

**Good governance and legitimacy in the EU:
the role of Article 226 EC**

By

Melanie Smith

PhD
The University of Edinburgh, 2007



Abstract

Article 226 is traditionally analysed as a forum of negotiation between the Commission and Member States, and as such there is no comprehensive discussion of the tensions that lie at the centre of the Article 226 infringement mechanism in the current political climate of constitutionalisation of the European Union. It is no longer meaningful to discuss the operation of the process presupposing it fulfils just one function within the European polity. The role of Article 226 can only be understood if it is scrutinised in the context of the current developments pertaining to the evolution of the EU as a polity and a legal order. This study characterises Article 226 not simply as a single faceted legal provision, but as a unique space of interaction for a multitude of actors. As the main actor in the enforcement mechanism, the European Commission designs, manages and controls the enforcement mechanism. The conflicting roles and divergent priorities of the Commission in relation to its role as ‘guardian of the Treaties’ undermines the overriding commitment to promoting good governance as a means of increasing legitimacy in the EU. However it not only concerns the Commission, but also other actors (such as the Courts, the Parliament, the Ombudsman and complainants). This thesis considers to what extent these actors have significantly altered the role of Article 226. Competing ideals of legitimacy, fairness and transparency need to be balanced against numerous other concerns such as effective enforcement, uniform integration, and efficient management of policy; such tensions are only set to intensify and must be given appropriate weight if the enforcement process is to retain any credibility in the European Union. Bearing in mind the contribution of the Ombudsman to promote good governance through good administration, Article 226 can be seen as a missed opportunity to increase the legitimacy of the EU. Article 226 can be seen as an opportunity, if correctly managed, to deliver greater accountability in the EU, and as a way of delivering in part the promise of bringing Europe closer to its citizens.

Acknowledgments

I would like to acknowledge and give thanks to numerous people who have helped me throughout the period of my doctoral studies. I am most grateful to my supervisor, Professor Jo Shaw, for all her constructive feedback and advice throughout my doctoral studies in relation to the subject matter of my PhD, and for supporting my academic development more generally. I am always inspired by her never-ending energy, application and dedication to her work. Her continuous support, understanding and encouragement have been much appreciated.

I would like to acknowledge the important contribution made by the University of Manchester to my PhD studies. I began my doctorate at Manchester University after being awarded a vital scholarship to support me in my studies, and I spent two productive and happy years there. I would also like to give thanks to the University of Edinburgh for continuing to support me financially in the final stages of my studies. Without the financial support of both these institutions, completion of this thesis would not have been possible.

I am particularly grateful to Professor Richard Rawlings. First, through his teaching at the London School of Economics, and later through numerous discussions, he inspired my interest in the topic of this PhD and encouraged me to pursue a doctorate. I would like to thank him for all his support, guidance and his insightful comments and criticism of my ideas, and for giving me his time whenever I needed it. I would also like to thank Professor Conor Gearty for his support throughout all my academic studies and for always being available to give the necessary word of encouragement when required.

I would like to thank all my family and friends, particularly those non-lawyers who managed to survive the arduous task of reading and re-reading my thesis chapters towards the end. In particular, I would like to thank Ms Liza Lovdahl Gormsen, a fellow PhD student, who kept me going through the highs and lows of PhD scholarship. Last, I would like to thank my parents for supporting me in my decision to undertake a PhD, even though they really didn't understand why I thought it was a good idea to have yet another degree. This thesis is dedicated to them.

Cardiff, January 2007

For my Mother and Father

Declaration

I declare that this thesis is my own work and that no part of the thesis has been submitted for any other degree or professional qualification.

Signed

Contents

List of Figures and Tables	vi
Chapter I: Introduction	1
1.1: Research motivation	8
1.2: The treatment of Article 226 in academic literature	10
1.3: The research puzzle	20
1.4: Research approach	24
1.5: Research method	27
1.6: Thesis structure	28
Chapter II: Mind the accountability gap – administrative law and legitimate governance	30
1.0: An introduction to administrative law in the EU	33
1.1: Judicial review of EU institutional decision-making	35
1.2: General principles of EU law as a source of administrative law	36
2.0: Two key principles of administrative law: transparency and the obligation to give reasons	39
2.1: The evolution of transparency in the EU	40
2.2: The obligation to give reasons for decisions	43
2.3: Transparency in infringement investigations	45
3.0: The attempt to develop new administrative rights	46
3.1: The principle of sound administration	48
3.2: The principle of diligent complaint handling	49
3.3: Advancing the administrative rights of complainants	52
4.0: The applicability of administrative law principles to enforcement mechanisms	52
4.1: The approach of the ECJ: deference and limited intervention	53

4.2: Competition law	58
4.3: State aid	59
4.4: A difference in administrative protection in enforcement actions	61
Concluding remarks	64
Chapter III: Conceptualising democracy, legitimacy and the development of good governance in the EU	67
1.0: The challenge of terminology	68
1.1: The ‘state model’ of democracy	69
2.0: Conceptual tools to aid the discussion of democracy and legitimacy	71
2.1: Focusing on the ‘key pillars’ of democracy	72
2.2: A liberal democratic emphasis	74
2.3: Democracy and citizen control	76
2.4: Categorisation of approaches: reconciling differences	77
2.5: Technocratic governance: the non-majoritarian approach	80
3.0: The introduction of ‘good governance’ as a tool to redress the legitimacy deficit	82
3.1: A changing political vision of Europe	83
3.2: The background to the White Paper on Governance	85
3.3: The underlying normative vision and the five principles of good governance	85
The principle of openness	87
The principle of participation	88
The principle of accountability	89
The principles of effectiveness and coherence	92
3.4: The WPG and its five principles: is this ‘good governance’?	93
3.5: The WPG and the enforcement action	94
4.0: A framework for evaluating policy and practice in Article 226	97
Concluding remarks	101

Chapter IV: The management game – political enforcement, neutral guardianship and legal uniformity	104
1.0: The European Commission: an introduction	105
1.1: The formal Treaty process and Commission discretion	107
1.2: Buttressing the enforcement mechanism – financial penalties under Article 228 EC	110
2.0: Operational problems with the infringement mechanism	114
2.1: Scale	114
2.2: Reform of administrative procedures	115
2.3: Attempts to reform the Treaty language	121
2.4: One size fits all: a horizontal policy with vertical challenges	125
3.0: Conflicting roles of the Commission within Article 226	130
3.1: The guardian of the Treaties – enforcement and compliance	131
3.2: An efficient administration – complaint handling and case investigation	132
3.3: An executive power – policy development and control	134
Concluding remarks	137
Chapter V: The policy on enforcement in an era of good governance	139
1.0: The two tier approach to enforcement: prevention and correction	140
1.1: Prevention of infringements	140
1.2: Correction of infringements – developing a strategy of prioritisation	142
1.3: Enhancing the co-operation of Member States	151
1.4: The citizen as enforcer	152
2.0: Enforcement policy and good governance principles: the cleavage between theory and practice	155
2.1: Coherence	155
2.2: Effectiveness	157
2.3: Openness	160
2.4: Participation	163

2.5: Accountability	164
3.0: Getting the basics right: increasing legitimacy in the enforcement policy	166
3.1: The need for identifiable rules	167
3.2: Justifications for decisions	169
3.3: Consent and recognition	170
Concluding remarks	171
Chapter VI: The impact of the European Ombudsman: breaking down barriers to procedural legitimacy	174
1.0: An introduction to the Office of the European Ombudsman	175
1.1: Powers and process	176
1.2: Overview of numbers of complaints for non-fulfilment of Article 226 obligations received by the Ombudsman	179
2.0: Re-moulding the process through inquiries and complaint handling	182
2.1: The quest for full and frank reasoning	182
2.2: The own initiative inquiry: concentration on basic procedural guarantees	184
2.3: A genuine opportunity to respond	187
2.4: Proper consideration of all the relevant factors	189
3.0: A detailed case study: the Parga complaint	190
3.1: The facts according to the complainant	191
3.2: The complaint to the Ombudsman	193
3.3: The inquiry	194
3.4: The final decision	196
4.0: The results of the Ombudsman's intervention	198
4.1: The Commission Communication: a complaint form for citizens	198
4.2: Consequences of the code	202
4.3: The Ombudsman's principles in the administration of infringements	203

5.0: Good administration and good governance in infringement investigations	207
5.1: Coherence and effectiveness	208
5.2: Openness and accountability	210
5.3: Participation	214
Concluding remarks	215
Chapter VII: Conclusions	217
1.1: Summary of findings	217
1.2: Re-conceptualising the role of Article 226	222
1.3: Plugging the supervisory/accountability gap through law	226
The individual as guardian	226
Transparency	228
1.4: Focusing on change through good governance	229
Effective enforcement and technocratic solutions	229
Internal procedures	231
Policy	231
Transparency and accountability	233
Resources	234
1.5: The potential for a mechanism of multi-faceted accountability	235
Member State to Commission	236
Commission to Parliament	236
Commission to citizen via the Ombudsman	238
Member State to citizen	239
Bibliography	242
Appendix 1	256
Appendix 2	263

List of Figures and Tables

Figures

Figure 1	3
Figure 2	26
Figure 3	98
Figure 4	144
Figure 5	145
Figure 6	147
Figure 7	148
Figure 8	148
Figure 9	154
Figure 10	158
Figure 11	180
Figure 12	257

Tables

Table 1	21
Table 2	100
Table 3	193
Table 4	205
Table 5	257
Table 6	258
Table 7	260
Table 8	260

Chapter I: Introduction

Article 226 EC is the central mechanism of enforcement in the EC Treaty, and has remained unchanged since the original Treaty of Rome. It forms part of a triumvirate of provisions in the EC Treaty that are dedicated to the enforcement of the broad spectrum of Member State obligations under the Treaties, along with Article 227 EC and Article 228 EC.¹ Article 226 provides the European Commission, as guardian of the Treaty,² with a broad power of policing Member States' conduct, and confers jurisdiction on the European Court of Justice³ to pronounce whether or not the Member State's conduct is compatible with EC law.⁴ The text of the provision is as follows:

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

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

The enforcement mechanism of Article 226 is split into two broad stages by the language of the provision.⁵ The first stage is the administrative stage of Article 226. This consists of the Commission investigation into the Member State's behaviour to provisionally determine whether or not it is *prima facie* compatible with the Treaty. In order to make this determination, the Commission and Member State enter into a dialogue, both formally and informally, in order to establish the material facts of the situation. Formally, this consists of the 'formal letter'⁶ and the reasoned opinion, which outlines the Commission's legal case against the Member State, and provides a deadline by which the Member State must remedy the situation. If the Commission and the Member State cannot come to an agreement in

¹ I will refer to the provisions in the EC Treaty hereinafter by simple number alone rather than providing the full reference. Where I refer to Articles for the first time, or where I refer to provisions from other Treaties, I will include the complete reference.

² Article 211 EC 'the Commission shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied'.

³ I will refer to the European Court of Justice as the Court of Justice and ECJ interchangeably.

⁴ I will use the term 'EU law' in general to refer to all the Treaties and the associated legal obligations, and will only differentiate between the EU and EC law where it is legally necessary to do so, i.e. where I am referring to specific 'pillars' of the EU legal system. Article 226 applies only to legal obligations within the EC Treaty, as there is no equivalent provision in the TEU, see D Chalmers *et al*, *European Union Law* (Cambridge University Press, Cambridge, 2006) p 348, see also TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003) p 307.

⁵ See P Craig and G De Búrca, *EU Law Text Cases and Materials* (3rd Edition, Oxford University Press, Oxford, 2003), pp 398-402, TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003) pp 310-317, D Chalmers *et al*, *European Union Law* (Cambridge University Press, Cambridge, 2006) p 350, J Steiner *et al*, *EU Law* (9th Edition, Oxford University Press, Oxford, 2006) p 225.

⁶ 'after giving the State concerned an opportunity to submit its observations' Article 226 EC.

order to remedy the suspected infringement of the Treaty, the administrative phase of Article 226 ends.

If the Commission wishes to pursue the Member State further, it may refer the case to the ECJ for a judgment which definitively states whether or not the Member State has in fact breached its obligations under the Treaty; the ECJ alone is responsible for interpreting EU law.⁷ The judgment of the ECJ is declaratory in nature – it simply states there has, or has not, been an infringement. If a Member State is found to have breached the Treaty, it must rectify the situation by referring to the directions given by the Commission in the administrative phase of Article 226. Since 2000, the Commission has on average referred 186 cases to the ECJ per year under Article 226.⁸

The Commission uses various methods in order to detect possible infringements. It devotes considerable resources to developing efficient detection techniques, whether this is through the development of databases which track Member States' transposition of Directives, or systematic monitoring of compliance with particular measures by Commission staff. Many infringement investigations begin on the basis of a complaint to the Commission from an individual or interest group. Indeed the Commission continually comments upon the importance of the complainant's role of informing the Commission of suspected infractions,⁹ and has developed a particular complaint form to facilitate this interaction.¹⁰ Figure 1 below illustrates how significant the complainant is in bringing suspected infringements to the Commission's attention.

⁷ Article 220 EC.

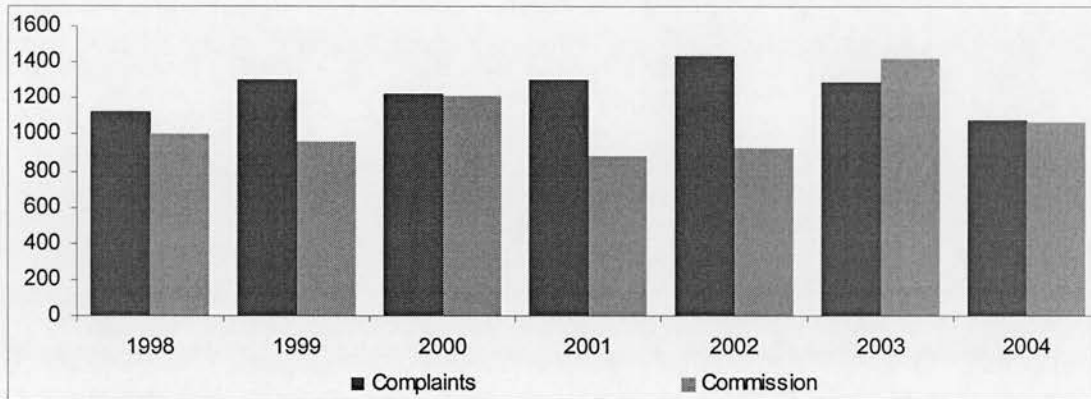
⁸ Source Eighteenth Annual Report on Monitoring the Application of Community Law (2000) COM (2001) 309 final, Nineteenth Annual Report on Monitoring the Application of Community Law (2001) COM (2002) 324 final, Twentieth Annual Report on Monitoring the Application of Community Law (2002) COM (2003) 669 final, Twenty-First Annual Report on Monitoring the Application of Community Law (2003) COM (2004) 839 final, Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final. For purposes of comparative analysis, and to ensure consistency in the use of statistics, only data relating to the 'old 15' Member States will be quoted. Until the Twenty-Third Annual Report on Monitoring the Application of Community Law (2005) COM (2006) 416 final, this data was collated separately by the Commission.

⁹ Usually at the beginning of each Annual Report, see for instance the Twenty-Third Annual Report on Monitoring the Application of Community Law (2005) COM (2006) 416 final, p 3.

¹⁰ This complaint form is available on the infringement webpage at http://ec.europa.eu/community_law/complaints/form/index_en.htm.

Figure 1

Method of detection of all suspected infringements (1998-2004)



Source: Annual Monitoring Reports, 1998-2004.

If the Member State refuses to rectify the situation as directed by the Commission, this may lead to the Commission instigating the Article 228 penalty process. Article 228 is a supplementary enforcement mechanism in the Treaty, and is directly connected to the action under Article 226. An action under Article 228 cannot be engaged until Article 226 has been fully exhausted. Originally this provision of the EC Treaty was simply a further opportunity for the Commission to obtain another judgment against the Member State, if the Member State refused to adhere to the ECJ's judgment under Article 226. The Treaty of Maastricht¹¹ amended this provision to allow the possibility of the ECJ imposing a financial penalty against the Member State, formally for non-compliance with the Court's judgment under Article 226.¹² The text of Article 228 reads as follows:

'If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

If the Commission considers that the Member State concerned has not taken such measures it shall, after giving the State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgement within the time-limit laid down by the Commission,

¹¹ Treaty on European Union, signed 1992.

¹² Formally this is still a provision concerned with punishing Member States for not complying with the ECJ judgment, but in reality is directly related to the original infringement. This is evident when one takes into account the method of calculating the penalty or lump sum, which is based on the seriousness and duration of the infringement, rather than a set penalty for ignoring the Court's judgment which would always be the same amount. See the Commission's latest Communication on how it reaches an appropriate penalty in 'Commission Communication: Application of Article 228 of the EC Treaty' SEC (2005)1658.

the latter may bring the case before the Court of Justice. In doing so it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.’

Article 228 has the same format of Article 226 and is split into two stages (administrative and judicial). The Commission must once again provide the Member State with ample time to bring its conduct into line with the judgment of the ECJ, and must again produce a formal letter and reasoned opinion before moving to the judicial stage. The decision to move to the judicial stage, as in Article 226, is not mandated by the Treaty, and the Commission may simply abandon its attempts to bring the Member State into compliance. If the Commission decides to refer the case to the ECJ, it may request a financial penalty, and may suggest the amount of financial penalty, but it remains at the discretion of the Court as to the final penalty imposed on the Member State (in form and amount).¹³ Article 228 actions are not yet routinely pursued to their conclusion by the Commission, and in fact there have only been five judgments to date against Member States under this provision since Maastricht.¹⁴

Article 227 is an enforcement provision of the Treaty that is rarely used. It is a mechanism of enforcement that enables Member States to refer each other to the ECJ for non-fulfilment of obligations. The text is as follows:

‘A Member State which considers another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case, both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such an opinion shall not prevent the matter from being brought before the Court of Justice.’

Due to the obvious political sensitivity of such an action by a Member State, it would be politically expedient for Member States to resolve such differences in the numerous other diplomatic meetings available to Member States as members of the European Union, or to

¹³ Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

¹⁴ Case C-387/97 *Commission v Greece* [2000] ECR I-5047, Case C-278/01 *Commission v Spain* [2003] ECR I-14141, Case C-304/02 *Commission v France* [2005] 12 July 2005 nyr, Case C-177/04 *Commission v France* [2006] 14 March 2006 nyr, Case C-119/04 *Commission v Italy* [2006] 18 July 2006 nyr. Although there are many more cases than this referred each year to the ECJ, most are settled before the Court has any chance of imposing the financial penalty.

bring the Commission's attention to a suspected infringement and encourage an action by the Commission under Article 226. The action under Article 227 is similar to that of Article 226 and 228, in that there is both an administrative stage and judicial stage to the provision.

In an action under Article 227, the Commission acts as arbiter, rather than as prosecutor, as both sides submit their views to the Commission, which must provide a provisional opinion on the legality of the accused Member State's conduct. Regardless of whether the Commission agrees or disagrees with the Member State who has initially brought the case, that Member State is free to refer the case to the ECJ for a definitive answer. The few cases that have been brought under this provision have had reasoned opinions that both supported and disagreed with the complaining Member State.¹⁵ These three enforcement provisions in the EC Treaty are the general enforcement actions of the EU legal system.¹⁶ Article 226 is at the pinnacle of this enforcement triangle and as such is the focus of this study, with discussion of the other two actions included only where relevant.

The enforcement articles in the Treaty do not exist in a legal and political vacuum, but are shaped by the complex process of European integration. The process of European integration has been one of constant change and renewal, beginning with sectoral economic reform projects, and stretching right through to the current period of constitutional reflection.¹⁷ Since the 1990s in particular, the process of intergovernmental conference (IGC) followed by Treaty revision has been a constant stimulus for discussion and debate about the nature of the European project.¹⁸ Although change has been constant, the trajectory of European integration has not been uniform. The Community 'pillar' containing

¹⁵ For instance see Case 141/78 *France v UK* [1979] ECR 2923 where France had the support of the Commission, and Case C-388/95 *Belgium v Spain* [2000] ECR I-3123 which proceeded without the support of the Commission. Although this provision is not a regularly used enforcement provision, it should not be assumed it is entirely defunct, as the recent case between the UK and Spain demonstrates, Case C-145/04 *Spain v UK* [2006] 12 September 2006 nyr. This case proceeded without the support of the Commission.

¹⁶ Of course these are not the only enforcement provisions in the EC Treaty, but they are the only generally applicable enforcement provisions. Other enforcement provisions which are relevant to isolated parts of EU law, such as competition law or state aid, will only be referred to as necessary throughout the thesis.

¹⁷ There have been numerous attempts to understand and explain the process of European integration stretching from Haas' functionalist perspective, to neofunctionalism and the intergovernmental/supranational dichotomy, to contemporary debates about the multi-level governance, see P Craig and G De Búrca, above n 5, pp 5-12. See generally JHH Weiler 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

¹⁸ B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing, Oxford, 2002).

Article 226 remains the most supranational¹⁹ element of the Union.²⁰ The EU legal system is one element of supranationalism in the EU, particularly after the Court of Justice established the principles of supremacy and direct effect.²¹ The EU has a supreme legal order, which binds the Member States in relation to EC law, and subjects them to the jurisdiction of a supranational authority (the ECJ) should the Member States not fulfil their obligations in the Treaty. This is different from the traditional format of international agreements based on the consent of sovereign actors, characterised as intergovernmental co-operation.²² Some policy sectors however remain intergovernmental in nature; they are non-binding areas of political co-operation.²³ There has not been a simple progression from an international collaboration of Member States to a supranational entity and the so-called variable geometry has to some extent always been present.²⁴ The state of integration of different actors, institutions and policy sectors has been, and continues to be, variable.²⁵

The Maastricht Treaty²⁶ was an important turning point in achieving greater political co-operation.²⁷ From this point onwards, the rate at which renewal and debate about the nature of the European project has greatly increased. The prospect of enlargement to include states from Central and Eastern Europe focused attention on issues relating to institutional reform, initially on a practical level of whether the existing institutions could cope with the increased workload enlargement would bring.²⁸ The Treaty of Nice and in particular the Declaration

¹⁹ Supranational means government above, or beyond, the state level of government where states do not wield individual vetos.

²⁰ This of course is a rather simplistic overview of the pillar structure, since the first pillar now contains provisions on visa and asylum matters which retain some residual third pillar (intergovernmental) characteristics.

²¹ See generally P Craig and G De Búrca, above n 5 chps 5 and 7.

²² Intergovernmental means international co-operation based on solely on the consent of the each state involved.

²³ Mainly found in the second pillar.

²⁴ The phrase variable geometry relates to the opt in or opt out policy sectors contained in the Treaties allowing some Member States to co-operate without all Member States agreeing to new policy initiatives. See J Usher 'Variable Geometry or Concentric Circles: Patterns for the EU' (1997) 46 *International and Comparative Law Quarterly* 243.

²⁵ JHH Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 1.

²⁶ Treaty on European Union, signed 1992, and entered into force in 1993.

²⁷ The TEU renamed the EEC Treaty as the EC Treaty (which would comprise the Communities and be the first pillar) and created the three pillar structure and the European Union.

²⁸ The focus behind the amendments in the Treaty of Amsterdam signed 1997, entered into force 1999 and the Treaty of Nice, signed 2002, entered into force 2003. See for discussion J Shaw 'The Treaty of Nice: Legal and Constitutional Implications' (2001) 7 *European Public Law* 195.

on the future of the Union²⁹ called for a deeper and wider debate about the future of the EU, leading to the Laeken Declaration.³⁰

This Declaration set out the political agenda and the normative vision of the EU's Member States for a more democratic Europe. The Declaration focused upon some general key themes, such as bringing the institutions closer to the citizens by making them more open and efficient, which in turn would lead to an increased democratic scrutiny of the EU's actions. Through the simplification of instruments, clearer roles for each institution and greater transparency in its operation, the Laeken Declaration pinpointed the way in which the democratic credentials of the EU could be greatly increased. The Declaration culminated in the convening of the Convention on the Future of Europe to reflect upon the issues raised.³¹ After 17 months of work and discussions, the Convention proposed a Draft Treaty, establishing a Constitution for Europe. The Draft Treaty was debated and amended at the IGC in 2004, eventually resulting in agreement upon the Treaty establishing a Constitution for Europe which was signed by the Member States in October 2004. The Constitutional Treaty³² has been ratified by only 18 out of 27 Member States.³³ Negative results in referendums in France and the Netherlands have stalled progress on the Constitutional Treaty preventing it from entering into force. This negative reaction indicates that the EU must overcome significant obstacles if the normative vision it holds is to be accepted across and within the Member States. The future of the Treaty is yet to be decided.

In order to have a proper understanding of the enforcement mechanism, it must be evaluated in the light of the political context of the EU, especially those normative initiatives bound up in the drive for greater constitutionalisation of the EU. Amongst these is the drive for good governance, adopted by the European Commission as a talisman in the fight against the spectre of the so-called democratic deficit. The Laeken Declaration, the Future of Europe

²⁹ Declaration on the future of the Union, Treaty of Nice OJ C 80 10.3.2001, Declaration 23 at p 80.

³⁰ European Council, December 2001, the text can be found at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf.

³¹ The Convention was charged with preparing for the 2004 IGC in a transparent and open format, including many stakeholders into the debate, for instance, the governments of the Member States and the candidate countries, representatives of national parliaments, representatives of the European Parliament and the European Commission, and observers from the Committee of the Regions, the European Economic and Social Committee and the European social partners. For a step by step description of the work of the Convention and the debate about the future of Europe, see http://europa.eu/scadplus/european_convention/introduction_en.htm. See generally J Shaw 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9 *European Law Journal* 45.

³² Treaty establishing a Constitution for Europe OJ C 310 16.12.2004.

³³ As of January 2007, see http://europa.eu/constitution/index_en.htm.

Convention and the production of a Constitutional Treaty are relevant political factors that structure and underpin a useful evaluation of the role of Article 226 in contemporary Europe.

1.1: Research motivation

The traditional characterisation and approach to Article 226 by the main stakeholders in the enforcement mechanism presents an interesting paradox in contemporary Europe.³⁴ As the EC progressed from an economic to a political union, the EU has become increasingly criticised as an organisation lacking in democratic credentials. These credentials are important since they legitimate the transfer of economic, political and legal power over the citizen from the state to the supranational level. The recent focus of both the institutions and the Member States has been on increasing the legitimacy and popularity of the European project with the citizens of Europe, in the face of increasing disinterest and disillusionment.³⁵ Article 226 provides a rare opportunity for the institutions of the EU to connect directly with European citizens, as citizens can complain to the Commission about breaches of Community law. This forum of institution-citizen interaction is a valuable conduit for improving citizen relations with institutions that are all too often seen as distant, bureaucratic and unapproachable.

Article 226 provides an opportunity for the citizens to hold Member States to account through the EU institutions, by using Article 226 as a complaint forum. The Commission could develop a citizen friendly image as the protector of European citizens' rights by seeking legal enforcement of Member States' obligations. It also provides an opportunity for inter-institutional dialogue and interaction: the Parliament has a vital role to play in ensuring the Commission carries out its role as guardian of the Treaty effectively. Furthermore, the European Ombudsman has sought to improve the administration of the Commission when it interacts with citizens in relation to Article 226 complaints and investigations, and has attempted to create some form of accountability of the Commission to the citizen. Ensuring Member States fulfil their obligations under the Treaty is crucial in terms of protecting and reinforcing citizens' European rights, and is therefore of particular importance in the context of delivering good governance:

‘in a moment of serious doubt about the capability of the EU to listen to its citizens, the ability to ensure the implementation of...legislation, could

³⁴ The traditional characterisation of Article 226 will be explored later in this section particularly with reference to other scholarly works and documents produced by the institutions.

³⁵ See the Eurobarometer website for opinion polls on the popularity of the EU project at http://ec.europa.eu/public_opinion/index_en.htm. See generally A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, Oxford, 2002).

represent a way to regain citizens' confidence that should be given the upmost priority by EU institutions.'³⁶

As part of the good governance agenda, the Commission recognises the importance of its enforcement responsibilities in increasing the legitimacy of the EU, and it contends that it will 'pursue infringements with vigour',³⁷ and that:

'Reforming European governance implies that the Commission must refocus on its core mission...and maximise the impact of the Commission's actions as guardian of the Treaty.'³⁸

The Commission recognises that in order to achieve greater legitimacy, the EU cannot rely solely on policy delivery. This is no longer sufficient in order to connect Europe to its citizens. The sole function of Article 226 therefore cannot be the delivery of effective enforcement alone because:

'The Union is changing as well. It will no longer be judged on its ability to remove barriers to trade or to complete an internal market; its legitimacy today depends on involvement and participation',³⁹

Furthermore:

'Ultimately this...concerns the citizens themselves. Through information, participation and access to justice they are to be the actors of a Community based on the rule of law.'⁴⁰

In the search for greater legitimacy, adherence to the rule of law is crucial. Respect for the rule of law is a fundamental foundation of the EU project, and of Article 226 itself. It is, after all, a mechanism for ensuring Member States respect the rule of law by fulfilling their legally binding obligations under the Treaty. The Commission acknowledges that:

'The Union is built on the rule of law; it can draw from the Charter of fundamental rights'⁴¹

Yet, respect for the rule of law appears to be problematic in the traditional operation of Article 226. A lack of legal regulation of the operation of Article 226, culminating in extensive Commission discretion, means that:

'There is a clear contradiction between the principles underlying the rule of law and a certain practice of indulgence and negotiation engendered by the Commission through its use of Article 226 EC.'⁴²

³⁶ Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final, p 15.

³⁷ European Governance: A White Paper COM (2001) 428 p 25.

³⁸ *Ibid* p 8.

³⁹ *Ibid* p 11.

⁴⁰ Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003, p 21.

⁴¹ Above n 37 p 7.

There is a conflict between the good governance agenda, aimed at increasing legitimacy in the EU, and extensive political and administrative discretion when compliance with legal rules is the ultimate goal:

‘Discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law.’⁴³

Juxtaposed against this search for popular approval and legitimacy, the approach of the stakeholders toward the central mechanism of enforcement appears essentially the same as it always was: an arena of secretive deal-making, riddled with a lack of transparency and accountability for those actors claiming to promote legitimate European governance. If the good governance agenda, and the process of constitutionalisation are to be taken seriously, this situation cannot be permitted to continue. Furthermore, it need not be the case that improving governance in the EU, and the effective operation of Article 226, are seen as contradictory propositions. There is scope for both the delivery of effective enforcement and the accommodation of good governance values through the recognition of the multiple functions which Article 226 performs, and of the different roles of the multiplicity of actors involved in the process of enforcement. This thesis will discuss the issues highlighted in the above quotations, and evaluate the role of Article 226 in the context of good governance and legitimacy in the EU.

1.2: The treatment of Article 226 in academic literature

Much of the early work on Article 226 was by legal scholars, who attempted to break down the provision into distinct phases and analyse the meaning of each particular section of the Treaty article.⁴⁴ Various authors adopt this descriptive analytical approach, whether this relates to the position of an institutional actor in the infringement process, or the specific interpretation of the Treaty given by the Court. For example, some authors have chosen to focus on what conduct constitutes a ‘failure to fulfil obligations’ under the Treaty.⁴⁵ A thorough analysis of the case law provides an illustration of the specific types of Member

⁴² Above n 36 p 15.

⁴³ *Ibid* p 17.

⁴⁴ See generally A Dashwood and R White, ‘Enforcement Actions under Articles 169 and 170 EEC’ (1989) 14 *European Law Review* 388, J Mertens de Wilmars and IM Verougstraete, ‘Proceedings against Member States for Failure to Fulfil their Obligations (1970) 7 *Common Market Law Review* 385.

⁴⁵ A Barav, ‘Failure of Member States to Fulfil their Obligations under Community Law’ (1975) *Common Market Law Review* 369.

State conduct that the Commission will prosecute.⁴⁶ Barav's work is typical of the early legal scholarship on Article 226 which is generally supportive of the Article 226 procedure and remarks that conflict ought to be resolved through negotiation, with the Commission resorting to the Court only '*in extremis*'. This is an approach that reinforces the international, diplomatic characterisation of Article 226 popular in early academic pieces. This analysis is primarily aimed at providing a detailed understanding of the application of the Treaty to specific cases before the Court, in order that the outcome of analogous cases might be predicted using these criteria and applying legal reasoning.

The role of the Court of Justice in Article 226 has also been documented in previous studies. Some pieces particularly focus upon the Court's deferential approach to the Commission's discretion under Article 226.⁴⁷ Article 226 has also been explored as a paradigm of Member State/ECJ interaction, using the outcome of cases and the reasoning applied by the Court to extrapolate the division of power between the respective players (identified as the Commission and Member States).⁴⁸ By analysing the statistics generated by the infringement process, Everling attempted to draw a picture of the way in which Member States react to the pressure of an impending Court appearance for failing to fulfil their responsibilities under the Treaty, and concluded that some Member States are particularly anxious to avoid the 'stain of judgment' resulting from judicial proceedings.⁴⁹

The subject of the Commission's discretion in Article 226 is a familiar topic of inquiry.⁵⁰ Such discussions tend to focus upon the extent of Commission discretion throughout the administrative and judicial stages of the enforcement procedure, and examines the limits (or lack thereof) that the ECJ has attempted to set. This analysis is based on examination of the Article 226 case law from the ECJ and Opinions of Advocates General. Again the procedure is characterised as *sui generis*. The Commission's duty as 'guardian of the Treaty' in Article 211 EC is considered by Evans to be a significant limiting factor upon the exercise of the Commission's discretion under Article 226.

⁴⁶ eg breach of Treaty articles, secondary legislation, general principles of EC law, omission of state as well as action, incorrect application.

⁴⁷ See especially AC Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' (1979) *European Law Review* 442.

⁴⁸ U Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 *European Law Review* 215.

⁴⁹ *Ibid* p 244.

⁵⁰ See Evans, above n 47.

Similar questions have been raised in connection with the use and extent of Commission discretion and the operation of the revised Article 228 procedure, which now includes financial sanctions for non-compliance with judgments under the infringement process.⁵¹ By way of comparison and analogy with the Article 226 process, Bonnie is very critical of these instances of discretion on the grounds that it undermines the effectiveness of the Article 228 procedure. It was not suggested in earlier work that discretion contributed to undermining the effectiveness of the infringement proceedings, because the discussion of Article 226 and Article 228 tended to focus upon the lack of sanctions available to compel the Member States to act. This lack of sanctions, rather than extensive discretion, was considered as the major barrier to effective enforcement. Despite many criticisms levelled at the penalty process by Bonnie, the operation of Article 228 is subject to a great deal more transparent structuring and confining of Commission discretion.⁵² The Commission has produced several Communications specifically explaining the method of calculation and the criteria on which the seriousness of the infringement will be judged. In comparison with Article 226 where there was no similar structuring of discretion, Article 228 appeared to be a far more transparent process.⁵³

Such a discussion of discretion exemplifies the limits of legal analysis. The way in which the Commission behaves in relation to these two similarly worded and closely related Treaty provisions is of great significance, but cannot be adequately explained by legal analysis of the case law and Treaty provisions alone. Political motivations, institutional attitudes and

⁵¹ A Bonnie, 'Commission Discretion under Article 171(2) EC' (1998) 23 *European Law Review* 537.

⁵² This structuring of discretion was self-imposed by the Commission to some extent, but was also a consequence of the ECJ's approach to the imposition of financial penalties. This will be discussed in greater detail in Chapter IV.

⁵³ In fact Bonnie, above n 51, attempts to differentiate the infringement process under Article 226 and the financial sanctions in Article 228 as being entirely unrelated, despite the obvious link between them, to explain the difference in approach by the Commission. But see MA Theodossiou, 'An analysis of the recent response to non-compliance with the Court of Justice Judgments: Article 228(2) EC' (2002) 27 *European Law Review* 25. Theodossiou argues that these Articles are clearly linked. Both Bonnie and Theodossiou seem intent on distinguishing the conduct under each proceeding however, since both authors object to the taking into consideration of voting capabilities in the Council as a criterion for judging the amount of payment, on the grounds that this does not correlate to ability to pay the fine (as in GDP) but to political power. However, political motivation (power) is felt to be an acceptable criterion under Article 226 for judging whether to proceed to the ECJ, or at all. Both argue that as the *ultima ratio* for securing compliance, discretion ought to be minimal under Article 228 as this is seen as a hindrance to effectiveness, but this was exactly the argument used in relation to Article 226 for allowing extensive Commission discretion (Barav, Evans) in earlier academic work.

decision-making processes need to be explored in depth, in order to enhance our understanding of the reasons for a difference in approach.⁵⁴

The seminal work of Audretsch on Article 226 was a forerunner of a more contemporary debate.⁵⁵ This early work focused upon questions of effective supervision not common to works of pure legal analysis, and raised questions about the overall transparency of the process at a time when transparency was not a popular concern of other authors. The scope of his original study was supervision of the Member States in the EC context, which involved examining the principal supervisory sections of the Treaties (ECSC, Euratom and EC Treaty). This study included a comparative analysis of the Treaty articles in relation to state aid and competition.⁵⁶ Additionally, the actual day-to-day work undertaken by the Commission in this field is also analysed, using a number of different empirical materials, including Commission papers and interviews. The analysis of the Commission's activities adds a further dimension to Article 226 scholarship as previous to Audretsch's work little was known about the day-to-day management of the infringement process.

In terms of the characterisation of the infringement process Audretsch notes that it differs from the general obligation contained in the principle of *pacta sunt servanda* in international law, due to the *sui generis* nature of the EC legal order. Nevertheless the Article 226 mechanism retains some of the distinctive nature of international procedure such as the 'diplomatic mystique' involved in its operation, typical of interaction through negotiation, consent and a respectful attitude toward state sovereignty. Commission supervision is characterised as political in nature,⁵⁷ since it occurs with the participation of all the interested parties (defined as the Member State and the Commission). This is justified since it correlated to the (then) political reality of more limited obligations of the Member States and a Community not yet considering its evolution into a constitutional polity. Due to the often competing interests of the Community and the Member States, and the absence of sanctions available for breach, there seemed little alternative to extensive Commission discretion at

⁵⁴ See the work of KC Davis, *Discretionary Justice in Europe and America* (University of Illinois Press, Chicago, 1976).

⁵⁵ HAH Audretsch, *Supervision in European Community Law* (2nd Edition, Elsevier, North Holland, 1986) hereinafter as 'Audretsch'.

⁵⁶ This technique is repeated again and again in many later pieces, for example see Gil Ibáñez, below n 61.

⁵⁷ Above n 55 p 451.

this point in time.⁵⁸ Negotiation was necessary precisely because there were no effective sanctions available to compel Member State compliance.

Much of the academic discussion of Article 226 relates to the question of how to achieve effective enforcement of Community law. In this respect Snyder focuses upon improving the effectiveness of European law using different ‘tools and techniques’.⁵⁹ He characterises Article 226 as just one process of administrative negotiation which, in order to ensure effective enforcement of Community law, ought to be used in tandem with his two other suggested methods of enforcement: soft law and structural reforms. Effective enforcement, in turn, is considered necessary for smooth European integration. In this study Article 226 is characterised primarily as a strategic bargaining device, used to ‘play for rules’ before the Court, essential in order to establish general principles in the case law. In this way, Snyder agrees with Audretsch that the role of the Commission as initiator and enforcer of policy are complementary and are both essential to the successful evolution of the EU.⁶⁰ Article 226 is conceived less in the traditional international/political terms used in the earlier, more doctrinal pieces, and more as a bureaucratic aid to regulation of Community law. The main focus of this piece is the element of ‘structural reforms’ (meaning the interaction between the Commission and national authorities in enforcement), which he contends are vital avenues of reform in order to achieve more effective enforcement.

Increasing the efficiency of Community administration is also an aspect of better supervision and enforcement of Community law. Ibáñez’s study on enforcement examines the role of the Commission in tandem with national administrations when supervising and enforcing EC law, and questions how the two administrations interrelate and conflict, using the structural reforms element of Snyder’s three part enforcement model.⁶¹ Ultimately, this is a search for a more *efficient* system of enforcement of EC law, and Article 226 data is used to establish areas of non-compliance, and therefore to pinpoint areas of possible improvement. Article 226 is described as a tool of administrative regulation, along with other enforcement provisions relating to state aid and competition.

⁵⁸ *Ibid.*

⁵⁹ F Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *Modern Law Review* 19.

⁶⁰ In Audretsch’s terms, the ‘steering’ function of his model of effective supervision.

⁶¹ AJ Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law. Powers Procedures and Limits* (Hart Publishing, Oxford, 1999). See also AJ Gil Ibáñez, ‘Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States’ (2000) 6 *European Law Journal* 148.

Ibáñez's empirical focus is upon problems of co-ordination between the two levels of administration which inhibit efficient enforcement. He concludes that the Commission's enforcement powers should be developed more consistently instead of the current trend of developing enforcement proceedings to suit the particular sector on an *ad hoc* basis. A plethora of individual pieces of enforcement legislation, he argues, has led to unnecessary confusion, favouring the increase in Commission power without leading to better enforcement. Improving efficiency in enforcement is best achieved through the development of clear legal rules, in concert with better co-ordination in the practical application of those rules between the two levels of administration. Studies that move beyond pure legal analysis (such as this one) tend to conclude that the legal framework of Article 226 alone is insufficient to achieve effective and efficient enforcement. Ibáñez suggests on the one hand creating a more flexible and responsive approach to enforcement,⁶² but similarly pushes the notion of further juridification of administrative procedures⁶³ that seems, to some extent, contradictory.

Most authors agree that one function of Article 226 is to enhance uniform integration by means of coercion of Member States to ensure they fulfil their Treaty responsibilities. It is therefore important to consider the relative success of its operation across the Member States: i.e. how effective is Article 226 as a mechanism of integration? This question is addressed in the research undertaken by Siedentopf and Ziller, which examines problems of control and monitoring of Community law and evaluates the consequences of non-compliance for uniform integration.⁶⁴ This study consists of comparative research across all the Member States of how national administrations transpose and implement European legislation in practice, and it is designed to highlight the problems experienced by national administrations in the execution and administrative application of Community law.⁶⁵

A number of directives and regulations are used as the empirical basis of this comparison, drawn from different policy sectors and varying in political, legal and economic significance across the Member States. As well as horizontal comparisons across the Member States in terms of working practices relating to transposition of the directives, there is also a detailed case study of regulations. The research suggests that Article 226 cannot bear the burden of

⁶² *Ibid* p 316.

⁶³ *Ibid* p 320.

⁶⁴ H Siedentopf and J Ziller (eds), *Making European Policies Work. The Implementing of Community Legislation in the Member States Volume I, Comparative Synthesis* (Sage, London, 1988).

⁶⁵ For instance by uncovering of common difficulties across the Member States' administrations or specific problems due to local (legal or political) conditions.

ensuring states comply with their legal obligations and that the future lies in ‘decentralised control’.⁶⁶ This would mean a shift from the traditional reliance on the Article 226 mechanism and Commission enforcement, towards a greater role for the national courts which ought to be the ultimate guardians of proper implementation and application of EU law. As a consequence, the centralised control can become more selective and compensate for the failures of the national control mechanisms.

Although there are numerous studies on Article 226 as a mechanism of effective enforcement, and an equally abundant selection of research on the Commission as an institution, few studies have combined consideration of these two questions. One exception to this is Mendrinou’s paper which focuses on the role of the Commission in European integration through the use of its monitoring powers under Article 226.⁶⁷ Using infringement data to analyse the trends in the Commission’s enforcement policy with regard to particular states and policy areas, Mendrinou argues that the non-compliance of Member States is a ‘systemic phenomenon’ not linked to a particular country or policy area. Mendrinou, through the use of game theory, attempts to construct a theoretical model that explains the differing tactics adopted by the Commission in its enforcement strategy. She concludes that when pursuing infringements the Commission’s own institutional self-interest has had some influence over which infringements are prosecuted and which are not.⁶⁸

The Commission’s policy approach is evaluated by Mendrinou as having moved away from a policy of ‘forbearance’⁶⁹ (the patient, diplomatic approach) to a more aggressive policy of monitoring. Through its monitoring function the Commission has been able to prioritise certain policy fields over others, emphasising integration in one policy sector through consistent pursuit of certain types of infringements. This in turn can be linked to the Commission’s role in policy initiation and policy development. The Commission tends to pursue those policies it remains most committed to, perhaps because it is a particular initiative for which the Commission itself had fought for when acting as the legislator. Thus, the Commission does not pursue each infringement with equal impartial disinterest, contrary to the assumptions made in other academic studies, which do not consider the Commission’s

⁶⁶ CD Ehlermann, ‘Opening Speech at the IVth Erenstein Colloquium’, in H Siedentopf and J Ziller (eds), *Making European Policies Work. The Implementing of Community Legislation in the Member States Volume I, Comparative Synthesis* (Sage, London, 1988) 147.

⁶⁷ M Mendrinou, ‘Non-compliance and the European Commission’s Role in integration’ (1996) 3 *Journal of European Public Policy* 1.

⁶⁸ See also J Tallberg, *European Governance and Supranational Institutions: making states comply* (Routledge, London, 2003).

⁶⁹ Described by Ehlermann, above n 66 as the ‘diplomatic period’.

strategic priorities as a factor that determine how effective Article 226 can be as a mechanism of enforcement.

The European Union presents a unique environment for the discussion of theories that try to analyse why states behave in a certain way in the context of complying with international obligations, because of the *sui generis* nature of the legal obligations incurred by the Member States under the Treaties. Article 226 data is used to pinpoint areas of non-compliance, against which theories or models are constructed which seek to understand the behaviour of states in the arena of compliance with international law. An example of such an approach is Börzel who studies the statistical data relating to Article 226 and examines whether in fact it is possible to assert that there is a growing compliance problem amongst the Member States with EU law, as previous academic works had done.⁷⁰ She asserts that there is no conclusive raw data available to measure accurately the rate of non-compliance of Member States, due to varying factors, such as of the lack of consistency of the reporting methods of the Commission when collating the Article 226 data.

Börzel *et al* critique the use of the figures generated by Article 226 actions, due to the fact that they represent only a sample of all possible breaches, as every breach is not pursued or discovered by the Commission.⁷¹ Statistics alone cannot portray a realistic picture of non-compliance, let alone the underlying reasons for it. Compliance theory is then used to provide the theoretical framework to test hypotheses against the data. This type of study is useful as it tries to understand compliance from the perspective of studying Member State behaviour rather than that of the Commission.

Some contemporary studies into Article 226 have begun to recognise the value of acknowledging and examining the role of other actors in the enforcement process, besides the Commission and Member States. In particular, the role of the complainant in the infringement process has been commented upon. The position of the individual in the infringement process had not been a prominent feature of the earlier academic work, perhaps understandably so given the (then) state of integration at the European level. Timmermans analyses the role of the complainant with reference to established case law principles and Treaty provisions and in doing so restates the traditional approach to Article 226

⁷⁰ TA Börzel, 'Non-Compliance in the European Union: pathology or statistical artefact?' (2001) 8 *Journal of European Public Policy* 803.

⁷¹ TA Börzel, T Hofmann and C Sprungk, 'Why Do States not Obey the Law? Lessons from the European Union?' (EUSA Conference, Nashville, 2003).

scholarship.⁷² The basic premise of the paper is that individuals have no place in the Article 226 process (beyond that of informant), and thus there is nothing amiss in the secretive, international approach to the conduct of Article 226 as it currently stands. Individuals are catered for via the preliminary rulings system under Article 234 and it is within this arena that individuals must pursue their grievances.

In order to increase the effectiveness of Article 226, Timmermans proposes that supervision of EC law should be a 'partenariat' between the Commission and the Member States, with national courts offering better opportunities for the individual to find redress.⁷³ Any attempt to correlate the position of the complainant under Article 226 with that in state aid and competition⁷⁴ is totally rebuffed on the basis that the reason the complainant's role in such proceedings differ is directly related to the type of Treaty provision under consideration.⁷⁵ It is in fact this *a priori* assumption made by many academic studies, that Article 226 has one sole function (i.e. of effective enforcement to be achieved via negotiation between the Commission and Member States) that reinforces a blinkered approach to the characterisation and role of Article 226 which is now out of date in the current political context.

Consideration of the participation and impact of other actors in relation to the operation of Article 226 is limited, although more recently there has been some discussion of the impact of the citizen and Ombudsman.⁷⁶ This study is based on the case law of the courts and consideration of citizen complaints to the Ombudsman in relation to the extent of Commission discretion and the lack of transparency in the infringement process. Rawlings departs from previous studies in that his work questions the appropriateness of the traditional characterisation of Article 226 as a process of 'elite regulatory bargaining', i.e. one of closed and secretive negotiation between Member States and the Commission, or that this is the sole function of Article 226 in the European polity. The role of the complainant in enforcement is not viewed as being restricted solely to preliminary rulings or direct actions, contrary to

⁷² CWA Timmermans, 'Judicial Protection against Member States: 169 and 177 revisited' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers Volume II* (Martinus Nijhoff, Dordrecht, 1994) 391.

⁷³ The type of technocratic jargon used by Timmermans (such as *partenariat* and *complementarity*) is unhelpful in the context of engaging with citizens. This is commented upon further in Chapter III.

⁷⁴ Where the individual possess many more procedural rights than under Article 226, see Maselis for a full discussion below n 75.

⁷⁵ Other scholars have commented on the rights of complainants in other enforcement actions and made the comparison between those and Article 226, see I Maselis and HM Gilliams, 'Rights of Complainants in Community Law' (1997) 22 *European Law Review* 103 is one example relating to state aid and competition.

⁷⁶ R Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal* 4.

the view of Timmermans. Instead he asserts that private actors do have a role to play in public enforcement, and this needs to be complemented by a more effective targeting of Commission enforcement policy.

The material presented above provides a broad overview of previous academic discussion of Article 226. In summary, Article 226 has been characterised as a forum of negotiation between the Commission and Member States, with the ECJ having a deferential attitude to the institutional power of the Commission. Rather than a mechanism of strict legal enforcement, the judicial phase of Article 226 has been characterised as a mechanism that is resorted to only in extreme circumstances and after all other avenues have been exhausted. The enforcement mechanism was surrounded by 'diplomatic mystique' and as such was not open to scrutiny by outsiders. The emphasis had largely been on the examination of just two actors in the enforcement mechanism; the Commission, which devises, manages and controls the enforcement process, and the Member State which is the subject of the enforcement action. These studies are concerned with either legal analytical questions, or with questions of institutional behaviour, but do not necessarily identify the connection between the two.

Previous scholarship has (largely) assumed that Article 226 has one function/output in the EU polity, usually that of achieving effective enforcement of Community law. The question of how this is best achieved in the light of a cumbersome legal provision has been explored at length, whether through decentralised control, better coordination between national and European administrations or a more effective enforcement policy from the Commission. It is rarely acknowledged that Article 226 might have more than one function in the European polity.⁷⁷ Furthermore, this single function approach is analysed almost always in isolation from the contemporary legal and political context of the Union. When contemporary legal or political developments have been commented upon, it has been incidental to the discussion or has not been considered of particular importance or explored in any significant depth.⁷⁸

Similarly, the Commission's discretion and its consequences is an abundantly analysed topic in legal doctrinal accounts of Article 226. However, work on discretion based on the analysis of legal provisions or case law provides a necessarily limited set of questions and answers and does not address the more in-depth conceptual and theoretical problems

⁷⁷ Although see the very recent article by C Harlow and R Rawlings, 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure' (2006) 31 *European Law Review* 447.

⁷⁸ See the recent article by A Bonnie, 'The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States?' (2006) 1 *Journal of Contemporary European Research* 39.

inherent in the exercise of discretion that are tackled by other disciplines such as public administration. This is because legal scholarship focuses upon analysing specific sections of legal text which are broad enough to confer discretion on an actor through wide drafting of particular phrases. This analytical approach then considers ways to limit or expand this discretion using legal reasoning techniques, or using pre-established legal principles (for instance, natural justice) to instil limits to discretion that are not necessarily self-evident by reading the text itself.⁷⁹ There is no investigation into the complex institutional/actor interactions that occur within the enforcement process, or the behaviour of the actors on whom discretion is conferred (for instance the factors which may influence the way in which they exercise this discretion).⁸⁰

1.3: The research puzzle

This study will contribute to the scholarly discussion of the role of Article 226 by starting from the basic standpoint of questioning the function (or functions) of Article 226. In contrast to the established approach to discussions on Article 226, this study begins from the proposition that the Article 226 mechanism has many different functions or roles. These differing functions must all be accommodated within the Article 226 process, and any conflicts between these functions must be identified and explored before a useful evaluation of the role of Article 226 can be undertaken. An examination of the role of Article 226 cannot be complete if only one function, say that of effective enforcement, is identified as the only relevant consideration. Table 1 below highlights the various functions or processes that exist under the umbrella of Article 226.

⁷⁹ R Mastroianni, 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?' (1995) 1 *European Public Law* 535.

⁸⁰ See for instance the work of K Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002).

Table 1***The different functions of Article 226***

<i>Function of Article 226</i>	<i>Output/Example</i>
Constitutional mechanism of enforcement, compliance and integration.	Uniform application of EU law.
Executive policy choice.	Design/implementation and control of policy on enforcement a Commission prerogative.
Forum for citizen-institution interaction.	Citizen-Commission, citizen Ombudsman, citizen-Parliament.
Administrative/regulatory tool.	Rule making for Member States, soft law codes for citizen.
Institutional forum for debate, control and accountability.	Commission-Member State, citizen-Member State via Commission, Parliament-Commission, Ombudsman-Commission.

There are five different functions that must be accommodated within the enforcement mechanism of Article 226. There is an obvious emphasis on compliance and effective enforcement evident throughout the scholarly literature and the policy papers of the Commission. Article 211 EC, which governs the Commission's responsibilities, makes clear that as 'guardian of the Treaty' it must ensure that Member States comply with Community obligations. Under the auspices of Article 226, during the period of infringement investigation and management by the Commission, there is also a rare opportunity for the European Union to connect directly with its citizenship⁸¹ by a process of complaint and administrative interaction between the citizen and the institution. The European Commission encourages this interaction between itself and the citizens of Europe as vital to the process of monitoring Member State compliance with Community obligations, and in doing so engages in the process of administrative rule making through the use of soft law instruments. Article 226 also provides a forum for valuable institutional interaction and debate in the EU, and is one of the few processes by which the actors interact to provide control and accountability in respect of the how enforcement responsibilities under Article 226 are discharged. The European Ombudsman and the European Parliament are the primary institutions involved in this process of debate and control with the European Commission. Finally, Article 226 confers an executive policy choice on the Commission – it

⁸¹ There is a lively debate about the nature and extent of citizenship in the EU, and the relationship between the citizens of Europe and the institutions, see generally S O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer, The Hague, 1996), J Shaw, 'European Union Citizenship: The IGC and Beyond' (1997) 3 *European Public Law* 413, J Shaw 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 60 *Modern Law Review* 554, RW Davis 'Citizenship of the Union...rights for all?' (2002) 27 *European Law Review* 121.

alone is responsible for formulating the strategy on how it will pursue, investigate and prosecute infringements and which areas of substantive EU policy it will concentrate its efforts upon. This in turn effects the output of the Union, and in doing so impacts upon the process of integration and the citizens' perception of what the EU can deliver.

This study evaluates the role of the Article 226 in light of the different functions assigned to it, with reference to the contemporary legal and political context of the EU. This study then questions to what extent the current understanding of the role of Article 226 fits with the greater aspirations of good governance and legitimacy in the EU. An understanding of the contemporary legal context of the EU is essential to the evaluation of the role of Article 226 as an enforcement mechanism. Article 226 is of course a legal provision, and one that has been shaped by the interpretation of the courts. The EU is not a static legal environment and the Treaties are 'living instruments', where the interpretation of text is always evolving. The legal system of the EU has changed enormously since Article 226 was conceived, and this includes the continuing development of administrative law and human rights principles, along with an increasing expectation of rights protection amongst the European public.

The relationships and interactions that occur within the enforcement action are themselves governed by legal principles that have been developed by the courts. It is also a legal provision that accords tremendous power to the Commission in dealing with compliance in an administrative forum. Most of the institutional decision-making under Article 226 occurs in the administrative phase of the enforcement action, in fact around 91 per cent.⁸² The importance of legally enforceable administrative rights becomes relevant, especially in the context of creating greater accountability in respect of European institutions, and the role of administrative law in creating a legitimate system of governance.

The political context is equally important in evaluating the role of Article 226. This study identifies Article 226 as the central mechanism of enforcement in the constitutional architecture (the Treaties) of the EU. Member States' compliance with the Treaties is fundamental to the success, and even the existence of, the European project:

⁸² Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final. Out of 2146 infringements detected, only 202 were referred to the ECJ, or 9% of the total infringements detected. All other infringements were therefore dealt with in the administrative phase of Article 226.

‘In an enlarged EU the fact that laws are correctly and visibly implemented is essential to give meaning to the whole European project. This is not only a matter of legal obligation but also a question of political responsibility’.⁸³

The uniform application of EU legislation in all Member States underpinned the initial primary goal of creating an economic area, where the conditions governing the internal market are equalised across the Union, necessitating a system of uniform legal rules across state boundaries.⁸⁴ Although the goals of the European project have moved forward to a political union, the need for Member State compliance with their Community obligations has remained of primary importance. The drive toward political union, in combination with the enlargement of the EU, has posed even greater challenges in terms of ensuring Member State compliance, with a greater geographic area to monitor and ever more politically sensitive policy domains being transferred to EU competence. With a changing political environment come unique challenges to enforcing compliance with European obligations, although the central mechanism for ensuring compliance remains unchanged. Against this backdrop, Article 226 is problematic as the central enforcement mechanism of the EU because it has not evolved in line with either the dominating legal or political aspirations of the EU.

Against this legal and political background, this study characterises Article 226 not simply as a single faceted legal provision, but also as a unique space of interaction for a multitude of actors. The study takes into consideration the increasingly important input of other actors involved in the enforcement process, such as the European Ombudsman, the complainant and the European Parliament, as well as the more traditionally discussed roles of the Commission, Member State and the ECJ. The focus on the Commission, the European Ombudsman and the ECJ (and where appropriate the Court of First Instance) as the institutional actors considered in detail in the study is motivated by relevance to the thesis question, and methodological reasons. The role of the two courts is relevant as, in the interpretation of the Treaty and development of administrative principles, they provide the legal framework within which the enforcement mechanism is operated. The Commission is the primary actor in Article 226, as it is charged with the responsibility of monitoring and enforcing compliance, and is also responsible for the design of enforcement policy itself, and

⁸³ Above n 36 p 11.

⁸⁴ The uniform application of EC law has been achieved through a variety of mechanisms in the Treaty as well as the developing jurisprudence of the ECJ, which developed the doctrine of direct effect and supremacy. However, ensuring compliance with all the Treaty provisions, through the use of Article 226, is the precondition for these doctrines to be effective – they are only as effective as Member States’ compliance with them. Member States must comply with the doctrine of supremacy and direct effect as part of its obligations under the Treaties, and this is ensured through the Commission’s guardianship through Article 226 amongst other things.

more generally the political and policy direction of the EU. This enables a comparison to be made between the Commission's practice in Article 226 against its overall policy ambition of delivering good governance in the EU. The Ombudsman fulfils the role as surrogate for the European citizen; through this actor, those issues relevant to the administrative function of Article 226 will be explored, including whether the administration of Article 226 conforms to principles of good administration and good governance. The European Parliament and Member States also play a role in Article 226, but their roles are primarily reactive rather than proactive in nature, and accordingly the impact of these institutional actors will not be considered in the same detail.⁸⁵ Consideration of a greater number of actors is crucial to analysing the role of Article 226. It enables all the functions of Article 226 to be taken into account when analysing the role of this mechanism in the current legal and political context, and it allows a different set of questions to be pursued, including issues of control, accountability and legitimacy.

The impact of these actors on the role of Article 226, and the extent to which they have contributed to re-shaping the role of Article 226 by their interaction with each other, will be discussed against a framework of analysis that has been developed on the basis of the legal and political context identified. This will be composed of the separate but overlapping conceptual tools of good administration, good governance and legitimacy. These concepts are explored in further detail in Chapters II and III, which set out the intellectual framework for the evaluation of the role of Article 226 in contemporary Europe.

1.4: Research approach

The study will consider the role of Article 226 in the context of good governance and the quest for greater legitimacy in the EU. I have approached this question by breaking down the main topic into a number of smaller questions. What is the contemporary legal administrative and political context in the EU, and how has it impacted upon the operation of the enforcement mechanism? What do we mean when we discuss concepts such as legitimacy, good governance and good administration? What actors actively shape the development of the enforcement mechanism, and how have they shaped it? How does the design, management and operation of the enforcement mechanism fit with the aspirations of greater legitimacy, against a defined benchmark of good governance and good administration? Can we re-conceptualise the role of Article 226 as being able to provide

⁸⁵ The extent to which the Member States and European Parliament play a proactive role discussed throughout Chapters IV, V and the VII.

accountability and legitimacy alongside effective enforcement? Essentially, this study seeks to move academic discussion of the enforcement mechanism away from an entrenched historical perspective of a negotiation forum focused on the sole function of effective enforcement, by examining Article 226 in the light of more contemporary debates including concepts such as democracy, legitimacy, good administration and good governance in the EU. Figure 2 below sums up the research approach and puzzle.

Figure 2

Research approach and puzzle⁸⁶

Good governance and legitimacy in the EU: the role of Article 226 EC	
Intellectual framework	<p>Inquiry: What are the factors that influence the role of Article 226? <i>Research aim:</i> To identify the different functions of Article 226, and to establish the relevant legal and political questions which influence the development of the role of Article 226. <i>Examines</i> the contemporary legal and political context of the EU, focusing on the role of administrative law and contemporary debates about legitimacy and good governance in the EU <i>Carried out:</i> Chapter I (functions and actors) Chapter II (legal context) and Chapter III (political context)</p>
	<p>Inquiry: What is the appropriate benchmark against which the role of Article 226 should be evaluated? <i>Research aim:</i> To create a set of defined criteria against which the role of Article 226 may be evaluated <i>Examines</i> the development of administrative law principles and the policy initiative of good governance in the EU <i>Carried out:</i> Chapter II (legal context) and Chapter III (political context)</p>
Empirical investigation and analysis	<p>Inquiry: Who are the relevant actors, and what interactions, shape the role of Article 226? <i>Research aim:</i> To identify the relationships and interactions that affect the role of Article 226, and assess the impact of these actors on the enforcement mechanism through analysis of empirical material <i>Examines</i> the ECJ and CFI, the Commission, the European Ombudsman, complainant and European Parliament by analysing relevant case law, policy papers, interview data, reports and complaints <i>Carried out:</i> Chapter I (actors) Chapter II (the courts), Chapter IV and V (the Commission and Parliament), Chapter VI (the Ombudsman/complainant)</p>
	<p>Inquiry: To what extent is the role of Article 226 compatible with the concepts of good governance and legitimacy in the EU? <i>Research aim:</i> To identify the strengths and weaknesses of Article 226 as an enforcement mechanism in a constitutionalised Europe <i>Examines</i> the compatibility of Article 226 with the criteria of legitimacy and good governance, and considers the scope for re-conceptualising the role of Article 226 in order to accommodate the aspirations of good governance and legitimacy <i>Carried out:</i> Chapter IV and V (the Commission/European Parliament), VI (the Ombudsman/complainant) Chapter VII (conclusions)</p>

⁸⁶ I have drawn inspiration for the format of this model from D Sindbjerg Martinsen, 'European Institutionalisation of Social Security Rights: A Two-layered Process of Integration' (European University Institute, Florence, PhD Thesis, 2004) p 13.

1.5: Research method

The primary research method employed in this study has been examination and analysis of primary and secondary documentary material. This has been complemented by conducting elite interviews. The primary research material consists of a broad spectrum of documents sourced from the actors involved in the enforcement mechanism. In order to evaluate the appropriate legal context, I will analyse the approach of the European courts including where appropriate specific judgments of the courts. The political context, and in particular the normative initiative of good governance in the Union, will be analysed with particular reference to the Commission's White Paper on Governance⁸⁷ and the subsequent Communication on Better Monitoring.⁸⁸

The Commission's Communications and Annual Monitoring Reports provide useful information on the Commission's approach to monitoring. This primary research material is however necessarily one-sided as it presents Article 226 from the perspective of the Commission alone. In order to uncover another perspective on the role of Article 226, the Annual Reports and Decisions of the European Ombudsman, along with Reports from the European Parliament have also been analysed.

In addition, elite interviews have been conducted in relation to the institutional actors involved in the enforcement mechanism. This includes Commission officials, the European Ombudsman and his staff as well as staff of the European Parliament. Interviews with Commission staff were conducted on the basis that they remain absolutely anonymous. In order to preserve the confidentiality of those who agreed to be interviewed, where requested by the interviewee, the generic title 'Commission Official A' etc and the date they were interviewed is the method used to identify the source. A list of the questions and a breakdown of all interview data can be found in Appendix 1.⁸⁹

The secondary documentary material comprises scholarly works in the disciplines of law, public administration and political science.

⁸⁷ Above n 37.

⁸⁸ Above n 40.

⁸⁹ See Appendix 1 for full information on the elite interview methodology, including breakdown of those interviews, questions and answers where appropriate.

1.6: Thesis structure

The thesis is divided into seven chapters. *Chapter I* introduced the thesis puzzle and explained the research approach and motivation, and contextualised the study in relation to other academic discussion of Article 226.

