distributed across such wide publics that their value for any person is too small to compete with the costs of legal proceedings or even with the lesser costs of forming a litigation coalition.<sup>144</sup> Additionally, such a coalition brings the off-putting consequence of free-riding where those who mobilize provide the advantages for those who do not.<sup>145</sup> The benefit has to be really high or, rather, the damage resulting from the violation has to be really serious and personally experienced by individual stakeholders to induce mobilization (e.g. grave damage to health). Of course, as Harlow emphasizes, "individuals do sometimes act as disinterested public advocates."<sup>146</sup> The additional benefit in terms of satisfaction from helping others can be so strong that it surpasses the costs of litigation. This, however, is a rare occurrence and the system cannot rely on the good will of such altruistic individuals. For that reason, concentrated interests are more likely to mobilize their

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<sup>136</sup> Judgment in *Defrenne*, 149/77, EU:C:1978:130; Judgment in *Defrenne*, 43/75, EU:C:1976:56; Judgment in *Defrenne*, 80/70, EU:C:1971:55.

<sup>137</sup> Harlow (1992a), 346-347.

<sup>138</sup> Galanter (1974), 141.

<sup>139</sup> *Ibid.*, 142.

<sup>140</sup> *Ibid.*, 143.

<sup>141</sup> Harlow (1992b), 236.

<sup>142</sup> Galanter (1974), 145.

<sup>143</sup> *Ibid.*, 107.

<sup>144</sup> Wilman (2015), 468.

<sup>145</sup> Vogel, *Representing Diffuse Interests in Environmental Policymaking*, in Weaver, Rockman (eds.), *Do Institutions Matter?* (The Brookings Institution, 1993), 237.

<sup>146</sup> Harlow (1992b), 233.

members than diffuse because they are shared by fewer stakeholders and the stakes are generally higher. While it does not mean that every concentrated interest will be defended in court, its chances of mobilizing stakeholders are, in principle, higher.

#### Repeat players: large corporations, concentrated interest organizations

- High benefits: high value claims, perspective of recurring problems, litigation strategies, long-term objectives
- Low costs: extensive financial resources, profficient legal expertise and information, risk-neutral, no psychological costs

#### Repeat players: lawyers

- High benefits: litigation strategies, long-term objectives, professional advancement and career
- Low costs: profficient legal expertise and information, risk-neutral, no psychological costs, no problems with legal standing, low financial cost

#### Repeat players: unions or associations of one-shotters, business owners

- High benefits: distribution of interest with high per capita stakes, long-term objectives
- Low costs: sufficient resources, low litigation and lawyers' fees, low psychological costs, sufficient legal information

#### Repeat players: diffuse interest organizations

- High benefits: litigation strategies, long-term objectives but fragmentation of interests
- High costs: good legal information and risk-neutral but small resources, limitations on legal standing

#### One-shotters: natural persons, small businesses

- Small benefits: low value claims, short-term objectives
- High costs: lack of legal information, small recourses, impacted by self-esteem and legal culture, high psychological cost

Table 3. A typical distinction between categories of repeat players and one-shotters.

In the end, every case is specific just as every individual is unique but certain dependencies in litigating tendencies can be pointed out. The decentralized enforcement mechanism is most useful in situations when litigation costs are low and benefits high. Costs are low in cases which are overall simple and clear, or for individuals with considerable budget and legal support. Benefits are high with respect to violations which seriously impact the core of one's life or business, or for stakeholders who see and aspire further than the case at hand. The higher the probability of prevailing, the more the balance between costs and benefits tilts towards the latter. Concentrated interest are more likely to lead to litigation than diffuse.

## Repeat players

- Application violations
- Unfavorable policies and laws
- Ambiguous rules that offer favorable interpretation
- Cases that give prospects for rule-change
- Violations impacting concentrated interests

## One-shotters

- Application problems with severe personal consequences
- Easy and uncomplicated cases

Table 4. An outline of violations typically targeted by repeat players and one-shotters.

### 6.7 Weak spots of the decentralized enforcement mechanism

The analysis of the decentralized enforcement mechanism's dynamics reveals that it is an instrument mostly useful for repeat players who rely on it in order to induce change in their favor. This is especially true with respect to large corporations and concentrated interest organizations with fixed membership rules which generally have more than sufficient resources, good legal expertise and overall low litigation costs while their benefits are high for they often exceed the immediate stakes and extend to future favorable case-law and shifts in policies. Such repeat players are very likely to go to courts in order to combat state violations that negatively impact their interests and it is so even in cases with low probability of prevailing as long as they create the opportunity for an attractive future benefit.

By dominating private litigation, repeat players shape the dynamics of the decentralized enforcement mechanism. However, one-shotters are not absent in national courts nor are they abandoned by the EU compliance system as a whole, let alone the decentralized enforcement mechanism. The balancing of costs and benefits of litigation suggests that OSs, and especially natural persons, are most likely to initiate national proceedings in cases which touch on the core of their lives' goals: when state violations prevent them from doing or having that which they consider vital to their existence such as career, family, etc. While they are likely to close their eyes to, for example, small instances of injustice or discrimination, violations that impact their lives more severely or where they feel like they do not have any other options are likely to induce them to seek national courts' help. Also easy cases that can either fall back on established precedents or are simply undemanding by virtue of clear rules and facts promising a rapid and successful resolution can prompt OSs to litigate. Finally, the support of interest organizations, if available, can give enough of an incentive to launch legal proceedings.

Overall, the decentralized enforcement mechanism is most useful to combat state violations in the process of application. Stakeholders, in the great majority of cases, are concerned with their own interests and they will litigate only if these are infringed. Repeat players such as organizations and large corporations tend to look past individual application problems and are sometimes equally concerned with the state of law as with practice but private litigation against violations in the process of legislation is rather scarce. This is also due to national procedural limitations which can make it difficult for individuals to challenge laws, instead requiring that they have a direct interest in the form of challenge to actual non-conforming practice. Furthermore, the effect of national courts' rulings in such cases are generally limited only to individual application problems and the correction of incompatible legislation remains within the domain of governments and parliaments. It is, however, possible for private enforcement to induce states to amend or repeal their non-conforming laws. The more individuals litigate against bad practice, the stronger the pressure put on legislative organs to remedy sources of bad application. This, however, takes time. Overall, the decentralized enforcement mechanism is most useful against violations in the process of application and most of the time it leads only to the rectification of litigated instances of non-compliance while incompatible measures remain. The result is such that systemic bad applications may also not receive sufficient attention but, instead, be addressed on an irregular basis, especially when they do not concern the interests of repeat players.

As a result, one of the weak spots of the decentralized enforcement mechanism is its predominant concentration on individual instances of application violations. Aside from this, cases that are least likely to find their way to national courts are those which are heavily complex, technical and ambiguous. Litigation costs are high because proceedings are bound to take a long time, the benefit is difficult to determine and the prospect of a successful resolution slim. With respect to such difficult violations and time-consuming proceedings, even repeat players may opt out. Small application problems that do not touch upon the core of individuals' priority goals are also unlikely to be litigated because their benefits do not surpass costs and only few launch legal proceedings on matters of principle. This is even more when stakeholders do not expect to have to deal with the same organ over the same issue again. While even small businesses are more likely to repeatedly perform identical activities, natural persons - in principle - come into contact with state organs less often. However, both natural and legal persons' litigating readiness depends on the frequency with which they expect to be affected by a state infraction which, in turn, increases or decreases their benefit in legal proceedings. Diffuse interest organizations are also likely to litigate less, especially when compared to other repeat players such as concentrated interest organizations. On account of their

limited legal standing, scarce resources and vocation that applies to an indefinite amount of members with low per capita stakes, their litigation perspectives may be rather low despite overall low costs of litigation. In the case of such organizations, despite their calling and determination, the usefulness of the decentralized enforcement mechanism may be hindered by insurmountable constraints and it is doubted whether private enforcement is at all appropriate for this type of litigation (especially in the sector of environmental and consumer protection).<sup>147</sup> Finally, violations that do not directly impact individuals do not constitute the subject of the decentralized enforcement mechanism. This is the case when violated norms do not confer 'rights' on individuals or where an 'interest' in litigation cannot be established.

### Weak spots of the decentralized enforcement mechanism

- Violations in the process of legislation
- Systemic application problems
- Complex, technical and ambiguous violations
- Small application problems
- Violations with minor consequences
- Violations impacting diffuse interests
- Violations which do not directly impact individuals

Table 5. Weak spots of the decentralized enforcement mechanism.

The decentralized enforcement mechanism is therefore mostly useful with respect to violations that have negative effects for repeat players such as large corporations and concentrated interests organizations but one-shotters also find it useful, depending on the simplicity and clarity of violated rules and the seriousness of their consequences. In terms of different categories of violations, those in the process of application clearly dominate the enforcement mechanism as well as those which have serious, concentrated effects for a narrow group of individuals. The decentralized enforcement mechanism thus can be seen as failing mostly with respect to litigation violations, systemic application problems, violations that affect diffuse interests with low per capita stakes, violations which concern complex and ambiguous rules or which constitute small application problems or the consequences of which are minor or, finally, those that do not directly impact individuals. While this is a generalization and exceptions are bound to occur, it nonetheless gives a general idea of areas where we can expect less litigation.

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<sup>147</sup> Wilman (2015), 491, 555.

## 6.8 SOLVIT

Private enforcement and the preliminary reference procedure constitute the largest decentralized enforcement instrument in the EU, counterbalancing the Commission's centralized enforcement. For this reason, it was important to have a look at its dynamics in order to narrow down the concept of demand placed on the Commission's enforcement. However, it is not the only decentralized measure that is capable of dealing with issues of state post-violation compliance. SOLVIT is another important enforcement instrument intended to help individuals protect their interests against state encroachment. While not as large as the decentralized enforcement mechanism and highly informal in nature, it nonetheless performs an important function in the EU system of compliance measures and influences the demand side of the Commission's enforcement. It should, however, be underlined that the EU compliance system has at its disposal more decentralized enforcement measures than just private litigation and SOLVIT. For example, ad hoc contact points for "case-by-case handling and resolution" are used with respect to directives establishing rights for many citizens where they can turn in situations of state infringements. However, these are generally specific to particular EU measures and have a restricted impact on the overall demand of the Commission's enforcement that is limited only to specific policies (e.g. in diploma recognition).<sup>148</sup>

### 6.8.1 SOLVIT as an instrument of enforcement

The Internal Market Problem Solving Network (SOLVIT) is a decentralized compliance instrument intended to "deliver fast, effective and informal solutions" to cross-border problems that citizens and businesses experience when dealing with public authorities. It was created in 2001 as a problem-solving measure for stakeholders who encountered difficulties in contacts with foreign administrations when utilizing the opportunities offered by the internal market. Its scope was thus limited to cross-border problems in the application of internal market rules by national administrations.<sup>149</sup> The original version of SOLVIT underlined its problem-solving capacity rather than its conformity-inducing potential which was apparent in the vocabulary used by the Commission where it did not talk of combating obstacles or breaches but merely of solving "problems" such as "mistakes, misunderstandings and disagreements."<sup>150</sup> However, over time inconsistencies arose

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<sup>148</sup> Commission Communication Better Monitoring of the Application of Community Law, COM(2002)725, 16.

<sup>149</sup> Commission Recommendation of 7 December 2001 on Principles for Using 'SOLVIT' – the Internal Market Problem Solving Network, 2001/893/EC, Articles I-II.

<sup>150</sup> Commission Communication Effective Problem Solving in the Internal Market (SOLVIT), COM(2001)0702, paragraph 1.

concerning the application of SOLVIT where it was questioned whether it could deal with cases of non-conforming legislation as well as those that lay outside internal market rules. As a result, in 2013 the Commission decided to extend the scope of SOLVIT and change the nomenclature. Nowadays, SOLVIT deals with “all cross-border problems caused by a potential breach of Union law governing the internal market by a public authority, where and to the extent such problems are not subject to legal proceedings at either national or EU level.”<sup>151</sup> SOLVIT thus has the capacity to resolve not only misapplication violations but also so-called “structural problems”: breaches caused by incompatible national provisions. Additionally, it is no longer limited to internal market rules, instead extending to all cross-border problems, including rules that merely have an impact on the Internal market.<sup>152</sup>

SOLVIT operates through a system of SOLVIT centers established in Member States in 1997 and integrated into the SOLVIT network in 2001. It is available only if no parallel national or EU legal proceedings are taking place. A citizen or business informs the home center (of his nationality, qualifications or establishment) about a potential breach of EU law by the administration of another state. The home center contacts the SOLVIT center from the said Member State which then becomes ‘lead’ in the case and takes on the responsibility of resolving the cross-border problem. Working in cooperation with the defaulting administration and within a set deadline, the lead center proposes a solution to the problem which the individual can accept or reject. Since SOLVIT is an informal measure, the individual can challenge neither the proposed solution nor the information on the compatibility of the administration’s conduct with EU law. If the proposed solution is accepted, the case is closed. If the solution is rejected, the individual can pursue the alleged violation by other means, including national legal proceedings.<sup>153</sup> The European Commission does not take part in SOLVIT procedures but it does stay in contact with its centers by providing their staff with legal training and informal advice in more complex matters. Most of all, it monitors SOLVIT’s handling of cases and proposed solutions and can intervene if the latter do not conform to EU law. It can also refer complaints it received to SOLVIT.<sup>154</sup> SOLVIT is ultimately a decentralized enforcement measure because it relies on individuals filing their complaints with the system and on solutions provided by SOLVIT centers. However, it should be remembered that it is a project established by the Commission and falls under its supervision.

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<sup>151</sup> Commission Recommendation on the Principles Governing SOLVIT, C(2013)5869, Preamble paragraph 8-9.

<sup>152</sup> *Ibid.*, Preamble paragraph 10-11.

<sup>153</sup> *Ibid.*, Section V; Commission Recommendation on Principles for Using ‘SOLVIT’, 2001/893/EC, Articles I-II.

<sup>154</sup> Commission Recommendation on the Principles Governing SOLVIT, C(2013)5869, Preamble paragraph 4, Section VI.



SOLVIT was clearly meant as an informal, pragmatic and non-confrontational instrument that is an alternative to legal proceedings.<sup>155</sup> It is a post-violation measure of managerial nature which aims at helping individuals solve problems in contacts with foreign administrations. It provides citizens and businesses with a free of charge procedure and an easily accessible contact point which, while keeping them informed, takes over the task of quickly resolving their problems. Its only limitation is its scope where it ultimately deals only with application violations (although it can propose solutions to structural problems of non-conforming provisions) and is relevant only for cross-border issues. Nonetheless, it is an alternative to legal proceedings, forming together with private litigation one of the two major decentralized compliance measures that are capable of addressing some types of state infractions and thus influence the demand side of the Commission's enforcement. In 2014, it helped more than 4000 individuals. Interestingly, for a measure that was initially devised as a tool most useful for small and medium-sized economic operators, businesses constituted only 5% of submitted cases, the vast majority coming from citizens.<sup>156</sup> As a result, the highest number of cases concerned social security (61%)<sup>157</sup>, professional qualifications (13%) and residence permits and visas (12%).

### 6.8.2 Dynamics of SOLVIT

Just as in the case of the decentralized enforcement mechanism, individuals that rely on SOLVIT to combat state infractions also make cost-benefit analysis and take into account the probability of prevailing. Their decisions whether to refer their cases to SOLVIT are thus influenced by the same factors that influence their choices regarding private litigation. However, due to SOLVIT's primarily informal and problem-solving nature, these factors have different effects.

Starting with access to justice which, in this case, means access to SOLVIT, specific limitations constrain individuals' capacity to rely on this measure. While both natural and legal persons can submit a case, including through an intermediary or an organization on behalf of its members, only cross-border problems encountered by individuals can constitute the subject-matter of the application. A cross-border problem is a problem that involves a "potential breach of EU law governing the internal market by a public authority in another Member State." The concept of public authority includes not only administration from another Member State but also a stakeholder's own

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<sup>155</sup> Commission Communication Effective Problem Solving in the Internal Market, COM(2001)0702, paragraph 1.

<sup>156</sup> Single Market Scoreboard: Performance per governance tool: SOLVIT (Reporting period: 01/2014 – 12/2014), 6, 10.

<sup>157</sup> Out of 61% of social security cases, many concerned German family benefits and Greek pension. Discounting these two categories of cases, social security area still remains at the top with 48% cases.

administration after he exercised (or while attempting to exercise) one of the four freedoms. The SOLVIT's scope of application is thus considerably narrower than that of the decentralized enforcement mechanism for it excludes, for example, such diffuse interests as consumer or environmental protection. Nonetheless, it does assume a broad understanding of internal market because it also includes rules that merely have an impact on the free movement of persons, goods, services and capital.<sup>158</sup>

While narrower in scope, the obvious SOLVIT's benefit over the decentralized enforcement mechanism is the lack of fees which considerably decreases applicants' costs. SOLVIT allows for the use of intermediaries or organizations which can either add costs (lawyers' fees) or decrease them further (organization's support). However, since SOLVIT does not require individuals to actively participate in its procedures, instead leaving the resolution of the problem to home and lead SOLVIT centers, it is considerably more affordable.

Similarly to the decentralized enforcement mechanism, the clarity and precision of law and facts as well as the existence of precedent can decrease costs such as time and increase the probability of a rapid, favorable outcome. On the other hand, SOLVIT is mostly intended for the pursuit of short-term goals. Due to its inherently informal nature, it is not a measure useful for mounting long-term strategies where battles are lost but wars won. These require legally-binding official court rulings in order to contribute to the attainment of stakeholders' long-term objectives. The informality of SOLVIT does, however, have a benefit in the form of its less confrontational character where individuals with lesser self-esteem and those risk-averse can feel more comfortable. Finally, due to its informal nature, cases are addressed within an average of nine weeks<sup>159</sup> which is much shorter than what can be said of litigation before national courts. This decreases all costs, including psychological and opportunity costs of time and money, while it does not prevent individuals from going to courts if a resolution is not reached.

### 6.8.3 One-shotters v repeat players

SOLVIT is mostly useful to one-shotters. Its informal nature combined with its concentration on concrete problems of application make it a tool attractive to individuals that are put off by the costs of formal litigation. It is free of charge, takes little time and is non-confrontational. The benefits are also not very high both because SOLVIT mostly involves the resolution of the case at hand and

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<sup>158</sup> Commission Recommendation on the Principles Governing SOLVIT, C(2013)5869, 4.

<sup>159</sup> *Ibid.*, 2.

does not have space for the pursuit of additional objectives (although it can also deal with so-called structural problems).

As a result, SOLVIT is mostly helpful in the resolution of immediate problems and it does not serve long-term strategies and test cases. These are profitable only if they lead to legally-binding official rulings that either establish precedent and/or draw the attention of the wider public, bringing in a discussion over state conduct and the need for change. To repeat players, it is thus of low value while one-shotters see in it as an easier alternative to national proceedings. The only obstacle to SOLVIT is that individuals have to be aware of its existence and their cases have to fall within its premise of a cross-border dispute over rules affecting internal market. Statistics show that SOLVIT is utilized in the great majority of cases by natural persons.<sup>160</sup> Not surprisingly, large corporations are not interested. However, it is a little but surprising that small businesses tend to avoid it too. A possible explanation might be that undertakings -engaged in repetitive activities - do not see a benefit in informal resolution methods that lack the benefits of legally guaranteed state compliance in future similar cases.

#### 6.8.4 SOLVIT's influence on the demand side of the Commission's enforcement

With its concentration on one-shotters, SOLVIT constitutes a counterbalance to the decentralized enforcement mechanism. While the latter is mostly useful for repeat players, SOLVIT partially fills in the gap by constituting a tool that, in principle, has a different balance between the costs and benefits of action, making one-shotters more comfortable and likely to file their cases. Once again, it is only limited to cross-border problems, thus narrowing its premise and having the capacity to deal only with specific types of state obligations. Yet, this condition stems from SOLVIT's specific procedures that rely on the cooperation between two SOLVIT centers. The result, however, is such that not all state violations can be subject to SOLVIT, diffuse interest cases being the most obvious example of those left out. Nonetheless, SOLVIT does have its results. In 2014, 2368 cases were lodged with SOLVIT (while another 2400 were rejected because they did not fall within its remit). Interestingly, practice shows that SOLVIT is capable of addressing also systemic violations in application.<sup>161</sup> Out of the 2368 cases lodged in 2014, almost as many as 800 concerned two recurrent issues: German family benefits and Greek pension cases.<sup>162</sup>

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<sup>160</sup> Single Market Scoreboard: SOLVIT (2014), 6, 10.

<sup>161</sup> *Ibid.*, 7.

<sup>162</sup> *Ibid.*, 10.

## 6.9 Narrowing down the demand

Stakeholders shape the dynamics of the decentralized enforcement mechanism. By choosing to bring their cases to courts, its operation is mostly dependent on their will. Their decisions to take action are dictated by a balance between the costs and benefits of participation, as well as the probability of prevailing. While certain factors facilitate the use of the decentralized enforcement mechanism such as legal aid or clear and comprehensible EU rules, others impinge its functioning such as legal standing constraints or convoluted and ambiguous norms. As a result, not all wronged citizens resort to private litigation to combat state non-compliance nor all violations find their way to courts. Each stakeholder and each case are unique, with a distinctive configuration of variables impacting three sides of litigation choice. However, by looking at factors that influence individuals' readiness to launch legal proceedings, it is possible to draw some general remarks on categories of stakeholders who are most likely to use private litigation, and categories of violations which are most likely to end in courts. These remarks are a simplification but one that serves the purpose of demonstrating that not all violations of EU law require as much Commission attention as others and that not all individuals are in need of the Commission's aid.

This chapter made the distinction between repeat players and one-shotters, the former having the capacity and will to not only combat specific instances of infractions but to also mount long-term litigation strategies and bring changes in laws and policy. These are mostly multinational corporations as well as the largest concentrated interest organizations which litigate against violations impacting their businesses and interests such as those impinging free movement rules. Lawyers also tend to be repeat players with agendas of rule-change, and so can associations brought together by common interests. One-shotters, on the other hand, are mostly citizens and small businesses who litigate in exceptional situations when the core of their lives or businesses is at stake.

Seeing these interdependencies, it is possible to say that, while the decentralized enforcement mechanism has its benefits, it also has its failings: areas where it is least likely to perform its function because, due to an unfavorable combination of costs and benefits, stakeholders are unlikely to utilize it in order to combat state non-compliance. These include complex, technical and ambiguous violations, those with minor consequences, small application problems, violations impacting diffuse interests, those that do not directly influence individuals or, finally, violations in legislation and systemic bad applications because, although repeat players do target entire policies, it is a long and uncertain process, and the substance of private litigation ultimately comes down to individual challenges of bad application.

The failings of the decentralized enforcement mechanism are, however, partially mitigated by SOLVIT. Since this measure is used most often by natural persons, it gives one-shotters an easier and faster alternative to resolve their problems. Nonetheless, its limited scope of application to cross-border violations and the fact that it mostly mobilizes individuals with respect to infractions that, as in private litigation, have serious effects on their lives (social security, professional qualifications, residence permits and visas), limits its overall impact. It is, however, a useful alternative to private litigation which is considerably more costly.

It should be underlined that this chapter did not seek to estimate the effectiveness of the decentralized enforcement mechanism which is dependent on more than just stakeholders' will to litigate. This effectiveness is not only the matter of legal procedures and legal standing rules which, outside influencing individuals' cost-benefit analysis, have a more concrete impact on the operation of private litigation as an enforcement mechanism.<sup>163</sup> There is also the matter of national courts which have to have the means, knowledge and will to correctly apply EU norms. As Broberg and Fenger have shown, there are large discrepancies in the national judges' use of the preliminary reference procedure, and a number of factors can explain these variations, both structural (e.g. population size, litigation patterns, level of state compliance) and behavioral (e.g. constitutional traditions, policy preferences).<sup>164</sup> It is undeniable that the operation of the decentralized enforcement mechanism is conditional upon national courts' cooperation and that it differs across Member States and policy areas, incidentally leading to "inconsistencies and unequal treatment."<sup>165</sup> Its output (and supply) is also conditional upon the complexity of national procedures, the availability of courts, their resources and finally competences. However, this chapter did not seek to offer solutions to variations in the demand for the Commission's enforcement nor did it aspire to formulate guidelines for its enforcement priorities. It merely sought to draw the attention to the fact that not all stakeholders require help in dealing with state infractions and that certain categories of violations are less likely to find their way to national courts.

The identified weak spots of decentralized measures can be considered to create the core of the demand side of the Commission's enforcement. Categories of violations where these instruments are least likely to perform their enforcement function constitute the neglected areas that, in the lack of better option, require centralized enforcement. On account of the Commission's limited reporting where only the application of the infringement procedure and the EU Pilot are subject to annual reporting, insufficient information regarding the application of alternative enforcement measures

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<sup>163</sup> Wilman (2015), 12.

<sup>164</sup> Broberg, Fenger (2014), 34-59.

<sup>165</sup> Wilman (2015), 12.

(e.g. negotiations) prohibits from verifying whether the Commission's practice conforms to the identified weak spots of decentralized measures. However, a look at the Commission's priorities does allow to say that the Commission targets only a part of neglected areas. Taking as a reference the latest communication A Europe of Results<sup>166</sup> (section 4.2.3) it is possible to tell that the Commission concentrates more on horizontal breaches in legislation (non-transposition and non-conformity) than on the process of application, as well as on violations of significant, fundamental norms and those which have serious consequences, to the detriment of infractions with minor impact and individual bad application problems.<sup>167</sup> Further, the Commission's annual reports suggest that diffuse interest do receive some of its attention which, however, to environmental lawyers is still not enough.<sup>168</sup> In 2015, violations of the environmental sector constituted 11,5% of EU Pilot files and 17% of opened infringement cases. In contrast, mobility and transport amounted to 14% of EU Pilot files and 20% of infringement proceedings while internal market, industry, entrepreneurship and SMEs represented respectively 12% and 10,5%.<sup>169</sup>

Having identified the weak spots of decentralized measures does not mean that the Commission ought to concentrate its resources on all isolated categories because this would be a conclusion focused only on demand. It is not enough to identify areas where the Commission's enforcement is mostly needed. It is also necessary to look at the Commission's capacity to provide this enforcement. Only once we realize the extent of its demand and supply sides, we will be able to comprehend why the Commission continues with its discretion-based policy of selective enforcement and is negligent of complainants who are likely mostly one-shotters or diffuse interest organizations that, on account of an unfavorable balance of costs and benefits, cannot rely on decentralized measures and thus have no real choice but to seek the Commission's intervention.