Chapter II begins an examination of the actors involved in Article 226 by providing an outline of the contribution of the Court of Justice (and where appropriate the Court of First Instance) in developing legal principles applicable to the enforcement mechanism, and explains the role of administrative law as a part of the EU's quest for legitimacy. It identifies the lack of legal controls on the operation of the infringement procedure as being unacceptable within the EU as an organisation with pretensions of good governance and constitutional legitimacy.

Chapter III explores the current debates about democracy and legitimacy in the European Union and focuses on the examination of the Commission's conceptualisation of what constitutes good governance in the EU, as presented in the White Paper on Governance. On the basis of both institutional and academic debates about legitimacy, democracy and the EU, this Chapter develops a framework of analysis using the concepts of good administration, good governance and legitimacy as separate but overlapping lenses through which the role and operation of the enforcement mechanism will be evaluated.

Chapter IV continues the examination of the major institutional actors that affect the development of the enforcement mechanism, focusing on the Commission's practice, management, and attempt at reform of the enforcement mechanism. This Chapter also highlights the relevant interactions of the Commission and Member States, and the influence this has had on shaping the way in which the Commission manages Article 226.

Chapter V examines the Commission's strategy with regard to Article 226, provided by the Commission in its Communication on Monitoring,⁹⁰ and considers to what extent the Commission's commitment to good governance can be cross-referenced against the available data provided by the Commission in its Annual Monitoring Reports. The choices of the Commission are then examined against the framework model developed in Chapter III, particularly focusing on the principles of good governance.

⁹⁰ Above n 40.

Chapter VI continues the examination of institutional actors by analysing the impact of the European Ombudsman on the enforcement process, as both a surrogate for the citizen as well as an institutional actor in its own right. It begins by analysing the procedural reforms brought about by the institutional interaction of the Commission and Ombudsman, and then considers the impact of the Ombudsman in relation to enforcing principles of good administration in relation to infringement investigations. It identifies good administration as the foundation of good governance, and analyses to what extent the Commission's approach to citizen-institution interaction is consistent with principles of good administration and good governance.

Chapter VII presents the conclusions of the research and considers to what extent it is possible to reconceptualise the role of Article 226 in the light of good governance and legitimacy in the EU by taking into account the different functions of the mechanism and the multiplicity of actors involved in the process.

Chapter II: Mind the accountability gap – administrative law and legitimate governance

The role of administrative law is central to the legitimacy of any system of governance. In a system of governance based on the rule of law¹, those who wield public power must respect the law and where that power is discretionary, there must be clear limits upon it to prevent arbitrary, corrupt or unfair behaviour. Administrative law may be broadly defined as

‘a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of various organs of government that are engaged in administering public policies...there is no bright line demarcating constitutional and administrative law’.²

It can be viewed as a system for controlling public power, or as a system to facilitate the defence of an individual’s rights or as a conflation of both these propositions.³

The development of administrative law and the role it plays in a system of governance is dependent upon the context in which it develops. Thus, there is a different role and definition applied to administrative law across the Member States of the EU.⁴ A typical view of English administrative law might be that it provides a conduit for making public actors accountable to the public through a variety of mechanisms; accountability is a key organising concept in providing a useful definition of the nature of administrative law.⁵ It may provide certain procedural safeguards for individuals when dealing with public authorities, or provide a mechanism for challenging the decisions taken by public authorities that adversely affect an individual’s interests. Regardless of which normative approach is taken to the characterisation of administrative law, even in the most developed democratic systems of governance, administrative law is an essential factor in the delivery of a legitimate system of rule.

¹ In this sense, that both the citizens and the institutions (and the officers of those institutions) are all equally subject to the law. See generally J Jowell, ‘The rule of law today’ in J Jowell and D Oliver (eds), *The Changing Constitution* (5th Edition, Oxford University Press, Oxford, 2004), P Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] *Public Law* 467, J Raz, ‘The rule of law and its virtue’ (1977) 93 *Law Quarterly Review* 195.

² AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th Edition, Pearson Longman, Harlow, 2006), ch 27 p 657. For more detailed definitions of administrative law see P Craig, *Administrative Law* (5th Edition, Sweet & Maxwell, London, 2003), P Leyland and G Woods, *Textbook on Administrative Law* (5th Edition, Oxford University Press, Oxford, 2005), M Loughlin, *Public Law and Political Theory* (Clarendon Press, Oxford, 1992), J Schwarze, ‘Sources of European Administrative Law’ in S Martin (ed) *The Construction of Europe* (Kluwer, The Netherlands, 1994) 183.

³ C Harlow and R Rawlings, *Law and Administration* (2nd Edition, Butterworths, London, 1997).

⁴ C Harlow, ‘European Administrative Law and the Global Challenge’ EUI Working Paper 98/23 European University Institute, Florence, <http://cadmus.iue.it/dspace/handle/1814/3//browse-date>, JP Olsen, ‘Citizens, public administration and the search for theoretical foundations’ ARENA Working Papers WP 20/03, <http://www.arena.uio.no/publications/>.

⁵ P Cane, *Administrative Law* (4th Edition, Oxford University Press, Oxford, 2004) ch 1.

The wide variety of administrative law traditions within the Member States⁶ has not been transplanted uniformly into the European Union system of governance.⁷ Unlike the rich administrative traditions of individual Member States, there has been little activity in the EU on a horizontal and/or legislative basis to systemize the application of administrative law. Although Member States may have legislation to govern the behaviour of discretionary administrative decision-making, or a long-standing common law tradition of judicial review based on principles of natural justice, no such tradition has been inculcated into the European level administration.

It is more common to see a non-linear approach to administrative law in the EU, where administrative principles and procedural guarantees are sourced from the individual Treaty provisions or specifically granted in sector specific secondary legislation. These vary a great deal as to their nature and extent. This has led scholars in the field of public administration and European law to debate the appropriateness of adopting a more systematic approach to administrative law in the EU.⁸ This chapter does not seek to revisit such debates, but instead focuses upon examining the legal context within which Article 226 is operated.

Understanding the role that administrative law plays in the operation of the enforcement mechanism is particularly important when considering whether Article 226 is compatible with the wider legal context of the EU. The administrative element of Article 226 is overwhelmingly the most dominant part of the enforcement action in terms of institutional decision-making. For instance in 2004, 91 per cent of the cases were closed in the administrative phase of the process.⁹ It is therefore of crucial importance to understand how the administrative part of Article 226 is regulated by the Treaty and how the case law

⁶ R Seerden, and F Stroink (eds), *Administrative Law of the European Union, its Member States and the United States* (Intersentia Uitgevers, Antwerpen – Groningen, 2002).

⁷ On the cross-fertilisation of administrative law through membership of the EU, see J Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe' in J Beatson, and T Tridimas (eds), *New Directions in European Public Law* (Hart Publishing, Oxford, 1998) 147. See also JP Olsen, 'Towards a European administrative space?' (2003) 10 *Journal of European Public Policy* 506.

⁸ See generally C Harlow, 'Codification of EC Administrative Procedures. Fitting the Foot to the Shoe or the Shoe to the Foot?' (1996) 2 *European Law Journal* 3, P Craig, 'The Constitutionalisation of Community Administration' Jean Monnet Working Paper 3/03, <http://www.jeanmonnetprogram.org/papers/index.html>, AJ Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law. Powers Procedures and Limits* (Hart Publishing, Oxford, 1999), AJ Gil Ibáñez 'Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States' (2000) 6 *European Law Journal* 148.

⁹ Out of 2146 infringement cases detected, only 202 (9%) were referred to the ECJ, beginning the judicial element of the Article 226 process, source Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final.

principles are developed through judicial interpretation. To what extent has administrative law, through the interpretation of the courts, contributed to filling in the gaps left by the widely drafted Treaty language, in order to deliver procedural safeguards on the exercise of public power?¹⁰

It is appropriate to examine the contribution made by the Court of Justice (ECJ) and the Court of First Instance (CFI) to the development of administrative rights across the EU legal system in general (to identify the context) and specifically in relation to Article 226 (to assess its impact). Judicial enforcement and development of administrative rights is of special significance, particularly in the absence of any secondary legislation granting administrative rights, or extensive recognition of procedural guarantees in the Treaty provision.¹¹ Before assessing the impact of administrative law principles in delivering greater legitimacy to the operation of Article 226, it is necessary to narrow down the focus from 'administrative law' generally to key principles or rights to be found in the EU legal system.

The chapter will be structured as follows. Section one will outline the main sources of administrative law in the EU legal system, in order to provide an overview of the legal context in which the enforcement mechanism is operated. Section two then focuses upon two key horizontal administrative principles (transparency and the obligation to provide reasons for decisions) as principles that could contribute to the legitimisation of the use of public power under the enforcement action, and will discuss the applicability of such principles to Article 226. Section three considers the renewed drive to develop further administrative rights in the EU, as the EU advances towards greater constitutionalisation, based on the provisions of the Charter of Fundamental Rights.¹² Section four will then present a brief comparative analysis of the ECJ and CFI's approach to administrative rights in three different enforcement actions in the Treaty. Finally, some concluding remarks are made on the success of the courts in developing and applying administrative law principles in order to provide control and accountability to the operation of the enforcement mechanism.

¹⁰ This chapter does not consider any 'soft law' procedural protections and only deals with the applicability of formal legal rights.

¹¹ Obviously administrative law is far wider than simply the operation of judicial review mechanisms or court developed remedies.

¹² The European Union Charter of Fundamental Rights, Title V: Citizens' Rights OJ C 310 16.12.2004. hereinafter referred to as the 'Charter'.

1.0: An introduction to administrative law in the EU

It is the role of the two European courts in the development of administrative law as it applies to the European institutions that is most relevant when considering the impact of administrative law on the enforcement mechanism.¹³ The ECJ stands at the apex of the European judicial architecture that comprises the ECJ, the CFI and the courts and tribunals of the Member States.¹⁴ The role of the ECJ in the development of the European legal order is a familiar topic of discourse in European literature, generating both supporters and critics of its self-imposed role of judicial integration.¹⁵ The ECJ's inability to cope with its ever increasing caseload led to the creation of the CFI, initially to deal with fact intensive cases brought by private applicants in areas such as competition law, state aid and staff cases. Gradually the jurisdiction of the CFI has been widened, culminating in a much needed overhaul in the Treaty of Nice.¹⁶ Broadly speaking, the ECJ retains the sole jurisdiction to hear cases that concern an 'essential Community issue' and cases brought by privileged applicants.¹⁷

If the ECJ remains the 'constitutional court' of the EU, the CFI is better characterised as an administrative court, due to the original jurisdiction of hearing fact intensive cases from individual applicants, and challenges to individual decisions of an administrative nature. Consequently, the different courts do not always approach the issue of administrative rights in exactly the same way. The ECJ retains sole jurisdiction over enforcement actions brought by the Commission against the Member States under Article 226. Nonetheless, it is the CFI that is the main arena for enforcement actions under the competition and state aid provisions of the Treaty, and it is the CFI that has been most active in developing administrative rights

¹³ For the sake of clarity in discussing the development of administrative law, references are made to either the ECJ or CFI individually where appropriate. The term 'courts' refers to both these institutions together. There is no discussion of the role of the national courts although they are an integral part of the European judicial system.

¹⁴ In addition, the Treaty of Nice (TN) amends the EC Treaty and allows for the creation of specialised 'judicial panels' which also form part of the European judicial architecture, Article 225a EC. This resulted in the creation of the Civil Service Tribunal which deals with staff cases, Council Decision 2004/752/EC 2 November 2004 establishing the European Union Civil Service Tribunal OJ L 333 9.11.2004 p 7.

¹⁵ See generally A Arnall, *The European Union and its Court of Justice* (2nd Edition, Oxford University Press, Oxford, 2006), G De Burca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press, Oxford, 2001), HP Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing, Oxford, 1998).

¹⁶ These range from the creation of the specialised judicial panels designed to perform the same role the CFI originally performed for the ECJ, ie to cope with the ever increasing case loads, to the inclusion of a provision in Article 225(3) which would allow the CFI jurisdiction to hear preliminary rulings in specific areas of law.

¹⁷ The distinction between privileged and non-privileged applicants will be explained below.

where instances of institutional decision-making have directly impinged on the interests of individuals.

One of the most commonly recognised features of administrative law is the ability of the courts to oversee the discretionary decision-making power of public authorities through the function of judicial review. This review function ensures that public authorities exercise public power in a fair and impartial manner, and it is crucial to the legitimisation of such an authority's discretionary power. Another common feature of administrative law is the right of access to information. Freedom of information, or transparency in a system of governance, even has constitutional significance in some Member States. In the context of the EU, human rights principles may also be relevant in so far as they might provide further grounds for judicial review of administrative discretionary action. In the EU such principles are said to be 'general principles' of EU law and may provide the basis for the development of abstract principles that are administrative in nature.¹⁸ In the EU, the source of the courts' power is Article 220 EC which states that:

'The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.'¹⁹

The ECJ interpreted this article broadly and it became the source of the ECJ's power to review measures not listed in the Treaty, and bodies which were not expressly subject to its review power, and it became the basis for developing general principles of review that were of a constitutional nature.²⁰ The ECJ may only review acts of the institutions. These are acts which produce 'legal effects'. This is not restricted to legislative acts, but the act must be capable of producing a change in somebody's rights and obligations. In general, this will not apply to recommendations or opinions²¹. The next sections will briefly explain the provisions governing the process of judicial review and the general administrative principles that have been developed by the courts (initially the ECJ and then later the CFI) to increase the scope and application of administrative law principles.

¹⁸ Although human rights review may be considered as constitutional rather than administrative in nature.

¹⁹ This article concerned the ECJ alone until it was amended by the Treaty of Nice Article 31 to include the CFI.

²⁰ See P Craig and G De Búrca, *EU Law Text Cases and Materials* (3rd Edition, Oxford University Press, Oxford, 2003) p 97.

²¹ Except where Parliament is acting alone. See TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003) pp 337-338.

1.1: Judicial review of EU institutional decision-making

The segmented approach to the development of administrative law means that most administrative rights are found in individual Treaty provisions or secondary legislation. However, there are some common sources of administrative law to be identified in the EU. Article 230 EC is the general provision for judicial review of the activities of the institutions. There are two main elements to consider in any system of judicial review: ability to obtain *locus standi* and the grounds of review. Article 230 differentiates the position of privileged applicants (Member States, European Parliament, Council and Commission) and of the semi-privileged applicants²² from that of the non-privileged (all other potential applicants, whether natural or legal persons).

The privileged applicants may (within the two month limitation period) always bring applications before the ECJ on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law, or misuse of powers. Individual applicants find themselves in a lesser position to challenge Union acts since they may only do so in three circumstances: (1) if they are the addressee of the decision (2) if the decision is addressed to another but is of direct and individual concern to them (3) if the decision is in the form of a regulation but is of direct and individual concern to them. The case law resulting from this Treaty article has been interpreted narrowly to mean that an individual can only gain *locus standi* if he or she can fulfil the narrow definition for being directly²³ and individually concerned.²⁴ This means it is virtually impossible to challenge a measure not addressed to the individual, even though this was a possibility contemplated by the Treaty itself under the wording of Article 230.

The issue of standing under Article 230 in the EU has generated enormous controversy amongst EU scholars, and is roundly criticised as being too narrow, resulting in a lack of access to justice for European citizens.²⁵ Whilst this is not the appropriate place to rehearse

²² The Court of Auditors and the European Central Bank may only sue in defence of their prerogatives.

²³ Although the requirement of 'direct concern' is a limiting condition in itself, it is the condition of 'individual concern' that has caused most difficulty in this area of law, see J Steiner *et al*, *EU Law* (9th Edition, Oxford University Press, Oxford, 2006) pp 249-266.

²⁴ Known as the Plaumann test 'certain attributes peculiar to them... factors distinguishing them individually just as in the case of the person addressed' Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

²⁵ MP Granger, 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo Quéré et Cie SA v Commission* and *P Unión de Pequeños Agricultores v Council*' (2003) 66 *Modern Law Review* 124, P Craig, 'Standing, Rights, and the Structure of Legal Argument' (2003) 9 *European Public Law* 493.

that debate, a few points remain relevant. The ability to obtain judicial review in a system of governance is directly linked to the ability of administrative law to deliver legitimacy to public decision-making.²⁶ The more restrictive access to judicial review becomes, the less legitimacy is generated by the existence (in principle) of judicial review. Some systems of administrative law have wide *locus standi* rules and narrow grounds of review; some instead have narrow *locus standi* rules and wide grounds of review. These choices reflect the desire to enable legitimate challenges to public decision-making, whilst simultaneously limiting the number of cases that can proceed to court.²⁷ However, the EU has both narrow *locus standi* rules and narrow grounds for review (as interpreted by the ECJ), making individual challenges in general to EU institutions decision-making extremely difficult to achieve.²⁸

There are four grounds for review under Article 230: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or any rule of law relating to its application and misuse of powers. The latter three grounds of review are often interchangeable and the ECJ does not necessarily have a strict approach to categorisation of rights in each ground. For instance, a breach of the right to a fair hearing may be deemed a breach of an essential procedural requirement, or a breach of any rule of law. In order for the court to consider conduct to be a breach of an essential procedural requirement, it is usually a procedural requirement that is contained in the Treaty or secondary legislation rather than one required by the court on the basis of an abstract principle. It is primarily these two grounds of review that form the basis of challenges to administrative decisions in individual cases, with the grounds of misuse of power and lack of competence providing (often interchangeably) grounds for review of a more constitutional nature.²⁹

1.2: General principles of EU law as a source of administrative law

The third ground of review, an infringement of the Treaty or any rule of law relating to its application, has been interpreted by the ECJ to include the so-called general principles of EU law. These principles have been developed by the ECJ over a long period of time and are

²⁶ In the case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* Application No. 45036/98 [2006] 42 EHRR 1, the European Court of Human Rights has recently indicated that it may in future be willing to re-examine whether an individual's access to review by the ECJ is protected sufficiently to satisfy the standards of the European Convention on Human Rights and Fundamental Freedoms, Article 6. See concurring opinions of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki and the concurring opinion of Judge Ress.

²⁷ See generally C Harlow and R Rawlings, *Pressure Through Law* (Routledge, London, 1992).

²⁸ See generally C Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 *Yearbook of European Law* 213.

²⁹ Such as challenging a piece of legislation because it has been based on the incorrect legal base of the Treaty, see Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.

inspired by the constitutional traditions and legal systems of the Member States³⁰; they include, but are not limited to, human rights principles, in particular those contained in the European Convention on Human Rights and Fundamental Freedoms.³¹ They have not been concretely defined and are an open ended set of ideas or principles that may guide the courts when deciding cases. Although some of these general principles may be reflected in Treaty articles or secondary legislation, many are not specified in such a format and have been developed on an *ad hoc* basis.

There is no definitive closed list of general principles. They provide an illustration of the evolution and nature of the EU legal order – one that is influenced by the legal systems of the Member States and so changes with each new accession and reflects changes within the Member States themselves. This ‘cross fertilisation’ has resulted in the general principles of the EU reflecting the diverse legal traditions of the common law and civil legal systems of the constituent members.³² The principles that are transferred into the EU arena undergo a metamorphosis in order that they might properly interact with the other elements of the *sui generis* EU system. This means that the EU general principles neither retain the same function and definition that they once did in the original Member State, nor are they applied in the same manner. Consequently, whilst the explanations of what constitutes the ‘general principles’ of EU law differ according to which texts are consulted, there are some common strands that are agreed upon.

The most established general principles are those that protect fundamental (human) rights³³; legal certainty, including the concept of legitimate expectations; proportionality; and equality (non-discrimination).³⁴ The principles of a right to a fair hearing, the right to a reasoned decision, and transparency are also sometimes referred to as general principles.³⁵ These general principles are, with the exception of fundamental rights protection, largely

³⁰ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

³¹ Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

³² See generally J Bell, above n 7.

³³ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

³⁴ For a discussion of the general principles of EU law, see T Tridimas, *The General Principles of EU Law* (2nd Edition, Oxford University Press, Oxford, 2006), JA Usher, *General Principles of EC Law* (Longman, London, 1998) and see generally TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003), P Craig and G De Búrca, *EU Law Text Cases and Materials* (3rd Edition, Oxford University Press, Oxford, 2003), J Shaw, *Law of the European Union* (3rd Edition, Palgrave, Basingstoke, 2000).

³⁵ TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003) ch 5 pp 122-157.

administrative in nature although there is considerable overlap between human rights principles and administrative principles.

In the EU, the intensity of administrative review of institutional discretion differs a great deal according to the particular policy sector and complainant. Part of this differential treatment can be connected with the source of administrative principles in the general principles of EU law. It is relatively rare to win a case on the basis of breach of a general principle in the abstract sense, especially in relation to general legislation. There is more evidence of the application of general principles in cases of review of individual administrative decision-making, and this has been a fertile area of development of the general principles of EU law.³⁶ Nevertheless, the applicability of such principles is heavily dependent on them being formally protected in either the Treaty or secondary legislation, for example the granting of specific procedural rights to a defined party. They may be general principles, but they are not generally applicable, in the sense that they are concretely defined and consistently applicable to all administrative discretionary action.

In relation to enforcement actions, the most important of the general principles are those of legal certainty and the right to a fair hearing. The principle of legal certainty is well developed and encapsulates retroactivity and the concept of legitimate expectations.³⁷ The concept of legitimate expectations is most easily established when practices affecting the financial (business) interests of the complainant are altered to their detriment without adequate notice and/or compensation.³⁸ The right to a fair hearing is subsumed in the EU principle of the 'rights of defence'. The right to a fair hearing differs according to the status of the complainant and is quite dependent on the procedural rights granted by secondary legislation being breached by the institution.³⁹ It is therefore most commonly raised in areas of competition law and state aids, where certain complainants have this right formally protected.⁴⁰ In the context of Article 226, the general principles of EU law are not decisive in the outcome of cases before the ECJ. When the Member States claim protection of the rights of defence, these are considered to be an 'essential procedural requirement' as this is

³⁶ In the areas of competition law and state aids.

³⁷ See S Schønberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, Oxford, 2000).

³⁸ There is not a sophisticated distinction between substantive and procedural legitimate expectations, and in the EU it is linked to strict legality rather than an abuse of power as in the English system from which it originates.

³⁹ Both legitimate expectations and the right to a fair hearing are inspired by the same principles in English public law, and the rights of defence is an import from the French legal system.

⁴⁰ Instances of individual decisions, such as those relating to staff issues, are also a common source of this principle being raised.

written into the Treaty text. Breach of the rights of defence therefore come under a separate ground of review in Article 230 and are not treated as a species of the general principles of EU law.

2.0: Two key principles of administrative law: transparency and the obligation to give reasons

The traditional characterisation of Article 226 as a forum of negotiation between Member States and the Commission had the inevitable consequence that the operation of Article 226 is surrounded in secrecy. In order to ensure compliance without any coercive or financial penalty to force Member States to comply, confidential negotiations were seen as the only way to ensure Member States fulfilled their obligations. Political deal making was the norm: political rather than legal supervision predominated.⁴¹ As a result, one of the most incongruous aspects of Article 226 in the contemporary legal context is that it is out of step with an avowed commitment to greater transparency in the Union.

Although horizontally applicable⁴² principles of administrative law are not common in the EU legal system, the EU has embraced the principle of transparency and has enacted legislation accordingly. This action has further buttressed the obligation on the institutions to provide reasons for their decisions (when legislating) contained in the Treaty in Article 253 EC. The drive toward greater transparency in the EU is directly related to the delivery of legitimacy and is bound to the ambition of securing greater political and democratic legitimacy for the EU.⁴³

The Member States have very different approaches to the idea of freedom of information, with the Scandinavian states leading the way with constitutional traditions of openness in public authorities. Consequently, the idea of transparency in the EU has not been without controversy since there are many different appreciations of what this notion really means. Tomkins argues that transparency is an umbrella term for different ideas and may be used in

⁴¹ HAH Audretsch, *Supervision in European Community Law* (2nd Edition, Elsevier, North Holland, 1986).

⁴² This refers to principles of administrative law that are applied with the same definition by the courts in a variety of policy sectors and cases.

⁴³ Again, this might also be seen as an example of Member States' legal orders influencing the development of the EU legal system, as transparency was really embraced in the EU with the accession of the Scandinavian countries where transparency has constitutional significance, see D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 17.

at least five different ways.⁴⁴ Access to information is the least demanding aspect of transparency and is the definition of transparency traditionally embraced at the European level. Knowledge of who makes decisions and how these decisions are made, simplification of the legislative process, consultation and a duty to give reasons make up the other elements to a more rounded vision of what transparency really encompasses. Despite the numerous opportunities both courts have encountered through developing case law on access to documents, they have always resisted the argument by applicants that the right of access to information is a fundamental or general principle of EC law, on the same level as proportionality, direct effect and supremacy.⁴⁵

2.1: The evolution of transparency in the EU

The formal recognition of the principle of transparency began with Declaration 17 at Maastricht which stated:

‘The [Intergovernmental] Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration.’⁴⁶

As the search for legitimacy at the European level became an increasing concern, the term ‘transparency’ became a tool to be brandished in the campaign of connecting Europe to its citizens.⁴⁷ With this in mind the Council and Commission drew up a Code of Conduct designed to establish the principles governing access to documents held by these two institutions. Establishing the rules on a more formal basis, the Council adopted Decision 93/731/EC which governs access to Council documents.⁴⁸ Starting with the principle of ‘widest possible access to documents held by the Commission and Council’, it goes on to list the circumstances in which the institution may refuse to grant access, contained in Article 4(1). The institution *will* refuse access (the mandatory exception) if it could undermine the protection of the public interest.⁴⁹ The Council *may* refuse access (the discretionary

⁴⁴ A Tomkins, ‘Transparency and the Emergence of a European Administrative Law’ (1999) 19 *Yearbook of European Law* 219.

⁴⁵ Although some scholars list it as such, TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003). For general discussion on the desirability and ‘inspiration’ of making this a fundamental right, see M O’Neill, ‘The Right of Access to Community Held Documentation as a General Principle of EC Law’ (1998) 5 *European Public Law* 403.

⁴⁶ Final Act, TEU.

⁴⁷ See generally I Harden, ‘Citizenship and Information’ (2001) 7 *European Public Law* 165.

⁴⁸ Council Decision 93/731/EC 20 December 1993 on public access to Council documents OJ L 340 31.12.1993 and Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents OJ L 46, 18.2.1994.

⁴⁹ Public interest is defined as public security, international relations, monetary stability, court proceedings, inspections and investigations (the Article 226 exception); the protection of the individual and of privacy; the protection of commercial or industrial secrecy; the protection of the Community’s financial interests; the protection of the confidentiality as requested by natural or legal

exception) in order to protect the institution's own interest in the confidentiality of its proceedings. Article 7(1) states that reasons must be provided when refusing access.

The CFI proceeded to flesh out the governing Code in various positive ways, introducing a balancing exercise into the discretionary exception regarding each document being requested.⁵⁰ It also developed the principle that the exceptions to access should be construed narrowly⁵¹ and extended the ambit of the Code to the comitology system.⁵² One of the most important developments was the extension of the Code to cover access to information rather than just documents. This development introduced the notion of granting partial access,⁵³ and latterly, the CFI re-evaluated an institution's judgment as to whether access to information would *in fact* harm the public interest as the institution claimed.⁵⁴

In the Treaty of Amsterdam, transparency had gained more formal recognition. Article 255 states that:

‘any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents’

and as of December 2001, access to documents was governed by Regulation 1049/2001 relating to documents held by the Council, Commission and European Parliament.⁵⁵ The Regulation specifically links the principles of democracy and respect for fundamental rights with transparency in the text of its preamble.⁵⁶ The ambit of the Regulation extends from that of the previous Decision to agencies set up by the institutions, and to documents received as well as drawn up by the institution.⁵⁷ Acknowledging the Court's jurisprudence, the Regulation covers information in whatever form⁵⁸ rather than just ‘documents’ and the

persons that supplied the information or as required by the legislation of the Member State that supplied the information.

⁵⁰ Case T-194/95 *Carvel and Guardian v Council* [1995] ECR II-2765.

⁵¹ Case T-105/95 *WWF UK v Commission* [1997] ECR II-313.

⁵² Case T-188/97 *Rothmans International v Commission* [1999] ECR II-2463.

⁵³ Case T-14/98 *Hautala v Council* [1999] ECR II-2489.

⁵⁴ Case T-211/00 *Kuijper v Council* [2002] ECR II-1729.

⁵⁵ 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 31.5.2001.

⁵⁶ *Ibid* preamble para 2.

⁵⁷ *Ibid* para 10 abolishing, at least in principle, the authorship rule. This means that documents covered by the Code only included those actually drafted by the institution, and did not relate to information held by the institution which it received from a third party.

⁵⁸ Including information relating to the CFSP and PJCC areas, *ibid* para 7.

purpose of the Regulation is stated as being to give the ‘fullest possible effect to the right of public access’.⁵⁹

Article 4(1) contains the exceptions present in the original Code, and the legal test is slightly stricter in that refusal shall only occur when disclosure would (as opposed to could) undermine the protection of the relevant public interest. Article 4(2) contains a further list of exceptions (commercial interests, court proceedings, investigations) which must be balanced against what is termed an ‘overriding public interest in disclosure’. The previous discretionary exception has been elaborated in Article 4(3), which now states that documents *shall* be refused if disclosure *would seriously undermine* the institution’s decision-making process, unless there is an overriding public interest in disclosure. This seems to be a step backwards from the Code, as the ‘discretionary’ element has been removed. Although the institution (and the Court) still has to take into account the public interest, it would seem easier to balance the interests (in the Code) than to have to establish an *overriding* public interest in disclosure for the applicant. This seems more onerous on the applicant than under the previously discretionary exception in the Code.

Article 5 dictates that any Member State that possesses documents which originate from the EU cannot release them (unless it is clear that the documents shall or shall not be disclosed) without consulting with the institution concerned.⁶⁰ This clause is in fact likely to conflict with constitutional provisions in certain Scandinavian countries,⁶¹ leaving applicants in a disadvantaged position in comparison to that allowed under national rules.⁶² Although the EU institutions have accepted the principle of transparency as a part of the EU legal order, it would be wrong to suggest that a cultural revolution had taken place throughout the administration in the EU institutions on this basis.

⁵⁹ *Ibid* para 4.

⁶⁰ This is a clear attempt to prevent a repeat performance of the *Svenska* scenario where the Swedish authorities released 18 of 20 documents requested by the Swedish Journalists Union, and yet when these exact same documents were requested from the Council, only two were released under the more oppressive EU regime. See Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

⁶¹ Sweden and Finland in particular have constitutional rights devoted to citizens’ access to public documents, see Curtin below n 62.

⁶² Contrary to the assertion by Curtin, that when interpreted in the light of the principle of subsidiarity, EU legislation on access to documents should not be allowed to supersede national guaranteed rights ‘a reverse supremacy in the interests of the citizens’. See D Curtin, ‘Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?’ (2000) 37 *Common Market Law Review* 7 pp 15, 26.

2.2: *The obligation to give reasons for decisions*

The obligation to provide a reasoned decision is a cornerstone of administrative law and is a specific manifestation of the principle of transparency. When a public authority exercises its decision-making power, it is essential that an explanation is provided as to why that particular course of action was taken. Without access to this information, it becomes difficult for anyone to challenge the decision being taken or for the court to perform an effective judicial review. The Treaty has always made provision for the important administrative principle of providing reasons in Article 253 EC. As well as the common traditions of the Member States and the general principles of EU law, Article 253 is often referred to by the courts as the source of a more general principle of providing reasons for decisions. Article 253 is not a reasoning requirement in itself, but merely states in a formal manner that legislation produced by the Community must have a preamble that takes the form of a list of reasons.

The CFI has repeatedly stressed the importance of the institutions providing fully reasoned decisions to explain a decision to refuse access to information.⁶³ More generally, when the CFI is dealing with judicial review of an administrative decision taken by the institution, the court considers the giving reasons requirement as essential to its own ability to conduct a proper review of the situation. If the court cannot perform its review function on the basis of the explanations offered by the institution to the applicant, a decision may well be overturned on this basis.

The rationale behind a duty to provide reasons for decisions, like that of transparency in general, is strongly connected to the idea of legitimate governance. If a decision-maker must provide reasons for a decision, in theory the decision-making process itself will be less likely to be unfair or arbitrary in nature because the decision will have to be publicly justified. This in turn ensures an approach to decision-making invoking the consideration of all options and weighing the pros and cons of each alternative argument before arriving at the best possible decision. The duty to give reasons therefore has an intrinsic benefit of producing the best possible decision, and increases the legitimacy of that decision by virtue of rendering the decision-making process more transparent. It allows the court to perform an effective review of the institution's decision-making process, and on a more basic level, allows the public access to information on how public authorities exercise their discretion.

⁶³ Case T-124/96 *Interporc Im-und Export GmbH v Commission* [1998] ECR II-231, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

The duty to provide reasons for decisions varies in different constitutional traditions and different contexts, and can be more or less effective in producing legitimacy depending on the intensity of this obligation. One of the most demanding reasoning requirements can be found in the Administrative Procedures Act in the US which has been characterised as a ‘synoptic’ reasoning requirement.⁶⁴ This essentially means the duty to provide reasons has been extended by the courts to resemble a ‘record requirement’; the list of reasons provided by the decision maker is a record of the deliberation undertaken by the administration before the decision was reached. Such an extensive reasoning requirement enables the court to assess whether all relevant arguments have been taken into account by the administration and accorded proper weight. Ultimately this allows the court to substitute its own decision for that of the administration, as it is in full possession of the facts presented to it in the record of deliberation.⁶⁵ This transforms the procedural reasons requirement into a mechanism for the court to perform substantive review of the decision, and ensures the administration enters into a dialogue with interested parties before reaching a decision in order that it is able to be in possession of, and fully consider, all relevant arguments.

At the other end of the scale, there is the purely formulaic reasoning requirement of Article 253 which states only that reasons must be provided when legislating. The reasoning requirement that has developed from this article of the Treaty varies according to context like other general principles of EU law. Some scholars claim that the ECJ is edging ever closer to requiring ‘good reasons’ to be provided, rather than the institution being allowed to present a formulaic response on the basis of formal legal doctrine.⁶⁶ At any rate, the reasoning requirement in the EU is not as advanced as that in the US and does not yet require a record of the dialogue undertaken between the administration and all interested parties.

In relation to Article 226 enforcement actions the only reasoning requirement is that guaranteed by the Treaty, which states that the Commission must provide a reasoned opinion to the Member State that is the subject of the infringement investigation. This forms an essential procedural requirement in the enforcement action, and is a part of the dialogue between the Member State and the Commission in trying to avoid referral to the ECJ, as well

⁶⁴ M Shapiro, ‘The Giving Reasons Requirement’ (1992) *University of Chicago Legal Forum* 179.

⁶⁵ This is similar to performing review on the basis of a proportionality test.

⁶⁶ Shapiro, above n 64.

as forming the legal basis of the subsequent (possible) action in the ECJ.⁶⁷ However, this requirement is not for the purpose of producing a transparent and open procedure, or engaging all parties and canvassing all possible arguments in a decision to prosecute. First, the reasoned opinion is not a public document. Furthermore, it is more akin to a formulaic legal document setting out the factual and legal position of the Commission in relation to the existing infringement, and does not contain a statement of record of the Commission's deliberation leading up to the decision to proceed to the ECJ. Decisions not to prosecute, or even to investigate a complaint of an infringement, or to close an investigation, are not decisions that legally require a public record of deliberation. As a consequence, the courts are unable to perform a review of the administrative process in Article 226.

2.3: *Transparency in infringement investigations*

Applicants trying to obtain information relating to the Commission's investigations and management of Article 226 infringements soon tested the new transparency regime. One of the defining characteristics of the central enforcement mechanism had always been the secretive nature of how it is conducted, primarily because of the 'closed shop' arrangement of the Commission and Member State relationship. The formal Code on access to documents provided the first window of opportunity to open up the enforcement action. Unfortunately for the applicants, there was to be no change to the *status quo*, as the Commission routinely rejected all requests for access to documents relating to Article 226 investigations on the basis of Article 4(1) (court proceedings, inspections and investigations). The early judgments under the Code in *WWF*,⁶⁸ *Bavarian Lager*⁶⁹ and *Petrie*⁷⁰ confirmed the CFI's reluctance to second guess the Commission in the conduct of infringement investigations, including the classification of, and access to, all information connected with infringements.

All information held by the Commission in relation to an infringement investigation is unavailable to the public under the exception in the Code, although the CFI did state that the Commission must consider each request on its merits and not operate this rule as a blanket exception for refusing access to information.⁷¹ Early applicants had concentrated on obtaining access to the Commission's reasoned opinions, although it soon became apparent

⁶⁷ U Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 *European Law Review* 215.

⁶⁸ *WWF* above n 51.

⁶⁹ Case T-309/97 *Bavarian Lager Company v Commission* [1999] ECR II-3217.

⁷⁰ Case T-191/99 *Petrie and Others v Commission* [2001] ECR-II 3677.

⁷¹ *WWF*, above n 51.

all documents were considered as covered by the exception in Article 4(1), regardless of the timing of the request.⁷² This means that even if the Commission has not brought proceedings against the Member State and the investigation has been concluded, historical documents are still covered by the exception under the present case law, as release of these documents is still considered capable of ‘undermining the public interest’.⁷³

Under the Regulation, access to information categorised as relating to Article 226 is even harder to achieve.⁷⁴ The Regulation states that an ‘overriding public interest in disclosure’ must be demonstrated before access to such information would be granted. Without applicants having prior knowledge of exactly what is in the file they wish to access ahead of time (which seems unlikely in the case of Article 226 investigations), it is near impossible to prove there would be an overriding public interest in disclosure. As there was a less strict test to overcome in the Code and applicants still could not access information related to infringement investigations, it seems unlikely there will be greater success under the more stringent Regulation.

Article 5 of the Regulation seems to prevent the only other route to accessing information under infringement investigations, which would be to obtain information from the Member State itself. Particularly in Scandinavian administrations, this would have provided a better opportunity to access Commission correspondence with the Member State regarding the investigation (as it did in the *Svenska* case). In summary, the new drive to increase transparency in European administration does not extend to accessing information relating to the enforcement mechanism, and the position remains unchanged for applicants in this respect, and may even have taken a step backwards from the original Code.

3.0: The attempt to develop new administrative rights

As well as the drive for transparency in the EU, there has been fresh impetus from the CFI in its attempt to develop administrative rights protection after the proclamation of the Charter of Fundamental Rights, itself a reflection of the need to increase legitimacy in the EU. This is based on the express acknowledgement in the Charter of such rights as the right to good

⁷² *WWF*, above n 51, the CFI confirmed that even where time had elapsed after the conclusion of an investigation, the Commission could still refuse access to those documents.

⁷³ This seems difficult to justify. If the infringement complaint had been, say, about building a motorway, and five years later after the motorway has been built someone wished to access the reasoned opinion of the Commission (or even relevant surveys regarding the project), why should this be deemed as prejudicial to the public interest? The entire incident is historical. The only purpose of keeping this information secret is to suppress politically embarrassing information.

⁷⁴ This information is categorised by the Commission and is not subject to outside review.

administration.⁷⁵ The further development of administrative rights has been led mainly by the CFI rather than the ECJ largely due to the nature of the cases that are heard by the CFI which in general tend to be concerned with administrative rights.⁷⁶ The CFI was the first court to acknowledge the Charter as a source of inspiration in developing legal principles.⁷⁷ The ECJ is reluctant to develop jurisprudence based on the Charter and it remains to be seen whether it will develop a strong line of cases before the Constitutional Treaty becomes a legally binding.

In the context of the EU institutions, the principle of good administration is very much in its fledgling stage of development, and has mainly been an invention of the European Ombudsman. The Ombudsman campaigned extensively for the inclusion of the right to good administration at the first European Convention which drafted the Charter of Fundamental Rights. The explanatory notes to the Charter as amended by the second European Convention,⁷⁸ which proposed incorporation of the Charter into the Draft Treaty establishing a Constitution for Europe, contain an indication as to why the right to good administration was included:

‘Article 41 is based on the existence of the Union as subject to the rule of law and whose characteristics were developed in the case law which enshrined, *inter alia*, good administration as a general principle of law.’⁷⁹

This links the right to good administration directly to the legitimacy of the Union, acknowledging the connection between the conduct of the administrations and respect for the rule of law.

⁷⁵ See the final text of the Charter as incorporated into the Treaty establishing a Constitution for Europe Part II: The European Union Charter of Fundamental Rights, Title V: Citizens’ Rights, Article II-101 OJ C 310 16.12.2004, p 50.

⁷⁶ Particularly in cases relating to competition law and state aid.

⁷⁷ This relates back to the earlier discussion regarding the different roles of the ECJ and CFI, with the ‘constitutional’ court of the ECJ tending to be more cautious in the development of administrative rights.

⁷⁸ The European Convention ‘Updated explanations in relation to the text of the Charter of Fundamental Rights’ CONV 828/1/03 REV 1 18 July 2003.

⁷⁹ For instance Case C-338/00P *Volkswagen AG v Commission* [2003] ECR I-9189, Case T-392/02 and Case T-392/02 R *Solvay Pharmaceuticals BV v Council* [2003] ECR II-1825. It has been mentioned in several cases before both the CFI and ECJ, but the explanatory notes include references to cases that refer in general terms to the institutions being subject to the rule of law, and as a part of this the principle of good administration is said to exist as a general principle, such as Case C-255/90 P *Louis Burban v European Parliament* [1992] ECR II-2253, Case T-167/94 *Detlef Nölle v Council* [1995] II-2589. It is interesting to note that standard textbooks do not all include the right to good administration as one of the ‘general principles’ of EU law.

3.1: *The principle of sound administration*

The CFI has adopted the language of ‘sound administration’ rather than good administration in its case law, but has not yet fully defined the concept of ‘sound administration’. An explanation of the principle of good administration, from which this term derives, is provided in the Charter as follows.⁸⁰ In broad terms the right to good administration is meant to guarantee the right to an impartial and fair decision from an institution within a reasonable period of time.⁸¹ This right is then clarified into three composite parts. The first part is:

‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken’.

The second part concerns the right of access of each person to their file and the third part is the obligation for the administration to provide reasons for its decisions. Parts two and three are reflections of the case law of the ECJ, and the explanatory notes specifically refer to the obligation to provide reasons for decisions being based on Article 253.⁸² The right to a fair hearing is potentially much wider in the Charter than the general principle referred to by the ECJ, partly by defining the right in this way, the discretion of the court is reduced in the way the principle is applied. The wording of ‘individual measure’ widens the type of decisions to which the right to a fair hearing could apply, but as the Charter remains unenforceable the CFI has been unable to apply this principle concretely and turn it into a legal right in its case law. Finally, the explanatory notes to the Charter link the right to good administration to the right to an effective remedy.⁸³

Where the principle of sound administration does appear in the case law, it often does so as a ‘catch-all’ statement, much like a general principle, which sums up individual procedural rights guaranteed to the complainant in secondary law or the Treaty. For instance, the general principle of a right to a reasoned decision, inspired by the formulaic reasoning requirement for legislation in Article 253 in the Treaty (and then usually in the relevant governing Regulation or Decision) is often covered by the use of the catch-all term ‘sound administration’. Other general principles are also sometimes implied in the use of this term, for instance access to the administration’s file, objectivity in decision-making, fairness and

⁸⁰ The CFI has referred to the Charter when discussing the concept of sound administration, so it is reasonable to assume that this relates to the right to good administration in the Charter.

⁸¹ Charter above n 75.

⁸² The European Convention ‘Updated Explanations relating to the text of the Charter of Fundamental Rights’ Rights CONV 828/1/03 REV 1 18 July 2003.

⁸³ *Ibid*, ‘The right to an effective remedy, which is an important aspect of this question [the right to good administration], is guaranteed in Article 47 of this Charter’, p 37.

following the correct procedural steps in taking a decision, equal treatment and proportionality.

As different procedural rights are guaranteed in different policy sectors and secondary legislation, it is hard to make generalisations about the meaning of sound administration, or whether in fact it adds anything to the scope of administrative rights protection or whether it is just used as a form of legal shorthand by the CFI. What is clear from the case law is that cases are, as yet, not decided on breach of this principle alone; it has not been effective as a ground for annulment before the court, as even where the court finds a breach of sound administration, it is not enough to set aside the contested decision. In the EU, the applicant must have a stronger 'hook' on which to decide the case.⁸⁴

3.2: The principle of diligent complaint handling

A significant element of administrative law is aimed at producing a sense of fairness and objectivity into the way in which the institutions interact with the citizens. Since a large part of this interaction occurs when citizens complain to the institutions themselves, or where the institution's decision affects the individual's interests directly, enforcement actions have provided a fertile ground in the development of administrative law protections. After the proclamation of the Charter which contained the right to good administration, the CFI quickly seized upon an appropriate case relating to an enforcement action to attempt to enhance the administrative rights of complainants.

The *max.mobil* case was based on the Commission's decision to reject the complaint of *max.mobil* in relation to an alleged breach of the law on state aid.⁸⁵ The complainant alleged that the Commission had arrived at the wrong conclusion when deciding not to open enforcement proceedings under either the competition law enforcement procedure or the state aid enforcement procedure in relation to one of *max.mobil*'s competitors, and had therefore breached both Articles 82 and 86(3) EC. The point of interest in the case is the CFI's attempt to develop the complainant's administrative rights in the context of 'sound administration', and in doing so correlating the procedural rights applicable in competition law cases as also applying to state aid cases.

⁸⁴ When and if this principle does evolve, it is much likelier to be in the context of competition or state aids, rather than the Article 226 action.

⁸⁵ Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313.

The CFI developed the principle that the Commission must undertake a diligent and impartial examination of a complaint in competition law cases, and furthermore, that this diligent and impartial examination of complaints should also apply to state aid cases:

‘diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States...[the Charter] confirms that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.’⁸⁶

Moreover,

‘the obligation to undertake a diligent and impartial examination has already been imposed on the Commission by the case-law of the Court of First Instance relating to Articles 81 and 82 EC on the one hand, and in the context of Article 87 and 88 EC on the other...there is no specific written provision or anything else to support the view that the position is any different so far as concerns the discretion enjoyed by the Commission in respect of a complaint in which it is called to take action under Article 86(3) EC.’⁸⁷

The CFI justifies this reasoning as follows:

‘that the existence of an obligation to undertake a diligent and impartial examination was justified by the general duty of supervision to which the Commission is subject, even though the action taken by virtue of that duty is directed under Article 86(3)⁸⁸...that must apply without distinction in the context of Articles 81, 82, 86, 87 and 88 of the EC Treaty, even though the precise manner in which such obligations are discharged varies according to the specific areas to which they apply and, in particular, to the procedural rights expressly conferred by the Treaty or by secondary Community law in those areas on the persons concerned’.⁸⁹

The reasoning of the CFI was therefore based on the right to good administration in the Charter, and the comparable situation of complainants in other areas of the Treaty. Most importantly, it was the Commission’s general duty of supervision (which also applies to Article 226) and the nature of the Commission’s extensive discretion in these areas of the Treaty which meant that all complainants had the right to a diligent and impartial handling of their complaints.

In this case, the CFI attempted to systematise the way in which complainants are treated when they complain to an institution of the EU, regardless of the context of that complaint. The CFI was not attempting to impose a particularly high standard – in fact the concept of diligent complaint handling was very basic in itself. Since the institutions had already proclaimed the Charter, which promised a higher standard than that being developed by the

⁸⁶ *max.mobil* *ibid* para 48.

⁸⁷ *max.mobil* *ibid* para 49. I have updated the numbering of the Treaty articles throughout the quotes.

⁸⁸ *max.mobil*, *ibid* para 52.

⁸⁹ *max.mobil*, *ibid* para 53.

CFI, in theory the notion of diligent complaint handling ought to have been uncontroversial, especially since it already applied to certain complainants in competition law cases. However, the notion of administrative systematisation is yet to be embraced in the EU legal order, and if the Commission's (and ECJ's) response is an indication of the acceptance of administrative systematisation, there is a long way to go before this might be achieved in enforcement actions.⁹⁰

The Commission won the case in the CFI against *max.mobil* on the facts as the CFI considered that the applicants' administrative rights had been respected, since the complainant had been in a position to fully understand the Commission's reasoning in deciding not to open an enforcement action. Despite this, the Commission still appealed the case to the ECJ, specifically in order to overturn the reasoning of the CFI regarding the principle of diligent complaint handling, not only because of the impact of its discretion in the administration of state aid cases, but by analogy, its similar discretion under Article 226. It is the argument that the Commission's general duty of supervision (i.e. as guardian of the Treaty) that is the real source of the right to sound administration that was unacceptable to the Commission. The Commission's submission to the ECJ in its appeal reflects the attitude of both the ECJ and the Commission to the principle of sound administration⁹¹:

'the Commission expresses the view that the principle of the proper administration of individual situations, hitherto unknown in the case-law of the Court but on which the Court of First Instance bases its reasoning, is too general to constitute a basis to support procedural rights for the benefit of individuals, *a fortiori* as the Charter of Fundamental Rights invoked in support of that principle is not applicable. The third indent of Article 41(2) of that Charter, moreover, merely repeats the obligation to state reasons set out in Article 253 [190] of the Treaty'.⁹²

The ECJ made its position clear in *max.mobil* that the abstract notion of diligent complaint handling is not transferable between different articles of the Treaty on the basis that it forms part of the concept of a sound administration. The Commission won the case. On a more general basis, it seems clear that any principles developed in the administration of competition law or state aids are unlikely to be applicable, by analogy, under the administration of infringement actions by the Commission. In reality, the CFI has already

⁹⁰ It is worth noting that the CFI did not attempt to introduce a basic standard for administration of Article 226 and expressly exempted Article 226 from this reasoning, probably as a way to avoid being overturned by the ECJ which would not have supported this reasoning.

⁹¹ Case C-141/02P *Commission v T-Mobile Austria GmbH, formerly max-mobil Telekommunikation Service GmbH* [2005] ECR I-1283.

⁹² I have already argued that the obligation to provide reasons for decisions extends far beyond the formulaic reasoning requirement of Article 253.



rejected the attempt, in previous cases, to enhance administrative rights under Article 226 by reference to rights enjoyed in other areas of the Treaty.⁹³

3.3: Advancing the administrative rights of complainants

In the context of Article 226, the ECJ has been steadfast in its rejection of the development of administrative rights, and there is nothing to suggest a different attitude will prevail even when (if) the Charter were to become legally binding. It is interesting to note the vehemence with which the Commission rejects the relevance of the Charter in its entirety, and especially the development of a basic standard of complaint handling by the Commission in the context of its discretionary exercise of public power. The Ombudsman, supported by the European Parliament, has already made it clear that in the course of his investigations into the administration, he intends to hold all the institutions that declared the Charter as bound by its contents.⁹⁴

In the light of greater constitutionalisation of the EU and proclamation by the Commission of the Charter, it seems an amazing contradiction in attitude. It is difficult to defend objectively the imposition of a (very basic) standard of diligent discharge of its duties, composed of basic principles like impartiality, objectivity and fairness as too much of an administrative bind for the Commission to accept. It seems even more difficult to justify why one class of citizens can justifiably expect one standard of treatment of complaint handling (the business community) and others cannot.⁹⁵

4.0: The applicability of administrative law principles to enforcement mechanisms

The above sections have outlined some key administrative rights that are crucial to the delivery of legitimacy in a system of governance based on the rule of law. It is now appropriate to consider in more detail the breadth and depth of legal administrative rights and principles as they apply to the enforcement mechanism of Article 226, and to provide an illustration of the type of administrative rights present in other enforcement actions in the Treaty, to form a basis for comparison.⁹⁶ Article 226 has been thoroughly examined and

⁹³ Case T-182/97 *Smanor SA v Commission* [1998] ECR II-271.

⁹⁴ Foreword, Code of Good Administrative Behaviour, adopted by Resolution of the European Parliament 6 September 2001 p 5, which can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

⁹⁵ See the difference in approach considered in following section between competition law, state aids, and individuals under Article 226.

⁹⁶ This is not an exhaustive comparative analysis of enforcement actions and administrative law. For a comprehensive discussion of other mechanisms see AJ Gil Ibáñez 'Exceptions to Article 226:

commented upon in terms of the exact meaning of the Treaty wording, the legal reasoning and impact of the case law principles.⁹⁷ As such, the 'conventional wisdom' in relation to Article 226 is now well established. The following sections will therefore only give a brief outline of accepted legal doctrine, in order to draw some conclusions as to the influence of the courts on the application of administrative principles to Article 226. I will then briefly consider the different approaches taken in the field of state aids and competition law, where separate enforcement mechanisms exist within the Treaty, and try to draw some conclusions as to why there is such a marked difference in approach.

4.1: The approach of the ECJ: deference and limited intervention

The impact of the ECJ on the development and role of Article 226 has been crucial. As the institution tasked with interpreting the bare Treaty language, the approach of the Court has had a great deal of influence on the way in which Article 226 is operated by the main actors in the process. The ECJ deals with numerous infringement cases in any given year; in 2004, 202 cases were referred to the ECJ.⁹⁸ Cases vary a great deal as to policy sector, Member State, political sensitivity and the nature of the infringement under examination.

Infringement cases can vary from the prosaic to the explosive: from cases of failure to notify measures,⁹⁹ to cases that have incredible political and economic fallout attached to them.¹⁰⁰

Many of the cases before the ECJ originate from a complaint by a citizen to the Commission, although by the time the case reaches the ECJ, such a personal connection to an individual citizen is almost entirely removed.¹⁰¹ The case before the ECJ is usually presented in an anodyne fashion; a simple question of the facts of the infringement (the behaviour of the Member State) applied to the legislation in question. Nonetheless, it would be wrong to suggest the Court is entirely unaware that at some point a complainant had been involved in

Alternative Administrative Procedures and the Pursuit of Member States' (2000) 6 *European Law Journal* 148.

⁹⁷ See generally A Dashwood and R White, 'Enforcement Actions under Articles 169 and 170 EEC' (1989) 14 *European Law Review* 388, J Mertens de Wilmars and IM Verougstraete, 'Proceedings against Member States for Failure to Fulfil their Obligations (1970) 7 *Common Market Law Review* 385.

⁹⁸ Source, Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final.

⁹⁹ This means that the Member State failed to notify the Commission of the measures it had take to transpose a directive into national law, as required by the deadline in the directive. See for instance Case C-385/04 *Commission v UK* [2005] 10 November 2005 nyr.

¹⁰⁰ For example Case C-265/95 *Commission v France* [1997] ECR I-6959. Protesting farmers caused France to be prosecuted for failing to fulfil obligations relating to free movement of goods.

¹⁰¹ See for example Case C-344/03 *Commission v Finland* [2005] ECR I-11033 regarding the conservation of wild birds.

the case – and that this somehow excuses the lack of legal supervision under Article 226 – as the judgment of the court always comments on the pre-litigation (administrative) procedure. This commentary includes whether the Commission’s investigation began on the basis of a complaint being made.¹⁰²

In terms of analysing the case law and applicable principles that are relevant to understanding the courts’ approach to Article 226, for the purpose of this chapter, two categories of cases can be identified – those relating to Member States’ rights of defence and those relating to third party interests. Much of the ECJ’s positive activity (in terms of ‘fleshing out’ the Treaty framework) has been in relation to the rights of defence of the Member State. In contrast, a more conservative attitude has been displayed in relation to third party interests on the basis that they are exactly that – by definition these applicants are not identified as a party to infringement proceedings in the Treaty wording itself.

The concept of ‘rights of defence’ encapsulates the notion of legal certainty and the protection of essential procedural requirements that are in the Treaty. In relation to Article 226, this includes the principle of the right to a fair hearing which is formally protected in the Treaty, through the requirements of the information exchange in the formal letter and reasoned opinion stages in the administrative procedure. Breach of these procedural requirements will lead to the action being declared inadmissible in the ECJ. In order to provide legal certainty and protect the Member State’s ability to defend itself properly against an infringement action, the ECJ has stated that at the point of the reasoned opinion the substance of the infringement is clarified, and serves to delimit the area for legal action.¹⁰³ Regardless of the circumstances, the Commission cannot subsequently introduce further grounds for prosecution of the infringement after the reasoned opinion has been issued¹⁰⁴. The Commission may however make a more limited case before the court than that contained in the reasoned opinion.¹⁰⁵

¹⁰² But see the recent ruling in Case C-494/01 *Commission v Ireland* [2005] ECR I-3331 where the Commission is asking the court to allow an alteration to the pre-litigation procedure based on the fact that the Commission is mounting a case of ‘general and persistent breach’. Such cases are based on a series of individual complaints to the Commission, which the Commission argues can constitute an administrative practice across the Member State, see P Wennerås, ‘A New Dawn for Commission Enforcement under Article 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments’ (2006) 43 *Common Market Law Review* 31.

¹⁰³ Case 7/69 *Commission v Italy* [1970] ECR 111, Case 232/78 *Commission v France* [1979] ECR 2729.

¹⁰⁴ Although see the ruling in Case C-494/01 *Commission v Ireland* [2005] ECR I-3331 and commentary on this case by Wennerås above n 102 who argues that the Court has moved from this established position in certain Article 226 cases by stating that new evidence is allowed to be brought

These rights of defence do not extend to preventing the Commission from pursuing an action before the court even if the Member State has already remedied the infringement.¹⁰⁶ The Member State cannot claim that the right to a fair hearing has been violated by the fact that the Commission (in its application to the ECJ) does not take account of the further facts or defences put forward by the Member State after the reasoned opinion has been issued.¹⁰⁷ In contrast to the Commission, the Member State is free to bring fresh issues and new facts/defences to light at the judicial stage that have not been previously mentioned throughout the investigation of the infringement.

The ECJ has not attempted to impose strict time limits in an Article 226 action, even though it could have done so on the basis of legal certainty (a general principle of EU law). The Commission is not bound by any significant time restrictions in the sense that an action cannot be declared inadmissible on such grounds,¹⁰⁸ but an excessive delay in bringing a case before the ECJ might be considered as inhibiting the Member States' rights of defence.¹⁰⁹ Such a formulation is sufficiently elastic as to avoid placing restrictions on the Commission in the exercise of its discretion. The Commission must give the Member State adequate time to respond to the formal letter and reasoned opinion¹¹⁰ and cases will be declared inadmissible if this essential procedural requirement has been breached, although cases of urgency can be justified before the Court.¹¹¹

The general principle of equality before the law is not considered an adequate defence for the Member State in Article 226 actions; a Member State cannot point to other Member States' illegal conduct (not prosecuted by the Commission) to justify their own actions in infringing

before the ECJ that was not contained in the reasoned opinion, p 40 in cases of general and persistent breach. Whether this departs from the settled case-law is questionable as the Court also pointed out that new evidence did not amount to new grounds in the legal action, as the subject matter of the dispute remained the same.

¹⁰⁵ Case C-191/95 *Commission v Germany* [1998] ECR I-5449.

¹⁰⁶ Case 7/61 *Commission v Italy* [1961] ECR 317, Case 240/86 *Commission v Greece* [1988] ECR 1835. Specifically, once the period allowed by the Commission (contained in the reasoned opinion) has elapsed without the Member State remedying the breach, it is no defence, nor does it render the action inadmissible, if the Member State remedies the breach before the case is heard in the ECJ.

¹⁰⁷ Case C-3/96 *Commission v Netherlands* [1998] ECR I-3931.

¹⁰⁸ Case 7/68 *Commission v Italy* [1968] ECR 428.

¹⁰⁹ Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461.

¹¹⁰ Case 293/85 *Commission v Belgium* [1988] ECR 305.

¹¹¹ For instance where there has been a long pre-formal letter negotiation procedure with the Member State to no avail and the Commission's position is well known on the subject, or the particular circumstances of the case demand it, Case C-56/90 *Commission v UK* [1993] ECR I-4109, Case C-328/96 *Commission v Austria* [1999] ECR I-7479.

Community law.¹¹² This appears to confirm that the Commission need not prosecute every Member State for the same infringement and (in principle at least) one judgment against an individual Member State is sufficient to cover all defaulting Member States.¹¹³ A Member State cannot claim (as a defence to prosecution) that the measure being infringed is in fact an illegal act itself, as all Member States have the opportunity to open an action for annulment for illegality under Article 230 as privileged applicants.¹¹⁴

Third parties developed an interest in the Article 226 enforcement action mainly because they were invited to become a part of the enforcement process by the Commission itself. Like other enforcement actions in the Treaty, it is only with the cooperation of individuals in informing the Commission of infringements that the Commission can perform its role as guardian of the Treaty. In third party actions before the CFI, the court has been dogmatic in its rejection of many different kinds of claims brought by individuals. The two main legal obstacles to developing administrative rights for third parties under Article 226 are a lack of standing for individual applicants under Article 230 to bring an action for annulment, in combination with the fact that decisions taken by the Commission under Article 226 are not reviewable acts within the meaning of Article 230.¹¹⁵ The Commission therefore cannot be forced to adopt a particular position in the investigation of an infringement. Any decision taken by the Commission under the auspices of the infringement action cannot be challenged by any other party, be it an institution, individual, organisation or Member State.¹¹⁶ Conversely, the Commission cannot be challenged for failing to act via Article 232.¹¹⁷

Although the Treaty wording appears to mandate the Commission to issue a reasoned opinion if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, this cannot be enforced in reality.¹¹⁸ The decision not to issue a reasoned

¹¹² Case C-146/89 *Commission v UK* [1991] ECR 3533. However, for a discussion of the practical application of this principle in the Commission's conduct of infringement proceedings, see Chapter V.

¹¹³ Although see Chapter V for a discussion of the Commission's approach to this in practice.

¹¹⁴ Case 226/87 *Commission v Greece* [1988] ECR 3611. Though Member States may raise this defence in specific instances, see P Craig and G De Búrca, *ibid* n 20 p 428.

¹¹⁵ Case C-87/89 *Sonito v Commission* [1990] ECR I-1981, Case 48/65 *Lütticke v Commission* [1966] ECR 19, Case T-182/97 *Smanor SA v Commission* [1998] ECR II-271.

¹¹⁶ For instance, a decision to open an investigation, a decision to stop investigating an infringement, a decision which concludes there has been an infringement or there has not been an infringement, a decision to issue a formal letter or reasoned opinion or a decision not to prosecute the Member State before the ECJ even where there appears to be a clear infringement established by the Commission. These decisions do not fulfil the requirement of acts which produce 'legal effects', which is the criterion for acts being challengeable in principle under Article 230.

¹¹⁷ Case 247/87 *Star Fruit v Commission* [1989] ECR 291.

¹¹⁸ AC Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' (1979) *European Law Review* 442.

opinion has never been successfully challenged under Article 232, because such a decision is dependent on the previous subjective judgment of the Commission as to whether or not there has been a breach of the Treaty, which itself cannot be challenged in court.¹¹⁹ Finally, the ability to access information held by the Commission under the infringement procedure by a third party is so far non-existent, as the applicable legislation on access to documents does not apply to Article 226-related information. At each stage in the negotiation process with the Member State, the Commission can conclude that an infringement has been remedied without needing to test this proposition before the ECJ.

Although Article 226 remains the central mechanism to ensure Member States comply with their obligations under the Treaty, there exist separate and specialised mechanisms of enforcement in the Treaty for the areas of competition law and state aids. These mechanisms are contained (principally) in Articles 85 and 88(2) EC, and like Article 226, contain a significant administrative element where the Commission exercises some discretion. In both competition law and state aids, the Commission's discretion is much more limited and the administrative process is concretely defined, with procedural protections in place which embrace general administrative principles not found in Article 226. Such procedural protections are mainly absent from the wording of the Treaty itself¹²⁰ and are to be found in secondary legislation such as Regulation 1/2003¹²¹ and the new Regulation on state aids¹²² (which essentially codifies the court developed jurisprudence on practices in state aid investigations).¹²³ The next two sections will only provide a brief overview of some of the procedural rights evident under these sections of the Treaty and does not attempt an exhaustive comparative analysis.¹²⁴

¹¹⁹ Commentary on the nature and extent of the Commission's discretion can be found in Chapter IV.

¹²⁰ Except in the case of state aids where Article 88(2) EC states that the Commission must give the parties concerned an opportunity to submit their comments.

¹²¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1 4.1.2003.

¹²² Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 83 27.3.1999.

¹²³ L Flynn, 'Remedies in the European Court' in A Biondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press, Oxford, 2004) 283.

¹²⁴ For further detailed discussion of procedures in competition and state aids enforcement see K Lenaerts and J Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *Common Market Law Review* 531, I Maselis and HM Gilliams, 'Rights of Complainants in Community Law' (1997) 22 *European Law Review* 103, AJ Gil Ibáñez 'Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States' (2000) 6 *European Law Journal* 148, A Biondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press, Oxford, 2004), J Venit, 'Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Market Law Review* 545.

4.2: Competition law

As one of the primary goals of the EC Treaty was the creation of an internal market, regulation of barriers to trade had special significance. Controlling the barriers to trade, and in particular, the way in which private undertakings operated within the internal market was crucial to achieving a properly functioning internal market. The regulation of competition within the Community was so important that it had separate and specialised enforcement mechanisms in place, with the Commission acting as the Community's competition authority, approving or declaring illegal certain practices. Enforcement of competition law relates primarily to private economic operators rather than Member States.¹²⁵

The development of administrative rights for individuals under the enforcement of competition law has been extensive. Primarily, it is the ability to gain standing and therefore judicial review of the exercise of administrative discretion under the competition law enforcement action that sets it apart from Article 226. In the context of competition law enforcement, any natural or legal person who can claim a 'legitimate interest' is entitled to complain to the Commission of an infringement of competition law rules, and from this position all administrative rights follow. The requirement of a legitimate interest is fairly easily satisfied and includes competitors¹²⁶ and anyone who suffers injury or loss as a result of the suspected infringement, including relevant associations whose members are affected.¹²⁷

A decision to reject a complaint is addressed to the complainant and can therefore be challenged under Article 230,¹²⁸ or if the Commission has taken no decision on the complaint, a complainant may compel the Commission to act through Article 232 proceedings. The complainant does not have a right to a decision on the compatibility of the conduct (complained of in the alleged infringement) with Community law,¹²⁹ unless the complainant is the subject of a negative decision,¹³⁰ but the Commission must still define its position regarding the complaint.

¹²⁵ Articles 81 and 82 EC are primarily aimed at undertakings and Regulation 1/2003 applies to both private and public undertakings within the meaning of Article 81 and 82 EC, but not to states.

¹²⁶ Case 26/76 *Metro SB-Großmärkte GmbH & Co KG v Commission* [1977] ECR 1875, Case 142/84 and Case 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487.

¹²⁷ Case T-37/92 *BEUC and NCC v Commission* [1994] ECR II-285.

¹²⁸ Case 201/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

¹²⁹ Case T-24/90 *Automec srl. v Commission (Automec II)* [1992] ECR II-2223.

¹³⁰ The Commission must then give a decision on the substance of the case, *Automec II*, *ibid.*

In terms of opening up the administration of competition law enforcement, interested parties are entitled to an explanation of the Commission's decision-making process. Before the Commission can reject a complaint, the Commission must provide a fully reasoned decision and give the complainant an opportunity to submit their views in writing. The statement of reasons provided by the Commission cannot be general or abstract, but must address all the allegations in the complaint.¹³¹ Although the Commission is not bound to investigate all complaints (as the Commission is entitled to define the Community's priorities in this area)¹³² the Commission cannot refer in the abstract to 'lack of Community interest' in its reasoning in order to justify not investigating a complaint. The Commission must undertake a balancing exercise when reaching a decision on whether to prosecute an infringement. It must consider the significance of the infringement on the functioning of the market, the probability of being able to establish the infringement and the extent of the investigative measures required to ensure compatibility with competition law provisions.

The complainant is allowed to pursue annulment of this decision by claiming the decision was not adequately reasoned, which the CFI will review in some detail.¹³³ This reasoning requirement is not as extensive as a 'synoptic' review of the decision-making process, but it is certainly more extensive than merely providing a formulaic response. If the Commission agrees to prosecute the alleged infringement, but only in part, in the interests of the administration of justice the complainant may seek annulment of that decision under Article 230.¹³⁴ If the Commission decides to open an infringement procedure in competition law, the rights of the complainant are not as extensive as those companies which are the subject of the Commission's investigation. The complainant's rights are therefore limited to the right to participate in the administrative procedure of the investigation, but nevertheless these administrative rights are protected by law. The right to access the Commission's file is limited to the subjects of the investigation, and is subject to the necessary exception of maintaining business confidentiality.

4.3: *State aid*

Unlike the field of competition law where procedural practices were codified early on in the Community's development, the procedural requirements applicable in state aid

¹³¹ Case 293/83 *CICCE v Commission* [1985] ECR 1105.

¹³² *Automec II*, above n 129.

¹³³ Case T-7/92 *Asia Motor France a.o. v Commission (Asia Motor II)* [1993] ECR II-669.

¹³⁴ *Metro*, above n 126.

investigations have only more recently been codified by the legislator¹³⁵; this codification has largely reflected the court developed jurisprudence rather than the invention of 'new' procedural guarantees.¹³⁶ The rules applicable to state aid investigations are complex and varied in nature, and depend upon the type of administrative decision being challenged and whether the applicant has standing to challenge the measure. Consequently, it is difficult to present a generalised picture of administrative rights under state aid provisions. However, in broad terms, it is possible to challenge Commission decisions that approve, or refuse to approve, state aid regardless of the stage of the administrative procedure (formal or preliminary stage), as well as Commission decisions that reject a complaint regarding aid.¹³⁷

Anyone may file a complaint in relation to state aid but not all applicants have the same rights in the state aid infringement procedure. Concerned parties,¹³⁸ like those in competition law, enjoy different rights to other complainants and can request the Commission to adopt a position regarding compatibility of the aid with the internal market. Where the state aid is found to be compatible with the common market, the Commission tends to address the decision to the Member State and sends a copy of that decision to the complainant. This letter of information cannot be the subject of an action for annulment.¹³⁹ The decision addressed to the Member State is only considered to be of direct and individual concern, if the applicant was the original complainant, if they had participated in the administrative procedure and if the applicant's market position was substantially affected by the aid in question.¹⁴⁰

If the Commission does not act following a complaint, this in itself is a decision that can be challenged¹⁴¹ (under failure to act Article 232). Only the beneficiaries of the state aid can have standing under Article 230 for annulment of a (negative) Commission decision. Competitors of the recipient of state aid cannot instigate an action for annulment on the basis they are directly and individually concerned, but the Commission must give all concerned parties notice to submit their observations in the course of the investigation. If the

¹³⁵ Regulation 659/1999 OJ 1999 L 83/1.

¹³⁶ Although some novel inventions such as the 'information injunctions' echo similar Commission frustrations in the prosecution of Article 226 infringements. Regulation 659/99, *ibid*, provides for the possibility of the Commission adopting a negative decision on the basis of incomplete information, due to the lack of co-operation in state aid investigation by the Member States.

¹³⁷ Flynn, above n 123 p 290.

¹³⁸ Persons, companies or trade associations whose interests might be affected by the award of aid, Case 323/82 *Inter Mills v Commission* [1984] ECR 3809.

¹³⁹ Case C-189/91 *William Cook v Commission* [1993] ECR I-2487.

¹⁴⁰ Case 169/84 *Cofaz v Commission* [1986] ECR 391.

¹⁴¹ Regulation 659/99, above n 122 Article 20(2).

Commission breaches this procedural requirement, the competitor/complainant can then protect their procedural rights via an action for annulment.¹⁴² Simple breach of a procedural right is insufficient in itself to annul the decision, and the applicant must show that if the procedural right had not been breached the Commission would have reached a different decision.¹⁴³

If the Commission opens the formal enforcement procedure under Article 88(2) then it must request the opinions of all parties concerned,¹⁴⁴ as this is mandated by the Treaty provision. In decisions taken in the context of the preliminary procedure, or those where the Commission decides not to open the formal procedure, the Commission must give clear reasons such that complainants who participated in the procedure before the adoption of a decision are able to defend their administrative rights and courts can provide effective judicial review of the decision.¹⁴⁵ An extensive obligation to respond with clear reasoning to complainants for decisions is imposed by the CFI.¹⁴⁶ The Commission must allow the complainant to comment before the Commission adopts a definitive decision, which therefore protects the right to a fair hearing. All parties with a legitimate interest are able to participate in this administrative process.

4.4: A difference in administrative protection in enforcement actions

Even from this very brief survey of the different enforcement actions in state aid and competition law, it seems clear that there is a marked difference in approach of both the ECJ and CFI in relation to administrative controls placed on the Commission's discretion, to that exhibited in the general enforcement action of Article 226. In summary, there are more procedural protections in place for third parties as well as those who are formal parties in the enforcement action. This is based on who is considered to have a 'legitimate interest' in the enforcement action. Although competition law directly concerns individual companies, state aid is principally concerned with the actions of Member States (granting illegal aid to economic operators) and so is analogous to Article 226, insofar as it concerns states and not private undertakings. Even in the context of competition law, it is not only those mentioned as parties to the action in the Treaty that are accorded administrative rights, nor is it only

¹⁴² *Cofaz* above n 140.

¹⁴³ Case 40/85 *Belgium v Commission (Boch II)* [1986] ECR 2321.

¹⁴⁴ Case 84/82 *Germany v Commission* [1984] ECR 1451.

¹⁴⁵ Case T-49/93 *SIDE v Commission* [1995] ECR II-2501, Case T-95/94 *SYTRAVAL v Commission* [1995] ECR II-2651.

¹⁴⁶ *Ibid.*

those parties who are directly mentioned in a Commission decision who are deemed to have a legitimate interest.

Once the element of a legitimate interest (or concerned party) has been established, most of the other administrative rights flow from this basic starting point. Even where there is no *locus standi* to seek annulment of the ultimate decision, the right to a fair hearing and the opportunity to receive information about the administrative process is legally enforceable. This is in stark contrast to Commission action under Article 226 where the lack of administrative protection is justified by the fact that individuals are not mentioned as parties in the Treaty text, even though they clearly have a legitimate interest in the proper enforcement of community obligations, as they are the recipients of the benefits of enforcement. This is especially relevant where the complainant is the source of information of a suspected infringement and may be directly affected by the Member State's breach of their obligations.

The difference in the position of third parties in the different enforcement actions is as a result of the attitude and approach of the courts (and in particular the ECJ) rather than the Community's legislator. There are several feasible explanations for this difference in approach by the court, and in the case of competition law at least, persuasive arguments are often put forward. The Treaty language itself is one such argument, which specifically calls for secondary legislation to be adopted governing the procedural safeguards for those involved in the competition law enforcement action, as well as the fact that the relevant Treaty articles specifically concern private undertakings rather than the Member State themselves. Neither of these circumstances exists in relation to Article 226, nor state aids. Whether the existence of secondary legislation alone provides an adequate answer as to why there has been a substantial increase in the protection of third party interests (beyond the terms of the original legislation) is questionable.¹⁴⁷ Nor does such an explanation cover the situation of state aid law, where the Treaty language supports a narrow interpretation of the parties concerned (i.e. the Member State and Commission) and until recently there was no secondary legislation supporting procedural rights at all.

There are more organic explanations offered by some authors, who view the proliferation of different types of enforcement actions as being an *ad hoc* response to the policy development

¹⁴⁷ Regulation 17/1962 OJ 1962 13/204.

of the EU,¹⁴⁸ which in turn promotes a differentiated administrative approach to enforcement actions. Others choose to concentrate on the different character of the Commission's role in the different enforcement procedures. This approach emphasises the 'judicial' nature of the Commission's role in the enforcement of competition law and state aid, as opposed to the non-judicial role of the Commission in Article 226.¹⁴⁹

It is questionable whether such a distinction is well founded. Whilst it remains the case that the Commission's decisions in state aid and competition law are binding on the subjects of those decisions, these can be challenged before the CFI for review under Article 230 and so the Commission's decision is not necessarily final. In Article 226 cases, it is formally for the ECJ to decide whether an infringement has in fact occurred, but just like competition and state aids, the Commission must necessarily have made a *prima facie* finding there has been a violation. The fact that the Commission decides whether to refer the infringement to the ECJ, and prescribes the behaviour necessary to remedy the infringement, brings the Commission's role close to being a judicial one. At each stage in the negotiation process with the Member State, the Commission can conclude that an infringement has been remedied without needing to test this proposition before the ECJ; in this way, the Commission's ostensibly administrative role becomes judicial and final, since no other actor can prosecute a Member State for infringement of the Treaty in this manner.¹⁵⁰

The ECJ is in no position to re-evaluate the very complex factual evidence supplied by the Commission in these cases, and unless the Commission has committed a procedural error (which is unlikely given there are few procedural protections in place), the ECJ is unlikely to come to a different conclusion than that offered by the Commission.¹⁵¹ The ECJ leaves the Commission in charge of deciding how the infringement will be corrected as judgments under Article 226 are declaratory in nature. It is rarely a case of pure legal interpretation, especially in the complex and politically sensitive infringement cases, but of factual evidence proving an infringement. Beneath the formalistic distinction of judicial/non-judicial roles of

¹⁴⁸ AJ Gil Ibáñez, 'Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States' (2000) 6 *European Law Journal* 148.

¹⁴⁹ See Hartley, above n 35, and CWA Timmermans, 'Judicial Protection against Member States: 169 and 177 revisited' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers Volume II* (Martinus Nijhoff, Dordrecht, 1994) 391.

¹⁵⁰ Save the other Member States under Article 227, a situation which is politically unlikely although not entirely unprecedented.

¹⁵¹ In 256 cases in the period 2001-2003, the Court sided with the Commission in 240, and only found against the Commission in 16 cases, see Chalmers, D *et al European Union Law* (Cambridge University Press, Cambridge, 2006) p 350.

the Commission, in reality there is little distinction between the enforcement actions in terms of the Commission's ultimate power.

Overall, these enforcement actions have many factors in common. They are all manifestations of the Commission's role as guardian of the Treaty, and all are in place to achieve the same end of enforcing Community law. All the enforcement actions rely significantly on the information from complainants in order to police effectively the Member States'/economic operators' compliance with Community law. In each enforcement action there is a widely drafted Treaty provision and a large element of administrative discretion involved. In each enforcement action the interests of third party complainants have been acknowledged by the Commission, but only in state aids and competition proceedings is this interest legally protected through the development of enforceable administrative rights by the courts or by the legislator.

Concluding remarks

The above analysis is intended to outline the legal context within which Article 226 operates. It attempts to provide an overview of the evolution of some key administrative law principles in the EU legal order, and to highlight the fact that administrative law protections, and the legitimacy such protections bring to a system of governance, are heavily dependent on the courts' efforts in the absence of legislative action. The absence of legal administrative controls in the operation of the Article 226, particularly in terms of curtailing the Commission's discretion and providing effective protection of legal rights for third parties, is incompatible with the courts' activities in other enforcement actions.

The impact of the court is crucial in Article 226, especially since the main players in the enforcement mechanism have little to gain from introducing rights for third parties. It is not the case that such mechanisms and principles of control and accountability (such as transparency, the right to be heard, the right to a reasoned decision, the right to good administration) are absent from the EU legal context. Although they are arguably underdeveloped, such principles and protections are part and parcel of the EU legal order and have been applied by the court in other enforcement actions. The difference in approach to the enforcement mechanisms cannot be adequately explained by the difference in the *locus standi* requirements, or the characterisation of the Commission's role in the different processes.

The problem is simply that the court has chosen not to apply these principles to Article 226. The lack of a synoptic reasoning requirement in the EU legal order, and particularly with reference to Article 226 the absence of a requirement of even ‘good reasons’, has resulted in a complete abdication of responsibility by the ECJ in performing judicial review of the Commission’s conduct in the administrative (and most dominant) phase of this mechanism. This is both a cause and effect of the lack of legal control of the discharge of public power. The court continues to view Article 226 as more of a political, rather than a legal, mechanism of control – there can be no other explanation as to why the ECJ has chosen to ‘opt out’ of this particular process. Even when presented with an opportunity to systematise the way in which the Commission handles citizen complaints, the ECJ has refused to intervene.

The lack of judicial review has propagated the ‘special’ relationship between the Member State and Commission, and has had a knock-on effect in terms of granting access to Article 226 information under the Regulation on access to documents. Even where this information is entirely historical, at present it is still unavailable for scrutiny. This again prevents any *ex post* scrutiny of the conduct of Article 226 investigations by any other actors, something desperately needed if the ECJ is unwilling to judicially review Commission conduct. Some authors have argued that there is nothing wrong with this lack of control of administrative discretion, on the basis that it is this legal and administrative flexibility (and the inevitable ‘special relationship’ with the Member State that this generates) that guarantees the ultimate success of this enforcement mechanism.¹⁵²

In a system of governance so reliant on generating its legitimacy through the advocacy of the rule of law and the adherence of Member States to its novel legal system, it seems remiss that the central mechanism of enforcement of EU law lacks so many pivotal elements of administrative and legal legitimacy. The ability of European citizens to enforce their European rights in the national courts has, in the past, been central to the defence of the transfer of power to the supranational organisation, particularly in the absence of an increase in democratic control and accountability.¹⁵³ Even in a European Community with limited political ambitions, this placed a great strain on the legal system as a main source of legitimacy. In a Union with greater political ambitions, the limited development of

¹⁵² Timmermans, above n 149.

¹⁵³ There has been a traditional reliance on ‘output legitimacy’ in defending the EU as an organisation which lacks democratic credentials, such as the delivery of protection of EU rights through the novel legal system. This is discussed in greater detail in Chapter III.

administrative rights at the European level has further undermined the claims of a Europe that is focused on what it can do for its citizens.¹⁵⁴

Identifying the appropriate legal context of the operation of the enforcement mechanism is only the beginning of a deeper understanding of the role of Article 226. In the absence of control and accountability provided through legal mechanisms, the enforcement mechanism becomes a forum for unbounded political decision-making. It is necessary therefore to consider the political context of the EU in greater detail, and to outline the kind of legitimacy that may or may not be present through political rather than legal mechanisms.

¹⁵⁴ Even the officers of the ECJ have expressed doubts about the strength and depth of rights protection in the EU, see the Opinion of AG Jacobs in Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677. See also Final report of the discussion circle on the Court of Justice CONV 636/03 25 March 2003.

Chapter III: Conceptualising democracy, legitimacy and the development of good governance in the EU

A key feature of Article 226 is that it provides a forum for political interaction between the institutions of the EU, and between the institutions and the citizen. This interaction occurs in both the judicial and administrative phase of Article 226, and concerns the formulation of policy, the administration of infringement investigations and *ex post* control and accountability of the discharge of public power. Due to the lack of intervention by the ECJ, these political and administrative interactions are largely unbounded by legal restrictions. This transfers the pressure for creating legitimacy in the operation of Article 226 from legal controls, to the quality and nature of the political decision-making that drives Article 226. The political environment that shapes the operation of (and political decision-making within) Article 226 becomes a key factor in our understanding of the role it plays in a Union with constitutional pretensions.

Questions regarding the evolution of the EU, and its expanding boundaries (both territorial and philosophical) are inextricably bound to complex questions about the nature of the EU project, and the extent of the legitimacy and popularity such an entity commands. The lack of traditional democratic mechanisms and government institutions in the EU have led to questions as to how the EU ought to be judged in terms of its political legitimacy or democratic merit as a whole. These debates have evolved from claims as to whether there is, or is not, a palpable ‘democratic deficit’ operating in the European Union, to more subtle discussions that are less concerned with quantifying the depth of the democratic deficit but instead consider some alternative conceptualisations of democracy which fit more neatly with the current organisational structure and governance mechanisms of the Union. More recently, debates have widened and are often interrelated with discussions of such nebulous concepts as ‘legitimacy’ and ‘good governance’ when addressing the subject of the overall credibility of the Union’s organisation. Such debates are not confined to the academic arena, but are very much at the centre stage of European Union politics, with a renewed focus on how to improve the legitimacy of the EU in the eyes of the citizens in the context of a constitutional project, as evidenced by such texts as the Laeken Declaration¹ and the Commission’s contribution to this debate in the White Paper on Governance.² The debate

¹ Declaration No 23 annexed to the Treaty of Nice. The Treaty of Nice was signed in 2002 and came into force February 2003 and the Declaration was agreed by the European Council summit in December 2000.

² European Governance: A White Paper COM (2001) 428 hereinafter referred to as the WPG.

about the nature and direction of the European polity did not begin with the Laeken Declaration, but rather has been part of an on-going process of renewal and reform that has gained significant momentum since the Maastricht Treaty.³

Such debates feed into every policy-making domain of the Union, including the policy domain of enforcement of legal obligations. In order to incorporate a useful debate regarding the political context of the EU into the evaluation of the role of Article 226, this chapter will focus on some key questions relating to the legitimacy of the EU. It will highlight the fact that good governance in particular has been used to bridge the divide between traditional concepts of democracy and workable solutions to the legitimacy question. By defining the key concepts of legitimacy and good governance, the discussion of the role of Article 226 can take place with reference to a specific intellectual framework.

This chapter will be structured as follows. First, I will discuss the challenge of terminology in academic debates on the democratic deficit, and the difficulties caused by embedded conceptions of democracy in attempting to construct an effective discourse. The next section will then offer a broad outline of some conceptual tools used in academic debates, in order to help clarify the discussion of democracy and legitimacy in relation to the thesis question. The third section introduces the concept of ‘good governance’, which has been embraced as an alternative approach to increasing the EU’s legitimacy, and in particular considers the contribution of the Commission in its White Paper on Governance. Finally, section four will focus upon how these conceptual tools and contemporary institutional contributions can be utilised in order to outline a framework of analysis for the consideration of the legal and political context of the enforcement action, and which can ultimately be used as a benchmark against which the role of Article 226 can be evaluated.

1.0: The challenge of terminology

The question of the democratic deficit in the European Union is as vast as it is opaque. It is, like questions relating to the concept of legitimacy, very much dependent on one’s theoretical and ideological perspective. What there can be no doubt about is that there is a pervasive feeling of discontent amongst the European publics with the Union project.⁴ In response to this perception of discontent, politicians, bureaucrats and academics alike have

³ See below for an outline of the process of reform that has led to the current focus on the nature of the EU as a constitutional entity, culminating in the production of the Constitutional Treaty. See also Chapter I for an overview of the evolution of the EU as a *sui generis* organisation.

⁴ See http://ec.europa.eu/public_opinion/index_en.htm for a comprehensive analysis of opinion polls about the popularity of the Union.

tried to envision a solution to this crisis, albeit in sometimes very different guises. The suggestions presented as a means of solving the problem of the democratic deficit are equally problematic – there is, at the heart of these debates, no accepted definition of the term ‘democratic’. Consequently the ideas (or ideals?) are wide-ranging depending upon which definition of ‘democratic’ is adopted.⁵ This in turn depends upon one’s own normative vision for the European Union in the first place, and indeed whether you think the Union ought to be democratic under any definition at all.⁶ Like so many dilemmas, this particular chicken and egg question is difficult to resolve without an accepted benchmark as to what is democratic or legitimate. Whilst this is certainly not inimical to the generation of debate on the problem of legitimacy and democracy in the EU, and indeed such debate might certainly create a more democratic environment in and of itself,⁷ such difficulties do present a challenge to those charged with making concrete and readily defensible changes to the system of governance in the EU.

1.1: *The ‘state model’ of democracy*

The term democracy is inevitably linked in the popular consciousness with the modern western liberal conception of state level democratic rule. First, this typical benchmark of the ‘state model’ of democracy is, in reality, a far cry from the idealised version of democracy against which the EU is unfavourably judged. Executive dominated parliaments, declining voter turnouts, and the effects of globalisation on nation state politics are just a few points on a very long list of criticisms to be levelled at modern state democracies. Secondly, there is no single model of state democracy, even one with all these limitations. The approach to democratic governance varies over time and territory.⁸ There are a myriad of different configurations currently in operation, so it is unsurprising that, in practical terms, an organisation made up of (now 27) very differently configured states finds it hard to agree on what form of ‘democracy’ the EU ought to take – each being rather fond of its own particular

⁵ C Lord, ‘Assessing democracy in a contested polity’ (2001) 39 *Journal of Common Market Studies* 641.

⁶ See the commentary of Ulrich Haltern who poses the question as to whether the difficulties in attempting to create constitutional legitimacy for the EU through a Constitutional Treaty are not created by the very nature of the EU itself which in Haltern’s terms was simply never supposed to evolve into such an entity, see U Haltern, ‘Pathos and Patina: the Failure and Promise of Constitutionalism in the European Imagination’ (2003) 9 *European Law Journal* 14. See also A Moravcsik, ‘What Can We Learn from the Collapse of the European Constitutional Project?’ (2006) 47 *Politische Vierteljahresschrift* 219.

⁷ C Lord and P Magnette, ‘E Pluribus Unum? Creative Disagreement about the Legitimacy in the EU’ (2004) 42 *Journal of Common Market Studies* 183.

⁸ D Held, *Models of Democracy* (2nd Edition, Polity Press, Cambridge, 1996), P Dunleavy and B O’Leary, *Theories of the State: The Politics of Liberal Democracy* (Macmillan, Basingstoke, 1987).

brand of democracy – let alone what view those who represent the EU itself should champion.

The lack of one accepted ‘pure’ model of state democracy is not the only drawback to simply transforming the EU into an organisation with a state-like structure. Even if, in organisational terms this were possible, there are some other well-rehearsed objections to this approach to democratising the EU. Some authors point to the difficulties of democratising the EU without a fixed, cohesive *demos*. In short, without a common cultural identity to unite the peoples of Europe, it is argued that operating a nation-state model would not work.⁹ Majority rule would be harder to justify with such diverse and large minorities being subordinated in this way. The problems of a lack of common European political space in which to debate European issues, and more importantly, a common European vernacular in which to debate issues, are cited as central obstacles to the formation of a cohesive *demos*.¹⁰ There are of course some alternative views on these problems, such as Held’s cosmopolitan democracy of multiple identities and ‘thin’ citizenship, based on basic human rights norms as the validating and cohesive element of the *demos*.¹¹ Such theories are criticised on the basis that they do not adequately address the problem of how a European political space could develop without a common vernacular whilst the impetus still remains with the nation-state in terms of controlling the discussion and promotion of the EU.¹²

If the critique of state democracy is accepted, there is one of two paths to follow in attempting to alleviate the democratic deficit problem. One approach is the better-the-devil-you-know attitude, replicating the imperfect state system at the EU level with (or without) some alterations. Alternatively, there is the approach of identifying of an entirely new set of democratic criteria on which to judge the credibility of the EU. The first path has limitations; even if it were a perfect working model of democracy, without the requisite characteristics of a nation-state, this model may still not work in an international entity, and

⁹ W Kymlicka, ‘Citizenship in an era of globalisation: a comment on Held’ in I Shapiro and C Hacker-Cordón (eds), *Democracy’s Edges* (Cambridge University Press, Cambridge, 1999) 112, although it is questionable as to what extent a common cultural identity exists at the state level either.

¹⁰ *Ibid.*

¹¹ D Held, ‘The transformation of political community: rethinking democracy in the context of globalisation’ in I Shapiro and C Hacker-Cordón (eds), *Democracy’s Edges* (Cambridge University Press, Cambridge, 1999) although see also A Peters, ‘European Democracy after the 2003 Convention’ (2004) 41 *Common Market Law Review* 37.

¹² On how to tackle this thorny issue see P Steinberg, ‘Agencies, Co-Regulation And Comitology - And What About Politics?’ in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>.

may even prove disastrous. Taking selected elements from across the Member States, a ‘best bits’ concoction of state democracy, is not assured success. The difficulty of ‘fit’ between elements that have not evolved within the same constitutional set-up is already evident in the current organisation of the EU.¹³

The problem with the second path is that conceiving of entirely new democratic criteria is a difficult theoretical task in itself and worse, novel concepts of democracy are harder to sell to the European public at large. Yet this is arguably the most important point of reference when defining such criteria. The quandary here is that there is no other model to replicate, to use as a template to point to its relative success (or failure), and therefore no way to predict the consequences of choosing one set of criteria over another. What is feasible in theoretical terms in constructing a new model of a ‘post-national democracy’ in order to overcome the democratic deficit problem, may not be feasible in the ‘real world’ of politics.

2.0: Conceptual tools to aid the discussion of democracy and legitimacy

Accepting the above proposition that each approach to the question of democratic deficit is dependent upon the normative vision of the EU, in concert with a certain definition of democracy, it is unsurprising that the European Union is often characterised as both a ‘*sui generis* organisation’ and a ‘contested polity’. These terms are often used in academic literature because they appear to offer a degree of value-free descriptive narrative when talking about the European Union, but in fact such terms belie the very nature of the problem of the democratic deficit itself.

When the term ‘democratic deficit’ was first coined¹⁴ it was in response to the lack of traditional direct ‘inputs’ into the system of governance in the EU, specifically with reference to the (then) non-elected Assembly.¹⁵ One suggested response to resolve this democratic deficit was to create a directly elected Parliament. Despite this eventual occurrence, there has been no abatement of the discussions on democratic deficit, but quite the opposite. At any rate, it proved rather insufficient at plugging the gap between those who govern, and those being governed.

¹³ See generally J Ziller, ‘European Models of Government: Towards a Patchwork with Missing Pieces’ (2000) 54 *Parliamentary Affairs* 102.

¹⁴ D Marquand, *Parliament for Europe* (Jonathan Cape, London, 1979).

¹⁵ In this sense, ‘inputs’ refers to the input of voter preferences through regular voting in elections.

The discussion of the democratic deficit is often seen as interchangeable with discussions on legitimacy and the EU, although properly conceived these are not necessarily the same concepts at all. 'Democratic deficit' debates ought to be confined to an analysis of the organisation of a system of governance against pre-defined criteria of what constitutes the optimum configuration of democratic institutions and mechanisms. In this sense, it might be reduced to a consideration of inputs and outputs that represent the best formula for achieving democracy. In contrast, discussions of the legitimacy of the EU are normatively driven. It is a discussion which relates to the *external acceptance and support* for a system of governance by those who are governed by it. It is not about whether a system is 'democratic' *per se*. Clearly, if a system is judged as democratic, then chances are that it is more likely to be regarded as legitimate by the citizenry, since through the operation of the democratic mechanisms in which their value choices are imposed on the governors, the *demos* might incrementally mould the organisation into one that they feel is legitimate. Democracy and legitimacy are not synonymous concepts however. It is quite feasible to suppose a non-democratic governance system might be seen as legitimate, accepted and supported by the *demos* at large. Debates on legitimacy are therefore really debates about how to generate support for the EU in the European public at large.

Unfortunately such distinctions are not always made within the academic literature on legitimacy and democracy in the EU, further confusing and blurring the boundaries of an already complex issue. It is necessary therefore to clarify the terminology and normative approach being used to define the political context of the EU in this thesis, and to define the key concept of legitimacy which will frame the evaluation of the role of Article 226.

2.1: Focusing on the 'key pillars' of democracy

One approach to tackling the issue of democratic deficit is that of Mény, who sums up the problem of the democratic deficit in Europe as being a struggle to find the correct balance between the 'popular pillar' and the 'constitutional pillar' of democracy.¹⁶ According to Mény, most modern democracies are dependent on two particular elements; inputs, in the form of citizens' influence through regular voting; and a constitutional framework guaranteeing rights and the protection of minorities from the rule of the majority.

¹⁶ Y Mény, 'De la démocratie en Europe: Old concepts and new challenges' (2002) 41 *Journal of Common Market Studies* 1.

In this analysis, the popular pillar comprises of direct methods of accountability of the EU institutions to the citizens. This has fallen way behind in the EU's expansion and evolution, perhaps unsurprisingly, given the initial focus on negative economic integration in the early years of the Community. It is at this fledgling stage of the Community's development that the popular pillar was created and has remained largely untouched since.¹⁷ As politics have progressed beyond the economic project, the popular pillar has not developed in parallel along with this new enterprise. Simultaneously the constitutional pillar, which focuses upon guaranteeing rights and imposing duties directly on the citizenry, is overdeveloped. Naturally therefore, there is a cleavage between the control of the EU and its institutions, policy direction and decision-making by the citizenry (including the continued development of the constitutional pillar), and the burgeoning impact of the EU on citizens' daily lives.

Neither the constitutional pillar nor the popular pillar is sufficient without the other in a properly functioning democracy, and although the relative balance between these two pillars might vary over time and space, they are seen by Mény as equally significant in combating democratic malaise.¹⁸ Here the discussions of democratic deficit and legitimacy are intertwined somewhat. By increasing the democratic credentials through alteration of the institutional set-up, which in turn will increase the citizens' input, the legitimacy of the EU is also improved. Nevertheless, this discussion is firmly placed in the 'democracy' end of the spectrum – improving democracy is the first priority and is the pathway to achieving legitimacy.

Mény does not suggest trying to replicate the state at the EU level, but rather the development of a *sui generis* definition of democracy to go with the *sui generis* organisation: to develop a concept of 'post-national democracy'. According to Mény, there is no value in replicating the national system as there is also a 'democratic deficit' being felt at the national level, though less acutely than at the EU level. The same problems (of a lack of popular input and control) persist in this domain of governance also, as the influence of non-democratic institutions and corporations expand and voter apathy grows. In national systems however, the development of the constitutional pillar has either occurred suddenly (in a state

¹⁷ With the exception of the direct election of the European Parliament.

¹⁸ In order to improve the relative balance between these two pillars, Mény suggests that tentative and small adjustments to the current system would begin to address some of the weaknesses in the popular pillar, such as making the institutions of Commission, Council and European Parliament directly accountable to the citizens; improving the 'transmission belts' of democracy (the political party system); improving the role of national parliaments with regards to EU policy; and introducing referenda on European issues.

forming big bang event) or at a significant time after the popular pillar, bringing with it the will of the people, and consequently the bigger imbalance felt at the EU level is not present.

This broader approach to the question of democratic deficit is useful as it crystallises the main arguments of many other authors in the discussion of these key ‘pillars’. The critique is along similar lines to Schmitter who links the problem of the democratic deficit to the key factor of the European project proceeding without the direct input or control of the citizenry.¹⁹ It is clear that under Mény’s analysis of the democracy crisis in the EU, the current institutional attitudes to the problem of the democratic deficit are perhaps misguided, since the most visible efforts at reducing the malaise of the European public are placed squarely in the further development of the constitutional pillar. Indeed a new constitution, complete with its own bill of rights is first and foremost on the agenda, with no equivalent effort being aimed at the popular pillar or voter input.

2.2: A liberal democratic emphasis

A more detailed analysis of the democratic deficit is undertaken by Beetham and Lord, who conflate the problem of democratic deficit and lack of legitimacy in the EU, and describe it as the ‘legitimacy deficit’.²⁰ This study lays out a cogent and clear approach to the question of legitimacy deficit in the EU. Using such terminology allows the debate to take into account both legitimacy and democracy criteria, and also circumvents the expectations generated by the use of the term ‘democratic’. They analyse what criteria underpin legitimate government and describe the lack of legitimacy, or democracy deficit, as:

‘a gap between principles and practice, or between legitimating norms and societies support for those norms’.²¹

The central argument of this contribution is that liberal democratic criteria are the appropriate criteria for judging the legitimacy of the EU, although they may be insufficient on their own, and the ultimate institutional structure may differ from that of the state model of democracy.

The concept of legitimacy used by Beetham and Lord is helpfully defined as consisting of three distinct criteria: identifiable rules; justifications for actions (by those who govern)

¹⁹ Discussed above n 25.

²⁰ D Beetham, and C Lord, *Legitimacy and the European Union* (Longman, London, 1998).

²¹ *Ibid* p 2.

founded on beliefs; and consent and recognition by those governed by the system.²² They define liberal democratic legitimacy as having five key features²³: a constitutional rule of law to determine legality of action; popular sovereignty as the source of political authority; rights defence as the purpose of the government (freedom, welfare, security); consent of the *demos* by electoral authorisation; and external recognition of the validity of that entity's political arrangement.²⁴ Clearly the EU has some features of liberal democratic legitimacy and not others. Beetham and Lord analyse the EU's legitimacy by focusing upon specific aspects of the liberal democratic model, particularly those which are seen as posing the greatest problem in terms of translation to the EU level of governance: political identity; popular authorisation/accountability; and performance.

This approach to the discussion of the democratic deficit is useful in several ways. First, it clearly articulates its particular normative vision for the EU from the outset, by using modified criteria of a liberal democratic state as its starting point, as well as *articulating what constitutes legitimacy* which provides a clear yardstick. This first step is often overlooked entirely in discussions on democratic deficit, leading to unclear benchmarks against which claims of a lack of legitimacy/democracy are often made.

In analysing certain aspects of the legitimacy criteria, the discussion is also opened out to consider alternative models for increasing the democracy and legitimacy of the EU, with each alternative approach critiqued and dismissed in turn. The analysis considers the problems of using the liberal democratic criteria to judge the EU against, in terms of the costs to state legitimacy – that in some cases, strengthening one system inevitably leads to weakness in the other and, alternatively, that such criteria might also have the positive effect of reinforcing democracy at both levels. This brings with it another perspective on the question of the democratic deficit and the difficulties caused when addressing certain problems at the EU level might have a detrimental knock-on effect at the level of the Member States.

²² Above n 20 p 4. This is the definition of legitimacy I will adopt and apply as the benchmark for consideration of the legitimacy of the infringement process in the wider context considering the operation of its competing functionality.

²³ Liberal democratic legitimacy is usually the term used to describe western European modern state democracies.

²⁴ Above n 20, p 9.

2.3: Democracy and citizen control

Schmitter's work on democracy and the European Union takes a different approach, heavily focused on democracy as traditionally understood.²⁵ It begins with a definition of democracy as:

‘a regime or system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their representatives’.²⁶

Whilst this does not equate to replication of the state institutions, it is heavily based on voter input and representation – in this sense it is liberal democratic in orientation. After describing the three main features of a democracy as being the rulers, citizens and representatives, Schmitter goes on to discuss how a Euro-democracy would be configured in relation to his model which incorporates these three key elements at the centre of the organisation. He provides a detailed critique of the current configuration of the EU with reference to these standards, concluding each section with some suggested ‘modest proposals’ for reform of the current system. These ‘modest proposals’ are detailed and practical changes to the current institutional and Treaty framework rather than an elaboration of a grand theory or new way of thinking of the democratic deficit, albeit there is clearly an underlying normative vision underwriting it. This is a remodelling rather than a reconceptualisation of democracy.²⁷ Most of the proposals are geared towards strengthening the key elements of Schmitter's model of democracy, which hark back to models of democracy heavily based on citizen control of public actors.

Although this is not a deeply theoretical discussion on the democratic deficit, the detailed consideration of particular amendments in the current practices in the EU and of the institutions and the manner in which they work, still contributes to the debate by highlighting how future concrete changes might affect the legitimacy and democratic credentials of the EU. What this book focuses upon much more than other pieces is the practical realisation of theoretical discussions on democratic deficit, as judged against the initial definition of democracy. The top-down approach of most theories, which inevitably outline change and

²⁵ PC Schmitter, *How to Democratize the European Union...and Why Bother?* (Rowman & Littlefield, Oxford, 2000), PC Schmitter, ‘What is there to legitimise in the European Union and how might this be accomplished?’ in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>. See also Miles, L ‘Editorial: The Paradox of a Popular Europe’ (2004) 42 *Journal of Common Market Studies* Annual Review 1.

²⁶ *Ibid* n 25 p 3.

²⁷ For instance, under the key element of citizenship, Schmitter proposes the insertion of referenda into European elections; allowing citizens to vote over a much longer time period and by electronic means; an entirely new voting system for MEPs; and granting the EU the authority to define and protect the status of third country nationals in the EU who are permanent residents.

democratic/legitimacy gains being elite driven through the process of Treaty amendment, tend to obscure the underlying cause of dissatisfaction with the EU project.

Schmitter repeatedly concentrates on ways in which to directly involve the citizenry on a level that the European public already understands, without trying to replicate the state institutions at the European level. The recurring calls for referenda on the issue of the direction of the EU and on certain policy initiatives is a specific example of the realisation that legitimacy and democracy cannot be invented over night, and the achievement of closing the emotional and intellectual gap between the elites who are invested in the EU project, and the *demos* at large, will be a long and painful process.

The focus on generating the ‘spark’ of change in the current malaise of the European public is usually either missing entirely or not treated in sufficient detail in other academic discussions. In Mény’s parlance, this would relate to the expansion of the ‘popular pillar’, but crucially Mény does not fully connect the necessity of this expansion being ‘bottom up’ i.e. coming at the behest of the citizenry. Only time, and a monumental publicity campaign, can hope to improve the European citizens’ disconnection with the EU.²⁸ Schmitter identifies this correctly as a risky strategy, since increasing the citizens’ involvement and awareness of the Union will not necessarily result in generating overwhelming support for it.²⁹

2.4: Categorisation of approaches: reconciling differences

Lord and Magnette’s discussion of legitimacy is focused upon reconciling the competing theories of legitimacy in debates about EU governance.³⁰ The premise of this work is that these competing visions of legitimate governance do not constitute evidence that there can never be legitimate governance in Europe, but quite the opposite. Accordingly, it is within these broad ideological differences of what is legitimate that a plurality of legitimating principles can be found, and whilst some visions may compete and conflict, others complement and reinforce each other. It is within the management and reconciliation of these competing visions of legitimacy that the EU’s claim to legitimate government can be made, based on the common legitimating principles.

²⁸ The EU is not blind to this and recent initiatives clearly demonstrate that this has been identified as a key part of the strategy to increase the legitimacy of the EU, see for instance <http://euobserver.com/9/21452/?rk=1> where the Commission is keen to emphasise its commitment to addressing citizens’ concerns.

²⁹ Though see the Commission’s thoughts on this matter in the WPG, discussed below.

³⁰ Lord and Magnette above, n 7.

In surveying the literature on legitimacy/democracy and the EU, Lord and Magette categorise the different approaches taken by other authors. These are described as indirect legitimacy, parliamentary legitimacy, technocratic legitimacy and procedural legitimacy. This is a useful tool to aid the discussion of the broad approaches taken by other authors when discussing legitimacy and/or the democratic deficit in the Union, and I will use this terminology throughout the thesis to identify the different ways of conceptualising the conflicting approaches, and to define the types of legitimacy questions applicable to evaluating the role of Article 226. Ideologically, the categorisation used by Lord and Magette easily covers those discussions strictly dealing with democracy questions, and those strictly dealing with legitimacy questions, as well as those who conflate the discussion of both.

These categorisations reflect a commitment to a fundamental way of conceiving a more legitimate or more democratic Europe. The *indirect legitimacy* approach relies heavily on the pre-existing legitimacy of the state actors and each Member State's sovereignty when participating in the EU on the basis of consent³¹ – this is also sometimes referred to as the international model and is an approach adopted in earlier discussions of the EU's legitimacy, and in particular the 'legitimacy' of the enforcement action.³² This particular line is favoured by those authors who prefer the intergovernmental model of the EU to the supranational model or those who prefer the democratic credentials to stay at the nation-state level.

The category of '*parliamentary legitimacy*' refers to those authors that support the status quo of representation of citizens through the Council of Ministers and government heads in the European Council, plus the direct representation through the European Parliament, combined in a forum of consensus and majority decision-making. This approach favours alterations to the current system on a smaller scale, and places emphasis on re-conceptualising the problem of democratic deficit rather than reducing it to increasing the elements of direct representation of the citizen.³³ It can also refer to those academic contributions that wish to

³¹ Moravcsik, A *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht* (University College London Press, London, 1998).

³² In fact the word legitimacy is never used in relation to early discussions of Article 226 at all, as this was considered irrelevant to the utility of Article 226 as an enforcement mechanism. Nonetheless, consideration of Article 226 was always couched in terms of intergovernmentalism and Member State sovereignty and the lack of legal control and unbounded discretion is defended on this basis.

³³ An example of this approach is in Lord & Beetham above n 20.

concentrate on improving the direct accountability of the EU institutions to the citizens of Europe by changing the current institutional structure to offer direct input opportunity other than that already offered by the European Parliament.³⁴ Both those who want ‘more Europe’ and, occasionally those who want less, can champion this path – ideologically this is quite a flexible tool. Clearly, the greater the traditional nation state characteristics are replicated at the EU level, the more it resembles a super-state that is at once more federal and more democratic (if the major democratic criterion is voter input, though again, this is a point of disagreement). Those who want less Europe might also wish to see the *status quo* largely preserved (since it appears so unpopular, thereby denying it democratic credibility) with an increase in the role of national parliaments keeping the democratic credentials at the national level.³⁵

It is the final two categorisations of Lord and Magnette, of technocratic and procedural legitimacy, that dominate the discussion and evaluation of the role of Article 226 in this thesis. The *technocratic* vision of the EU is based on an entirely different premise from the first two categories, is largely associated with the work of Majone,³⁶ and will be discussed *infra*. The *procedural* category best describes those authors who prefer the approach of improving the current institutional framework with more commitment to certain overriding principles in the EU’s operation such as transparency, due process, legal certainty and respect for fundamental rights. This stance is less concerned with (voter) inputs and more concerned with increased participation and transparency more generally³⁷; it is heavily reliant on the legal system to provide legitimacy, when the political system is considered deficient in certain respects.³⁸ This standpoint is often combined with other models in academic literature rather than a stand-alone approach to improving the legitimacy of the EU, and is more linked to questions of legitimacy than questions of democracy.³⁹

³⁴ Mény above n 16.

³⁵ C Harlow, *Accountability in the European Union* (Oxford University Press, Oxford, 2002).

³⁶ G Majone, *Regulating Europe* (Routledge, London, 1996), G Majone, ‘The European Community: An Independent Fourth Branch of Government’ EUI Working Paper 94/17, Florence, G Majone, ‘Europe’s ‘Democratic Deficit’: The Question of Standards’ (1998) 4 *European Law Journal* 5. See more recently G Majone, *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth* (Oxford University Press, Oxford, 2005).

³⁷ D Curtin, ‘Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?’ (2000) 37 *Common Market Law Review* 7, D Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 *Common Market Law Review* 17.

³⁸ In Beetham and Lord’s terms, deficient in the conventional legitimating criteria present in the liberal democratic state. In terms of Article 226, deficient in legal administrative controls in the operation of the enforcement mechanism.

³⁹ See also A Héritier, ‘Composite democracy in Europe: the role of transparency and access to information’ (2003) 10 *Journal of European Public Policy* 814.

This categorisation of the debates on democratic deficit and legitimacy is not an attempt to apply a particular theory to one policy field or institution (which is a popular approach in academic contributions), but to show how the combination of various broad approaches might eventually produce the most acceptable outcome in a new system of governance such as the EU, and how a plurality of views promotes the idea that the EU might be defended as a legitimate system of governance.

2.5: *Technocratic governance: the non-majoritarian approach*

Technocratic governance is a different approach to the legitimation of the EU and is firmly rooted in discussions of legitimacy rather than democracy. If the EU is not envisioned as a super state, a federal state or any other kind of state-like entity, it need not possess the characteristics of such an entity to be legitimate. Majone's approach to the discussion of the democratic deficit was quite different from most others, since it focused upon the necessity of non-majoritarian (non-democratic) institutions in democratic governance. An example of this type of system is the American 'fourth branch of government' of executive agencies, which are non-elected expert bodies charged with rule making.⁴⁰ Examples of this type of governance now abound in most liberal democratic systems of government.⁴¹

The premise of this theory is that the necessity for traditional (state like) organisation of democracy is limited at the European level, since conceptually it can be viewed as a regulatory body on a grand scale. This government by epistemic communities requires no democratic credentials save the governing instruments of such bodies be clearly set out; legitimation is generated by the quality of those decisions that are being made and the superior knowledge of those participating in the decision-making process.⁴² The legitimacy credentials are therefore reliant only upon the quality of the outputs (good or bad decisions or policies) rather than the inputs of voter/citizen values or beliefs.⁴³ In a regulatory system,

⁴⁰ M Shapiro, 'The problem of Independent Agencies in the United States and the European Union' (1997) 4 *Journal of Public Policy* 276.

⁴¹ For instance, the Bank of England is one such institution in the UK.

⁴² E Vos, 'Reforming the European Commission: What Role to Play for EU Agencies' (2000) 37 *Common Market Law Review* 1113, E Chiti, 'The emergence of a Community administration: the case of European agencies' (2000) 37 *Common Market Law Review* 309, R Dehousse, 'Misfits: EU law and the Transformation of European governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, Oxford, 2002).

⁴³ Although as part of Beetham and Lord's definition of liberal democratic legitimacy, the outputs (in terms of the 'performance' criterion) are a part of the five key features of liberal democratic legitimacy and the relevance of outputs is not solely associated with the non-majoritarian approach to legitimacy.

decisions are best insulated from politics which (should) reflect voter beliefs or preferences, which in turn might negatively affect the quality of the decisions being taken by experts in the field.

Doubtless this theory has some significant drawbacks. Since progression to a political union the EU cannot accurately be described as a technical rule making body alone (if indeed it could ever have been accurately described as such), and is it very much immersed in normative political choices extending to the heart of value-laden judgments like human rights and social policy. There is no 'expert body' more qualified than the representatives of the citizens to take such normatively foundational decisions which shape the society in which we all live. The weakness of this theory is accountability to the *demos*; whilst legitimacy is based on outputs of 'good decisions', even the most technical and seemingly non-political decision will at some point contain a value-choice. If the citizenry disagrees with this value choice, there is no way for the citizenry to alter the system – it is completely insulated from political influence and purposely so. Whilst 'experts' may be accountable to each other via a species of 'network accountability',⁴⁴ again this is internal accountability rather than external. This viewpoint can be contrasted with the approach of Schmitter above where the input from 'below' is of central importance in the debate on the democratic deficit and is viewed as the only way forward to bridge the growing disconnection with the citizens of the EU.

There might be discrete areas within the EU that might more properly relate to this particular stance on legitimacy, such as the organisation of the European agencies or the European Central Bank. In this respect, on a functional basis, this theory has much to offer as an explanation of legitimacy in individual non-majoritarian based institutions. Equating the EU with the American system, as Majone does, misses the crucial point that this system of executive agencies is deeply imbedded within the traditional organs of state democracy and is not a stand-alone system responsible for the entire governance of the US. Nevertheless, this particular approach to the legitimacy crisis in the EU is useful since it provides an alternative to most other theories which posit political representation as a cornerstone of improving the democratic deficit in the EU. It also reflects, to some extent, the focus of institutional discussions of legitimacy in the EU.

⁴⁴ C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Legal Studies* 38, KH Ladeur, 'Towards a Legal Theory of Supranationality - The Viability of the Network Concept' (1997) 3 *European Law Review* 33, C Scott, 'The Governance of the European Union: The Potential for Multi-Level Control' 8 (2002) *European Law Journal* 59.

The above survey only touches upon the enormously varied discussion of the issues which surround the questions about democratic deficit and legitimacy in the EU, but it does provide a broad overview of some of the intellectual approaches taken, focusing on material that specifically contributes to the underpinning the discussion of legitimacy in this thesis. If it is a difficult task theoretically to construct an acceptable solution to the democracy/legitimacy crisis of the EU, transferring such considerations to the infinitely less flexible and less adaptable 'real world' of politics is exponentially harder. Nevertheless, the political world is awake to the dissatisfaction of the European public with the EU, and must try to forge a solution that is workable in the arena of co-operation between 27 differently configured Member States.

3.0 The introduction of 'good governance' as a tool to redress the legitimacy deficit

Due to the lack of a traditional state structure, based on hierarchical authority derived from the popular consent of the *demos*, the notion of government as a basis for conducting the business of the European Union has been largely sidelined. In its place, the more fluid concept of governance, which can be constructed in various organisational formats and can accommodate even the vagaries of the EU's operations, has replaced the idea of traditional government as an organising concept. The governance trend is widely addressed in academic literature in relation to the evolution of the EU,⁴⁵ and has also caught the imagination of the political/institutional arena as a way forward in addressing the legitimacy problems of the Union. Employing the term 'governance' in debates on legitimacy in the EU is yet another method of circumventing the difficulties associated with the democratic deficit debates, as government seems inevitably linked with 'democracy' rather than an alternative form of rule.

When focusing down from the generalised debates on democracy/legitimacy, the concept of good governance provides a yardstick of legitimacy in the EU. The question then becomes, what constitutes good governance and legitimacy in the contemporary political context of the EU? Fortunately, the EU itself, in the form of the European Commission has outlined what

⁴⁵ For instance C Carter, and A Scott 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union' (1998) 4 *European Law Journal* 429, R Rhodes, 'The New Governance: Governing without Government' (1996) 44 *Political Studies* 652, J Scott, and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2001) 8 *European Law Journal* 1, IJ Sand, 'Understanding the New Forms of Governance: Mutually Independent, Reflexive, Destabilised and Competing Institutions' (1998) 4 *European Law Journal* 271.

it considers to be the appropriate defining criteria of the concept of good governance, and this will be considered in greater detail below. The Commission's vision of good governance, together with the appropriate political and legal context will be used as the framework of analysis for considering the role of the Article 226.

3.1: A changing political vision of Europe

The Maastricht Treaty⁴⁶ was an important turning point in achieving greater political co-operation.⁴⁷ It introduced the pillar structure and with it more nationally sensitive policy areas into the EU domain. From this point onwards, the rate at which renewal and debate about the nature of the European project greatly increased. The prospect of enlargement to include states from Central and Eastern Europe focused attention on issues relating to institutional reform, initially on a practical level of whether the existing institutions could cope with the increased workload enlargement would bring.⁴⁸ The Treaty of Nice and in particular the Declaration on the future of the Union⁴⁹ called for a deeper and wider debate about the future of the EU, leading to the Laeken Declaration.⁵⁰

This Declaration sets out the political agenda and the normative vision of the EU's Member States for a more democratic Europe (without, conveniently, defining the term 'democratic'). The Declaration focuses upon some general key themes, such as bringing the institutions closer to the citizens by making them more open and efficient, which in turn will lead to an increased democratic scrutiny of the EU's actions. Citizens' expectations are explained in the language of 'more results, better responses to practical issues, less bureaucracy' and not the formation of a 'European super-state involved in every detail of everyday life'. It is stated that the citizens are in complete agreement with the Union's broad aims and there is no ambiguity in the citizens' call for a clear, open, effective and democratically controlled Union. Through the simplification of instruments, clearer roles for each institution and greater transparency in its operation, the Laeken Declaration pinpoints the way in which the democratic credentials of the EU could be greatly increased. The Declaration culminated in

⁴⁶ Treaty on European Union, signed 1992, and entered into force in 1993.

⁴⁷ The TEU renamed the EEC Treaty to the EC Treaty (which would comprise the Communities and be the first pillar) and created the three pillar structure and the European Union.

⁴⁸ Treaty of Amsterdam signed 1997, entered into force 1999 and the Treaty of Nice, signed 2002, entered into force 2003.

⁴⁹ Declaration on the future of the Union, Treaty of Nice OJ C 80 10.3.2001, Declaration 23 at p 80.

⁵⁰ European Council, December 2001, the text can be found at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf.

the convening of the Convention on the Future of Europe⁵¹ to reflect upon the issues raised, which eventually resulted in the production of a Draft Constitutional Treaty. The Draft Treaty was debated and amended at the IGC in 2004, eventually resulting in the Constitutional Treaty which was signed by the Member States in October 2004.

The Laeken Declaration marks an important step forward in the recognition that the European project must search for better democratic credentials if it is to be sustained, not only in response to the (then impending) enlargement process, but also to improve its democratic standing and therefore its legitimacy in the eyes of the public. By virtue of the fact that the Laeken Declaration is a political document from the Member States, it is light on detail and heavy on rhetoric. However, it is feasible to speculate that in the politician's mindset, the discussions of democracy and legitimacy are inextricably linked and often interchangeable.⁵²

The concentration on clarification and transparency broadly adopts the route of procedural legitimacy in its approach to delivering greater legitimacy credentials for the EU, combined with a focus on improving performance, or increasing the quality of the 'outputs'.⁵³ In Mény's parlance, this is once again a concentration on expanding and improving upon the 'constitutional pillar', and despite the mention of 'democratic control' in the Laeken Declaration, there is not much in the way of suggestions to increase the ambit of the 'popular pillar'. In comparison to Schmitter's model, which is completely focused on increasing the democratic credentials of the EU, the vision espoused in the Laeken Declaration bears scant resemblance to a blueprint for increasing citizen control. This is important to note because, as will become clear, the incantation of particular phrases does not amount to the adoption or realisation of that strategy in reality.

⁵¹ The Convention was charged with preparing for the 2004 IGC in an transparent and open format, involving many stakeholders into the debate, for instance, the governments of the Member States and the candidate countries, representatives of national parliaments, representatives of the European Parliament and the European Commission, and observers from the Committee of the Regions, the European Economic and Social Committee and the European social partners. For a step by step description of the work of the Convention and the debate about the future of Europe, see http://europa.eu/scadplus/european_convention/introduction_en.htm.

⁵² See the speech by R Prodi, President of the European Commission 'The European Union and its citizens: a matter of Democracy' European Parliament Strasbourg, 4 September 2001, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/365&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁵³ This is a combination of technocratic legitimacy and procedural legitimacy.

3.2: The background to the White Paper on Governance

As a part of the process of re-conceptualising the EU in the political world, the Commission as central policy initiator, drafted what it foresaw as a realistic vision of a better governed Europe. This document contained clues as to the Commission's particular normative vision for the future governance of the EU.⁵⁴ The White Paper on Governance⁵⁵ proved an eerily accurate precursor of the Laeken Declaration with many of the themes espoused in the Laeken Declaration advocated in the WPG.⁵⁶ This is of course no co-incidence; the Commission is eager to position itself as the neutral mediator between the political struggles of the Member States, and so it should come as no surprise that in search for politically neutral terminology, phrases from the earlier produced WPG appear replicated. It is also the primary function of the Commission to initiate new policy so naturally, when the political, philosophical and functional direction of the EU might be changing, the Commission was keen to actively participate in shaping the future direction of the Union.

The stated purpose of the WPG was to engage in an intellectual exercise of debating new governance techniques, in order to improve the governance of the EU, placed within this changing political context. It was put forward specifically as a way to exchange ideas, in the form of an open consultation paper, with anyone who wished to contribute to this debate. It acknowledged the wider debate taking place on the future of Europe, and is self-conscious that the proposals contained therein form a part of the same normative debate. From this perspective, the WPG was an ambitious project of attempting to open up the discussion of EU governance by and with the Commission, so often an event viewed as being exclusive and behind closed doors by the outside world. On the whole, this process in and of itself was a positive step forward in opening up policy making discussions in EU governance.

3.3: The underlying normative vision and the five principles of good governance

The Commission set out its position on greater democracy and legitimacy in the EU. The emphasis was placed on adopting five principles of good governance to be applied to the conduct of the EU governance. The principles articulated by the Commission were those of

⁵⁴ The Commission's White Paper has been chosen as it reflects the view of the 'neutral' representative of Europe itself, as well as being the institution responsible for policy initiation in the EU. More importantly, in the context of the wider thesis, the Commission is the main controller of the infringement process, which itself is a central tool of governance.

⁵⁵ Above n 2.

⁵⁶ Proving once again the astute policy organisation of the Commission in getting its proposals in early in order to influence the Laeken Declaration and the Convention.

*openness, participation, accountability, effectiveness and coherence.*⁵⁷ The WPG began with the warning label of not being ‘a magic cure for everything’ and the statement that the Commission was constrained in its suggestions by the framework of the Treaties.⁵⁸ This being acknowledged, it is correct to say that even within the parameters of its own circumscribed proposals, there is a normative vision of Europe being put forward by the Commission nonetheless.⁵⁹ The WPG used the terminology of ‘democracy’ and it is quickly evident that much of the WPG is aimed at a particular brand of ‘democracy’ that is not necessarily liberal democratic in nature⁶⁰: however, it is no less democratic for this reason alone. As we have seen, democracy is a flexible term that can be applied to many different configurations of institutions and principles.

It is disappointing that there is no working definition of democracy within this document, and this is a particular weak point if the WPG was to represent an intellectual (rather than political) exercise of discussing better governance. It is hard to measure the effectiveness of the suggestions if there is no self-set benchmark. Notwithstanding this, there is an appreciation in the WPG, so often missing in academic contributions to the debate, that the legitimacy of the EU can be viewed as quite separate from the democratic credentials of the EU, and is just as important (if not more so), when framing the proposed solutions in the WPG. There was an ostensibly two-prong approach to the discussion of governance: legitimacy-based solutions and democracy-based solutions. The legitimacy-based proposals are a species of procedural and technocratic legitimacy. The democracy-based solutions are heavily influenced by theories that rely significantly on increasing (citizen) participation in public affairs, although the legitimacy ‘input’ is not necessarily created by the elements of liberal democracy and citizen control emphasised by Schmitter.⁶¹

⁵⁷ Governance is defined in the WPG as ‘rules, processes and behaviour that affect the way in which powers are exercised at the European level, particularly as regards openness, participation, accountability, effectiveness and coherence’.

⁵⁸ WPG, above n 2 p 3.

⁵⁹ Contrary to the thoughts of EO Erikson, ‘Democratic or technocratic governance?’ in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>.

⁶⁰ Unlike most of the academic discussions surveyed above which, if focusing upon democracy, tend to reference liberal democratic criteria as the benchmark.

⁶¹ It is feasible to suggest that in the early drafting of the WPG, the Commission may well have originally been influenced by the theoretical approach of civic republicanism, which is less reliant on the traditional emphasis of liberal democratic systems of voter input and control that the EU does not presently contain. See the governance website of the Commission for some of the early contributions to the debate, http://ec.europa.eu/governance/index_en.htm. See also http://ec.europa.eu/governance/areas/preparatory_work_en.pdf. A useful elaboration of civic republicanism can be found in P Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford University Press, Oxford, 1997).

The principle of openness

The proclaimed objective of the WPG proposals was to ‘promote greater openness, accountability and responsibility’⁶² in European governance. These terms are defined in a way that underlines the emphasis placed by the Commission on procedural and technocratic legitimacy. The principle of openness is defined as the:

‘institutions working in a more open manner...actively communicating about what the EU does.’⁶³

In choosing the principle of ‘openness’, the Commission was responding to the criticism that the EU is a complex organisation not easily understood by the citizens of Europe.

Embracing greater openness, meaning in this case greater transparency in the way in which the Union operates, will ensure that citizens feel less suspicious of the ‘bureaucracy in Brussels’. Secretive dealings behind closed doors do not inspire claims of legitimacy, and without a doubt the Commission has pinpointed one aspect of citizen dissatisfaction about the EU as a whole.⁶⁴

The Commission concentrated on openness in relation to one very specific issue with the EU, relating it only to the complex methods of decision-making.⁶⁵ Here, openness equates to clarity within and between the institutions, which can loosely be defined as a type of procedural legitimacy. Arguably, greater openness relies not only on open deliberations of the legislator and clarity in the legislating process, but also easy access to information. The often quoted shining light of progress in this particular field is woefully inadequate and has proved insufficient at quelling calls for a more open Europe.⁶⁶ The Commission itself is often a target of citizen complaints under this very legislation; it is disappointing therefore, that this rather central aspect of ‘openness’ was sidestepped in discussion of this governance principle.

Interestingly, despite ‘transparency’ being the buzz-word of the new governance trend, it was not adopted as a principle of good governance. Transparency and, perhaps, even the more limited version of openness adopted by the Commission, requires much more than active communication about the ways in which decisions are taken, but also (at the very

⁶² WPG above n 2 p 3.

⁶³ WPG above n 2 p 10.

⁶⁴ The Commission does not connect this problem to the operation of the enforcement mechanism.

⁶⁵ Though this is a very basic requirement of any system of legitimate legislation.

⁶⁶ Regulation 1049/2001 OJ 2001 L145/43, discussed in greater detail in Chapter II.

least) an ability to discover information for oneself rather than a one-way stream of educative information from the EU ‘downward’.⁶⁷ This might be seen as a missed opportunity to improve the legitimacy of the EU, especially considering the Commission would not have had to compromise on its particular normative vision of procedural and technocratic legitimacy, in order to improve both the transparency credentials of the Union and its own beleaguered image in this respect.

The principle of participation

The principle of participation was defined with reference to the underlying Commission vision of technocratic legitimacy; in this sense, active participation is important in European governance because there is ‘a greater need for quality, relevance and effectiveness’.⁶⁸ This version of participation is output driven: with greater participation from appropriate parties, including citizens in the form of organised interest groups, policies will be of better quality, more relevant (and therefore more popular) and more effective. This approach to participation might be seen as a lost opportunity. Arguably, one is tempted to think of participation in very different terminology than ‘quality, relevance and effectiveness’ when the self-proclaimed task at hand is aimed at establishing *democratic* governance and reconnecting Europe to its citizens.⁶⁹

This was perhaps one of the most crucial miscalculations on the Commission’s part in the WPG, revealing the essentially political (rather than intellectual) aspect of the WPG exercise. Correctly identifying the lack of citizen connection with the EU in several passages in the WPG nevertheless resulted in an extremely weak attempt to engage with the citizenry under the principle of participation, focusing on the task of engaging with already integrated elite actors, and failing to mention political parties in any fashion.⁷⁰ It seems the principle of participation is not focused on engaging with the citizenry, but rather on improving the quality of the policy output. On closer inspection, this initiative is more to do with (technocratic) policy management techniques and therefore does not contribute to democracy-based solutions. This is not to suggest good policies are not an admirable goal in

⁶⁷ M O’Neill, ‘The Right of Access to Community Held Documentation as a General Principle of EC Law’ (1998) 5 *European Public Law* 403, A Tomkins, ‘Transparency and the Emergence of a European Administrative Law’ (1999) 19 *Yearbook of European Law* 219.

⁶⁸ WPG above n 2 p 10.

⁶⁹ See generally F Bignami, ‘Three Generations of Participation Rights in European Administrative Proceedings’ Jean Monnet Working Paper 11/03, <http://www.jeanmonnetprogram.org/papers/index.html>.

⁷⁰ Steinberg above n 12.

any governance reform programme, only that this was the least suitable principle to assign to this task.

Putting aside the reasoning behind the definition of this principle, the Commission has attempted to be more inclusive in its policy making by arranging to include the organisations of civil society, with the Commission choosing which organisations will qualify as proper representatives of the citizens.⁷¹ The principle of participation, on further elaboration by the Commission⁷² actually really equates to some form of consultation, which has very different democratic (and legitimacy) connotations than that of participation. It is certainly less catchy as a headline principle of good governance, and ultimately less meaningful in practical terms as a way of actively engaging with the citizenry.

The principle of consultation does fit entirely with the Commission's emphasis on procedural and technocratic solutions, and should have replaced the term 'participation' so as not to give a false impression. On further elaboration of this principle in the Commission's more detailed Communication, even as consultation properly conceived, it still remains rather restricted as a principle of good governance. As a form of consultation, it resembles the natural justice end of the consultation spectrum: an opportunity to air views, rather than a way to truly assert influence in the policy making process.⁷³ This then reduces the WPG focus from a two-pronged approach of democracy and legitimacy-based solutions, to being focused only on legitimacy.