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<sup>166</sup> Commission Communication A Europe of Results – Applying Community Law, COM(2007)502, 9.

<sup>167</sup> Krämer, *Monitoring the Application of the Birds and Habitats Directives*, 2013 *Journal for European Environmental and Planning Law* 10, 228-229.

<sup>168</sup> *Ibid.*

<sup>169</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 20, 23.

## 7 Supply side of the Commission's enforcement

The exploration of the dynamics of decentralized enforcement measures confirms that certain categories of state violations are less likely to find their way to national courts. While SOLVIT mitigates some of these effects by decreasing the costs of participation and making room for one-shotters, it nonetheless does not balance out private litigation's weaknesses. As a result, such categories as legislation infractions, systemic application violations, complex, technical and ambiguous cases, violations with minor consequences, small application problems, those impacting diffuse interests or finally cases that do not directly influence individuals constitute areas where stakeholders are least likely to trigger decentralized measures. Since Article 259 TFEU<sup>1</sup> cannot be expected to fill in the gaps created by decentralized measures on account of Member States' unwillingness to bring cases to the Court of Justice, centralized enforcement is the only other alternative to identified weaknesses of decentralized instruments. As a result, while the Commission's demand side can be understood in broader terms of 'need for enforcement' (the expectation that the Commission ensures state compliance in all infraction cases), we can also narrow it down to the pinpointed weak spots of decentralized measures under the presumption that categories of violations which decentralized instruments are least likely to address ought to be tackled by the Commission as a priority. However, this still does not tell us much about why the Commission pursues its policy of selective enforcement based on four discretion-based pillars aside from observing that it diverges from identified demand, concentrating only on a few, more significant categories of violations isolated as decentralized measures weak spots (section 6.9).

Drawn from the economics forces of supply and demand,<sup>2</sup> demand constitutes only one side of institutions' operation. It points to areas where their activity is mostly needed but, by itself, it does not account for how institutions function nor does it suffice to explain institutional choice. Supply constitutes the second side of institutions' operation, counterbalancing the demand. It determines the limits to institutions' capacity, drawing our attention to the fact that they are rarely capable of addressing the entirety of demand. As a result, it is one thing to know where an institution's attention is needed and yet another to determine if it has the capacity to provide this attention. By looking at both the demand and supply sides of institutional behavior, we can better comprehend their institutional choices.

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<sup>1</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>2</sup> Mankiw, *Principles of Economics* (Cengage Learning, 2015), 65.

Following on the analysis of demand, this chapter will explore the supply side of the Commission's enforcement. By examining its three components: physical capacity, substantive ability and dynamics, it will be submitted that, despite the Commission's overall large size and extensive competences, its enforcement practice is subjected to numerous limitations that compel it to not only prioritize but also to maintain the discretionary model of enforcement. On account of the Court's significant role in the infringement procedure, its capacity to rule on state breaches will also be addressed in order to underline additional motivations that guide the Commission and the Court in their resistance against the accountability model. However, whereas the benefits of the discretionary model of enforcement will already become visible in this chapter as will the negative consequences of the accountability model, this will not suffice to fully explain the Commission's institutional choice in continuing with its discretion-rooted selective enforcement. It is one thing to protect its staff and resources from an increase in responsibilities but if institutions made choices solely on the basis of such reasoning then they would face stagnation. The fact that an amendment has its cost should not, in principle, dismiss it as undesirable. What matters is this amendment's larger impact not only on the entirety of an institution's supply but also on the balance between its supply and demand. This question will, however, be answered only in chapter 8 where the problem of balancing the forces of supply and demand will be explored. There, it will be proposed that the Commission resists major changes to its powers and operation because it lacks the ability to integrate the accountability model's propositions without suffering far-reaching consequences that would immobilize its functioning. By realizing its limitations, it protects itself against an increase in demand, making choices which allow it to function within its limited capacity and continue its policy of selective enforcement working towards the attainment of its main objective of ensuring compliance, instead of concentrating on securing complainants' rights and decreasing or even losing its ability to respond to the demand.

## 7.1 Concept of supply

"The essence of law does not lie in disembodied principles and abstract values" but it is determined by the processes that make, interpret, and enforce it. These processes involve elaborate procedures and limited resources and are thus constrained by specific rules that define their role and character in the system.<sup>3</sup> The same can be said of the Commission's enforcement which is exercised according to specific procedures and on the basis of attributed resources. Despite being a large bureaucratic machinery, the Commission can do only so much and tackle only that many violations

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<sup>3</sup> Komesar, *Law's Limits* (Cambridge University Press, 2001), 3.



while remaining relatively efficient. Demanding that it addresses a variety of state infraction and expecting cases to be handled within reasonable time-limits while it adheres to a chain of complicated procedures and explains every of its decisions to interested parties may simply prove unfeasible within the limits that constrain its operability. Thus, the question of the Commission commitment to the discretionary model of enforcement necessitates the recognition and consideration of its supply.

Demand was understood in the previous chapter as the need for enforcement. Supply should be understood as the Commission's ability to provide this enforcement. Komesar, in his analysis of law and rights as products of the adjudicative process, submits that in order to understand the operation of an institution and assess its supply side, three aspects need to be considered: 1) its physical capacity, 2) the substantive ability of its decision-makers, and 3) its dynamics. These elements take into account the "reality of institutional behavior" and not only determine the functioning of an institution but also influence its decisions. They interact with each other, and understanding their content and mutual interactions can help explain the choices decision-makers take as they perform their functions.<sup>4</sup> Since the Commission is not the only institution which participates in centralized enforcement, the issue of supply will also be addressed in relation to the Court of Justice as it also has an impact on the protection of the Commission's discretionary powers.

## 7.2 Physical capacity

Despite what is sometimes tacitly assumed in literature, the Commission is not an enormous institution that can expand its responsibilities without consideration given to its physical capacity and the question whether it has the space to integrate the influx of new ideas. The concept of an institution's physical capacity includes "resources or budget available ... and the constraints on the expansion of the size."<sup>5</sup> While the fact that the Commission has insufficient resources is common knowledge and many commentators recognize that the constrained budget influences the Commission's performance of its enforcement functions,<sup>6</sup> this hindrance is rarely taken into account when new propositions are put forward with respect to the improvement of the Commission's discretionary management of state infractions. As for the Commission's size, it is generally assumed that the Commission is a bloated bureaucracy that, if anything, hires an excessive amount of staff, and considerations of limitations on its size as well as that of the Court of Justice rarely play any part in the studies of the centralized enforcement mechanism.

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<sup>4</sup> Ibid., 35.

<sup>5</sup> Ibid., 38.

<sup>6</sup> E.g. Wilman, *Private Enforcement of EU Law before National Courts* (Edward Elgar Publishing, 2015), 6-7.

### 7.2.1 Size

The consideration of the Commission's and the Court's size is vital when deliberating the potential impact of the accountability model of enforcement. This is because a set amount of an institution's members means that it can deal with a limited amount of tasks. If we expand those tasks, introducing new responsibilities (transparency, complainants' rights), then we ought to accordingly increase its size or, alternatively, overburden the existing staff. In his study of the adjudicative process, Komesar concentrates on the difficulty with which an institution expands, stressing that judges - due to their independence and skill - are not easy to replace and their numbers are unlikely to increase.<sup>7</sup> The same can be said of the Court of Justice, the size of which is very limited. For 28 Member States, it consists of only 28 judges and 11 advocates general while its competences range from ensuring Member States' compliance, through interpreting EU law to reviewing the legality of EU measures and considering appeals from the General Court. At the same time, an increase in the Court's size is unlikely because this would require a Treaty amendment and the reformulation of the current rule: one judge per Member State. A Treaty amendment - albeit difficult - is feasible and, so far, proved necessary as confirmed by the creation of two additional courts: the General Court and the Civil Service Tribunal, established with the primary purpose of relieving the Court's of Justice case-load and taking over specific competences to adjudicate in the first instance. Nevertheless, a Treaty amendment is a complex and time-consuming undertaking and one that is never taken lightly. The potential for expansion of the Court's size is therefore quite small.

It is also doubtful whether the expansion of the Court's size would serve the uniform application of EU law. The larger the amount of decision-makers, the harder it is to reach consensus and maintain consistency in interpretation and reasoning. After all, there is a reason why even nowadays the Court of Justice has only one judge per Member State and why the number of advocates general has increased only minimally. Additionally, the Court itself may not be willing to give away any more of its powers if a new court was to be created. The Treaty of Nice<sup>8</sup> made it possible for the General Court to have jurisdiction in the preliminary reference procedure in areas specified in the Statute<sup>9</sup> (Article 256(3) TFEU). However, no such stipulation has ever been introduced into the Statute, the Court of Justice maintaining the preliminary references within the domain of its exclusive

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<sup>7</sup> Komesar (2001), 40-41.

<sup>8</sup> Treaty of Nice, OJ C 80, 10.3.2001.

<sup>9</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union annexed to the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (consolidated version), OJ L 112, 24.4.2012.

jurisdiction. It is, therefore, even more unlikely that the infringement procedure, remaining the sole competence of the Court both in practice and on paper, would suddenly be shared by other EU courts. Considering that the infringement procedure involves challenges to Member States themselves, it is also doubtful that national governments would agree to a Treaty amendment that transferred some of this jurisdiction onto a 'lesser' court. Member States being sovereign states and the wielders of Treaties cannot be judged by anything less than the highest EU court. The result, however, is such that the Court of Justice remains a small institution and its size is unlikely to increase while the amount of work it performs involves a spectrum of different actions, references and appeals.

While the Court's size is considerably limited, the Commission is famous for its enormous bureaucracy. Its staff exceeds 33,000 workers.<sup>10</sup> Although there are only 28 commissioners forming the College, it has a large multilevel structure with complex internal organization. There are currently 42 DGs, services and offices grouped into seven families: Internal Policy I, II and III, External Relations, Central Services, Multilingualism, and Offices.<sup>11</sup> The European Commission is the largest of EU institutions.<sup>12</sup>

Despite the impressive number and popular opinion, the Commission is not a 'bloated bureaucracy' that employs an excessive amount of staff. It roughly compares to local authorities of medium-sized European cities,<sup>13</sup> and its size is smaller than administrations of many cities such as Paris or Birmingham.<sup>14</sup> Even though the Commission's responsibilities differ considerably from those of local administrations and a comparison between the two is not really accurate, it nonetheless demonstrates that the Commission is not, in fact, as enormous as it is widely claimed. Additionally, not all of the Commission's staff deals with matters of enforcement. The monitoring of the application of EU law belongs to the tasks of administrators (AD) who make about 35% of the Commission's staff, out of which 11,500 is permanent and another 500 temporary.<sup>15</sup> Yet, administrators also draft proposals, implement EU law, coordinate policies, represent the Commission and execute a variety of other functions.<sup>16</sup> They hence constitute the Commission core and are responsible for the performance of various powers, enforcement being merely one of many. The result is such that staff dealing with monitoring and enforcement constitutes a small percent of all operational staff in the Commission. In 2013, their number amounted to 10% which was more than linguistics (7%) but less

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<sup>10</sup> In 2015 there were 33 197 persons employed by the Commission; [http://ec.europa.eu/civil\\_service/about/figures/index\\_en.htm](http://ec.europa.eu/civil_service/about/figures/index_en.htm).

<sup>11</sup> Human Resources Report of the European Commission (2015), 57.

<sup>12</sup> Szapiro, *The European Commission* (John Harper Publishing, 2013), 98.

<sup>13</sup> [http://ec.europa.eu/civil\\_service/about/who/index\\_en.htm](http://ec.europa.eu/civil_service/about/who/index_en.htm).

<sup>14</sup> Szapiro (2013), 99.

<sup>15</sup> [http://ec.europa.eu/civil\\_service/about/figures/index\\_en.htm](http://ec.europa.eu/civil_service/about/figures/index_en.htm).

<sup>16</sup> Szapiro (2013), 89.

than policy-making (16,2%), finance control and anti-fraud (12,9%), administrative support (16,6%) and program management and implementation (24,3%).<sup>17</sup> The best example is provided by Hedemann-Robinson with respect to DG Environment where (in 2013) all environmental infringement cases including the processing of complaints as well as the conduct of the pre-litigation stage were handled by only 25 officials (and some of them only part-time) which makes less than one person per Member State.<sup>18</sup> At the same time, violations in the environmental sector constituted in 2013 a quarter of all infringement proceedings (25,7%).<sup>19</sup>

Consequently, only a fraction of the Commission is actually involved in monitoring and enforcement. The Commission has many other, equally or more important functions of legislative, executive and administrative nature. It sets the legislative agenda, drafts laws, prepares and oversees policy strategies, all of that aside from its delegated power where it adopts implementing legislation. Additionally, the Commission is heavily involved in the preparation of the EU budget, oversees and coordinates EU expenditure and negotiates international agreements (Article 17(1)TEU<sup>20</sup>).

As regards the potential expansion of the Commission, it is surely more likely than in the case of the Court of Justice. An increase in the size of the College itself is as complicated a matter because it requires Treaty amendment and it could be detrimental to the Commission's decision-making process. However, since the bulk of enforcement work is done in individual DGs and the College mostly approves draft decisions, what is more important is the ability to expand the size of the Commission's staff. This is surely easier than with respect to commissioners even if a difficult test constitutes an entrance prerequisite. Nonetheless, figures show that, in the past, the Commission's workforce was slow to increase due to budgetary constraints when compared to such institutions as the Council or the European Parliament,<sup>21</sup> or the General Court where the number of judges was doubled in 2015.<sup>22</sup> Furthermore, after the latest three enlargements during which 13 new Member States joined the EU and the Commission had to accordingly increase its size, it has taken a new commitment to halt the process of growth and rather proceed to cutting it down than further increasing it.<sup>23</sup> In any case, any

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<sup>17</sup> Human Resources Report of the European Commission (2013), 12. The data is from 2013 because this was the last report to specify the percentage distribution of jobs allocated to operational activities. In the following 2014 and 2015 HR Reports, the Commission presents only the overall statistic for all jobs under the category of operational (54,5%). It no longer specifies the percentage distribution of jobs within the operational category.

<sup>18</sup> Hedemann-Robinson, *Enforcement of European Union Environmental Law*, 2nd ed. (Routledge, 2015), 203.

<sup>19</sup> Commission 31<sup>st</sup> Annual Report on Monitoring the Application of EU Law (2013), COM(2014)612, 12.

<sup>20</sup> Treaty on European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>21</sup> Stevens, Stevens, *Brussels Bureaucrats? The Administration of the European Union* (Palgrave, 2001), 15.

<sup>22</sup> Regulation (EU, Euratom) No 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

<sup>23</sup> Szapiro (2013), 101.

thought of expanding the amount of the Commission's officials brings in the consideration of resources that would have to be accordingly enlarged.

A closer look at the size of the Court of Justice and the Commission allows to explain the infringement procedure's specific two-tier construct. Officially, the pre-litigation procedure pursues three objectives: "to allow the Member State to put an end to any infringement, to enable it to exercise its rights of defense and to define the subject-matter of the dispute with a view to bringing an action before the Court."<sup>24</sup> Yet, there is also another goal to consider. Since, due to its limited size, the Court is capable of ruling over only a limited number of non-compliance cases per year, then the long pre-litigation stage serves the purpose of diminishing its demand, constituting a sieve through which only the most complicated or important cases reach the Court. While this may seem like nothing new, looking at the two institutions from the perspective of their size helps comprehend the function performed by the administrative stage and the reasons why it remains a drawn-out and sometimes cumbersome process. Interestingly, the infringement procedure is regularly criticized for being unnecessarily lengthy and convoluted<sup>25</sup> and the Commission took steps to streamline it and shorten the average time it takes to complete a case. Yet, this extensiveness of the pre-litigation phase is there for a reason: to ensure that only a limited amount of cases reach the Court. By allowing Member States multiple opportunities to comply, the Commission, with its considerably larger size, protects the Court's capacity to perform its functions, taking over the initial responsibility for dealing with non-compliance cases and ensuring that the Court does not have to rule on all state violations that the Commission deals with. The Commission's statistics show that "Member States make serious efforts to settle their infringements" before they reach the Court. In 2015, the Commission closed 726 EU Pilot files before even launching the infringement procedure, 446 late transposition infringements, 474 cases after sending the letter of formal notice, another 183 after sending reasoned opinions and finally 12 more after deciding to refer the case but before submitting it. This made 1841 cases that the Court, with its limited size, did not have to preside over. As a result, the Court delivered in 2015 only 25 judgments under Article 258 TFEU and 3 under Article 260(2) TFEU (and considered 13 more cases which were withdrawn during the proceedings).<sup>26</sup>

Realizing how the pre-litigation procedure serves the purpose of diminishing the demand for the Court's adjudication allows to comprehend the importance of voluntary compliance. The Member States' willingness to conform before, outside or during the pre-litigation procedure allows to limit

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<sup>24</sup> Judgment in *Commission v Ireland*, C-362/01, EU:C:2002:739, 18.

<sup>25</sup> Krämer, *Environmental Judgments by the Court of Justice and their Duration*, 2008 *Journal for European Environmental and Planning Law* 5, 279.

<sup>26</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 20, 25-27.

the amount of cases that reach the Court. While the confidential and bilateral nature of such opportunities causes concern and has its drawbacks in the decreased transparency and legitimacy of the Commission's activities as was shown in chapter 5, it does allow to solve compliance problems without unnecessarily burdening the Court. Member States are more eager to cooperate in a friendly setting and outside the attention of third parties than if they are formally challenged with witnesses watching. The Commission thus offers them different occasions for amicable settlements, ensuring that they are presented with comfortable conditions such as secrecy and informality. The result is such that voluntary compliance constitutes the cornerstone of the infringement procedure and the Commission's enforcement function, ensuring their proper functioning and guarding the Court's capacity to rule on state non-compliance while it diminishes the overall amount of state violations.

The implication of the above analysis is such that the Commission's and, even more, the Court's sizes are unlikely to grow in the near future not only because of Treaty limits and new staff policies but also because nobody is eager to see the Commission increase its co-called 'bloated' bureaucracy. The adoption of the accountability model - which necessarily involves new tasks, more responsibilities, an overall formalization of relations with Member States and a corresponding intensification of the infringement procedure (chapter 8) - would thus likely lead to the overburdening of the existing staff which, in turn, would translate into delays as well as a decrease in quality and efficiency. While these effects are dependent on more than just the limitations on institutions' growth (e.g. resources discussed further), the consideration of the Commission's and the Court's size already allows to put the accountability approach into perspective.

### 7.2.2 Resources

Starting with the process of monitoring and supervision, the extent and depth of which partially depends on existing resources, through the process of unofficial contacts, EU Pilot and negotiations with Member States, up until the running of the administrative and judicial proceedings and even past them, the whole period after the Court's judgment of renewed supervision and potential action, all of that is determined by the availability of the Commission's resources. The issue of resources thus heavily intertwines with the remaining aspects of the enforcement function, determining how much it can do with the powers it has at its disposal. An increase in responsibilities not unsurprisingly requires resources.

While the previous section discussed the Commission's human resources, the current section mostly refers to the Commission's finances, covering not only the functioning of the Commission itself but also the external help it contracts. On the outset, it would seem that the Commission's resources

are vast because it operates in such high numbers that are difficult to grasp for individual citizens. For example, in the budget for 2015, the total of 2,416,466,000 Euros was devoted solely for the Commission's administrative expenditure allocated to policy areas.<sup>27</sup> Yet, what should be remembered is the fact that the Commission performs multiple functions, enforcement constituting hardly one among many areas to use its resources on. In fact, the Commission's insufficiency of resources is generally recognized in the literature, and studies of the centralized enforcement mechanism often underline this problem with respect to the Commission's performance of its monitoring and enforcement functions.<sup>28</sup> It is said that already in the European Community of 10 or 15 Member States, finances were an issue in the infringement procedure. The subsequent three enlargements have only deepened the problem.<sup>29</sup> The hindrance of the Commission's limited resources is unequal though. Depending on the policy area, some DGs deal with non-compliance more often than others and they are thus more likely to experience budgetary problems (e.g. DG Environment).<sup>30</sup> The more violations are discovered, the more they require resources, the less resources are available and the less the department is capable of addressing the influx of new problems. As a result, policy departments where complainants are most active are also the same that suffer the most from insufficient resources.

The concept of resources, however, does not mean only staff and money. It also means time. The Commission needs time to properly investigate a violation, to accumulate evidence and draft necessary documents. As a result, while the size of personnel and budget are one thing that influences the Commission's selective enforcement, the question of time also impacts its choices as it considers the most appropriate means and alternatives. This can help explain why the Commission prefers friendly solutions and the EU Pilot as a structured but ultimately informal pre-procedure enforcement measure. The infringement procedure is a lengthy endeavor that takes approximately two years to complete and which, because of its long and formal structure, costs a lot while the EU Pilot aims to solve problems within the time-frame of 12 months and, due to the informality and overall shortness of proceedings, is simply cheaper.

Whereas the problem of the Commission's limited resources is generally recognized in the literature, the consequences of this limitation are rarely taken into account when new propositions

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<sup>27</sup>Budgets - Definitive adoption (EU, Euratom) 2015/339 of the European Union's general budget for the Financial year 2015, OJ L 69 13.03.2015, Title XX Administrative Expenditure Allocated to Policy Areas, 370.

<sup>28</sup>Hedemann-Robinson (2015), 203; Bieber, Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 2014 Common Market Law Review 51, 1058; Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU*, (Routledge, 2010), 97; Nugent, *The European Commission* (Palgrave, 2001), 276; Stevens, Stevens (2001), 14.

<sup>29</sup>Smith (2010), 98.

<sup>30</sup>Nugent (2001), 281.

are put forward regarding amendments to the Commission's operation. The basic rule is that every change requires staff, money and time to be properly executed and function effectively afterwards. If we burden the Commission with new responsibilities without taking into account its resources, this will affect its supply by either withdrawing resources from other aspects of its functioning or by simply stretching them thinner and thus contributing to mediocre results. Investing in one area means that other areas will receive less. This basic dependency can help explain why the Commission has reservations against the injection of new accountability-based responsibilities to its operation.

The commitments made so far by the Commission with respect to complainants already put a considerable strain on its staff, finances and time. Let us look at the guarantees the Commission afforded complainants with respect to its operations in the EU Pilot and the infringement procedure.<sup>31</sup> Before even any action is taken, the Commission's staff has to read all received complaints which currently amounts to approximately 3,000-4,000 a year.<sup>32</sup> Complaints can be written in any of the official languages of the EU which means that many of them have to be translated. Next, all complaints (with a few exceptions of insufficient information) have to be recorded in the registry of complaints and enquiries (CHAP) and the acknowledgement of receipt is sent to individuals. Later, whenever the Commission moves forward with respect to a particular case (launch of EU Pilot, letter of formal notice, reasoned opinion, maybe another reasoned opinion, referral to Court), it has to inform the complainant: draft the document detailing the stage of the procedure, the action taken and the Member States' position, and have it translated. If the Commission chooses to close the case, it has to provide a setting of grounds in which it invites the complainant to present their comments (again a translated version is sent). According to the European Ombudsman, such Commission's explanations ought to be "sufficient, coherent and reasonable." They should therefore "(i) address the complainant's relevant arguments; (ii) be reasonably coherent with the Commission's general practices, communications and policies in the area; and (iii) be such that the citizens concerned would be better able to decide whether it is relevant to complain about similar matters in the future."<sup>33</sup> Complainants' comments have to be translated back, read and analyzed and if they do not persuade the Commission, the information on the closure is translated and sent. All these tasks are performed in addition to the investigation of the infringement itself (inspections, analysis of legislation,

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<sup>31</sup> Commission Communication Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law, COM(2012)154; Commission Communication on Relations with the Complainant in Respect of Infringements of Community Law, COM(2002)141.

<sup>32</sup> In 2015, 3450 new complaints were registered and, in 2014, 3715, Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 17.

<sup>33</sup> Decision of the European Ombudsman closing his inquiry into complaint 846/2010/PB against the European Commission (25 June 2013), paragraph 40.



accumulation of evidence, etc.), as well as aside from any requests and documents exchanged with the Member State, including the letter of formal notice and the reasoned opinion, overall preparation of the application and, finally, if the Member State does not conform, the participation in the procedure itself. Here again, every exchanged documents is translated. And this is just one complaint.

Ultimately, the amount of work the Commission has to put into an infringement differs on a case-by-case basis. Some violations can be easy to prove such as non-communication cases, and others may require a lot of investigating. Sometimes Member States will comply before referral and sometimes they will wait until the Court's declaration or even longer. Nonetheless, the presented depiction of various tasks the Commission has to perform with respect to infringement cases is still simplified because it fails to take into account the internal decision-making process (section 7.3.2), and it does not show how the action can be bounced of different units inside the Commission. It concentrates only on aspects relevant to stakeholders but it already suffices to demonstrate that the task of processing just one complaint involves a lot of work in addition to the handling of the infringement itself, is time-consuming and costs resources. Imposing on the Commission more responsibilities vis-à-vis stakeholders without simplifying those already existing would obviously prolong and further complicate this process.

Even Smith who is the main advocate of the accountability model notices that complainants are no longer 'resource-friendly.' Whilst before the Commission's soft-law commitments,<sup>34</sup> it could simply ignore certain complaints barely having a look at their content (or not even), and having no duties towards stakeholders, now it is under a number of obligations to fulfill before it closes cases.<sup>35</sup> Smith recognizes that this is not really efficient in terms of the Commission's resources. However, her solution to this is that the Commission should simply accept these facts and live with them. If it wishes to be well informed by individuals (efficiency gain), it has to simply deal with an increased administrative burden.<sup>36</sup>

With its limited monitoring powers that will be discussed further, the Commission would be blind to state infractions in many areas of EU law if it did not have complainants inform it on state incompatible conduct. Stakeholders, on the other hand, need incentives to write their complaints and these incentives include not only the belief that centralized enforcement will induce state compliance but also that the Commission will not ignore their complaints. It is therefore a mutual exchange between the incentives the Commission provides stakeholders in the form their procedural

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<sup>34</sup> Communication Updating the Handling of Relations with the Complainant, COM(2012)154; Communication on Relations with the Complainant, COM(2002)141.

<sup>35</sup> Smith (2010), 139.