The principle of accountability

The term accountability is famously elastic and, rather like the term democracy, it can mean whatever one would like it to mean, depending on one's perspective.⁷⁴ In the WPG, the Commission adopts the principle of accountability as one of its good governance principles and defines it as a combination of participation (meaning consultation) and openness. This view of accountability again reflects the underlying normative bias of the WPG towards

⁷¹ There is no duty to consult other than that which already exists (with reference to the 'social partners') and no clear commitment to when and on what issues the Commission will consult. On the problem of agency capture and self selection of civil society and the value of this approach see O De Schutter, 'Europe in Search of its Civil Society' (2002) 8 *European Law Journal* 198, LSE response paper to the governance consultation 'Taking Governance Seriously' http://ec.europa.eu/governance/index_en.htm.

⁷² Commission Communication 'Towards a Reinforced Culture of Consultation and Dialogue' COM (2002) 277 final 5.6.2002.

⁷³ S Arnstein, 'A Ladder of Participation' (1969) *Journal of the American Institute of Planners* 216.

⁷⁴ R Mulgan, 'Accountability: An Ever Expanding Concept?' (2000) 78 *Public Administration* 555.

procedural and technocratic legitimacy-based solutions. Accountability is not, despite the conflicting rhetoric, about direct accountability of the European Union towards the citizens of Europe and therefore is not a species of democracy-based solutions.

Accountability is defined as comprising of two elements. The first is democratic accountability as traditionally understood in the liberal democratic model as the representatives of citizens.⁷⁵ This is the *status quo*, a rehearsal of the current arrangement and contains no new initiative. To complement this, the second aspect of accountability suggested by the Commission is in the form of technocratic and procedural accountability. It is within the *clarification* of the decision-making rules that procedural legitimacy is assured (i.e. openness in decision-making). Technocratic accountability relates specifically to the introduction of the new type of European agencies. This is a measure which is meant to increase accountability by the use of clear governing legislation to frame their operation, increased monitoring by the Commission and the ability to easily identify those institutions charged with the decision-making task in a particular field.⁷⁶ There is an indication that this principle might also refer to internal accountability of the institutions through path dependence and networks,⁷⁷ partnership and monitoring practices,⁷⁸ although this is not explored in any depth in the WPG.

This illustrates the weakness of the technocratic approach to governance; it is a rather technical, obscure and jargon based approach to legitimacy and therefore not easily 'sold' as a concept to the public at large. This is a problem with all new 'post national' concepts of democracy/legitimacy and, as identified by Schmitter, has some serious drawbacks in terms of connecting the citizens to the institutions of the EU.⁷⁹ It is unfortunate that this approach is adopted when dealing with one of the central concerns of the European public, i.e. that of accountability of the EU to the citizens.

It is true that the Commission was restricted in its options on accountability if it were to propose solutions within the framework of the current Treaties, but there are alternative ways

⁷⁵ Already provided for through the direct election of MEPs and the election of national MPs who then sit in the Council of Ministers and the European Council.

⁷⁶ As opposed to the previous system of comitology, often pilloried for blurring the lines of responsibility and being impossible for the citizens to understand.

⁷⁷ Above n 44.

⁷⁸ For instance as already practised through the structural funds, see J Scott, 'Law, Legitimacy and EC Governance: Prospects for Partnership' (1998) 36 *Journal of Common Market Studies* 175. For an alternative view, see MW Bauer, 'The EU Partnership Principle: Still a Sustainable Governance Device across Multiple Administrative Arenas?' (2002) 80 *Public Administration* 769.

⁷⁹ Above n 25.

of dealing with accountability as a governance principle within the current framework which would also have the advantage of not using technocratic jargon. Surprisingly, and given the negative publicity generated by the resignation of the Santer Commission, there was no discussion of the Commission's own reform programme relating to internal accountability, which would have been an excellent opportunity to demonstrate that citizens' concerns were being taken seriously.⁸⁰ There was no attempt to define accountability as either 'responsibility', or in terms of accountability through audit (the actual root meaning of the term⁸¹) which would have fitted in perfectly with the Commission's own technocratic and procedural normative vision. This approach would have been explainable in terms of legitimacy and democracy in easily understandable language, with the emphasis being placed on a more fastidious approach toward quantifying how public money was being spent – a real and tangible concern of most citizens.

Without the ability to hold to account (remove, sack, publicly shame, command explanation from) the decision maker for decisions that go badly wrong, it is hard to convince the European public that there can be real accountability. The fact that decision-making is interdependent, majority, consensus, collegiate, outsourced, obscure and ultimately never the responsibility of just one actor or body is no consolation – this excuse, often played out time and again, could be said of *any state* in the European Union. Yet, in these imperfect examples of governance, accountability (however flawed) is still believed to be present (sometimes) in some form. This is a missed opportunity to connect with the citizenry of the EU.

There are yet other alternative ways to discuss and define accountability. One such way would have been to promote the adoption of the Code of Good Administrative Behaviour⁸² as a Regulation, already adopted by some institutions within the EU as Decisions (such as the European Agencies and the European Parliament) . The Commission however has an amended soft law version⁸³ which it uses as a kind of New Public Management technique in dealing with the European public. Again, this in no way threatens or undermines the Commission's normative vision, as it is a species of procedural legitimacy. This might have

⁸⁰ See the Code of Conduct for Commissioners, European Commission, SEC 1487/2 at http://ec.europa.eu/commission_barroso/code_of_conduct/code_conduct_en.pdf.

⁸¹ Mulgan above n 74.

⁸² Code of Good Administrative Behaviour, adopted by Resolution of the European Parliament 6 September 2001, can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

⁸³ See the Commission's version at http://ec.europa.eu/civil_society/code/index_en.htm.

struck a chord with the European public without at all compromising the Commission's position, or necessitating a 'ballot box' approach to accountability.

The principles of effectiveness and coherence

The final two principles of effectiveness and coherence fit most comfortably with the WPG approach to increasing the legitimacy credentials of the EU based on procedural and technocratic solutions. By definition, these governance principles are not concerned with democracy *per se*. Historically, the EU has derived much of its legitimacy through the delivery of specific policies, such as the achievement of the common market. The principles of effectiveness and coherence are not 'normative' criteria; it is an inbuilt assumption that the policies adopted are the right policies and have been arrived at in the correct fashion.⁸⁴ Effectiveness is defined with reference to policy outputs, meaning good policy management techniques resulting in effective implementation and achieving the maximum results from each policy initiative. Similarly, coherence is concerned with clarity and simplicity in policy delivery, maximising the efficiency of the institutions responsible for co-ordinating and delivering the policies on the ground.⁸⁵

Most of the concrete proposals outlined in the WPG could easily be placed under the banner of one of these two principles; intellectually, these would have been sufficient to underpin the WPG's entire approach to better governance. For example, the policy initiative of tripartite target based contracts⁸⁶ could conceptually be placed under increasing multi-level governance in the EU (taking decisions as close to the citizen as possible), but actually relates to the efficient and effective policy making goal. The commitment to the 'reinvigorated Community method'⁸⁷ might suggest a commitment to openness and clarity, but again, the emphasis is placed on the efficiency gains of this method of decision-making.⁸⁸ A great deal of the strain of creating a legitimate or more democratic European system of governance is placed on these two principles of good governance, and it is questionable as to whether these principles in isolation can deliver the vision of good

⁸⁴ It is the function of other democracy or legitimacy principles/mechanisms that are responsible for ensuring the 'right' policies are adopted, such as voter inputs and accountability in the liberal democratic model, or the correct procedures in the procedural model.

⁸⁵ WPG above n 2 pp 10, 13, 18.

⁸⁶ See Commission Communication 'A Framework for Target-Based Tripartite Contracts' COM (2002) 709 final.

⁸⁷ WPG above n 2 p 34.

⁸⁸ Not to mention the unambiguous commitment to increasing the Commission's power and control of the legislating process in the EU.

governance based on procedural and technocratic legitimacy as defined by the Commission in the WPG.

3.4: *The WPG and its five principles: is this 'good governance'?*

The WPG has been the subject of intense debate and criticism⁸⁹ relating to two broad aspects; the normative vision underpinning the document as a whole, and more specifically, as a missed opportunity for the main policy initiator of the EU to achieve the self-set task of re-connecting with the citizens of Europe. The Commission identifies the lack of interest and confidence of the European public in the EU system of governance, urging that the institutions 'can and must try to connect Europe with its citizens'. Crucially, however, this particular cry for action ends with the sentiment 'This is the starting condition for more effective and relevant policies'.⁹⁰ And thus, the WPG normative vision is born. What might have begun as a genuine desire to engage in a meaningful debate on the future governance of Europe, descended into an unambiguous statement of institutional ambition by the Commission, with the constant message of increasing the Commission's power and control in the EU.

There is no ambiguity or confusion in recognising citizen distrust and disconnection with the EU, but there is an *inability to identify and correctly analyse* the reasons for this disconnection: the proposals put forward therefore do not alleviate these concerns. The democratic challenge, properly conceived, is not addressed at all, and what could have been a shining light in this area (under the principle of participation) performed an entirely different function. Efficiency, and not legitimacy or improving the democratic credentials of the EU, is a key goal. Under the heading of 'Why Reform European Governance?'⁹¹ this dilemma is in evidence. The first half of the page is geared toward the democratic challenge – talk of political objectives, political institutions, the rejection of the EU by its citizens and

⁸⁹ See generally JHH Weiler, 'The Commission as Euro-Skeptic: A Task Oriented Commission for a Project-Based Union, A Comment on the First Version of the White Paper' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, N Walker, 'The White Paper in Constitutional Context' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, M Wind, 'The Commission White Paper: Bridging The Gap Between The Governed And The Governing?' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01 all available at <http://www.jeanmonnetprogram.org/papers/index.html> D Wincott, 'Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union' (2001) 39 *Journal of Common Market Studies* 897.

⁹⁰ WPG above n 2 p 3.

⁹¹ WPG above n 2 p 7.

the problem of citizens feeling isolated.⁹² The second half of this section goes on to identify the reasons for this isolation being fourfold: a lack of effectiveness of the EU; the ignorance of the public of the achievements of the EU; Member States failing to communicate well with their citizens about the EU; and finally the citizens' ignorance of the institutions.⁹³ Whilst this checklist of cause and effect might neatly fit the broadly technocratic and procedural solutions offered by the WPG, it lacks saleability to the European public. It seems, after lengthy analysis, it is largely the citizens' fault that things are not working in the EU. This does not appear to be a prudent way forward if the goal is reconnection with the citizens. It is an approach that never comes to terms with issues raised in academic discussions that explain and identify the cause of the legitimacy crisis and democratic deficit in the EU.

The strength of the WPG lies in the principles of effectiveness and coherence. All legitimate governance structures ought to pursue the aims of effectiveness and coherence in policy making and delivery – since these are bureaucratic/management driven proposals, the Commission's institutional expertise is put to best use here. The principles of good governance, as selected by the Commission, are not objectionable *per se* regardless as to which particular normative vision one might subscribe, but the definition assigned to these terms is rightly subject to some criticism, particularly in the light of the WPG's proclaimed task.

3.5: *The WPG and the enforcement action*

The WPG is a fairly detailed policy paper and, as well as explaining the concept of good governance, it introduces in great detail some novel policy initiatives that the Commission views as necessary improvements to the EU system of governance. A great deal of space is dedicated to the Commission's role as policy initiator and legislator in the EU, with a detailed exposition of how the Commission might better perform its role in this regard.⁹⁴ As a central tool of governance in the EU, and as a tool of governance central to the discharge of the Commission's own institutional responsibilities in the EU, the enforcement mechanism of Article 226 is given surprisingly little mention. Nonetheless, the WPG does provide a limited overview of the enforcement mechanism and is a useful starting point when considering how the Commission views the role of Article 226 within the context of improving governance in the EU.

⁹² Specifically focusing on the rejection in the referendum in Ireland on the Treaty of Nice.

⁹³ WPG above n 2 p 7.

⁹⁴ This is in respect of the 're-invigorated Community method' of legislating, amongst other things.

The WPG specifically acknowledges the enforcement mechanism as being a central tool of governance in the EU. The Commission discusses Article 226 under the heading of 'Better policies, regulation and delivery', clearly characterising Article 226 as having a singular function: delivering effective compliance. The Commission harks back in some respects to the traditional approach described in earlier academic pieces on Article 226, where the broader political context and the policy direction of the EU were considered as having little relevance to the role of Article 226 or its effectiveness as an enforcement action.

In relation to improving the application of EU law at the national level, the Commission promotes various solutions, such as the 'twinning arrangements' of national administrations,⁹⁵ and better training for legal professionals in the Member States. Interestingly, and in contrast to the traditional approach of the Commission, the European Ombudsman and the Petitions' Committee of the European Parliament were also mentioned in the context of the enforcement action. This is unusual in the sense that the Commission does not usually acknowledge the role of other actors in relation to Article 226 besides itself and the Member States. The Commission's suggestion is that the European Ombudsman's role of dealing with citizen complaints (in relation to suspected infringements of the Treaty) ought to be:

'complemented by creating networks of similar bodies in the Member States, capable of dealing with disputes involving citizens and EU issues'.

This was not elaborated in any further detail, but it seems to suggest a body for dispensing information – a sort of European version of the Citizens' Advice Bureaux, to be based in the Member States to encourage better awareness of citizens' rights and ensure better application of EU norms in the Member States, through citizens' invocation of their EU rights in national courts.⁹⁶

In terms of the role of the Commission in the enforcement action, the WPG reinforced the Commission's intention of 'pursu[ing] infringements with vigour', noting the importance of individual complainants within this process, and reiterating its commitment to speeding up the processing of such complaints by highlighting the published Communication which

⁹⁵ WPG above n 2 p 25. Twinning arrangements essentially means co-operation between national administrations to swap best practices, and co-ordination units set up within central government in order to have increased control over the application of EU law. This is a suggestion of Gil Ibáñez, discussed in Chapter II in AJ Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law. Powers Procedures and Limits* (Hart Publishing, Oxford, 1999).

⁹⁶ For further discussion of this and the role of the Ombudsman in enforcement actions see Chapter VI.

details the position of the complainant in relation to the Commission's investigation of infringements.⁹⁷ The Commission is unequivocal in stating that Article 226 is *not* the forum for complainants to seek legal satisfaction as:

‘a lengthy legal action against a Member State is not always the most practical solution. The main aim of an infringement action is to oblige the offending Member State to remedy its breach of Community law’.⁹⁸

The Commission committed itself to establishing criteria that will identify how it prioritises the infringement cases it will pursue under the enforcement action.⁹⁹ Generally, the main cases to be handled within the formal infringement process are as follows: incorrect transposition of directives; compatibility cases of national law and EC law; cases that seriously affect the Community interest; cases where specific EC legislation created repeated implementation problems in a Member State; cases that involve Community financing. The WPG ends the very brief discussion of enforcement with the continued commitment to pursuing an ‘active dialogue’ with Member States, since this can often:

‘lead to a faster resolution of a potential infringement than a full court case and therefore offer a quicker solution to the person at the origin of a complaint.’¹⁰⁰

The WPG did not propose any changes to the enforcement action or administration of the infringement process. In this way, the WPG restated the long established position of the Commission in relation to Article 226, namely that it is a bi-polar forum of negotiation with the Member States and not an avenue of grievance satisfaction for individual complainants.¹⁰¹ Despite the commitment to ‘pursue infringements with vigour’, it is made equally clear that active dialogue is as much a part of the Commission's strategy as court proceedings, and is considered far more effective in resolving disputes. It seems that from the standpoint of the Commission, the quest to improve governance in the EU does not extend to the alteration of one of the Commission's own central governance tools. Presumably this indicates that in the assessment of the Commission, the enforcement mechanism as it currently stands already fits squarely within the Commission's normative vision of a more legitimate and better governed EU.

⁹⁷ Commission Communication on ‘Relations with the Complainant in Respect of Infringements of Community Law’ COM (2002) 141.

⁹⁸ WPG above n 2 p 25.

⁹⁹ Commission Communication ‘Better Monitoring of the Application of Community Law’ COM (2002) 725 final 16.5.2003, which is analysed in Chapter V.

¹⁰⁰ WPG above n 2 p 25.

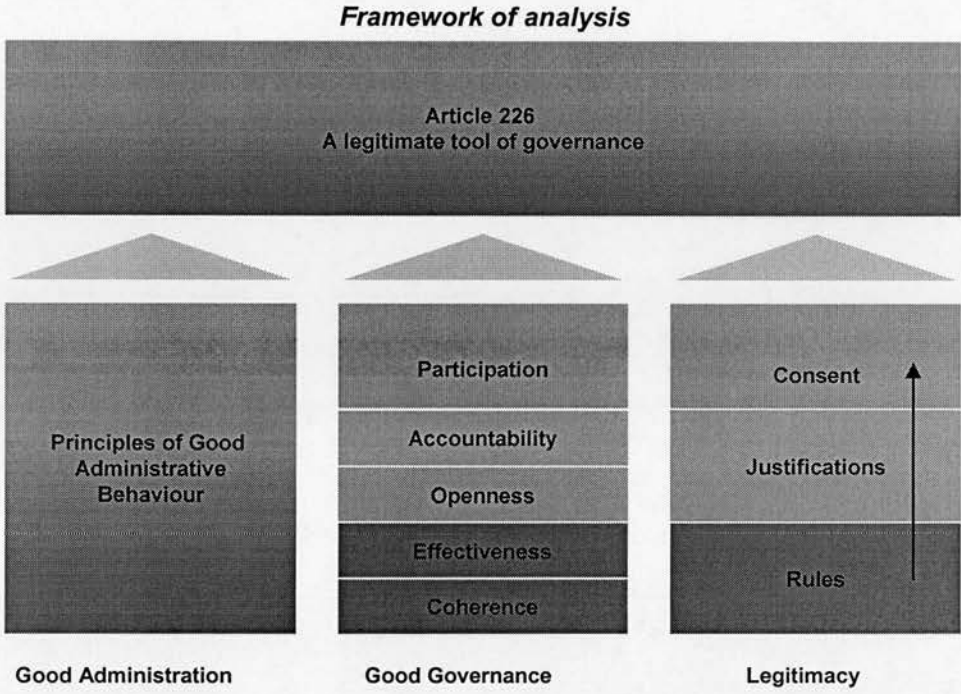
¹⁰¹ As detailed in past academic discussions of the infringement process outlined in Chapter II.

4.0: A framework for evaluating policy and practice in Article 226

It is important that one of the central tools of governance in the constitutional architecture of the EU conforms to some limited standards of legitimacy, particularly in light of the dominating policy initiatives of achieving good governance across the EU as a method of bridging the ‘legitimacy deficit’. In order to try and evaluate the role of Article 226 in the contemporary legal and political context which drives the operation of the enforcement mechanism, it is necessary to identify some organising concepts that will be used as a framework of reference in the following chapters. Rather than engaging in a vague or generalised debate about ‘legitimacy’ and ‘good governance’, this chapter has sought to identify and define these concepts in a clear and precise manner, and draw out some relevant debates that constitute the appropriate frame of reference.

The framework of analysis for the evaluation of the role of Article 226 will be composed of three separate but overlapping organising concepts, or lenses. These concepts have been chosen on the basis of their relevance to the current legal and political context of the EU, and in particular the operation of the enforcement mechanism itself. The three key organising concepts, or lenses, are those of good administration, good governance and legitimacy. Figure 3 below gives a diagrammatic representation of this framework. Each lens in the framework will be described in greater detail below.

Figure 3



Note: The arrow denotes the correct progression through the different criteria which constitute the concept of legitimacy.

Different colours are used to show the correlation between each stage in the model. The principles of good administrative behaviour form the basis of the principles of good governance, and these are inspired by the current legal principles that exist in the system of administrative law of the EU,¹⁰² in conjunction with the European Ombudsman’s Code of Good Administrative Behaviour which is the relevant code of practice for European institutions. The principles of good governance as selected by the Commission and discussed in this chapter correspond to the broader academic definition of legitimacy identified by Beetham and Lord. Effectiveness and coherence correlate to the need for identifiable rules in a legitimate policy; openness and participation provide the opportunity for clear justifications; and the principle of accountability relates directly to the acceptance of those being governed. Due to the multi-faceted nature of Article 226, different organising concepts in the framework will be used according to the particular function/actor under consideration, as opposed to applying all three stages in each of the following chapters. Each of these conceptual tools feed into each other and overlap.

¹⁰² As identified in Chapter II.

The first organising concept is that of good administration. These standards are the basis of a deeper understanding of the concept of good governance and are relevant to the enforcement mechanism particularly, since it has a significant administrative dimension. The requirement of good administrative conduct is therefore a crucial legitimating criterion in evaluating the role of Article 226, and whether it conforms to the standards of legitimacy and good governance. In order to provide an objective set of administrative standards, I will adopt the European Ombudsman's model of good administrative behaviour, as is elucidated in the Code of Good Administrative Behaviour, in conjunction with some common legal administrative principles identified in Chapter II. This is particularly important as the standards of good administrative behaviour have been developed with specific reference to the European institutions and so there ought not to be a problem of 'fit' between adopting principles of good administrative behaviour that have been developed with specific reference to another (say, the state) model of governance.

Table 2 below provides an indication of how the principles of good administrative practice feed into the broader framework of analysis. The concept of good administration will be relevant to the enforcement mechanism in three ways: in relation to the legal framework and legal principles which govern the operation of the enforcement mechanism; in relation to the Commission's conduct in the management of infringement investigations; and in relation to the contribution of the Ombudsman to the enforcement mechanism, both as a surrogate for the citizen, and in relation to the Ombudsman's role as promoter of good governance in the EU.

Table 2

Interlocking concepts of good administration, good governance and legitimacy

B&L	Rules		Justifications		Consent
WPG	<i>Coherence</i>	<i>Effectiveness</i>	<i>Openness</i>	<i>Accountability</i>	<i>Participation</i>
CGAB	Legitimate expectations	Efficiency	Giving reasons	Giving reasons	Right to be heard
	Impartiality	Time-limits	Preventing abuse of power	Lawfulness	Courtesy
	Objectivity	Keeping adequate records	Public access to documents	Right to appeal	Language rights
	Independence	Obligation to transfer complaints	Access to file/information	Objectivity	Notification of decision
	Fairness		Proportionality		Acknowledgment of receipt
	Non discrimination				Providing contact name

Notes: B&L = Beetham and Lord's model of legitimacy.

WPG = Principles of good governance from the White Paper on Governance.

CGAB = Principles of good administration from the Ombudsman's Code of Good Administrative Behaviour.

The second organising concept through which Article 226 will be considered is that of good governance. This study will use the Commission's own principles of good governance of openness, participation, accountability, effectiveness and coherence.¹⁰³ It is important to use the Commission's principles of good governance as part of the framework of analysis for two reasons. First, the Commission is the main player in the Article 226 procedure, and controls, designs and operates the enforcement mechanism. Secondly, as policy initiator and 'engine' of the EU, the Commission has committed to the application of these principles of good governance across the Union, contending that these principles amount to a species of good governance, and identifies these principles as the appropriate mechanism for delivering greater legitimacy in the EU.¹⁰⁴ The governance principles, as has already been discussed

¹⁰³ It is outside the ambit of this thesis to construct a model of good governance for the EU. Using the Commission's principles serves both methodological and normative purposes – it provides a ready made framework of analysis from the principal policy maker of the EU, and main actor in the enforcement mechanism. This is also in normative terms as neutral as possible, as by using this framework, rather than one of the author's invention, the evaluation of Article 226 relates to the self-set benchmark rather than an idealised version of legitimate governance.

¹⁰⁴ Since the Article 226 process is one of the Commission's main tools of governance, logically these principles of 'good governance' ought to apply not only across the board of EU governance to frame policy proposals, but also to the operation of specific governance tools.

above, are legitimacy-based principles, and so fit neatly within the framework of analysis that seeks to evaluate the role of Article 226 in the current political context.

The different governance principles might have a particular resonance with one function of Article 226 over another, but together the principles of good governance adequately encapsulate all the modalities of Article 226, as set out in Chapter I.¹⁰⁵ The principles of good governance used throughout the thesis will not necessarily be applied with the exact definition as adopted by the Commission in the WPG. These will be re-moulded to accommodate some of the criticisms outlined above and to incorporate the standards of good administrative behaviour, whilst still adhering to the Commission's overall vision of good governance based on procedural and technocratic legitimacy solutions.

The third organising concept will be that of legitimacy defined by Beetham and Lord. This broad definition of legitimacy is broken down into its three basic component parts of: identifiable rules; justifications for actions (by those who govern) founded on beliefs; and consent and recognition by those governed by the system. Although Beetham and Lord use this as a test for the legitimacy of a system of rule in an entire community, it will be used at a micro level as a part of the test for the legitimacy of the enforcement action as a tool of governance appropriate in contemporary Europe. This definition of legitimacy takes the format of a 'building blocks' definition, meaning that the first criterion of identifiable rules forms the necessary foundation for the next criterion of justifications. This in turn forms the foundation for the third criterion of consent. The 'building blocks' definition therefore requires all three criteria to be adequately met before claiming that the test for legitimacy has been fulfilled.

Concluding remarks

There are considerable difficulties associated with discussing the concept of legitimacy in the EU which stem from embedded conceptions of democracy associated with state level government. Due to the *sui generis* nature of the EU, with its distinct organisational and decision-making structure, traditional notions of what constitutes a legitimate or democratic system of decision-making have to be modified or re-invented. The momentum towards re-

¹⁰⁵ For example, the principles of effectiveness and coherence will be appropriate to analyse Article 226 as a compliance mechanism and as an executive function of the Commission, in relation to the formulation and control of the enforcement policy. The principles of openness, accountability and participation will be appropriate when discussing Article 226's competing roles as a formal process where institutions and citizens interact, a forum for institutional dialogue and control, and as a tool of administrative regulation.

conceptualising debates about democracy and legitimacy is evident in both academic and political discourse, as is the changing political context of the EU.

One way of structuring the debate about legitimacy in the EU is through the adoption of the more flexible terminology of good governance, which enables notions of legitimacy to be cut free from the ties of voter inputs. This traditional reference point of legitimate rule in democracy debates is not useful in the current legal and political organisation of the EU. Nonetheless, the use of the rhetoric of democracy has not lessened in political discourse about increasing the legitimacy of the EU, although this brand of democracy is not democracy as the European citizen might understand it. In the absence of the recognisable inputs of legitimacy, and in a constitutional era where the traditional reliance on output legitimacy is no longer sufficient, it is essential that the commitment to deliver good governance is taken seriously by the institutions who proffer it as the solution to the legitimacy crisis. Focusing down from wider discussions of legitimacy at the macro organisational level of the EU, to the micro level of policy and practice in Article 226, requires a specific framework of analysis. This enables an examination of the political context of the EU and how this context impacts upon the political motivations of the actors/institutions involved in moulding the role of Article 226.

The traditional characterisation of Article 226 as a forum for political bargaining, unbounded by legal restrictions, is incongruous with the current legal developments and political discourse taking place in the EU. It is essential therefore that in the absence of legal controls, political legitimacy through the adoption of good governance techniques, fills the void left by the lack of judicial review of conduct in Article 226. The Commission's definition of its principles of good governance is open to criticism, not least because the normative foundations of some of the concepts have been buried in an overt political scuffle for power and influence in a constitutionalised EU. The Commission remains focused on technocratic and procedural legitimacy as the answer to improving governance in the Union. In terms of the approach to enforcement, the emphasis placed on Article 226 as a single-function mechanism of effective enforcement is totally misguided with reference to increasing the legitimacy of the EU. If the main aim of the enforcement mechanism is to oblige Member States to remedy the infringement, for the benefit of the complainant, it is dubious whether the correct method of achieving this outcome is that of 'active dialogue' with Member States; not just in terms of legitimacy, but also in terms of effectiveness.

In order to concretise these wider issues into a useful set of criteria for the evaluation of the role of Article 226, it is necessary to focus down from generalised debates about legitimacy and good governance, to produce a defined framework of analysis. The related and overlapping concepts of good administration, good governance and legitimacy will frame the analysis of the practice and policy within Article 226, and the impact of the major actors on the mechanism. This will begin with a consideration of the role played by the Commission. As the dominant actor in the enforcement mechanism, the Commission plays a pivotal role in both the operation of Article 226, and as the promoter of the policy of good governance in the EU.

Chapter IV: The management game – political enforcement, neutral guardianship and legal uniformity

The European Commission is the dominant actor within Article 226. It occupies a unique position in relation to ensuring the compliance of Member States with their obligations under the Treaty, by acting as investigator, primary judge of the Member States' conduct, and ultimate arbiter of what will constitute the appropriate conduct in order for Member States to have complied with the Treaty.¹ The Commission's stated view of the enforcement mechanism is that:

'The main aim of an infringement action is to oblige the offending Member State to remedy its breach of Community law'.²

This characterisation of Article 226 suggests that the Commission views Article 226, in the main, as a compliance mechanism, and as such the Commission's role under Article 226 is largely that of the enforcer of compliance. This is a rather simplistic explanation of the Commission's position. If the *main* aim of the infringement action is to oblige the Member State to remedy its breach of Community law, this implies that there might be other aims or roles that the enforcement action might perform; nonetheless the Commission continues to discuss Article 226 in terms of a singular enforcement function. It must necessarily be true that first and foremost, Article 226 remains an executive policy choice – the Commission chooses its strategy on enforcement and is in complete control of the design, management and operation of the Article 226. Only then can the Commission carry out its role of enforcer (or in the Commission's terms, guardian of the Treaties).

The factors that influence and drive the behaviour of the Commission in relation to the practice and policy of Article 226 ultimately help to shape the role of Article 226 within the constitutional architecture of the EU. It is important therefore to consider how the Commission actually manages the enforcement action on a day to day basis, and to consider to what extent the Commission has tried to improve or alter Article 226. Does the Commission's practice complement the ideals set forth in the WPG in terms of a coherent and effective approach to enforcement under Article 226? To what extent does the Commission's simplistic characterisation of its own role underpin and perpetuate the narrow definition of the role or functions of Article 226, and thus undermine the conception of

¹ The judgments of the ECJ are declaratory as to whether there has been a breach but do not shed light on what is required to for Member States to fulfil their obligations under the Treaties. The Court merely states that there has or has not been a breach. It is the Commission that prescribes the conduct that will be satisfactory in order to either avoid referral to the Court in the first instance, or satisfy the Court's judgment so as to avoid being referred again under Article 228 and neither of these opinions can be challenged in the ECJ.

² European Governance: A White Paper COM (2001) 428 page 25.

Article 226 as a mechanism that is well matched to the aspirations of good governance and legitimacy in the EU?

The chapter is structured as follows. The first section will provide a brief overview of the organisation and make up of the Commission, and explain the Commission's central role in Article 226, as defined by the Treaty language and the case law principles. Section two will then consider in detail the recent evolution of the Commission's approach to the operation of Article 226. I will discuss the reforms implemented in relation to the internal management of infringement investigations and the attempts to amend the Treaty provision. Section three then identifies the different roles of the Commission within Article 226, and explores how these discrete functionalities may conflict. Finally, I will conclude with some observations regarding the Commission's conflicting roles and divergent priorities under the enforcement mechanism, and question how this approach to enforcement ultimately affects the role of Article 226.

1.0: The European Commission: an introduction

The organisation and characteristics of the Commission³ is a field of study in itself.⁴ The Commission is a notoriously labyrinthine organisation and practically impossible to navigate by outsiders, however for the purposes of this chapter the organisation of the Commission can be discussed in very broad terms. The Commission may be broken down into two distinct parts: the individual Commissioners and the Directorates General. The individual Commissioners are the political head of their respective departments and provide the initiative in policy direction and political leadership, or 'face', of a policy sector. The Directorates General (DGs) are the administrative body of the Commission which carry out the broad spectrum of tasks assigned to the Commission as a whole.

The Commissioners periodically sit as a 'College of Commissioners' in order to take certain decisions, including taking decisions in relation to infringement cases. Individual Commissioners must act independently in their duties as a Commissioner and only in the general interest of the Community. In this way, the Commission is seen as the 'neutral'

³ I will use the term 'the Commission' when referring to the body as a whole and where necessary I will differentiate between the political head (the Commissioners) and the administrative body (the DGs).

⁴ See generally P Craig and G De Búrca, *EU Law Text Cases and Materials* (3rd Edition, Oxford University Press, Oxford, 2003), ch 2, M Cini, *The European Commission: leadership, organisation and culture in the EU administration* (Manchester University Press, Manchester, 1996), N Nugent, *The European Commission* (Palgrave, Basingstoke, 2001), L Hooghe, *The European Commission and the integration of Europe: images of governance* (Cambridge University Press, Cambridge, 2001).

heart of the European project untainted by national politics and allegiance. This core element of the Commission is then supported by the 'service' DGs which comprise of horizontal service staff such as the legal service, the translation service and the Secretariat General.⁵

The current Commission is made up of 27 individual Commissioners, each of whom have been nominated by one Member State and appointed by the Commission President. The President of the Commission is proposed by the European Council, and must be formally approved by the European Parliament by a majority vote. The Commission President, who provides the political leadership for the Commission as a whole, then determines which Commissioner receives which portfolio, or policy field/department (after much political lobbying by the Member States). Each Commissioner has his own personal *cabinet*, or staff, and heads up a Directorate General.

The formal tasks of the Commission are laid down in Article 211 EC and can be broken down into four distinct responsibilities: (1) ensuring compliance with the Treaty and subsequent laws; (2) to formulate recommendations and deliver opinions on matters within the Treaty; (3) to have its own power of decision and participate in legislating; (4) to exercise rule making powers as conferred by the Council. Cini characterises the Commission as having six distinct roles within the EU⁶: the right to initiate policy and legislation; the ability to execute detailed legislation; the duty to ensure Member States fulfil their obligations; the power to provide the external representation of the Community; the capacity to act as a mediator between different factions (Member States and interest groups); and the role of acting as the 'conscience' of Europe or promoter of the 'general interest'.

The Commission has been discussed and analysed at length, leading to various characterisations of the Commission. These range from descriptions which characterise the Commission as acting principally as a technocracy or regulatory body to the Community's executive authority, a politicised bureaucracy or network organisation.⁷ Cini describes the

⁵ For a basic description see the Commission's website at http://ec.europa.eu.int/comm/atwork/basicfacts/index_en.htm.

⁶ Cini above n 4.

⁷ See generally T Christiansen, 'Tensions of European governance: politicised bureaucracy and multiple accountability in the European Commission' (1997) 4 *Journal of European Public Policy* 73, V Mehde, 'Responsibility and Accountability in the European Commission' (2003) 40 *Common Market Law Review* 423, L Metcalfe, 'Reforming the Commission: Will Organisational Efficiency Produce Effective Governance?' (2000) 38 *Journal of Common Market Studies* 817, P Craig, 'The

Commission as a hybrid body, part executor and part administration.⁸ Tallberg characterises the Commission as both agent and supervisor of the Member States.⁹

1.1: The formal Treaty process and Commission discretion

The original wording of Article 226 reveals two main historical points. First, the drafters envisaged a two-party relationship between the Commission and the Member States. Secondly, as an effective enforcement mechanism, it was never meant to pack a significant punch, as it lacked any type of coercive penalty or means to enforce a judgment of the ECJ.¹⁰ The provision was meant to be a forum for negotiation; this is revealed by the lengthy, cumbersome procedure and ultimately the lack of sanctions in this or any other Treaty article for general non-compliance. The Treaty of Rome did not follow the blue print of the ECSC Treaty, its precursor. This perhaps belies the intentions of the original members to submit in principle to the jurisdiction of an outside authority (the ECJ) but to ensure no consequences would follow from non-compliance (and consequently no reduction in sovereignty).

The Treaty wording refers to two stages in the pre-litigation (or administrative) procedure. This begins with the formal letter and ends with referral to the ECJ. In practice, this process has been much lengthened by the Commission in a political climate that was very concerned with emphasising negotiation and protecting state sovereignty.¹¹ The negotiation process involved long investigations and information exchange between the permanent representatives of the Member States and Brussels, both before and after the formal letter and reasoned opinion had been issued. In the spirit of co-operation that predominated the early years of Article 226,¹² it was common practice for the Commission to engage in negotiations with Member State officials in the hope of securing compliance throughout the administrative process. Referrals to the ECJ were to be avoided at almost all cost.¹³

Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation' (2000) 6 *European Law Journal* 98.

⁸ Cini above n 4.

⁹ J Tallberg, *European Governance and Supranational Institutions: making states comply* (Routledge, London, 2003). These different characterisations depend upon which particular aspect of the Commission's activities are the focus of inquiry, the part of the Commission being analysed, the disciplinary background of the commentator, and the overall normative vision of the EU.

¹⁰ See U Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 *European Law Review* 215. Until the Maastricht Treaty, see below.

¹¹ HAH Audretsch, *Supervision in European Community Law* (2nd Edition, Elsevier, North Holland, 1986) hereinafter as 'Audretsch'.

¹² This was in the period up until the Jenkins Commission reforms of the management of infringements, see Audretsch, *ibid.*

¹³ Everling above n 10.

The conventional wisdom in relation to Article 226 is that the Commission formally possesses two areas of discretion sourced from the Treaty wording, as indicated in italics below:

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

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter *may* bring the matter before the Court of Justice.’¹⁴

Within the administrative phase of the enforcement procedure there exists substantial administrative discretion on the part of the Commission. The first point of discretion relates to the Commission’s ‘consideration’ as to whether or not there is, *prima facie*, an infringement on the part of the Member State. Whilst this is often referred to as discretion in legal literature, it is more properly conceived as an exercise of subjective judgment since the term ‘discretion’ means a choice between limited but clearly proscribed options,¹⁵ and subjective judgment means an unlimited choice on the part of the Commission. Whatever term is assigned to it, it is clear that the Commission exercises public power that is not subject to outside review, or circumscribed by the Treaty. This directly impinges on the whether or not a reasoned opinion must be issued. Even though the Treaty language appears to mandate this step, giving no discretion to the Commission, the Commission must still ‘consider’ that an infringement exists. At any time the Commission can change its position and decide that the infringement no longer exists, removing the necessity to issue a reasoned opinion.

After an initial investigation by the Commission has taken place it may seem more convenient to avoid coming to the conclusion that there has been an infringement (whether there has been one or not), as once this conclusion has been reached, the Treaty then mandates the Commission to deliver a reasoned opinion. Historically, this proved quite a controversial move as issuing a reasoned opinion was not a common practice.¹⁶ There are multiple reasons for why the Commission might choose to drop an investigation before the reasoned opinion stage. Particularly in cases where there has been an individual misapplication of the rules on the ground due to negligence or bad faith, the Commission might consider it a waste of resources to attempt to remedy a ‘one off’ infringement through

¹⁴ Article 226, Treaty establishing the European Community, my emphasis.

¹⁵ KC Davis, *Discretionary Justice in Europe and America* (University of Illinois Press, Chicago, 1976), J Jowell, ‘Legal Control of Administrative Discretion’ (1973) *Public Law* 178.

¹⁶ See Audretsch above n 11.

its Article 226 powers. Instead, it may advise the complainant to seek a remedy in the national courts.

It may be politically inconvenient to pursue an obvious infringement and this is the ideal opportunity in the Article 226 process to put the suspected infringement on the back burner.¹⁷ The Commission may also consider that a case is not worth pursuing if there are reasonable grounds to suspect that there is no way to prove the infringement has occurred. Through the course of informal contact with the Member State in question, the Commission may also find it expedient to arrive at a political trade-off whereby the Member State promises to abide by the rules in future and to discontinue the conduct that has given rise to the infraction. The first formal point of discretion in the Treaty flows from this area of subjective judgment. Since this cannot be challenged, the prescription of 'shall issue a reasoned opinion' in reality is transformed into 'may issue a reasoned opinion'.

The second formal point of discretion within the Treaty wording is that, after the reasoned opinion has been delivered, if there is further non-compliance, the Commission may or may not bring the case to the Court of Justice. This is problematic if Article 226 is to be characterised as a compliance mechanism; surely if the object of the Treaty article is to obtain compliance, is it not logical for automatic referral to the Court of Justice to occur after non-compliance has been established by the Commission? It seems in essence that the wording of the article itself does not entirely censure non-compliance. Two opportunities to drop the case before the reasoned opinion seems both unnecessary and inefficient.

It is the very nature of the wording of this Treaty article that has been the source of much consternation in relation to legal enforcement of Member State obligations, but despite this obvious flaw, this part of the Treaty has never been revised. The issuing of the reasoned opinion may well be enough to spur the Member State into action in any case, and statistics produced by the Commission may be interpreted as supporting this assertion.¹⁸ The standard reasoning of the Commission is that negotiations between the Commission and the Member

¹⁷ For instance, if the country suspected of non-compliance happens to be holding the Presidency of the EU, Interview, Commission Official C (25 October 2005), Interview, Commission Official D (25 October 2005), Interview Commission Official G (26 October 2005), Interview, Commission Official H (26 October 2005).

¹⁸ See Chapter V.

State produce quicker results than referring a case to the ECJ,¹⁹ and cases are often withdrawn from the Court following corrective action by the Member States who are anxious to avoid prosecution.²⁰

The Commission's administrative and political discretion under Article 226 is therefore fairly extensive. To summarise, the Commission determines whether an infringement has occurred, defines the extent and nature of the infringement, determines the course of action to be undertaken by the Member State to remedy that infringement,²¹ and decides all the relevant time-limits imposed on the Member State (and itself) throughout the investigation and administrative process. It also decides whether or not to refer the case to the ECJ (and subsequently to refer the case under Article 228 and request a financial penalty). To compound this unchecked power, all of these acts or decisions are not able to be challenged before the courts and are not subject to the legislation on transparency.²²

1.2: Buttressing the enforcement mechanism – financial penalties under Article 228 EC

The only complementary enforcement mechanism to aid the Commission in discharging its enforcement responsibilities is that contained in Article 228. In its original format Article 228 was simply an opportunity for the Commission to re-prosecute those Member States that had not complied with the Court's judgment under Article 226. In formal terms, this mechanism did not provide another occasion for the Commission to obtain the same judgment of non-compliance with Community obligations, but was an attempt to obtain judgment against a Member State for failing to abide by the Court's previous judgment. Its purpose was to provide the Commission with an opportunity to publicly denounce those Member States who were disregarding the authority of the Court.

¹⁹ See for example European Governance: A White Paper COM (2001) 428, p 25 and Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003 p 14.

²⁰ See Everling above n 10 p 244.

²¹ Recently, this discretion has been extended further by the ruling in Case C-494/01 *Commission v Ireland* [2005] ECR I-3331 where the possibility of the Commission mounting an infringement case on the basis of a 'general and persistent breach' has been established, for discussion of this concept see P Wennerås, 'A New Dawn for Commission Enforcement under Article 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) 43 *Common Market Law Review* 31.

²² See Chapter II for the application of Regulation 1049/2001 OJ 2001 L145/43 on Access to Documents to the infringement process.

Article 228, in its original format, was not a particularly effective punishment for Member States who failed to comply with an Article 226 judgment.²³ There seemed to be little incentive for the Commission to engage in another lengthy legal battle, to obtain another judgment from the Court, when the original judgment had been ignored. Furthermore, obtaining this declaration involved another lengthy process of investigation and back-and-forth communication between the Commission and Member State, resulting in even further delays in correcting the original infraction. The lack of penalties available to the Commission to force Member States to comply with their obligations helped to entrench the environment of negotiation between the Commission and the non-complying state. This emphasis on negotiation with Member States was seen by the Commission as the only way to achieve compliance – the Commission was in the business of persuading and cajoling compliance, rather than enforcing it as a matter of law.

Eventually, it was accepted by the Member States and Commission that these two Articles were an insufficient deterrent, particularly in an organisation whose entire existence was predicated on the rule of law and uniformity within the legal system.²⁴ Accordingly, after repeated attempts at reform, the necessity of changing this article finally found some momentum at Maastricht. The revised Article 228 now reads as follows:

‘If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

If the Commission considers that the Member State concerned has not taken such measures it shall, after giving the State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court’s judgement within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In doing so it shall specify the *amount of the lump sum or penalty payment* to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.’²⁵(my emphasis)

²³ See generally Audretsch above n 11 and Everling above n 10. See also A Bonnie, ‘Commission Discretion under Article 171(2) EC’ (1998) 23 *European Law Review* 537 p 358 and MA Theodossiou, ‘An analysis of the recent response to non-compliance with the Court of Justice Judgments: Article 228(2) EC’ (2002) 27 *European Law Review* 25, pp 25-27.

²⁴ It also prompted similar observations in the legal literature, Theodossiou above n 23 and Bonnie above n 23.

²⁵ Article 228 EC, Consolidated Treaty Establishing the European Community.

The lengthy administrative and judicial procedure from Article 226 is still in place in the revised Article 228. This arguably reduces the effectiveness of this mechanism as a compliance tool. It also now allows the Commission to pursue a financial penalty against the Member State if it has not complied with the Court's judgment under Article 226. This in turn strengthens the authority and impact of a judgment under Article 226. The imposition of a financial penalty was originally understood to have been a choice between one of two options, reflecting the actual wording of Article 228, with either the Commission requesting a lump sum payment *or* a periodic penalty payment. Initially the Commission favoured the periodic penalty payment to encourage the Member State to correct the infraction as quickly as possible, and to remove the temptation for the Member State to simply pay a large fine and reap the potentially greater financial rewards of its illegal conduct.²⁶ This choice reflects the Commission's approach to achieving compliance – that it is the neutral enforcer, trying only to bring the Member State into line as quickly as possible.

The request for a financial penalty to be imposed for non-compliance is again a matter falling within the discretion of the Commission, although the actual amount of the penalty is ultimately decided by the ECJ. This was a source of controversy between the Commission and Court, with the Commission claiming that it ought to have responsibility for setting the payment amount as indicated by the Treaty wording.²⁷ In answer to calls from Member States for more clarity with regard to the calculation of the financial penalty, the Commission devised a formula and published its guidelines in a Communication, thereby to a certain degree taking control of how expensive infractions would become.²⁸ Whilst the Court bases the final penalty on the recommendations of the Commission, it stated in the first Article 228 judgment which imposed a financial sanction that it alone bears the responsibility of deciding the penalty amount.²⁹ Initially the Commission was fairly hesitant to use the new sanction of a financial penalty under Article 228, but since the first judgment in 2000, the number of cases of Article 228 referrals has increased steadily.³⁰

²⁶ For an explanation of the calculation of the financial penalty and the policy behind its application in Article 228 cases see the latest of the Commission's Communications on the subject in Commission Communication 'Application of Article 228 of the EC Treaty' SEC (2005) 1658.

²⁷ Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

²⁸ The formula is also explained in the Commission Communication, above n 26.

²⁹ *Commission v Greece* above n 27.

³⁰ Commission data only provides information as to how many cases have been referred to the court under Article 228, rather than specifically which of these cases include a request for a financial penalty. In the period 1998-2004, Article 228 referrals increased by 87%. In the period 2000-2004 referrals increased by 128% source Sixteenth Annual Report on Monitoring the Application of Community Law (1998) COM (1999) 301 final, Seventeenth Annual Report on Monitoring the

The way in which financial penalties are being imposed has changed however, suggesting a more proactive approach by the ECJ to Article 228 than it has ever adopted in relation to Article 226. In *Commission v France*,³¹ for the first time the court imposed *both* a lump sum penalty of €20 million and a periodic penalty of €58.7 million every six months until the infraction is rectified. This clearly contradicts the Treaty wording which suggests an either/or choice between a penalty payment or lump sum. Nevertheless, the ECJ seems to have stepped in where the Commission had been outmanoeuvred by the Member State, making certain that the weapon of financial sanction, which was not being utilised to its potential, is as effective as possible.³² Member States had routinely taken up the practice of settling the infringement a matter of days before final judgment under Article 228 was delivered by the ECJ,³³ thereby circumventing the imposition of the penalty payment which would only be applicable after the date of the final judgment.³⁴

The further buttressing of the enforcement powers of the Commission, through the revision of Article 228, has occurred in place of making changes to the main enforcement provision of Article 226. The Commission has adopted a different approach under the financial penalty provision to that of Article 226, and furthermore, so has the Court of Justice. The Commission has provided several explanatory Communications on the subject of how it exercises its discretion under Article 228, not only in relation to calculating the penalty but also its policy choices, namely in which cases it will request a fine and why. The Court of Justice has been proactive in its interpretation of the Treaty by reading the text of the Treaty

Application of Community Law (1999) COM (2000) 92 final, Eighteenth Annual Report on Monitoring the Application of Community Law (2000) COM (2001) 309 final, Nineteenth Annual Report on Monitoring the Application of Community Law (2001) COM (2002) 324 final, Twentieth Annual Report on Monitoring the Application of Community Law (2002) COM (2003) 669 final, Twenty-First Annual Report on Monitoring the Application of Community Law (2003) COM (2004) 839 final, Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final.

³¹ Case C-304/02 *Commission v France* [2005] 12 July 2005 nyr.

³² This radical reinterpretation of Article 228 was proposed first by Advocate General Geelhold (Opinion of AG Geelhold 29 April 2004). Since this had not been proposed by the Commission nor discussed by the parties in the original proceedings, the Court re-opened the oral procedure to enable the parties to put their views forward. AG Geelhold then delivered a second Opinion on 11 November 2004 which re-stated his original position that the Court was entitled to impose both a lump sum and periodic payment on France given the particular circumstances of the case.

³³ Communication, above n 26 p 3.

³⁴ Although see <http://euobserver.com/?aid=21024&rk=1> where France is refusing to pay the penalty imposed by the Court, and is attempting to challenge the judgment of the Commission under Article 228. The Commission has concluded France has yet to alter its conduct sufficiently in order to comply with the Court's findings in Article 226 and therefore has not remedied the infringement. France contests this assessment in the application for annulment pending before the Court in Case T-139/06. Meanwhile the fine continues to accumulate.

in contravention of the clear language to achieve a particular policy result, and in doing so, has stepped in to ensure the effectiveness of the provision in the light of Member State conduct, when the Commission has been unable to maximise the potential of this provision.

2.0: Operational problems with the infringement mechanism

The historical evolution of Article 226 has presented the Commission, as the main actor in the process, with three major problems. The first of these relates to scale. There are too many Community rules to police over a vast geographical area combined with the fact that the different Member States have different arrangements for implementing Community rules. This makes it difficult for the Commission to be able to monitor Community legislation single-handedly. Secondly, and compounding the first problem, the Commission has insufficient resources to effectively police the EU. The problem of insufficient resources relates not only to the amount of money earmarked for enforcement, but also insufficient staff and ultimately, insufficient time. The Commission is not a single-task enforcement body and ensuring compliance is not its number one priority at all times, even if it views the sole function of Article 226 as compliance. Thirdly, the Commission is faced with an inadequate compliance mechanism drafted in the original Treaty. It compounds inefficiency, consumes resources by its nature and relies too much on the consent of the Member States to be truly effective. The Commission has therefore tried to circumvent these limitations using technocratic methods with which it is most familiar, and has been successful in some respects, and in others less so. The next subsections consider each of these problems in detail and identify the methods adopted by the Commission to deal with them.

2.1: Scale

In relation to the first problem of a vast geographical area and sheer volume of rules to monitor, the Commission has been inventive in the way in which it initially dealt with detection of infringements. The Commission chose the path of outsourcing to combat management and resource problems. Rather than relying on self-detection, the primary source of information has long been citizen complaints,³⁵ where citizens contact the Commission directly and report suspected infringements. This source of information is crucial to the Commission's resource efficient policing of the Community legal system and

³⁵ Twentieth Annual Report on Monitoring the Application of Community Law (2002) COM (2003) 669 final.

fulfilling its role as guardian of the Treaties.³⁶ The Commission has facilitated direct contact with citizens through a number of initiatives, utilising advances in technology to streamline the information gathering process. The Commission has encouraged the use of a specific complaint form available on its infringement website,³⁷ but has also developed complaint forums, such as those relating to the internal market³⁸ and competition cases.³⁹ It also relies on citizen questions or petitions made to the European Parliament, which are then referred back to the Commission by the Petitions Committee for further investigation.

Internal detection of infringements by the Commission is an alternative method of monitoring. This occurs by surveying national press or through the Commission undertaking its own investigations into specific pieces of legislation. It has been especially proactive with regard to the enforcement of directives, which statistically account for a large proportion of infringement cases.

2.2: Reform of administrative procedures

The Commission's second problem of insufficient resources, particularly in relation to staff administration of the infringement cases, has led to a programme of internal reform in order to eradicate internal inefficiencies.⁴⁰ Throughout the 1990s, it became apparent that after the big push to complete the internal market, the enforcement mechanism was unable to cope with the increased urgent workload. In the mid 1990s internal reforms were put in place but were slow to gain any real administrative momentum.⁴¹ These reforms were further reviewed in 1998 culminating in yet more initiatives to streamline the infringement investigation

³⁶ The Commission relies on citizens enforcing their community rights in national courts of course, although this type of rights assertion policing is not counted as a way of detecting infringements for the purposes of this discussion.

³⁷ http://europa.eu.int/comm/secretariat_general/sgb/lexcomm/index_en.htm.

³⁸ http://europa.eu.int/solvit/site/index_en.htm.

³⁹ For instance, for consumer concerns see

http://europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/consumer_liaison.

⁴⁰ The first wave of these reforms occurred early in the 1970's under the influence of Ehlermann – these reforms are detailed in the original work by Audretsch into Article 226, above n 11. These reforms occurred in a very different political context to the more recent changes, and hence I have not detailed these in my discussion.

⁴¹ These can be viewed at OJ C 332 3.11.1997 p 9.

process.⁴² The main priorities of the Commission's reform were threefold: faster handling of cases, greater transparency⁴³ and better relations with the complainant.⁴⁴

The amount of time that the Commission took in handling cases was the source of a great deal of frustration, both for complainants and the Commission itself. The established decision-making procedure in Article 226 consisted of the compilation of four periodic reports by the Secretariat General (March, June, October, December) that detailed all the infringement cases and stages of investigation. These reports were then discussed at the quarterly infringement meetings of the Commissioners, who sit as a College to take decisions on infringement cases.

This report-based approach was meant to deliver consistent handling of the infringement cases across different sectors, DGs and Member States, (demonstrating a coherent approach to enforcement), but could lead to considerable delay in reaching decisions whilst cases waited for the production of the report before being discussed.⁴⁵ A decision whether or not to proceed to the next stage of the Article 226 procedure, whether this was to issue a formal letter or reasoned opinion, or to abandon the investigation altogether, could potentially have to wait three months until the next quarterly meeting, and then another three months for the next meeting and so on.

The 1996 reform package contained the innovation of handling state aid infringement cases (the focus of the Commission's infringement policy at that time) in a different format. This meant that state aid cases were decided every fortnight in the regular Commissioner meetings. The emphasis was on 'cases ripe for a decision'⁴⁶ so that these could proceed more quickly without having to wait for the quarterly infringement meeting of the College.

In 1998 the Commission decided to modify, in certain cases, the established decision-making procedure. The fortnightly decisions had been widened to encompass more cases of infringements and nearly 400 cases had been dealt with in this manner, compared with only

⁴² Sixteenth Annual Report on Monitoring the Application of Community Law (1998) COM (1999) 301 final, hereinafter 'Sixteenth Annual Monitoring Report'.

⁴³ The push for greater transparency was already in place at this time and consisted solely of the production of press releases that outlined the Commission's decision to give a reasoned opinion or refer a case to the Court of Justice.

⁴⁴ Better relations with the complainant relates to the work of the Ombudsman and is discussed in detail in Chapter VI.

⁴⁵ Interview, Commission Official G (26 October 2005).

⁴⁶ Sixteenth Annual Monitoring Report above n 42, p 6.

70 in the previous year.⁴⁷ The impact of faster internal decision-making has the inevitable consequence of speeding up Member State compliance with Community law (either through negotiation or legal proceedings) and a more efficient Commission administration, with a reduction in the time between the opening and closing of a case.

The increased automatic use of the formal letter meant that time devoted to pre-procedure, behind the scenes negotiation declined dramatically. Additionally, the Commission promised more rigorous adherence to specified time limits in the formal letter with the promise to initiate the reasoned opinion stage as soon as the specified time had elapsed. This had not always been the case in the past with quite significant time gaps between the expiry date in the formal letter and the reasoned opinion stage of infringement proceedings. The Commission also promised to significantly decrease the time passing between a decision being reached by the Commissioners, and the notification of that decision to the Member State by the responsible DG. This had previously been 'measured in months',⁴⁸ for no other reason than administrative inefficiency, but the Commission undertook to complete this task in the same week. Such administrative reforms resulted in an 18 per cent increase in the amount of cases that were opened and reached the reasoned opinion stage within the same year.⁴⁹

The Annual Report for 2000 was the first to be produced after the Commission was substantially reorganised under the Santer presidency.⁵⁰ In relation to infringement investigations, it was clear there was still considerable work that could be done to improve efficient case handling by the time of the Prodi presidency. Despite earlier promises in the 1998 Annual Report to reduce the time delay between the Commission reaching a decision on an infringement (at the initial investigation and the reasoned opinion stages), and the communication of that decision to the Member State from a matter of months to one week, in 2000 there was still an average time lapse of 29 days. The failure to eradicate such a time gap between decision and communication seems unfathomable, since it is completely within the control of the Commission and not subject to the influence of other actors. The Commission once again promised to reduce this unacceptable time delay.

⁴⁷ Sixteenth Annual Monitoring Report above n 42.

⁴⁸ Sixteenth Annual Monitoring Report above n 42 p 6.

⁴⁹ Sixteenth Annual Monitoring Report above n 42.

⁵⁰ Eighteenth Annual Report on Monitoring the Application of Community Law (2000) COM (2001) 309 final.

The detection of infringements in relation to directives, always a high priority for the Commission, had been made far more systematic and efficient by the development of a special internal database.⁵¹ This database enabled the issuing of formal letters to be automated, thereby avoiding the politicisation of what were indisputable and straightforward infringements. Member States are judged to have automatically committed an infringement in relation to the implementation of directives if they do not follow the instruction within the directive to notify the Commission when they have implemented national legislation to transpose the directive.⁵² Whether they have or have not transposed the directive is irrelevant, as failure to adhere to this notification is sufficient in itself to trigger the infringement process. The Commission's database records all deadlines for directive transposal and Member State notification. This process of notification is not a question of political judgment but administrative certainty as the Commission either has, or has not, been notified of measures adopted by Member States.⁵³

The standard formal letter and reasoned opinions have reduced the administrative delays within the DG and between the DG's internal legal department and the legal service associated with drafting work. These database advances are combined with a sustained effort to increase the amount of information available to the public on the internet, including decisions taken to issue formal letters and an on-line database containing information for the public on deadlines for specific directives.⁵⁴

Increasing the efficiency of infringement investigations and reform of internal procedures had thus far focused upon three common themes. First, reducing time delays by sticking to internal deadlines and streamlining administrative procedure. Secondly, increasing the use of technology to better utilise resources and create systematic, impartial monitoring of the transposition of directives. Thirdly, increasing the information available to the public by establishing an infringement website.

⁵¹ Asmodée II Database, see Eighteenth Annual Monitoring Report *ibid* p 10.

⁵² The so-called non-notification cases.

⁵³ This still needs the 'rubber stamp' of the College of Commissioners, but this can be obtained in the weekly meetings without controversy, Interview, Commission Official A (25 October 2005), Interview, Commission Official B, (25 October 2005), Interview, Commission Official C (25 October 2005) Interview, Commission Official D (25 October 2005) Interview Commission Official E (24 October 2005), Interview, Commission Official G (26 October 2005).

⁵⁴ Previously this had been restricted to publicity relating only to issuing reasoned opinions, Sixteenth Annual Monitoring Report above n 42.

By 2001, there was a notable change of approach by the Commission in its Annual Report.⁵⁵ The Commission had achieved the promised reduction in administrative delays between arriving at a decision on an infringement case and communication of this decision to the Member State, eliminating the delay from a massive 29 days, to communication within 24 hours. Having achieved this momentous turnaround in its internal efficiency, including making further improvements to the directive database, the Commission turned its attention to those delays which were outside its direct control.

The Member States have always played a significant part in the inefficiency of the Article 226 process and have been aided both by the case law of the ECJ in this regard, and the Commission's internal inefficiencies.⁵⁶ The efficiency of the enforcement mechanism always depended on a significant degree of cooperation from the Member State under investigation, because it often required the Member State to hand over the proof of its own non-compliance, without which the Commission found it difficult to bring proceedings.⁵⁷ It has been the practice of some Member States to simply string out the investigation process by a number of methods. They often deny the Commission information for as long as possible, or alternatively simply refuse to cooperate at all, or they promise to correct behaviour and then fail to deliver on this promise. Against this conduct, the Commission has been more or less impotent. Without an exchange of information there can be no negotiation with the Member State. When the Commission is unable to establish the facts there can be no prosecution before the ECJ, and without this there can be no judgment, and no financial penalty under Article 228.⁵⁸

The Commission has always belaboured the point of needing close cooperation with the Member State for this reason.⁵⁹ In the 2001 Annual Report the Commission introduced the strategy of prosecuting Member States for their non-cooperation in infringement

⁵⁵ Nineteenth Annual Report on Monitoring the Application of Community Law (2001) COM (2002) 324 final.

⁵⁶ See Chapter II for an explanation of the applicable case law. In particular, the Court's refusal to enforce specific deadlines in the administrative procedure.

⁵⁷ This is not necessarily true across the broad range of policy sectors, in particular, common policies such as fisheries have their own inspection teams and are not so reliant on Member State co-operation.

⁵⁸ This depends on the type of infringement under investigation – a straightforward conflict in the wording of the legislation (or no transposition of measures) is fairly easy to discover for the Commission without the cooperation of the Member State, but cases of misinterpretation or misapplication require intensive fact finding on the part of the Commission.

⁵⁹ See the approach in the WPG, above n 2 pp 25-26 where the Commission reaffirms its commitment to 'active dialogue' with the Member States, discussed in Chapter III.

investigations.⁶⁰ An action for non-cooperation would be based on Article 226, i.e. non-fulfilment of Community obligations, and the specific obligation is that contained within Article 10 EC (interpreted as a duty of close cooperation). This had been hinted at in the Commission's White Paper on Governance,⁶¹ produced in the same year, by statements that focused upon closer co-operation with Member States in order to fulfil the task of effective monitoring. However, specific statements relating to coercion through the application of Articles 10 and 226 were not mentioned.

In 2000, the Commission had already resorted to the use of Article 10 before the Court of Justice in relation to infringement investigations seven times (without announcing this strategy in the previous Annual Report), but by 2001, this had increased notably to 20 separate cases. The Commission's increasing frustration with the 'information asymmetry',⁶² inherent in the Article 226 process was beginning to materialise in the diverse approaches it was taking to right this problem.⁶³ However, the Commission was still hesitant to make recourse to these prosecutions routine. Prosecution would only be resorted to where Member States persistently refused all cooperation rather than simply took excessive time to answer the Commission's inquiries.

The 2002 Annual Report did not mention recourse to prosecution for breach of Article 10 at all, but instead emphasised the implementation of various preventative strategies to decrease the incidence of infringements.⁶⁴ Again the Commission's position moved from a tougher 'prosecution' approach back to encouraging negotiation with Member States. These new operational measures were to be explained in more detail in the 2003 Annual Report, but

⁶⁰ *Ibid* n 55 p 6.

⁶¹ WPG above n 2 pp 25-26.

⁶² Tallberg above n 9. Tallberg uses the term 'information asymmetry' when discussing how effective the Commission is when acting as supervisor of the Member States. This role is hampered considerably by the fact the Member State is in possession of all the information the Commission needs to mount a case before the Court, but the Commission cannot obtain much of this information independently.

⁶³ At the Convention on the Future of Europe, the Commission proposed a different strategy to achieve the same end (of reducing the opportunity for Member States to delay infringement proceedings) by suggesting that if the Member States objected to the reasoned opinion of the Commission, the Member State could take the case to the Court of Justice, rather than wait to be referred to the ECJ by the Commission. In reality this turns the reasoned opinion into a legally binding instrument, with the Member State appealing the Commission's decision before the Court. This also suggests a change in the burden of proof whereby the onus would be on the Member State rather than the Commission to prove their case. In fact this proposal was rejected, as it had been time and again at other IGCs when the Commission had proposed similar amendments to Article 226, albeit using different terminology.

⁶⁴ Twentieth Annual Monitoring Report above n 35.

instead mysteriously slipped off the agenda and are not mentioned at all.⁶⁵ The reasons behind the Commission's sudden reluctance to pursue the Article 10 strategy in 2002 are unclear. It might be related to a hostile reaction from the Member States or simply a lack of coherence from the Commission in the reporting of its activities under Article 226. Nevertheless the current position remained reasonably clear – the Commission felt that it had eradicated its internal inefficiencies in relation to the decision-making process under Article 226 as well as it could, and was now beginning to look for other ways to streamline the procedure, including forcing Member States to be more cooperative in its investigations.

2.3: Attempts to reform the Treaty language

The third main problem of the Commission is that the Commission has often been frustrated by an enforcement procedure that is undeniably weighted in favour of the Member States it tries to supervise. The Treaty wording itself, compounded by the interpretations laid down by the Court of Justice, has created a slow and cumbersome enforcement mechanism. There is no doubt that when the pressure has been on to achieve maximum compliance, and in particular to meet the deadline to create the internal market by 1992, both the Commission and certain Member States' attention focused on how best to remedy this situation.