<sup>36</sup> *Ibid.*, 140.

guarantees and the information stakeholders provide the Commission: administrative burden v information gain. However, there is only so much information that the Commission can process with its limited resources. While increasing the incentives would likely increase the amount of received complaints and information, it would also increase the Commission's costs of both, processing this additional information and providing the additional incentives. As a result, a boost in guarantees does not have to be that beneficial from the Commission's perspective. It cannot be negated that there may be ways to incorporate at least some of the accountability enforcement model into the Commission's operation without a detrimental increase in costs or thanks to smart budget management, but it cannot be denied that the fear of increased costs in an institution that - as it is - does not have enough resources to deal with state infractions, is what must be steering it away from major changes.

A solution to the Commission's limited resources problem would be - in theory - an increase in its budget.<sup>37</sup> However, the EU's budget also has its limitations. First of all, the EU cannot have a deficit or take loans to cover its expenses. It is highly dependent on the Member States' Gross National Product (GNP) and each EU institution has to manage its resources in a way that does not exceed what it was allocated and, in situations of lower income, it has to adapt and limit its administrative costs.<sup>38</sup> Additionally, the Council has never been very favorable towards the Commission's suggestions of increasing its budget, often blocking its attempts despite rather positive attitude of the Parliament.<sup>39</sup> The result was such that, while the Commission's responsibilities increased and its powers multiplied, its budget failed to expand analogously and meet new demands.<sup>40</sup>

Finally, the Court of Justice, aside from its small size, also has its constrained budget and only so much time to devote issues of state non-compliance among other, equally important competences. The pre-litigation procedure thus achieves the purpose of limiting the amount of cases that reach judicial proceedings and that is not only because of the Court's small size as was underlined in the previous section, but also because Court proceedings increase the costs of handling files,<sup>41</sup> prolong the process of enforcement while 28 judges can sit in only so many chambers and rule only on so many violations without incurring unacceptable delays. Compliance during the pre-litigation procedure is thus more cost-friendly in terms of money, time and staff than post-ruling conformity.

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<sup>37</sup> Bieber, Maiani (2014), 1091.

<sup>38</sup> Stevens, Stevens (2001), 13.

<sup>39</sup> *Ibid.*, 14.

<sup>40</sup> Bieber, Maiani (2014), 1091.

<sup>41</sup> *Ibid.*, 1061.

The fewer procedural constraints bind the Commission and the more its relations with Member States are based on friendly dialogue, the cheaper it is for the budget. As a result, informal methods of resolution are, in principle, more cost-friendly than even the formalized pre-litigation procedure. However, as much as Member States are often willing to voluntarily comply, abuse is also a fact and it cannot be denied that they sometimes intentionally violate EU law and artificially prolong the state of non-compliance. The lack of procedural constraints becomes a burden in such situations and leads to an increase in costs where not only the violation lasts longer bringing additional costs to stakeholders, but where the Commission itself incurs higher costs the longer it has to work to bring states into line. This is where the Commission's assessment of violation's background can come into play. If the Commission has reasons to believe that a Member State has intentionally breached EU provisions, informal methods may prove an inefficient method of achieving compliance, but when it suspects error or misinterpretation, cooperative instruments may prove more successful and resource-friendly than coercion and procedural, formal enforcement.

The potential for abuse cannot however be denied and the EU Pilot seems to constitute the middle-ground between the benefits and dangers of informal solutions. While it is a rather resource-friendly measure because it is based on informal contacts with Member States, it nonetheless follows a specific set of rules and is bound by pre-defined time-limits. It, therefore, protects against excessive delays and allows to root out cases of state abuse by transferring them to the infringement procedure. It does not foreclose the possibility of additional secretive negotiations taking place during and after the EU Pilot but it does structure the Commission's work and Member States' cooperation while decreasing the costs vis-à-vis the infringement procedure. It also diminishes the amount of translations which, in the infringement procedure, are obligatory with respect to every document exchanged. The dominating language of the EU Pilot is English and only several Member States communicate in their official languages. "The need for translations is met by the Commission as necessary" and the costs of translations are accordingly diminished.<sup>42</sup> The EU Pilot can thus be perceived as the Commission's response to some of the stakeholders' demands. It allows centralized enforcement to handle a larger number of complaints and thus address more violations overall but without increasing the costs, both money- and time-wise.

### 7.3 Substantive ability

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<sup>42</sup> Second Evaluation Report on EU Pilot, COM(2011)930, 2.

This concept of the Commission's substantive ability mostly includes the issue of competence of the Commission's College and officials, the expertise of which is generally well-known but the political character of its decision-makers often ignored. However, what also matters for the Commission's ability to enforce EU law is its internal organization and procedures. It is widely recognized that the infringement procedure is a long and cumbersome process but attention is rarely paid to the Commission's internal organization and procedures that further complicate the process of enforcement.

### 7.3.1 Competence

By competence, Komesar refers to the ability of judges to "investigate, understand, and make the substantive social decisions that may come to them."<sup>43</sup> With respect to the European Commission, this aspect of supply mostly refers to the competence of its staff to analyze, comprehend and make choices with respect to issues of state non-compliance. The Commission investigates state conduct not only to make provisional determinations whether an alleged infringement took place but also to accumulate evidence, formulate claims and finally decide on the future of the case and applicable measures, constituting a bottleneck through which cases reach the Court. As a result, the Commission is not just an institution performing purely administrative functions of cataloging cases and passing them along the procedural chain but it also examines and evaluates state conduct. Most of all, within the framework of the EU Pilot and other complementary instruments, it actually makes final determinations whether state propositions of rectifying their conduct conform to the requirements of EU law. Every of those tasks requires a high level of competence and knowledge. Similarly, the Court of Justice also needs a high level of competence to examine cases and pass rulings.

Komesar underlines that in the United States there is a considerable amount of distrust towards judges and jurors for their shortages. Their competence is questioned with respect to their ability to understand technical, complex, sensitive or large-scale policy issues since they have to preside over cases concerning various areas of law irrespective of their potential (if any) specialization which also prevents them from ultimately specializing in any particular field either.<sup>44</sup> As a result, judges' limited competence is a restriction on the courts' supply. Despite their legal knowledge, training and practice, they are not omniscient and certain cases can go beyond their expertise.

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<sup>43</sup> Komesar (2001), 38.

<sup>44</sup> *Ibid.*, 38-39.

Especially when cases are complex and concern large publics, they may have difficulty properly assessing cases, and the adjudicative process may struggle to meet the demand.<sup>45</sup>

Although this could seem like a problem also with respect to the Court of Justice, the reality is not that straightforward. Both judges and advocates general are chosen from persons who “possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are juris consults of recognized competence” (Article 253 TFEU). They are, therefore, not just mere judges but persons of highest recognition for their exceptional competence and skill. Additionally, many of them are also academics who specialize in areas related to the European Union as a whole (European or International law) or its particular policies (e.g. competition law) which gives them additional theoretical mastery. Despite their superior expertise, however, they do not sit in specialized chambers and thus have to rule on cases that may have little to do with their specialization. This makes it harder for them to decide on technical or complex issues and diminishes their competence. However, the fact that advocates general give their opinions in each case helps mitigate this problem and, combined with the judges’ overall proficiency, lessens (but does not remove) potential deficiencies. When compared to the ‘basic judge’ from Komesar’s analysis, the competence of the Court of Justice by far exceeds what could be reasonably expected of a basic level court.

Different is the issue of the European Commission’s competence. The Commission, being primarily an administrative body, does not suffer from the same kind of hindrance that could be said of judges. As Komesar points out, “expert bureaucrats from administrative agencies” usually have specialized expertise.<sup>46</sup> This expertise is further strengthened by a difficult recruitment test that allows for a selection of only the most proficient and knowledgeable candidates. Additionally, the Commission being charged with both drafting legal acts and implementing adopted laws, should, of all EU institutions, best understand the complex and technical issues that these laws involve. And since it partially participates in the decision-making process, it should be very well prepared to appreciate all the sensitivities of different rules and their political implications. It could even be said that no other EU institution or organ understands better all the EU laws and their implications. The fact that the Court rules against the Commission once in a while does prove that the Commission is not omniscient either but, when compared to other institutions or even courts, the Commission’s competence is difficult to question. In 2015, for example, the Commission won 82% of infringement cases before the Court of Justice.<sup>47</sup> In 2014, it won as many as 92% of cases.<sup>48</sup> Nonetheless, it does not mean that all

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<sup>45</sup> Ibid., 87.

<sup>46</sup> Ibid., 39.

<sup>47</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 25.

<sup>48</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring the Application of EU Law (2014), COM(2015)329, 15.

the Commission's officials dealing with state infractions have such high competence. Not only are the persons that monitor and enforce EU law uninvolved in the process of drafting laws. There is also the issue of enforcement's low prestige in the Commission's DGs. Everyone wants to draft legislation rather than work on non-compliance. This often results in less experienced staff assigned to infringement cases.<sup>49</sup> On the other hand, such persons, even if they lack in practice, still have easier access to those more experienced and can draw from the general, collective expertise of their department.

While the Commission's legislative and executive functions allow it to understand complex provisions, increasing its competence to inspect and evaluate state performance, they also bring in a controversial consequence. The Commission's enforcement power is neither its most important nor prevailing function. It is merely one of many that the Commission performs with the purpose of serving the EU's interests and furthering the European integration. In fact, if one was to put the Commission's different powers by order of importance, the enforcement function would likely be placed in one of the lower tiers.<sup>50</sup> Regardless of the problem of importance, however, what matters is the existence of the Commission's multiple functions. For this reason alone, the Commission cannot be compared to any national prosecuting body whose sole objective is to bring violating persons to justice and who has the freedom to indiscriminately stay true to one and only objective.

The effect of this multi-functionality is that the Commission's staff, while performing its enforcement function, strives to reconcile it with its remaining powers or, at the very least, avoid conflict and inconsistency between different objectives and departments. This is clearly easier said than done and clashes are unavoidable especially between policy sectors that serve seemingly opposing goals such as environment and agriculture. Nonetheless, it should not be surprising that the Commission does not wish to contradict itself in its actions nor hinder its operations by thoughtlessly following one objective at the cost of others. This, however, can lead to situations where decisions are taken with the consideration of their implications for the Commission's remaining functions and under the influence of goals lying outside the scope of the case at hand. The result is such that the Commission not only negotiates compliance and strikes deals with Member States but it even sometimes turns a blind eye to certain incompatible situations or chooses to solve cases by merely

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<sup>49</sup> Smith (2010), 104-105.

<sup>50</sup> This is visible in textbooks on EU law where the Commission's legislative and executive powers are more often than not discussed at the beginning of relevant chapters, while its enforcement powers are addressed closer to the end even though Article 17(1) TEU enumerates monitoring and enforcement as the first Commission's function. The lesser importance of enforcement is also confirmed by the mentioned low prestige of the Commission's officials dealing with non-compliance.

informally chastising states for their misconduct,<sup>51</sup> which is not received well by the accountability approach.

The Commission is not, however, the only institution to make decisions on grounds that are not just solely factual and legal. The Court of Justice is said to formulate its decisions in a way that is likely to find support in Member States which allows it to uphold its own legitimacy. When faced with several, equally legal and valid solutions, the Court favors the one which will be most acceptable to Member States.<sup>52</sup> The Commission does the same with respect to the enforcement of competition rules. To avoid embarrassing Member States or pushing companies to move their businesses outside the EU, it imposes fines on companies that are often merely symbolic, or requires the reimbursement of only a fraction of state aid unlawfully granted.<sup>53</sup>

In connection to the Commission's multi-functionality, studies of the infringement procedure tend to disregard an obvious fact: the Commission is a political actor just as the Council or the European Parliament. It has "policy preferences" that affect how it performs its enforcement function and makes strategic choices regarding the most appropriate means of addressing violations which also includes tolerance of incompatible state conduct.<sup>54</sup> This is particularly visible in the Commission's latest annual report<sup>55</sup> where it openly admits to have adopted its enforcement practice to its political priorities.<sup>56</sup>

To better understand this, it is necessary to look at the commissioners and their competence to enforce EU law. While the competence of the Commission's bureaucratic staff can be considered high and its understanding of long-term objectives and political implications is merely an additional benefit (or detriment, depending on the point of view), the competence of the commissioners can be seen mostly in terms of their political experience. Under Article 17 TEU, the commissioners are "chosen on the ground of their general competence and European commitment" but in practice they are more often than not members of governing political parties and their nomination is often perceived in terms of a reward for their political service. They are, therefore, first and foremost politicians with often long-lasting political careers. Additionally, while infringement cases are processed by specific DGs in cooperation with the Legal Service and the Secretariat General, they eventually always find their way to HEBDO, a weekly meeting of the heads of cabinets. These are the

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<sup>51</sup> Szapiro (2013), 228.

<sup>52</sup> Conant, *Compliance and What EU Member States Make of It*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 27.

<sup>53</sup> Nugent (2001), 286.

<sup>54</sup> Szapiro (2013), 228.

<sup>55</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463.

<sup>56</sup> *Ibid.*, 3-4.

persons that offer political guidance to their commissioners and who decide whether infringement decisions are adopted automatically by the commissioners or if they are left for further discussion or removed from the College's agenda altogether. Their main purpose is to monitor the political situation and advise their commissioners in that regard and it thus cannot be surprising that they are sensitive to matters of political nature and take into account considerations which lie outside matters of law and fact.

It is not a clear-cut matter whether the Commission's multi-functionality and politicization is a benefit for the uniform application of EU law, and the accountability model of enforcement strives towards the replacement of the Commission's flexibility in the handling of state violations in favor of a more objective, uniform and non-discriminatory approach to enforcement. However, aside from transferring the power of monitoring and enforcement to an entirely different institution, it is difficult to see how the Commission could successfully eradicate flexibility from its management of state infractions since such flexibility is the direct result of its composition and powers with its political decision-making apparatus and multi-functionality. It is, therefore, not surprising that the Commission insists on maintaining the core of its compliance-related contacts with Member States confidential, bilateral and autonomous so as to leave itself space for maneuverability that takes into account objectives of its different functions, opinions of experienced and competent staff as well as goals of the political, procedurally-dominating apparatus.

Interestingly, the EU Pilot can once more be seen as a partial response to factors that encourage the Commission's flexibility. Since unlike infringement proceedings it is based on friendly and informal cooperation with Member States, the involvement of the College is not necessary for the initiation or completion of the process. The result is such that decisions concerning the EU Pilot such as those that reject, open, close files or transfer cases to the infringement procedure are made by the Commission's services, relevant departmental operational units and their heads<sup>57</sup> which decreases the participation of politicians, leaving the deciding power in the hands of administrative officials. This does not guarantee that such cases will be only assessed on legal and factual grounds, but the College's non-involvement makes EU Pilot cases seem less significant and less likely to steer political disputes. It gives national organs an opportunity to rectify their violations without the watchful eye of the public and the formality of infringement proceedings which, on the one hand, leaves ample space for flexibility but, on the other, allows violations, especially those unintentional, to be remedied rapidly and with no negative consequences, outside the attention of grander political actors in both,

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<sup>57</sup> Ballesteros, Mehdi, Eliantonio, Petrovic, *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness*, Study commissioned by the European Parliament, 2013, 67.



the Commission and Member States. Similarly, other compliance tools can also be seen as a method to not only avoid the cumbersomeness, slowness, shame and coercion of infringement proceedings, but also a tool to decrease the involvement of higher-level politicians, allowing national responsible organs to voluntarily rectify their violations before they could become large-scale, politically-sensitive issues. Paradoxically, the EU Pilot can thus be seen as the Commission's attempt to depoliticize the process of enforcement in spite of its confidential, bilateral and ultimately flexible nature that keeps the watchful eye of stakeholders at bay.

### 7.3.2 Internal organization and procedures

There is no doubt that the centralized enforcement mechanism is cumbersome and time-consuming.<sup>58</sup> This is partially due to the structure of the procedure itself which, aside from judicial proceedings, consists of the pre-litigation phase built around several main stages. It is also the result of sometimes slow conduct of the Commission which, for the purpose of achieving amicable solutions, stretches out the negotiating part. As was already underlined, such elongated pre-litigation procedure is necessary in order to give Member States an opportunity to voluntarily comply and decrease the amount of cases that require the attention of the Court of Justice. However, the cumbersome and time-consuming nature of the centralized enforcement mechanism also stems from the Commission's internal organization and procedures which add another layer of complex actions to the process of dealing with state infractions. This is due to the Commission's size and its political and administrative nature where procedures are necessary in order to organize the work of an institution as large as the Commission.

In the early years of the Community, the Commission saw itself as a rather small institution with non-bureaucratic procedures. As the years passed, however, and the Commission expanded in size to accommodate new policies and enlargements, it grew to become a large bureaucracy with complicated and cumbersome internal organization and procedures, where the processing of cases became needlessly long and burdensome.<sup>59</sup> The result was such that the Commission underwent several internal reforms in order to accelerate the infringement procedure and root out unnecessary delays (e.g. communication A Europe of Results).<sup>60</sup>

Before the reforms, the main decisions in the procedure that progressed it into the next stage (letter of formal notice, reasoned opinion, and referral) were taken only four times a year at the

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<sup>58</sup> Hedemann-Robinson (2015), 206.

<sup>59</sup> Stevens, Stevens (2001), 23-24.

<sup>60</sup> Commission Communication A Europe of Results – Applying Community Law, COM(2007)502.

commissioners' quarterly infringement meetings. Member States, aware of this internal rule, were deliberately sending their replies too late for the Commission's staff to process them for meetings and thus further delaying the procedure and allowing for the state of incompatibility to last longer.<sup>61</sup> Additionally, the coordination of departments' monitoring and enforcement was carried out by the Commission's Legal Service which discussed infringement cases with all DGs only once every three months. The result was such that each department reviewed its files as little as four times a year.<sup>62</sup> These delays diminished the Commission's efficiency in the handling of state infractions and new rules were introduced in order to accelerate the process.

The internal regime was first supplemented by the rule that infringement decisions could also be taken at regular commissioners' meetings every fortnight.<sup>63</sup> Eventually, however, quarterly infringement meetings became monthly.<sup>64</sup> The frequency of the Legal Service's meetings with the DGs was increased to ten per year, new time-limits were set for the handling of specific types of cases and the Commission's Secretariat-General became involved in overseeing the management of state infractions, meeting twice a year with the Legal Service in order to evaluate whether the new standards were respected.<sup>65</sup> The Commission automated the sending of the letter of formal notice, reducing the amount of lengthy negotiations and observing more closely the time-limits set out in those letters. Also, a special internal database was developed with respect to the transposition of directives which automated the Commission's responses to non-communication cases. These internal reforms had thus the effect of reducing time delays by streamlining the infringement process and strengthening the practice of respected deadlines, while reliance on new technologies allowed for better resource efficiency.<sup>66</sup> The Commission also concentrated on speeding up Member States' response time by prosecuting them for non-cooperation under Article 4(3) TEU but this was ultimately replaced by introducing more preventive strategies.<sup>67</sup>

The Commission's internal reforms rooted out unnecessary burdens and they no longer take as much time as they used to, allowing for more efficiency in the handling of state infractions. Nonetheless, the Commission's complicated internal organization does influence its capacity to perform its enforcement function. The Commission has no specific department, the sole responsibility of which would be the handling of infringement cases. On the contrary, non-conformity issues are

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<sup>61</sup> Smith (2010), 99-100.

<sup>62</sup> Szapiro (2013), 231.

<sup>63</sup> Smith (2010), 99-100.

<sup>64</sup> *Ibid.*, 104.

<sup>65</sup> Szapiro (2013), 231.

<sup>66</sup> Smith (2010), 100-101.

<sup>67</sup> *Ibid.*, 102-103.

spread among different DGs, each responsible for its policy area. Such internal organization can be both beneficial and detrimental to the Commission's supply. On the one hand, the same departments that draft laws also enforce them. This allows for expertise and detailed knowledge that a single unit detached from policy areas could lack. On the other hand, even within a single DG the people who draft laws and prepare infringement cases are not necessarily the same. Each DG has its own internal organization where the management of violations is attributed differently. Some DGs have special infringement units, others have horizontal coordinating units and yet others do not have any such special units at all. This is sometimes dependent on the policy area and sometimes simply constitutes a relic of the past. Finally, the monitoring of compliance can look differently in different DGs. Depending on the policy area, some departments have to heavily rely on their own monitoring measures while others drown under a flood of complaints, each type of monitoring involving different enforcement problems.<sup>68</sup> Further, certain violations can affect several policy areas. Such cases require the cooperation of different DGs which may not be easy to attain because of both insufficient central coordinating units and potential conflicts between opposing policy interests. Overall, however, while a separate enforcement department covering all policy sectors would, on the outset, seem beneficial to the Commission's internal management of cases, it would lack in the specialized expertise of individual departments, decreasing the competence of the Commission's enforcement staff. Additionally, the uniformity of rules typical of singular units would likely fail to take into account the specificities of all sectors. Policy areas can largely differ from one another and they may require vastly diverse approaches. Such a reform could thus, instead of increasing the Commission's efficiency, actually decrease it.

Despite streamlined procedures and set time-limits, the internal processes still take time and require the involvement of a number of persons and units across the entire Commission. Ten times a year the legal units of each DG initiate the "internal decision-making cycle on infringements." Each DG sends a list of infringement cases (NIF fiche) to the Secretariat-General which makes about 150-450 cases. Each case is scrutinized by the Legal Service and uploaded to the infringement database (NIF) in order to begin the inter-service consultation (CIS) across all departments and services, in which the Legal Service and Secretariat-General participate by default. Afterwards, the coordinated list of cases is transmitted to the meeting of the heads of cabinets (HEBDO) where any of the cases can still be withdrawn. If the list is adopted unanimously by HEBDO ('A' point) then it is sent to the College which adopts the decision by means of the "finalization written procedure" (PEF). If HEBDO disagrees on specific cases, these are sent to the College under the 'B' point of its agenda. They require the College's

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<sup>68</sup> Ibid., 107-108.

discussion and trigger the “habilitation procedure” (HAB) which authorizes one of the commissioners to make the decision within set conditions or postpone it.<sup>69</sup>

While the same internal procedure is set for all DGs, the attitude and the work of each DG with respect to infringement cases differs according to the commissioner in charge of the policy as well as the director general responsible for the relevant area. If the commissioner considers enforcement important on their agenda and if they are influential within the College then their increased attention to enforcement affects the attention given by their subordinates to enforcement which can translate into an increase in infringement cases in relevant policy areas. The same can apply to directors general who, according to their personal opinions, may impose on their employees policies of more or less stringent tolerance.<sup>70</sup>

In line with this, another issue that affects the Commission’s ability to enforce EU law is the original rule that not only all main decisions within the infringement procedure (letter, reasoned opinion, and referral) still have to be made by the College but that each of those decisions requires the consent of all commissioners.<sup>71</sup> Clearly, in the early years of European integration, an agreement of six commissioners was much easier to attain than that of 28. Smith points out, however, that such a rigid rule causes problems only to some DGs and with respect to certain violations. It is no surprise that, ultimately, cases which result in largest consensus problems and which take the longest are those that are most infused with political sensitivities.<sup>72</sup>

While it is not difficult to notice that the Commission’s internal organization and procedures, despite different reforms, are still long and complicated and they could be further simplified in order to increase the efficiency of infringement proceedings,<sup>73</sup> it should be remembered that their very existence is an indispensable part of the workings of institutions and they will always have an impact on the Commission’s output in its enforcement function. The Commission, however, appears to be aware of existing drawbacks, and its reliance on alternative and informal solutions could be seen as a means of avoiding the cumbersomeness of its formalized infringement procedure. Formal measures require the strict observance of internal procedures with the involvement of various officials of different levels and units, while informal measures allow for flexibility, speed and a decrease in the amount of persons involved. They are, however, possible only if the Commission retains the core of its enforcement powers, having the discretion to use whatever means necessary, as well as

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<sup>69</sup> Szapiro (2015), 231-232.

<sup>70</sup> Smith (2010), 108-109.

<sup>71</sup> Hedemann-Robinson (2015), 85.

<sup>72</sup> Smith (2010), 105-107.

<sup>73</sup> Hedemann-Robinson (2015), 208.

guaranteeing Member States the confidentiality and bilateralism of such solutions which increases their willingness to comply and ensures that such solutions achieve their objectives. The accountability model of enforcement, however, not only seeks to limit the opportunities for informal and confidential solutions but it also involves new responsibilities inter alia towards complainants (e.g. access to documentation) which necessarily involves the lengthening of the Commission's procedures.

The difference in the complexity of formal and informal procedures further explains the Commission's transformation of the EU Pilot into a regular pre-procedural step. Not only is the College removed from the decision-making process of the EU Pilot which instead rests with the heads of operational units from relevant DGs,<sup>74</sup> but the Pilot's procedure is overall simplified when compared to Article 258 TFEU. It basically involves the submission of questions to the relevant contact point in a Member State which has ten weeks to respond. After the reply is sent to the Commission, the latter has ten weeks to assess it and decide whether to close the case or proceed with another compliance method, namely the infringement procedure. Clearly, the Commission is free to both extend the deadlines or the EU Pilot itself, asking for more information. However, the core of the EU Pilot exchange comes down to two main steps. If the action is taken on the basis of a complaint, however, the Commission has to record it in CHAP and inform the stakeholder of the outcome.<sup>75</sup> As regards internal procedures inside the Commission, the handling of EU Pilot files is carried out by the Commission's services and relevant operational units in DGs.<sup>76</sup>

Nonetheless, the Commission insists that even the EU Pilot procedure require time and effort which translates into its enforcement output and allows it to process only so many cases a year. The assessment of a Member State's reply requires analysis as well as internal and potentially also inter-service consultation. The EU Pilot's main language is English but Member States can ask for a translation.<sup>77</sup> Also, it is important to remember that the swiftness of both, the EU Pilot and the infringement procedure depends on Member States' internal procedures. A mere reply within the EU Pilot requires "transmission to the relevant Member State authorities, examination of the issues, internal consultation, drafting, possible need for translation, possible inter-departmental consultation and submission to the Commission."<sup>78</sup>

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<sup>74</sup> Ballesteros et al. (2013), 67.

<sup>75</sup> Second Evaluation Report on EU Pilot, COM(2011)930, paragraph 2.

<sup>76</sup> Ballesteros et al. (2013), 67.

<sup>77</sup> EU Pilot Evaluation Report, COM(2010)70, 17.

<sup>78</sup> *Ibid.*, 17.