From the Commission's perspective the main problems with Article 226 are related to the wording of the Treaty. It is the lengthened process which allows the Member States to delay compliance, and so the focus on improving Article 226 would naturally begin with reform of the Treaty itself. This is one area where the Commission often finds itself in an uncomfortable position. The clamour for amendment of Article 226 is seen by the Member States as an overt attempt to boost the supranational element of the Union by increasing the Commission's powers, and is instinctively resisted on this very basis alone. The Commission has not helped matters as it has not always 'played the IGC game' as well as it ought to have over recent decades, and consequently has not been as effective as might have been hoped for.⁶⁶ Particularly through the 1970s and 1980s there were calls for greater central enforcement powers from the institutions of Europe, and comparisons were often drawn with those enforcement provisions of the ECSC Treaty which were more extensive and far more efficient from the Commission's perspective. Despite serious efforts at two

⁶⁵ Twenty-First Annual Report on Monitoring the Application of Community Law (2003) COM (2004) 839 final, possibly because the Commission has changed its method of reporting, see Chapter V on this point.

⁶⁶ See especially Cini above n 4 and Tallberg above n 9 in this regard.

separate IGCs the Commission has never managed to exert enough pressure on the Member States to amend the wording of this provision.⁶⁷

At the 1990 IGC there was a substantial emphasis placed on the task of completing the internal market, and consequently on enforcement of EC law. Even so, the language of Article 226 remained immovable. The Commission presented four alternative suggestions to the current enforcement powers in Article 226, but only the first of these proposals suggested amendments to the wording of Article 226 itself. This proposal, which was to replicate the ECSC Treaty provision on enforcement, was immediately dismissed. This amendment would have granted the Commission the power to find an infringement by decision on appeal to the Court of Justice, but it had quickly become apparent that there was no appetite amongst the Member States for this initiative.⁶⁸ Two of the other suggestions circumvented the Article 226 provision altogether by focusing on developing a state liability principle,⁶⁹ or alternatively an extension of ECJ's powers to annul national laws. Unsurprisingly, such extensions to the ECJ's powers were also seen as supranationalist and unpopular.

The only proposal that was really under discussion was the UK Government's suggestion that Article 228 could be amended to include a financial penalty for those Member States that refused to comply with an ECJ judgment under Article 226. The Commission had expressed reservations about this method of ensuring enforcement during negotiations but ultimately this proposal was accepted, resulting in the current Treaty wording of Article 228.⁷⁰ The Commission's reservations concerned the practicality of obtaining the penalty payment from the Member States, an issue that underpinned the Commission's eagerness to replicate the ECSC Treaty which provided for the Commission to withhold monies owed to Member States in order to recoup financial penalties. This scepticism proved well grounded when it took Greece some years to pay the financial penalty imposed on it under Article 228. At the next IGC in 1996 the same themes from the Commission arose. Replacing the reasoned opinion stage of Article 226 with a reasoned decision (similar to the ECSC Treaty) was still the preferred option and again this was unsuccessful. The Commission also proposed amending the new Article 228, so that Article 226 and 228 proceedings were

⁶⁷ See Tallberg above n 9, for a detailed explanation of the Commission's attempt at Treaty reform of Article 226.

⁶⁸ Tallberg *ibid.*

⁶⁹ Which the Court of Justice would eventually develop through its own case law principles anyway, despite the Member States' firm opposition.

⁷⁰ Tallberg above n 9.

attached. This would reduce the time delays in the Article 228 procedure, but this proposal was unsuccessful despite the backing of some Member States.⁷¹

The one advantage the Commission has in the Treaty revision process is that it can more successfully play the long game, whereas Member States' priorities and attentions can fluctuate dramatically depending on the overall political picture. In the Convention on the Future of Europe, the Commission finally had some success in its reform quest. This can be attributed to two factors; first, other more pressing constitutional matters consumed the agenda of the Member States, and secondly, the Member States finally had something to gain from increasing the Commission's enforcement powers. The enlargement of the EU and fears that the new Member States would not fulfil their responsibilities weighed heavily. For once, the 'them versus us' mentality of the IGC negotiations that the Commission had been forced to battle against in previous IGCs worked in its favour, with the prospective accession states being on the wrong side of the 'them and us' fence.

Suggested alternatives to the current enforcement provisions again bore resemblance to those from the 1990 and 1996 IGC negotiations. The three main proposals involved abolishing either one or both of the pre-litigation stages in Article 228, pursuing Article 228 penalties simultaneously with Article 226 proceedings, or granting the Commission the right to declare an infringement by decision, which would be challengeable in the ECJ.⁷² In the final version of the Constitutional Treaty, Article 226 (Article III-360) again remains largely unchanged in its wording in terms of the applicable procedure.⁷³ However, it should be noted that Article III-360 refers to failure to fulfil obligations in the Constitution, rather than only the EC Treaty, so the range of 'obligations' covered by the mechanism is greatly expanded.

In contrast, Article 228 (Article III-362) is to be amended in three ways.⁷⁴ First, the requirement of a reasoned opinion under the Article 228 action would be removed so that only a formal letter is required before the Commission can refer the case to the ECJ. This makes the procedure faster and leaves less room for procrastination by the Member State.

⁷¹ Tallberg above n 9 states that one reason this was unsuccessful was that the Commission had yet to initiate any proceedings under Article 228 requesting a financial penalty, so the newly amended system had not even been tested before the Commission was attempting to amend the Treaty provision again.

⁷² Final report of the discussion circle on the Court of Justice CONV 636/03 25 March 2003.

⁷³ Treaty establishing a Constitution for Europe OJ C 310 16 December 2004 p 158.

⁷⁴ *Ibid* p 159.

The reasoned opinion is no longer necessary as it is clear by this stage exactly what the Member State should have done to remedy the non-compliance with the Article 226 judgment. Secondly, Article 228 would be amended to include a final paragraph as follows:

‘When the Commission brings a case before the Court of Justice of the European Union pursuant to Article III-360 [226] on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a European framework law [a directive], it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.’

This would mean that when Article 226 proceedings are brought for non-notification cases, the Commission may request that a financial penalty be imposed in the course of these proceedings instead of having to wait for a separate case to be brought under Article 228. Although this step does not fully achieve what the Commission had wanted in terms of attaching all Article 226 and 228 proceedings to reduce time delays, it does address the central preoccupation of the Commission in achieving greater compliance with directives, in particular the non-notification cases. Last, the final paragraph has been altered at the IGC by the Member States, as this was not included in the text of the Draft Constitutional Treaty submitted by the Convention.⁷⁵ This final paragraph attempts to place control over the amount of the fine for non-notification cases in the hands of the Commission, as opposed to the Court. In ordinary Article 228 cases it is the ECJ that has the final say on the amount of penalty payment imposed on the Member State.

The amendments contained in the Constitutional Treaty are of course only indications of the enforcement strategy that the Member States and Commission can currently agree upon. Given the rejections of the Constitutional Treaty in two Member States’ referendums, it might be some considerable time before these changes become binding Treaty text, if ever. Nevertheless, this analysis does provide an insight into the Commission’s strategy for external reform and long term goals for Articles 226 and 228 as a joint enforcement mechanism. It reveals that the Commission may eventually succeed in its aim of increasing its enforcement powers by seizing the opportunity presented by political challenges within

⁷⁵ See for comparison The European Convention ‘Draft Treaty establishing a Constitution for Europe’ CONV 850/03 18 July 2003 pp 187-188, Articles III-265-267.

the EU (such as that of enlargement), so that it can champion the cause of increased compliance as something that the Member States can benefit from.

2.4: One size fits all: a horizontal policy with vertical challenges

In principle, the Commission operates an enforcement policy under Article 226 that appears to apply equally across the DGs. Although the internal procedures of the Commission remain a secretive business,⁷⁶ there are several standard procedures that all DGs follow, in respect of internal management of infringement investigations. These are (1) processing of complaints from citizens⁷⁷ and (2) all decisions to pursue infringements must be verified by the College of Commissioners at each stage. Despite concerns over internal efficiency, the management of the enforcement action is nonetheless still a political and time-consuming affair and the influence of the Commissioners has not diminished in recent years.

In principle, the Commissioners still meet on a quarterly basis to specifically discuss on-going infringement cases, along with the Secretariat General and Legal Service. These meetings are based around the collation of data regarding all infringements across all DGs, contained in an internal quarterly report. The quarterly meetings are split into two 'A Meetings' and two 'B Meetings' in order to discuss infringement cases that are more or less controversial.⁷⁸ The internal reforms of 1998 have not altered this procedure as the standard procedure.

Each decision taken during an investigation of a possible infringement must be authorised by the College of Commissioners. The issuing of a formal letter, reasoned opinion, referral to the ECJ and each subsequent step in the Article 228 procedure all require this political stamp of approval. This has been the procedure within the Commission since time immemorial, reflecting the historical position that infringement decisions are not a case of 'crime and punishment', but a more of a political affair riddled with negotiation and trade-offs. All Commissioners must agree to a decision for the case to move forward. The rigidity of the

⁷⁶ Note the refusal to supply the European Parliament with the internal manual, amongst other things, discussed in Chapter V.

⁷⁷ Discussed in Chapter VI.

⁷⁸ Interview, Commission Official A (25 October 2005), Interview, Commission Official B, (25 October 2005), Interview, Commission Official C (25 October 2005) Interview, Commission Official D (25 October 2005) Interview Commission Official E (24 October 2005), Interview, Commission Official F (24 October 2005), Interview, Commission Official G (26 October 2005), Interview, Commission Official L (24 October 2005).

decision-making process seems to be a problem for some (but not all) DGs, depending on the policy sector and the type of infringement case that each DG encounters.⁷⁹

Flexibility in the procedure can exist in some cases, particularly where the infringements are not especially politically sensitive (such as non-notification cases) or where interim measures are required.⁸⁰ An example of a quick decision-making procedure is in relation to a transport case against Austria. This case was initiated by DG Transport on the basis of internal monitoring of compliance with a directive; this is a case of non-implementation rather than non-notification. On 25 June 2003 a formal letter was set to the Member State. On 9 July a reasoned opinion was sent to the Member State, and by 24 July the case had been listed by the ECJ. The first judgment, an order for interim measures against Austria for breach of its obligations, was made on 30 July 2003.⁸¹ The entire decision-making process of the College of Commissioners took a matter of weeks. The Member State claimed that the case should be dismissed due to the short time period in which they had to respond to the Commission's allegations. Nonetheless, the Commission was judged not to have breached the Member State's rights of defence even though the case had proceeded at a brisk pace.

Contrast this approach with the recent case against Finland regarding the conservation of wild birds.⁸² The Commission had received numerous complaints between 1995 and 1996 about Finland's failure to comply with a directive. In February 1998 the Commission sent a letter of formal notice. In April 1998 the Commission sent a reasoned opinion to Finland. Inexplicably, nothing then happened for another three years, until July 2001 when the Commission sent a supplementary reasoned opinion. This is totally unnecessary in Article 226 proceedings, and this step is not required by the Treaty provision or the case law of the ECJ.⁸³ Another two years passed before the case was finally referred to the ECJ in August 2003, resulting in a judgment in December 2005. In contrast with the case against Austria, this no doubt seems like a protracted timescale for bringing Member States into line with

⁷⁹ Interview, Commission Official A (25 October 2005), Interview, Commission Official B, (25 October 2005), Interview, Commission Official C (25 October 2005) Interview, Commission Official D (25 October 2005) Interview Commission Official E (24 October 2005), Interview, Commission Official G (26 October 2005).

⁸⁰ See for instance Case C-320/03 R *Commission v Austria* [2005] ECR I-9871.

⁸¹ *Ibid Commission v Austria*. The full infringement hearing took place two years later, with the court delivering judgment against the Member State on 15 November 2005. This delay was the same experienced by most cases before being heard in the Court of Justice and is not peculiar to Article 226 cases, or the Commission's management of them.

⁸² Case C-344/03 *Commission v Finland* [2005] ECR I-11033.

⁸³ If the Commission wishes to advance different arguments to those in the original reasoned opinion, it must issue a new reasoned opinion. This appears to be different from a 'supplementary' reasoned opinion.

their obligations under Community law, but it must be pointed out that this case probably proceeded faster than many other cases. The more political the case, and the more severe the sanctions, the longer Commission decisions seem to take. The recent case against France, regarding France's failure to comply with technical conservation measures relating to the fishing of Hake, is illustrative of this point.⁸⁴ Even though an infringement was established by the ECJ in 1991 (for an infringement beginning in 1984) France has yet to correct its conduct and, according to the Commission, is still in breach of its obligations under Community law.⁸⁵ The Commission took 11 years to refer the case to the ECJ under the Article 228 procedure.⁸⁶

The actual practice of managing the Commission's enforcement responsibilities across and within individual DGs belies the apparent uniform formal procedure. In fact, there are vast differences between the DGs in terms of how they discharge their enforcement responsibilities.⁸⁷ These differences are sometimes directly related to the peculiarities of the policy sector, but sometimes are affected by more nebulous issues. Each DG has its own internal organisation, not necessarily consistent with any other DG – some DGs have a specific unit devoted to the management of infringements,⁸⁸ and others spread this responsibility across the DG.⁸⁹ Some DGs have internal horizontal co-ordination units specifically devoted to infringements.⁹⁰ Some have no specific arrangements for infringements at all.⁹¹ Many DGs subsume the management of infringements within a legal unit of the DG whose central task might be drafting legislation rather than enforcement of it.⁹² None of the DGs have a specific unit whose sole task is to manage complaints from citizens.⁹³

Due to the different organisation of infringement handling across the Commission, no two DGs operate the enforcement mechanism in the same way. The internal organisation of each

⁸⁴ This case also concerns France's failure to adopt the concurrent measures relating to this conservation of fish stocks, including ensuring fisherman used the correct mesh size, and the minimum size of fish allowed to be sold.

⁸⁵ Case C-64/88 *Commission v France* [1991] ECR I-272.

⁸⁶ Case C-304/02 *Commission v France* [2005] 12 July 2005 nyr.

⁸⁷ Christiansen, *ibid*, note 7 discusses the issue of DGs operating in very different ways in general, but not in relation to Article 226.

⁸⁸ See eg DG Transport and Energy.

⁸⁹ In a specialised unit for the diverse legislative areas contained within one DG, for instance see DG Employment, Social Affairs and Equal Opportunities.

⁹⁰ For instance, DG Internal Market.

⁹¹ DG Justice Freedom and Security.

⁹² DG Environment.

⁹³ See Appendix 2 for the details of the organisation of a selection of DGs.

DG can be related to the type of policy and legislation it develops, or simply an historical artefact. Those DGs with higher infringement rates tend to be departments that deal mainly with first pillar policy sectors, or where the majority of legislation is produced in the form of directives.⁹⁴ As a consequence the internal organisation of that DG has evolved to compensate for this higher instance of infringement.⁹⁵

In terms of the method adopted for infringement detection, again there are vast differences across the Commission. Some departments are inundated by citizen complaints, overwhelming the resources available within the DG for dealing with such complaints.⁹⁶ In contrast, certain DGs have comparatively limited citizen complaints and rely far more on their own internal monitoring of Member State legislation to detect infringements.⁹⁷ This is related to the policy sector at hand and the attitude of Member State compliance to that particular sector. The environmental sector is a case in point. There is a reluctant attitude amongst Member States to compliance for a variety of reasons, including the complex nature of the legislation, the form of the legislation and the cost of compliance. At the same time there is a large number of complaints⁹⁸ because it is an area of NGO lobbying, and a difficult area for citizens to enforce their rights directly before a national court.⁹⁹ As a consequence a complaint to the Commission is the best hope of affecting compliance from a bottom up perspective. Whether a policy sector is one of shared competence or EU competence also makes a significant difference. Certain aspects of the fisheries sector are an exclusive competence of the EU; the nature of the sector has resulted in fewer citizen complaints, and detection is achieved via the EU Inspectors. In comparison, internal market or employment issues may be infringements that are of a more individual nature. Without a similar inspection team, the DG is left with the task of monitoring. In instances of individual misapplication of the rules it is much easier to monitor infringements on the basis of citizen complaints.¹⁰⁰

⁹⁴ Which generate by far the highest number of infringement cases, see Figure 7, Chapter V.

⁹⁵ Interview, Commission Official A (25 October 2005), Interview, Commission Official E (24 October 2005).

⁹⁶ Interview, Commission Official A (25 October 2005), Interview, Commission Official B, (25 October 2005), Interview Commission Official E (24 October 2005).

⁹⁷ Interview, Commission Official C (25 October 2005), Interview, Commission Official G (26 October 2005), Interview, Commission Official H (24 October 2005).

⁹⁸ For instance, in 2004, 33% of all infringement complaints to the Commission related to environmental legislation, Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) Com (2005) 570 final.

⁹⁹ Due to issues of a lack of standing in relation to 'diffuse rights', see Chapter II for a discussion of these issues.

¹⁰⁰ Interview, Commission Official H (26 October 2005), Interview, Commission Official G (26 October 2005), Interview, Commission Official E (24 October 2005).

There are other factors influencing the way in which a particular DG operates infringement investigations which are harder to quantify. Certainly, the attitude of the Commissioner in charge of the policy sector is of vital importance.¹⁰¹ The significance of compliance on his/her particular agenda has a definite influence on the effectiveness of that DGs enforcement of Member States' obligations.¹⁰² It is also influenced by that Commissioner's success in political terms in the context of putting forward an infringement case that the entire College will agree to proceed with.¹⁰³ Similarly, the attitude, commitment and political skill of the Director General within a DG is equally important.¹⁰⁴ The Director General is the ultimate bridge between an infringement case proceeding from the hands of the investigating Commission official and the Commissioner's *Chef de Cabinet*.¹⁰⁵ It is the *Chef de Cabinet* who communicates downwards whether it is politically possible to proceed with the case. Once the infringement file has navigated all these hurdles successfully, it must then come before the College for a decision.¹⁰⁶

As a consequence, it is difficult to make sweeping comments about the way in which 'the Commission' actually practises its enforcement responsibilities. There are, however, some common themes that emerge for all the DGs. Resources are a perennial problem across the Commission in the discharge of all of its duties, including those relating to enforcement.¹⁰⁷ The enlargement of the Union has created a situation of enormous consequence in terms of ensuring Member State compliance, the impact of which will not be fully understood for a

¹⁰¹ Interview, Commission Official A (25 October 2005), Interview, Commission Official B, (25 October 2005), Interview, Commission Official C (25 October 2005) Interview, Commission Official D (25 October 2005) Interview Commission Official E (24 October 2005), Interview, Commission Official F (24 October 2005), Interview, Commission Official G (26 October 2005), Interview, Commission Official H (26 October 2005), Interview, Commission Official I (6 April 2005) Interview, Commission Official L (24 October 2005).

¹⁰² *Ibid.*

¹⁰³ Interview, Commission Official C (25 October 2005), Interview, Commission Official G (26 October 2005).

¹⁰⁴ In organisation terms, the Director General is the most senior Commission official of the DG and is the last tier of management before the Commissioner.

¹⁰⁵ Each Commissioner has his own personal, *Cabinet*, or personal staff of advisors and administrators and the *Chef de Cabinet* is the head of this department. This is not a department within the DG, but an adjunct to the Commissioner, Interview Interview, Commission Official C (25 October 2005), Interview, Commission Official G (26 October 2005).

¹⁰⁶ *Ibid.*

¹⁰⁷ Interview, Commission Official A (25 October 2005), Interview, Commission Official B, (25 October 2005), Interview, Commission Official C (25 October 2005) Interview, Commission Official D (25 October 2005) Interview Commission Official E (24 October 2005), Interview, Commission Official F (24 October 2005), Interview, Commission Official G (26 October 2005), Interview, Commission Official H (26 October 2005), Interview, Commission Official I (6 April 2005) Interview, Commission Official L (24 October 2005).

number of years to come. This is an issue of language as well as volume. Within the Commission DGs, those staff that deal with enforcement generally have proficiency in a variety of languages between them which covered most, if not all, of the 15 'old' Member States.¹⁰⁸ Staff therefore were able to translate the relevant Member State legislation to check compliance, without having to submit pieces to the translation service which has long suffered from severe backlogs.¹⁰⁹ The situation is not the same for new Member States, resulting, in some cases, in a complete inability to check compliance through monitoring of the transposal measures notified to the Commission, or complaints from citizens. This means it will be difficult to monitor compliance effectively in the new Member States for the immediate future.¹¹⁰

A complicating factor is the insistence by the Commission that all States are investigated simultaneously for the same infringement, i.e. if there seems to be a problem in a particular Member State, a survey is conducted to see if this problem is unique to that Member State, or in fact uniform across the Union.¹¹¹ This is not required in the case law of the Court, but is a manifestation of the equal treatment principle in the practice of the Commission. Unfortunately, this practice will now hinder the Commission, since it lacks the linguistic ability to pursue recent accession Member States to the same degree as the 'old 15' Member States. Whilst there is an interim transitional period for compliance in some sectors for the new Member States as part of the accession agreement, enabling the Commission to justify taking a 'two tier' approach to enforcement, this reprieve will not last indefinitely.¹¹²

3.0: Conflicting roles of the Commission within Article 226

The Commission's continuing efforts at reform, both of its internal management of infringement cases and Treaty revision, are compromised by the Commission's attempts to accommodate the competing roles and priorities that are inherent in its management of the enforcement action. The Commission engages in different, and sometimes competing roles, when it executes the separate tasks assigned to it under the Treaties. In general, it may be said to act as an executive body when it initiates and steers policy development, or single-

¹⁰⁸ Interview, Commission Official G (26 October 2005).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Interview, Commission Official G (26 October 2005), Interview, Commission Official C (25 October 2005).

¹¹² This means that some DGs within the Commission will develop the strategy of prosecuting infringements in two blocks – one block of cases against the old 15 Member States and a second block at a later date against the new 12 Member States, Interview, Commission Official G (26 October 2005).

handedly executes implementing legislation, and acts as a bureaucracy or administration when engaging in monitoring activities and contracting various bodies to carry out the implementation of Community policies. These functions rarely operate in a completely discrete fashion, and to complicate matters, such functions are not always complementary to one another. In the field of enforcement actions undertaken in Article 226, these tensions are especially evident. Within this one Treaty provision the Commission must act as guardian of the Treaties, an efficient and fair administration, and balance its executive function. The following subsections identify the Commission's different roles under Article 226 and explore how each of these discrete functions conflict, and how the conflicts work to shape the role of Article 226.

3.1: The guardian of the Treaties – enforcement and compliance

The first role or function of the Commission is that of enforcement and compliance. The Commission's role in ensuring compliance with Community law through the use of Article 226 is exclusive. Its role as the 'guardian of the Treaties' is contained within Article 211 which states that the Commission must ensure that the Treaty provisions and pursuant legislation are applied by the Member States. The objective of this duty is spelled out in the Treaty in no uncertain terms: compliance. The Commission's duty as the guardian of the Treaties is arguably more important than any other power or responsibility it possesses, since the very existence of the Community depends upon the unique legal system which has evolved under the Treaty. The value of Article 226 as a compliance mechanism in terms of its effectiveness, i.e. the achievement of complete uniform application in the arena of international legal obligations, is outside the scope of this study.¹¹³ The main focus of this section is the Commission's use of Article 226 through the function of 'guardian of the Treaties'. This is the role identified by the Commission as central to its activities under the enforcement action.

The Commission is keen to promote its role of guardian of the Treaties as that of a neutral monitoring agency. The Communications and Annual Reports it produces in connection with this role are all described as 'monitoring' reports, rather than compliance or enforcement reports. The moniker of 'guardian' evokes an image of an equitable overseer of

¹¹³ Though others have canvassed the issue of compliance, see especially H Siedentopf, and J Ziller, (eds), *Making European Policies Work. The Implementing of Community Legislation in the Member States Volume I, Comparative Synthesis* (Sage, London, 1988), TA Börzel, 'Non-Compliance in the European Union: pathology or statistical artefact?' (2001) 8 *Journal of European Public Policy* 803, Börzel, TA, T Hofmann and C Sprungk 'Why Do States not Obey the Law? Lessons from the European Union?' (EUSA Conference, Nashville, 2003), Tallberg above n 9.

the Treaty, a neutral even-handed defender of the legal order. The guardian of Treaties ought therefore to pursue uniform application of the laws across all Member States without regard to other (conflicting) priorities. In this sense, the process of guarding the Treaties ought to be as automated and mechanical as possible, apolitical and without regard to other issues that have no connection with ensuring uniform application of the law. The Commission embraces this characterisation in its technocratic methods of detection and reform, and when it focuses upon the function of compliance and integration.

This role of neutral guardian is undermined by the reality in which the Commission must operate to ensure compliance with the Treaty. It is not simply a mechanical application of transparent (or even secret) rules which govern the duty of compliance assigned to the Commission. Enforcement of Community responsibilities is not an aseptic, neutral or valueless monitoring task. The Commission's management has promoted an atmosphere of negotiation and mediation with the Member States. The internal decision-making procedures relating to Article 226 have also been slow and highly politicised (notwithstanding the advances made in relation to directives), in direct contrast with the fictional mechanical application of rules that the role of 'guardian' might promote. To compound this problem, inadequate resources have ensured that all infringements cannot be pursued with equal vigour. This, in turn, has seen the neutral compliance mechanism transformed into an executive policy choice; a policy field of enforcement implies political choices and is the antithesis of a neutral rule driven compliance tool.

3.2: An efficient administration – complaint handling and case investigation

The second role or function is that of an efficient administration, concerned with handling complaints from citizens relating to suspected infringements and conducting investigations. The DGs are at the centre of the administration in relation to the handling of infringement cases. Not only do DGs detect infringements through their own investigations, they also act as a contact point for European citizens who wish to complain about alleged infringements.

The Commission has developed an administrative code of conduct in relation to its dealings with complainants in an effort to standardise treatment of complaints and improve relations with the European public.¹¹⁴ Additionally, there is an internal code of conduct informing DG staff how to proceed when investigating suspected infringements. The code consists of

¹¹⁴ See Chapter VI for a discussion on the Ombudsman's contribution and the Code.

administrative protocols and deadlines for actions.¹¹⁵ Indeed when publishing reports or communications on the infringement process, the Commission tends to characterise the task of ensuring enforcement of Community law as primarily a monitoring exercise, a type of administrative review of the conduct of Member States.¹¹⁶

The Commission has devoted a lot of resources to developing administrative (or technocratic) strategies such as database management systems which automatically monitor the transposal of directives. This is an efficient administrative mechanism to enable centralised policing of the transposal of directives, but is limited to a specific type of infringement. It does not account for misapplication or misinterpretation of the rules once formal transposition has occurred. The more automated a task becomes, the less discretion or value choice is attached to it and the more neutral and administrative it becomes. The DGs are also responsible for collating statistics, and in cooperation with the Secretariat General, produce reports which are then analysed to gather information on implementation trends across sectors and Member States. In all these tasks, the DGs are acting as a large administration, in principle pursuing correction of infringements in a regimented and bureaucratic manner.

This dry and formalistic picture of the Commission acting as a tightly bound rule driven administration is compromised in several respects. The first problem with this characterisation is the actual composition of the Commission, with the two distinct sections of the political head and the administrative body. Decisions on infringement cases have to travel between the level of the DG and the Commissioners, causing both administrative delay and a possible (political) change of direction. The DG case handlers are only responsible for unearthing the facts relating to any particular case and taking decisions at a fairly basic level. Pursuing the case to the next stage, say the delivery of a formal letter or reasoned opinion, involves not only the input of the legal service but also takes on a far more political and discretionary dimension; pursuing cases to the Court of Justice even more so, and invoking Article 228 penalties increases the political element even further.

The enforcement policy decided at the level of Commissioners and overall the Commission President then becomes far more instrumental than the (theoretically) neutral, aseptic

¹¹⁵ Not available to the public.

¹¹⁶ For instance, see Sixteenth Annual Report on Monitoring the Application of Community Law (1998) COM (1999) 301 final, Twentieth Annual Report on Monitoring the Application of Community Law (2002) COM (2003) 669 final, Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003.

approach of the rule driven administration.¹¹⁷ The Secretariat General (SG) is also involved in decisions to pursue or drop a case, and is responsible for co-ordinating the overall enforcement policy across the different DGs to ensure consistency. Where cases involve more than one Directorate General, the input of the SG becomes particularly crucial. The result of the political guidance from more senior officials means that infringement investigations cannot be even-handed, rule driven administrative affairs alone. This conflict can manifest itself (internally at least) when it seems clear from the facts of a case that an infringement has occurred, yet for other undisclosed reasons, after the case is referred up the chain of command it is not pursued.

Recent statements that individual case handlers will be given more authority in infringement investigations is an attempt to increase the efficiency of the system of decision-making, and to try and decrease the number of cases referred to the ECJ by encouraging resolution of cases much earlier during the investigation phase.¹¹⁸ If this is the case it might suggest that the 'political' decision-making is simply moving down the hierarchy rather than being removed. To counteract these developments, the freedom of the administration is compromised by the scrutiny of the European Ombudsman who has been keen to police the administrative protocol of infringement investigations in response to citizen complaints.¹¹⁹

3.3: An executive power – policy development and control

The third function or role of the Commission within the enforcement mechanism is that of the 'executive' of the EU, responsible for designing, managing and controlling the enforcement policy. The Commission occupies a unique position in the Community's legislative function as it may play a part in each and every stage of the formation of the legislation, from its executive prerogative of initial policy proposal to the formal legislating procedure with Council and Parliament, to the execution of detailed rule making powers within the legislation conferred by the Council. Whilst the Council can claim similar (though not quite as extensive powers) in formal legislating, only the Commission possesses the power to pursue implementation of the legislation once it is passed down to the Member States.

¹¹⁷ This is evidenced by the apparent difference in approach to some infringement cases between the administration and the Commissioners themselves. Interview, Commission Official I (6 April 2005), Interview Commission Official E (24 October 2005), Interview, Commission Official G (26 October 2005).

¹¹⁸ Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003 p 17.

¹¹⁹ See Chapter VI for a full analysis of the Ombudsman's contribution.

The Commission's executive power relating to policy initiation is extended to arguably the most important stage of all – that of implementation and uniform application. The Commission itself makes the explicit link between its right of initiative and its role as defender of legal order:

'So that it can play its role as guardian of the Treaties and defender of the general interest, the Commission has been given a right of initiative in the legislative process, proposing the legislation on which the European Parliament and the Council decide'.¹²⁰

The Commission has sole control over the policy of enforcement. In having the exclusive power to select which legislation it will focus on to ensure compliance, the Commission has the power to control selectively the Community's output. The consequences of this are twofold. If a piece of legislation is considered less important to the Commission's overall political agenda, it may choose to pursue a 'soft' enforcement policy by diverting its resources to concentrate on other types of infringement.¹²¹ Without a consistent approach of equitable and unbiased enforcement, uniformly applied across all policy sectors (and it is clear that Commission is selective in its choice of enforcement policy), some sectors may become ineffective, especially if by definition such sectors rely on uniform application across the Member States. Conversely, those areas that the Commission concentrates its enforcement efforts on may appear disproportionately important in the output of the Union when one considers the bare statistics.¹²²

The Commission may choose a different enforcement policy to achieve different aims, whether to achieve a specific focused goal like the completion of the internal market, or in order to emphasise the importance of a particular sector. It may seek to correct a particularly recalcitrant Member State by targeting it specifically in its investigations, or in seeking to scale down the importance of a sector or a point of particular political controversy, it may choose to do nothing at all. It is not only the positive steps taken by the Commission under Article 226 that count; equally, the choice of inaction is significant.

When determining its enforcement policy, the Commission has been motivated by various internal and external factors, but the two most important variables have often been those of

¹²⁰ http://ec.europa.eu.int/comm/atwork/basicfacts/index_en.htm.

¹²¹ See M Mendrinou, 'Non-compliance and the European Commission's Role in integration' (1996) 3 *Journal of European Public Policy* 1 for a more detailed exposition of the Commission's use of the Article 226 to fulfil its institutional self-interest and to make strategic gains in the bigger picture of Community politics.

¹²² See Chapter V, Figure 4 in relation to the environment sector.

prioritisation and timing – neither of which reinforce an image of mechanical neutral guardianship, and these relate directly to its executive function. Internally, the influence of the personality of the incumbent Commission, and particularly the Commission President is important, because this determines to a large extent the prioritisation given to the policy of enforcement.¹²³ Externally, the shaping of the policy of enforcement depends on the current political climate, the political objectives of the Union and the more general prevailing atmosphere regarding the popularity of the Community project as a whole.

In times of crisis or stagnation, enforcement as a policy sector has taken a back seat, whether to avoid rocking the boat by engaging in high profile legal attacks on the Member States, or because there have simply been more pressing policy objectives to pursue. The completion of the internal market saw the compliance with Community norms return to the forefront of the political (and Commission) agenda, and a concerted effort was undertaken by the Commission when policing the Member States. The enforcement policy became a priority due to the particular characteristics of the single dominating policy objective being pursued. The completion of the internal market depended on the uniform application of a vast amount of legislation, perhaps significantly more than other policy objective by its very definition.

It seems crucial to be able to tie the policy of enforcement to a ‘greater good’ in order for it to command significant political/executive attention and compete with other policy fields. More recent discussions regarding enlargement and the functioning of the Community with a much larger membership brought the issue of compliance again to the fore, but this time with less success than might have been hoped for, particularly since the focus on new Member States adopting the *acquis* before membership removed the impetus from discussion of compliance. Nevertheless, the Commission’s recent Communication explicitly ties the need for new policy initiatives to the enlargement of the Community.¹²⁴

The executive function of Article 226, and the Commission’s role, is compromised by a number of factors. First, when acting as guardian of the Treaties the Commission’s focus ought to appear to be uniform application of Community law, which (in principle) limits to some degree just how selective it can be in pursuing its own self interest or political agenda. Secondly, control of the enforcement policy generated at the political head of the Commission, requires a great deal of bottom up administrative cooperation and information

¹²³ See the current Commission’s approach at http://ec.europa.eu/atwork/programmes/index_en.htm.

¹²⁴ Discussed in Chapter V.

flow. The political head is not necessarily master of all information in this respect and may find itself having to operate in a less self interested manner as a result of other institutional controls on its executive function. The European Parliament is charged with the task of monitoring the Commission's discretionary activities under the infringement proceedings.¹²⁵ The production of the Annual Reports which are presented to Parliament for scrutiny is one aspect of this external control,¹²⁶ but this also includes questions from MEPs and petitions from citizens through Parliament about these activities.¹²⁷

Concluding remarks

This chapter has attempted to identify and analyse the Commission's practice in Article 226, and to identify what factors have moulded the enforcement action into its current format. The emphasis placed on achieving compliance through negotiation with the Member States is motivated by both practical and political factors. The lack of regulation of the Commission's discretion in Article 226 ensures that executive (political) power remains protected, but this comes at a cost. The emphasis placed on negotiation and cooperation with Member States means that the administration of infringements becomes a frustrating task; the Commission can be stonewalled by the Member States themselves, ultimately reducing the effectiveness of Article 226 and the ability of the Commission to ensure legal obligations are complied with. This resulted in a brief threat to become more combative by prosecuting Member States for breach of Article 10, but the Commission quickly returned to a more conciliatory approach.

The Commission defends the use of protracted negotiation as the most effective way to ensure compliance because of (1) the cumbersome nature of Article 226 and (2) the information asymmetry inherent in Commission prosecutions. Evidence suggests however that in some cases, no negotiation and swift progression to the court can see a judgment given in as little as five weeks. The vast difference in the timescales spent bringing a case before the ECJ can, in part, be explained by the difference in the complexity of the cases, but

¹²⁵ The role of the European Parliament will be explored in more detail in Chapter V, from the perspective of the accountability of the Commission in the discharge of its duties as guardian of the Treaties.

¹²⁶ As a result of a Resolution by the European Parliament, Resolution 9 February 1983, <http://www.europarl.europa.eu/search/motion/perform.do?query=Resolution+1983&language=EN>.

¹²⁷ This report is subject to some delay. The most recent report (at July 2006) was made available on 24 March 2006 and this report covered the Commission's Annual Reports of 2003 and 2004. Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final.

this is not the only factor, or even the most significant. The political nature of the decision-making procedure, still unchanged since inception of the Communities, is hugely important and arguably no longer appropriate, especially if we adopt the Commission's vision of Article 226 as a single function effective and efficient compliance mechanism.

Internal reforms to the administration of the Article 226 process are technocratic in nature (database management) but this efficiency drive ends at the administrative divisions of the Commission. They have no impact on the political bargaining at the level of the Commissioners themselves. Where reform of the Treaty language has been (provisionally) agreed, this relates only to the prosecution of infringements of directives, and could only be agreed as an amendment to Article 228. There is nothing in the practice of the Commission to suggest a solution to the problems of scale or scarce resources. The problems related to enlargement and enforcement appear to be swept away to be dealt with at a later date, although this is not all the fault of the Commission, there seems to be little publicity being given to what is surely about to become an immensely serious situation in terms of legal uniformity across the EU.

The three conflicting roles of the Commission of guardian, administration and executive exist within one single Treaty article. These conflicting roles cause tension and inefficiency within Article 226 and undermine the agenda of efficiency and effectiveness. The Commission must therefore face the difficult task of formulating an enforcement policy, which recognises and accommodates the competing functions of Article 226, and the divergent priorities of the Commission, whilst still being faithful to its promise to deliver good governance throughout the Union. The next Chapter will examine the Commission's policy on enforcement under Article 226 as developed in the context of the WPG and the subsequent Communication, and what this policy contributes to further defining the role of Article 226.

Chapter V: The policy on enforcement in an era of good governance

The Commission's view of Article 226 (what its function is, and how it will be operated) is explained in the Communication produced in the context of improving governance throughout the Union.¹ The Commission committed to a better explanation of policies in order that the citizens might better understand the workings of the Union. This has not traditionally been a strategy embraced by the Commission in relation to Article 226, where even basic policy statements or guidelines in respect of the operation of the enforcement mechanism have been avoided. The problem that the Commission has encountered is that its own definition of good governance (openness, participation, accountability, effectiveness and coherence) does not fit comfortably with the way in which it historically operated Article 226. Explaining the enforcement policy in good governance language therefore ought to suggest a palpable change in the way in which the Commission discharges its enforcement responsibilities. This should alter the enforcement mechanism in two ways. First, the Commission's policy ought to recognise the role of other actors in the enforcement process. Second, the explanation of Article 226 in good governance language should include the recognition of the various functions Article 226 performs, rather than being solely focused on achieving enforcement through secretive negotiation. At the very least, the commitment to producing a policy statement ought to provide greater insight, and therefore openness and clarity, into the executive choices of the Commission in carrying out its enforcement responsibilities.

This chapter will be structured as follows. The first section analyses the Commission's Communication on its policy on enforcement under Article 226, and attempts to establish to what extent it is possible to compare the Commission's policy to its actual practice. The next section analyses how, and to what extent, this policy reflects a change in approach by the Commission which is consonant with the Commission's vision of good governance. The third section comments upon how the Commission might have improved its policy on the use of Article 226 in ways which complement its commitment to good governance as the pathway to legitimacy in the EU. Finally, some concluding remarks are made as to the success of the Commission in explaining the way it will operate Article 226 in light of its commitment to good governance.

¹ Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003, hereinafter 'Communication'.

1.0: The two tier approach to enforcement: prevention and correction

The Commission's Communication entitled 'Better Monitoring of the Application of Community Law'² elaborates the Commission's approach to Article 226 against the wider backdrop of improving governance in the EU. The Communication describes *the* function of enforcement in Article 226 as being 'essential to the interests of European citizens'³ and so identifies the need for this policy to be better understood by the public. Both the administrative procedure and the prosecution of Member States before the Court of Justice (ECJ) are considered as non-exclusive parts of the same objective of enforcing Community law.

The Commission notes that due to lack of detailed guidance in the Treaty, it is the responsibility of the Commission to:

'continually adapt...to carry out its mission effectively, and where necessary, make innovations designed to improve the application of Community law.'⁴

There is an acknowledgement that the Commission controls the process and shapes the role of Article 226. It is clear that the Commission realises it must adapt the operation of the enforcement mechanism in a changing Community environment. However, it is the enlargement of the Community that is identified as the key factor in the need to further innovate and redesign the process of enforcement in order for it to remain effective, rather than a need to alter practices in light of a commitment to good governance. The enforcement policy is split into several stages by the Commission, but for the purpose of this analysis it can be broadly divided into proposals aimed at prevention of infringements and proposals aimed at correction of infringements.

1.1: Prevention of infringements

The Commission has developed a number of strategies aimed at preventing an infringement from occurring, in order to decrease the instances where the Commission would need to resort to initiating Article 226. This strategy is considered as necessary and inevitable since the Commission does not have enough resources to pursue every infringement through the Article 226 mechanism. In the WPG and several subsequent detailed Communications,⁵ the Commission has identified the need for both clearer legislation (in terms of better drafting)

² Communication above n 1.

³ *Ibid* p 3.

⁴ *Ibid* p 3.

⁵ For example Commission Communication 'Towards a Reinforced Culture of Consultation and Dialogue' COM (2002) 277 final 5.6.2002, Commission Communication 'A Framework for Target-Based Tripartite Contracts COM (2002) 709 final.

and the choice of the right instrument for the policy proposal – a key feature of the ‘better regulation’ section of the WPG was the emphasis on ‘less is more’. Less legislation was proposed by the Commission on the understanding that the legislation produced was of a better quality, meaning that fewer infringements would occur because of bad drafting, and of course there would be less legislation to monitor. Such initiatives will prevent unintended infringements, which might occur through a simple misunderstanding of the language of the legislation. To further aid prevention of these types of infringements, the Commission also proposed greater use of interpretative Communications, produced by Commission departments, to explain in clear terms what outcomes are expected from transposal of a directive.⁶ The increased use of specialised committees to help oversee drafting and implementation of particular pieces of legislation (like those relating to workers or equality) has also been part of the Commission’s strategy for improving the quality of the legislation, particularly since the increased role of such groups was a core part of the Commission’s approach to increasing participation in the WPG.⁷

The strategy of ‘name and shame’ has been a long-term weapon in the Commission’s arsenal of preventative measures. These measures consist of the Internal Market Scoreboard,⁸ reports on the implementation of particular directives across the Member States and the production of the Annual Monitoring Reports. This strategy has also been developed by the online publication of deadlines for each directive. These are not just instruments for the use of the Member States to police each other, but also for attracting the attention of interest groups which may then litigate on a particular infringement, thereby reducing the administrative burden on the Commission. It has also concentrated on finding the best means to inform the ‘target public’.⁹ The Commission also pays particular attention to so-called ‘national projects’. Such projects, attracting large-scale investment, are likely to be a source of infringement (for instance of state aid or public procurement rules) and these often generate substantial publicity in the national press, assisting centralised proactive monitoring by the Commission.

⁶ The use of soft law as a mechanism or weapon of the executive to circumvent the proper paths of legislating is a tactic of the Commission that is used in many areas of EU law, see Cini, M ‘The soft law approach: Commission rule-making in the EU’s state aid regime’ (2001) 8 *Journal of European Public Policy* 192, Snyder, F ‘Soft Law and Institutional Practice in the European Community’ in S Martin(ed), *The Construction of Europe* (Kluwer, The Netherlands, 1994) 197.

⁷ See generally Commission Communication ‘Towards a Reinforced Culture of Consultation and Dialogue’ COM (2002) 277 final 5.6.2002.

⁸ http://europa.eu.int/comm/internal_market/score/index_en.htm#score

⁹ Presumably this means the particular NGO/lobby group/industry/region most affected by the legislation so that such groups can create pressure on the Member States to comply.

In the case of directives in particular, the Commission views the close co-operation of the Member States at an earlier stage in the transposal process as crucial to the prevention of many infringements. The Commission now dispatches automatic reminders two months before the transposal deadlines to the Member State. A more efficient use of the transposal period is also proposed by the Commission, by transforming the purpose of ‘package meetings’¹⁰ to be used to prevent infringements in the transposal periods. The established practice was to use such meetings to correct an infringement after it has already occurred. The Communication also suggests that the Member States could contribute to better enforcement by setting up clear ‘horizontal co-ordination points’ within governments. This would provide Commission officials with a specific reference for all infringements. A horizontal contact point would have the responsibility for co-ordinating activities across the levels of a national administration to ensure that infringements are corrected. A core part of preventing infringement actions for non-transposed directives is the smooth operation of the notification process itself. Previously, the process of notifying the Commission was not specifically defined. The Commission proposed this should be remedied and the process of transposal should be defined and restated systematically in each directive, including the obligation to establish a ‘concordance table’, so there can be no confusion on the part of the Member State.

1.2: Correction of infringements – developing a strategy of prioritisation

The correction of infringements is the main focus of the Communication as this is the central task of Article 226: after all, this is not, and was never designed as, a preventative mechanism. In order to clarify the Commission’s policy on its use of the enforcement action, the Commission has produced ‘priority criteria’. These criteria are meant to define what types of infringements will take priority in the use of Article 226 over others, and as an alternative to commencing an Article 226 action, what other corrective measures will be used to remedy the infringement. The stated purpose of the priority criteria is to ‘produce *effective and fair* use of the infringement procedure by the Commission’ (my emphasis).¹¹ The formation of the priority criteria is an executive policy choice. The Commission links the choice of the priority criteria to the *seriousness* of the infringement which it goes on to define. Some infringements, and therefore some policy sectors or pieces of legislation, are considered more important to the Commission than others. The priority criteria are defined

¹⁰ The package meeting is a forum for Commission officials and bureaucrats from the Member State to meet and resolve potential conflicts in transposing and implementing legislation. Historically, this was the main arena for negotiating secret diplomatic solutions to infringement cases in order to prevent the disclosure of the details of an infringement.

¹¹ Communication, above n 1 p 11.

by reference to policy sectors or particular principles. The Commission goes on to identify and explain three categories or priority areas that will result in the suspected infringement being pursued under the enforcement action.

The types of infringements that are identified as the most serious, which I will refer to as priority one infringements, are those that ‘undermine the foundations of the rule of law’.¹² This is explained as any breach of the primacy or uniform application principle, i.e. the application of the preliminary reference mechanism or judicial subverting of the primacy principle. It also refers to ‘systematic infringements that provide for no redress in national law’.¹³ Failure to refer cases under the preliminary reference procedure in the past has led to the development of strict rules relating to the application of the preliminary reference mechanism, and the national judiciary are increasingly scrutinised in relation to the proper application of EC law by the Court of Justice.¹⁴ This is consistent with the emphasis placed on the supremacy of the EU legal order throughout the EU’s evolution. Infringements that cannot be redressed by asserting rights in the national court have not received the same in-depth treatment by the courts and Commission.¹⁵ The lack of redress in national law for certain breaches of EC law has been exacerbated by the legal fiction that citizens can always find redress for breach of Community law rights in national courts – which is obviously not the case, or the Commission would not have acknowledged this in its priority criteria.

The Commission also highlights under the priority one category any violations of human rights principles enshrined in Community law, along with threats to human health and damage to the environment with implications for human health.¹⁶ Although the Commission’s approach to enforcement in the environment sector as a whole can be examined by analysing information produced in the Annual Reports, it cannot be stated that this correlates exactly to the category of ‘damage to the environment with implications for human health’. The statistics relating to the environment sector as a whole encompass all violations of environmental legislation, and not only those that have implications for human

¹² Communication above n 1, p 11.

¹³ *Ibid.*

¹⁴ To the point where damages are now obtainable against a national supreme court in an instance of incorrect interpretation of the EU law by the national court, especially as regards the duty to refer questions to the ECJ under Article 234, see Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

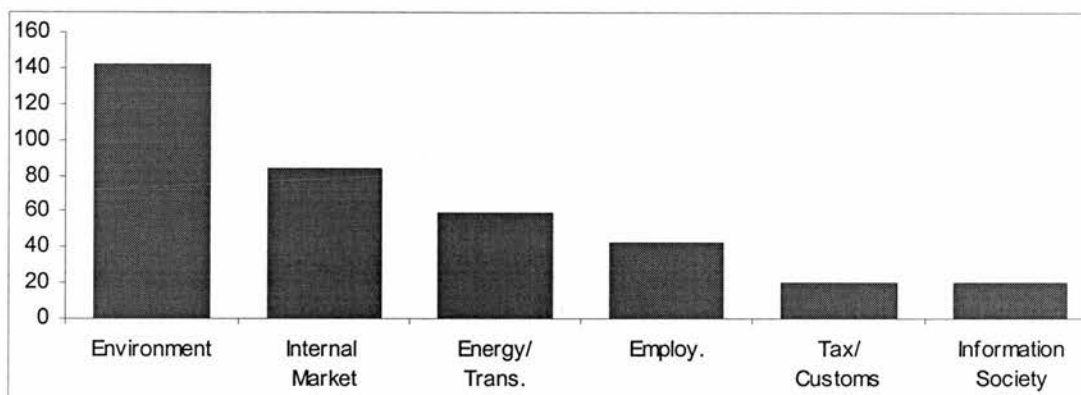
¹⁵ See the discussion in Chapter II about the availability of standing for individuals, and the extensive criticism this has provoked especially the Opinion of AG Jacobs in Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677. See also Final report of the discussion circle on the Court of Justice CONV 636/03 25 March 2003.

¹⁶ Last but not least in the priority one category are cases which involve damage to the Community’s financial interests.

health. The statistics relating to the environment sector underline the fact that the Commission pursues environmental cases through different stages of Article 226 more than any other type of infringement. Figure 4 below shows that in 2004 more cases in the environmental sector were under examination by the ECJ for an Article 226 violation than any other sector by a significant margin.

Figure 4

Article 226 cases under examination by ECJ, by sector (2004)



Source: *Annual Monitoring Report 2004*¹⁷ (French version). Top six sectors.

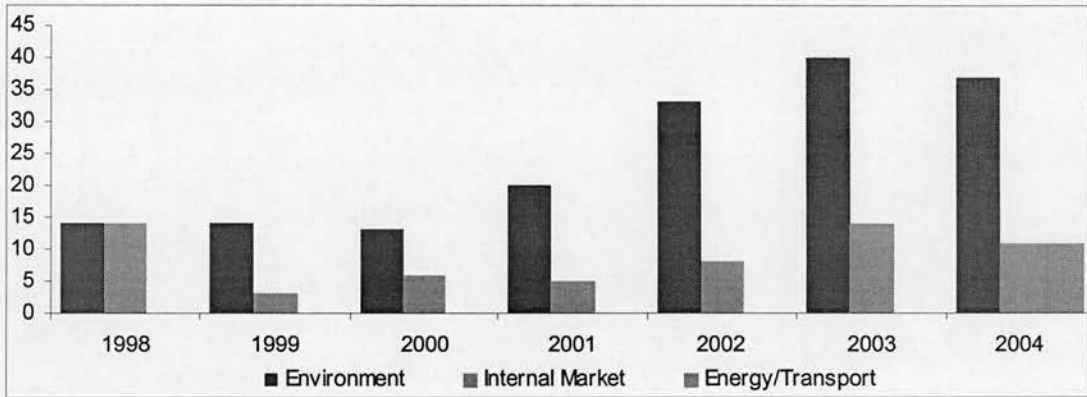
Figure 5 below shows that the trend of concentrating resources on prosecution of environmental cases is not a new strategy of the Commission. There is no concrete evidence that this strategy has any connection to refining the operation of Article 226 in the light of the Commission's commitment to good governance or the definition of its priority criteria. In fact, in the period from 1998-2004, the resources devoted to prosecuting environmental infringements have begun to far outweigh the next most significant sector (the internal market). This does not end with Article 226 prosecutions but extends to actions under Article 228.¹⁸

¹⁷ Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final, hereinafter referred to as the 'Annual Monitoring Report 2004'.

¹⁸ This also shows that environmental infringements may be less likely to be remedied by the Member State after an Article 226 judgment, due to the often immense costs involved in adhering to environmental legislation, it may be cheaper in the long run to 'buy off' the illegality and simply pay the penalty imposed by the ECJ.

Figure 5

Article 228 cases referred to ECJ – top two sectors (1998-2004)



Source: *Annual Monitoring Reports 1998-2004*.

The environment sector is exceptional, in the sense that it is the only ‘priority criterion’ that can be readily compared, however inaccurately, to the Commission’s data in the Annual Monitoring Reports. The Commission produces data on a sectoral basis in the Annual Monitoring Reports, and so it is impossible to easily compare priority criteria which refers to, say, infringements that breach the primacy principle to anything in the Annual Monitoring Reports. The Annual Monitoring Reports contain the only data on infringements that can be used as an indicator of the Commission’s practice *vis à vis* its policy statement. As a consequence, it is difficult to know how to judge the Commission’s practice as a whole in light of its statement on what it considers to be the most serious types of infringements. What can be drawn out of the above statistics is that, despite the fact that the environment sector does not produce the largest volume of legislation, it seems nevertheless to occupy a disproportionate amount of space/resources in the Commission’s enforcement activities.

Commenting on the other priority one criterion is more difficult. Suspected infringements that relate to health matters are detailed as a priority one infringement, but the health sector ranks only tenth in terms of the actual number of cases referred to the ECJ under Article 226. It is the seventh significant sector under Article 228 referrals, and eighth significant sector in terms of Commission detection of infringements.¹⁹ Of course, it could well be the case that all the health cases were unfounded or quickly remedied by the Member State concerned, and so do not appear in significant numbers in the final statistics produced by the Commission. The category of financial affairs is too vague to be useful in terms of using statistics from the Annual Reports because this category cuts across many different sectors

¹⁹ Source, Annual Monitoring Report 2004 above n 17. The Monitoring Reports categorise health and consumer complaints as one sector.

(customs, tax, Community financial affairs) and could encapsulate many different types of violations. In effect, out of the list of those infringements considered the most serious in the Commission's enforcement policy, it is only possible to conclude that the environmental sector is reflected in the Commission's actual practice of prosecuting Member States as a priority. This has been the case for a significant number of years, and does not reflect a palpable change in approach due to a new enforcement policy which embraces good governance.

Priority two infringements are those 'that undermine the smooth functioning of the Community legal system'.²⁰ This relates to Member States who legislate illegally in an area of exclusive Community competence, Member States that repeatedly commit the same infringements in relation to a specific piece of Community legislation, and cross border infringements where it is more difficult (if not impossible) for citizens to assert their rights directly in a national court. This category also includes those cases where Member States fail to comply with ECJ judgments under Article 228. Repeated infringements of the same legislation are correctly placed in this category of infringements; such breaches might be less serious than breaching the primacy principle, yet more serious than non-notification of transposal measures. They are also likely to generate a significant number of citizen complaints. With the exception of Article 228 prosecutions, the other Commission priorities cannot be compared with the data compiled in the Annual Reports.

It is surprising that infringement of Article 228 was not placed in the priority one category of infringements. It fits in the priority one category by definition, since failure to respect ECJ judgments surely amounts to an undermining of the rule of law. Categorising this type of infringement as less serious than subverting the primacy principle is a contradiction – non-compliance with a court judgment must surely be the very essence of undermining the rule of law. How can non-compliance with Article 226 (and then Article 228) be considered of secondary importance under that self-same article? If the Commission does not consider failure to comply with Article 226 proceedings as the very pinnacle of their enforcement responsibilities – let alone compounded by repeated failure to adhere to an Article 228 judgment – then why should the Member States take infringement proceedings seriously? Not only that, but there can be no doubt about the intent of the Member State when it does

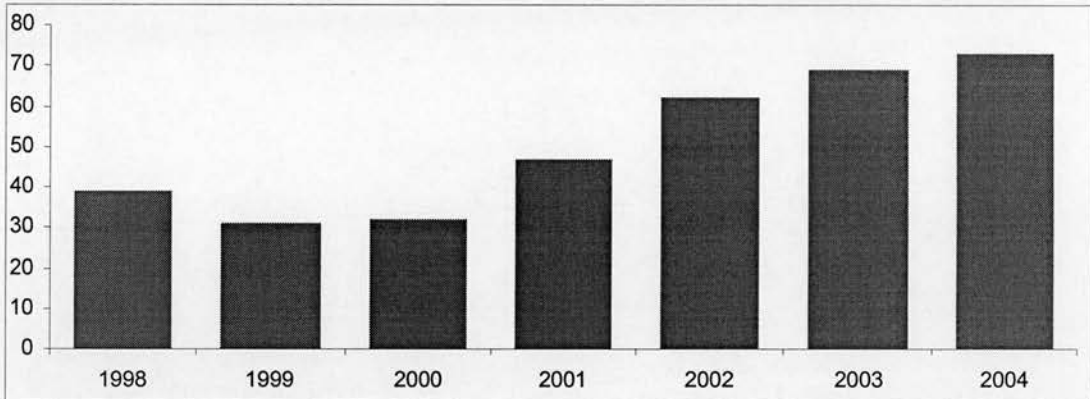
²⁰ Communication above n 1 p 11.

not comply with an ECJ judgment relating to a clear instruction to pay a financial penalty levied as a consequence of a state's misconduct.²¹

Figure 6 below illustrates the Commission's approach to the use of Article 228. There has been an 87 per cent increase in the number of cases referred for judgment under this provision since 1998, which at first glance, seems to suggest a committed approach to the financial penalty system by the Commission.

Figure 6

Article 228 cases referred to ECJ (1998-2004)



Source: *Annual Monitoring Reports 1998-2004*.

Despite this dramatic increase in referrals, the reality is that there have been only four fines imposed on the Member States to date under Article 228. The first case was against Greece in 2000.²² The second case was against Spain, but the fine imposed by the Court has been waived by the Commission, despite the fact that the infringement has still not been remedied.²³ The third fine was imposed on France, which now refuses to pay it despite not yet remedying the infringement.²⁴ The latest fine to be imposed was also against France, although in this case was not contested.²⁵

²¹ It is reasonable to assume that the Member State's 'intent' goes to determining the seriousness of an infringement. Intent is a factor in determining 'seriousness' in relation to calculating the amount of the financial penalty a state is made to pay by the ECJ under Article 228, see Commission Communication 'Application of Article 228 of the EC Treaty' SEC (2005) 1658.

²² Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

²³ Case C-278/01 *Commission v Spain* [2003] ECR I-14141, see the commentary by the European Parliament in the latest report on the Commission's enforcement activities, where the Parliament is extremely critical of the Commission dropping the fine even though it has been imposed by the Court and Spain has not corrected the infringement, Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final.

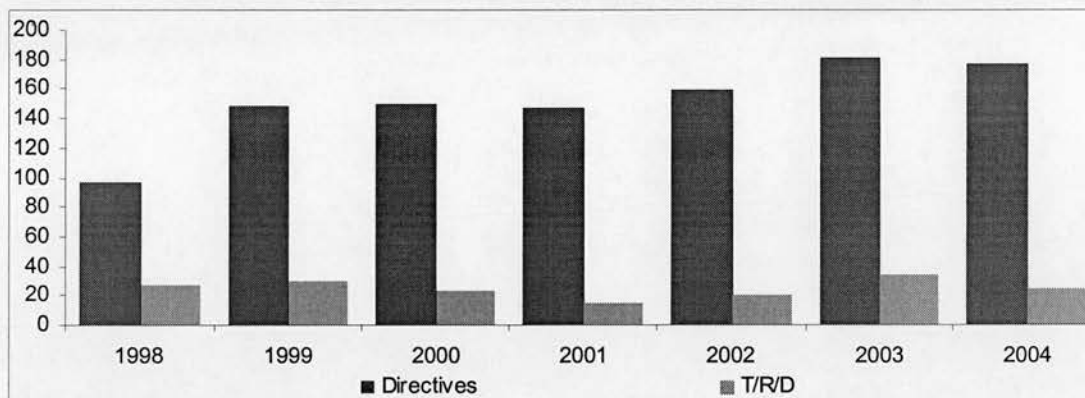
²⁴ Case C-304/02 *Commission v France* [2005] 12 July 2005 nyr, see the commentary on this case in Chapter IV.

²⁵ Case C-177/04 *Commission v France* [2006] 14 March 2006 nyr.

Priority three infringements are defined as the incorrect transposal of, or failure to transpose, directives. It is questionable as to exactly why the Commission chose to place transposal of directives in its lowest priority category. The proper enforcement of directives has historically been the area of compliance that has received the majority of the Commission's attention due to the quantity of infringements that occur from incorrect transposal. Figure 7 below illustrates that this trend is by no means on the decline (despite these devoted resources) with the main source of all infringements consistently being directives.

Figure 7

Directives as a main source of infringements (1998-2004)



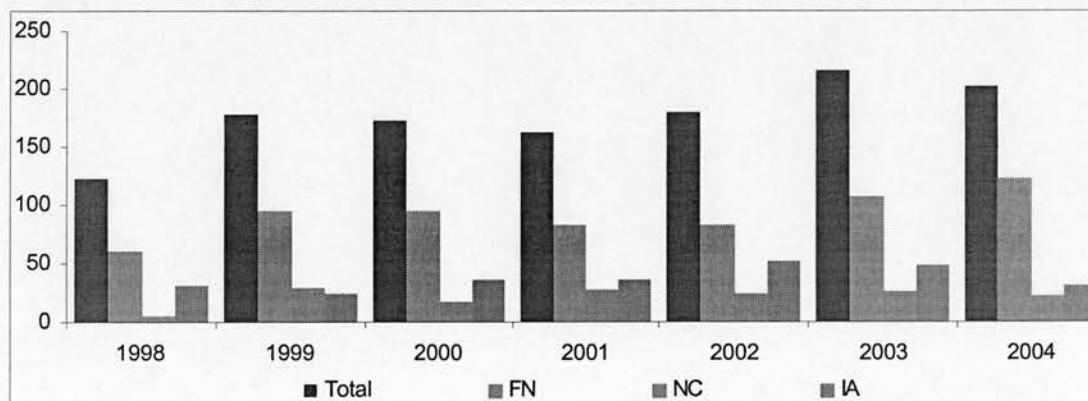
Note: T/R/D stands for Treaty provision, Regulations and Decisions combined.

Source: Annual Monitoring Reports 1998-2004.

Figure 8 below details the types of infringements of directives that can occur. Failure to notify still accounts for the majority of the infringements, and the categories of inaccurate application and non-conformity remain consistent, despite the considerable resources devoted to these areas of the Commission's enforcement strategy in the past.

Figure 8

Types of infringements of directives (1998-2004)



Notes: FN = Failure to Notify, NC = Non Conformity of transposal measures, IA = Inaccurate Application of the transposal measures.

These figures are taken from those cases that are referred to the ECJ under Article 226.

Source: Annual Monitoring Reports 1998-2004.

The Commission's proposals in relation to the correction of infringements of directives are twofold: faster notification of infractions, and measures to address the more complicated problem of incorrect application or non-conformity of national transposal measures. The perennial problem of speeding up the notification of infractions has resulted in the Commission suggesting DG officials (together with the President) dispatch formal letters automatically when Member States have not notified the Commission that transposal has taken place. This is tracked through an internal database (the Asmodée II database). The Commission is now prepared to extend this new system to the dispatch of reasoned opinions once the deadline specified in the formal letter has expired. This fast-track process enables referral to the Court of Justice to be possible (in theory) within six months of the initial formal letter. It is not explained how this strategy works in respect of the College of Commissioners' quarterly infringement meetings, or indeed how this transfer of decision-making downwards fits with the traditional standpoint of the Commission. The College of Commissioners alone has the authority to take decisions on infringement cases, and this responsibility cannot be delegated downwards to a Commission official.²⁶

The problems relating to incorrect application of directives or non-conformity of transposal measures is more difficult for the Commission to deal with, as such cases cannot be dealt with by automated (technocratic) solutions. The Commission produces implementation reports for certain directives where there might either be political resistance to implementation within the Member States or problems arising from the complex nature of the proposals.²⁷ However, such infractions are more likely to be detected by citizen complaints or the Commission's own *ex ante* investigations into specific pieces of legislation. The Commission's usual emphasis on technocratic or management focused solutions is incompatible with these types of infringements, but there is no suggestion in the policy paper as to how these types of infringements might be better tackled by the Commission.

The Communication explains that when an infringement meets one of these three priority categories, Article 226 proceedings will be:

²⁶ This is one reason why such a lengthy and cumbersome decision-making process evolved in the first place.

²⁷ The Commission states it will consider further legislative initiative where persistent problems arise with specific directives.

‘commenced immediately, unless the situation can be remedied more rapidly by other means’.²⁸

This statement from the Commission undermines the attempt to provide any clarity in relation to the enforcement policy and underlines its ‘one function’ approach to Article 226. It seems hard to imagine any infringement situation that cannot be solved more rapidly than invoking the full Article 226 procedure all the way to the Court of Justice, especially in light of the way in which the Commission operates the procedure without the imposition of any rigid deadlines. Cases that go to the ECJ have sometimes taken in excess of ten years to get to the stage of a judgment (and even longer to get the actual infringement corrected). The recent case against France took 21 years from initial detection in 1984 to final judgment under Article 228 in 2005.²⁹ Despite this, the Commission insists that:

‘The rapid turnover of cases in hand is reflected in the short handling time of procedures.’³⁰

The Communication states that infringement cases of a lower priority (so those not defined in categories one to three above) will be dealt with by ‘complementary mechanisms’. This approach is said to meet the concern for efficiency whilst ensuring that Member States (and those who have identified the infringement) receive equal treatment in the application of these mechanisms by the Commission. The complementary mechanisms highlighted in the Commission paper are as follows. First, *negotiation* with Member States is given priority, because when there are repetitive and numerous violations of Community law, this often proves more effective than opening full proceedings. Secondly, the Commission highlights the *SOLVIT problem solving network* which it hopes will offer a speedier resolution of problems submitted to this internal market forum, in principle within a ten week deadline.³¹ Thirdly, the ‘*package meetings*’ continue to be an important mechanism of enforcement. The fourth complementary mechanism is specifically for cases of non-compliance with directives that require case by case handling; these are distinguished from cases of failure to notify. In the case of infringements that relate to inaccurate application of transposed measures, *ad hoc contacts* often provide an effective solution to resolving non-compliance. These *ad hoc* contacts are those groups who are actually in charge of implementation of the directive on the ground, thereby bypassing the more cumbersome political channels and

²⁸ Communication above n 1, p 12.

²⁹ *Commission v France* above n 24.

³⁰ Communication above n 1 p 4 entitled ‘an efficient procedure’.

³¹ An internal market problem solving mechanism where centres are set up in each Member State and offer an out of court resolution of problems relating to implementation of the internal market rules. This is also complemented by an on-line database which allows information exchange across the Member States SOLVIT centres.

getting straight to the root of the problem and how to best solve it. Lastly, the establishment of *independent and specialised national bodies* who deal with a specific area of law can facilitate the Commission in its enforcement task, such as those bodies that relate to competition or public procurement contracts. These complementary mechanisms dovetail with the proposals for preventing infringements from occurring as discussed in Section 1.1.

1.3: *Enhancing the co-operation of Member States*

The Communication not only deals with strategies for prevention and correction of infringements, but also clarifies the Commission's position in other areas of potential conflict under the enforcement action, such as the Member States' proclivity for delaying the investigations of the Commission. The Communication explains that the Commission may bring proceedings under Article 226 against the Member State for failure to co-operate with the Commission in an infringement investigation, on the basis of the duty to cooperate contained within Article 10 EC.³² The Commission had previously warned that such prosecutions for failure to cooperate would be resorted to only in exceptional cases,³³ but the Communication states that this mechanism will be used in a more systematic and targeted basis.

The strategy of instigating these actions before the ECJ is aimed at combating the ability of the Member States to frustrate the Commission's efforts at investigation and prosecution of infringements. The Commission states in its Communication that cases of:

'manifest and persistent unwillingness to cooperate on the part of the Member State would make infringement proceedings for breach of Article 10 inevitable.'³⁴

The infringement proceedings in relation to Article 10 will be accelerated – which is a novel improvement on the previous Article 10 strategy – lasting no more than four months from the formal letter stage to referral to the court.³⁵ The secondary aspect to the tactic of

³² Communication above n 1 p 14. It is already established case law that the Commission cannot rely on a presumption of a breach where the Member State fails to provide the Commission with information in Article 226 investigations, Case 96/81 *Commission v Netherlands* [1982] ECR 1791. As was noted in the previous chapter, the 2001 Annual Report had included information on the actions taken by the Commission in this respect; however this strategy had never been fully explained and had mysteriously fallen out of favour by the 2002 Annual Report.

³³ Past cases on Article 10 include Case C-35/88 *Commission v Greece* [1990] ECR I-3125, Case C-48/89 *Commission v Italy* [1990] ECR I-2425, Case C-374/89 *Commission v Belgium* [1991] ECR-I 367.

³⁴ Communication above n 1 p 14.

³⁵ This strategy will not (presumably) follow the three monthly infringement meeting route, as prosecution could not be achieved within six months otherwise. This is not explained in the Communication.

instigating Article 226 prosecutions for breach of Article 10 is to 'name and shame' the recalcitrant Member State.

It will be interesting to see if the Commission itself can actually stick to this self imposed fast-track strategy, since it has not been blameless in the past in causing delays due to the rather loose fashion in which it takes decisions and conducts investigations. Indeed, as has already been seen, the more political a decision is the longer the Commission takes to make it. Proceedings under Article 226 for breach of Article 10 might be considered as even more political than regular infringement proceedings, since it is a kind of guilt by default, and decisions to prosecute for breach of the obligation to cooperate will be taken at the very top of the Commission organisation. When the Commission is using the Article 10 strategy it is doing so because it lacks the information to prove an actual infringement of substantive legislation has occurred.

Ultimately, the effectiveness of this weapon must then be questioned, since prosecution will not result in a correction of the infringement itself. The Member State may eventually be penalised through a judgment under Article 226 for breach of the obligation to cooperate. However, without a provable case of an infringement of legislation (and only proof of non-cooperation) it is unlikely the suspected non-compliance with Community legislation will be remedied or punished by a financial penalty through further recourse to Article 228. Nevertheless, it is clear that the Commission's inability to change the wording of Article 226 in order to reduce the opportunity for delaying tactics by the Member State has forced some creative thinking, and demonstrates the Commission's frustration with the enforcement action. This strategy is likely to prove an unwelcome addition to the Commission's enforcement arsenal in the view of the Member States, as past attempts by the Commission to reduce the Member States' control of the infringement process have been stonewalled.

1.4: The citizen as enforcer

The Commission is keen to emphasise the role of the individual citizen in the enforcement of Community law, beyond acting as informant to the Commission. In particular, the citizens' assertion of their Community law rights in their national courts is of primary importance. This approach to enforcement makes sense for the Commission and the citizen, for it is a far more efficient use of resources in achieving detection of infractions, and offers a speedier resolution for the citizen. However the blind assertion that invocation of a citizen's rights

within the arena of the national court as being an entirely sufficient (or only) mechanism for citizen redress is no longer tenable.

Cases that eventually come to the Commission's attention via complaints often do so precisely because the citizen is prevented from obtaining a remedy for infringement in the national courts.³⁶ There are many reasons why citizens cannot directly assert their rights in national courts. The financial burden of bringing a case to court is often punitive; to compound this, the inability to claim direct effect of directives in certain circumstances means that, when Member States do not transpose legislation, this often acts as a bar to claimants asserting their rights in national courts.³⁷ There are instances where there are insufficient remedies in the national legal system, particularly when diffuse rights are at stake and there is no *locus standi* for any complainants (such as environmental cases). Where a decision is taken and claimants cannot pass the stringent test for being individually and directly concerned by the decision,³⁸ they are prevented from attacking legislation head on in the ECJ or CFI.

These cases are as much of a problem for the Commission as the individual because the Commission is so heavily reliant on citizen enforcement. This is reflected by the Commission's inclusion of such cases in the most serious category of infringements. In an attempt to alleviate the need for individuals to turn to the Commission because of no *locus standi*, the Commission has proposed two new pieces of legislation that aim to enhance access to justice in cases of cross border disputes.³⁹ Such disputes create particularly complex jurisdictional issues in national courts, and can also affect the ability of litigants to claim financial aid. Accordingly, these measures also deal with the issue of granting legal

³⁶ In fact, the Commission has argued that individuals can protect their rights through other mechanisms and therefore there is no need to offer further protection under the Article 226 action. However, when Member States raise this exact defence in Article 226 cases (that the provision is directly effective or individuals can assert rights without transposition) the Commission and Court asserts that this is no defence for breach of Community obligations Case 29/84 *Commission v Germany* [1985] ECR 1661, Case 102/79 *Commission v Belgium* [1980] ECR 1473.

³⁷ Craig P and De Búrca, *G EU Law Text Cases and Materials* (3rd Edition, Oxford University Press, Oxford, 2003) ch 7.

³⁸ See Chapter II for an explanation of standing requirements for the ECJ and CFI.

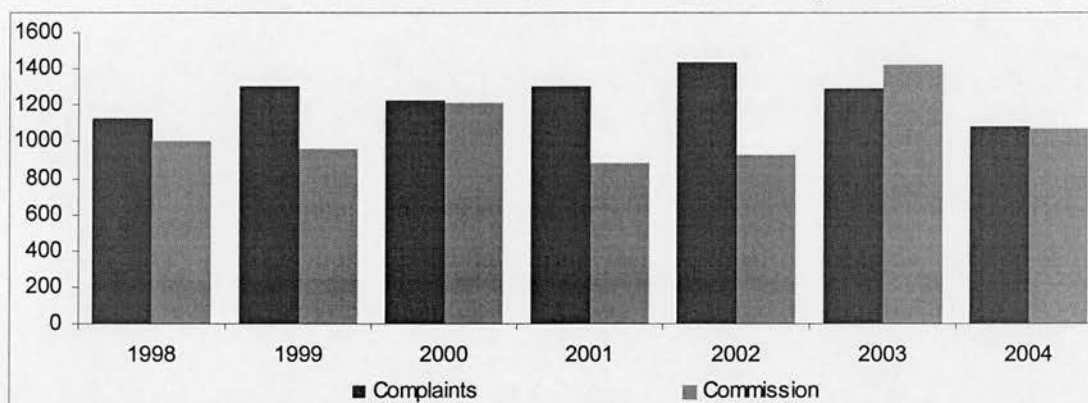
³⁹ This initiative is a part of transposing the Århus Convention into binding EU law. In particular, the Commission has proposed two directives which aim to increase the access of NGO groups to court by widening *locus standi*, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM (2003) 624 final, and for the Århus Convention to apply to the institutions of the EU, Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies COM (2003) 622 final.

aid to complainants. The creation of standing for non-governmental organisations to facilitate environmental litigation is a possible answer to the problem of diffuse rights. The different procedural conditions regulating *locus standi* across the Member States hinder the uniformity of protection at the national level, but interfering in national judicial procedures is not popular with the Member States. These measures remain only proposals at present.

For the first time, the Commission is beginning to rely less and less on the complainant as its primary source of information of potential infringements, primarily due to the development of the automated system of detection for incorrect transposal and non-notification of transposal of directives.⁴⁰ Figure 9 below illustrates that in 2003, the Commission outstripped the complainant as the primary source of information regarding possible infringements.

Figure 9

Method of detection of all suspected infringements (1998-2004)



Source: *Annual Monitoring Reports, 1998-2004*.

This is encouraging for the Commission since internal detection of infringements leaves the Commission with more room to manoeuvre under the infringement process; it does not have to spend resources on dealing with inquiries and correspondence with complainants.

The Communication breaks down the issues of enforcement into four distinct themes. Strategies for prevention of infringements do not really contribute to a better understanding of the role of Article 226, because these strategies are simply alternative enforcement mechanisms to Article 226 itself, much like those in other areas of the Treaty. They do not add to our understanding of the role of Article 226, although they do highlight the fact that

⁴⁰ Incorrect transposal is not the same as incorrect application. Incorrect transposal refers to instances where the Member State has transposed the directive, has notified the Commission in the correct manner and by the deadline, but has not transposed the entire directive but only parts of it, Interview, Commission Official G (26 October 2005).

the Commission does not consider Article 226 the most efficient method of ensuring compliance. Strategies aimed at correction of infringements are more important to the evaluation of Article 226 – the production of the priority criteria is an essential step for a better understanding of what the main actor in Article 226 sees as the central role of the enforcement mechanism, although it seems this is not the aim of the Communication from the Commission’s perspective. The sections on the complainant and Member State contain the tacit acknowledgment of the role both these actors play in the enforcement mechanism. It is equally significant that neither the European Ombudsman nor the European Parliament are not mentioned at all, despite the fact both these actors impact upon the Commission’s role as guardian of the Treaties under the enforcement mechanism.

2.0: Enforcement policy and good governance principles: the cleavage between theory and practice

The Communication provides the first opportunity of an insight into how the Commission, as the main actor in Article 226, views the enforcement mechanism in the context of improving governance in the EU. The following sections analyse the Commission’s policy in light of its own principles of good governance, and considers to what extent the Commission has changed its approach to the operation of the enforcement mechanism in order to acknowledge the various functions Article 226 now performs, and how to accommodate these functions in the light of good governance.

2.1: Coherence

The production of the priority criteria is supposed to facilitate a coherent approach to the way in which the policy of enforcement is operated across the Commission as a whole, although how effective this is in practice remains to be seen.⁴¹ In terms of creating coherence in theory at least (if not actual practice), these criteria can be criticised on a number of levels. First and foremost, the priority criteria are defined in a loose and vague manner; such vagueness not only compromises coherence, but can have the opposite effect, with each DG claiming a different interpretation of the policy. A good example of this incoherence is the Commission’s approach to the enforcement of directives. In its discussion of the priority criteria the Commission states that the infringement of directives (non-conformity and misapplication) is considered a priority three type of infringement.⁴² In a

⁴¹ As already discussed in Chapter IV, each DG operates the enforcement policy in very different ways.

⁴² Communication above n 1 p 12 under heading ‘Failure to transpose, or incorrect transposal of directives’.

later section,⁴³ the Commission contradicts this by stating that these types of infringements will in fact be considered as priority one (not three), i.e. such infringements violate the principles of primacy and uniform application. The Commission then goes on to state these types of infringements might be dealt with by the complementary mechanism of *ad hoc* contacts. Such blatant contradictions conflict with a coherent policy approach to enforcement.

The Communication promotes a policy of diversification in combating infringements, through the use of preventative measures, corrective measures and complementary mechanisms. The reason for such diversification is clear – limited resources demand the Commission alleviates the burden on actions before the ECJ. Unfortunately, diversification in policy approach rarely promotes a coherent application of rules across the myriad of DGs and the diverse cases of infringements that are investigated. The Commission pledges to use the complementary mechanisms impartially and with equality, but this seems incompatible with the parallel promise to increase individual case officers' responsibilities in taking decisions on infringement cases. The need for coherence and effectiveness is compromised by the need for efficient processing of suspected infringements.

When assessing the statistical information produced by the Commission, it must be acknowledged that there does seem to be a coherent output of the enforcement policy, although not one that necessarily matches the stated priority criteria. Whatever the stated approach to the enforcement policy, the result appears to guarantee that the environment sector always produces the greatest number of investigations and referrals to the ECJ. This sector is followed by cases on the internal market although internal market cases are not mentioned in the priority criteria at all.⁴⁴ This of course may not be a result of the policy on enforcement, but rather the particular organisation of the Commission and the way in which each DG mobilises its resources to combat infringements. For instance, DG Environment is one of the few DGs that specifically has a department that is responsible for dealing with infringements, as opposed to (say) DG Justice Freedom and Security which has no such department and generates very few infringement cases.⁴⁵ It may be that the type of legislation produced by DG Environment (predominantly directives) is particularly prone to

⁴³ Communication above n 1 p 18, under heading 'Speeding up the process of bringing implementing legislation into line'.

⁴⁴ See Figure 5 above.

⁴⁵ See Appendix 2 for organisation charts of these DGs. Despite the name, this DG is also concerned with some first pillar citizenship rights and so this cannot be explained by the fact it only deals with third pillar measures.

generating infractions (which appears to be confirmed by the Commission's Annual Reports), or it may be that the subject matter is particularly unpopular with Member States. It could be that DG Environment is particularly focused upon enforcement more than other DGs.

There are many variables that might relate to the particular vagaries of the DG, but none of these explanations is consistent with the (supposed) horizontal enforcement policy adopted by the Commission. If the statistics can be explained by the varied set-up of each DG and the peculiarities of the policy sector, it becomes untenable to assert a horizontal enforcement policy actually exists. It would be better to acknowledge that each sector pursues an entirely different policy from another, rather than trying to accommodate all sectors under one 'umbrella' enforcement policy. Abandoning the idea of explaining a coherent approach that is applied consistently across the Commission may be the better option, as it would at least allow a coherent approach to be developed (and explained) for each DG without contradiction.

2.2: Effectiveness

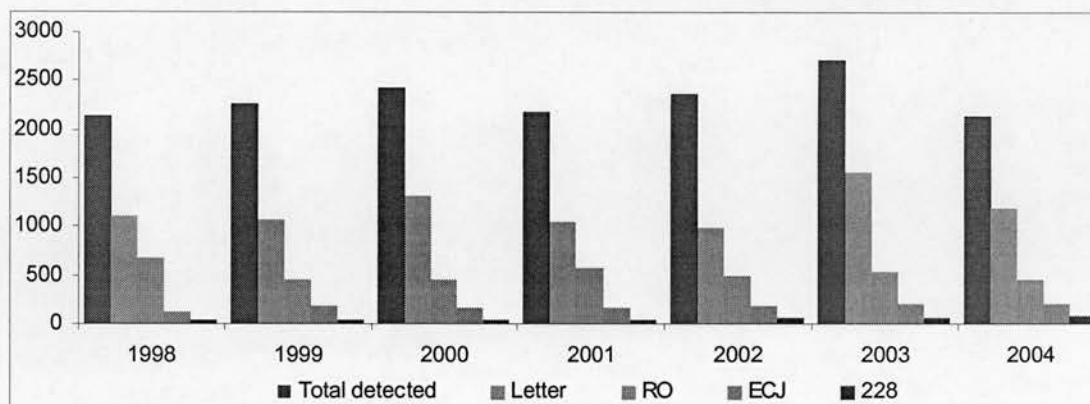
The good governance principle of effectiveness is of paramount concern in the Commission's operation of Article 226, because an effective enforcement mechanism is how the Commission characterises Article 226. In both the WPG and the Communication, the Commission equates the principle of effectiveness with that of efficiency.⁴⁶ An effective enforcement policy is therefore one that is administered in the most efficient manner, and (thus) results in compliance with Community law in the fastest possible way. It does not seem to equate to a policy that results in the maximum compliance which would be the most straightforward interpretation of effectiveness. In relation to Article 226, efficiency is concerned both with allocation of resources and the imposition of stricter (internal and external) time limits.

The Treaty process itself promotes a 'sifting' mechanism, so that most complaints/investigations are settled before it is necessary to refer the case to the ECJ. Scaling down the number of infringements the Commission actually pursues is vital to the ambition of managing a vast area of possible infringements with limited resources. Figure 10 below shows the decrease in numbers of cases handled by the Commission through each stage of the process.

⁴⁶ See Chapter III for a breakdown of the good governance principles.

Figure 10

Number of cases by stage of infringement process (1998-2004)



Notes: Total detected = total number of infringements identified, Letter = Letter of formal notice, RO = Reasoned Opinion, ECJ = Referral to ECJ under Article 226, 228 = Referral to ECJ under Article 228.

Source: Annual Monitoring Reports 1998-2004.

Efficient detection of infringements has been of paramount concern. This has led to the proliferation of techniques, both preventive and corrective in nature, to improve this element of the enforcement policy. The development of automated databases is one such mechanism that is utilised for both prevention and correction. Reliance on complaints from citizens as an information source remains problematic in terms of the effectiveness (efficiency) criteria. Complainants offer the most diverse (and cheap) policing mechanism, in terms of the coverage of Member States, types of legislation and sectors. They also provide the main source of information on misapplication of the law, or bad implementation on the ground that otherwise might be undetectable by Commission staff. Complainants are not as resource friendly as they used to be, since procedures have been put in place which now require the Commission to proceed in its handling of complainants in a certain administrative manner. This new procedure requires the Commission to spend more time on complaints it previously cast aside after a cursory reading. The current stated policy is to register every complaint to the Commission⁴⁷ regarding Article 226 irrespective of the veracity of the complaint being made.⁴⁸ This is not resource efficient for the Commission in the same way that an automated database is. There is a balance to be struck here. The Commission must be prepared to trade

⁴⁷ Interviews, Commission Official I (6 April 2005).

⁴⁸ Although this is the stated procedure, it may not necessarily be the actual case in practice. See Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final p 7 which reminds the Commission of its obligation to register complaints without selection, and the impending Ombudsman investigation into a number of complaints about non-registration.

off the administrative burden of dealing with complainants for the efficiency gains made in increased detection of infringements.

The Commission also views increasing informal contacts with the Member States as an efficiency gain. This inevitably increases the presence of negotiation in the enforcement policy, which in turn compromises both the coherent application of the policy rules and the openness of investigations. The notable emphasis placed on closer co-operation with the Member States reveals that the Commission is not moving forward in its policy on enforcement in the context of good governance, as this reinforces the long time practice of negotiation and extensive time limits for co-operation. The European Parliament comments that:

‘the Commission [must] re-evaluate cooperation with the Member States...in light of the fact that most Member States are not ready to do much to improve the implementation of EU law as was confirmed during the negotiations on the last Better Regulation Inter-institutional Agreement in 2003.’⁴⁹

The attitude of the Commission toward the Article 228 mechanism might be judged as misplaced if the aim is to create more effective enforcement. Making routine referrals to the ECJ without seeing the action through to its conclusion (infringement remedied and fine collected) undermines the commitment to effective enforcement. The financial penalty should no longer be operated as a threat, but as a crime and punishment mechanism. The ECJ has now introduced the notion that Member States are not only fined to end an infringement but also, in the form of the lump sum, as a punishment for the time the infringement has been in progress. The Commission’s generous attitude toward Member States in this regard has not gone unnoticed as the European Parliament:

‘Points out that...many cases of incorrect implementation...reflect Member States’ deliberate attempts to undermine Community legislation for political, administrative and economic reasons; in this connection notes that the Commission is in the habit of accepting late intervention by the Member States in order to close infringement proceedings; calls on the Commission to ask Member States to guarantee retroactive application of Community provisions which have been infringed...with immediate recourse to Article 228 in event of persistent failure to comply.’⁵⁰

Moreover, effective enforcement requires less dialogue and more discipline:

‘tighter discipline is necessary...in order to avoid excessive delays and persistent differences in the quality of national transposition’.

⁴⁹ Report of the European Parliament: ‘Report on the Commission’s 21st and 22nd Annual Reports on monitoring the application of Community law’ Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final p 5.

⁵⁰ *Ibid* p 6.

Not only does the Commission's attitude seem to reflect traditional practices, but it is exactly this relationship with the Member States that most hinders its approach to delivering good governance under Article 226.

2.3: Openness

In the WPG, the Commission defined openness as meaning clarity in decision-making procedures. Not even this limited version of openness can be said to apply to Article 226 in the enforcement policy as stated in the Communication. The internal decision-making processes are anything but clear to those outside the Commission, and the Communication has added nothing to change this established approach. The Commission notes that it has responsibility:

'for adopting the necessary *internal* organisation measures to allow it to carry out its task effectively and impartially.'⁵¹ (my emphasis)

Crucially though, this was not tackled by the Commission in the Communication. No Commission document ever specifies who exactly, within the Commission, develops the policy on enforcement in the first place. This is one policy for which it seems no-one wishes to be singled out as having overall responsibility; there is no 'enforcement department' as such, although there is a department within the Secretariat General that has responsibility for 'coordination' of the enforcement policy across the DGs of the Commission. The legal service reviews the viability of all cases that may be considered for referral to the ECJ. Beyond this, the veil of 'collegiate decision-making' takes over.

This approach clearly lacks a commitment to clarity in decision-making procedures. The top down approach of the Commission in enforcement (the Commissioners being the ultimate decision makers) further downgrades the commitment to openness. The Commissioners take political and not legalistic decisions in relation to pursuing infringements. This might mean that whichever Member State holds the Presidency of the EU experiences some degree of immunity from prosecution for the duration of their Presidency. This would delay (if not

⁵¹ See Chapter IV for a discussion of these internal reforms. It is important to point out that the way in which the Commission administers infringement investigations and proceedings is *not* dealt with in this Communication so 'internal organisation measures' does not in fact refer to the internal organisation of investigations. The focus of the Commission's reform effort has clearly moved on from its own administrative procedures, indicating that in the main such procedures now operate effectively.

entirely prevent) prosecution of an infringement, regardless of the priority criteria, the veracity of the case or any stated policy approach.⁵²

The Communication begins by stating that the Commission is complying:

‘with its duty of education and openness in a complex area of exclusive responsibility of the Commission’.⁵³

by producing the statement on its enforcement policy. The attitude to openness however is still the same as that in the era before good governance was embraced as a policy initiative. The information that is available to the public is nonetheless trumpeted as achieving a great step forward in transparency but the information made publicly available is exactly the same as before. The statistics and commentary produced for the European Parliament is at least two years old by the time it reaches the public domain, and so there is a significant development time between what has been reported and what is actually happening. The accuracy of the information in the Annual Reports is compromised by the fact that the Commission has altered the way it collates and categorises information from year to year, making accurate historical comparisons of the data problematic. Despite the fact that the Secretariat General is responsible for coordination of the enforcement activities of the DG, and for organising the production of the Annual Monitoring Reports, consistency in reporting is not yet a reality for the Commission in its enforcement activities.

Since enlargement, the Commission had some delays in translating the Annual Reports from French into any of the other official languages of the Community. This is a serious barrier to free access to information, and was not the previous practice of the Commission which previously translated each report into all the official Community languages simultaneously. There was a significant time delay in producing the full report covering 2004,⁵⁴ but the Commission did release an eight page statement that provides an overview of the ‘overall position’ in all other Community languages.⁵⁵ This is a significant downsizing from the previous Annual Reports, which were around 300 pages long and provided more detailed sectoral commentary about the actions of each DG. Internally, the DGs still have to provide this information to the Secretariat General (even though it is no longer available to the

⁵² Although this is already an unacceptable position, the current Presidency of the EU lasts only six months. If the planned reforms in the Constitutional Treaty were to come to fruition, the position would be much more serious with the Presidency lasting for two and a half years.

⁵³ Communication above n 1 p 4.

⁵⁴ By August 2006 this was still only available in French, but as of January 2007, the Commission has now managed to produce the 2004 and 2005 Annual Monitoring Reports in all Community languages.

⁵⁵ Report from the Commission on Monitoring the Application of Community Law (2003), Overall Position, Twenty-First Annual Report SEC (2003) 1638 COM (2004) 839 final 30.12.2004.

public), so this cannot be explained in terms of reducing the workload of the DG to increase efficient use of resources.⁵⁶ The Commission's ever changing style of reporting, and timetable for production of these reports, is a serious obstacle to accessing and analysing infringement data.

The Commission committed to an assessment of the effectiveness and practicality of the priority criteria which was to be discussed in the Annual Reports, but was not actually undertaken without any explanation as to why. The Parliament comments that:

'the Commission has not presented any structured, detailed follow up to some of the commitments announced in the [Communication], such as 'the application of the priority criteria will be assessed annually when the report on the monitoring of the application of Community law is discussed.'⁵⁷

If there was no attempt to engineer a meaningful comparison between the stated policy and the actual data generated by the Commission as a result of its actions under Article 226, then the policy statement fails to provide any clarity at all. If no independent assessment can be made of the stated approach and actual action, this policy falls short of the Commission's own limited definition of openness and good governance.

The advances in Internet access to information are again minimal; the press release system contains only the bare minimum of facts.⁵⁸ The formal letter and reasoned opinions are still not accessible by the public. This seems to be a misguided approach by the Commission and one that does not serve the Commission's strategy of shifting the burden to prosecute onto other actors in order to adopt a more resource efficient enforcement strategy. Nor does it help to create an image of an administration working to eradicate Member States' failure to fulfil their obligations. The European Parliament commented that:

'It is very important that the Commission decides to go public on these issues and to accelerate both the checking process and the reaction towards Member States who do not fulfil their obligations...conformity questions are difficult to track, some remain mysteriously hidden in the offices of the Commission before a 'complaint' of a citizen obliges the Commission to act.'⁵⁹

⁵⁶ Interview, Commission Official J (13 February 2004), Interview, Commission Official K (13 February 2004), Interview Commission Official H (26 October 2004), Interview, Commission Official E (24 October 2004).

⁵⁷ Above n 49 p 5.

⁵⁸ Consisting of naming the Member State being prosecuted, the legislation (or norm) being infringed and the stage of the procedure.

⁵⁹ Above n 49 p 15.

2.4: Participation

The principle of participation is defined by the Commission as ‘quality, relevance and effectiveness’ and, as I have argued in Chapter III, this definition of participation is inadequate in terms of generating good governance in the EU. The enforcement policy does address the need for greater participation for certain privileged actors, where the Commission ties this greater participation in the enforcement process to achieving greater compliance. Greater participation in enforcement is linked to greater effectiveness (efficiency) rather than being an end in itself. The Commission is eager to concentrate on encouraging more participation by the Member States through the generation of contacts, and in particular, placing emphasis on the ‘package meetings’ as a mechanism to achieve greater compliance.

All participation initiatives are linked to the complementary mechanisms, rather than a change in operation of Article 226. These participatory mechanisms are designed to enhance the Commission’s ability to prevent infringements or to achieve compliance without engaging Article 226 itself. The Communication focuses on further integrating those elite actors who are already influential in the policy making process in order to produce better legislation. The *SOLVIT* initiative is industry focused, as is the further integration of specialised national bodies, such as competition authorities in the Member States. The other complementary mechanisms are also elite actor driven, where the focus is on secretive negotiations with the Commission in order to achieve more compliance. This does not seem to represent a change in practice of the operation of Article 226, but a re-deployment of the traditional approach (of secretive negotiation) to other initiatives aimed at achieving more compliance. It does not increase participation in Article 226.

The principle of participation does not extend to the corrective element of the Communication. From the Commission’s perspective, only the Member State and itself still participate in this process. The structured relationship with the complainant, which has largely been forced upon the Commission by the Ombudsman (dealt with in Chapter VI), is not elaborated in the Communication. In the WPG, the principle of participation at best amounted to a weak species of consultation, in the sense of an opportunity for outside privileged parties to air their views (i.e. stakeholders and deliverers of the policy), rather than being considered as an equal or important player in the enforcement policy. The Communication simply reinforces this approach.

Increasing the participation of stakeholders in drafting legislation is merely a distraction in terms of the true orientation of the Commission's approach to improving the operation of the enforcement mechanism in an era of good governance. First, this does not increase the involvement of outside (privileged) actors in the enforcement process, because this 'initiative' is about drafting legislation, and not the operation of Article 226. The novel strategies contained in the 'preventative' section of the paper only relate to ways in which the Commission can alleviate the pressure on itself as the guardian of the Treaties by seeking to avoid infringements occurring and therefore do not strictly relate to how the Commission deals with infringements when they have occurred. This is not to downplay the importance of developing strategies to prevent infringements in the sense of improving governance throughout the Union. This is surely an example of good governance in action, but adds nothing in terms of how the operation of the enforcement mechanism is being modernised in accordance with standards of good governance, or increasing the accountability of the Commission.

2.5: Accountability

The Commission's definition of accountability in the WPG is in essence 'participation plus openness equals accountability'. Using this formula to equate to accountability is problematic in and of itself, but especially in relation to the enforcement policy of Article 226, it is deficient in a number of respects. As highlighted above, the Commission's approach to openness and participation in the policy on enforcement is flawed in many respects, and therefore does not provide a solid foundation to establish accountability even within the Commission's own limited terms of reference.

The principle of accountability should be the very essence of Article 226. It is, above all other things, a mechanism of accountability wielded by the Commission over the Member States to ensure they remain committed to the obligations they have assented to under the Treaties. It is flawed as a tool of accountability generally because of the cumbersome nature of the process,⁶⁰ and the fact that the Commission relies on the Member States' cooperation in order to police them. The Commission has found some ways to corroborate information supplied to it by using complainants and its own minimal resources, but can nevertheless be stonewalled by the Member States in some instances. In terms of changes specific to the way in which the Commission operates the enforcement mechanism itself, the only 'new'

⁶⁰ An average of 54 months between the registration of a complaint and a judgment under Article 226, Source, European Parliament Report above note 49 p 4.

addition was the strategy of prosecuting Member States for non-co-operation.⁶¹ In terms of the Commission's good governance agenda, this strategy is supposed to be focused on making Article 226 actions more effective (though certainly not more efficient and this is at the heart of the Commission's effectiveness definition).⁶²

There is a lack of recognition in the policy paper that Article 226 offers much more than this one-way avenue of accountability (Member State to the Commission), especially in the context of increasing good governance in the EU. Article 226 is multi-faceted when it comes to the principle of accountability. There are considerations of internal accountability within the Commission in the administration of its investigations into infringements that the Commission chose not to comment upon.⁶³ The external accountability of the Commission to the citizens (through the Ombudsman) was not given appropriate weight in the Communication. Similarly, the Commission's accountability to the European Parliament was never mentioned. The Commission refused to supply information of its internal procedures to the European Parliament, which has the ultimate role of reviewing the Commission's discharge of its guardian function. The Parliament has:

'Call[ed] on the Commission to provide specific data on respect for deadlines as set out in its Internal Manual of Operational Procedures which could only be obtained informally.'⁶⁴

Furthermore:

'The Committee's rapporteur has specifically asked for information and data on the resources allocated for the implementation policy...it is difficult to understand why this prevented the rapporteur from obtaining data on the CURRENT situation.'⁶⁵

The absence of any mention of the European Parliament from the Communication speaks volumes about the Commission's perception of which actors have an appropriate stake in Article 226.

⁶¹ As discussed in Chapter IV, this strategy was not entirely new and had been mentioned in previous Annual Reports.

⁶² It seems that this strategy really vents the Commission's frustration with the Member State, but whether it has any tangible effect on the Member State's conduct is questionable, Interview, Commission Official C (25 October 2004).

⁶³ See Chapter VI and the discussion of the Parga complaint, but also the resignation of the Santer Commission, not a high point in the Commission organisation see P Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation' (2000) 6 *European Law Journal* 98, L Cram, 'Whither the Commission? Reform, renewal and the issue-attention cycle' (2001) 8 *Journal of European Public Policy* 770.

⁶⁴ Above n 49, p 8.

⁶⁵ Above n 49, p 20.

The Commission's policy on enforcement is clearly couched in terms of technocratic legitimacy alone, and has nothing to offer in procedural legitimacy terms other than consultation with already integrated elite actors. The various strategies devised by the Commission to improve the efficiency of the enforcement action are all species of technocratic management initiatives. The concentration on improving the Commission's administrative abilities to keep track of Member States' compliance is not new – database development is a consistent theme throughout the recent decades of the Commission's internal management reform agenda, along with greater publicity for those Member States who break the rules. Making greater use of the transposal period of directives is couched in the same terms – closer monitoring through internal databases, and more active 'policing' of Member States in the package meetings are all similar types of management initiatives. These strategies are output driven, with the concentration on generating legitimacy, or good governance through an improved output, i.e. better monitoring of infringements and a more effective enforcement policy. This somewhat undermines the statement that:

'Ultimately this...concerns the citizens themselves. Through information, participation and access to justice they are to be the actors of a Community based on the rule of law.'⁶⁶

3.0: Getting the basics right: increasing legitimacy in the enforcement policy

The Commission's attempt to discuss its policy on enforcement in the context of good governance highlights one of the key problems in the Commission's management, design and operation of Article 226. According to Beetham and Lord, a legitimacy gap appears when there is:

'a gap between principles and practice, or between legitimating norms and society's support for those norms'⁶⁷.

It is difficult to judge whether the stated policy and Article 226 data correlate: if it was not designed to correlate with the Annual Monitoring Reports, how could this add to clarity in the Commission's policy? In short, in what way is it possible to check for the gap between principles and practice?

The Commission's characterisation of Article 226 as having only one function is not a useful starting point. The emphasis on technocratic legitimacy (without the element of procedural legitimacy included in the WPG proposals) further undermines the policy on enforcement in good governance terms. The following sections will comment on the appropriateness of the

⁶⁶ Communication above n 1 p 21.

⁶⁷ D Beetham, and C Lord, *Legitimacy and the European Union* (Longman, London, 1998) p 2.

emphasis on technocratic solutions alone in the context of Beetham and Lord's basic criteria of legitimacy, and suggest where the Commission might have taken a more rounded approach to explaining the enforcement policy in terms which emphasise good governance and legitimacy.

3.1: The need for identifiable rules

In order for the enforcement policy to be considered as generating some elements of legitimacy, it is first necessary to establish the existence of any identifiable rules in the enforcement policy. The Treaty language itself, along with the ECJ's interpretation and case law principles provide a sketchy outline of the basic legal requirements, but these do not structure the way in which the mechanism is managed by the Commission on a daily basis.

This executive policy choice is not structured either by detailed Treaty provisions or concurrent legislation and there are no binding policy guidelines issued by the Parliament or the Council. The enforcement of Community obligations is a 'one man band' policy domain, unlike most areas of the Treaties where there is a requirement for rules/legislation to be produced in concert with other institutional actors. The lack of identifiable rules to structure and guide the Commission's behaviour under Article 226 has in itself been a springboard for many complaints, leading to accusations of arbitrary action on the part of the Commission. As a result, the Commission has endeavoured to provide identifiable rules in relation to the infringement process in its recent statement, concerning both the administrative role played by the Commission in the management of Article 226 and the executive role played by the Commission in respect of the development of specific policy choices.

In terms of the administrative function, the main source of identifiable rules is the Commission's published guidelines on what rights complainants can expect to enjoy when they complain to the Commission regarding a suspected infringement. There is an easily accessible complaint form that clearly states the Commission's administrative responsibilities under this process. This has been achieved only after years of campaigning by the Ombudsman, whose interference in the administration of Article 226 was heavily resisted by the Commission. The administrative process does therefore have some identifiable rules (the quality of which is discussed in Chapter VI), but only regarding a tiny element of the administration of Article 226.

The rest of the administration and investigation of suspected infringements remains rather mysterious. The existence of secret internal rules that cannot be examined or substantiated is insufficient to satisfy the criterion of *identifiable* rules. These must be available for public scrutiny and it is especially important that the European Parliament is able to scrutinise such rules. This is one area where the policy paper might have expanded its explanation in terms of (say) a reporting line or management structure for dealing with infringement investigations.⁶⁸

Defining the executive policy choices of the Commission is clearly the focus of the Communication, and perhaps, rightly so. The method adopted by the Commission in this respect was the development of the ‘priority criteria’. It is unfortunate that the Commission does not elucidate its policy in much detail (or with convincing coherence), presumably because it does not want to be held accountable to it. This undermines the commitment to good governance and legitimacy in policy making. Whilst there is certainly some progress in the production of the priority criteria, the terminology remains vague enough to resist any kind of *ex ante* challenge; for instance, as to why a particular infringement was not pursued when it seemed to fit into the priority one criteria. There is plenty of room for manoeuvre available, and certainly sufficient room to enable any Commission official to justify one choice over another. The priority criteria are therefore not tight enough to promote fairness and equality in the treatment of the Member States (contrary to the claim made in the Communication), and are too loose to create legitimate expectations on the part of the complainant.

The need for identifiable rules amounts to more than simply creating a coherent and effective policy on enforcement. The point of identifiable rules is twofold: such rules help prevent allegations of fraud, corruption and mismanagement and allow debate and challenge to take place if such rules appear to inadequate or arbitrary in nature. The Commission continually – on purpose or otherwise – misses this point in relation to the management of the enforcement action, and this undermines the entire policy statement. Instead of producing vague and conflicting priority criteria it would create more legitimacy to state, for example, which sectors it will pursue above all others (and why), and what concrete instances of infringements it will prosecute. This stated approach could then be checked against the statistics generated in the Commission’s Annual Reports. An exhaustive list may be

⁶⁸ Of course, as highlighted in Chapter IV, this would require a singular approach by all DGs to the infringement management process which does not (apparently) exist as yet.

impractical, but a middle ground somewhere between too vague to matter and too prescriptive to be useful ought to be achievable. Even if more detailed guidance is considered prescriptive – what is wrong with this approach? The enforcement policy is in the sole control of the Commission, and therefore it could change its prescriptive list as often as it wishes. The problem from the Commission’s perspective is that it may be expected to follow its own stated approach, but this seems an indefensible reason for perpetuating a policy without identifiable rules attached to it.

3.2: Justifications for decisions

The second criterion of justifications is based around, but is more encompassing than, the Commission’s good governance principles of openness and accountability. The reason that justifications for decisions are so important as a criterion for underpinning the concept of legitimacy, is that without adequate explanation, no amount of well defined and identifiable rules will be enough to combat allegations of arbitrary action.⁶⁹ Accordingly, the Commission must embrace the concept of openly justifying its choices in terms of both its policy overall, and the decisions taken in individual cases.

The *choice* of the priority criteria is not defended or explained in the Communication, apart from a rather vague reference to ‘being built on experience built up over the years’.⁷⁰ The Commission may be basing its choice of priority criteria on (say) detailed sectoral analysis of implementation trends across the Community, but there is no outright statement from the Commission that indicates this might be the reason behind its approach. Why these particular criteria are chosen over another equally logical arrangement is never explained. Conclusions can be drawn as to why the Commission pursues one type of infringement instead of another, but why should this be reduced to a guessing game? The end result of a lack of justifications is that the close observer is left in wonderment as to why, subjectively, the Commission considers one type of infringement more serious than the next, and in what specific circumstances the use of complementary mechanisms will take over from the traditional enforcement action.

The attempt at justifications at the institutional level is also relevant. The external accountability of the Commission to the European Parliament certainly exists in principle, and has resulted in the production of the Annual Monitoring Reports. The European

⁶⁹ See Chapter II on the importance of institutions providing reasons for their decisions.

⁷⁰ Communication above n 1 p 4.

Parliament exercises its political control over the Commission's performance of its duties, using the Monitoring Reports as a way to scrutinise the Commission's activities as guardian of the Treaties. As with most aspects of the enforcement action, this process of accountability consists of a one-way information flow from the Commission to the Parliament. In terms of real accountability, this seems to be lacking in the corner stone of all good systems of accountability: namely independence and the ability to coerce a change in behaviour. In theory, the Parliament could produce its own independent report into the Commission's activities through the Committee system, and this might produce a more effective tool of accountability, although resources for such a momentous task are lacking.

At present, the Parliament's ability to monitor the Commission effectively under this mechanism is blighted by the problem of information asymmetry (so often a problem of the Commission in relation to the Member States), and the Annual Reports produced by the Commission are actually more useful for allowing the Parliament to monitor the Member States rather than the Commission's discharge of its guardian function. The Parliament does produce a Report⁷¹ on the Annual Monitoring Reports of the Commission wherein the Parliament makes a resolution and calls for certain changes to be made in the way in which the Commission operates and manages the enforcement mechanism.⁷² These recommendations are not binding, or apparently even persuasive on the Commission, and more often than not fall on deaf ears.⁷³

3.3: Consent and recognition

The third criterion comprising consent and recognition in the context of the enforcement policy means the consent and recognition of those governed by the system of enforcement. This relates to the good governance principles of participation and openness and concerns the Member State and the citizen; both these actors are affected by, and involved in, the Article 226 procedure and therefore legitimacy comes from both parties' consent and recognition. Unless the enforcement policy meets the conditions of consent and recognition,

⁷¹ Previously the Committee on Legal Affairs and the Internal Market, now the Committee on Legal Affairs.

⁷² See for instance Report of the European Parliament: 'Report on the Commission's 18th and 19th Annual Reports on monitoring the application of Community law 30 April 2003' Committee on Legal Affairs and Internal Market, A5-0147/2003 final, and the latest available report, above n 49. These reports will be discussed in greater detail in Chapter VII.

⁷³ The European Parliament has been consistently requesting for some time that the Commission provides a section within the Annual Reports dedicated to Petitions, in order that the Parliament can track the progress of citizen complaints referred by the Petitions Committee to the Commission. The Commission has not done so until Twenty-Third Annual Report on Monitoring the Application of Community Law (2005) COM (2006) 416 final.

there can be no adequate acceptance of it, which decreases the effectiveness of the policy itself. On a basic level the Member States do consent to the Commission's role as enforcer and monitor of the application of Community law. The Treaties identify this role for the Commission and the Member States have signed up to this agreement. Without this mechanism in the Treaties, the uniformity of the rights available to European citizens is jeopardised:

'In an enlarged EU the fact that laws are correctly and visibly implemented is essential to give meaning to the whole European project. This is not only a matter of legal obligation but also a question of political responsibility.'⁷⁴

However, the relationship between the Commission and the Member States over this provision is nonetheless fraught with power struggles. The Member States actively solicit better enforcement (against other Member States) on the occasions when it appears to be in their interest, and then oppose strict enforcement when it harms their economic or political goals. They have steadfastly refused to countenance any change to the enforcement provision in the Treaty on numerous occasions; so whilst a limited species of consent is identifiable on the part of the Member States, it is not without difficulties, evidenced by the Commission's initiative to prosecute Member States for non-cooperation. In relation to the citizen, there is no opportunity for consent *per se*, and only a circumscribed opportunity for 'participation'.

Concluding remarks

The Commission Communication on better monitoring is interesting in many respects. It contains the tacit acknowledgment that, first and foremost, the Commission ought to explain its executive policy choices in relation to the discharge of its duty to ensure compliance with Community law. This is important because in the past, the Commission has steadfastly refused to explain its conduct in relation to any aspect of the operation of Article 226. It must be acknowledged however, that the attempt to provide some guidance as to which cases of infringements will be pursued by the Commission as a priority does not stand up to close scrutiny, either from the perspective of increasing good governance or from developing a legitimate policy approach to enforcement.

An explanation of the enforcement policy that is consistent with good governance and legitimacy does not require an entirely new policy by the Commission by any means. Such a policy could easily fit within the overall strategy of technocratic and procedural legitimacy promoted by the Commission in the WPG, but it requires a broader overview of all the actors and processes involved in the enforcement policy, and more focus on how to improve the

⁷⁴ Above n 49 p 11.

enforcement mechanism itself, rather than on ways to avoid infringements in the first place. Although the Commission correctly identifies proper enforcement as being essential to the interests of the European citizen, it does not recognise this as an opportunity for the Commission to deliver greater accountability by offering an avenue for citizens to ensure their rights are protected. Whilst such infringements are recognised in the priority criteria, there are no concrete suggestions as to how the Commission will actively pursue these infringements, or how the Commission's activities can be tracked in relation to citizens' concerns, for instance, via a separate section in the Annual Monitoring Reports. This is further exacerbated by the lack of proposals to tackle those infringements that most often result in a citizen complaint – misapplication of EU rules (rather than say, non-transposition of directives). The delay in the production of the Annual Reports, and the lack of fit between the priority criteria and available data, weakens the Commission's approach to greater efficiency and decentralisation of monitoring, and greater openness.

The Commission pinpoints the enlargement of the Community as being the most important driving factor in a 'new' approach to enforcement, rather than as a response to developing policies that reflect its approach to good governance. In light of enlargement, once again the Commission turns to increased cooperation with Member States as the avenue to a more effective policy. There is no appreciation of the inherent contradiction in the indulgence of Member States and greater effectiveness in enforcement.

The approach of the Commission to the management, design and operation of the enforcement mechanism is lacking in some foundational criteria of legitimacy, the most serious of which is that of justifications for decisions. The participation of complainant, Ombudsman and Parliament in the enforcement process contributes to the generation of procedural legitimacy by increasing accountability within the operation of the enforcement mechanism. Procedural legitimacy was a central part of the Commission's approach to good governance in the WPG, and some mention of procedural legitimacy ought to have been included in the Communication, and could have easily been incorporated into the paper by explaining the role of the complainant and Parliament in these terms. Beyond this, the policy paper is designed to explain the long-standing *status quo*, rather than develop the enforcement process into a policy that is consistent with good governance principles.

The Commission does not act in total isolation in the management of infringement investigations, and therefore there are other processes by which the enforcement mechanism

might be improved in terms of good governance and legitimacy. The European Ombudsman has attempted to make some inroads to increase the procedural legitimacy, lacking from the Commission's own proposals, in the administration of infringement investigations. The attitude of the Commission to these attempts to instil a culture of good administration and good governance in the enforcement policy is instructive, and reveals some serious limitations to the Commission's commitment to good governance and legitimacy as a way to connect with the citizens of Europe. Whilst the Commission's vision of good governance is based on technocratic and procedural legitimacy, the Commission focuses the majority of its attention on developing technocratic solutions, increasing procedural legitimacy appears to have been left almost entirely to the Ombudsman. The next chapter will examine the role of the Ombudsman in improving the Commission's administrative procedures in respect of infringement complaints, and will identify the main reforms brought about by the interaction of the Commission and Ombudsman.

Chapter VI: The impact of the European Ombudsman: breaking down barriers to procedural legitimacy

The impact of the European Ombudsman¹ on the role of Article 226 is important in relation to three of its functions: its function as a forum for citizen-institution interaction; its function as an administrative and regulatory tool; and its function as a forum of debate, control and accountability in which other institutional actors may attempt to control the discharge of public power by the Commission when it exercises its guardian function. These aspects of Article 226 are left largely unexplored by the Commission's policy statement, but are nonetheless crucial if the role of Article 226 can be explained with reference to principles of good governance and legitimacy.

Although the Commission has always encouraged citizens to play watchdog over Member States' compliance with Community law, until the intervention of the Ombudsman, there was relatively little structure to the way in which the Commission dealt with citizen complaints. The administrative interaction with citizens was largely unrecognised as an area that required any regulation. In the light of the Commission's approach to good governance and legitimacy in the WPG (based on technocratic and procedural legitimacy), it is important to consider, to what extent procedural legitimacy has in fact been realised within the operation of Article 226, since the Commission's own proposals seem to focus upon technocratic legitimacy and the executive/enforcement function of Article 226.²

As an institution that promotes good administration within the EU, the Ombudsman has focused upon engendering a culture of good administration in Commission practices under Article 226, by developing some concrete principles that the Commission has agreed to apply in the handling of infringement complaints. The Ombudsman's Code of Good Administrative Behaviour provides a detailed explanation of the concept of good administration.³ The Code provides the template for the appropriate standard of conduct in order to create procedural legitimacy in the interaction of institutions and citizens. The impact of the Ombudsman within the administrative process of Article 226 has been

¹ Hereinafter I will use the terms Ombudsman and European Ombudsman interchangeably.

² Proposals contained in the Annual Reports detailed in Chapter IV and the Communication analysed in Chapter V.

³ The European Ombudsman Code of Good Administrative Behaviour, adopted by Resolution of the European Parliament 6 September 2001, the text of which can be found at <http://www.ombudsman.europa.eu/home/en/default.htm> hereinafter referred to as the CGAB or the Code.

important on two distinct levels: first, as a conduit for the redress of citizen grievances and increasing the procedural legitimacy of the administrative function of Article 226; and secondly, in providing an insight into the actual practice of the Commission in respect of infringement investigations outside that of the Commission's statements in the Annual Monitoring Reports and Communication.

This chapter will be structured as follows. Section one outlines in brief the mandate and functions of the Ombudsman. Section two examines and analyses what the Ombudsman has managed to achieve in the context of making improvements to the Commission's administration of infringement investigations, by considering a number of significant complaints and inquiries relating to Article 226. Section three presents a detailed case study of a complaint to the Ombudsman regarding the administration of an infringement complaint, in order to provide a deeper examination of the Commission's handling of citizen complaints and highlight the type of problems that result from a lack of procedural protections for citizens. Section four provides an overview of the results of the Ombudsman's intervention in the Article 226 process by examining the latest soft law code developed by the Commission in response to the Ombudsman's criticisms. Section five considers the administrative function of Article 226 in the light of the Commission's commitment to good governance and legitimacy in the EU.

1.0: An introduction to the Office of the European Ombudsman

The Office of the European Ombudsman, which became operational in 1995, was created by the Treaty of Maastricht and is governed by Articles 22 and 195 EC. The evolution of the Ombudsman idea at the European Union level began in the 1970s, initially generating support from the European Parliament which first debated the idea. It was not until the Inter-Governmental Conference on European Political Union in 1990 that the idea of an Ombudsman was back on the agenda, this time championed by the Spanish and Danish governments, albeit with very different ideas of the role that the Ombudsman ought to play. The Spanish proposal leaned more towards regulating the conduct of Member States with a particular focus on human rights (unsurprisingly given the role the Spanish Ombudsman plays) and the Danish model focused upon regulating the activities of the EC institutions. Ultimately this latter model was the basis on which the present day Office of the European Ombudsman was formed.⁴

⁴ Heede, K *European Ombudsman: redress and control at Union level* (Kluwer Law International, The Netherlands, 2000).

According to Article 195 EC, any citizen of the Union, and any natural or legal person residing in the Union can complain to the Ombudsman regarding instances of maladministration in the activities of the Community's institutions or bodies (except the Court of Justice and Court of First Instance acting in their judicial roles). The Ombudsman has two methods of administrative reform at his disposal; he may either conduct inquiries in response to complaints received or investigate institutions on his own initiative.⁵ The Ombudsman has had considerable scope to define his mandate by controlling the definition of what constitutes maladministration and designing the Office's implementing provisions. Maladministration was originally defined by Jacob Söderman, the first European Ombudsman, as:

‘occur[ing] when a public body fails to act in accordance with a rule or principle which is binding upon it.’⁶

Both the European Parliament and Commission accepted this definition, although the Ombudsman considers the definition a flexible one rather than a strictly binding precedent.⁷

1.1: Powers and process

The primary focus of the Ombudsman is complaint handling, and once a decision to investigate a complaint has been made there are several possible outcomes. The Ombudsman may find that no maladministration has occurred; this either totally exonerates the institution's conduct by finding no maladministration or contains a further remark, which identifies an opportunity for the institution to improve its administration in the future. If the Ombudsman finds that maladministration has occurred, he may attempt to negotiate a friendly solution between the parties, or the institution may decide to settle the issue with the complainant directly. If such a solution is not possible, then the Ombudsman issues either a critical remark or a draft recommendation to the institution concerned. The critical remark indicates that the complainant was justified in making a complaint and that the institution acted wrongly, but it is no longer possible to remedy the maladministration. In this case the instance of maladministration has no general implications for the institution and requires no further action. The draft recommendation is issued when the Ombudsman feels that the institution can rectify the instance of maladministration, and it is a particularly serious instance of maladministration or has general implications for the administration of the

⁵ Article 195 EC.

⁶ The European Ombudsman Annual Report 1997, the text of all the Annual Reports can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

⁷ Interview, Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman (5 April 2005).

institution. The institution must respond to the Ombudsman within a period of three months. If the institution does not respond satisfactorily, the Ombudsman may send a special report to the European Parliament, including recommendations for the institution to rectify its administrative procedures. The matter is then in the hands of the European Parliament and the Ombudsman has no further powers available to him.

Ultimately the Ombudsman has no formal power to compel an institution to change its behaviour in line with his recommendations.⁸ The Ombudsman does have the power to inspect files and call on the staff of the institutions for questioning and has done so regarding infringement complaints.⁹ The practice of inspecting files and interviewing staff is not an automatic action in every complaint investigation. Usually, this is only resorted to if the usual dialogue between the Commission and Ombudsman has not proved sufficient to answer the Ombudsman's inquiries.

The process by which the Ombudsman handles complaints can be characterised as one of mediation and information exchange. Once the Ombudsman has received a complaint it is automatically registered. It is then necessary to decide whether or not it is within the Ombudsman's mandate before a further investigation can proceed.¹⁰ The Ombudsman then corresponds with the complainant to determine all the relevant facts and identify what kind of maladministration (if any) has occurred, and the Ombudsman is limited in his investigation to the complainant's specific allegations. As a part of the investigative process, the Ombudsman instigates a full disclosure procedure; the correspondence of each party is submitted to the other, along with the Ombudsman's own comments and questions. This is a very important aspect of the Ombudsman's work, since many complaints can be remedied once a full and complete disclosure of events has taken place. Many misunderstandings occur due to a lack of information or simple oversight, which can culminate in allegations of maladministration. In these cases it may be possible to resolve the case quickly and achieve a friendly solution.

⁸ Although this is not particularly unusual in terms of the design of national ombudsmen, it has been the source of some criticism regarding the Ombudsman's ability to actively police the institutions.

⁹ Decision of European Ombudsman on Complaint 995/98/OV. Details of all Decisions and Own Initiative Inquiries can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

¹⁰ The complaint must fall within the Treaty language of 'concerning a Community institution', and this has been subsequently widened to include executive agencies and third pillar bodies. However, the Ombudsman still receives a significant number of complaints that concern the national administration of the Member States, over which he has no authority. The Ombudsman has however cultivated a network of national Ombudsmen to which such complaints are referred.

The institution and the complainant are given deadlines to respond to the Ombudsman's questions. In complex and disputed cases of serious maladministration, this back-and-forth process can be extremely time consuming as it may take repeated information exchanges by both sides before the Ombudsman receives a full picture of events. Once the Ombudsman is satisfied that all the available information has been presented to him – and this may include inspection of the institution's files – and both sides have had the opportunity to respond to the allegations of the other, the Ombudsman makes his findings clear to both parties and concludes the investigation with a further remark, critical remark or draft recommendation as appropriate.

In addition to complaint handling, the Ombudsman has the ability to conduct inquiries on his own initiative. The own initiative inquiry has been utilised by the Ombudsman in several circumstances. If there are procedural bars to the Ombudsman investigating a specific complaint due to the fact the complaint is outside the Ombudsman's mandate,¹¹ but the Ombudsman nevertheless considers that the issues raised in the complaint warrant further investigation, the own initiative inquiry can provide the basis for an investigation. The Ombudsman has tended to use this broader tool of investigation where there seems to be a recurring problem within a particular area of administrative practice, established by the receipt of a large number of complaints from citizens about the same type of practice within an institution.

The advantage of using the own initiative inquiry is that the Ombudsman is free to determine the remit of the inquiry rather than being bound by a specific complaint. This broader tool of investigation can therefore prove useful in attempting to introduce an entire new procedure at once, rather than by increments, as and when a complaint occurs. The own initiative inquiry also has advantages in terms of the way in which the Ombudsman deals with the institution. The situation is less combative because there is no specific allegation of maladministration being investigated, and so the institution is likely to react in a more conciliatory manner than the generally defensive approach taken to allegations made by complainants. In an own initiative inquiry, the Ombudsman can work directly with the institution behind the scenes to establish an agreement with the management and policy formulators within an institution, rather than dealing with specific case handlers on a 'one-off' basis. This allows the Ombudsman to formulate recommendations on the basis of both parties wishing to arrive at

¹¹ For an illustration of this use of the own initiative inquiry, see European Ombudsman Own Initiative Inquiry 01/4/2003ADB.

the best compromise, rather than as a reaction to public criticism or negative allegations against specific staff. At the end of an own initiative inquiry, the Ombudsman publishes the result of the inquiry in the Annual Report and on his website.¹²

1.2: Overview of numbers of complaints for non-fulfilment of Article 226 obligations received by the Ombudsman

The Ombudsman is appointed by, and is politically accountable to, the European Parliament in the performance of his duties. The Ombudsman presents an Annual Report to the European Parliament that outlines the activities of the Ombudsman in combating maladministration throughout Community institutions.¹³ Each report contains a detailed explanation of the Ombudsman's work across the board, as well as a section on statistics that provides an analysis of the types of complaints dealt with by the Ombudsman. An outline of the progress of any own initiative inquiries that have been undertaken is also provided. The percentage of the total number of complaints that the Ombudsman dealt with (i.e. that were within his mandate¹⁴) which related to Article 226 is detailed in Figure 11 below.

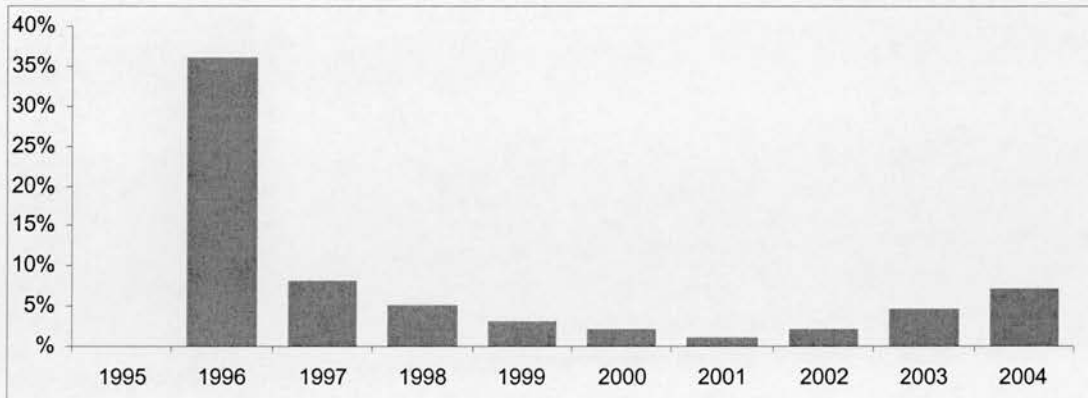
¹² <http://www.ombudsman.europa.eu/home/en/default.htm>.

¹³ In accordance with Article 195(1) EC Treaty and Decision of the European Parliament 2002/262/EC, ECSC, Euratom of 14 March 2002 amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties OJ L 92 9.4.2002.

¹⁴ Defined as complaints that are made in relation to Community institutions or bodies (but not the ECJ or CFI acting in their judicial roles), made by an authorized person, and relate to maladministration. The Ombudsman receives many complaints each year that are outside his mandate, especially complaints which relate to the conduct of Member State institutions, eg 69% of complaints in 2005 were outside his mandate, with 94% of those not against a Community institution or body. See The European Ombudsman Annual Report 2005, p 181.

Figure 11

Percentage of complaints for non-fulfilment of Article 226 obligations 1995-2004¹⁵



Source: Annual Reports of the European Ombudsman, 1995-2004.

Figure 11 shows that the Ombudsman was initially dealing with a large proportion of Article 226 related complaints, a fact that prompted his decision to open an own initiative inquiry into the matter in 1997. After the Ombudsman's negotiations with the Commission, the number of complaints declined rapidly by the next year. By 2001 the Ombudsman's statistics show complaints relating to Article 226 at an all time low of only 1 per cent of the total number of complaints being investigated. Since then, there has been a reversal of that trend and the numbers of Article 226 complaints seem to be on the increase.

There are several ways to interpret the data in Figure 11. It could suggest that the Ombudsman had tremendous success with his initial foray into the Commission's administration of complaints, achieving satisfaction for European citizens. This would indicate that an improving administrative process had resulted in a successive reduction in the number of complaints to the Ombudsman to 2001. If this is the case, there is no obvious explanation as to why the number of complaints thereafter began to rise, especially as in 2002 the Commission published a Communication containing further improvements, extending and clarifying the complainant's 'rights'. It is just as likely that this data could be interpreted to mean exactly the opposite. It is possible that complainants realised quite early on that there was a limited amount the Ombudsman was able to achieve, and so complainants stopped looking to the Ombudsman for a solution. Initially, complainants may have focused on areas that the Court of Justice had refused to police; such as the amount of

¹⁵ Percentage of total complaints received within the mandate. This is how the Ombudsman categorises complaints which refer to the Commission's handling of a complaint made in relation to the Commission's guardian function of pursuing infringements under Article 226. This should not be confused with complaints about Member States not fulfilling their obligations under Article 226, which is of course at the root of any complaint being made to the Commission in the first instance.

information released by the Commission in relation to its on-going investigations, or the extent of the Commission's discretion in relation to taking action under the infringement procedure. When it became clear that the Ombudsman was unable to change this situation (in terms of not being able to force the Commission to adopt a position) perhaps they simply ceased to complain. Similarly, the publication of the codicil containing clarified 'rights' in the form of soft law promises, may have produced a 'second wind' of complaining by citizens.

Perhaps though, neither explanation is really sophisticated enough to account for the sudden drop in the percentage of complaints being dealt with under this category. On closer examination of the actual complaints and the Ombudsman's system of classification of the types of maladministration, another explanation presents itself. In fact, the categorisation of Article 226 'complaints' is not straightforward. It could refer only to those instances where the complainant has alleged that the Commission has failed to *prosecute* Member States for alleged infringements, either because the Commission has decided there is no infringement and the complainant disagrees, or because despite the fact that an infringement has been found, the Commission chose not to pursue the case to the ECJ preferring instead to pursue the alleged infringement by other means, such as a complementary mechanism.¹⁶

It is difficult to prove there has been an overwhelming success in legitimising the infringement process by viewing the statistics, or that examining the bare data in isolation will provide an accurate picture. On reading a selection of complaints in the Annual Reports produced by the Ombudsman, there appear to be a number of cases relating to Article 226 that are classified as other types of maladministration (such as lack of transparency, abuse of power, unfairness, failure to give reasons, avoidable delay etc).¹⁷ This, quite correctly, is the type of maladministration being alleged, but the fact remains that it often occurs under the auspices of the infringement process. Due to the way in which the Ombudsman compiles the statistics, there is no way to tell (without reviewing each and every complaint that has ever been registered) exactly what percentage of the complaints actually relates to some element of the Commission's administration of Article 226. Like the Commission's reporting of Article 226 data, the Ombudsman has refined his classification system since inception of the office.

¹⁶ See Chapter V.

¹⁷ For instance see Decision of European Ombudsman on Complaint 2333/03/99 which is categorised as 'avoidable delay' although this avoidable delay occurs in relation to an infringement issue.

2.0: Re-moulding the process through inquiries and complaint handling

The Ombudsman has influenced the development of the administration of the infringement process primarily through his handling of complaints from citizens. The initial focus of the Ombudsman on Article 226 complaints is partly explained by the large number of complaints received,¹⁸ but this is only part of the story. Equally important in this initial focus was the type of complaints that the Ombudsman received where it became apparent that there was no consistent administrative practice directing Commission staff on how to interact properly with the citizens who were complaining.¹⁹ The Ombudsman's mechanism for solving disputes between citizens and institutions of the Union creates a unique environment for information exchange and this helps the creation of good working relationships with the other institutions that the Ombudsman must police. It is through these information exchanges that the Ombudsman's style of incremental adjustment and standard setting has induced a change in practice. The following sub-sections analyse some specific complaints from citizens about the handling of the infringement process by the Commission. The Ombudsman's rulings in these particular cases have formed the backbone of the administrative changes implemented by the Commission.

2.1: The quest for full and frank reasoning

The Newbury Bypass complaint is one of the early examples of the Ombudsman making inroads into the infringement process.²⁰ The complainants alleged that the Commission was guilty of maladministration in deciding not to open up infringement proceedings against the UK government in relation to the building of the Newbury Bypass, because there had been no Environmental Impact Assessment (EIA) carried out (as required by Community law) before consent had been given for the project. Although there are a number of different legal points of contestation, the core of the complaint was the Commission's discretion in deciding not to open up infringement proceedings where it seemed apparent that there had been a clear infringement on the complainants' reading of the facts.