## 7.4 Dynamics

The Commission's supply understood as its ability to provide enforcement is dependent not only on its physical capacity and substantive ability but also on its dynamics. Just as in the case of decentralized enforcement where its use in the overall system of EU compliance measures was estimated by reference to its dynamics (chapter 6), so is the Commission's ability to enforce EU law dependent on the types of cases that reach its attention. Since the Commission is incapable and cannot be expected to know of all instances of non-compliance, what determines its dynamics is the information it has regarding state infractions.

There are two main avenues for such information to reach the Commission. On the one hand, the Commission's monitoring powers allow it for a degree of its own supervision over state conduct. On the other hand, external actors such as stakeholders, NGOs, the European Parliament and the Ombudsman also supply the Commission with information regarding observed breaches. In other words, the Commission's dynamics are shaped by its knowledge of state violations. For this purpose, the Commission has to rely on a "relatively haphazard system of acting on complaints" and on its own "far from perfect internal supervisory system."<sup>79</sup>

### 7.4.1 Monitoring

Academics agree that the Commission's monitoring powers are limited and thus influence its performance in the infringement procedure. There are too many EU norms, too many Member States and too many differences between various legal systems for the Commission to single-handedly monitor state compliance.<sup>80</sup> Most of all, however, the Commission's monitoring powers and measures vary, depending on the type of obligation Member States are charged with. Whether it is about achieving compliance in the process of legislation or application and depending on the policy area in question, the extent of the Commission's powers as well as the range of methods and its overall capacity diverge considerably. This results in a situation where the Commission's effectiveness in detecting state non-compliance differs depending on the infraction in question. This difference is what ultimately delimits the Commission's information and the content of infringement action and what has a considerable effect on the Commission's dynamics of enforcement.

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<sup>79</sup> Krislov, Ehlermann, Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, in Cappelletti, Seccombe, Weiler, *Integration Through Law*, Volume 1. Book 2 (Walter de Gruyter, 1986), 73.

<sup>80</sup> Smith (2010), 97.

The Commission's monitoring of the conformity of national measures with EU law consists of two stages: surveillance and the recording of a violation.<sup>81</sup> Many EU legal acts (e.g. directives) contain the obligation to inform of transposing measures. This makes the detection of non-communication cases easy and, due to the Commission's automatic response method, it results in a high number of opened infringement proceedings. For example, in 2015 the Commission launched 543 new late transposition infringement cases,<sup>82</sup> and 585 in 2014.<sup>83</sup> Verifying, on the other hand, the conformity of transposing measures of twenty eight Member States demands more time and work. When cross-checking national measures, officials often have to deal with multiple domestic acts, especially from countries with decentralized or federal structures or in case of EU measures which touch upon several sectors of laws.<sup>84</sup> Also, they have to be familiar not only with European legislation but also with the nature of administrative and legal traditions of Member States to understand the subtleties of their transposition. The Commission suffers from insufficient technical staff that can perform such systematic and comprehensive conformity verifications.<sup>85</sup> As a result, it often contracts external consultants such as university academics to make preliminary verifications of national transposing acts, and encourages Member States to use tables of concordance which, article by article, detail transposing measures corresponding to directives' precise obligations.<sup>86</sup> It also organizes multi- or bilateral meetings with Member States' officials to discuss issues which pose interpretational problems. Certain EU measures may entail the creation of special committees of state officials to aid the Commission in the task of monitoring national transpositions.<sup>87</sup>

The Commission also relies on other actors to draw its attention to potential violations in the legislation process. It can request information from Member States on an ad hoc basis, or the Member States' duty to provide information can be established in European secondary legislation. For example, Directive 98/34<sup>88</sup> imposes on Member States an obligation to notify the Commission of all new draft technical regulations and standards which could have consequences for the free movement of goods.

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<sup>81</sup> Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986), 7.

<sup>82</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 27.

<sup>83</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 17.

<sup>84</sup> Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing, 2010), 715.

<sup>85</sup> Krislov et al. (1986), 66-67.

<sup>86</sup> Macrory (2010), 716.

<sup>87</sup> Bossche Van den, *In Search of Remedies for Non-Compliance: The Experience of the European Community*, 1996 Maastricht Journal of European and Comparative Law 3, 394.

<sup>88</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, OJ L 204, 21.7.1998, 37-48.

Whereas monitoring state compliance in the process of legislation is difficult, it is considerably harder in the process of application.<sup>89</sup> Due to the particular nature of such violations, the Commission is more likely to never hear of them than to actually learn of their existence on its own. In order to detect non-compliance in application, the Commission can request information, analyze press releases, gather information from officials within its delegations in Member States, and perform particular, limited inspections.<sup>90</sup> Sometimes, it asks of its own motion economic operators who are likely to be affected by EU measures if they experience any troubles with domestic legislation.<sup>91</sup> It also stays in contact with national implementing authorities, non-governmental organizations, consultancies and researches.<sup>92</sup>

Considering the scale of the application process and the fact that it consists of hundreds of individual decisions in every Member State, the Commission's methods fall far from what would be required to systematically and methodically monitor state compliance in application.<sup>93</sup> Article 337 TFEU stipulates that the Commission may "collect any information and carry out any checks required for the performance of the tasks entrusted to it" but only within the limits and under the conditions provided by the Council. This Article, therefore, does not grant the Commission any general power of inspection but only with respect to issues which the Council details in specific measures. Aside from this, many directives and regulations contain provisions that impose on Member States various obligations of auxiliary nature such as reporting or accumulating data, which contribute to the Commission's knowledge of state performance in the process of application.<sup>94</sup> Some norms may even require individuals to communicate data to Member States which pass it further to the Commission.<sup>95</sup> The overall result, however, is such that the monitoring of the process of application relies heavily on the activity of external informers such as stakeholders and NGOs discussed in the following section.

Regarding the investigation of a violation, the Commission needs to verify whether the information received from an outside source is true, and accumulate enough evidence to prove its existence before the Court. After all, it has the burden of proof in infringement proceedings.<sup>96</sup> The easiest and most obvious method is to ask the Member State for necessary documentation which,

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<sup>89</sup> Nugent (2001), 278.

<sup>90</sup> Ibáñez, *The Administrative Supervision and Enforcement of EC Law* (Hart Publishing, 1999), 64-65.

<sup>91</sup> Bossche (1996), 394.

<sup>92</sup> Börzel, *Guarding the Treaty: The Compliance Strategies of the European Commission*, in Börzel, Cichowski (eds.), *The State of the European Union* (Oxford University Press, 2003), 203.

<sup>93</sup> Hedemann-Robinson (2015), 199.

<sup>94</sup> Nugent (2001), 279.

<sup>95</sup> Ibáñez (1999), 69.

<sup>96</sup> Timmermans, *Judicial Protection against the Member States: Articles 169 and 177 Revisited*, in Curtin, Heukels (eds.), *Institutional Dynamics of European Integration* (Martinus Nijhoff Publishers, 1994), 399.



under the principle of loyal cooperation from Article 4(3) TEU, has the duty to provide it. However, Member States are not always eager to share damning information in the course of the Commission's investigations which, even though it constitutes a failure to cooperate which is a violation in its own right, does not make the Commission's investigation any easier. Sometimes, requested documents simply do not exist or the government may have troubles collecting required data from, for example, autonomous regions. Finally, there are those documents that fall under the interest of national security which Member States are not required to divulge under Article 346(1a) TFEU.<sup>97</sup>

The second method of investigating state non-compliance is inspections. This method is, however, hindered by two obstructions: limited inspecting powers and limited resources to perform them, the latter discussed in earlier sections. The Commission's powers of inspection are restricted only to particular sectors,<sup>98</sup> such as competition, agriculture, fisheries and EU own resources.<sup>99</sup> However, even within these areas, the Commission's inspecting powers differ on a sectoral basis extending from the right to merely witness inspections carried out by national officials to performing sudden, unannounced on-site visits even without the participation of Member States' representatives. For example, Regulation 1224/2009 establishing a control system for ensuring compliance with the common fisheries policy broadens the Commission's power of inspection to the point where it can carry out autonomous inspections without giving prior notice and the presence of state officials in order to verify control operations performed by the competent authorities of that Member State.<sup>100</sup> Such unannounced visits are also typical of the competition sector and are called 'dawn raids' where the Commission has access to all locations and documentation without prior notice.<sup>101</sup> These are, however, the broadest inspection powers the Commission can possess. On the other side is the sector of environmental protection which suffers from the Commission's complete lack of investigatory powers while constituting a policy area particularly prone to complex application problems that often require on-spot verifications.<sup>102</sup>

Ibáñez enumerates the most common inspectors' rights as follows: 1) to accompany Member States' inspectors during their inspections; 2) to request Member States to carry out investigations with a possibility of participation; 3) to perform physical checks and on-site inspections with or without prior notification; 4) to visit national control authorities; and 5) to ask for explanations.<sup>103</sup> He classifies

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<sup>97</sup> Ibáñez (1999), 68-69.

<sup>98</sup> *Ibid.*, 67.

<sup>99</sup> *Ibid.*, 72.

<sup>100</sup> Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy, OJ L 343, 22.12.2009, 1-50, Article 98-99.

<sup>101</sup> Nugent (2001), 282.

<sup>102</sup> Hedemann-Robinson (2015), 200-201.

<sup>103</sup> Ibáñez (1999), 74-75.

them into two groups: those where the Commission's inspectors can prevail over national and those where they depend on national inspectors to do the inspections themselves. He finally also distinguishes between powers where the Commission's inspectors are performing the inspections themselves (enforcement inspections), those where they mostly just monitor the performance of national inspectors (efficiency inspections) and those where they carry out both functions.<sup>104</sup>

According to Ibáñez, there is no uniform rule that would determine which particular inspecting powers are granted to the Commission in different areas. He does not find any correlation between inspecting tools and Treaty provisions. It is rather that the extent of the Commission's inspection powers is determined by specific needs and political consensus in the form of support the Commission has managed to accumulate.<sup>105</sup> Further, Ibáñez doubts whether available inspection tools correspond properly to particular features of specific policy areas, and stresses the lack of clear criteria to determine where inspectors are really needed and with what powers. He concludes that this issue is "subject more to political bargaining than to efficiency criteria."<sup>106</sup>

It is difficult not to agree with Ibáñez. The leading policy sector that is characterized by many infractions in application but where the Commission's monitoring powers are excessively limited, is the environment. The Commission does not have its own inspectors in that sector and cannot carry out checks verifying whether reality corresponds to received information.<sup>107</sup> Since the Commission has the burden of proof in infringement proceedings, it is imperative that it accumulates enough evidence to establish non-compliance before the Court of Justice, and the lack of inspection rights in environmental matters can effectively prevent it from verifying state conduct and acquiring the necessary evidence.<sup>108</sup> In such situations, the Commission can do only so much and, failing to find enough proof, it may simply have to let the case go. Another alternative is the application for a general and persistent breach (GAP)<sup>109</sup> but such a technique has its own conditions and it requires proof of at least several examples that testify to the general and systemic nature of the violation.<sup>110</sup> This is, however, something that stakeholders do not take into account when they criticize the Commission for negligence, and which is rarely emphasized in the literature. Not every ignored complaint is the

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<sup>104</sup> Ibid., 76-77.

<sup>105</sup> Ibid., 77.

<sup>106</sup> Ibid., 88.

<sup>107</sup> Grohs, *Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 63.

<sup>108</sup> Ibid., 67.

<sup>109</sup> Harlow, Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), 185.

<sup>110</sup> More in Wennerås, *A New Dawn for Commission Enforcement under Article 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments*, 2006 *Common Market Law Review* 43; Albors-Llorens, *The Commission's Powers in the Enforcement of Directives: A Step Forward?*, 2000 *European Law Review* 25.

result of the Commission's secretive and political bargaining with Member States. Sometimes, the Commission may simply lack the evidence to prove it.

In the end, the power of on-site inspections is an exception and the Commission mostly relies on information furnished by Member States and stakeholders.<sup>111</sup> However, even if the Commission's investigative powers were extended, Timmermans argues that it would lack resources to perform complex investigations on a permanent basis and collect the necessary data.<sup>112</sup> Finally, an increase in inspections could actually reduce the EU's legitimacy which constitutes the cornerstone of the accountability model of enforcement. Certain areas such as social policies are still often perceived by citizens as remaining primarily within the hands of national decision-makers, and the Commission's surveillance and inspection could be received as unwarranted interferences.<sup>113</sup>

One of the solutions to the problem of monitoring is the creation of EU agencies. Such agencies perform a variety of functions, including regulatory and coordinating tasks but also monitoring, and some of them are even awarded with the power of inspection which includes either inspecting national inspectors or directly inspecting their regulated sectors.<sup>114</sup> For example, the European Maritime Safety Agency and the European Aviation Safety Agency assist the Commission by inspecting the safety and security of their respective sectors.<sup>115</sup> However, in the area of environmental protection where the monitoring of the application process is particularly crucial and complex, the European Environmental Agency was set up without any monitoring competences to speak of, mostly due to the opposition from Member States.<sup>116</sup> Excessive outsourcing is, nonetheless, not a solution compatible with the accountability model of enforcement despite it being advocated by authors concerned with the Commission's insufficient enforcement.<sup>117</sup> This is because, while decreasing the Commission's demand, outsourcing can lead to situations where monitoring rests in the hands of bodies which are even less accountable than the Commission which, in turn, translates into a decrease in the legitimacy of new tools.<sup>118</sup>

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<sup>111</sup> Bieber, Maiani (2014), 1087.

<sup>112</sup> Timmermans (1994), 399.

<sup>113</sup> Bieber, Maiani (2014), 1091.

<sup>114</sup> Szapiro (2013), 228-229.

<sup>115</sup> Commission 28<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2010), COM(2011)588, paragraph 3.3.

<sup>116</sup> Krämer, *The Environmental Complaint in EU Law*, 2009 *Journal for European Environmental and Planning Law* 6, 21.

<sup>117</sup> E.g. Krämer (2009), 21; Weatherill, *Reflections on EC Law's 'Implementation Imbalance' in the Light of the Ruling in Hedley Lomas*, in Krämer, Micklitz, Tonner (eds.), *Law and Diffuse Interests in the European Legal Order* (Baden-Baden, 1997), 52.

<sup>118</sup> Bieber, Maiani (2014), 1091.

It is apparent from above considerations that the Commission's ability to monitor state compliance in the process of application is selective and not because of the Commission's choice. It simply does not have sufficient resources to monitor the conduct of hundreds of national administrative agencies and adjudicative organs and verify the performance of their administrative or judicial functions.<sup>119</sup> It is difficult enough to know and be able to prove that somewhere in a Member State a local administrative body has made a decision inconsistent with EU law. But there, at least, exists an official document in the form of the incompatible decision, and the effort is in learning of this violation, getting the hands on the decision and verifying it. It is, however, even harder to know and be able to prove that somewhere in a Member State an individual violating EU rules got away with it because of a domestic organ's inertness. Failures to obey enforcement obligations can be even harder to trace than violations in application.

By realizing the Commission's limitation in monitoring state compliance, it becomes apparent that many violations in application must necessarily go unnoticed. Unless they are systemic or their consequences are large and serious, the likelihood of the Commission learning of their existence is considerably small. The more isolated and minor such incidents are, the lower are the chances that they will ever reach the Commission's 'ears.' Incidentally, these are also the same categories of violations which seldom find their way to national courts as was shown in chapter 6. The problem with violations in application is thus two-fold: it is not only difficult to learn of their existence, it is also often difficult to confirm their existence. Even if the Commission is aware of a systemic infraction, its investigation and confirmation for the purpose of initiating procedures may still prove a strain on resources and necessitate the help of stakeholders or NGOs.<sup>120</sup> The result is such that the Commission is considered to be rather ineffective when it comes to pursuing application and enforcement violations.<sup>121</sup>

The problem of the Commission's constrained monitoring powers goes in pair with its limited human and financial resources. The Commission not only has troubles learning of state infractions and investigating them, it additionally has limited resources to perform those functions. As a result, while it is a large bureaucracy with a high level of competence and skill, there is only so much it can do to monitor state compliance and discover non-conformity with the limited resources it has at its disposal. To deal with this hindrance, the Commission prioritizes already in the process of monitoring. With so many areas to supervise and so many violations to investigate, it chooses where to funnel its resources.

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<sup>119</sup> Nugent (2001), 276.

<sup>120</sup> Harlow, Rawlings (2014), 174.

<sup>121</sup> Krämer (2009), 13.

The Commission's limited monitoring powers and insufficient resources help explain its policy of selective enforcement and its insistence on its discretionary powers. Not only is the Commission forced to prioritize monitored areas which leads to gaps in 'coverage'. Even if it is aware of certain violations, its limited inspecting powers prevent it from acquiring enough evidence to prove it before the Court of Justice. It is easy to say that the Commission should concentrate on pursuing those state violations that individuals complain about but, since many of them involve violations in the process of application, it may either appear to be beyond the Commission's capacity or result in irrational distribution of resources, the latter signifying situations where little is achieved with a great amount of effort. This is why certain violations escape the Commission altogether and others are seemingly 'ignored', or yet others are subjected to informal methods of resolution. The Commission's insistence on efficiency demonstrates that it does not like wasting resources. If it knows it is likely to fail before the Court, it prefers to devote the same resources to cases that are more likely to have a successful resolution.

Informal contacts and the EU Pilot allow to circumvent some of those hindrances. The fact that such measures lack the characteristics of legal proceedings and that the Commission does not have to fulfill strict requirements of burden of proof, allows it to merely inform Member States of its knowledge regarding an infraction's existence and, if the state is willing, to remedy the situation without having to present rigid evidence. This is especially the case with respect to the EU Pilot which "is the main tool for the Commission to communicate with the participating Member States on issues raising a question concerning the correct application of EU law or the conformity of the law in a Member State with EU law."<sup>122</sup> The EU Pilot is therefore based on the idea that it is a communication channel via which the Commission asks and procures information regarding state conduct while offering national authorities the opportunity to immediately rectify it. Clearly a Member State's will to comply without sufficient evidence is very much dependent on its own motivation but, if the breach was unintentional, the EU Pilot may be a more successful method of achieving compliance than Article 258 TFEU. Finally, this is what can help explain the practice of bargaining that is undeniably taking place between the Commission and Member States. If the Commission lacks the evidence to prove a violation's existence and knows that the only alternative is to give it up completely, it may negotiate partial compliance in exchange for the Member State's disregard of insufficient proof. While partial compliance should not be an objective in itself, it can still be a more beneficial result than plain dismissal.

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<sup>122</sup> Second Evaluation Report on EU Pilot, COM(2001)930, 2.

#### 7.4.2 External informants

The Commission's limited and uneven monitoring powers allow only for a degree of supervision over state conduct, and information from external sources such as stakeholders, the European Parliament and Ombudsman is unparalleled in helping the Commission perform its enforcement functions. This is especially the case in the process of application where the Commission has few opportunities to learn of state non-compliance, but it is also useful in the process of legislation where its attention is drawn to specific non-conforming provisions that could otherwise escape it.

The European Parliament and Ombudsman regularly furnish the Commission with information regarding state non-compliance but, in most cases, they simply pass on petitions and complaints received from individuals. A considerable portion of information on state infractions is brought to the Commission directly by citizens, businesses, NGOs and other organizations and associations. For example in 2015, the Commission registered as many as 3450 complaints,<sup>123</sup> and 3715 in 2014.<sup>124</sup> Not all complaints fulfill basic registration requirements and not all concern actual state infractions though. Out of 3315 complaints handled in 2015, 2853 were closed because they did not qualify as a complaint (454), the Commission had no power to act (152) or there was no breach of EU law (2247).<sup>125</sup> As a result, out of 881 new EU Pilot files opened in 2015, only 295 were triggered by complaints and 578 resulted from the Commission's own initiative inquiries.<sup>126</sup> This, however, does not diminish the role complainants play in the Commission's monitoring. The result of their vigilance is such that the Commission was pressed to grant stakeholders some minimal guarantees in the infringement procedure as discussed in previous chapters.

It cannot be denied that the help the Commission receives from stakeholders in monitoring state compliance is irreplaceable but it also has its shortcomings that influence the Commission's supply. Complaining to the Commission has its own dynamics that determine the types of cases the Commission is informed of and has to address. As was shown in chapter 6, individuals make cost-benefit analysis when they deliberate whether to litigate. They also make cost-benefit analysis when they deliberate whether to inform the Commission on state non-compliance. The benefits of complaining on the outset do not appear very high because the infringement procedure does not provide any remedies to individuals. Nonetheless, it can still lead to the discontinuance of the violation that can help the interests of stakeholders directly by either improving their situation or by providing

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<sup>123</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 17.

<sup>124</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 7.

<sup>125</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring (2015), COM(2016)463, 18.

<sup>126</sup> *Ibid.*, 20.

grounds for court claims. The EU Pilot, however, being a measure designed with the thought of complaints, deals less with rules and principles and more with individual, specific breaches to which defaulting national authorities propose concrete solutions. Unlike the infringement procedure, it is thus more likely to remedy individual grievances and bring concrete benefits to individuals. The costs of complaining to the Commission are, on the other hand, really low. Complaining does not involve any financial cost and is not constrained by any legal requirements. All it demands is a little knowledge to realize that there is a violation and be able to describe it, and a little time to fill out a complaint form and upload it to the Commission. This does not even begin to compare to national legal proceedings which, at the very least, involve litigation costs and are characterized by legal standing limitations, or even to the SOLVIT network, the scope of which is constrained.

Additionally, the EU Pilot is expected to resolve issues within the timeframe of one year which is considerably less than in most national proceedings. It is not as adversarial and confrontational as national procedures, even more so that complainants are rather removed from it and do not enter into direct dialogue with national authorities. This can be seen as an advantage particularly to one-shotters who do not have the practice of court proceedings and who are often discouraged from litigation because they *inter alia* fear to directly confront state organs. The lack of stakeholders' access to the dialogue is, however, seen as a negative not only because it does not give them enough acknowledgment and prevents them from expressing their own opinions but also because it allows the Commission to negotiate outcomes that are not to their liking. Yet, it does lower the costs of complaining to both stakeholders and the Commission.

The balance between the costs and benefits of complaining is, therefore, rather positive. The result, however, is such that the Commission receives many complaints. And while some would see complaining as a measure of last resort for individuals who have no other means of redress, the cost-benefit analysis demonstrates that it is not so and, if anything, it may be the opposite: first an almost costless complaint and, if this fails to achieve the expected result, national proceedings. As was discussed in the previous section, a large number of complaints means more information but it also means more resources to analyze and process them. The Commission has only so much staff, money and time to deal with complaints. Most of all, however, the benefit in the form of information the Commission receives may also have its downside.

While individuals are likely to complain because the costs are low and benefits high, they are only incidentally vigilant and, as was shown in chapter 6 with respect to the decentralized enforcement mechanism, they act only if national measures or practice affect their interests.<sup>127</sup> Unless

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<sup>127</sup> Audretsch, *Supervision in European Community Law*, 2nd ed. (North Holland, 1986), 243.

they are non-governmental organizations or other associations the purpose of which is the furthering of a specific interest, they have no stake in informing the Commission if a violation did not impact their direct interests, and this dependency applies even to situations of low costs. The result is such that relying too much on complaints skews the Commission's knowledge regarding the state of non-compliance in the EU. It diverts it from high-priority to low-priority issues, leading to situations where the Commission spends its limited resources on isolated incidents of non-compliance while important but not so complainant-relevant violations demand its attention.<sup>128</sup> This can explain why the Commission remains selective in its enforcement and why it refrains from attributing complainants more procedural guarantees.

The current level of the Commission's responsibilities vis-à-vis stakeholders is thus a price to pay for information about state violations. Complainants inform the Commission about incidents of non-compliance and, in exchange, they are guaranteed that their complaints are registered in CHAP and they are informed about major decisions taken in the EU Pilot and the infringement procedure. The Commission is bound with a time-limit of one year from registration to either issue a letter of formal notice or close the case (during which the EU Pilot is in effect) and it has to allow the complainant to submit observations before closure as well as explain why it decided to close the case.<sup>129</sup> The Commission's responsibilities towards stakeholders thus require an amount of effort from its officials and the engagement of additional resources while it also ultimately prolongs the process of ensuring compliance. Expanding on those responsibilities would increase these costs and could no longer equalize the benefit in the form of information gained.

The EU Pilot is clearly a measure that was intended to aid stakeholders and, while it has undergone an evolution that has effectively pushed them to the sidelines, it nonetheless serves their interests. Mostly, with its lower costs and simplicity of operation to which Member States respond well, it is capable of processing more files. The result is such that a great majority of complaints are nowadays transmitted to Member States and have a chance at a rapid, successful resolution. The achieved outcome may not always be what stakeholders expect but so do national judicial proceedings lead to differing outcomes where judges are also sometimes forced to choose among competing alternative options. Thus, while the EU Pilot keeps complainants removed from its procedures to their dissatisfaction,<sup>130</sup> it does integrate at least some of their problems but without jeopardizing the four pillars of the Commission's discretionary enforcement powers.

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<sup>128</sup> Ibáñez (1999), 64.

<sup>129</sup> Communication Updating the Handling of Relations with the Complainant, COM(2012)154, 4-7.

<sup>130</sup> Ballesteros et al. (2013), 78-80.



## 7.5 Commission's overall capacity

The European Commission is often presented as an enormous and powerful institution that is capable of achieving a lot but ultimately fails to meet its challenges. The same is said with respect to its enforcement function and its resistance against the accountability model of enforcement with its four standards: transparency, trilateralism, objectivity and accountability. It surely cannot be denied that the Commission is a large institution with a high level of expertise to assess state performance which increases its overall supply. However, this does not mean that it is free of weaknesses and capable of easily incorporating the presented demands. While it is generally recognized that the Commission's resources are limited, its monitoring powers insufficient or the infringement procedure long and cumbersome, and that these factors hinder the Commission's enforcement capabilities, little attention is paid to the consequences that those deficiencies entail. Further, we are at a point where the negativity or positivity of certain aspects of the Commission's functioning is simply presumed and little is done to understand it. To give an example, the length of the pre-litigation phase in the infringement procedure has been for years considered a detriment to the effective and efficient enforcement and partially rightfully so when the Commission's internal procedures were unnecessary long and the officials lax with deadlines. However, while attention was paid to the pre-litigation procedure's benefit of amicable settlements, no attention was drawn to the fact that it also performs the function of protecting the supply of the Court of Justice, limiting the amount of cases that require a ruling on non-compliance. Similarly, whereas the importance of individuals in the Commission's enforcement is regularly underlined, little attention is paid to the fact that it also has its drawbacks and not only in the form of increasing the Commission's costs and prolonging the processing of files but also because it skews the Commission's information on non-compliance towards cases that are only complainant-relevant.