The complainants suspected that the reason for the lack of prosecution was a political bargain struck between the Member State and Commission.²¹ The source of the

¹⁸ 36% of complaints received within the mandate referred to Article 226.

¹⁹ Interview, Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman (5 April 2005).

²⁰ There were 27 separate complaints in all, Decision of European Ombudsman on Complaint 206/27.10.95/HS/UK.

²¹ The allegations of political reasons/bargaining/motivation are often a part of a complaint to the Ombudsman under the Commission's handling of this particular type of complaint.

disagreement lay in the lack of transitional provisions in the EIA Directive²² concerning projects that had been started, but not completed, by the time the Directive came into force. According to the complainant there was no conclusive court ruling on the issue of 'pipeline' cases, the ECJ specifically leaving open the question as to whether the Directive applied to cases already in the process of obtaining consent in the planning application procedure.²³

The Newbury Bypass case was one of the so called 'pipeline cases'. In its response to the complaint, the Commission chose not to explain its conclusion that there had been no infringement. This conduct in itself prolonged what proceeded to be a lengthy battle for the complainants in obtaining satisfactory answers in relation to their complaint. The reasons for the Commission's conclusion that there was no infringement were far from obvious, especially in the light of non-conclusive precedent, leading to the inevitable accusation of 'political motivations' for not pursuing the case. The Commission's response was simply to reiterate the Court's case law relating to Article 226²⁴: that the Commission retained complete discretion in determining whether or not to initiate infringement proceedings.

Whilst the Ombudsman was bound by the case law, he did assert that the Commission was obliged to issue a reasoned opinion if it considered that there had been an infringement.²⁵ This gave the Ombudsman the opportunity to decide whether there had been maladministration in reaching the conclusion that there was no infringement. This in itself is significant progress under the administrative arm of Article 226 as it amounts to second-guessing the original decision (that there had been no infringement and therefore no need to issue a reason opinion). It limits (in theory) the Commission's ability to arbitrarily close cases which is a serious concern when evaluating the way in which the enforcement mechanism is operated in an era of good governance and legitimacy. The Ombudsman was prevented from actually stating the decision was legally wrong as this is outside his powers, but he nonetheless stated that the way in which the Commission had acted amounted to maladministration due to deficient reasoning.

²² Council Directive 85/337/EEC 27 June 1985 on Environmental Impact Assessment OJ L 175 27.6.1985 p 40.

²³ Case C-431/92 *Commission v Germany* [1995] ECR I-2189 para 28.

²⁴ Case 48/65 *Lütticke v Commission* [1966] ECR 19, Case 247/87 *Star Fruit v Commission* [1989] ECR 291, Case C-87/89 *Sonito v Commission* [1990] ECR I-1981.

²⁵ Although as I have already observed in Chapter IV, the term 'shall' in reality is turned into a 'may' as the Commission must first consider that there is an infringement. This is a jealously guarded area of institutional power of the Commission and the Ombudsman was therefore in controversial territory in the view of the Commission.

This forces the Commission to pay closer attention to the way in which investigations are conducted and justified in relation to Article 226 violations. The Ombudsman's input is felt beyond the interaction between the complainant and Commission, as it also affects the way in which the Commission fulfils its role as guardian of the Treaties in prosecuting Member State violations. After an analysis of the Commission's legal reasoning which led it to reach the conclusion that there was no infringement, the Ombudsman considered that the Commission was 'probably correct' and that the complainants had offered no evidence to support their claims of 'political motivations', although it seems difficult to imagine how evidence of such political dealing is to be obtained by the complainant. It was clear that the Ombudsman considered the threadbare reasoning provided by the Commission for its decision to be totally inadequate, preventing both the Ombudsman and the complainant from understanding the Commission's motivations. In three separate paragraphs of his decision, the Ombudsman criticises the explanations offered by the Commission as 'very brief, and possibly incomplete...' and '...lacking clear explanation'.²⁶

The Ombudsman concluded that at the very least the Commission ought to have informed the complainants personally of its decision before announcing it to the media, instead of three months after issuing a press release on the subject; such administrative practices simply lack basic courtesy. The outcome of this case was a further remark, which announced that, given the number of complaints received by the Office in relation to the infringement process, the Ombudsman would conduct an own initiative inquiry.²⁷ The Ombudsman noted that citizens viewed the Commission's approach to the discharge of its Article 226 duties as 'arrogant and high-handed' and that the process:

'appeared not to promote the degree of transparency which European citizens increasingly expect'.²⁸

2.2: The own initiative inquiry: concentration on basic procedural guarantees

After the Newbury Bypass case in 1996, the Ombudsman decided to open an own initiative inquiry into the Commission's administrative procedures for handling infringement complaints that was published in the 1997 Annual Report. The further remark in the Newbury Bypass case had announced the intention of the Ombudsman to investigate the Commission's administrative procedures in relation to Article 226 complaints, and began the

²⁶ Decision of European Ombudsman on Complaint 206/27.10.95/HS/UK.

²⁷ Detailed at length in The European Ombudsman Annual Report 1997, European Ombudsman Own Initiative Inquiry 303/97/PD.

²⁸ The European Ombudsman Annual Report 1996 p 65.

process of starting a constructive dialogue between the Ombudsman and the Commission.²⁹ The inquiry reveals the methodology the Ombudsman would adopt in his own initiative investigations. This is one of moulding the areas the Ombudsman perceived he could (and ought to) pursue. The Commission has an incentive to co-operate with the Ombudsman because during this private process of negotiation the Commission is not forced to adopt any particular position. In contrast when the Commission must respond to the Ombudsman's draft recommendations or answer to Parliament after a special report, the situation becomes more combative and the Commission is forced to defend its position publicly.

The opening section of the own initiative report states that:

‘the object of these [Article 226] complaints was not the discretionary power of the Commission to bring legal proceedings against a Member State’.³⁰

This could be viewed as a rather naïve interpretation of what complainants are trying to achieve since many of the complaints are aimed at exactly that, including the Newbury Bypass complaint which sparked off the own initiative inquiry in the first place. It is the discretionary element of the Commission's duty to enforce compliance under Article 226 that often provokes the allegations of ‘political motivations’ by complainants. However, the Ombudsman was keen to foster a good working relationship with Community institutions and decided initially not to push the boundaries of the Court of Justice's entrenched case law, which steadfastly protects the Commission's discretion in this regard.

The Ombudsman began his first real foray into this sensitive administrative process by attempting to establish very basic procedural ‘guarantees’, in the form of a soft law commitment.³¹ These are easier and more flexible instruments for the institutions to work with, and as procedural ‘promises’ such instruments might have a positive impact insofar as they tend to yield relatively quick results for the complainant. Unfortunately, such instruments do not give rise to substantive legal rights that can be asserted in a court of law. Beginning with the very basic procedure of registering a complaint (which was not routinely practiced by the Commission), the Ombudsman tackled the lack of basic administrative organisation of infringement investigations. It is hard to believe that a process that had been operating for many decades did not include this first step.

²⁹ This process can take place by correspondence or meetings between the Ombudsman and the relevant institution.

³⁰ The European Ombudsman Annual Report 1997 p 271.

³¹ For detailed discussion of the importance of the Ombudsman in relation to ‘soft law’ see especially PG Bonner, ‘The European Ombudsman: a novel source of soft law in the European Union’ (2000) 25 *European Law Review* 39.

There had been numerous complaints to the Ombudsman that referred to the lack of an acknowledgement by the Commission on receipt of a complaint, and this was something the Ombudsman felt could not be refused by the Commission as a matter of good administrative practice. Additionally, keeping a complainant informed as to the action being taken in response to the complaint was seen as a matter of good practice by the Ombudsman, and was the first step in bringing the complainant firmly into the infringement proceedings. Some of the procedural guarantees agreed bordered on basic courtesy, but ensuring the complainant is kept informed is tantamount to acknowledging the citizen plays an important role in policing Member State activity and not merely one of simple information provider.³² The next procedural guarantee that the Ombudsman and Commission agreed upon is that the Commission must provide the complainant with the reasons for rejecting the complaint and closing the file. This sticking point will be returned to below in the examination of the case study. The Commission also agreed to inform the complainant as to the outcome of the investigation into the complaint, and to establish a maximum time limit of one year before a file is closed (except in special circumstances). Furthermore, in the course of these negotiations, the Ombudsman and the Commission agreed that the Commission will allow the complainant time to respond to the Commission's provisional decision to close the case file, allowing a possibility of rebuttal of the Commission's reasoning by the complainant. Again, this acknowledges that the complainant is considered as having a valid stake in infringement investigations and should not be simply ignored once they have alerted the Commission to a possible infraction.

These narrowly defined procedural guarantees leave no opportunity for redress of the majority of complaints however, which are rooted in the suspicion that the Commission is finding no infringement for 'political reasons' but refuses to admit it, rather than reaching a decision based on an objective judgement of the facts of the case. This is of course perfectly acceptable within the framework of the Court's case law, which is exactly why complainants ultimately turn to the Ombudsman: they have nowhere else to turn. The Ombudsman's failure to ensure that the Commission adheres to its commitment to provide full and frank reasoning in the explanation of its decisions was to be a recurring problem in later complaints, both in terms of dealing with a complainant's initial inquiry, and in the subsequent investigations by the Ombudsman. Nevertheless the Ombudsman's first

³² Interview, Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman (5 April 2005).

substantial intervention into the administration of Article 226 managed to achieve agreement with the Commission on some basic organisational changes.³³

2.3: *A genuine opportunity to respond*

Even after the own initiative inquiry and subsequent Ombudsman report, many complaints were to contain the same recurring themes throughout the Ombudsman's investigations. Analysis of later Annual Reports detailing the substance of complaints relating to Article 226 reveals that the repeated attempts made by the Ombudsman to infuse better procedural practices has had a limited impact on the *attitude* of the Commission towards the Article 226 process, regardless of what had actually been agreed with the Ombudsman. The Macedonian Metro case is a good illustration of this point.³⁴ In brief, the initial complaint to the Commission concerned the way in which the Greek authorities had handled the award of a public procurement contract, a familiar area of complaint to the Commission under the enforcement action.³⁵ The complainant, whose company had tendered for the contract and had been unsuccessful, turned to the Commission alleging unlawful action of the Greek authorities in the procurement procedure. The eventual decision of the Commission was to close the file and take no further action, despite considerable evidence of an infringement.

A detailed reading of the complaint reveals that it is the suspicion of 'political motivations', combined with a lack of communication by the Commission, which infuriated the complainant. Initially, it was clear that the Commission thought there had in fact been a violation of Community law, and the Commission sent the Greek authorities a letter of formal notice under the Article 226 procedure. The relevant DG wrote a letter to the complainant informing them of this decision, together with reasons for concluding there had in fact been a violation. When the case later came before the College of Commissioners there was a 'radical and unexplained change of position',³⁶ ending in the decision to take no further action and close the file.³⁷

³³ 'Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission' OJ 1999 C119/5.

³⁴ Decision of European Ombudsman on Complaint 995/98/OV, detailed in The European Ombudsman Annual Report 2001.

³⁵ Possibly due to the rather inadequate levels of redress available for breach of public procurement rules on awarding contracts in EC law.

³⁶ Above n 34.

³⁷ There are numerous reasons for a 'radical and unexplained change of position'. As detailed in Chapter IV, the essentially political nature of whether to pursue an infringement can depend on many and various considerations, such as the personal political expertise of the Commissioner (of the DG investigating the complaint) in persuading the College to proceed, whether the Member State holds

The Ombudsman conducted a detailed investigation, involving the inspection of Commission files and taking oral evidence from Commission staff. The Ombudsman found maladministration in several respects. First, the Commission's letter informing the complainant of the decision to close the file was to be understood as meaning the Commission did not at that time consider there to be any infringement of Community law. The Ombudsman found that this was not the case, and that the Commission had decided to make a *discretionary decision* to close the file, despite the evidence of a possible infringement. The reasoning was therefore inadequate and misleading. The Commission had allowed only eight days for the complainant to respond (in peak Greek holiday season) before closing the file on the complaint conclusively, despite earlier agreements with the Ombudsman in the context of the own initiative inquiry to allow rebuttal by the complainant. This was not considered a genuine opportunity to respond and, along with inadequate reasoning, constituted maladministration.

In his further remark on the case, the Ombudsman stated that *if* the decision by the Commission to close the file on the complaint were considered as a decision addressed to the complainant under Article 230 EC, the actions of the Commission in the case would be grounds for annulment in a court of law. The Commission's response to this criticism was to point out the new rules of procedure in place for complainants³⁸ – although these were not adhered to and were in fact the basis of this complaint – and that a further re-working of this procedure was already underway.³⁹

Even at the end of the Ombudsman's investigation there was no honest answer as to why the Commission had had such a 'radical and unexplained change of position', leaving the complainant's suspicions firmly in place. The case was closed without any tangible conclusion, as the complainant could not prove their suspicions of unscrupulous behaviour and the Ombudsman could take the inquiry no further. The Macedonia Metro case is not a one-off situation. More recent cases reveal similar complaints of a lack of clear reasoning in

the Presidency, whether a significant political scandal might be caused by openly condemning the actions of one Member State through an infringement action etc.

³⁸ Above n 33.

³⁹ Resulting in the production of the latest guidelines: Commission Communication on Relations with the Complainant in Respect of Infringements of Community Law' COM (2002) 141.

the Commission's decision to close a case, even after the Ombudsman requests a further explanation from the Commission, leading to similar conclusions by the Ombudsman.⁴⁰

2.4: Proper consideration of all the relevant factors

There has been slow and incremental advancement in some later cases that attempt to make further inroads into the administration of Article 226 beyond what the Commission had agreed to in the context of the own initiative investigation. In the Motor Racing Track case the complainants alleged that the UK authorities had not adhered to the Directive containing the obligation to conduct an Environmental Impact Assessment (EIA), when they granted planning permission for a motor racing circuit to be built in Wales.⁴¹ This time the complaint concerned the Commission's interpretation of the Directive when it concluded that the EIA was not necessarily required for every project, and that it was at the discretion of the authority granting planning permission as to whether an EIA was necessary. There had already been a lengthy report made by the Local Government Ombudsman for Wales into complaints about the building of the motor racing track. The Commission had failed to take this report into account when it reached the conclusion that there had been no infringement and closed the file, despite the fact that the complainants had brought the report to the Commission's attention.

The Ombudsman concluded that the Commission had committed an act of maladministration, since good administrative behaviour requires that an administration take into account all the relevant factors, giving each factor its proper weight, as well as disregarding any irrelevant factors before reaching a final decision. The report from the Ombudsman for Wales was considered a relevant factor that the Commission did not evaluate. In this case, the Ombudsman conducted a re-examination of the way in which the Commission reached its decision on whether there had been an infringement, by introducing an elastic rationality test,⁴² on the basis of principles contained in the Code of Good Administrative Behaviour (CGAB).⁴³

⁴⁰ See Decision of European Ombudsman on Complaint 39/2002/OV, and more recently Decision of European Ombudsman on Complaint 1273/2004/GG and Decision of European Ombudsman on Complaint 2229/2003/MHZ.

⁴¹ Decision of European Ombudsman on Complaint 39/2002/OV.

⁴² Similar to that used in English administrative law, in terms of whether objectively (i.e. in the judgment of the court) the decision maker took into account all the relevant considerations or based their decision on irrelevant considerations. Such factors could render the decision illegal, or *ultra vires*, in English administrative law.

⁴³ Above n 3 in particular Article 9, 'Objectivity'.

The Ombudsman used his Code to further widen and deepen the opportunities to re-evaluate the Commission's original decision as to whether or not an infringement had taken place. The notion of relevant or irrelevant considerations had not been mentioned in previous cases as a ground on which the Ombudsman could interfere. This could be partly due to the fact that previous cases had not presented the opportunity to follow this line of reasoning, and partly because the CGAB had not existed as reference point for this standard of behaviour. This highlights the disadvantage of the Ombudsman's focus on complaint handling because he requires the right kind of complaint to come along, with just the right factual circumstances, in order to make further improvements in an administrative process.⁴⁴ There have been other cases⁴⁵ (Newbury Bypass is just one example) where the complainants' allegations of 'political motivations' are aimed at the Commission not giving proper weight to all relevant factors before deciding to close the file, in essence challenging what the Commission considers a relevant factor.

3.0: A detailed case study: the Parga complaint

It is useful to present an in-depth case study of a complaint to the Ombudsman in order to fully appreciate the extent of the problems that exist in the administrative element of the infringement action. Due to the complex nature of infringement complaints it is difficult to gain a genuine understanding of the problems faced by complainants, and the Ombudsman without analysing complaints in great detail. This section will analyse a particular complaint to the Ombudsman, the Ombudsman's investigation into that complaint, and comment on the quality of the Commission-complainant interaction. This will highlight the way in which the Commission conducts infringement investigations as a whole, as opposed to just examining the Commission-complainant interaction.⁴⁶ Crucially, examining a complaint in great detail provides a different insight into the administration of the Commission other than that outlined in the Annual Monitoring Reports and policy papers provided by the Commission.

The Parga case reflects some inherent organisational problems within the operation of the Commission's administration and investigation of infringement complaints.⁴⁷ It

⁴⁴ Interview, Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman (5 April 2005).

⁴⁵ Decision of European Ombudsman on Complaint 39/2002/OV, Decision of European Ombudsman on Complaint 1273/2004/GG, Decision of European Ombudsman on Complaint 2229/2003/MHZ, Decision of European Ombudsman on Complaint 1288/99/OV are just a few examples.

⁴⁶ Although case studies, by their nature, are anecdotal and selective, they are nonetheless useful in respect of revealing Commission behaviour in response to infringement complaints, as these practices cannot be discovered without examining Ombudsman investigations into specific complaints.

⁴⁷ Decision of European Ombudsman on Complaint 1288/99/OV, hereinafter 'Parga complaint'.

demonstrates that the value and extent of the Ombudsman's investigation is not necessarily restricted to simply examining whether the Commission has followed certain administrative steps. An investigation by the Ombudsman allows an outsider into the enforcement process, and as a result, enables another institution to question the Commission's conduct in the discharge of its guardian function. Through the insight provided by the Ombudsman, the Parliament can more effectively hold the Commission to account as the information asymmetry is lessened. This inter-institutional interaction is crucial to the creation of procedural legitimacy and good governance. As is typical with Article 226 complaints to the Ombudsman, the Parga case was a particularly complex and long running disagreement between the Commission and the complainant that spirals in several different directions. Not only does this case raise questions about the professional conduct of the Commission in the administrative interaction with the complainant, it also questions the Commission's performance of its role as guardian of the Treaties.

3.1: The facts according to the complainant

The facts as the complainant presented them are as follows. The complainant wrote to the Commission alleging that the Greek government had breached Directive 85/337/EEC⁴⁸, in particular the provision which stipulates the carrying out of an Environmental Impact Assessment (EIA) for the planned building of a biological waste treatment plant in Parga, Preveza (Greece). This building project was to be funded by the European Community. The complainant made her initial complaint for breach of Community law to DG Environment in July 1995 stating that during the EIA, the municipality of Parga used misleading information in order to avoid a genuine assessment of the environmental consequences of the project, and the EIA was therefore inadequate.

The complaint was acknowledged by the Commission only after the complainant pursued the case by telephone on several occasions. Despite sending new information to the Commission, the complainant received no response, resulting in the complainant petitioning the European Parliament in October 1996 to find out how the complaint was progressing. The response from Parliament was to question the Commission and communicate the Commission's response to the complainant. The Commission had decided that the complaint would be attached to Article 226 proceedings already underway against Greece for breach of

⁴⁸ Council Directive 85/337/EEC 27 June 1985 on Environmental Impact Assessment OJ L 175 27.6.1985 p 40.

Directive 85/337/EEC, and that Community funding for the project would be suspended in light of this action.

During repeated phone calls from the complainant to the Commission, the complainant alleged that DG Environment consistently informed her that they would only correspond with Member States and not with citizens in relation to investigations under Article 226. In October 1998, the complainant obtained minutes (from the Greek Government) of a meeting between the Greek Foreign Ministry and Commission representatives which stated that the Commission had closed consideration of the complaint in May 1998, and had decided to fund the project on the basis that:

‘the shortcomings which had appeared in the project at an earlier stage had been overcome’.⁴⁹

On receiving this information, the complainant immediately wrote to the Commission, stating that the Commission’s decision to fund the project and close the complaint was erroneous because it was based on misleading information obtained from the Greek authorities.

The Commission responded in December 1998 stating that the issue was still under consideration. The Committee on Petitions informed the complainant in late December 1998 of the Commission’s further answer of 19 March 1998. Here, it appeared that the Commission had confirmed to Parliament that there had been a violation of the Directive and the Commission had decided to suspend Community funding; on this basis the Committee on Petitions had terminated its own examination of the situation.

In December 1998 the complainant again sent further detailed information to the Commission to support the conclusion that the Directive had been breached. The Commission replied in January 1999 saying that Commission officials would be visiting Parga in March 1999 to conduct a site visit. Finally, in April 1999 the Commission wrote to the complainant stating its intention to close the file. This was based on new information obtained from the Greek authorities; namely that the planning consent for the project was approved by Decision 667 of the Prefect of Preveza, 28 February 1986. This decision relates to the commencement of a study of a sewerage system at Parga, and included a map of the affected area. The Commission therefore concluded that this project fell outside the scope of the Directive since the Directive did not come into force until after this date.

⁴⁹ Parga complaint, above n 47.

Table 3 below provides a summary of the facts as they are confirmed by the Ombudsman's investigation.

Table 3

Summary of relevant facts as they appear after Ombudsman's investigation

Date	Action
<i>July 1995</i>	Initial complaint to Commission.
<i>October 1996</i>	EP communicates Commission position – will prosecute for violation, funding suspended.
<i>March 1998</i>	EP confirms Commission position – will prosecute for violation, funding suspended.
<i>May 1998</i>	Commission confirms to Greek Government no prosecution and will fund project.
<i>May 1998</i>	Commission notes that relevant date for consent is 28 February 1995.
<i>July 1998</i>	Funding approved for project under Cohesion Fund.
<i>December 1998</i>	EP again confirms Commission position – violation, no funding resulting in EP closing file.
<i>December 1998</i>	Commission informs complainant it is still deciding on her complaint.
<i>January 1999</i>	Commission states it will make a site visit to Parga.
<i>April 1999</i>	Commission closes file stating no violation of Community law as relevant date for consent is 28 February 1986.

3.2: The complaint to the Ombudsman

The complainant turned to the Ombudsman for assistance in October 1999. Over the next two and half years, the Ombudsman doggedly pursued the Commission requesting information and clarification of events, dates and facts. The Ombudsman sent this correspondence to the complainant for her views and received additional information from both sides. In total, the Ombudsman had to contact the Commission on seven separate occasions. By March 2000 the Ombudsman was still unsatisfied with the Commission's response and decided to undertake further inquiries. Still unconvinced of the veracity of the information he received from the Commission, the Ombudsman requested inspection of the Commission's file in July 2001, which eventually took place in September 2001.

During the course of the information exchange between both sides, facts emerged that cast further doubt on the Commission's original version of events, including the suspicion of professional misconduct of the Commission official in charge of the complaint. After the Ombudsman's extensive inquiries the substance of the complaint was summed up as follows:

- That from 7 July 1995 until December 1998, the complainant did not receive any letters from the Commission informing her about the development of her case and therefore the complainant was unable to properly defend her position. The complainant also alleged that the Commission had not informed her that it had decided, by its decision E(98)2297 of 28 July 1998 to fund the project under the Cohesion Fund, but on the contrary had sent letters (such as the one of 9 December 1998) which indicated that the issue was still under consideration.
- The Commission's decision to close the case was wrong in law and the Commission had manipulated the situation; it tried to find means to close the case as shown in its final decision of 20 April 1999. It took the Commission four years to come to the conclusion that the project predated the entry into force of the Directive. However, earlier in March 1997 and March 1998 the Commission proposed including the case in the horizontal Article 226 action against Greece for failing to comply with the Directive.
- A lack of impartiality in the handling of the complaint due to the fact that the official in the Commission held a position in a Greek political party which supported the construction of the project. This is incompatible with his duty to verify the project is carried out lawfully. Additionally, the written expression of thanks from the Greek Foreign Ministry to the Commission for delaying the processing of complaints indicated that certain officials within DG Environment set themselves the task of avoiding the proper implementation of Community law, and instead to ensure the project received Community funding.

3.3: The inquiry

The Ombudsman's investigation took a total of two years and eight months to complete. In September 2000 the Ombudsman requested a response to four specific questions/allegations, but the Commission in November 2000 only responded to two of these requests, ignoring the other two completely which, in combination with the complainant's response, prompted the request to inspect the file in July 2001. The Ombudsman made renewed inquiries in the same month regarding the allegations of professional misconduct that the complainant had alleged and the Commission had ignored. The Commission eventually responded in late November 2001 (one month later than the deadline submitted by the Ombudsman). The Commission stated that it had initially felt the allegations were not relevant to the complaint and so no response was necessary. After the Ombudsman's renewed pressure, the Commission had given the official in question the opportunity to present his views in a

hearing in October 2001, a report of which was sent to the Ombudsman on the condition it was not disclosed to the complainant. This breached a fundamental practice of Ombudsman investigations that all parties are able to access information submitted by both sides in the course of an inquiry. On two separate occasions in January and February 2002, the Ombudsman again requested the disclosure of this report to the complainant, or in the alternative, asked the Commission to provide a summary of the report. Only after a rejoinder by the complainant, providing damning evidence that the official was in fact compromised⁵⁰ and the Commission's insistence that there had been no misconduct was placed in serious doubt, did the Commission relent and provide a summary of the report in March 2002.

Throughout the investigation by the Ombudsman, the Commission consistently avoided, delayed and refused to answer the very serious allegations being put to it. It revealed the practice of not adhering to its own internal procedures, including its own Staff Regulations concerning the suitability of Commission staff engaging in political office whilst serving as a Commission official. When questioned about this directly, the Commission attempted to defend its position through silence or misdirection. In the course of the own initiative inquiry launched by the Ombudsman in 1997, the Commission had undertaken to register and acknowledge complaints by letter, and to keep complainants informed of progress in the investigation and of a decision to close the file. This practice was not adhered to in the Parga case, but nevertheless was defended by the Commission, since the complainant had been able to garner information from the European Parliament with the Commission's own commitment to honour this procedure seemingly irrelevant.

The Commission's failure to inform the complainant of the decision to fund the project under the Cohesion Fund seemed a deliberate attempt to keep the apparent U-turn in policy a secret, and the Ombudsman also noted that:

'the Commission kept this important information concealed equally from the Ombudsman'

during the course of his investigation.⁵¹ This information was discovered only after inspection of the file. The Commission also failed to provide an acceptable explanation as to why it informed the complainant in December 1998 that it would take into consideration new elements transmitted by her, and in April 1999 that it was preparing to close the case, when it had in fact effectively already closed the case in July 1998 when it approved funding. The

⁵⁰ Due to the complainant submitting a number of newspaper articles where the Commission official in question visited Parga and delivered a speech on environmental matters, not as party political advisor in Greece, but as a Commission official.

⁵¹ Parga complaint above n 47 p 19 para 1.6.

Ombudsman noted further that when faced with these allegations the Commission simply asserts the CFI's case law relating to the independence of the Community funding procedure under the Cohesion Fund from the infringement procedure under Article 226.⁵² This case law however relates only to the independence of the administrative procedures (i.e. those of Article 226 and those of the Cohesion Fund), and does not question the principle that Community funding ought to be allocated only to projects that fully comply with Community law.⁵³

3.4: *The final decision*

The Ombudsman issued both a critical and a further remark in this case. He concluded that after thorough investigation, it became clear that during the period March 1998 to December 1998 the Commission's position with regard to the complaint had changed and:

'the Commission had failed to provide adequate information, because the Commission had concealed from the complainant a crucial element in the case, namely that by Decision E(98)2297 of 28 July 1998 the Commission had decided to fund the project under the Cohesion Fund. This left the complainant believing that the complaint was still being investigated and this constituted an instance of maladministration.'⁵⁴

Crucially, and this was the main added-value element of this decision, the Ombudsman contradicted the Commission's interpretation of the applicability of the Directive to the project. In previous cases the Ombudsman had hinted that the Commission may have misjudged the applicable case law or factual circumstances, but had not gone so far as to state the original Commission decision was wrong. Using the ECJ's case law on what actually constitutes the relevant date for application for consent, the Ombudsman concluded that the relevant date was in fact 28 February 1995, which was after the Directive entered into force by some eight years and *not* 28 February 1986 as the Commission alleged. Not only is this the date [28 February 1986] that the relevant Greek authorities considered as the applicable date at the time of granting consent,⁵⁵ this was in fact recognised as the relevant date by the Commission (in May 1998) in the course of its own investigation.⁵⁶ This incidentally is the exact same time that the Commission suddenly decided that it would fund the project after all, due to the alleged inapplicability of the Directives.⁵⁷ This supported the

⁵² *Ibid* p 11 para 3.

⁵³ *Ibid* p 20 para 1.8.

⁵⁴ *Ibid* p 25 para 2 (conclusion).

⁵⁵ *Ibid* p 21 para 2.8-2.11.

⁵⁶ *Ibid* para 2.13.

⁵⁷ This is the same month that the Commission publicly states, due to the consideration of the new element of the Decision 667 28 February 1986 of the Prefecture of Preveza constituting the formal application for consent, that the Directive does not apply. This despite the fact (as later discovered by

complainant's assertion that the Commission was, *ex post*, trying to justify its decision to close the file to disguise the real motivation. This constituted an instance of maladministration.

Finally the Ombudsman tackled the difficult issue of misconduct by a Commission official, stating that:

'there appear to be sufficient reasons to mistrust the impartial and proper handling of the case, and to question that the official in question did not conduct himself solely with the interest of the Communities in mind. In fact, it would be difficult for any citizen in any Member State not to doubt the impartiality of the Commission's actions as Guardian of the Treaty if a Commission official, who is deeply involved with an infringement case, also holds a post in a political party in the very Member State that case concerns and acts publicly in that capacity at a time when the case is being dealt with. In the eyes of European citizens, this kind of incident may put at risk the reputation of the Commission as guardian of the Treaty, responsible for promoting the rule of law...this constitutes an instance of maladministration.' (my emphasis)

This aspect of the case reveals that the way in which infringement complaints are dealt with by Commission officials means that the possibility of abuse of power by individual Commission officials is left completely unchecked. On detailed reading of the case and the carefully chosen words of the Ombudsman, there seemed to be no safeguards to ensure that an official, directly involved in ensuring the correct application of Community law, was not also being paid to act as an advisor to those who were set on ensuring the project went ahead.

The Commission's conduct throughout the initial complaint and again throughout the course of the Ombudsman's inquires, completely undermined any serious commitment to good governance or good administrative behaviour. Not only did the Commission fail to adhere to some of the basic procedural steps already agreed to in the course of the 1997 own initiative inquiry (such as acknowledgment of receipt of a complaint, keeping the complainant informed of the progress of the complaint), they willingly concealed crucial information, firstly from the complainant and subsequently from the Ombudsman himself.

Although the Parga case is a particularly shocking example of maladministration, including the alleged misconduct of an official, this is not the crucial aspect of the case in terms of good administration in infringement investigations. One official's misconduct can easily be explained away as one-off situation, and there is no evidence to suggest such unbelievable behaviour occurs as a matter of general practice. More important, in terms of taking an

the Ombudsman) that this sudden 'discovery' was in reality pointed out by the complainant to the Commission in her initial complaint in July 1995, and was therefore not a new element at all.

overview of Commission practice in infringement investigations, is the persistent disregard of procedural steps that have already been agreed to by the Commission as a result of the Ombudsman's intervention.

The consequences of this flagrant disregard of procedure are a complete undermining of the Commission as an institution committed to good administration and good governance. This can and will have detrimental effects on how citizens perceive the Commission, undermining its legitimacy as well as that of the enforcement procedure. In some cases, such as Parga, the complete disregard of basic procedure can help to conceal unethical conduct: this reinforces why administrative procedure is crucial to the legitimation of a system of governance. The only hope of increasing procedural legitimacy in the administration of the infringement investigations is through adopting (and actually carrying out) basic procedural steps that serve to some extent to structure Commission behaviour under the enforcement process, and provide an appropriate context within which citizen-Commission interaction can be constructive.

4.0: The results of the Ombudsman's intervention

The Ombudsman's intervention in the Commission's investigation of infringement complaints has certainly been significant in terms of achieving some measure of satisfaction for individual complainants. As a result of these cumulative individual complaints and Ombudsman-Commission interaction, there has been some success in obtaining a commitment to overhaul the Commission administration of infringement investigations. This culminated in the production of a complaint form and set of 'guarantees' by the Commission. The following subsections outline the latest administrative measures that the Commission has undertaken to comply with in relation to handling complaints under Article 226, and examines to what extent these administrative measures represent a significant breakthrough for the treatment of complainants in relation to Article 226 complaints.

4.1: The Commission Communication: a complaint form for citizens

In 2002, and as a result of the Macedonia Metro case and associated criticisms from the Ombudsman, the Commission decided to publish a standardised complaint form and codicil⁵⁸ of:

⁵⁸ Commission Communication on Relations with the Complainant in Respect of Infringements of Community Law' COM (2002) 141, my emphasis, hereinafter 'Communication'.

‘administrative measures for the benefit of the complainant with which it [the Commission] undertakes to comply when handling his/her complaint and *assessing the infringement in question*’.⁵⁹ (my emphasis)

The list of measures broadly corresponds to the issues tackled by the Ombudsman in the course of his investigations into individual complaints and in particular, to those measures agreed with the Commission in the course of the own initiative inquiry. Thus, firstly the Commission undertakes the general commitment to record all genuine complaints in a central registry held by the Secretariat General of the Commission, and to formally acknowledge receipt of all correspondence within fifteen days of receipt. Within one month of this first formal acknowledgment, the Commission undertakes to send a further acknowledgment with a formal case number. If the Commission decides not to register the complaint, it must notify the complainant of this decision by writing, setting out the reasons for this decision, and informing the complainant of any alternative avenues of redress. To facilitate the process of complaints, the Commission has designed a complaint form, accessible on the internet, although complainants may simply submit a complaint in writing without using this. This basic administrative organisation of complaint handling is where the Ombudsman’s initial efforts at altering the Commission’s behaviour began and was most successful.

The Communication then moves on to more controversial ground. The Commission undertakes to contact complainants and inform them in writing after each decision has been taken in response to their complaint. This would be carried out by the relevant DG investigating the complaint rather than the Secretariat General. The Commission goes on to state that:

‘at any point during the procedure complainants may ask to explain or clarify to the Commission officials...the grounds for their complaint.’⁶⁰

Even interpreting this clause narrowly to mean that all the complainant can expect is to be informed as each decision is taken, this is still exactly what did not happen in relation to the Parga complaint. Decisions were taken, and the complainant was not informed, with or without explanation. The choice of wording is instructive – the complainant may ask to explain, but is not entitled to a hearing to give an explanation.

The Communication contains a clause on time-limits, and this is something that the Ombudsman had tried to achieve through the complaint redress mechanism. The

⁵⁹ Communication *ibid.*

⁶⁰ Communication *ibid.*

Commission undertakes to keep all investigations to one year, after which time the Commission must decide to close a case or begin the infringement process by issuing a formal notice (unless there are exceptional circumstances). In reality, it is in the Commission's own interest to keep to this (generous) time-limit. If there is an infringement, it should want to prosecute as quickly as possible, and the only hindrance to that is obtaining information from the Member State. The complainant is likely to prove a valuable source of information anyway, making it much easier to pin down the facts of the Member State's conduct. The get-out clause of 'exceptional circumstances' provides an easy justification if this time-limit is not met. However, the imposition of a time limit was an achievement in itself, especially since the Court of Justice had never imposed a formal time limit to restrict the Commission's discretion.

The Communication also addresses the thorny issue of the outcome of infringement investigations, which is the root cause of the most serious complaints to the Ombudsman regarding the Commission's handling of their complaint. The Communication is carefully worded to leave the complainant (and the Ombudsman) in no uncertainty as to the Commission's view:

'After investigating a complaint, Commission officials *may* ask the College of Commissioners either to issue a formal notice...or to close the case definitively. The Commission will decide on the matter at its discretion. This discretion shall cover not only the desirability of opening or terminating an infringement procedure but also the choice of complaint. Complainants will be informed in writing of the decision taken...and any subsequent decisions taken on the matter.'⁶¹ (my emphasis)

This makes clear that even where an infringement has been uncovered by the Commission officials, they are under no obligation to inform the College anyway. So the discretion enjoyed under the infringement procedure does not only extend to the political decision-making of the College, but also to individual officials with the DG. This is further clarified in the section entitled 'simplified procedure for closing cases'. The Communication states that where there has not been a formal letter dispatched (i.e. the case has never been referred to the College), the case may be closed by a procedure that does not include any notification to the College at all.

This procedure may be applied in cases where complaints are considered:

⁶¹ Communication above n 58 clause 9.

‘groundless or irrelevant; or that there is no evidence, or insufficient evidence, to substantiate the complaint. The procedure may also be applied where the complainant shows no further interest in prosecution of the complaint.’⁶²

This clause is interesting because the Commission has made it quite clear, repeatedly and in the beginning of this very Communication, that firstly, Article 226 does not represent an avenue that is to be utilised for citizens to defend their legal interests, and secondly, that complainants do not have to demonstrate an interest in order to complain. So citizens do not have to have an interest (legal or otherwise) to complain, but they must have an interest for the Commission to continue to investigate the complaint! The Commission’s duty to investigate relates to their duty as guardian of the Treaties, and not because a citizen demonstrates continuing interest in the suspected infringement: regardless of whether the citizen cares, the Commission ought to.

The closure of cases was something that the Ombudsman specifically raised in the Macedonia Metro case. The Communication states that the Commission will henceforth notify the complainant when it is proposing to close a case, in order to give the complainant the opportunity to respond to this decision, before the case is finally closed. The letter will set out the grounds on which the Commission is basing its decision to close the case, and will invite the complainant to submit comments within a period of four weeks. Where the complainant does not respond, or where the complainant cannot be contacted for reasons for which he/she is responsible, or where the complainant’s observations do not persuade the Commission to change its decision, the case will be closed. The four week period is an obvious improvement to the eight days allowed by the Commission in the Macedonia Metro case, but this entire process is still conducted by formal letter i.e. through the regular mail. In order to allow the complainant an adequate response time, the Commission might have committed to more up-to-date and speedier methods of correspondence, such as email.

Finally, the Commission states that it will publish a list of formal notices and reasoned decisions sent to Member States on its infringement website. This does not contain any details of the complaint or conduct, but is simply a list of legislation infringed and stage of the infringement process. At the end of the Communication, the Commission reiterates that it handles all requests for information in accordance with the Regulation on Access to

⁶² Communication *ibid* clause 11.

Documents 1049/2001⁶³, but as I have already noted in Chapter II, this in fact does not enable access to documents connected with infringement investigations.

4.2: Consequences of the code

The measures adopted in the code are not legally binding on the Commission. The language used by the Commission in its drafting of the code is particularly instructive, in that it only ‘undertakes to comply’ with these measures, and does not at any point refer to these as administrative rules, or measures that generate any kind of rights for the complainant. The measures in the code are by no means a true reflection of all the achievements of the Ombudsman in individual cases. Although these broad measures are now ‘horizontal’ commitments of the Commission, in individual cases the Ombudsman is often able to achieve far greater results for the complainant.

The Code lacks the basic commitment to full and frank reasoning. At no point does the Commission use the language of ‘reasoned decisions’ and instead only commits to ‘informing’ the complainant as to decisions being taken. Although the Commission undertakes ‘to set out the grounds’ for a decision, this is not the same as providing a fully reasoned decision; in fact the phrase ‘reasons for decisions’ never appears in the text of the code at all. This is not to suggest that the Ombudsman has not succeeded in deducing the reasons for some complaints being closed as a result of detailed investigation, inspection of files and back and forth correspondence with the Commission, but this is evidently still not accepted by the Commission as the appropriate way to conduct infringement investigations.

The Communication is also used as an opportunity to re-entrench a specific sticking point between the Commission and the Ombudsman in relation to the proper extent of the Ombudsman’s interference in Article 226 administration. The Commission’s view is that the proper remit of the Ombudsman is strictly within the area of the organisation of the administration of investigations – registering complaints, acknowledgment, notification, time-limits etc. Re-examining the reasoning of the Commission for dismissing a complaint is outside the remit of the Ombudsman according to this viewpoint. The Commission alone is sole judge of whether *prima facie* there may have been an infringement of the Treaty, and that no other institution can objectively assess the facts of a complaint and make a different determination. Clearly, the Ombudsman has reached a different conclusion to the

⁶³ 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 31.5.2001.

Commission as to whether there has been a *prima facie* infringement in a number of cases, including the Parga complaint. The Ombudsman has stated that the Commission must adequately reason its decisions in order to demonstrate that it has carried out its duty as guardian of the Treaties, and therefore the Ombudsman has the right to review whether this reasoning is sound or not.

The clause relating to the outcome of investigations is interesting. The Commission expands its already vast discretion further by stating that it need not refer cases to the College. According to the Treaty and the Commission's (and ECJ's) interpretation of Article 226, it is the College of Commissioners that is ultimately responsible for deciding whether or not to prosecute an infringement of the Treaty. The Commission defends the cumbersome procedure and lack of efficiency within the provision on the basis that decisions cannot be taken by officials (which would be more efficient) for this very reason. In the Communication, this no longer seems to be the case, and some (negative) decisions are indeed taken by officials although the case law and Treaty provisions have remained the same.

4.3: The Ombudsman's principles in the administration of infringements

The Ombudsman's original definition of maladministration was a flexible and open-ended guide, but it was not particularly useful to the institutions since it (purposely) did not identify the type of behaviour that would lead to a finding of maladministration by the Ombudsman. This definition was based on the case law of the ECJ and the common principles of administrative practice to be found in the Member States, leading to some commentators to criticise the definition as being too narrow and legalistic.⁶⁴ A further explanation of this concept is provided by the Ombudsman in the CGAB. This states that overall, good

⁶⁴ See R Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal* 4. Compare the Ombudsman's rather vague definition to an approach adopted in English administrative law known as the 'Crossman Catalogue'. This list included principles such as 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'. More recently, this was updated by the UK Ombudsman as including: rudeness; unwilling to treat the complainant as a person with rights; refusal to answer reasonable questions; neglecting to inform the complainant of his/her rights or entitlement; knowingly giving misleading or inadequate advice; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the decision maker; offering no redress; showing bias; omission to notify those who thereby lose a right of appeal; refusal to inform adequately of the right to appeal; faulty procedures; failure by management to monitor compliance with adequate procedures; cavalier disregard of guidance intended to produce equitable treatment of service users; partiality; failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment. P Leyland and G Woods, *Textbook on Administrative Law* (5th Edition, Oxford University Press, Oxford, 2005) p 146.

administrative behaviour is concerned with ‘promoting the rule of law and *showing respect for European citizens*’ (my emphasis),⁶⁵ and therefore maladministration was the opposite of the principles contained in the Code. The idea of good administration goes beyond mere legality and extends to something more nebulous.

The soft law Code is the only reference point for the proper conduct of European administration. The principles contained in the Code are not particularly adventurous or far-reaching. They are fairly classic and basic administrative principles that ought not to be considered as placing too much of an administrative burden on the institutions, and they have been developed by a European institution with the context of the European Union in mind. The classic balance to be maintained between respecting the rights of citizens, and not fettering the discretion of the public body, is not undermined by adhering to the Ombudsman’s Code and in reality the conservative approach of the Code protects administrative discretion to a great extent.

The principles contained in the Code are set out in Table 4 below. Table 4 illustrates the relationship between the broad concepts of good administration, good governance and legitimacy. The top row of the table sets out the three criteria that constitute Beetham and Lord’s concept of legitimacy. The second row contains the Commission’s five principles of good governance, which further elaborates these key criteria of legitimacy, and positions the principles as they relate to the overarching criteria of legitimacy. The third level of the table contains the principles of good administrative behaviour identified in the CGAB, and illustrates how these interrelate and feed into the wider concepts of good governance and legitimacy. The highlighted sections of the table indicate which principles of good administration have been adopted by the Commission in its handling of infringement complaints and investigations in the Communication.

⁶⁵ Above n 3 foreword.

Table 4

Interlocking concepts of good administration, good governance and legitimacy

B&L	Rules		Justifications		Consent
WPG	<i>Coherence</i>	<i>Effectiveness</i>	<i>Openness</i>	<i>Accountability</i>	<i>Participation</i>
CGAB	Legitimate expectations ⁶⁶	Efficiency ⁶⁷	Giving reasons ⁶⁸	Giving reasons	Right to be heard ⁶⁹
	Impartiality ⁷⁰	Time-limits ⁷¹	Preventing abuse of power ⁷²	Lawfulness	Courtesy ⁷³
	Objectivity ⁷⁴	Keeping adequate records	Public access to documents	Right to appeal ⁷⁵	Language rights ⁷⁶
	Independence ⁷⁷	Obligation to transfer complaints	Access to file/information ⁷⁸	Objectivity	Notify of decision
	Fairness ⁷⁹		Proportionality ⁸⁰		Acknowledgment of receipt ⁸¹
	Non discrimination ⁸²				Providing contact name

Notes: B&L = Beetham and Lord's model of legitimacy.

WPG = Principles of good governance from the White Paper on Governance.

CGAB = Principles of good administration from the Ombudsman's Code of Good Administrative Behaviour.

Out of some 20 substantive provisions in the CGAB, only six of the principles of good administration are mentioned in the Communication which lists the administrative 'guarantees' that the Commission undertakes to comply with in relation to its dealings with complaints under Article 226.⁸³ Only five of these principles are in practice adhered to, with the principle of giving reasoned decisions still being resisted by the Commission, particularly in its rejection of a complaint, or refusal to prosecute, an alleged infringement. Although the

⁶⁶ Above n 3 Article 10.

⁶⁷ *Ibid* Article 17.

⁶⁸ *Ibid* Article 18.

⁶⁹ *Ibid* Article 16.

⁷⁰ *Ibid* Article 8.

⁷¹ *Ibid* Article 17.

⁷² *Ibid* Article 7.

⁷³ *Ibid* Article 12.

⁷⁴ *Ibid* Article 9.

⁷⁵ *Ibid* Article 4.

⁷⁶ *Ibid* Article 13.

⁷⁷ *Ibid* Article 8.

⁷⁸ *Ibid* Article 21.

⁷⁹ *Ibid* Article 11.

⁸⁰ *Ibid* Article 6.

⁸¹ *Ibid* Article 14.

⁸² *Ibid* Article 5.

⁸³ Communication above n 39.

duty to state the grounds for decisions is listed in the Communication, it has hardly been practiced with conviction by the Commission, as evidenced in the numerous complaints on this very problem to the Ombudsman. Five out of 20 is not a particularly convincing approach to good administration in the administration of Article 226 complaints.

There are some very basic principles that were not adopted by the Commission in regard to its handling of infringement complaints that might have been. For instance, one technique is to provide the name of the official that the complainant is corresponding with, or who is dealing with complaint within the relevant DG. This is simply about providing a face to the otherwise impersonal, intimidating and faceless public bureaucracy; it is a cheap, yet effective, mechanism of good administrative behaviour. This is especially relevant to an institution such as the Commission which is the institution that most citizens complain about,⁸⁴ and yet the practice in regard to infringement investigations is to sign each letter in the name of the Unit Head of a DG, rather than the actual official dealing with the investigation.⁸⁵

Basic professional conduct, such as signing one's own correspondence and courteousness could have been incorporated into the Communication as standards of good administration, but were not. Such standards of behaviour, including apologising for mistakes and providing contact details for individual officials, help combat the allegations that Commission officials are arrogant and highhanded in the discharge of their Article 226 duties. It is not clear whether the Ombudsman has pushed for such standards of behaviour to be included specifically in the Communication; these are not areas the Ombudsman has pursued in respect of individual infringement complaints, which seems odd as he specifically referred to the 'high handed and arrogant' conduct of Commission officials when he undertook his own initiative inquiry.

Another interesting omission from the Communication is the term 'efficiency' which in general is a key watchword of the Commission's overall commitment to technocratic governance, especially in relation to its policy on effective enforcement. Above all things, the Commission accepts that efficient governance is good governance. Efficiency is also a part of good administration, although it is not adopted as such in respect of the handling complaints and investigations. Although the Ombudsman managed to obtain a half-hearted

⁸⁴ In 2004 69% of inquiries concerned the Commission, source The European Ombudsman Annual Report 2004.

⁸⁵ Interview, Commission Official G (26 October 2005).

commitment to close a file or open proceedings within one year (except in special circumstances), there is no other mention of dealing with complaints in an efficient or timely manner: the term 'efficiency' is entirely absent from the Communication.

The CGAB has not been an unqualified success in changing the administrative culture of institutions. This is demonstrated first and foremost by the refusal of the Commission to either adopt the CGAB in its entirety as the relevant guideline for the staff of the Commission in dealing with citizens, or to take the initiative to turn the CGAB into a binding piece of legislation, as called for by the European Parliament and Ombudsman. However the Parliament and other institutions have adopted the CGAB, and in particular, the European agencies apply the code as originally drafted by the Ombudsman as the appropriate standard of interaction with citizens. The next section will evaluate why some of the principles of good administration have been more problematic than others for the Ombudsman, in terms of inducing a change in behaviour in the routine administration of complaint handling and infringement investigation.

5.0: Good administration and good governance in infringement investigations

The vast majority of the principles in the Ombudsman's Code ought to be applicable in the Commission's management of infringement investigations and its dealings with complainants. The Ombudsman's principles all fit broadly within the Commission's own vision of good governance in the EU, and thus, should be embraced by the Commission since they can help to create legitimacy in the eyes of the European citizen. In broad terms, the management of infringement investigations is weakest under the good governance principles of coherence and effectiveness. Generally this is where the Commission scores highest in terms of its overall policy and management of the enforcement mechanism. The 'strongest' area (although this is relative) is that of participation which is generally the weakest area for the Commission in general in terms of its overall management of the enforcement mechanism. The following subsections will analyse which of the principles of good administration have been inculcated into the codicil on relations with complainants and how these interrelate to the Commission's own principles of good governance, and which principles are notably absent, reducing the level of procedural legitimacy.

5.1: Coherence and effectiveness

The principles of good administration that underpin the broader good governance principle of coherence are a particular weak area of the administrative handling of complaints and investigations by the Commission. Dealing with complaints in an independent, objective, and fair manner with impartiality and respecting the legitimate expectations of complainants is simply not accepted by the Commission as the correct approach to infringement complaints and investigations. Furthermore, the Commission does not feel compelled to defend this approach, and in fact, resents the inference that its power in respect of the enforcement action should be confined in this way. This is endemic in the process of dealing with alleged infringements of the Treaty, but is also related to institutional practices that are out of date for an EU desperate to create an impression of legitimacy.

The blurred line between political and administrative decision-making undermines any claims (although few are made) about the impartial or objective treatment of complaints and investigations. Examination of complaints to the Ombudsman, such as Parga, reveals that even at the 'administrative' level of the DG, an infringement investigation does not always amount to an objective, fair and impartial view of the factual evidence. This damages the credibility of the Commission in the discharge of its guardian function under Article 226. The neutral guardian approach is undermined by the rejection of an impartial and objective approach to complaint handling and infringement investigations.

Many complaints to the Ombudsman centre around the suspicion that the Commission is acting on 'political motivations'. This phrase, or something similar, occurs repeatedly in allegations made by complainants. The lack of objectivity, impartiality or fairness is exactly what these types of complaints are pointing to although the Commission resolutely refuses to address these claims. The Commission has the *legal right* to act unfairly, arbitrarily and with partisanship in the discharge of its guardian function and operation of the enforcement action. However, the Commission refuses to explain its partisan, unfair and arbitrary conduct, and this infuriates complainants and prolongs Ombudsman investigations unnecessarily. This attitude has been criticised by the Parliament which has recently emphasised the Commission's duty to register all complaints which denounce a real violation of Community law *without selection*.⁸⁶

⁸⁶ Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final p 7.

There might be many valid reasons why the Commission may choose not to pursue a suspected infringement pointed out by a complainant. There might be a lack of evidence, or the Commission might reasonably conclude from its experience that the factual circumstances of the complaint might make a case impossible to prove. The complaint might represent a 'one off' instance of corruption or misconduct by a national official that the Commission perceives is best dealt with through informal channels or a complementary mechanism.⁸⁷ It might be an infraction in an area of law the Commission does not view as a priority as part of its own political strategy. All of the above explanations would constitute acceptable reasons, if clearly articulated to the complainant, for not pursuing the case. It might even be defended as good administration to prioritise complaints (and therefore not treat all complaints equally), but this requires an explanation or justification to be made to the complainant along those lines, rather than simply rejecting the complaint without explanation, or with formulaic reasoning that further undermines the Commission's credibility. Instead the Commission asserts there is no infringement.

Although the Communication might create a legitimate expectation as to how a complainant might be treated, in reality, there is no way (judicially or otherwise) to enforce that legitimate expectation. If the Commission does not register a complaint, does not give reasons for a decision, does not provide an opportunity to respond to notification of closure of a complaint, the complainant can do nothing except complain to the Ombudsman. The Commission accepts the necessity for treating Member States equally, impartially and fairly once the case is pursued to the ECJ (because Member States can defend these rights in the ECJ) but the same cannot be said of the complainant. There is no adequate defence of this behaviour, except to state that the Court of Justice's case law does not prevent the Commission acting unfairly, arbitrarily and in breach of legitimate expectations. It may be legal, but it is surely not good administration.

The production of the Communication is aimed, to a certain degree, at creating a uniform process of handling complaints across the Commission, so that complainants are treated fairly and without discrimination. The absence of these terms in the Communication itself reveals one of the key tensions between the Ombudsman and the Commission. Although the Commission might be committed to certain administrative organisational steps which would be applied across the range of complaints, it is not committed to fairness and non-

⁸⁷ See Chapter V.

discrimination in the *investigation and subsequent decision-making* in relation to the substance of the complaint.

5.2: Openness and accountability

Good administrative behaviour promotes an open and accountable administration. In the absence of openness and accountability, users of the administration become suspicious of decisions that appear objectively or factually incorrect, and particularly where there is no right of appeal, such behaviour undermines the legitimacy of the institution. In infringement investigations, even the very basic expectation of being provided with reasons for a decision is denied by the Commission. It is of course a classic and legalistic administrative technique being deployed by the Commission, designed for damage limitation – the less a decision is explained, the less easily it can be challenged. Such a limited and realistic goal as obtaining a fully reasoned decision (and a truthful one) does not however affect the Commission's unlimited and absolute discretion on whether to prosecute a Member State in connection with a possible infringement. It might, at most, result in more reasoned opinions being issued to Member States as, after full and frank reasoning, if it is clear the Commission perceives there is an infringement, the Commission is mandated to move to this next step by the Treaty.

The time is long past where the issuing of reasoned opinions is a rare and politically sensitive event.⁸⁸ In fact it gives absolutely no more legal rights to the complainant in terms of forcing action before the court, so the defensive approach to answering these complaints only hinders the Commission's relationship with the European citizen (not to mention the Ombudsman) for absolutely no gain in institutional power. It also compromises the utility of the procedure, as the Commission's time is taken up again and again with requests for greater clarity, which in turn undermines the Commission's own agenda of increasing efficiency in the administration of infringement investigations. This is not to suggest the complainant is not entitled to a reasoned explanation from the Commission because this somehow places an unacceptable fetter on the institution's discretion, but rather that the Commission's time would be better utilised if it provided this explanation in the first instance.

⁸⁸ Timmermans, CWA 'Judicial Protection against Member States: 169 and 177 revisited' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers Volume II* (Martinus Nijhoff, Dordrecht, 1994) 391.

It could be argued that the case-by-case approach of the Ombudsman does not achieve a transformation in the *attitude* of the Commission towards the Article 226 complainants, because such an approach concentrates on achieving individual satisfaction – these efforts remain seemingly unconnected in the Commission mindset.⁸⁹ Once the Ombudsman pushes for a clear explanation of the Commission’s reasoning he may obtain it in the particular case, but this does not necessarily transform the behaviour of the Commission in the next case the Commission handles. So it becomes a routine of one step forward, two steps back. By the end of the Ombudsman’s exhaustive inquiry into a complaint, the complainant may achieve a fairly detailed explanation of the Commission’s reasoning process, although not every complainant receives this in-depth treatment. Though the ultimate decision is not reversed, and as with the Parga case the whole point of the initial complaint to the Commission has become moot, the complainant might claim some vindication in revealing the misconduct of the Commission. This is a classic situation where the redress model⁹⁰ of the Ombudsman only proves effective for that one complainant who is tenacious enough to pursue a claim for years through the Ombudsman before any explanation is received.

The Commission has overtly acknowledged the complainants’ right to appeal to the Ombudsman in its Communication.⁹¹ This right of appeal is supposed to relate to how the Commission has handled the original complaint, rather than an appeal of the Commission’s decision to commence infringement proceedings (i.e. the substance of the complaint). There is no right of appeal on the substance in any forum at all due to the courts’ case law.⁹² In practice however, the Ombudsman has begun to wear away at such fine distinctions and, as was seen in the Parga complaint, occasionally the Ombudsman reinvestigates the original complaint from scratch. Notwithstanding this, the Commission remains the final decision maker under Article 226 as the Ombudsman can only review and criticise *ex post*.

The lack of appeal to any institution has compounded the Commission’s behaviour in the administration of infringement investigations. Without legally enforceable administrative rights, the Commission remains at liberty to conduct its affairs as it sees fit. With no other body able to judge the lawfulness of this conduct, it is not surprising that the administration

⁸⁹ This might in fact be exactly the reason the Ombudsman chooses this approach, as it appears easier in the short term to achieve effective results almost by stealth. An all out assault would in fact cause the Commission to sit up and take notice and may inspire a more combative attitude on their part.

⁹⁰ Heede, K *European Ombudsman: redress and control at Union level* (Kluwer Law International, The Netherlands, 2000).

⁹¹ Communication above n 39 para 14.

⁹² Case T-191/99 *Petrie and Others v Commission* [2001] ECR-II 3677.

of infringement investigations has progressed into a regulatory black hole without adequate checks and balances on institutional power. This places even greater emphasis on the correct decision-making *process* being followed in the first instance since there is no appeal to review or correct that decision.

The area of good administration that has been most disappointing in terms of the Ombudsman's impact on legitimating the administration of infringements is that of access to information. The Ombudsman has yet to make inroads in this regard, despite complaints from citizens. A recent complaint, detailed in the 2003 Annual Report shows that the Ombudsman has not given up hope of prising open this area of Article 226, but is perhaps dependent on the right complaint coming along.⁹³ The recent complaint related to the public access to the letter of formal notice sent to the offending Member State.⁹⁴ This is an issue that has been tried in the courts already without success, and indeed the Ombudsman found there was no maladministration in refusing access to the letter of formal notice. However, it is notable that he chose to emphasise the fact that if in future a complainant could establish an overriding public interest in disclosure of such documents, this might amount to an instance to maladministration. Although this is the same test as that in the applicable legislation, there is probably more hope of establishing this overriding public interest in the mind of the Ombudsman, because of the process of information exchange in Ombudsman investigations, than in the Court where the complainant's access to the information (which would prove an overriding public interest) would probably be unavailable. Nonetheless this is still disappointing as this is the same standard that the Court applies.

The particular investigative tools of the Ombudsman, of requesting an inspection of the files and interviewing individual Commission staff, have been invaluable. But these tools have not been without controversy – behind every request for information from the Ombudsman is the possibility that eventually, information provided by the Commission could be double checked by an outsider. In the Macedonia Metro case the Ombudsman chose to interview Commission staff, who he found were unable to speak on their own behalf due to the relevant regulations, and could only divulge information that had been authorised by their line manager. This has been amended slightly to allow a more independent stance to be taken, but certainly not to the extent to which the Ombudsman and Parliament had

⁹³ Interview, Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman (5 April 2005).

⁹⁴ Decision of European Ombudsman on Complaint 1437/2002/IJH.

requested.⁹⁵ The Commission resisted the attempt by the Ombudsman and European Parliament to change the words from ‘shall continue to be bound by their duty of professional secrecy’ to ‘shall give complete and truthful information’, though they did accept the removal of the words ‘on behalf of and in accordance with instructions from their administrations’. There is no guarantee that this is the end of the matter for the Ombudsman, who may well return to this battle at some point in the future.⁹⁶ It is vital that Commission staff are compelled to give truthful answers to the Ombudsman,⁹⁷ as this is the *only* conduit by which citizens can access information. Not only is the key principle of openness underdeveloped in the administration of Article 226 in the first place, it is important that the Commission accepts that full and frank reasoning of decisions is the time efficient option and the correct good governance approach to take in Article 226.

The Communication contains no reference to the principle of proportionality, a well established administrative principle in the EU system. This is interesting as, from the Commission’s perspective, the proportionality principle could be a useful method of distinguishing the complaints it will pursue from those it dismisses. Proportionality in this sense is defined widely to mean taking the appropriate action necessary in all the circumstances. Decisions to pursue or not to pursue a complaint might be defended on ‘reasonableness’ grounds according to particular circumstances of each case. Applying a proportionality test would however necessitate a clearer explanation of the decision-making process of the Commission, but would also help to legitimise how the Commission prioritises the cases it pursues.

The figures produced by the Ombudsman do not quantify how many of all of the infringement complaints (received over the past nine years) have ended in a friendly solution as opposed to a critical or further remark. An examination of the complaints that are selectively detailed in the Annual Reports produced by the Ombudsman reveals that no infringement complaints were in fact settled by a friendly solution, and only five complaints (out of eight Annual Reports) were stated to have been satisfactorily settled by the

⁹⁵ Commission Opinion on amendments to the regulations and general conditions governing the performance of the Ombudsman’s duties 6.3.2002 COM (2002) 133 final.

⁹⁶ Interview, Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman (5 April 2005).

⁹⁷ The Ombudsman himself is still restricted from passing on information that is regarded as confidential by the Commission so this does not impinge on the obligation to safeguard personal data or business information.

Commission.⁹⁸ Falling numbers of citizen complaints in relation to Article 226 can be interpreted in several different ways, and may or may not support the assertion that citizens are more satisfied and have more acceptance of the way in which infringement complaints are handled by the Commission.

Acceptance is important in identifying whether a process has legitimacy⁹⁹; if citizens feel a process offers some accountability of public actors to private citizens, it is feasible to speculate that the public would be more accepting of the process. The Ombudsman's principles in the CGAB of giving reasons, lawfulness, a right to appeal, objectivity and non-discrimination are crucial to the legitimisation of Article 226 since the citizen can find no place in court for any of these types of accountability. These are the concrete standards that build citizen acceptance. The Ombudsman has had some success in this area by obtaining a formal commitment to provide reasons, and by reinforcing the notion that operating within the strict limits of the law does not amount to a *carte blanche* on how infringement investigations are conducted.¹⁰⁰

5.3: Participation

The Ombudsman has managed to achieve the most for complainants under the general heading of participation, which is otherwise one of the weakest areas of Commission management of the enforcement action. The Ombudsman has managed to establish that complainants can expect to present their views (and evidence) to the Commission, and expect a right to respond to the decision to close a case, effectively establishing a process of interaction with the Commission which had been previously lacking in the Commission's handling of infringement complaints. This element of good administrative behaviour could be improved further with an increased commitment to administrative techniques at no additional cost (in terms of resources or discretion) to the Commission at all. The Commission's relationship with the complainant is explained in the Communication produced by the Commission.¹⁰¹ The Commission states that it:

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

⁹⁸ The European Ombudsman Annual Report 1996-2004.

⁹⁹ This is the second criterion in Beetham and Lord's model of legitimacy, see Chapter III.

¹⁰⁰ Decision of European Ombudsman on Complaint 995/98/OV.

¹⁰¹ Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4. 16.5.2003

applied in such a way that citizens are given careful and reasoned replies...the Commission must ensure it remains neutral and objective in its replies.'

Despite these remarks, it does not seem in practice that the Commission has revolutionised its approach to dealing with citizens' complaints. Nonetheless, the Ombudsman's intervention has been useful in other ways. The most important aspect of increasing participation is arguably the participation of the Ombudsman himself. This inter-institutional interaction provides a window into the administration of Commission enforcement, as well as an avenue of grievance satisfaction for citizens who feel they have been unfairly treated.

Concluding remarks

If the enforcement mechanism as a whole is based on a vision of technocratic and procedural good governance, and the executive policy has focused on increasing legitimacy through technocratic measures, the administrative function of Article 226 has lacked the same development. The administrative element of Article 226 remains vulnerable to criticism of a lack of good administrative behaviour on the part of the Commission, and therefore of procedural legitimacy. Procedural legitimacy means simply that an administration will follow a legitimate set of procedural rules when exercising discretionary decision-making powers.¹⁰² This is especially important when the administration is in direct contact with citizens, and the decisions being taken affect the interests of the citizen. Furthermore, it is also necessary that the set of procedural rules being followed appears to legitimise the decisions being taken, and therefore the quality of these procedural rules is paramount: it is insufficient that a set of 'rules' simply exists. It is also necessary to consider exactly what these procedural rules are applicable to: is it administrative organisation or substantive decision-making?