This chapter has analyzed the Commission's supply by concentrating on three aspects: its physical capacity, substantive ability, and dynamics. While seemingly obvious or simple, dependencies were underlined between the shortages that the Commission experiences and how they impact its policy of selective enforcement. The emerging notion is that the Commission's resistance against the accountability model of enforcement is, first and foremost, the result of large implementation costs. The Commission's capacity to integrate new responsibilities is limited and the accountability model would diminish this capacity, decreasing its overall efficiency in handling non-compliance cases. However, this is a supply-oriented conclusion which concentrates solely on the Commission's deficiencies and not only fails to take into account the demand, but it is also laced with an erroneous presumption that any alteration which increases the costs of institutions' operation is unwarranted.

This is a misleading supposition for it leads to stagnation. However, it does not mean that we should ignore these costs either.

The supply and demand analysis allows to determine the feasibility and desirability of new measures. By, on the one hand, exploring the accountability model's influence on the Commission's supply and, on the other, measuring it against its demand, we can assess whether the objectives of this model correspond to the existing need for centralized enforcement and if the required modifications are worth the consequences of their implementation and functioning (consequences to demand and supply). The underlying premise here is that the benefits of transformation have to outweigh its costs while maintaining the forces of supply and demand in a balance. This analysis will be the subject of chapter 8. What can be said so far is that, while the accountability model's concentration on (somewhat unidentified) complainants can be said to partially correspond to the content of demand identified in chapter 6 where the unfavorable position of one-shotters and diffuse interest organizations was underlined, the integration of its propositions would not only lead to large consequences and operational costs but it could also simply prove unworkable. To give an example, it is difficult to advocate the Commission's prioritization of small application problems seeing how it lacks the means and resources to monitor and enforce such violations. Such a modification would not only cost more than it is worth but it would also unbalance supply and demand because the entirety of the Commission's supply would be spent to cover a fraction of its demand and still potentially fail even at that simply due to the centralized nature of the Commission's enforcement.

The realization of the limits to the Commission's supply thus brings us closer to answering the question of the Commission's stubborn commitment to a policy of selective enforcement rooted in four pillars of confidentiality, bilateralism, flexibility, and autonomy. However, while the purpose of this chapter was mainly to demonstrate that the Commission faces a number of constraints and it cannot be expected to integrate every new objective without suffering the consequences, it also brought into view two more points to consider. Firstly, that what many may see as a weakness in the Commission's operation can actually be a benefit. For example, stakeholders' non-participation in the EU Pilot makes it less demanding in terms of participation costs (psychological strain, time invested) and opens it up to shy and risk-averse one-shotters while presenting fewer benefits to repeat players who, in any case, do not need the Commission's help knowing well enough how to exploit the decentralized enforcement mechanism. Similarly, the EU Pilot's informal and confidential nature actually allows it to resolve issues directly with violating organs and without the watchful eye of political bodies both in Member States and the Commission which, paradoxically, can make it a more objective instrument of enforcing state compliance.

Secondly and in connection to the point just made, this chapter has also brought into light the multiple benefits of the EU Pilot. Knowing already the content of the Commission's demand and supply sides, it becomes apparent that the EU Pilot constitutes an instrument open to violations that rarely find their way to national courts while, at the same time, being cost-efficient. It invites stakeholders who would otherwise refrain from litigation, contains incentives for Member States to voluntarily comply and, from the Commission's perspective, is not so cost-demanding while allowing to process more files when compared to the infringement procedure. It, therefore, makes it possible for the Commission to respond to more cases but without straining its supply.

However, due to insufficient information and differences in the Commission's reporting between pre- and post-EU Pilot annual reports, it is impossible to make conclusive comparisons in order to assess to which extent the EU Pilot has contributed in processing files. What can be said without a doubt is that there was an increase of 72% in the number of received complaints since the launch of the EU Pilot so over the course of six years (between 2008 and 2014) which is significant considering that only after four years (in 2012) all Member States participated in it, and the accession of Croatia in 2013 cannot account for such a large surge in complaints.<sup>131</sup> This can be contrasted with an increase of 21% in the number of received complaints over the span of 12 years from before the EU Pilot (between 1996 and 2008) during which seventeen new Member States joined.<sup>132</sup> Such a difference in an increase in complaints likely means that EU citizens have become increasingly aware of their rights. However, it can also mean that the Commission has become better at handling complaints and provides them better incentives.

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<sup>131</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 8; Commission 26th Annual Report on Monitoring the Application of Community Law (2008), COM(2009)675, 3.

<sup>132</sup> Commission 26th Annual Report on Monitoring (2008), COM(2009)675, 3.



## 8 Commission's institutional choice

The Commission's policy of selective enforcement has undergone an evolution over the years during which the Commission not only established a number of preventive and reactive measures but also recognized the usefulness of complainants in monitoring state compliance by granting them some limited rights. Nonetheless, while the EU transformed in order to embrace democratic standards and bring more transparency and legitimacy into its operations, the evolution of the Commission's enforcement policy stayed at the edge of those standards, incorporating them to a minimal and - according to some<sup>1</sup> - unsatisfactory degree. The reason for such a reserved approach can be found in the Commission's unwavering commitment to the four pillars of its enforcement function: confidentiality, bilateralism, flexibility, and autonomy. The European Commission alters and adapts its policy of selective enforcement in a way that maintains the core of the four pillars unscathed. This earns it criticism for refusing to move forward and embrace the accountability model of enforcement based on such standards as transparency, triateralism, objectivity, and accountability. There is, however, a reason why the Commission protects the four pillars of its enforcement function. The pillars serve to maintain the balance between the demand and supply sides of the Commission's enforcement.

Remaining faithful to the discretionary model of enforcement allows the Commission to use its limited supply in a way that efficiently addresses the largest amount of state infractions while it adapts its priorities to changing circumstances. The importance of these goals stems from the Commission's commitment to the original reading of its enforcement role as guardian of the Treaties where it remains the central overseeing institution capable of managing the larger picture of non-conformity problems and ensuring compliance understood in broad terms of dispute resolution and effective application rather than unconditional adherence to EU norms. The accountability model, however, due to its concentration on the role of complainants and by advocating the imposition of stricter obligations and constraints on the Commission, carries with it a large administrative burden

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<sup>1</sup> E.g. European Parliament Resolution of 10 September 2015 on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring the Application of EU Law (2012-2013), 2014/2253/(INI); Ballesteros, Mehdi, Eliantonio, Petrovic, *Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness*, Study commissioned by the European Parliament, 2013; Valero, *Administrative Procedure in Environment Files Linked with Article 258 TFEU Proceedings: A Lawyer's Perspective*, briefing note requested by the European Parliament, 2011; Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU*, (Routledge, 2010); Rawlings, *Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement*, 2000 European Law Journal 6.

which translates into an increase in demand and a strain on its supply. It leads to the transformation of the Commission's role from that of an ever-watching powerful guardian to a side-tracked vehicle for individual grievances with the capacity to address a severely constrained amount of cases which are ultimately irrelevant in the grander picture of non-compliance problems. Seeing as the EU legal system does not have the tools to either considerably diminish the amount of state violations nor the consent to attribute the central role and responsibility of guardian to another institution(s),<sup>2</sup> the Commission safeguards the four pillars that maintain the discretionary model and allow it to pursue its role of guardian, fulfilling its original objective of ensuring compliance. However, this does not mean that the Commission is blind to the accountability model's concerns. While it distributes its demand among different compliance tools in order to ensure a large coverage of state infractions with its limited supply, the EU Pilot can be seen as the Commission's response to the problem of complainants without jeopardizing the four pillars of its enforcement. This suggests that the Commission's selective enforcement may not be as much about prioritizing cases as it is about assigning appropriate enforcement measures.

## 8.1 Balance between supply and demand

Chapter 6 sought to narrow down the concept of the Commission's demand. Whereas 'demand' signifies the general need for enforcement, it was argued that it can also be understood through the lens of failings or weak spots of decentralized measures: areas where stakeholders are least likely to invoke these measures to combat state non-compliance. While recognizing that the exploration of said dynamics does not suffice to assert their effectiveness which is additionally dependent on national judges' knowledge, will and capacity as well as on the availability of legal and non-legal tools, chapter 6 nonetheless allowed for the identification of some basic litigation patterns before national courts (and SOLVIT) which, in turn, helped draw a few general conclusions regarding stakeholders' likelihood of relying on these measures. Thus, aside from acknowledging that one-shotters are in principle less likely to make use of private enforcement than repeat players and, for that reason, are in a less favorable position, chapter 6 distinguished several categories of violations which, in principle, are less likely to induce stakeholders' participation in decentralized measures: violations in the process of legislation and systemic bad applications, infractions which are highly complex or obscure and, by contrast, those which constitute simple application problems or which

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<sup>2</sup> Such as, for example, the European Environmental Agency. More in Krämer, *The Environmental Complaint in EU Law*, 2009 *Journal for European Environmental and Planning Law* 6, 21.

have minor consequences, infringements impacting diffuse interests and, finally, those which do not directly impact individuals.

Chapter 7, on the other hand, concentrated on the supply side of the Commission's enforcement, emphasizing that its resources are not infinite nor that its powers are unrestrained. While being a large institution with vast competences, it has only so much staff, time and money to deal with state violations especially that it performs a number of other functions, enforcement being merely one of many. For that reason, the Commission lacks the capacity to not only respond to the entirety of the demand, but also to comprehensively address even these categories of violations which constitute the weak spots of decentralized measures. The identified categories require different approaches, methods and resources and place on the Commission expectations that seem difficult to reconcile within a single policy such as systemic bad practices and isolated minor application problems.

One of the most important facts that should be underlined about the Commission's enforcement or the functioning of any other public institution is that its supply is set. While small fluctuations take place with respect to the rotation of staff or new budget plans, the Commission's overall capacity to enforce EU law remains fixed. In markets, the forces of supply shift in order to fit the demand, boosting the production and sale offer of a particular good in order to meet the increased demand for this good. The same, however, cannot be said of public institutions which do not have the ability to easily (or sometimes at all) increase their supply when there is an increase in demand. As a result, in most public institutions, including the European Commission, supply does not correspond to existing demand. Instead, there is a discrepancy between both sides, usually the demand exceeding the supply. Their resources being limited and the number of staff constrained, public bodies are put in a position where they have to meet the demand with what little supply they have. Thus, they seek compromises where they can accommodate most of the demand with the existing supply, striving for a difficult balance between the two sides. This is achieved by determining areas where institutions' attention is mostly needed and distributing their resources in a way that, in the end, allows to respond to the demand in the most efficient way. If an institution is under the obligation to address equally every properly-filed case then it either incurs delays or makes erroneous decisions because it does not have enough resources to promptly and professionally evaluate each case. If it is not under any such obligation, then it prioritizes.

The same rules apply to the European Commission. Its supply is set and, as was shown in chapter 7, it is unlikely to substantially increase in the foreseeable future. On the other hand, the need for enforcement is rather large and, even if we narrow it down to failings of decentralized measures,

it still involves a number of somewhat incompatible categories of violations, preventing the Commission from responding to all categories in a satisfactory way. As a result, since the Commission is not under the obligation to pursue all state infractions, it chooses to prioritize its caseload in a way that allows it to react to its demand in - what it considers to be - the most efficient and effective way. This can explain why the Commission has such a high record of won infringement cases before the Court of Justice. In 2015, its success rate stood at 82%<sup>3</sup> but in 2014 it was 92%.<sup>4</sup> Similarly, in the sample years of 2000, 2005 and 2010, it oscillated around 90%. By choosing which violations go through the infringement procedure, the Commission ensures that these cases, being subject to the Court's rigid rules on the burden of proof, receive more attention and are ultimately better prepared than if the Commission had to equally deal with all state infractions. As a result, it is the need to balance its supply against the demand that shapes the Commission's institutional choice and which is responsible for its policy of selective enforcement. The choice of priorities and appropriate measures results from the Commission's consideration of its capacity limitations and the existing need for action. Such freedom of choice, however, is only possible with the discretionary model of enforcement.

Supporters of the accountability approach most of the time do not advocate drastic changes to the Commission's enforcement. The European Parliament, for example, is predominantly concerned with granting complainants' stronger participation in, for example, the EU Pilot and with securing their participation rights in a legally-binding document.<sup>5</sup> Smith insists that stakeholders do not need to be a party to infringement proceedings but they should have access to documentation, and their basic administrative rights ought to be transformed into hard law, "provid[ing] a form of redress for citizens that the Commission would be forced to take seriously."<sup>6</sup> Smith would like the Commission to "concentrate more on cultivating a 'special relationship' with the citizen" and prioritize cases where complainants have no remedies in their national legal systems (no legal standing or direct effect).<sup>7</sup> Similarly, the study commissioned by the European Parliament draws the conclusion that complainants' access to information and the binding nature of their rights would suffice to increase

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<sup>3</sup> Commission 33<sup>rd</sup> Annual Report on Monitoring the Application of EU Law (2015), COM(2016)463, 25.

<sup>4</sup> Commission 32<sup>nd</sup> Annual Report on Monitoring the Application of EU Law (2014), COM(2015)329, 15.

<sup>5</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring the Application of Union Law: 2014 Annual Report, 2015/2326(INI), paragraph 7-9, 11; European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring the Application of EU Law (2012-2013), 2014/2253/(INI), paragraph 18, 47.

<sup>6</sup> Smith (2010), 212-215.

<sup>7</sup> *Ibid.*, 225.



the effectiveness and efficiency of the Commission's tools.<sup>8</sup> The European Ombudsman believes that access to documents "could actually favor or facilitate an end to the infringement."<sup>9</sup>

If anything, advocates of the accountability vision of enforcement actually recognize the benefits of the discretionary model. Smith does not want her reforms to sacrifice "effective enforcement for accountability." In fact, she talks of "balanc[ing] the virtues of flexibility and the negative consequences of [confidential] negotiation."<sup>10</sup> Her main problem with the infringement procedure is its political aspect which prevents the Commission from embracing transparency and accountability. Similarly, the study commissioned by the Parliament underlines the need to preserve the Commission's discretionary power to open and close infringement cases, and presupposes that this does not stand in conflict with proposed reforms.<sup>11</sup>

Supporters of the accountability model thus consider their propositions rather moderate, believing that they should not have much bearing on the Commission's exercise of its enforcement powers, concentrating instead on their positive effects such as legitimacy or the improvement of complainants' role. However, the fact about any change to an institution's responsibilities is that it influences its demand and supply sides and alters the balance between them. The formula is two-fold. On the one hand, the accountability model increases the Commission's demand because it requires that the Commission, aside from dealing with state infractions, increases complainants' rights and secures them by means of a legally-binding measure. On the other hand, as Komesar puts it, "[t]he same forces that produce the call for law and rights cause a deterioration in their functioning. The same forces that increase the demand for law and rights diminish their supply."<sup>12</sup> New responsibilities thus mean a decrease in supply because the Commission has to reshuffle its existing resources and devote some portion of them to the performance of new tasks. Somewhere something is removed so that it could be added somewhere else. A decrease in supply means, in turn, a further increase in demand understood in the amount of state infractions needing a remedy. Having divided its resources among a larger amount of responsibilities, the institution no longer has the capacity to address the same number of infractions as before. The result is such that while supply decreases demand increases and the gap between the two forces widens, impacting the institution's effectiveness in delivering the prescribed objective. This is a very basic and intuitive fact and there are those who notice the

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<sup>8</sup> Ballesteros et al. (2013), 106-109.

<sup>9</sup> European Ombudsman Annual Report for 2013, Good Administration in Practice: The European Ombudsman's Decisions in 2013, 24.

<sup>10</sup> Smith (2010), 210-211.

<sup>11</sup> Ballesteros et al. (2013), 86.

<sup>12</sup> Komesar, *Law's Limits* (Cambridge University Press, 2001), 4.

correlation between reform and resources,<sup>13</sup> yet it can be overlooked in studies of the Commission's enforcement on account of its seemingly 'large' bureaucracy, resources, and powers.

However, this does not mean that every reform is 'bad' on account of introducing new responsibilities. The analysis of supply and demand should not be used in order to justify the lethargy of institutions and to prevent their adaptation to new standards and circumstances simply because any new obligation means a decrease in supply. The analysis of supply and demand serves more to demonstrate that, before we implement new rules, we should attempt to predict their consequences to the institution's functioning and foresee how they will affect the existing balance. Such an exercise helps avoid rules which are unfeasible or undesirable, ensuring that the institution's operation will not be destabilized but that, instead, it will have the capacity to integrate new obligations.

The accountability model of enforcement strives to inject the Commission's operation with such standards as transparency, objectivity or accountability. It is mostly intended to improve the position of complainants while bringing actual control over the Commission's policy of selective enforcement. It is thus based on the idea of limiting the Commission's discretion by binding it with new rules and increasing its duties vis-à-vis complainants and other institutions such as the European Parliament. In the end, however, and irrespective of its advocates' conviction, the accountability model with its seemingly minor new responsibilities not only leads to the formalization and proceduralization of contacts with Member States and the semi-automatization of the infringement procedure, but also carries the risk of transforming the Commission's policy of selective enforcement into an ultimately irrelevant vehicle for individual grievances that no longer fulfills the main purpose of centralized enforcement. To illustrate these consequences, a review of two main reforms (common to all accountability supporters) will now be presented in order to explore their potential impact on the Commission's supply and demand sides: complainants' access to documentation and transforming their administrative rights into hard-law.

#### 8.1.1 Access to documentation and binding complainants' rights - main premises

Access to documentation from the Commission's investigations as well as securing complainants' rights by means of legally-binding measures constitute two reforms most commonly advocated by the supporters of the accountability model of enforcement. Since they are generally put forward together as two suggestions most pressing but least invasive to the Commission's discretion

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<sup>13</sup> Bieber, Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 2014 Common Market Law Review 51, 1091; Weatherill, *Reflections on EC Law's 'Implementation Imbalance' in the Light of the Ruling in Hedley Lomas*, in Krämer, Micklitz, Tonner (eds.), *Law and diffuse Interests in the European Legal Order* (Baden-Baden, 1997), 45.

and its enforcement practice, their consequences to the forces of supply and demand can be discussed in tandem.

The prevalent confidentiality of the Commission's relations with Member States in the infringement procedure, EU Pilot or other informal means of enforcement is seen by the accountability approach as a hindrance to the legitimization of the Commission's enforcement role and to its effectiveness.<sup>14</sup> While the scope of the confidentiality clause<sup>15</sup> has been subsequently narrowed down by EU courts,<sup>16</sup> most of the exchange between the Commission and Member States remains closed to public scrutiny. Supporters of the accountability model believe that the time has come for the Commission to allow complainants access to documents from its pending investigations.<sup>17</sup> With different administrative principles that confine the Commission in its various contacts with individuals, including the right to good administration from the Charter of Fundamental Rights<sup>18</sup> (Article 41) and the European Code of Good Administrative Behavior,<sup>19</sup> it is seen as only fair that the Commission would apply same rules to the treatment of complainants and that it would grant them actual participatory rights since they are often fundamental to its knowledge of state infractions and can help by supplying it with evidence necessary to establish a case of non-compliance.

Granting complainants access to documentation, even if only restricted to specific documents, would change the configuration of the Commission's relationship with Member States by introducing a third, even if unequal, participant to the infringement procedure and the EU Pilot. A complainant could scrutinize the Commission's claims and the government's replies, and assess whether the Commission conducted the investigation in a manner that, in their view, is correct. The complainant would, thus, watch over the Commission's performance, verifying whether it adheres to rules, remains objective and pursues the Member State with vigor. This seemingly small but important right would not only guarantee stronger transparency of the Commission's operations as well as introduce a degree of trilateralism to the dialogue with Member States but it is also expected to help overcome some of the problems the Commission experiences in enforcement such as monitoring limitations. Better treatment of complainants means that more stakeholders should be inclined to complain to

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<sup>14</sup> Smith (2010), 30, 47; Krämer, *Public Interest Litigation in Environmental Matters before European Courts*, 1996 *Journal of Environmental Law* 8, 3, 9.

<sup>15</sup> Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, OJ L 145, 31/05/2001, 43-48.

<sup>16</sup> Judgment of 14 February 2012, *Germany v Commission*, T-59/09, EU:T:2012:75, paragraph 74-81; Order in *API v Commission*, C-461/06 P, EU:C:2007:425, paragraph 102-104, 120-122.

<sup>17</sup> Ballesteros et al. (2013), 88.

<sup>18</sup> Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007.

<sup>19</sup> Code of Good Administrative Behavior, OJ L 267, 20.10.2000.

the Commission, increasing its knowledge of state non-compliance. Giving them access to documentation would allow them to follow the Commission's argumentation and furnish it with additional information and commentaries that it otherwise lacks, bolstering its chances of winning cases.

According to the Commission's communication,<sup>20</sup> stakeholders can expect to have their complaints recorded by the Commission and their receipt acknowledged. The Commission will investigate complaints within the timeframe of one year upon the expiry of which it is to decide whether to launch infringement proceedings or close the case. It has to communicate each major procedural step to the complainant and inform them of the case's planned closure accompanied by a setting out of grounds, and providing the complainant with an opportunity to submit observations beforehand.<sup>21</sup> Being the product of the European Ombudsman's difficult battle with the Commission,<sup>22</sup> these 'duties' are intended to guarantee the Commission's diligent treatment of complainants. However, since they are published by means of a soft-law measure, they do not carry any real binding weight and do not constitute actual complainants' *rights* but merely the Commission's voluntary commitments. While stakeholders can complain to the European Ombudsman at the Commission's maladministration in the handling of their complaints, they cannot really claim these rights. At the same time, the Commission is known for treating these guarantees lightly or superficially while sometimes discounting them altogether.<sup>23</sup> For that reason, supporters of the accountability model of enforcement suggest that only by securing complainants' rights by means of a legally-binding act, can the Commission be compelled to treat complainants with due diligence.<sup>24</sup>

The European Parliament stands at the forefront of this movement, going as far as demanding that the Commission adopts a "procedural code" in the form of a regulation under Article 298 TFEU<sup>25</sup> in order to reinforce the rights attributed to individuals.<sup>26</sup> It has issues with soft-law measures since they bypass Treaty procedures and worries about their excessive use by the Commission. It believes that soft-law instruments lack democratic legitimacy, can be "hostile" to citizens, "ambiguous and

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<sup>20</sup> Commission Communication Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law, COM(2012)154.

<sup>21</sup> Communication Updating the Handling of Relations with the Complainant, COM(2012)154, 4-7.

<sup>22</sup> Decision of the European Ombudsman in the own initiative inquiry 303/97/PD into the Commission's administrative procedures in relation to citizens' complaints about national authorities (13 October 1997).

<sup>23</sup> Harlow, Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), 187-190.

<sup>24</sup> E.g. Ballesteros et al. (2013), 106-109; Valero (2011), 25; Smith (2010), 183.

<sup>25</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>26</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 7-9, 11; European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253(INI), paragraph 47; European Parliament Resolution of 4 February 2014 on the 29<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2011), 2013/2119(INI), paragraph 17, 19-20.

ineffective” and, lastly, constitute a threat to institutional balance when they substitute legal measures.<sup>27</sup> Its distress with the Commission’s resistance to the idea of binding procedural rights is so large that it has set up a new Working Group on Administrative Law to prepare a draft regulation on administrative procedure in order to show the Commission how it can be done.<sup>28</sup>

The Commission’s flexibility secured *inter alia* by complainants’ lack of access and the soft-law nature of their guarantees gives it the latitude to assess each case individually, adapt its enforcement to specific circumstances and balance conflicting values and goals. Since some cases are more complex or sensitive than others, this flexibility allows the Commission to bend its commitments *vis-à-vis* complainants (e.g. time-limits) whenever it considers it necessary. Codifying complainants’ rights would remove this flexibility by demanding that the Commission applies the same rules to all cases irrespective of their convoluted, ambiguous or sensitive nature, etc. It would also strengthen the advocated complainants’ access to documentation by securing it by means of hard-law and giving them legal provisions to rely on against the Commission. While the present soft-law nature of the Commission’s responsibilities *vis-à-vis* complainants does not mean that it should ignore them altogether, access to documentation and the binding effect would put pressure on the Commission, injecting it with stronger transparency, objectivity and accountability.

#### 8.1.2 Access to documentation and binding complainants’ rights - consequences

The two proposed accountability-based reforms are generally presented as benign or non-invasive especially towards the Commission’s enforcement powers. However, they are intended to alter the nature of the Commission’s pillars, infusing its enforcement policy with standards such as transparency or accountability which would noticeably impact its supply and demand sides. In fact, this impact would likely be so significant that the Commission protects the discretionary model of enforcement solely for the purpose of avoiding it. As will be shown further, the two ‘minor’ propositions would have the effect of substantially decreasing the Commission’s supply, reducing its ability to deal with state infractions and pressuring it to focus only on a fraction of its demand.

Advocates of the accountability model look at their propositions through the lens of their objectives: the improved position of complainants and installed caps on the Commission’s flexibility. However, what they do not see, or tacitly agree to, is their consequences: the Commission’s decreased supply brought down by the formalization of the Commission’s relations with Member States and the

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<sup>27</sup> European Parliament Resolution of 4 September 2007 on Institutional and Legal Implications of the Use of "Soft Law" Instruments, 2007/2028(INI), recital Y, paragraph 1.

<sup>28</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 9.

proceduralization of its enforcement practice, thwarting its capacity to respond to a variety of compliance problems. The following section discusses a number of effects that the accountability model's two main reforms would likely bring and indicates how they would impact the supply and demand sides of the Commission's policy of selective enforcement, widening the gap between dwindling capacity and growing expectations.

#### *8.1.2.1 Lengthening of the procedure and need for more resources*

First and foremost, if complainants gained access to the documentation exchanged between the Commission and Member States in the course of investigations (infringement procedure, EU Pilot), the most obvious consequence would be the lengthening of procedures and the need for new resources in order to accommodate this additional step. Even if complainants' access was dependent on request (i.e. not automatic), the Commission's officials would nonetheless need to make the time and effort to analyze these requests and respond to them. Additionally, seeing as the Commission already has to allow complainants to comment its decisions on closure, granting them the right of access would likely entail the right to opinion it if only so that the Commission could actually benefit from their participation and use the information they can offer. This, however, would further lengthen the procedures and require more resources to deal with these new administrative obligations.

Assuming the accountability approaches' perspective, this extra cost may seem merely a minor administrative inconvenience worth its benefit. However, numbers demonstrate that this would not be so. Regulation 1049/2001<sup>29</sup> establishes individuals' right of access to documents of EU institutions (unless they are covered by one of the derogation clauses, i.e. "inspections, investigations and audits"). In 2014, the Commission added 19,755 new documents to the register of documents. It received 6,227 initial stage requests for access to documentation and replied 5,637 times. It also received 300 confirmatory applications and finalized 327 cases.<sup>30</sup> This is, by no means, a minor administrative inconvenience.<sup>31</sup> Not surprisingly, the protection of the purpose of inspections, investigations and audits was the most frequently applied exception to the Commission's refusals (initial requests: 25%, confirming: 33%).<sup>32</sup> This not only demonstrates that citizens would be eager to seek access to documents from the Commission's investigations (since they already try despite the

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<sup>29</sup> Commission Report on the Application in 2014 of Regulation (EC) No 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents, COM(2015)391.

<sup>30</sup> *Ibid.*, 3-5.

<sup>31</sup> Harlow, Rawlings (2014), 123.

<sup>32</sup> Commission Report on the Application in 2014 of Regulation (EC) No 1049/2001, COM(2015)391, 3-5.

existing derogation clause) but also that, if access to such documents were granted, it would indeed increase the Commission's administrative burden.

Not surprisingly, securing complainants rights by means of legally-binding measures would also have a rather significant impact on the Commission's supply. Whereas currently, the European Ombudsman relies mostly on general principles such as the right to good administration in order to challenge the Commission's handling of complaints, transforming complainants' guarantees into hard-law would furnish it with a concrete set of obligations against which to scrutinize the Commission's conduct. The Ombudsman already interprets the Commission's communications on handling complaints with the principle of good administrative behavior (as containing obligations for the Commission)<sup>33</sup> but they nonetheless remain soft-law measures. However, the way it is envisaged by the Parliament, a procedural code would regulate in detail a number of the Commission's duties towards complainants such as notifications, time-limits, the right to be heard, the right to access one's files and the duty to state reasons.<sup>34</sup> If the Commission failed to observe any of these strict duties, complainants would have concrete legal provisions to raise against the Commission when seeking the Ombudsman's help. The Ombudsman's investigations are not legally binding but "they are certainly not ineffective" either.<sup>35</sup>

Transforming complainants' rights into hard-law would compel the Commission to pay closer attention to those rights which would involve additional costs. Whereas the Commission should already be respecting its soft-law commitment,<sup>36</sup> their non-binding nature nevertheless allows it to remain flexible (e.g. with respect to deadlines), and rigid adherence would naturally enlarge the Commission's administrative burden. Most of all, however, it would increase the amount of complaints to the Ombudsman, forcing the Commission to commit more resources to investigations concerning its handling of complaints at the cost of its overall supply.

Faced with such hard-law commitments, the Commission would thus have two choices. It could either ensure that its new duties were diligently fulfilled by its staff but at the cost of consuming additional resources and prolonging the process of handling infringements, which would visibly decrease the overall amount of addressed cases. Or, in order to minimize extra spendings and maintain the flow of cases, it could settle on minimalistic adherence but at the cost of continuingly

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<sup>33</sup> Decision of the European Ombudsman closing the inquiry into complaint 332/2013/AN against the Commission (13 January 2014), paragraph 34.

<sup>34</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 8; European Parliament Resolution on the 29<sup>th</sup> Annual Report on Monitoring (2011), 2013/2119(INI), paragraph 17, 19-20.

<sup>35</sup> Harlow, Rawlings (2014), 80.

<sup>36</sup> Commission Communication Updating the Handling of Relations with the Complainant, COM(2012)154.

insufficient respect for complainants, an even larger increase in the number of Ombudsman's investigations and, finally, unavoidable institutional conflict with the Ombudsman over the Commission's neglect of its recommendations. Alternatively, it could choose to improve its conduct only with respect to cases where Ombudsman found maladministration. This, however, would strengthen the selectivity and inequality of the Commission's cases.

Finally, if the binding nature of complainants' rights was further reinforced by awarding certain stakeholders such tools as appeal on the Commission's decisions on closure to the European Parliament or judicial review of reasoned opinions by the General Court, then not only would the Commission face a number of verifying proceedings to invest its resources to, it would be pressured into dealing with all infractions it received, complainants watching over its handling of each case. While this would be dependent on the specificities of 'appeal' and it cannot be negated that the Commission would nonetheless manage to extricate itself from certain problems by finding a way to, for example, credibly justify its contestable decisions on closure, it does not change the fact that a lot of its resources and time would be devoted to guaranteeing respect for complainants' rights at the cost of state compliance.

Interestingly, the European Parliament's insistence on an administrative procedural code demonstrates its lack of understanding regarding the Commission's problem with hard-law commitments. Frustrated with the Commission's lack of action in that regard, the Committee on Legal Affairs has set up a new Working Group on Administrative Law to prepare a draft regulation of administrative procedure to cover all contacts of EU officials with citizens, including the Commission's handling of complaints in order to "show that such a regulation would be both useful and feasible to enact."<sup>37</sup> Such a formulation of the Working Group's objectives indicates that the Parliament misunderstands the Commission's motives behind its inaction. First of all, codifying administrative procedure in a draft regulation as an example to the Commission can hardly prove its usefulness seeing as it would have no practical effect.<sup>38</sup> Second of all, the Commission's problem with a binding code has nothing to do with the "feasibility [of its] enactment." While the unification of administrative procedure rules may be a challenge, the present analysis seeks to demonstrate, that it is the consequences of such enactment to the Commission's supply and demand that are the problem.

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<sup>37</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI), paragraph 9.

<sup>38</sup> Commission Communication Updating the Handling of Relations with the Complainant, COM(2012)154.



### 8.1.2.2 *Too much information to process*

The basic equation is as follows: the more rights the Commission grants complainants, the more they will complain. Whereas it may seem on the outset beneficial, it means an additional increase in demand. Just as individuals balance the costs and benefits of national proceedings so they perform the same balance with respect to the possibility of complaining. Clearly, the benefit in it may not be that high because neither the Commission nor the Court can rule on damages but the cost is also very low because all it requires is a minimum amount of time and effort to sit down and fill-in an online form. Successfully resolved infringement proceedings actually do decrease the cost of national compensation claims because the case becomes easy and straightforward with the Court of Justice judgment to rely on. Since the idea of an increase in rights also means more serious adherence to corresponding Commission's obligations, then the latter would need to handle an increased influx of cases with special attention: address every case, register it, analyze it, verify it, discuss it with the Member State, inform the stakeholder of each step and decision, allow him to comment and potentially risk some form of appeal procedure in case the complainant did not agree with the Commission's decision on closure. Instead of helping, this could be detrimental to the Commission's selective enforcement by increasing its demand and diminishing supply. The amount of received information could no longer surpass or equalize the extra administrative burden.

### 8.1.2.3 *Decrease in enforcement alternatives*

Stakeholders and academics expect a certain level of predictability and uniformity of institutions' conduct, otherwise they raise challenges of discrimination or bias, asking questions why this enforcement measure was chosen over another or why two letters were exchanged instead of one. This is confirmed by the European Parliament which in its recommendations to an EU administrative procedural law talks of "creating a climate of confidence and predictability in relations between individuals and the administration."<sup>39</sup> While a degree of flexibility is usually appreciated of public institutions, the principle of legal certainty requires that legal rules are clear and precise and that their application is foreseeable by those subject to them.<sup>40</sup> Obviously, complainants are not the addressees of the Commission's enforcement decisions but they are, nonetheless, used to expecting an amount of clarity and consistency of administrative organs and procedures. If the Commission

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<sup>39</sup> European Parliament Resolution of 15 January 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union, 2012/2024(INL), Annex: Detailed Recommendations to the Content of the Proposal Requested, recommendation 3.

<sup>40</sup> Judgment in *Plantanol*, C-201/08, EU:C:2009:539, paragraph 46.

treated every case differently (even just in terms of chosen enforcement instruments) depending on the violation's consequences, complexity, organ responsible or state's intentions, stakeholders would be prone to raise objections and either complain to competent organs or, lacking such opportunities, draw the attention of the academia and the media.

It should also be remembered that stakeholders (such as NGOs) seek the right of access to documentation for a reason. They wish to gain a degree of control and influence over the Commission's secretive negotiations not only to provide the Commission with additional argumentation but also to scrutinize its conduct (which is visible in their complaints to the Ombudsman<sup>41</sup>). Any deviations from the standard procedure - even if they are justified by the Commission's priorities or the specificity of cases - are likely to trigger questions and draw outside attention.

As a result, even if the Commission decided to only furnish complainants with access to selected documentation, it would still feel the pressure from complainants misinterpreting and questioning its enforcement choices. Such pressure would likely eventually urge the Commission to formalize its dialogue with Member States, standardize its priority criteria and systemize rules on the applicability of measures, hindering the flexibility necessary to adapt to changing circumstances (and not just the flexibility to treat each case individually). Not surprisingly, couching complainants' rights with hard-law measures would add an all new level of pressure on the Commission to make its enforcement rules clear and uniform but, as a consequence, also inflexible and formalized, increasing the spendings the Commission devoted to accommodate the extra obligations. Alternatively, informal enforcement measures would simply lose their significance being avoided by the Commission due to their dislike by stakeholders for their lack of rules, procedural steps and administrative guarantees, a larger amount of violations having to go through the remaining proceduralized mechanisms and just as much, if not more, decreasing the Commission's supply.

#### *8.1.2.4 Member States' decreased benefit in voluntary compliance*

Even if, by some chance, the Commission managed to resist the pressure to abandon or formalize its informal enforcement measures, granting complainants right of access to documentation would ensure that Member States' interest in voluntary compliance would diminish. The confidentiality and bilateralism of their relations with the Commission achieves four results. First of all, it guarantees that the violation is kept away from the attention of the outside world and thus there

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<sup>41</sup> E.g. Decision of the European Ombudsman closing the inquiry into complaint 503/2012/DK against the European Commission (9 June 2015).

is no real 'name and shame' effect yet in place. While some information on ongoing cases is nowadays available in the Commission's online databases, the confidentiality and bilateralism of relations ensures that no one is yet watching and exerting pressure (unless the Commission leaks the information for that very purpose). Second and in connection to the first, the formula of such informal contacts is based on a friendly and cooperative atmosphere where Member States are more supported than coerced and where they feel like they receive help in finding solutions to their problems instead of being chastised and punished or, at the very least, carefully watched by wronged or dissatisfied complainants. This is particularly relevant with respect to non-intentional violations where Member States have the will but not the knowledge or capacity to comply. Thirdly and in stark contrast to the accountability model, confidentiality guarantees that there is space to make deals and negotiate concessions which, for obvious reasons, can be appealing to Member States when they are either unwilling or unable to conform. Finally, from the Commission's perspective, confidential dialogue is, in principle, cheaper because it does not necessitate abidance by rigid rules of procedure that take time and cost money. As the Court of Justice concluded in one of its rulings, "[t]he disclosure of the documents concerning an infringement procedure during its pre-litigation stage would ... be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings."<sup>42</sup>

The confidentiality and bilateralism of the Commission's enforcement measures account for the appeal national governments find in these measures. Complainants' scrutiny, however, would take away the feeling of dialogue, replacing it with something of a more confrontational and contradictory discourse where the Member State would be more challenged than asked to comply. As a result, while the simplicity and informality of complementary and alternative instruments could still suffice to entice some governments to voluntarily conform, its benefits would no longer so obviously surpass those of awaiting the CJEU's judgment and the advantages of extending the existence of a violation and gaining more time to conform. Just as stakeholders deliberate the option of legal proceedings, so can Member States make cost-benefit analysis when deciding whether it is more beneficial to comply voluntarily now or prolong the state of non-compliance while awaiting Court proceedings. Since informal methods rely on Member States' voluntary agreement, reducing their incentives would naturally reduce the benefits and weaken their motivation. This, however,

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<sup>42</sup> Judgment in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 63.

would mean an increase in infringement proceedings which are long, costly and a strain on both the Commission's and the Court's resources.

At the same time, granting complainants the right of access to documents would constrain the Commission's discretion to negotiate compliance. Unless it acted in stark opposition to stakeholders' opinion and risked, at best, a public fallout and, at worst, accountability proceedings, it would have to forfeit the possibility of balancing conflicting values and objectives when resolving compliance problems. While advocates of the accountability model see this reform as a benefit in itself, complainants' scrutiny could have the negative consequence of forcing the Commission to either aggravate a Member State if the case was politically sensitive or give it up for the lack of sufficient evidence that could be otherwise overlooked in bilateral negotiations. Such a rigid approach would not only be risky for the integration process, it would also be expensive.

#### *8.1.2.5 Interference with the Commission's Treaty-guaranteed discretionary powers*

One of the existing guarantees provided for by the Commission in its communications<sup>43</sup> foresees that it has to inform a complainant about its decision on closure, set out the grounds for its decision and give the opportunity for comment before it actually closes the case. This is an essential guarantee that not only performs an informative function but also gives stakeholders a last chance (albeit small) to influence cases' outcomes. While enshrined in the Commission's communication, it can also be connected to the right to good administration under Article 41 of the Charter of Fundamental Rights which includes the obligations to give reasons for their decisions. Since the Charter has now the same legal value as the Treaties, the Commission is technically already bound by this provision. However, if this duty is further confirmed in a legally binding measure enumerating the Commission's duties vis-à-vis complainants and strengthened by a form of a complaint/appeal procedure on decisions on closure<sup>44</sup> then there is a risk that it may become a gate through which a supervising institution would gain access to the Commission's discretion and rule on its limits.

To better understand the implications of the accountability model, it is necessary to realize the underlying purpose behind the movement towards granting complainants access to information and transforming their guarantees into legally-binding rights. On the one hand, it cannot be negated that the Commission tends to disregard stakeholders and that there is a need to ensure that their few basic guarantees are respected. On the other hand, the idea of securing complainants' rights is also intended to bring more transparency to the Commission's conduct and shed light on its dealings with

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<sup>43</sup> Commission Communication Updating the Handling of Relations with the Complainant, COM(2012)154, 7.

<sup>44</sup> Smith (2010), 183.

Member States. While sometimes complainants simply wish to know what is happening with their complaints, other times their problems with the Commission's insufficient justifications, unwarranted delays or overall lack of information stem from their worry regarding not only the Commission's diligence in performing its enforcement function but also from doubts regarding its objectivity; concern that it makes political deals, letting Member States negotiate their way out of compliance. This is confirmed by the European Parliament which is quite straightforward about its desire to ensure that the Commission's reasons for decisions on closure are revealed.<sup>45</sup> It is also a fact that complainants are much less content with the EU Pilot's success rate than the Commission, claiming that cases are often settled unsatisfactorily.<sup>46</sup> This discontent about their cases' resolution does not so much stem from the Commission's sluggish complaint handling but because the achieved result is not in line with what they expect or believe it should be. Since situations where the Commission, for better or worse, did use its powers flexibly (by taking into account objectives other than law and fact) are generally characterized by diminished care for complainants' guarantees in order to conceal these deals, it is not surprising that complainants become suspicious whenever the Commission becomes evasive. As a result, when stakeholders complain to the Ombudsman about the Commission's maladministration in the handling of their complaints, they do so to draw its attention not only to their bad treatment but also to their distrust whether the Commission was ultimately objective in its assessment and did not rely on non-legal considerations that, in their view, do not have a place in enforcement measures. If complainants were, therefore, granted stronger rights against the Commission, it cannot be guaranteed that they would use them only to secure their few rudimentary procedural rights and refrain from attempting to combat the Commission's flexibility and political deals. Believing its flexibility to stand in contrast to the transparency principle, they are bound to suspect bias and favoritism, hoping to pressure the Commission to resolve cases in a manner that is, in their opinion, satisfactory.

There is a thin line between investigating the Commission's adherence to complainants' rights and evaluating the merits of its decisions on closure in order to verify whether they were justified. Granted, it is not impossible to separate the two. The European Ombudsman had been walking this path for years, investigating grievances of the Commission's mishandling of complaints while trying to refrain from encroaching on its discretionary powers with better or worse results. However, lately the Ombudsman has been asserting more control over the Commission's discretion, by stating that it is its duty towards complainants to verify whether the Commission is not crossing the limits of its

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<sup>45</sup> European Parliament Resolution of 16 May 2006 on the Commission's 21<sup>st</sup> and 22<sup>nd</sup> Annual Reports on Monitoring the Application of Community Law (2003-2004), 2005/2150(INI), paragraph 26.

<sup>46</sup> Ballesteros et al. (2013), 71.

freedom by providing insufficient justification for its decisions.<sup>47</sup> As a result, the Ombudsman not only performed evaluations of the Commission's explanations of its enforcement decisions,<sup>48</sup> but it also did on occasion interfere with the Commission's discretionary power to "consider" that a violation took place.<sup>49</sup> As it said in one of its recent cases, it can examine "the Commission's behavior in analyzing and dealing with the infringement complaint" which "can extend to a review of the substance of the analyses and conclusions reached by the Commission" while "fully respect[ing] the Commission's discretionary power ... to decide whether or not to refer an infringement to the Court."<sup>50</sup> In other words, in order to verify whether there was no maladministration in the treatment of complainants, the Ombudsman evaluates the merits of the case. While checking whether the Commission has sufficiently and convincingly explained its decisions on closure, it de facto assesses whether it was right to close the case. It does not interfere with the Commission's choice of enforcement measures but it does, in fact, seek to ensure that the Commission does not make these decisions arbitrarily.

In any case, maintaining a distinction between the verification of the Commission's conduct and the merits of its decisions is not what the accountability model of enforcement is really about. Ensuring that complainants' rights are respected is one thing but the accountability model seeks to go further than that by infusing the Commission's policy of selective enforcement with actual accountability, transparency and objectivity so that citizens know its methods of operation and reasons for its decisions and that, whenever the Commission 'strays', it is held responsible. The accountability model is thus, by its very definition, opposed to the Commission's flexibility which allows it to treat similar cases differently and on the basis of contested goals. It seeks objectivity and equality instead of political deals, concessions and closures unjustified in the eyes of complainants. The result, however, is such that guaranteeing individuals the right of complaint against the Commission's decisions on closure is not far from spilling over to discussions over the limits of its Treaty-guaranteed discretion. Seeing how the Ombudsman is already eager to evaluate the Commission's justifications, supervising institutions would eventually put boundaries on the Commission's freedom in enforcement by constraining the opportunities for flexibility. This would be

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<sup>47</sup> European Ombudsman Annual Report for 2013, Good Administration in Practice: The European Ombudsman's Decisions in 2013, 23.

<sup>48</sup> Decision of the European Ombudsman closing his inquiry into complaint 1786/2011/(GRK)MHZ against the European Commission (17 May 2013); Decision of the European Ombudsman closing the inquiry into complaint 995/2011/KM against the European Commission (30 June 2015).

<sup>49</sup> Draft recommendation of the European Ombudsman in his inquiry into complaint 503/2012/RA against the Commission (7 May 2013).

<sup>50</sup> Draft recommendation of the European Ombudsman in his inquiry into complaint 503/2012/RA against the Commission (7 May 2013), paragraph 33.

achieved by subjecting the Commission to more stringent rules of conduct thus formalizing its treatment of cases and dipping further into its limited resources.

#### *8.1.2.6 Evaluating state conduct outside Treaty procedures*

Aside from the Ombudsman,<sup>51</sup> the accountability model of enforcement also takes into account the option that the European Parliament could supervise the Commission's adherence to complainants' hard-law rights.<sup>52</sup> The Parliament, while exercising its political control over the Commission, is famous for its unwavering campaign to break the wall of confidentiality of the Commission's policy of selective enforcement and inject more accountability into its operations.<sup>53</sup> In fact, the dialogue between the Parliament and the Commission over its enforcement has become something of a ritual where the former demands more clarity and content in reporting and the latter plays deaf, yielding only rarely and marginally.<sup>54</sup> The Parliament is, undeniably, an institution that does not lack in enthusiasm but its transformation into something of an appeal body could amount to an appropriation not only of the Ombudsman's powers whose primary purpose is that of supervising institutions' contacts with citizens but also of the Court of Justice which is the only body competent to decide on state compliance with EU law.

The verification of the Commission's decisions on closure not only threatens with decisions impacting its Treaty-secured discretionary powers but it also brushes close to actually evaluating state conduct and determining violations' (non-)existence. Since individuals would likely use the appeal procedure to challenge decisions on closure that they do not agree with when, for example, the Commission decided that there was no infringement, the determination of the validity of complainants' claims would involve the direct or covert evaluation of state conduct in order to prove or disprove whether there was an infringement and whether the Commission was right or wrong to close the case. This would be damaging to Member States which should have the right to defend their position when their compliance is challenged. But even if this brought no legal consequences to Member States, it would nonetheless have a shaming effect, somewhat pronouncing on their 'guilt'

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<sup>51</sup> Smith (2010), 183.

<sup>52</sup> *Ibid.*, 222-223.

<sup>53</sup> E.g. Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI); European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253(INI); European Parliament Resolution on the 29<sup>th</sup> Annual Report on Monitoring (2011), 2013/2119(INI); European Parliament Resolution of 21 November 2012 on the 28<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2010), 2011/2275(INI); European Parliament Resolution of 14 September 2011 on the 27<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2009), 2011/2027(INI).

<sup>54</sup> Harlow, Rawlings (2014), 190.

before they are 'proven guilty' by a competent authority. Furthermore, it would be detrimental to the principle of institutional balance which guarantees that Ombudsman or Parliament do not encroach on the CJEU's competences to assess and determine state non-compliance. It is one thing to allow the Ombudsman to decide whether the Commission abides by good governance principles but it is yet another to have the Ombudsman or, alternatively, members of the European Parliament evaluate state performance without respecting governments' right of defense. In a way, it could create a new procedure where the Commission would find itself a defendant alongside the defaulting Member State. It is doubtful that Member States would appreciate such a reform.

#### *8.1.2.7 Negative impact on appeal institutions*

Allowing for some form of complaint or appeal procedure against the Commission's enforcement conduct could have future negative consequences also to the appeal institution. Whether it was the Parliament, Ombudsman or the General Court, the more complaints they would receive, the more their demand would increase and supply decrease. The Commission is not the only one to balance its supply and demand sides. Every other public body also has a limited capacity to perform its functions and can integrate only so many new objectives. These institutions, according to Komesar's Comparative Institutional Analysis, take care to maintain their supply and demand sides in a balance, and they oppose changes that could threaten this balance just as the European Commission protects its four pillars. As a result, while in the beginning the Parliament and Ombudsman would likely be eager to hold the Commission accountable for its breaches, the more stakeholders complained against the Commission, the more these institutions might retreat, seeking to protect their supply. Paradoxically, by granting complainants a tool for ensuring accountability and transparency of the Commission's enforcement conduct, the very institutions empowered to exercise this control would constrain it, reinstating the Commission's discretion in dealing with Member States. The cost, however, would be an already shattered balance between the Commission's supply and demand sides. Before the controlling institution sought to protect its own supply, the Commission would have spent years struggling to accommodate complainants' expectations, exhausting its resources.

#### *8.1.3 Balance distorted*

The preceding analysis indicates that the suggested rise in the Commission's responsibilities vis-à-vis complainants would, first and foremost, increase its amount of tasks, lengthen the procedures and require more resources. This effect, by itself, would be difficult to accommodate by



the Commission which would have no choice but to limit the amount of handled cases in order to guarantee their proper management. However, what would be even harder to implement is the ensuing formalization and proceduralization of the Commission's enforcement instruments. As was shown in the previous section, outside scrutiny and Member States' diminished interest in voluntary compliance would compel the Commission into moving away from informal solutions towards more transparent and predictable but also formalized and rigid forms of enforcement such as the infringement procedure which is costly and time-consuming. Since the Commission would have to run each violation through a set of complex procedural steps in order to satisfy the demands of transparency, objectivity and allow complainants 'voice', the time and effort needed to process cases would enlarge, significantly decreasing the rate of achieved compliance. Finally, the situation could deteriorate to such a point where supervising institutions somewhat 'by-the-way' of administrative check-ups would begin interfering with the Commission's discretionary power to launch proceedings while performing evaluations of state conduct to verify the Commission's performance, both tasks clearly in breach of the Treaty and the Court's existing case-law and jurisdiction, further increasing the Commission's costs and forcing it to stick with the most formalized procedures.

The accountability model's two main reforms would thus have the effect of substantially distorting the balance between the Commission's supply and demand sides. They would require the reformulation of the Commission's policy of selective enforcement, where its choice of informal solutions would shrink down while the need for prioritization among known violations would rise in order to help decide which cases received the Commission's attention, paradoxically increasing the amount of dismissed infractions on account of lengthy procedures and insufficient resources. Since this last effect would be incompatible with the accountability model and the Commission would be pressured to addressing the majority of cases by means of lengthy, formalized procedures with few resources, it would not take long before any semblance of balance between the Commission's supply and demand would disappear. It would take excessively long to process each case and the Commission's rate of success would plummet down (having no resources to properly prepare claims), taking with it its authority as guardian of the Treaties.

Clearly, the presented consequences would also depend on the content of reforms which could, for example, constrain the amount of documents available for access (e.g. to just letters of formal notice, reasoned opinions)<sup>55</sup> or block individuals' opportunities for complaining against the Commission's disrespect of their hard-law rights. However, the more such reforms were limited, the

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<sup>55</sup> Advocated by, for example, Krämer, *Environmental Judgments by the Court of Justice and their Duration*, 2008 *Journal for European Environmental and Planning Law* 5, 279; Krämer, *Access to Letters of Formal Notice and Reasoned Opinions in Environmental Matters*, 2003 *European Environmental Law Review* 12.

more they would entice the Commission and Member States to avoid their inconvenience and burden by intensifying their reliance on alternative solutions which would not be subject to scrutiny. For example, if the right of access concerned main documents exchanged in the infringement procedure and the EU Pilot, the Commission could seek to circumvent this problem by intensifying its usage of informal negotiations. Instead of increasing transparency, this would - in fact - diminish it.

As a result, while the enumerated consequences may seem exaggerated, they ought to be considered in their full scope if we are to seriously treat the premises of the accountability model. Its strive towards ensuring the Commission's objectivity of case-handling by means of transparency and accountability would either require wider complainants' access to documentation and some form of actual appeal against the Commission's decisions, or they could end in superficial changes that would, in practice, allow the discretionary model to prevail. However, as was shown above, more serious reforms of the accountability model would, at the very least, distort the balance between the Commission's supply and demand sides by draining its resources and increasing the amount of awaiting cases or, at worst, shatter this balance and immobilize the Commission's functioning. Either way, it would narrow down the categories of tackled cases as will be shown in the following section.

## 8.2 A vehicle for individual grievances?

The previous sections has indicated how the two most commonly raised reforms of the Commission's enforcement could distort the balance between its supply and demand sides. This is because at the end of the day, the accountability model places contradictory, mutually exclusive expectations on the Commission. It wants to burden it with new or stricter responsibilities while expecting that it continues to conform to the same deadlines and does not experience a drop in the amount of tackled infringement cases. Not only is it impossible, it is also hazardous because it pulls the Commission in opposite directions and brings a promise that something somewhere will eventually fracture and that, instead of achieving at least one of the two contradicting objectives, the struggle to accommodate both will result in the attainment of none.

While the consequences of the accountability model enumerated in the previous sections may appear exaggerated, they are by no means impossible. The Commission's enforcement rests on four, closely intertwined pillars of confidentiality, bilateralism, flexibility, and autonomy. Imagining it as a Greek temple, these four pillars support the roof that is the Commission's policy of selective enforcement. We can chip small flakes off those pillars by introducing minor changes to their coating (chapter 4 and 5) but this way we do not impact their nature and thus fall short from injecting the accountability model of enforcement. If we, however, attempt to introduce a more concrete

amendment aimed at a substantial part of the pillar then not only does this pillar collapse but the entire roof comes tumbling down. As presented in the previous section, it becomes a chain reaction where a single seemingly harmless amendment results in a spillover of consequences increasing the Commission's costs and affecting its ability to respond to non-compliance.

The new responsibilities advocated by the accountability approach would thus have the effect of compelling the Commission to focus on complaints, shifting its attention from higher to lower priority violations. To satisfy stakeholders' demands of clarity and objectivity, the Commission's policy of selective enforcement would gradually begin favoring formalized measures and involve prioritization of complainants' cases. Secured by the binding nature of their rights and the possibility of complaint/appeal, the Commission would be compelled to pay special attention to their cases, otherwise challenged for ignoring their complaints. Stakeholders, satisfied with the Commission's accommodating hand in defending their interests, would regularly seek its help to resolve their problems. While some would still need to launch national proceedings in order to receive compensation, the ease and effortlessness of complaining would nonetheless increase the demand side of the Commission's enforcement. At the same time, the Commission's concentrated attention on complainants would skew its enforcement to only one aspect of the demand. In the long run, the Commission would find itself dealing much too often with minor application problems and not enough with violations having a larger or more systemic impact on the EU's main objectives. Slowly and despite the Commission's desire to the contrary, its policy of selective enforcement would become a vehicle for individual grievances.

Interestingly, advocates of the accountability approach quite unanimously claim that they do not support such a transformation, believing it feasible to introduce the accountability model without compromising the existing balance.<sup>56</sup> However, as the preceding analysis demonstrates, this would be possible only if the Commission's reforms were superficial and it did not adhere to them in practice, falling far from the accountability model's objective. Otherwise, the cornerstones of this model such as transparency or accountability are bound to impact the Commission's enforcement performance by not only formalizing its enforcement solutions and decreasing the amount of addressed cases but also by skewing it in the direction of complainants and their compliance problems. The larger the role stakeholders play in the Commission's day-to-day work, the more its enforcement becomes about them and less about Member States and their violations. The Commission thus protects the four pillars of its enforcement because it foresees that, if it compromised any of its pillars, the consequences would be so profound that, in the end, its enforcement practice would cease to be oriented around

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<sup>56</sup> Ballesteros (2013), 105; Smith (2010), 211, 213.

Member States' infractions and would no longer serve the purpose of ensuring compliance, instead revolving around complainants and becoming their vehicle for individual grievances. The Commission's increase in demand and decrease in supply would put it in a position where, on the one hand, it could address only a fraction of identified violations and, on the other, the binding nature of complainants' rights would compel it to prioritize their categories of cases.

Looking at the evolution of complainants' role in the Commission's enforcement, one could get a feeling that 'complaining' is becoming an institution in itself. Complainants' administrative guarantees secured in the Commission's communication, the European Ombudsman's verifications of the Commission's decisions on closure and the European Parliament's relentless pressure to extend these guarantees and secure them by means of legally-binding measures suggests that, to the supporters of the accountability model, 'complaining' amounts to a separate institution that is governed by its own rules and rights and which has its own objective of ensuring the proper handling of complaints. While not yet there, increasing complainants' role is on its way to granting them procedural rights much like those in procedures for damages but without the benefits in the form of compensation which neither the Commission nor the Court can provide. Of course, the accountability model is about more than just complainants' rights. It mostly seeks to insert transparency, accountability and objectivity to the Commission's enforcement policy, and extending the role of complainants constitutes a means to that end. Nonetheless, it feels as if in their effort to inject these standards into the Commission's operation, supporters of this model lost sight of the fact that complaining ultimately performs only an informative function and, while it can lead to a violation's rectification, it does not seek to secure or further the interests of complainants. It complements the Commission's enforcement by increasing its knowledge about state non-compliance covering areas that are difficult to monitor but, in the end of the day, it is not essential to its functioning. And while it is important that the Commission is respectful of EU citizens, the accountability model, by treating complaints as a means of bringing transparency and accountability to the Commission's enforcement, distorts this enforcement, increasing the importance of 'complaining' while failing to provide the benefits of complaining, and skewing it towards complainant-relevant categories of violations to the detriment of remaining types.

### 8.2.1 Potential solutions

Having established the consequences of the accountability model, it is time to turn to solutions. It is not enough to threaten with a broken balance and skewed enforcement to explain why the Commission protects the four pillars. It is also necessary to investigate whether these

consequences cannot be somehow mitigated without forfeiting the accountability model of enforcement.

The first solution would be to transfer some of the Commission's enforcement powers to other institution such as the European Maritime Safety Agency or the European Aviation Safety Agency, which already assist the Commission by monitoring their respective sectors,<sup>57</sup> or to the European Environmental Agency which, so far, has no such powers.<sup>58</sup> While this could bring problems of fragmentation of accountability and would not serve the objectives of the accountability model of enforcement, it would decrease the Commission's demand, allowing it to devote more time to other responsibilities such as more diligent treatment of complaints. Most of all, however, violations in, for example, environmental sector which are particularly hard to investigate and pursue for the Commission and difficult to challenge by stakeholders before national courts bringing a lot of complaints would receive increased attention. However, as things stand, Member States are far from eager to transfer enforcement to the EEA.<sup>59</sup>

The second solution to avoid the astronomic increase in demand while injecting the accountability model would be to increase the Commission's supply by affording it more money and staff.<sup>60</sup> After all, the problem with the accountability model is that it results in a considerable administrative burden for the Commission on account of which its output diminishes. A simple question thus emerges: if we give the Commission additional resources, should this not counteract the negative consequences and ensure that the Commission does not compromise its efficiency while accommodating new responsibilities?

Assuming such an increase were even possible, the Commission would grow in size, becoming and even larger bureaucratic machine. Since the accountability model threatens with a substantial drop in the Commission's supply, the attributed resources would need to be equally substantial. The Commission would need to hire new staff, establish even more complicated procedures to manage internal relations and hierarchy between many new officials while ensuring that it still fulfills all the additional obligations that stem from the transformation. This, in turn, would naturally mean a decrease in transparency. The larger the institution, the more paperwork, bureaucracy, complicated internal hierarchy and procedures and the less clear becomes the issue of who is responsible for what. It is doubtful that advocates of the accountability model would be satisfied with the Commission

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<sup>57</sup> Commission 28<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2010), COM(2011)588, paragraph 3.3.

<sup>58</sup> Krämer (2009), 20-22.

<sup>59</sup> Ibid.

<sup>60</sup> Bieber, Maiani (2014), 1091; Weatherill (1997), 45.

becoming a behemoth of an institution or that they would welcome a decrease in transparency. This problem demonstrates the contradictoriness of the accountability model's expectations. While advocating an increase in complainants' rights and securing them by means of hard-law, the European Parliament believes that the codification would "avoid unnecessary cumbersome and lengthy procedures."<sup>61</sup>

An increase in the Commission's supply to resolve the problem of accommodating additional obligations is, anyway, unlikely. It is difficult to believe that Member States would agree to enlarge an institution that is already infamous for its size and bureaucracy (see chapter 7). It should also be reminded that the accountability model of enforcement brings consequences not only for the Commission's supply but also for supervising institutions such as the European Parliament or Ombudsman which might also require additional resources. However, such mundane problems of supply and demand are rarely taken into account when higher goals are prompting scholars to call for a shift in the operation of institutions.

Faced with the threat of contradictory objectives and decreased supply, the Commission's other alternative would be to simply ignore or diminish the significance of the accountability model's injection. Since complainants are a helpful but non-essential element of enforcement, the Commission - with the support of the Court - could find a way to limit their newly-attributed rights and the impact of new reforms, decreasing received information on non-compliance but also maintaining control over its enforcement and preserving the discretionary model. This, however, again is not what the accountability approach is about.

The Commission's final solution which, at the same time, is - for obvious reasons - the most appealing to the accountability model, comes down to simply accepting the new model. Of course, it would not be easy to accommodate new rules and obligations but this should not discourage us from trying seeing as there are important issues at stake. Supporters of the accountability model, while failing to see the interconnectedness of the Commission's four pillars, believe in its feasibility and not just desirability.<sup>62</sup> The benefit is worth the cost, they say. Would it really be that bad if the Commission became a vehicle for individual grievances, favoring complainants over other categories of infractions? The answer to this question depends on the objective we ascribe to the Commission's enforcement function and on the availability of alternative enforcement solutions, discussed in the following section.

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<sup>61</sup> European Parliament Resolution on a Law of Administrative Procedure, 2012/2024(INL), recital M.

<sup>62</sup> E.g. Ballesteros (2013), 86, 105; Smith (2010), 213.

### 8.3 Choices and values

In order to answer the question why transforming the Commission's selective enforcement into a vehicle for individual grievances would be detrimental, it is necessary to understand the objectives that guide the Commission in its enforcement function. Since the power to introduce the accountability model lies mostly with the European Commission, it is this institution that does the balancing between the costs and benefits of the discretionary and accountability enforcement models. Granted, other entities also have it in their power to bring about a change to the Commission's policy of selective enforcement. It is, however, unlikely, seeing as the Court of Justice has always demonstrated support for the Commission's discretion, Member States enjoy their special confidential partnership with the Commission in matters of compliance, while the European Parliament and Ombudsman lack the tools to effectively coerce the Commission's obedience. As a result, the success of the accountability model is mostly dependent on the Commission itself who has the power to broaden the spectrum of complainants' rights or secure them by means of legally-binding measures. However, just as the Court and Member States, the Commission lacks the will to introduce the new model of enforcement. As will be shown in section 8.5, the Commission is, in fact, interested in finding a compromise between the discretionary and accountability approaches but, as the remainder of this thesis has demonstrated, it nonetheless protects the core of the four pillars that support the original enforcement model. Consequently, while the Court of Justice and the General Court also do the balancing of the two models in their judgments which touch upon the issues of the Commission's discretion or transparency, it is primarily the Commission that performs the balancing when considering the direction its policy of selective enforcement ought to take. While hearing the voices of the academia asking it to increase its legitimacy by adopting the accountability model and feeling the pressure from the European Parliament or Ombudsman, the Commission balances the new model against the old and, so far, the scale tips in favor of the latter.

#### 8.3.1 Balancing enforcement models

The issue of costs of the accountability model compared to the discretionary one has already been covered in section 8.1 where it was submitted that the new model would involve a considerable increase to the Commission's administrative burden including the staff, money and time that it would require to process each infraction and accommodate new obligations vis-à-vis complainants and supervising institutions. It would also lead to a substantial decrease in the amount of cases handled and result in the transformation of the Commission's enforcement into a vehicle for individual grievances, angling it in the direction of complainants-relevant categories of state infractions at the

cost of remaining types. At the same time, it would be a waste of resources due to the Commission's and the Court's inability to provide stakeholders with compensation (unless this would be changed too) while bringing the danger of overloading EU courts. Finally, it would threaten with Member States' license and abuse or, alternatively, alienation, either way leading to the slowdown of the European project.

Despite these rather large costs, institutions such as the European Parliament<sup>63</sup> and some members of the academia<sup>64</sup> believe that any difficulties the Commission's may encounter are outweighed by benefits such as respect for stakeholders, increased and improved information on non-compliance, stronger legitimization of the Commission's role and equal treatment of infractions. In truth, however, it is rather that the supporters of the accountability model simply do not see (or do not want to see) the spectrum of costs that their model involves, performing their balancing of costs and benefits without taking into account the existence of the forces of supply and demand (which allow to understand the costs of the accountability model). Further, they also do not recognize that some of the benefits involve, in fact, hidden costs such as: more information on state non-compliance means more work for the Commission. This makes it easier for them to believe that the benefits of the accountability model outweigh the few obvious costs they recognize. The Commission, however, knowing better than anyone the factual costs of processing state infractions, realizes the full extent of the accountability model's impact on its policy and practice. It is for that reason that, to the Commission, it is not so obvious that the benefits of the accountability model offset the costs.

In his Comparative Institutional Analysis, Komesar insists that institutions should not be analyzed in a vacuum but ought to be examined within the framework of surrounding entities and processes. They do not exist alone but are also the product of their 'neighboring' institutions.<sup>65</sup> To decide the desirability of the accountability model, it therefore does not suffice to just balance its potential costs and benefits. It is also necessary to balance the costs and benefits of alternative solutions, in that case the existing discretionary model, and only later determine how these balances compare to one another.

The discretionary model's costs of time, staff and money are obviously lower than those of the accountability model for the Commission is burdened with fewer rigid responsibilities. Nonetheless, they are still costs. To them we can also add inequality in treatment of infringements

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<sup>63</sup> Committee on Legal Affairs of the European Parliament Draft Report on Monitoring (2014), 2015/2326(INI); European Parliament Resolution on the 30<sup>th</sup> and 31<sup>st</sup> Annual Reports on Monitoring (2012-2013), 2014/2253(INI); European Parliament Resolution on the 29<sup>th</sup> Annual Report on Monitoring (2011), 2013/2119(INI).

<sup>64</sup> Ballesteros (2013), 102-109; Smith (2010), 212-226.

<sup>65</sup> Komesar (2001), 23.



and complainants, disrespect for the principle of good administration, the potential for the Commission's abuse or its insufficient legitimization which the accountability model considers as a cost. The benefits, on the other hand, include the Commission's flexibility to decide on the most suitable compliance methods and Member States' stronger willingness to cooperate.

However, the Commission's benefit in safeguarding the discretionary model also stems from the insufficiency or only partial effectiveness of alternative institutions. To be clear, alternative institutions to the Commission's enforcement of state compliance do exist but their output is limited and they are capable of addressing problems with state non-conformity only partially. Numerous problem-solving and capacity building tools aim to prevent state infractions from taking place while the new "smart regulation" agenda aspires to not only improve the quality of legislation but to also help Member States in the process of implementation ensuring the attainment of prescribed objectives.<sup>66</sup> Thus, not only the implementation process is being improved and national implementing institutions are receiving more and more support in order to encourage their compliance but also the EU legislative process and EU decision-making institutions are changing their approach to legislation with the purpose of reducing the ambiguity, complexity and burdensomeness of EU measures, that tend to lead to state non-compliance. However, these alternative institutions with their capacity to diminish non-conformity are oriented only around unintentional violations and are much dependent on the predictability of future compliance problems. They are therefore capable of addressing non-conformity issues only to a degree.

Similar is the problem of horizontal and decentralized compliance measures, which rest outside the Commission's control. Chapter 6 on the Commission's demand side did not categorically decide the effectiveness of the decentralized enforcement mechanism or SOLVIT but merely explained the forces that stand behind their dynamics, indicating patterns when they are most or least likely to be utilized by citizens, businesses and organizations. Nonetheless, the analysis of decentralized measures' dynamics did reveal that, while these instruments are accessible to at least some categories of litigants and with respect to certain categories of infractions, they do have their boundaries which limit their output. Cases such as systemic application violations, highly complex or convoluted breaches or those that impact diffuse interests are less likely to be litigated before national courts or resolved by means of SOLVIT. Further, horizontal measures such as Article 259 TFEU procedure are world-famous for their ineffectiveness seeing as Member States themselves prefer to rely on the Commission to resolve their conflicts over compliance.

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<sup>66</sup> Commission Communication Smart Regulation in the European Union, COM(2010)543; paragraph 1; Harlow, Rawlings (2014), 55-60.

While it cannot be excluded that the Commission opposes the idea of being brought down to the function of pursuer of complainants' individual grievances in principle, its resistance against the accountability model can also be seen as stemming from the inability of existing alternative institutions to either considerably diminish or take over the bulk of the Commission's enforcement. While a lot is done to not only improve the quality of EU legislation but also to support Member States in their implementation, this does not change the fact that state infractions are still taking place in numbers and complexity that requires the attention of the guardian of the Treaties: a centralized, powerful and highly competent enforcement body capable of convincing Member State of the benefits of compliance.

For these reasons, it can be argued that as long as no alternative compliance mechanism is capable of addressing the kind of violations the Commission is suited for such as systemic infringements or non-notification cases, the Commission considers it important to maintain the current enforcement role and safeguard the four pillars that ensure its effectiveness. This is more so because it can be doubted whether the vacuum created by the Commission's potential transformation would provoke alternative institutions to fill in the gaps. As was frequently underlined, the accountability model leads to an increase in demand and a drop in supply. It means that, if implemented, more violations would be left unremedied. And since stakeholders' benefits in complaining would increase due to the Commission's stronger respect for their rights, their reliance on decentralized measures would decline. Because private litigation is heavily dependent on stakeholders' readiness to initiate national proceedings, the cost-benefit analysis would favor complaining over national remedies. Stakeholders would complain more and litigate less. As a result, if the Commission became a vehicle for individual grievances then we could not expect decentralized measures to sufficiently fill in the areas left out by the Commission's new form of enforcement. The consequence is that a larger amount of Member States' infractions would remain unresolved and individual application problems would dominate the Commission's agenda at the cost of systemic violations. It is crucial to remember that the vigilance of private parties "concerns, first and foremost, their own individual interests."<sup>67</sup>

Thus, one of the benefits of the discretionary model of enforcement is its ability to address a larger and more varied amount of state infractions. A contrario, this can be translated into the cost of the accountability model, the capacity of which to handle infringements is considerably lower. While this conclusion does not come out as anything groundbreaking, the importance of this specific discretionary model's benefit cannot be underestimated. To briefly reiterate the Commission's role in

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<sup>67</sup> Wilman, *Private Enforcement of EU Law before National Courts* (Edward Elgar Publishing, 2015), 564.

formulating its policy, when deciding between two alternative models of enforcement, it basically chooses between, on the one hand, the endorsement of standards of popular democracy but at a considerably diminished rate of complaint-oriented induced compliance, or resistance against the contemporary standards and the capacity to deal with a large and more varied amount of state infractions. The accountability model means to the Commission not just hampered discretions and its transformation into a vehicle for individual grievances but mostly the negative consequences of this conversion to its output and to the overall level of non-compliance in the EU. This is why, the Commission's balancing of alternative models of enforcement comes out in favor of status quo. The benefits of complainants' increased role and the Commission's stronger legitimacy cannot compete with the costs of forfeiting its position as guardian of the Treaties and losing its capacity to manage problems of state non-compliance from above and efficiently respond to a wide array of large and complex issues. Andersen says that the infringement procedure's objective of ensuring compliance serves two purposes: it allows for collective benefits to be obtained and prevents the phenomena of free-riding.<sup>68</sup> Such reasoning suggests that, if we steered the infringement procedure away from the objective of ensuring compliance while the remaining mechanisms remained incapable of filling in the void, then Member States and their citizens would no longer be able to obtain their collective benefits and the Treaty signatories would free-ride the system.

According to Wilman, there are two sides to the concept of effectiveness used in EU measures harmonizing private enforcement rules in selected sectors to explain their purpose: on the one hand, it refers to the effectiveness of stakeholders' EU rights and, on the other, to the effective application and enforcement of EU law.<sup>69</sup> This distinction can be translated into the division between the effective protection of complaints advocated by the accountability model of enforcement and the general objective of ensuring effective compliance dominating the discretionary approach. Wilman emphasizes that, while these two visions of effectiveness often complement each other in private enforcement, they can also collide, which is when the EU legislator or the CJEU have to make choices balancing both visions.<sup>70</sup> The same balancing is performed by the Commission in the conflict between the accountability and discretionary models and the different, colliding interests they serve whereby, as will be underlined further, it seeks to accommodate at least some of the demand of the accountability approach while maintaining the discretionary model of enforcement. As the Court of Justice stated, "proceedings by an individual are intended to protect individual rights in a specific case,

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<sup>68</sup> Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press, 2012), 91.

<sup>69</sup> Wilman (2015), 456.

<sup>70</sup> *Ibid.*, 463-469.

whilst intervention by the Community authorities has as its object the general and uniform observance of Community law.<sup>71</sup> While imperfect, it is decentralized enforcement before national courts that constitutes the primary, long-established and broad-scale venue for the vindication of individual rights. The transformation of the Commission's enforcement into a similar venue would bring an imbalance in the array of enforcement tools, providing stakeholders with yet another mechanism for their private enforcement at the cost of public enforcement which pursues different goals.

Here we come back to the Commission's understanding of its enforcement objective. The Commission always references Article 17 TEU,<sup>72</sup> emphasizing its competence to oversee and ensure the application of EU law by Member States.<sup>73</sup> It believes that it "has been given the authority and responsibility to ensure respect for [EU] law, verifying that Member States respect Treaty rules and [EU] legislation."<sup>74</sup> It, therefore, perceives its enforcement function in the broad sense of compliance. It is committed to addressing all non-conformity which, in practical terms, translates into dealing with as many infractions as it can. While this can be questioned seeing as not all violations are resolved satisfactorily according to stakeholders and some happen to be downright overlooked, it does not change the fact that the Commission sees its function as that of addressing many compliance problems. At the same time, aware of its special position as a centralized body and the need to prioritize, it seeks to use its superior means to deal with violations that have the most widespread impact and which cannot be properly addressed by remaining compliance measures. This is visible in its communications<sup>75</sup> where priority is given to violations in the process of legislation as well as to systemic application problems.

The major difference between the Commission and its critiques lies in its policy of selective enforcement and stemming attitude towards the methods of achieving this compliance. The Commission does not so much care about how a Member State is induced to conform as long as it conforms effectively. As Nollkaemper emphasizes, while compliance (understood as conformity of behavior) in principle increases effectiveness, a system can be effective without total compliance if it induces changes in behavior allowing for the attainment of set objectives.<sup>76</sup> This is what seems to guide the Commission in its understanding of its enforcement objective. A violation has to be

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<sup>71</sup> Judgment in *Molkerei*, 28/67, EU:C:1968:17, 153.

<sup>72</sup> Treaty on European Union (consolidated version), OJ C 202, 7.06.2016.

<sup>73</sup> E.g. Commission 32<sup>nd</sup> Annual Report on Monitoring (2014), COM(2015)329, 4.

<sup>74</sup> Commission Communication A Europe of Results – Applying Community Law, COM(2007)502, 3.

<sup>75</sup> *Ibid.*, Commission Communication Better Monitoring of the Application of Community Law, COM(2002)725.

<sup>76</sup> Nollkaemper, *The Role of National Courts in Inducing Compliance with International and European Law – A Comparison*, in Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), 161.

addressed but not in the sense of absolute and literal adherence to EU norms.<sup>77</sup> Compliance has to result in the effective application of EU law and so a violation has to be resolved in an effective way that, according to the Commission, best serves the Union's goals and does not jeopardize its future. The Commission thus sees the objective of ensuring compliance more in terms of dispute resolution than total obedience, focusing on the effectiveness of EU norms instead of literal, superficial conformity.

As a result, when the Commission balances the costs and benefits of alternative enforcement models, it does so from the precinct of its main enforcement objective. While the literature has attempted to broaden the Commission's or the infringement procedure's roles by attributing them new functions,<sup>78</sup> the Commission remains faithful to its original understanding of its enforcement purpose. And since it is primarily the Commission who has the power to decide which enforcement model to adopt, it chooses this model which allows it to realize its enforcement objective. The academia may disagree with the Commission, insisting that its enforcement role is no longer limited to plain enforcement but, for the purpose of explaining the Commission's institutional choice, what matters is how the Commission understands its objective as long as it is the Commission that does the balancing. Considering that the EU compliance system lacks the instruments to take over the role of guardian, the Commission will continue performing its enforcement role and will ensure that it has the means and discretion necessary to find effective solutions to as many significant state violations as it can.

### 8.3.2 Balancing values

The Commission's process of balancing does not just come down to the weighing of costs and benefits of alternative enforcement models. While the accountability approach strives towards the injection of such values as transparency or equality, the discretionary model pursues a set of its own values, the importance of which is at the very least comparable, such as due process (and Member States' right of defense), data protection, or institutional balance.

The balancing of conflicting values and interpretative choices is something that courts do on a day-to-day basis and what the Court of Justice has been doing since the early years of European integration and how it was expanding the scope of EC law leading to its constitutionalization. While much of its early choices were masked by formal reasoning employed in its judgments, delivering its decisions as the only possible outcome of legal rules and giving the impression of neutrality, the

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<sup>77</sup> Andersen (2012), 42-43.

<sup>78</sup> Smith (2010), 15-16, 110-116; Rawlings (2000), 7-8.

Court's decisions were, in fact, the product of the balancing of conflicting values characterized by the majoritarian bias so that they appeared acceptable to most of the EC community.<sup>79</sup> Nowadays, the Court of Justice is more open in its judgments about balancing conflicting values and making interpretative choices. We should thus not be surprised that the Commission does the same in its enforcement practice. In fact, it is considered the duty of both, judges and administrators to weight the rights of applicants and complainants against the public interest.<sup>80</sup>

When balancing alternative enforcement models, the Commission makes choices between conflicting values and objectives. Such clashes are most visible in cases concerning the transparency of the Commission's investigations where different values protected by the Charter of Fundamental Rights collide with each other, e.g. access to information against privacy and data protection.<sup>81</sup> Since the Court of Justice remains in principle devoted to protecting the confidentiality of the Commission's investigations, including its contacts with Member States, the Commission accordingly favors data protection over access to information.

The same clashes can be observed in propositions regarding the verification of the Commission's decisions on closure. If such were conducted by, for example, the European Parliament *de facto* coming down to its evaluations of state performance outside regular procedures then, while ensuring transparency and the Commission's accountability and objectivity, they would go against the principle of due process (Member States' right of defense) and institutional balance, shifting the competence of assessing state compliance as well as the competence of investigating the Commission's maladministration to the European Parliament. The choice between the discretionary and accountability models of enforcement is therefore also a choice between transparency and accountability on the one hand and due process and institutional balance on the other.

### 8.3.3 Significance of flexibility

The Commission's decision to maintain the discretionary model of enforcement is, therefore, not only driven by the demand-supply analysis and the cost-benefit balancing of alternative solutions but also by its choices regarding the values and objectives represented by both models. Clearly, the Commission's solution is not perfect. Confidential negotiations - on which the discretionary model is based and which is a thorn in the accountability supporters' side - do not always work nor guarantee the Commission's objectivity but they allow to address more violations with the Commission's limited

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<sup>79</sup> Maduro, *We the Court* (Hart Publishing, 1998), 16-25.

<sup>80</sup> Harlow, Rawlings (2014), 65.

<sup>81</sup> Judgment of 14 October 1999, *Bavarian Lager*, T-309/97, EU:T:1999:257; Harlow, Rawlings (2014), 333.

resources. This is not only because they require fewer means than bureaucratic, formalized procedures. This is also because Member States are more eager to cooperate in a friendly manner behind closed doors. However, since such cooperative measures result in solutions that are not always satisfactory to complainants, they are seen as an inappropriate or even dangerous practice by the advocates of the accountability model. Such commentators believe the Commission's flexibility to be the source of everything that is wrong with its enforcement and, while they care about transparency and accountability, they perceive flexibility as the one thing that unquestionably requires eradication. For example, while the European Parliament recognizes it in its recommendations the need for EU officials to ensure "a fair balance between the interests of private persons and the general interest," it also strongly opposes "preferential treatment on any grounds" and political pressure.<sup>82</sup> Since the Commission's flexibility is possible due to the confidentiality and bilateralism of its relations with Member States and its own autonomy with respect to remaining EU institutions, advocates of the accountability model call for the replacement of those pillars in order to ensure that the Commission can no longer make decisions based on controversial considerations. However, flexibility of the Commission's enforcement actually has its benefits and constitutes a part of both the Commission's specific makeup and the EU's international organization, aside from it being an indispensable side-effect of amicable solutions. It is this flexibility that allows the Commission to balance different values and objectives. But this balancing is not just about the presented choice between two enforcement models which, in practice, could be decided by other institutions and imposed on the Commission. It is mostly about the choices the Commission makes on a day-to-day basis when it decides between conflicting goals of EU policies or helps resolve disputes between incompatible interests of Member States.

The EU is not a homogenous construct and conflicts often raise questions of compliance. The Commission's flexibility allows it to balance alternative solutions to existing conflicts in a way that serves best the EU's interests and does not alienate Member States. The relationship between the EU and its Member States is not the same as the relationship between the state and its citizens where the latter are subjected to the national legal system whether they like it or not. The EU is not a federation either where individual states have no choice but to abide by decisions of central institutions. The European Union is an international organization assembling free states which, albeit having transferred some of their sovereign powers, retain their statehood. The founding Treaties constitute a special type of contract whereby Member States choose to give away some of their

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<sup>82</sup> European Parliament Resolution on a Law of Administrative Procedure, 2012/2024(INL), Annex, recommendation 3.

sovereignty but where they can also choose to take it back and simply leave the contract. Not only the joining but also the subsequent participation in the EU structures constitute a voluntary act and Member States retain their full statehood despite transmitted sovereign powers and the EU's acquisition of exclusive competences.<sup>83</sup>

As demonstrated by the 2016 'BREXIT' crisis where the UK voted by referendum to leave the EU, Member States can, in fact, decide to opt out of the European project. What's more is that such a decision can be made on the basis of not-so-rational or justified or, as was the case, honest arguments.<sup>84</sup> What was, however, significant about the UK referendum was that the vote to leave was very much provoked by the people's opposition to the 'bureaucrats' in Brussels, accused of imposing on the rest of Europe an excessive amount of regulations. While it had nothing to do with state non-compliance, the 'BREXIT' comes as a reminder that Member States are still sovereign states with the capacity to quit if they so decide.

The Commission is dependent on national governments' cooperation in many of its functions and alienating them is not in its best interest.<sup>85</sup> Constraining Member States' opportunities for friendly negotiation and subjecting them to unconditional, rigid responsibility for each and every infraction could result in them taking a step back and potentially denouncing the Treaties. This means, that the Commission not only should offer space for amicable solutions to state disputes but that it should also make sure its enforcement system is not excessively coercive and its sanctions are not unreasonably invasive. While it is imperative that it ensures that Member States conform to their obligations, it is also imperative that it exercises its powers in a way that does not threaten the European project and risk the authority of the EU. It is therefore not only a matter of practicality that the Commission remains uniform in its objectives and sometimes negotiates compliance in a way that ensures the attainment of those objectives, it is also a matter of the Member States' belief in their position and the future of the European integration. Although advocates of the accountability model see it only as an opportunity for abuse,<sup>86</sup> flexibility in fact allows to diffuse bombs.

The flexibility necessary to balance conflicting objectives and take into account political considerations stems not only from the need to keep Member States content and resolve sensitive issues behind the scenes without risking governments' alienation. It is also, or mostly, because the

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<sup>83</sup> Bieber, Maiani (2014), 1061.

<sup>84</sup> The Telegraph, *Nigel Farage: £350 million pledge to fund the NHS was 'a mistake'*, 24 June 2016, <http://www.telegraph.co.uk/news/2016/06/24/nigel-farage-350-million-pledge-to-fund-the-nhs-was-a-mistake/>.

<sup>85</sup> Nugent, *The European Commission* (Palgrave, 2001), 282.

<sup>86</sup> For example, Smith argues that, among different types of violations, the one category where flexibility should not be present is politically sensitive cases, Smith (2010), 106.



Commission is a political body with a highly politicized chief apparatus that, at the same time, performs a number of other functions that can sometimes contradict each other. We have grown used to perceiving the Commission as the embodiment of bureaucracy<sup>87</sup> and, for that reason, the accountability approach measures its conduct according to principles that govern the operation of administrative bodies. However, “what makes the Commission less bureaucratic than other bureau - is the nature of continuous bargaining in the Union” which suggests that it should not be measured by criteria applied to similar national institutions. “A variety of contradictory institutional logics - bureaucratic, political, diplomatic, democratic - are at work within the Commission.”<sup>88</sup> The weighing of contradictory functions, objectives and values is thus part of the Commission work and tensions arise in enforcement as they do in decision-making. However, aside from giving its enforcement powers to an entirely new institution, it is difficult to see how we could expect the Commission to refrain from mixing its different functions and from balancing conflicting values and interests while it performs its enforcement duties. Not only would it be irrational of the Commission to ignore its remaining functions and policy objectives, contradicting itself as it executes different tasks and bringing chaos to EU law, but here is also no good alternative to such a restriction. If we remove from the Commission the flexibility necessary to balance conflicting values and objectives then what do we do with the ensuing host of cases that require the balancing? Do we leave them solely for the Court of Justice with its tiny supply and the shaming, coercive and contradictory nature of judicial proceedings?

Choices between conflicting objectives and values constitute an indispensable element of both, policy-making and enforcement. Whether judges and administrative organs admit it or not, they often make choices among alternative solutions, picking one goal over another. Further, democracy itself demands that laws are negotiated and agreements are achieved by means of dialogue and bargaining. In a spectrum of different solutions and goals, compromises are worked out. While the process of enforcement is not the process of law-making, it nonetheless can involve choices between alternative solutions that deciding bodies have to make. It also requires that Member States are awarded appropriate respect as wielders of Treaties. Convincing them to comply in a friendly setting may be easier to achieve than forcing them to unconditionally obey.

Whatever is said of the European Commission, it cannot be questioned that it is uniquely equipped to do just that. The four pillars of its selective enforcement furnish it with the capacity and space to choose among conflicting objectives and convince Member State to conform while keeping

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<sup>87</sup> Christiansen, *Tensions of European Governance: Politicized Bureaucracy and Multiple Accountability in the European Commission*, 1997 *Journal of European Public Policy* 4, 76.

<sup>88</sup> *Ibid.*, 77, 87.

Court proceedings as backup. At the same time, the Commission's multi-functionality provides its officials with expert knowledge that allows it to better understand the intricacies of EU provisions as well as it broadens their horizons, allowing them to see beyond the case in hand, consider different political consequences of their decisions and notice various conflicting values. While Komesar's American judges sometimes lack the competence to resolve large-scale policy issues because they know the law but not the politics, the Commission's officials do not suffer from such a hindrance. They are enriched by additional, political knowledge that allows them to better weigh in different interests and it is precisely this knowledge that makes them pay attention to more than just the law and facts of the case at hand.

As a result, instead of concentrating on how bad the Commission's flexibility is, maybe it is time we stopped perceiving its consideration of long-term or political objectives as a negative. While it is a fact that certain violations are treated better than others and that complainants are not always satisfied with achieved solutions nor that every case of non-compliance is always remedied, the benefits of confidential and bilateral negotiations surpass the alternative proposed by advocates of the accountability model. Overall, however, it is the balance between the supply and demand sides of the Commission's enforcement that requires it to continue relying on cooperative, informal instruments, remain autonomous and retain the possibility of being flexible in its treatment of state violations. While it is imperative that the Commission's enforcement evolves, adapting to changing circumstances, the replacement of the four pillars threatens with the end of the Commission's policy of selective enforcement and a subsequent degradation and collapse of its guardian function. Since the existing EU compliance instruments do not have the capacity to assume the role of guardian in the Commission's stead, it is necessary that the Commission maintains its policy of selective enforcement based on the four pillars of confidentiality, bilateralism, flexibility, and autonomy. Instead of criticizing the Commission's discretion, we could realize that the principle of proportionality can apply as much to the application of compliance mechanisms as it does to the decision-making process. It could be seen as providing a guideline to the Commission's management of compliance measures, suggesting that less intrusive mechanisms ought to be used if such are warranted and before recourse is made to coercive methods.<sup>89</sup>

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<sup>89</sup> Bieber, Maiani (2014), 1062.

## 8.4 Distribution of demand

Aware of the forces of supply and demand, the European Commission weighs alternative enforcement models and shapes its policy of selective enforcement in a way that allows it to follow its original objective of ensuring compliance. Since the accountability model of enforcement would transform the Commission into an impaired and inefficient enforcement institution and prevent it from pursuing its main goal by increasing its demand and decreasing supply, the Commission protects the four pillars that maintain the discretionary model of enforcement. Nonetheless, even this model - despite its advantages - does not allow the Commission to fully realize its objective of ensuring compliance for its supply is limited and there is only so much it can achieve with the flexibility and autonomy it enjoys. The Commission, however, has a solution which demonstrates its sincere devotion to the objective of ensuring compliance. Seeing that the supply is set and is unlikely to increase in the future, the Commission seeks to control the demand.

The demand side of the Commission's enforcement fluctuates depending on the Member States' capacity and willingness to comply with EU law as well as on the decentralized compliance measures that take away some of the enforcement burden. For that reason, the Commission has been intensely developing various measures of preventive nature with the idea of clarifying EU provisions and ensuring that Member States understand how to conform with their obligations before actual infractions take place. At the same time, it has been creating additional reactive instruments such as the EU Pilot in order to ensure that much of the demand is covered by enforcement measures. In other words, by establishing different compliance methods, the Commission attempts to control and diminish the demand, distributing it across various tools. This is how it guarantees that it serves in the interest of its main objective while taking on its shoulders only as much as it can handle with its limited supply.

The idea of the distribution of the Commission's demand is what stands behind its policy of selective enforcement. The Commission sees the variety of compliance tools capable of addressing state violations and manages its enforcement in a way that shifts some of its demand on the shoulders of individual measures. Prioritization is, therefore, a means for the Commission to handle its demand with its limited supply. Relying on priority criteria, it distributes the demand among existing compliance measures. This, however, brings the problem of the priorities' content and the question of which instruments ought to deal with systemic infractions and which with individual problems. While the negative consequences of the accountability model were already enumerated, the content of the Commission's priorities could still be questioned with its heavy reliance on non-compliance

cases and an overall strive to focus on non-conformity violations with serious consequences. The answer to this question lies in Komesar's theory of numbers and complexity.

According to Komesar, whose Comparative Institutional Analysis concentrates on the American adjudicative process, its operation - aside from being influenced by the balancing of the supply and demand sides - is also impacted by such systemic factors as numbers and complexity.<sup>90</sup> The concept of numbers refers to the amount of persons impacted by measures and complexity refers to technical and amorphous norms. According to Komesar, while institutions work well when few persons are affected by authorities' decisions and when these decisions are simple and clear providing strong protections, these same institutions tend to deteriorate as numbers and complexity rise. Issues become more convoluted and obscure, rules more complex and ambiguous, rights weaker and unclear and the need for the adjudicative process increases. The balancing of costs and benefits of alternative legal solutions becomes judges' to make as more and more stakeholders seek courts' aid in interpreting vague provisions and applying complicated rules. However, when the difficulty or obscurity of legal problems further rises increasing the amount of legal problems and persons in need, courts start losing their ability to provide the protection they are expected. They become overloaded with convoluted and time-consuming cases that they no longer have the technical and political expertise to comprehend nor to foresee the spectrum of potential consequences. Their capacity to deliver legal protection degrades while the level of this protection also decreases. Aware of their own limitations, both in matters of their physical capacity as well as competence, they withdraw from the responsibility of finding solutions. Their decisions become dismissive with the idea of limiting the amount of cases that they can no longer sustain. At that point of high numbers and complexity, no institution works well and the need for courts is the strongest, but courts' no longer see themselves as the appropriate determinants of individual legal rights.<sup>91</sup>

The same reasoning can be used to explain the Commission's enforcement priorities and its relationship with national courts and decentralized compliance mechanisms as alternatives to centralized enforcement. When EU norms are easy, clear and undemanding, Member States do not encounter troubles implementing them nor national court applying them against state infractions and guaranteeing the protections stakeholders expect. As these issues become more complex and more persons demand protection, the need for national courts increases which, in turn, have the preliminary reference procedure to fall back on in situations of difficulty. However, cases of highest numbers and complexity are too much for national courts to handle and this is not only because of

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<sup>90</sup> Komesar (2001), 25.

<sup>91</sup> *Ibid.*, 4, 19-20, 22.

their own limited supply. Such cases require highest expertise both in terms of legal competence, understanding of highly technical or convoluted norms, as well as the ability to foresee the fallout of alternative solutions and the political aptitude to make such determinations. The European Commission, being an institution that not only has the highest competence to understand the legal norms that it itself drafts but which is also a highly politicized body that comprehends political problems and conflicts in the EU, has clearly the aptitude to deal with the most complex or sensitive matters. Of course, the role of the Court of Justice cannot be forgotten here for it is the Court that makes final determinations in infringement cases. However, its role in enforcement is, in the end, self-constrained and this is visible in the fact that the Court has never interfered with the Commission's discretion to reach amicable settlements and negotiate compliance. Despite many voices that called for it to finally take action, it has never challenged the Commission's practice of confidential bargains thus proving that it recognizes its own limitations when it comes to highly political and sensitive matters. It is fine with ruling only on selected cases, accepting that those inconvenient which require political perspective are excluded beforehand and left out for the Commission's alternative options, be they merely a reprimand.

Finally, when talking also of numbers and not just complexity, centralized enforcement when compared to national proceedings is the most appropriate means of addressing violations that negatively impact the largest groups of persons. The more citizens are affected by state violations, the more it makes sense that the Commission takes action 'from above' while individual application problems are left for stakeholders to manage on their own.

This is why, the Commission's priorities should never be considered only with respect to the infringement procedure but rather in comparison to remaining compliance instruments. Since its supply is set, neither the Commission nor the Court have the capacity to handle every infraction by means of the infringement procedure. By distributing its demand among different tools, the Commission wishes to ensure that state infractions which are least likely to be addressed by means of decentralized measures are tackled by different centralized instruments. It strives to ascribe only some of its demand to the infringement procedure and accommodate the rest by means of alternative or complementary tools.

The Commission's reliance on various enforcement instruments stems directly from its limited supply. It has a choice between stronger reliance on formalized measures such as the infringement procedure but at the cost of fewer infractions addressed annually, or recourse to more flexible and amicable instruments with the benefit of a larger amount of cases settled. The dilemma between these two options the Commission has clearly resolved in favor of the latter for its enforcement

objective pushes it to ensure as much compliance as it can. In a way, the Commission's selective enforcement is, in fact, not as selective as it appears. If anything, the Commission's strive to address as many violations as it possibly can proves that it seeks to be as non-selective as it can. The concept of selective enforcement may thus not so much refer to the Commission's selection of cases but to its selection of methods.

## 8.5 The compromise: EU Pilot

The EU Pilot constitutes the Commission's answer to the criticism it receives while maintaining the balance between the demand and supply sides of its enforcement. Against popular belief, the Commission strives to adapt its policy of selective enforcement not only to changing circumstances but also to new expectations put forward by academics and citizens, supported by EU institutions. However, specifically because of the need to keep the demand and supply in a balance, the Commission's reforms, while introducing new solutions, are such that they maintain the core of the four pillars of its enforcement and, thus, fall short of the essence of the accountability model. The EU Pilot is a perfect example of the Commission's strive to accommodate new expectations but without removing the four pillars and destabilizing the balance between its supply and demand sides.

The EU Pilot offers an informal and cheap instrument of enforcement which gives Member States the opportunity to comply in a friendly atmosphere and by means of a confidential dialogue without the element of coercion and shaming. It is, however, bound by certain constraints and time-limits, allowing both Member States and complainants to know better what to expect but in exchange for some of its flexibility and maneuverability. It offers fewer opportunities to bargain and - against popular belief<sup>92</sup> - the transfer of the decision-making power from the College to the hands of the Commission's officials makes it actually a less politicized process which, despite keeping it a bilateral and confidential measure, paradoxically increases its transparency and objectivity. In a way, since the EU Pilot operates outside the attention of the College and national governments but between relevant Commission and national departments, this allows cases to be first resolved solely on the basis of law and fact before politicians engage themselves and more important matters are put on the table. While the EU Pilot does not prevent the Commission from relying on outside goals during and after its procedure, it at least offers an opportunity for a non-politicized solution. This way, the Commission maintains the benefits of amicable settlements guaranteeing that national authorities feel comfortable with it and decreasing the requirement of strong, irrefutable evidence but also structures

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<sup>92</sup> Valero (2011), 22.

it and brings in more objectivity to its operation, partially meeting the requirements of the accountability model.

However, aside from accommodating at least a few of the accountability expectations, the EU Pilot is also, or mostly, the product of the Commission's desire to address more of the existing demand but without diminishing its supply. The idea behind it is that, for new complementary measures to actually perform their objective by taking on the demand without straining supply, they need to remain cheap, quick, easy and flexible. Otherwise, they become similar to the infringement procedure, long and expensive, and achieve a contrary objective by diminishing the supply and increasing the demand. This is why, by preserving the mostly informal, bilateral and confidential nature of the EU Pilot and keeping complainants at bay, the Commission not only guarantees Member States' cooperation but also ensures the overall low cost. More rights for complainants means more duties for the Commission and higher costs, an increase in demand and an eventual decrease in supply. Without complainants' engagement, however, the EU Pilot remains cheaper than the infringement procedure and takes less time, allowing the Commission to process a larger amount of cases. This also permits to partially accommodate the demands of the accountability model simply because more complaints are addressed and fewer stakeholders ignored, irrespective of the content of their claims. Once again, by keeping complainants away from the core of the EU Pilot, the Commission heeds the accountability model and ensures its depoliticization. Complainants' access involves the possibility of attracting media. And if media get involved, then both the College and national governments have no choice but to also engage themselves and the case becomes an element of a political campaign or a subject of political bargaining. While solutions reached in confidential and bilateral contacts may not always be satisfactory to stakeholders, they are worked out mostly by experts and administrators and not politicians.

The Commission's remaining alternative compliance instruments such as informal contacts or package meetings constitute measures which are all compatible with the Commission's strive to maintain the balance between its supply and demand. They are cheap and undemanding and, while they offer aid to Member States in resolving their compliance issues, they do not demand much in terms of time and cost and do not strain the Commission's supply. By creating such measures, the Commission redistributes its demand. It determines which EU measures are particularly complex, technical or ambiguous, posing widespread compliance problems, and assigns them to those instruments.

The same is achieved with the EU Pilot. By establishing and transforming it into a regular pre-procedural step, the Commission has redistributed its demand. It made a distinction between

measures of problem-solving and coercive nature. The infringement procedure being the most expensive and demanding but at the same time contradictory compliance mechanism, the Commission has reserved mostly for situations which require definite action and where Member States' will to comply can be seriously doubted. This includes violations of highest numbers and largest consequences with widespread impact for stakeholders (late transposition of directives) as well as those most persistent (infringements confirmed by the Court). The Commission also left itself an opening to launch other cases through the infringement procedure if an overriding interest or urgency requires it. Remaining violations, the Commission left for the EU Pilot and only secondarily for the infringement procedure if the Pilot fails.

The move where the Commission has considerably limited the types of cases qualifying for an immediate launch of the infringement procedure can also be interpreted in terms of the Commission's supply and demand. Fewer infringement procedures and more EU Pilot proceedings allow to process more files. At the same time, the EU Pilot constitutes an opportunity for cases that the Commission would otherwise ignore but which are neglected by the decentralized compliance measures such as small application problems or violations of diffuse interests; cases that are often brought by one-shotters or NGOs but whose role in decentralized enforcement is considerably constrained. The EU Pilot presents to such entities a rather positive ratio of costs and benefits as well as an opportunity for a rapid resolution but without the formalized burden of condemning and irrefutable evidence which is often the issue with diffuse interest cases such as those in environment.

The EU Pilot does not contain solutions for all the problems that the Commission faces in enforcement and it also has its limitations. It does not guarantee that the Commission has the capacity to deal with the whole of its demand nor does it allow to accommodate the essence of the accountability model. Nonetheless, it constitutes a serious and well thought-through answer to the existing demand which allows to deal with at least a few problems that advocates of the accountability model point out while maintaining the balance between the supply and demand sides of the Commission's enforcement. Its establishment suggests that the Commission seeks to diminish the amount of dismissed cases, and that its selective enforcement may, in fact, be more about the choice of appropriate enforcement measures than it is about prioritizing cases.

## 8.6 Conclusion

The conflict between the discretionary and accountability models of enforcement can be seen as a conflict of values, roles and expectations. We confront the Commission's strive towards amicable settlements and the Court's obsession over Member States' rights with the need to guarantee



appropriate treatment of citizens and the call to control the Commission's discretion, deciding which side presents the higher value or appears more desirable or necessary. However, there is more to institutions than the objectives they pursue and standards they adhere to. While matters of institutions' mundane operations are not as exciting in legal research as studies of values and normative claims, the latter are meaningless if they are not supported or grounded in the former. We can argue over which principle or standard presents to us more value or which is more worthy of pursuit but we should not forget that institutions operate within specific, practical boundaries while the need for them is dependent on the successes and failings of institutions that surround them. There are reasons for the choices institutions make, and determining these reasons constitutes the first step on the path to reform that will not be thwarted by the mundane issues of practicality.

The purpose of this thesis was not to negate the accountability model of enforcement or to challenge the values and standards it represents. Instead, this thesis was intended to demonstrate that there are reasons for the Commission's policy of selective enforcement and the Court's unwavering safeguard of the discretionary model. Whether we agree with the accountability model's premise or not, it does not change the fact that the standards it represents threaten with the deterioration of the Commission's current enforcement practice where the balance between the forces of supply and demand fissures. While seemingly harmless, the accountability model's tenets (such as complainants' access to documentation from the Commission's investigations or transformation of their rights into hard-law) carry with them a promise of the Commission's lost efficiency in the handling of infringements and its slow but eventual transformation into a vehicle for individual grievances where the Commission fails in its role of the guardian and no longer has the capacity to ensure compliance on a broad-scale basis. Further, since the Commission is not alone in dealing with non-compliance problems, the accountability model also threatens with consequences for other institutions such as the Court of Justice where it either overloads with cases or, alternatively, loses its significance in matters of state enforcement and becomes a B-group player. Ultimately, the accountability model aspires towards a Treaty amendment outside Treaty procedures for it seeks to put a system of checks on the Commission's enforcement policy and practice, directly or indirectly interfering with its Treaty-guaranteed discretion to decide what to do with infringement cases. While this may seem different from the perspective of the accountability model's values, the analysis of this model's consequences to the Commission's supply and demand leaves little doubt as to its feasibility. Mundane issues of practicality challenge the desirability of legitimacy-focused standards and objectives especially that the latter collide with equally important values of due process or data protection.

In the end, the Commission's selective enforcement is not as selective as it may seem nor is the Commission as opposed to the accountability model as would initially appear. While it cannot be guaranteed that it is no longer overlooking certain violations or even abusing its powers, its quest for preventive and reactive compliance instruments demonstrates that it, in fact, seeks to widen the network of tools in order to address more and more state violations but without straining its supply. The selectivity in the Commission's enforcement can therefore be understood not so much in terms of its choice among violations to pursue and abandon but its choice among appropriate enforcement measures. The EU Pilot is a good example of this approach because it allows the Commission to process more infractions and, albeit somewhat moderately, responds to the concerns of the accountability model while keeping its supply and demand in a balance.

This thesis has assumed a holistic and comparative approach to the Commission's enforcement according to Komesar's Comparative Institutional Analysis, examining it in the larger system of compliance measures and EU institutions. It is primarily an analytical work by means of which the motives for the existing shape of the Commission's policy of selective enforcement were explained. It takes on a pragmatic approach, strongly grounded in the political scientists' desire to identify the processes behind institutions' choices and the economics' fundamental concepts of supply and demand, believing that by understanding the reasons why institutions function as they do and recognizing their limitation as well as the need for their operation, we can put forward informed propositions that are both feasible and desirable. As a result, this thesis presents parameters for new analysis of the Commission's enforcement and provides a framework for future normative claims. The forces of supply and demand are an inherent element of the Commission's enforcement and they substantially influence its institutional choice by shaping its policy and practice. Any propositions concerning amendments to the Commission's enforcement strategy ought to take them into account if they are to be effective in practice and heeded by policy-makers.

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