The Ombudsman has concentrated his efforts on improving the Commission's administration of infringement investigations by focusing on four basic administrative principles. First, by insisting on basic organisational changes to complaint handling procedures such as registering a complaint, acknowledging a complaint, and obtaining a general commitment to timeliness in handling complaints. Secondly, the Ombudsman has attempted to instil the automatic practice of full and frank reasoning in the Commission's correspondence with complainants, especially in regard to reasons why they will/will not prosecute the Member State under Article 226. Thirdly, the general administrative principle of a right to a fair

¹⁰² This correlates to the legitimacy criteria of 'rules' in Beetham and Lord's model of legitimacy, see Chapter III.

hearing underscores the ability of a complainant to have a proper opportunity to respond to the Commission's decision-making. Finally, but with most far reaching effects, is the Ombudsman's decision to ensure that the Commission takes 'reasonable' decisions in relation to infringement investigations, by stating that the Ombudsman will re-evaluate the Commission's decision-making process according to standards contained in the CGAB. The Ombudsman's achievements are not a sufficient substitute for effective judicial review of the Commission's administration however, as the Ombudsman cannot render the Commission's decisions null and void, nor can he provide a remedy for the complainant.

It should be emphasised that the purpose of changing the Commission's approach to its interaction with complainants does not correlate to changing Article 226 into a mechanism of individual grievance satisfaction. No doubt citizens may still feel aggrieved if the result of an investigation does not favour their own objectives. Ensuring equitable procedures exist for handling complaints is an end in itself, something to be achieved for the intrinsic benefits that good processes bring, in terms of generating accountability and control of the discharge of public power. The Parga complaint illustrates what can go wrong in an infringement investigation without the requisite administrative procedures being followed.

One of the most important aspects of the Ombudsman's intervention in Article 226 is that it provides another source of information about the Commission's discharge of its guardian function. This reduces the information asymmetry which undermines Parliament's ability to properly monitor the Commission's conduct when it is carrying out its role as guardian of the Treaties. The Commission may object to the imposition of administrative controls on its discretion under Article 226, but these (very limited controls) serve several purposes. The creation of good administrative culture fosters both internal and external accountability, and creates efficiency and fairness in the treatment of Member States and complainants.

Chapter VII: Conclusions

1.1: Summary of findings

This study has attempted to analyse the role of Article 226, by examining it from the perspective that it is a multi-functional mechanism in the Treaty that is influenced and moulded by a multitude of actors. It has attempted to show that it is only through the recognition of the different, but equally important functions, of Article 226 and the contribution made by, and interaction of, all the actors involved, that a proper understanding of the role of Article 226 can be gained. In trying to understand the role of Article 226 in the Union, it is insufficient and misleading to analyse Article 226 only in terms of its ability to deliver effective enforcement, or equally, only in terms of the influence and role of one actor. Moreover, due to a lack of legal control on the discharge of executive power in Article 226, it is only through examination of all the actors' behaviour and motivations that a genuine analysis of Article 226 can be undertaken. These institutional/actor motivations can only be appropriately analysed when placed against the wider legal and political development of the Union; this illustrates to what extent the changing environment of the Union (and therefore the motivations of the actors involved) has affected the static legal text of Article 226. This requires a framework of analysis that can adequately capture the different modalities of Article 226, the actors involved and the political context of the Union.

When examining the legal context, and in particular the impact of the ECJ, it is insufficient to recite the judgments applicable only to Article 226. It is necessary to consider the Court's approach in other enforcement actions, and across the EU more generally, with regard to the availability of judicial review of the institutional discharge of public power, and its approach to the protection of third parties. It is the interplay (or lack thereof) between the general principles (i.e. the administrative protections in the EU system) and Article 226 that illustrates the ECJ's abdication of responsibility under this mechanism. The reinforcement of untrammelled Commission power has had negative knock-on effects in other areas of the Treaty,¹ as evidenced by the approach to the CFI's judgment in *max mobil*.² The ECJ's approach to Article 226 prevented the evolution of case law in other areas of the Treaty from becoming aligned with the political aspirations of good administration and transparency (as contained in the proclaimed Charter of Fundamental Rights) by refusing to allow 'diligent complaint handling' to be recognised as a minimum legal standard, in order to preserve the

¹ In relation to all the enforcement mechanisms in the Treaty and transparency.

² Discussed in Chapter II, Case C-141/02P *Commission v T-Mobile Austria GmbH, formerly max-mobil Telekommunikation Service GmbH* [2005] ECR I-1283.

status quo in Article 226. This has robbed Article 226 of legal administrative protections, and of the opportunity to instil a practice of synoptic reasoning or enhance the opportunity to develop judicial review of discretionary power. It is crucial to understand the interplay of this case law and the practice and policy of the Commission under Article 226, including the ‘special relationship’ between the Member State and Commission, which is buttressed by the stranglehold on information in relation to what amounts to fulfilment of legal obligations. This is both promoted by, and is a consequence of, the ECJ’s case law on Article 226.

In the absence of legal controls on the discharge of public power under Article 226, it becomes important to evaluate the extent and impact of the political controls in the enforcement process. In evaluating the existence and quality of political controls, it is necessary to construct a framework of analysis that is relevant to Article 226, the political context of the Union which influences actor behaviour, and encapsulates the various actors involved in moulding the role of Article 226.³ The policy of good governance is one way in which the institutions and Member States have sought to increase greater legitimacy in EU policy making – in the White Paper on Governance⁴ the Commission concentrates its good governance agenda on increasing technocratic and procedural legitimacy in policy making and delivery. This thesis considers whether there has been any impact upon Article 226 as a result of the adoption of good governance techniques – is this able to fill the void (in control and accountability) left by the lack of judicial review of conduct in Article 226? Adopting a framework of analysis comprising good administration, good governance and legitimacy flows directly from the consideration of Article 226 as a multi-functional mechanism involving a number of different actors.⁵

When examining the impact of the different actors in Article 226, it has been necessary to delve beneath the surface of documentary evidence, such as that in the Annual Monitoring Reports or Communications of the Commission, Ombudsman and Parliament, or the case law of the Court, in order to analyse to what extent practice in Article 226 resonates with the stated policy (and how this can be measured, if it can be measured), and to what extent the approach of the actors reflects a vision of Article 226 as a multi-functional mechanism.

³ See Chapter III for an analysis of the political context and especially pp 94-98, and Figure 2 for a diagrammatic representation of the framework of analysis adopted in this thesis.

⁴ European Governance: A White Paper COM (2001) 428 hereinafter referred to as the WPG.

⁵ If only one function of Article 226 is considered, say effective enforcement, then the framework of analysis would be different, concentrating on output legitimacy (number of infringements that are remedied by the Commission) perhaps combined with consideration of efficiency gains. There would be no need to consider a legitimate policy approach, procedural legitimacy or the role of other actors (besides the complainant as information provider) in any detail.

Particularly with regard to the Commission, this requires access to a wide range of information, including information not contained in published documentation, which may highlight the motivations behind institutional practices. Published documentation reveals little about the inner workings of Commission departments, or the challenges faced by the Commission in accommodating its competing roles and priorities within the enforcement process. In order to understand these challenges, it was necessary to gather information by conducting elite interviews with a wide range of Commission officials from different levels and different DGs.⁶ In order to trace the approach of the Commission over time, it was important to look at Annual Reports produced before and after the good governance agenda became politically significant, and to analyse to what extent there had been either a change in approach to Article 226, or whether 'good governance' policy statements on Article 226 are reflected in the Annual Monitoring Reports where the Commission reports the outcome of its activities as guardian of the Treaties.

The lack of legal regulation of the Commission's discretion in Article 226 ensures that executive (political) power remains protected, but this comes at a cost. The emphasis placed on negotiation and cooperation with Member States means that the administration of infringements has become a frustrating task, ultimately reducing the effectiveness of Article 226 and wasting precious Commission resources, by preventing decentralisation of enforcement. Although this frustration resulted in a brief threat to become more combative by prosecuting Member States for breach of Article 10, it would be a mistake to see this as a fundamental change in practice, as the Commission quickly returned to a more conciliatory approach; nor was this a new or novel tactic as analysis of previous Commission reports has revealed.

The Commission's approach to Article 226 is reflected in its approach to Article 228, which is similarly no more combative than before the good governance agenda, although its practice with regard to transparency continues to be entirely different to its approach under Article 226. This is due to the interplay between the Court and the Commission – it is the ECJ that has taken a more proactive stance on financial penalties. Wresting control from the Commission in its first judgment imposing a financial penalty, the ECJ prompted the Commission to counter-manoeuvre by producing Communications on how the financial penalties were to be imposed in future, re-emphasising its prerogative power and limiting the Court's power to decide the amount of penalty imposed. The side effect of this power play

⁶ See Appendix 1 for collation of the data.

was to make the imposition of financial penalties, including the way in which the Commission would choose infringement cases and calculate the amount of penalty, a far more transparent process than the investigation and prosecution of Article 226 cases. Ultimately, it is the Court that has (in contravention of clear Treaty wording and the Commission's Communications) reinterpreted the provision of Article 228 to make financial penalties even more effective as a punishment for Member State infringements by enabling a double penalty to be imposed.⁷ Even so, the Commission still has the ultimate role in securing payment of those penalties, and has been less than convincing in this regard, allowing Member States to evade financial penalties imposed by the Court, and facing challenges from Member States who refuse to pay at all.

The political nature of the decision-making procedure, still unchanged since the inception of the Communities, is a major obstacle to good governance in Article 226 and arguably no longer appropriate, even if we adopt the Commission's vision of Article 226 as a single function compliance mechanism. This affects both the internal efficiency of the administration of Article 226 and the influence of politics on whether a Member State is complying with its legal obligations. The vast differences in time elapsed before cases are brought before the ECJ can, in part, be explained by the difference in the complexity of the cases, but this is not the only factor or even the most significant. The practice of compliance by negotiation is adopted not because this is either the most efficient or only solution to enforcement under Article 226, but because it protects the Commission's executive power, which in turn can be partly explained by the conflicting roles and divergent priorities of the Commission in Article 226. However, this is self-defeating – it protects the Commission from *ex post* control and accountability, but it also protects the Member States from having to comply with their obligations by ensuring there is no opportunity for review of decision-making within Article 226.

The Commission's policy, outlined in the Communication⁸ following the WPG, is an attempt to provide some guidance as to which cases of infringements will be pursued in the light of its commitment to good governance. This was an opportunity for the Commission to reinvent the enforcement mechanism in light of the great challenges it is to face after enlargement of the Union, particularly in relation to the problems it already encounters

⁷ A Lump sum and a periodic penalty payment, see especially Chapter IV for the discussion of Article 228 and the implications of Case C-304/02 *Commission v France* [2005] 12 July 2005 nyr.

⁸ Discussed in Chapter V, Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003.

regarding the scale of the task of enforcing conformity, and the scarcity of resources available to the Commission for monitoring purposes. It was also a valuable opportunity to address the important role played by other actors in enforcement, and to explore the rights and obligations of the various actors involved. However, the Commission chose to considerably narrow the scope of the Communication, with the vast majority of proposals being aimed at prevention of infringements (rather than at Article 226 itself). To the extent that Article 226 was focused upon, it was in the production of the priority criteria. This was a disappointing attempt at producing greater clarity, because it did not provide policy guidelines which were able to stand up to close scrutiny, either from the perspective of increasing good governance or from developing a legitimate policy approach to enforcement. It is only when this policy is examined against a framework of analysis relevant to Article 226, with the political and legal context in mind, and is analysed against the past practices of the Commission, that a meaningful conclusion can be made as to whether there has been a significant change in approach by the Commission in the light of good governance.

An explanation of the enforcement policy that is consistent with good governance and legitimacy does not require an entirely new policy by the Commission by any means. Such a policy could easily fit within the overall strategy of technocratic and procedural legitimacy promoted by the Commission in the WPG, but it requires a broader overview of all the actors and processes involved in the enforcement policy, and more focus on how to improve the enforcement mechanism itself, rather than on ways to avoid infringements in the first place. It requires the Commission to strike a balance between the exploration of technocratic initiatives relating to transposition and non-notification of directives, and infractions that leave citizens without a remedy due to misapplication of the rules within a Member State. The Commission could have increased the element of procedural legitimacy by explaining the important role that the European Parliament and Ombudsman could play in auditing the Commission's performance as the guardian of the Treaties. Although the Commission correctly identifies proper enforcement as being essential to the interests of the European citizen, it does not recognise this as an opportunity for the Commission to deliver greater accountability by offering an avenue for citizens to ensure their rights are protected.

It is important to consider the role of the Ombudsman in Article 226 as the interaction between the citizen and Commission is revealed, as well as the function of Article 226 as an administrative and regulatory tool, and its function as a forum of debate, control and accountability. The Ombudsman has attempted to encourage reform of the administrative

phase of Article 226, by investigating specific complaints relating to the administrative organisation of complaint handling by the Commission. This aspect of Article 226 can only be explored through the complaints made to the Ombudsman, and subsequent reports made by the Ombudsman, as the Commission does not release information relating to the administrative function of Article 226. It provides an insight into how control and accountability might be exercised over the Commission's extensive administrative discretion, and to some extent, reveals precisely the reasons such control and accountability are necessary in order to create some procedural legitimacy in the Commission's handling of Article 226.

Despite a commitment to procedural legitimacy in the WPG, the administrative phase of Article 226 has not been a focus of the Commission's policy proposals, even though this is where the majority of Article 226 decision-making takes place. Consideration of the Ombudsman's investigations into citizen complaints about the administration of Article 226 reveals the impact of the Court's case law regarding the position of citizens *vis à vis* Commission discretion. In the lacunae created by a lack of judicial review, inappropriate administrative practices have been allowed to flourish, and it is questionable to what extent the Ombudsman, without powers of coercion or sanction, has been sufficiently able to improve procedures. Appraisal of the Commission's approach to good administration enables a meaningful review of the extent of procedural legitimacy in the Commission's practices in Article 226; procedural legitimacy in the form of good administration dovetails neatly with the Commission's principles of good governance, suggesting that there ought to be little resistance to the standards of behaviour the Ombudsman has tried to introduce. The Commission has accepted in principle a limited number of organisational reforms in the handling of citizen complaints as a result of the Ombudsman's investigations, although the extent to which this has filtered through all of the DGs into a consistent practice is questionable. This can be traced back to the fractured practices across the DGs in relation to handling infringements generally, as a result of internal culture, policy area, organisation and commitment to pursuing infringements in a regimented bureaucratic fashion.

1.2: Re-conceptualising the role of Article 226

There is, at present, a discernable gap between the way in which the Article 226 mechanism is operated and the prevailing agenda of the key policy makers in the EU. It is clear that the traditional conception of Article 226, primarily fulfilling the function of an institutional power base for the Commission, and an arena for secretive deal making with the Member

States, contradicts the pervading agenda of good governance in the EU. The current operation of Article 226 fails to meet the needs of the citizens as evidenced by the consistent complaints to the Ombudsman, nor does it satisfy the needs of the Commission, which finds itself increasingly frustrated by the Member States' ability to delay compliance. Both the Commission and Member States' ambition to popularise the EU, through furtherance of the good governance agenda, is not serviced by this outdated approach. It is possible for Article 226 to become *primarily* a mechanism of accountability, which has the potential to (in part) connect the citizens to the EU, but this possibility is being overshadowed by outdated conceptions of this central mechanism. Notions of legitimacy and good governance need not be contradictory to the operation of Article 226, but fulfilment of the potential of Article 226 requires a major re-conceptualisation of the key role of Article 226 by the main stakeholders who have the ability to change it.

The traditional focus of the Commission has been on achieving enforcement in a close knit diplomatic community, with the primary method of achieving enforcement being that of secretive negotiation. Whilst this was possible in a group of six Member States with relatively few pieces of legislation, it became increasingly unrealistic in a club with 15 Members, and is arguably a total impossibility in an expanded (and expanding) Union of currently 27 members. Nor is this just a question of numbers – of members or legislation – it is also a question of political context. The preservation of the so-called 'special relationship' between the Commission and Member States (the cause and effect of secretive negotiations) can no longer be *the priority* underlining the design, management and operation of Article 226. As the European Parliament has pointed out, this 'special relationship' is at best a one-sided affair that does not significantly benefit the Commission in carrying out its duty as guardian of the Treaties. The Parliament urges the Commission to:

'reassess the cooperation with Member States in light of the fact that most Member States are not willing to do much to improve the implementation of EU law'.⁹

This 'special relationship' is the shield for many practices within Article 226 that are incongruous with the aspirations of good governance and legitimacy. Primarily, this creates a lack of openness or transparency in all aspects of the Commission's enforcement of alleged infringements, from decisions to open a case (or not), all the way to decisions to inflict or

⁹ Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final p 5.

suspend enforcement of a financial sanction in Article 228. The political (collegiate) nature of decision-making in Article 226 reinforces this lack of transparency, further justifying and perpetuating this 'special relationship' founded on secrecy. The refusal to allow access to correspondence between the Commission and Member States is one example of the practices being promoted by this approach to enforcement under Article 226. The European Parliament has repeatedly brought this to the Commission's attention to no avail:

'It is very important that the Commission decides to go public on these issues [infringements], and to accelerate both the checking process and the reaction towards Member States who do not fulfil their obligations...conformity problems are difficult to track, some remain mysteriously hidden in the offices of the Commission before a complaint of a citizen *obliges* the Commission to act.'¹⁰ (my emphasis)

It is not simply a problem of negotiation between the Commission and Member States, but also the form and manner of these negotiations, which render outside scrutiny of Member State compliance difficult to check.

The approach to Article 226 which relies heavily on private negotiation to achieve effective enforcement does possess certain advantages, namely that of flexibility. This flexibility is important in a system of enforcement with limited resources and a degree of information asymmetry, but flexibility need not be sacrificed in a version of Article 226 that is more compatible with good governance and legitimacy.¹¹ There needs to be a balance between the virtues of flexibility, and the negative consequences of private negotiation. In particular, the shield of private negotiation conceals Member State infringements from the actors which might otherwise provide an appropriate check on the discharge of public power, and help to legitimise the operation of Article 226. The Commission has already acknowledged that it is no longer good enough to deliver effective enforcement alone, and that the legitimacy of the EU depends on wider considerations:

'The Union is changing as well. It will no longer be judged on its ability to remove barriers to trade or to complete an internal market; its legitimacy today depends on involvement and participation'.¹²

¹⁰ *Ibid* p 15. The reality is that a complainant cannot oblige the Commission to act at all.

¹¹ Whether the operation of Article 226 is successful in delivering state compliance is not the central concern of this thesis. In fact, the argument is quite the opposite – whether Article 226 delivers effective enforcement is only one facet of the role of Article 226 and should not be focused upon to the exclusion of everything else. Nonetheless, it would be inaccurate to give the impression that Article 226 was an absolute failure. In terms of achieving some compliance, notably in relation to specific technocratic methods of enforcement, particularly the transposition of directives, the Commission has achieved high levels of success. However, this does not reflect the compliance rate of all EU norms throughout the Union. Given the problems highlighted in this thesis, it is to some extent a mystery as to how the EU manages to achieve any compliance at all.

¹² Above n 9 p 11.

There is arguably no idealised solution which will manage to retain all of the virtues of the historical operation of Article 226, as well as being consistent with notions of legitimacy and good governance in the EU. However, reform of Article 226 should not be couched in terms of sacrificing one function for another, say, effective enforcement for accountability. It need not be a choice between effective enforcement and good governance. Rather, it is a choice between preserving the fictional ‘special relationship’ inherent in enforcement via a *method* of negotiation, and a *method* of effective enforcement that is consonant with the principles of legitimacy and good governance. If something has to give in the design, management and operation of Article 226, arguably it should not be those aspects of it that contribute to the legitimacy and good governance of the Union. Is it not better to sacrifice the mirage of a ‘close’ or ‘special relationship’ between the Commission and Member States? The key tension in the current operation of Article 226, is that it is split between being a legal *and* political mechanism of enforcement, but does not possess the requisite controls either a political or legal mechanism demands in order to be compatible with good governance and legitimacy. This has been summed up by the Parliament thus:

‘If it is decided in the Community legal order that Article 226 is essentially a political procedure – granting powers but not legal obligations to the Commission – then political control over the guardian of the Treaties on behalf of EU citizens should be exercised by the Parliament. Discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law.’¹³

There are two possible solutions to enable the operation of Article 226 to better conform to the standards of good governance and legitimacy. First, there is the method of transforming Article 226 through law into a mechanism that embraces administrative protections and controls on the exercise of public power. This would allow the complainant to protect basic administrative rights, and by doing so, help to transform the way in which the Commission conducts itself in relation to investigating and prosecuting suspected infringements. Second, there is the pathway of good governance itself. By actually (rather than nominally) embracing the principles of good governance set by the Commission into the design, management and operation of Article 226 policy, Article 226 could be transformed into a more legitimate mechanism of enforcement in the EU. This revitalised enforcement mechanism would be one that would be more effective, more efficient and more participatory in nature. It would accommodate other institutional actors into the process of

¹³ Above n 9 p 17.

enforcement, and by doing so, create greater accountability of the Commission. This need not be an either/or solution. In fact, only a mixture of both of these approaches will be enough to inculcate the standards of legitimacy and good governance that are appropriate to a Union with constitutional pretensions.

1.3: Plugging the supervisory/accountability gap through law

The rule of law is considered a necessary and vital element of good governance and a prerequisite to any claims of legitimacy in the EU, and thus the legal regulation of Article 226 could and ought to be improved. There are several areas that might be tackled in order to plug the supervisory or accountability gap that currently exists in relation to the use of public power, identified and discussed in Chapter II, by placing further legal constraints on the operation of Article 226. These could be achieved without the necessity for amendment of Article 226 itself, which seems an unlikely avenue of reform given the Member States' opposition. The main two deficiencies in Article 226 which ought to be tackled by legal regulation are the creation of individual administrative rights for those who act as complainant to the Commission, and transparency in relation to access to Commission documentation on the administrative phase of Article 226. Self-regulation, i.e. promotion of good practice by the Commission, and latterly by the Ombudsman, has been insufficient in these two areas, and consequently outside controls on the Article 226 process have been underdeveloped.

The individual as guardian

Placing constraints on the discharge of public power under Article 226 could be achieved in two ways. The emphasis could be placed on court developed principles relating to the administrative phase of Article 226 such as those of good administration, diligent complaint handling, and 'natural justice' rights being adopted as the appropriate standard of conduct by the Commission under Article 226 in respect of those individuals who complain to the Commission regarding a suspected infringement. However, as Chapter II has highlighted, the courts have already had various opportunities to bring in the complainant, but have refused to do so. The Charter of Fundamental Rights might eventually provide some impetus in respect of encouraging the Court to be more proactive in this regard, although it seems unlikely that Article 226 will be an area of law in the vanguard of individuals' rights extension.

Alternatively, the Commission itself could transform the present 'soft law' instruments, such as the codicil on handling complaints, into legally binding administrative rights for the

complainant.¹⁴ This does not compromise the Commission's exclusive power to prosecute (or not) Member States, or impose higher standards upon the Commission to which it has not already consented. As Chapter VI has highlighted, there are further improvements that could be made to the codicil which do not dilute the Commission's exclusive prerogative. Rather, they simply provide a more citizen-friendly approach to citizen-institution interaction. Making the codicil legally binding merely provides a form of redress for citizens that the Commission would be forced to take seriously. The European Parliament notes that:

'there is nothing in the Treaty or the case law of the Court of Justice to prevent the use of appropriate legislative instruments in order to give further rights to complainants...[the EP] is convinced that this important and exclusive prerogative should correspond to a duty of transparency and accountability as to why decisions are taken, notably not to pursue complaints.'¹⁵

The Commission is already forced to comply with many of the standards of conduct recommended by the Parliament and the Ombudsman in relation to complainants under other Treaty articles, so it would just be a re-alignment of practice rather than creating an extra burden on the Commission.

The individual does not have to be made a party to the proceedings under Article 226 in order to act as an appropriate check on the discharge of institutional power. As the Commission often reminds us, Article 226 is not a form of individual legal redress in the Treaties. Nor does it need to be. A balance must be struck between the concretisation of very basic administrative rights in the investigation and complaint handling stages of Article 226, and over juridification of the entire Article 226 process. This is the reason that legal regulation of Article 226 should be restricted to the protection of basic administrative rights, rather than secondary legislation to regulate the entire administrative process of Article 226. This has the advantage of retaining some necessary flexibility in the administration of Article 226, whilst simultaneously compelling the Commission to abide by some very basic, service-minded, standard of conduct with complainants, like the provision of reasons for decisions.

When secondary legislation is mooted in relation to Article 226, the subject of time-limits is often used as an example of an area ripe for regulation.¹⁶ However, making strict time limits legally binding would probably be both undesirable and unworkable in practice, particularly because of the information asymmetry inherent in Commission supervision of Member State

¹⁴ Commission Communication on Relations with the Complainant in Respect of Infringements of Community Law' COM (2002) 141.

¹⁵ Above n 9 p 7.

¹⁶ R Mastroianni, 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?' (1995) 1 *European Public Law* 535.

obligations. Although there have been calls from the European Parliament to introduce rigid timescales into the administrative phase of Article 226, this apparent solution to lengthy delays in the Article 226 process fails to address the underlying issues that contribute to the average time scale of 54 months from complaint to referral.¹⁷ If the internal decision-making processes were different, and the motivation behind extensive time delays were tackled by other methods, timescales would be reduced as an inevitable consequence without the need to sacrifice the element of flexibility that would occur from the introduction of legally binding time-limits.¹⁸

Transparency

The lack of transparency in Article 226 is a matter of both good governance and legal regulation. The problem with transparency from a legal perspective, i.e. the inability of any interested party to obtain any documentation in relation to Article 226 files, is a direct result of the legislation on transparency containing an opt out clause for ‘prejudicial’ documents, which might ultimately be used in an action by the Commission against the Member States. This current situation only assists the Member States in avoidance of their obligations and is a barrier to the Commission’s agenda of ‘decentralising’ monitoring of the Member States to the citizens in order to make monitoring more effective and efficient. Furthermore:

‘the official reason for this [secrecy] is that the infringement procedure is prejudicial...and therefore should be covered by certain confidentiality. This is not a sustainable situation...We know that this is a controversial issue and it is possible that Council will never accept any transparency in this matter...But there are a lot of ‘middle way’ measures that could be envisaged.’¹⁹

It is interesting that Parliament appears to identify the lack of progress in this area not as a fault of the Commission but rather on the part of the Member States which appear resistant to claims for greater transparency under Article 226. In any case, there is nothing to prevent the Commission from providing Parliament with all the information it requires on a particular case. The Ombudsman can already inspect the Commission’s files so it seems inconsistent that Parliament cannot access the information it requires through the Petitions Committee.

¹⁷ Above n 9.

¹⁸ For example, it is clear when the Commission does not indulge/negotiate with Member States *ad infinitum* in order to bring them into line, the Article 226 process can be a fairly swift mechanism of enforcement. This depends on the political will to prosecute the Member State, rather than some inherent slow process due to a lack of rigid timescales.

¹⁹ Above n 9 p 19.

This is one particular area where an improvement in Article 226 will only come from an amendment of the legislation as a consequence of pressure from Parliament. It seems unlikely that the ECJ will simply abandon the long established case law on its own initiative. The Commission has more to gain than it has to lose in this regard – greater access to documentation will allow individuals to bring Member States to court in lieu of the Commission, easing the burden on scarce Commission resources and making enforcement more efficient and effective. Cases that have been investigated by the Commission, but where the Commission has concluded there is no infringement, should no longer be considered prejudicial and information ought to be released about these infringements to anyone who requests access to the information. This would allow Parliament, interest groups and individuals the opportunity to pursue Member States through national courts where possible, armed with all available and necessary information.

1 4: Focusing on change through good governance

The main functions of Article 226 fit comfortably with an agenda of good governance and improving the legitimacy of the EU. The emphasis on effective enforcement need not be sacrificed in light of the other functions of control and accountability, debate, regulatory tool and executive policy choice, but neither can the need for effective enforcement be seen as the monolithic element of Article 226. A general lack of procedural legitimacy, combined with an over-reliance on improvement through technocratic initiatives, has undermined the Commission's attempt to correlate Article 226 with its good governance agenda. Embracing change through good governance has the advantage of avoiding over-juridification, but improving Article 226 through good governance will only work if such a strategy is properly utilised in specific areas. Good governance is not an appropriate solution for individual administrative rights or access to documents for instance, but *is* appropriate in formulating policy standards, better reporting, improving internal procedures and inter-institutional cooperation.

Effective enforcement and technocratic solutions

The Commission was clear in the WPG that a key area of the good governance agenda was maximising its activities as guardian of the Treaties. Achieving effective – in the Commission's terms more 'efficient' – enforcement was a key goal. At the same time, the practice of the Commission has been somewhat remiss in several key areas under its own good governance standards. Enabling Member States to avoid paying the fines imposed on them by the Court of Justice under Article 228 for example, even though the infringement

had not yet been remedied, is not necessarily the best way to promote the concept of effective enforcement of obligations.²⁰

The reliance on negotiation by the Commission as the method to achieve effective and efficient compliance has been counterproductive. Although this has been, and continues to be, a relevant strategy in the initial stages of an Article 226 investigation in order to bring Member States *quickly* into line with Community obligations, it ceases to be an effective strategy when allowed to continue for a lengthy period of time, or if it involves some element of dilution of the Member States' obligations in order to achieve a half-baked solution. If the rationale behind negotiation is that this method of compliance is quicker than a full court case to the ECJ, than it should not be allowed to continue long after a full court case would have been heard and decided. Particularly if the Commission speeded up its own internal decision-making procedures, many cases would be heard before the ECJ far more quickly than the average time of 54 months.²¹ It seems clear that it is possible for the Commission to reach the referral stage within five weeks, even within the current cumbersome decision-making structure, if the political will exists.²²

Over-emphasising the use of technocratic initiatives to enhance the Commission's ability to monitor the Member States has resulted in exceptional compliance rates in one specific area of Community law (notification of transposition), and a less convincing approach in relation to 'visible' infractions – i.e. those infractions that directly affect citizens and result in complaints to the Commission. These 'misapplication' infractions can never be solved by technocratic initiatives by their very nature – the legislation may have been transposed on time (notification achieved), correctly transposed on paper (concordance table checked), but is nonetheless being implemented in the Member State in an incorrect manner. This still requires a complaint to bring the Commission's attention to it and an investigation to be undertaken. It is in these very instances that the Commission should now focus its 'efficiency' agenda, rather than on further designing or improving upon technocratic solutions. This requires the Commission to address those processes that contribute to inefficient and ineffective enforcement of these types of infringements – such as methods of investigation and information procurement, interaction with complainants and internal decision-making procedures.

²⁰ Case C-278/01 *Commission v Spain* [2003] ECR I-14141 commented upon by the European Parliament, above n 9.

²¹ Above n 9 from initial complaint to referral of ECJ (not conclusion of case).

²² See discussion in Chapter V.

Internal procedures

There are various problems with the current internal procedures of the Commission. The split between the political/administrative elements of the Commission both delays and potentially undermines the legitimacy of Article 226 as an enforcement mechanism. This reflects the key tension of whether Article 226 is a political or legal/administrative mechanism – it cannot function effectively as a mixture of both. Essentially, it currently operates as a political process masquerading as a legal mechanism which is contradictory to the good governance agenda. It is a matter of legal interpretation as to whether one Member State might not be fulfilling its obligations under the Treaties, and although there might feasibly be many different legal interpretations of a situation, this is not the reason why certain cases do not progress beyond the political debates of the College of Commissioners. On the contrary, this is affected by more nebulous issues such as political bartering between the Commissioners and the balance of power between the individual Commissioners and the Member States. It is also affected by judgments as to whether prosecution is ultimately worth the effort. The Commission engages in a cost benefit analysis, calculated on the basis of economic or political gains. The good governance agenda demands a different approach:

‘[The EP] calls on the Commission to place the rule of law and citizens’ experience above purely economic criteria and evaluations’.²³

Especially after enlargement, this approach of political bartering risks creating an uneven, two tier system of enforcement, with more experienced campaigners evading prosecution whilst new Member States are subjected to closer scrutiny.

In organisational terms, it would be better if the entire legal case were left at the administrative level of the DGs, with the necessary input from the Legal Service, insulating decisions on whether or not to prosecute Member States from individual Commissioners. This approach would not entirely insulate the enforcement process from politics, but it would at least be a more efficient and less political decision-making process. The Parliament suggests an alternative approach, whereby Commissioners would be individually rather than collectively responsible for authorising the early decisions in the Article 226 process.²⁴

Policy

The policy on enforcement rightly belongs at the level of the College of Commissioners. This could be better managed from a technocratic point of view in two ways. One way to introduce more accountability into the Article 226 mechanism would be to create a portfolio

²³ Above n 9 p 5.

²⁴ Above n 9 p 20.

specifically for enforcement across the Community. This would have the advantage of a specific individual responsible for both the policy, and perhaps the practicalities, of carrying out the enforcement policy. It would create a visible nexus point between the administration of enforcement and the College of Commissioners, without all minor decisions relating to enforcement having to be authorised by the entire Commission. It would create transparency both internally and externally, and creating a specific point of responsibility would enable the institutions to interact in a more efficient and effective manner. Particularly with regard to Parliament monitoring the Commission's activities and the compliance of the Member States, this would enable more proactive inter-institutional cooperation.

Another improvement to the policy on enforcement would be for the Commission to resist the temptation to attempt to explain the enforcement policy as if it were coherent and uniform. The policy would be more transparent, and better reflect the actual practice of the DGs, if the Commission were to simply acknowledge that the different policy sectors required different approaches to enforcement altogether. What is necessary in terms of resources, complaint handling, time-scales and strategy for prosecuting an infringement may differ between say, DG Environment and DG Fisheries. Each DG could produce their individual policy statements in the Annual Monitoring Reports. Perpetuating the current illusion of 'one size fits all' undermines any commitment to transparency. The advantage of reflecting the actual practice of the DGs is that it would enable a proper evaluation of the Commission's stated policy against its actual practice. Full disclosure of all enforcement information is already required by each DG (for the Secretariat General), so it would not be an additional or onerous administrative burden to produce the Annual Reports in this way.

The production of the priority criteria has not really helped shed any light on the construction or application of the Commission's policy on enforcement. In fact, the European Parliament is concerned that the Commission has taken this opportunity to somehow dilute its enforcement responsibilities under Article 226 to only those infringements that 'breach fundamental principles of EU law'. This is clearly not the limit of the remit of Article 226 according to the Treaties,²⁵ and it is important that any future clarification of policy does not replicate this approach. This interpretation of the role of Article 226 reduces the breadth and depth of what the Commission could deliver and in particular, Parliament is concerned that

²⁵ Above n 9 p 17.

the definition of priorities should not be used as an excuse for non-prosecution, and thereby lead to 'a decreased response to citizens' concerns'.²⁶

Transparency and accountability

Greater transparency regarding Article 226 is the gateway to greater accountability within the process. It is also a key factor of either legal or political legitimacy being introduced into the enforcement of Member States obligations. The European Parliament has the task of guarding the guardians, but it neither has the requisite powers nor information to really meet this responsibility. Nowhere is this more apparent than in the Parliament's own report into the Commission's activities as guardian of the Treaties. The Commission refused to supply Parliament with information relating to how much of the Commission's budget was allocated to its enforcement duties – a fairly basic organisational fact that Parliament ought to have access to.²⁷ The Commission also refused to divulge to Parliament what its internal procedures were in relation to how Commission officials dealt with infringement cases. It is difficult to comprehend how Parliament can really begin to evaluate the Commission's performance, when it cannot get access to basic organisational information such as how Commission officials administrate Article 226, and what resources it has available to perform its duties under the Treaties. If it decided that Article 226 is essentially a political process, it seems essential that the Community's political body is able to properly regulate the Commission's handling of its enforcement responsibilities.

The agenda of 'simplification' in the Laeken Declaration has to some extent influenced the Commission's reporting of its monitoring activities. This has resulted in less detailed (and less readily available) Annual Monitoring Reports. The more simplified the reports become, inevitably, the less accurate a picture is presented, making the task of evaluating the Commission's performance of its guardian duty all the more difficult. Despite the fact that the Secretariat General is responsible for overall coordination of the Annual Reports, promises to review the application of the priority criteria were not followed up in the latest report. This lack of consistency has increased due to the effects of enlargement, as data has been collated separately for the 'old 15' and the new Member States, making it difficult to assess or critique any 'overall' picture of the state of compliance across the Union. This additional data collection and handling has also caused significant delays in production, with the 2004 Annual Report not being produced until January 2006. The development time between reporting to Parliament, and actual monitoring activities, further reduces

²⁶ Above n 9 p 5.

²⁷ Above n 9 p 20.

transparency, the accountability of the Commission, and the accountability of the Member States.

Resources

The approach of 'less is more' was part and parcel of the WPG and the Laeken Declaration, with the emphasis being placed on less legislation being produced as a trade off for better quality and more relevant initiatives, and as a result a more effective deployment of resources. The Commission has chosen not to dwell on this aspect of its overall good governance strategy in its policy paper on Article 226, although there is clearly a significant connection. The connection is rightly made by the European Parliament in its report on the Commission's activities as guardian of the Treaties. Better quality (and less) legislation is meaningless unless it is to be backed up by a rigorous approach to enforcement. More effective enforcement should be seen as integral to the 'less is more' agenda, rather than being viewed as an inevitable consequence of better regulation.

Enlargement of the EU has brought about both practical and philosophical challenges to enforcement under Article 226. The current situation is that Commission departments are understaffed in relation to language capabilities for monitoring new Member States which is unsustainable and may lead to a two tier system of enforcement in the near future.²⁸

Although resource management in relation to enforcement is a sensitive issue, Parliament has pointed out that those staff previously dedicated to drafting can now be redeployed to concentrate on enforcement, but each DG needs to be assessed on its own merit. The uncomfortable reality is that in many DGs the staff responsible for drafting new legislation were already dedicated to the task of enforcement, and thus, this suggestion does not create a wealth of unused resources.²⁹ Targeting 'exposed Directorates' for greater resource allocation, like those of Environment or Internal Market, would be a sensible way to bring about effective enforcement at the administrative level.³⁰ However, this strategy would require a rigorous registration of all complaints and potential infringements in order to calculate which Directorates are truly 'exposed', as opposed to those which are currently the best internally structured to deal with infringements, and thereby generate the greatest figures in the Annual Reports. It would require key information about internal resource

²⁸ Above n 9 p 20 comments on the fact that it is difficult to understand why DG Environment has only two new members of staff for ten new Member States.

²⁹ Interview, Commission Official A (25 October 2005). It may also be possible to redeploy staff dedicated to pre-accession monitoring and compliance to the individual DGs.

³⁰ Exposed Directorates meaning those that deal with the highest number of complaints and infringements.

allocation for infringements to be made available. This might make interesting reading for the Member States, as it would become apparent just how much of valuable EU resources was being utilised to ensure they complied with obligations they had already consented to.

1.5: The potential for a mechanism of multi-faceted accountability

The lack of traditional input legitimacy in the EU has given rise to concerns about how the EU might become more legitimate, more popular and more closely connected to the citizens of Europe.³¹ The good governance agenda was in part conceived by the Commission as a workable solution to the challenge of increasing legitimacy in the EU, and in particular, as a way to bring citizens closer to the activities of the Community. In its proposals on good governance, the Commission chose to concentrate on generating support for policy delivery through what amounted to a combination of procedural and technocratic legitimacy. This approach nominally encompassed the principle of accountability. However, in the detailed explanation as to how the Article 226 policy was to be designed and managed in the light of good governance, there was little suggestion as to how the Commission intended to inculcate greater accountability into the operation of Article 226. This is particularly surprising because Article 226 is, at its core, a mechanism of accountability designed to bring Member States into line with their legal obligations.

There is no doubt that significant steps must be taken in order for Article 226 to be considered a mechanism of enforcement that is consonant with the wider policy ambitions of good governance and legitimacy in the EU. Nonetheless, Article 226 has great potential not only to meet the minimum standards described above, but also to become a mechanism of genuine multi-faceted accountability in the EU. Within Article 226, there is the scope to deliver much more than is currently conceived of by the institutions/actors that operate it. The traditional accountability of the Member States to the Commission is not the only type of accountability in Article 226. There is also the potential for some real accountability of the Commission to the Parliament, and of the Commission to the citizen via the interaction with the Ombudsman. There is also the accountability of the Member State to the citizen via the Commission under Article 226. These other faces of accountability within Article 226 have not been explored to their full potential, and particularly within the terms of reference of good governance and legitimacy in the EU, these facets of accountability have much to offer.

³¹ Whether this is to be achieved by conceiving of different standard of legitimacy derived from 'post-national democracy' increasing the development of the popular pillar, or asking the citizens what the EU can do for its citizens is a subject of some debate, see discussion of these issues in Chapter III.

Member State to Commission

This traditional face of Article 226 accountability is the main focus of the Commission in relation to the documentation and policy statements produced by it in terms of the good governance agenda. The emphasis on negotiation ought to be replaced with a more disciplined and automatic approach to enforcement. The 'special relationship' should be sacrificed in order to arrive at swifter enforcement decisions. A more proactive use of Article 228 needs to be accepted as the operating norm, rather than the exception. This has even been (to a limited degree) a strategy that is accepted by the Member States, as evidenced by the further amendment of Article 228 in the Constitutional Treaty. The Commission ought to jettison the 'tolerance' of Member State infractions since:

'many cases of incorrect implementation...reflect Member States' deliberate attempts to undermine Community legislation for political, administrative and economic reasons; in this connection [the EP] notes that the Commission is in the habit of accepting late intervention by the Member States in order to close infringement proceedings; calls on the Commission to ask Member States to guarantee retroactive application of Community provisions which have been infringed...with immediate recourse to Article 228 in event of persistent failure to comply.'³²

Commission to Parliament

The accountability of the Commission to the Parliament is critical to the legitimisation of discharge of public power by the Commission under Article 226, whether or not Article 226 is conceived of as either a legal or political mechanism of enforcement. Although the system of Commission reporting to the Parliament has been in place since the early 1980s, it has not been fully utilised by the Parliament in terms of delivering accountability. Although Parliament reports on the Commission's monitoring activities, meaningful assessment is blighted by a combination of information asymmetry and an inability to sanction or compel the Commission to make changes to its administrative activities or its reporting system. It can only repeatedly request changes, but the Commission is under no obligation to act on these requests.

Parliament has several suggestions as to how the institutions might improve the operation of Article 226, including a more integrated approach to the monitoring of Member State compliance across the institutions of the EU, rather than it being viewed as an exclusive activity of the Commission. One of the most useful is the suggestion that Parliament should be able to initiate Article 226 prosecutions where the Commission refuses to act. Although it is difficult to imagine how Parliament could do this without an alteration of the Treaties, the

³² Above n 9.

fact that this is being contemplated at all is an indication that the Commission's previous practices are no longer to be tolerated. It is clear from the tone of the Report, that Parliament feels that if there is to be less legislation initiated by the Commission (thereby reducing the input of Parliament into the political process of the Union), Parliament must shift its attention and resources to implementation control.³³ In particular, the Petitions Committee states that it has a legitimate role in prosecuting Member States for those infringements which come to light on the basis of a petition to the Parliament, if the Commission refuses to prosecute the Member State.

Allowing Parliament the right to prosecute breaches based on a petition would accomplish numerous objectives. It would reduce the amount of influence wielded by individual Commissioners in the decision taking process in the administrative phase of Article 226. It would also provide another opportunity for citizens seeking redress for breach of their European rights, without requiring special standing rights for individual complainants. Again, this undermines the Commission's 'special relationship' with the Member States, but perhaps this is a price worth paying. If the Parliament is to guard the guardians, should there not be some palpable redress if Parliament feels the Commission is not performing its duty as guardian of the Treaties? This is especially so since according to the Commission:

'Ultimately this [compliance] concerns the citizens themselves. Through information, participation and access to justice they are to be the actors of a Community based on the rule of law.'³⁴

An example of the type of case Parliament is referring to is that of the Equitable Life pensions complaints, where the Parliament was petitioned by numerous UK citizens because they were unable to find redress for a failure of the UK to fulfil its obligations, specifically to implement a particular directive. The Parliament took the case to the Commission, who refused to prosecute the UK government on the basis that the breach took place in the past. The UK had since implemented the directive, but without retroactive application and therefore without any benefit for the numerous complainants. Prosecuting past infringements is possible under the case law of the ECJ and so the Commission was not barred from initiating Article 226 proceedings, rather it lacked the will to do so. Parliament attempted to persuade the Commission to redress the situation, but was unsuccessful. The Report notes that Parliament:

³³ Above n 9 p 7.

³⁴ Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4. 16.5.2003, p 21.

‘Deplores the Commission’s unwillingness to investigate alleged violations of Community law that lie in the past and have since been remedied such as those raised in the Equitable Life and Lloyds of London petitions; urges the Commission to investigate such cases when the alleged failures are said to have caused significant damage to individuals, since the outcome of such investigations could be immensely helpful to citizens in obtaining compensation through appropriate legal channels’.³⁵

Commission to citizen via the Ombudsman

The value of the Ombudsman’s intervention in the administration of Article 226 is that it has uncovered dubious practices in individual cases. However, the inability to translate the reforms agreed with the Commission into actual practice is unsatisfactory for citizens. The kind of self-regulation encouraged by the Ombudsman has proved an inadequate method of ensuring consistent treatment of complainants across the DGs and standards of administrative interaction between the citizen and institution remain less than ideal.³⁶

The process of encouraging reform in the Commission’s administration is best achieved through the institution of the Ombudsman in two ways. First, by encouraging and campaigning for wholesale administrative reform across the Union the Ombudsman might achieve reform in the administration of Article 226 by a process of ‘filtration’. Secondly, the Ombudsman could concentrate on targeting the many administrative processes that could, and should be, standard practice in the case of any interaction between the Commission and citizens. Crucially, it is not yet necessary to stray into the arena of human rights. This undermines the importance of having good procedures in place as standard practice, because these good procedures uphold the principles of the rule of law and legitimacy within a system of rule. Reform of Article 226 is not, and should not, be focused on individual grievance satisfaction by using the ‘human rights card’ as the ultimate trump. Reform of the administrative phase of Article 226 should not be a process that is reliant on the concretisation of rights found in the Charter. This somehow belittles the importance of having good administrative procedures for its own sake. It is not necessary, nor is it desirable, to make good administrative practices dependent on proving a breach of a fundamental rights, in order for the necessity of such practices to be recognised as crucial to the legitimisation of a system of governance.

³⁵ Above n 9 p 9.

³⁶ The Parliament notes in its report that the Ombudsman is, once again, looking into allegations that the Commission is not even registering complaints as standard practice.

A general point of contention in terms of the accountability of the Commission to the citizen via the Ombudsman is the Ombudsman's inability to change the obligation of Commission officials to be able to independently answer the Ombudsman's questions. Whilst there might be genuine reasons why the Commission cannot release information regarding Article 226 cases as a general rule, it seems hard to defend this attitude to the Ombudsman – after all, he is already allowed to see the Commission's file (where others are prevented). This needs to be addressed as a matter of urgency, particularly because the Ombudsman represents the only 'outside' regulation of the Commission's administration of Article 226 at present.

Member State to citizen

Increasing legitimacy, in terms of the popularisation of the EU project is connected to what the EU can deliver to citizens, in terms of benefits and rights protection.³⁷ Article 226 represents a rare opportunity for the institutions of the EU to connect directly with the citizens of the EU. There are few opportunities where an EU institution can be seen as providing a direct service to the citizen, and so it is vital that this opportunity to interact is not wasted by the Commission. Delivering rights and ensuring citizens can access the benefits that the EU promotes is a concrete and fundamental way to increase the popularity of the EU project, particularly where it is the citizens' own Member State that prevents these benefits from becoming a reality:

'in a moment of serious doubt about the capability of the EU to listen to its citizens, the ability to ensure the implementation of...legislation, could represent a way to regain citizens' confidence that should be given the upmost priority by EU institutions.'³⁸

Article 226 provides the opportunity for citizens to be able to ensure their own Member States are being held to account when they fail to deliver on EU obligations. Although referral to the ECJ may not always be the appropriate method to ensure compliance is quickly obtained, it does have other benefits. Citizens are able to directly invoke their rights in a national court once a judgment of the ECJ has been delivered on an infringement, even if the Member State has not yet taken the steps to remedy the breach. It also assists citizens in obtaining compensation for breach of their rights in the national courts.³⁹

³⁷ See the discussion of Schmitter in this regard discussed in Chapter III.

³⁸ Above n 9 p 15.

³⁹ Certain parallels might be drawn here with the European Court of Human Rights. An ability to hold the Member State accountable to an outside body reinforces and ensures the delivery of benefits to the applicants.

This is a missed opportunity from the Commission's perspective. The Commission ought to concentrate more on cultivating a 'special relationship' with the citizen, who is the beneficiary of compliance, rather than the Member State, who is subject to it. If the lack of co-operation of Member States is really the only bar to more effective compliance (as the Commission's Communication suggested), perhaps increasing the use of actions based on non-cooperation is not the most effective solution. Decentralising the process, by allowing greater access to information, will enable greater citizen participation in Article 226. This is resource efficient and reduces the reliance on the accuracy (and rate of) the Member State's information provision. This approach to selecting Article 226 cases requires the Commission to prioritise repeated violations of legislation that have generated significant citizen complaint (for instance, the application of the Environmental Impact Assessment). This approach requires a conceptualisation of Article 226 as part of an entire package of 'access to justice' measures. It would be particularly effective if Article 226 actions could be launched in instances where there is no other remedy available for the citizen in the national system, either through no direct effect or a lack of standing.

When Article 226 is evaluated in the light of the contemporary political and legal context of the EU, it seems clear that there is a significant gap between the way in which the enforcement mechanism is regulated and operated by the main actors, and the ambition of delivering good governance and legitimacy in EU policy making. Isolating discussion of Article 226 from the contemporary legal and political context, by academics and institutional actors alike, necessarily narrows the expectations of what the enforcement mechanism might be capable of delivering. To do so reduces the impact, utility and legitimacy of one of the most important mechanisms of accountability in the EU.

There continues to be a need to ensure the conceptualisation of the role of Article 226 accurately reflects the changing political context of the Union. Not only is this mechanism central to the constitutional architecture of the EU, but it also presents a vital avenue through which the Union can be seen to be delivering rights directly to its citizens in the face of Member State non-compliance. This necessity for relevance does not begin and end with the consideration of Article 226 in light of policy initiatives such as good governance. The next challenge in relation to enforcement under Article 226 is how the current practices and policies of the main stakeholders in Article 226 can be adapted in order to accommodate the enormous challenge presented by enlargement of the Union from 15 to 27 Member States. The policy and practices relating to enforcement must not only accommodate the

philosophical challenges imposed by changing political environment, but the practical difficulties attached to enforcing compliance on the part of 12 additional Member States with very different legal, administrative and linguistic environments. Although the 'good governance' proposals on Article 226 were linked to the 'greater good' of enlargement in order to generate political support, there were no concrete proposals as to how the present political/legal approach to Article 226 can continue in the face of the inevitable increase in infractions that will occur across an expanded Union. This is a subject that requires further investigation by the stakeholders in Article 226 and academic commentators alike.

Bibliography

K Armstrong, 'Citizenship of the Union? Lessons from Carvel and the Guardian' (1996) 59 *Modern Law Review* 582.

A Arnall, *The European Union and its Court of Justice* (2nd Edition, Oxford University Press, Oxford, 2006).

A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, Oxford, 2002).

S Arnstein, 'A Ladder of Participation' (1969) *Journal of the American Institute of Planners* 216.

HAH Audretsch, *Supervision in European Community Law* (2nd Edition, Elsevier, North Holland, 1986).

G Azzi, 'The Slow March of European Legislation: The Implementation of Directives' in K Neunreither and A Wiener (eds), *European Integration after Amsterdam* (Oxford University Press, Oxford, 2000).

A Barav, 'Failure of Member States to Fulfil their Obligations under Community Law' (1975) *Common Market Law Review* 369.

MW Bauer, 'The EU Partnership Principle: Still a Sustainable Governance Device across Multiple Administrative Arenas?' (2002) 80 *Public Administration* 769.

D Beetham and C Lord, *Legitimacy and the European Union* (Longman, London, 1998).

J Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe' in J Beatson, and T Tridimas (eds), *New Directions in European Public Law* (Hart Publishing, Oxford, 1998).

F Bignami, 'Three Generations of Participation Rights in European Administrative Proceedings' Jean Monnet Working Paper 11/03,
<http://www.jeanmonnetprogram.org/papers/index.html>.

A Biondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press, Oxford, 2004).

P Birkinshaw, *European Public Law* (Butterworths, London, 2003).

PG Bonner, 'The European Ombudsman: a novel source of soft law in the European Union' (2000) 25 *European Law Review* 39.

A Bonnie, 'Commission Discretion under Article 171(2) EC' (1998) 23 *European Law Review* 537.

A Bonnie, 'The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States?' (2006) 1 *Journal of Contemporary European Research* 39.

TA Börzel, 'Non-Compliance in the European Union: pathology or statistical artefact?' (2001) 8 *Journal of European Public Policy* 803.

TA Börzel, T Hofmann and C Sprungk 'Why Do States not Obey the Law? Lessons from the European Union?' (EUSA Conference, Nashville, 2003).

- AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th Edition, Pearson Longman, Harlow, 2006).
- P Cane, *Administrative Law* (4th Edition, Oxford University Press, Oxford, 2004).
- C Carter and A Scott, 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union' (1998) 4 *European Law Journal* 429.
- D Chalmers, *et al European Union Law* (Cambridge University Press, Cambridge, 2006).
- E Chiti, 'The emergence of a Community administration: the case of European agencies' (2000) 37 *Common Market Law Review* 309.
- T Christiansen, 'Tensions of European governance: politicised bureaucracy and multiple accountability in the European Commission' (1997) 4 *Journal of European Public Policy* 73.
- M Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime' (2001) 8 *Journal of European Public Policy* 192.
- M Cini, *The European Commission: leadership, organisation and culture in the EU administration* (Manchester University Press, Manchester, 1996).
- P Craig, 'Standing, Rights, and the Structure of Legal Argument' (2003) 9 *European Public Law* 493.
- P Craig, 'The Constitutionalisation of Community Administration' Jean Monnet Working Paper 3/03, <http://www.jeanmonnetprogram.org/papers/index.html>.
- P Craig, *Administrative Law* (5th Edition, Sweet & Maxwell, London, 2003).
- P Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation' (2000) 6 *European Law Journal* 98.
- P Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' [1997] *Public Law* 467.
- P Craig and G De Búrca, *EU Law Text Cases and Materials* (3rd Edition, Oxford University Press, Oxford, 2003).
- L Cram, 'Whither the Commission? Reform, renewal and the issue-attention cycle' (2001) 8 *Journal of European Public Policy* 770.
- D Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?' (2000) 37 *Common Market Law Review* 7.
- D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 17.
- A Dashwood and R White, 'Enforcement Actions under Articles 169 and 170 EEC' (1989) 14 *European Law Review* 388.
- KC Davis, *Discretionary Justice in Europe and America* (University of Illinois Press, Chicago, 1976).
- RW Davis 'Citizenship of the Union...rights for all?' (2002) 27 *European Law Review* 121.
- G De Burca and Weiler JHH (eds), *The European Court of Justice* (Oxford University Press, Oxford, 2001).
- R Dehousse, 'Misfits: EU law and the Transformation of European governance' in C Joerges

and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, Oxford, 2002).

O De Schutter, 'Europe in Search of its Civil Society' (2002) 8 *European Law Journal* 198.

B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing, Oxford, 2002).

P Dunleavy and B O'Leary, *Theories of the State: The Politics of Liberal Democracy* (Macmillan, Basingstoke, 1987).

CD Ehlermann, 'Opening Speech at the IVth Erenstein Colloquium', in H Siedentopf and J Ziller (eds), *Making European Policies Work. The Implementing of Community Legislation in the Member States Volume I, Comparative Synthesis* (Sage, London, 1988).

EO Erikson, 'Democratic or technocratic governance?' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01.

AC Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' (1979) *European Law Review* 442.

U Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 *European Law Review* 215.

M Everson, 'Administering Europe' (1998) 36 *Journal of Common Market Studies* 195.

M Everson, 'The Legacy of the Market Citizen' in J Shaw and G Moore (eds), *New Legal Dynamics of the European Union* (Oxford University Press, Oxford, 1995).

L Flynn, 'Remedies in the European Court' in A Biondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press, Oxford, 2004).

AJ Gil Ibáñez, 'Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States' (2000) 6 *European Law Journal* 148.

AJ Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law. Powers Procedures and Limits* (Hart Publishing, Oxford, 1999).

MP Granger, 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo Quéré et Cie SA v Commission and P Unión de Pequeños Agricultores v Council*' (2003) 66 *Modern Law Review* 124.

EB Haas, *Beyond the Nation State* (Stanford University Press, CA, 1964).

U Haltern, 'Pathos and Patina: the Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal* 14.

I Harden, 'Citizenship and Information' (2001) 7 *European Public Law* 165.

C Harlow, *Accountability in the European Union* (Oxford University Press, Oxford, 2002).

C Harlow, 'European Administrative Law and the Global Challenge' EUI Working Paper 98/23 European University Institute, Florence,
<http://cadmus.iue.it/dspace/handle/1814/3//browse-date>.

C Harlow, 'Codification of EC Administrative Procedures. Fitting the Foot to the Shoe or the Shoe to the Foot?' (1996) 2 *European Law Journal* 3.

- C Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 *Yearbook of European Law* 213.
- C Harlow and R Rawlings, 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure' (2006) 31 *European Law Review* 447.
- C Harlow and R Rawlings, *Law and Administration* (2nd Edition, Butterworths, London 1997).
- C Harlow and R Rawlings, *Pressure Through Law* (Routledge, London, 1992).
- TC Hartley, *The Foundations of European Community Law* (5th Edition, Oxford University Press, Oxford, 2003).
- K Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002).
- K Heede, *European Ombudsman: redress and control at Union level* (Kluwer Law International, The Netherlands, 2000).
- D Held, 'The transformation of political community: rethinking democracy in the context of globalisation' in I Shapiro and C Hacker-Cordón (eds), *Democracy's Edges* (Cambridge University Press, Cambridge, 1999).
- D Held, *Models of Democracy* (2nd Edition, Polity Press, Cambridge, 1996).
- A Héritier, 'Composite democracy in Europe: the role of transparency and access to information' (2003) 10 *Journal of European Public Policy* 814.
- C Hilson, 'Legality Review of Member State Discretion under Directives' in T Tridimas and P Nebbia (eds), *European Law for the 21st Century (Volume 1)* (Hart Publishing, Oregon, 2004).
- L Hooghe, *The European Commission and the integration of Europe: images of governance* (Cambridge University Press, Cambridge, 2001).
- M Jachtenfuchs, 'Theoretical Perspectives on European Governance' (1995) 1 *European Law Journal* 115.
- J Jowell, 'The rule of law today' in J Jowell and D Oliver (eds), *The Changing Constitution* (5th Edition, Oxford University Press, Oxford, 2004).
- J Jowell, 'Legal Control of Administrative Discretion' (1973) *Public Law* 178.
- W Kymlicka, 'Citizenship in an era of globalisation: a comment on Held' in I Shapiro and C Hacker-Cordón (eds), *Democracy's Edges* (Cambridge University Press, Cambridge, 1999) 112.
- KH Ladeur, 'Towards a Legal Theory of Supranationality - The Viability of the Network Concept' (1997) 3 *European Law Review* 33.
- P Leino, 'The Wind is in the North. The First European Ombudsman (1995-2003)' (2004) 10 *European Public Law* 333.
- K Lenaerts and J Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 *Common Market Law Review* 531.
- P Leyland and G Woods, *Textbook on Administrative Law* (5th Edition, Oxford University Press, Oxford, 2005).
- P Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism:

- The Example of the European Community' (1999) 99 *Columbia Law Review* 628.
- C Lord and P Magnette, 'E Pluribus Unum? Creative Disagreement about the Legitimacy in the EU' (2004) 42 *Journal of Common Market Studies* 183.
- C Lord, 'Assessing democracy in a contested polity' (2001) 39 *Journal of Common Market Studies* 641.
- M Loughlin, *Public Law and Political Theory* (Clarendon Press, Oxford, 1992).
- G Majone *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth* (Oxford University Press, Oxford, 2005).
- G Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 *European Law Journal* 5.
- G Majone, *Regulating Europe* (Routledge, London, 1996).
- G Majone, 'The European Community: An Independent Fourth Branch of Government' EUI Working Paper 94/17, Florence, <http://cadmus.iue.it/dspace/handle/1814/3//browse-date>.
- D Marquand, *Parliament for Europe* (Jonathan Cape, London, 1979).
- I Maselis and HM Gilliams, 'Rights of Complainants in Community Law' (1997) 22 *European Law Review* 103.
- R Mastroianni, 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: Quis Custodiet Custodes?' (1995) 1 *European Public Law* 535.
- V Mehde, 'Responsibility and Accountability in the European Commission' (2003) 40 *Common Market Law Review* 423.
- M Mendrinou, 'Non-compliance and the European Commission's Role in integration' (1996) 3 *Journal of European Public Policy* 1.
- Y Mény, 'De la démocratie en Europe: Old concepts and new challenges' (2002) 41 *Journal of Common Market Studies* 1.
- J Mertens de Wilmars and IM Verougstraete, 'Proceedings against Member States for Failure to Fulfil their Obligations' (1970) 7 *Common Market Law Review* 385.
- L Metcalfe, 'Reforming the Commission: Will Organisational Efficiency Produce Effective Governance?' (2000) 38 *Journal of Common Market Studies* 817.
- L Miles, 'Editorial: The Paradox of a Popular Europe' (2004) 42 *Journal of Common Market Studies* Annual Review 1.
- A Moravcsik, 'What Can We Learn from the Collapse of the European Constitutional Project?' (2006) 47 *Politische Vierteljahresschrift* 219.
- A Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht* (University College London Press, London, 1998).
- R Mulgan, 'Accountability: An Ever Expanding Concept?' (2000) 78 *Public Administration* 555.
- HP Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing, Oxford, 1998).

- N Nugent, *The European Commission* (Palgrave, Basingstoke, 2001).
- S O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer, The Hague, 1996).
- M O'Neill, 'The Right of Access to Community Held Documentation as a General Principle of EC Law' (1998) 5 *European Public Law* 403.
- JP Olsen, 'Citizens, public administration and the search for theoretical foundations' ARENA Working Papers WP 20/03, <http://www.arena.uio.no/publications/>.
- JP Olsen, 'Towards a European administrative space?' (2003) 10 *Journal of European Public Policy* 506.
- A Peters, 'European Democracy After the 2003 Convention' (2004) 41 *Common Market Law Review* 37.
- P Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford University Press, Oxford, 1997).
- R Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal* 4.
- J Raz, 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195.
- N Reich, 'Citizenship and Free Movement in an Enlarged EU' (2005) 11 *European Law Journal* 675.
- R Rhodes, 'The New Governance: Governing without Government' (1996) 44 *Political Studies* 652.
- IJ Sand, 'Understanding the New Forms of Governance: Mutually Independent, Reflexive, Destabilised and Competing Institutions' (1998) 4 *European Law Journal* 271
- PC Schmitter, 'What is there to legitimise in the European Union and how might this be accomplished?' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>.
- PC Schmitter, *How to Democratize the European Union...and Why Bother?* (Rowman & Littlefield, Oxford, 2000).
- S Schönberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, Oxford, 2000).
- J Schwarze, 'Sources of European Administrative Law' in S Martin (ed) *The Construction of Europe* (Kluwer, The Netherlands, 1994).
- C Scott, 'The Governance of the European Union: The Potential for Multi-Level Control' 8 (2002) *European Law Journal* 59.
- C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Legal Studies* 38.
- J Scott, 'Law, Legitimacy and EC Governance: Prospects for Partnership' (1998) 36 *Journal of Common Market Studies* 175.
- J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2001) 8 *European Law Journal* 1.
- R Seerden and F Stroink (eds), *Administrative Law of the European Union, its Member*

- States and the United States* (Intersentia Uitgevers, Antwerpen – Groningen, 2002).
- M Shapiro, 'The problem of Independent Agencies in the United States and the European Union' (1997) 4 *Journal of Public Policy* 276.
- M Shapiro, 'The Giving Reasons Requirement' (1992) *University of Chicago Legal Forum* 179.
- J Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9 *European Law Journal* 45.
- J Shaw, 'The Treaty of Nice: Legal and Constitutional Implications' (2001) 7 *European Public Law* 195.
- J Shaw, *Law of the European Union* (3rd Edition, Palgrave, Basingstoke, 2000).
- J Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 60 *Modern Law Review* 554
- J Shaw, 'European Union Citizenship: The IGC and Beyond' (1997) 3 *European Public Law* 413.
- H Siedentopf and J Ziller (eds), *Making European Policies Work. The Implementing of Community Legislation in the Member States Volume I, Comparative Synthesis* (Sage, London, 1988).
- D Sindbjerg Martinsen, *European Institutionalisation of Social Security Rights: A Two-layered Process of Integration* (European University Institute, Florence, PhD Thesis, 2004).
- F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin (ed), *The Construction of Europe* (Kluwer, The Netherlands, 1994) 197.
- F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19.
- J Söderman, 'A Thousand and One Complaints: The European Ombudsman en Route' (1997) 3 *European Public Law* 351.
- P Steinberg, 'Agencies, Co-Regulation And Comitology – And What About Politics?' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>.
- J Steiner *et al*, *EU Law* (9th Edition, Oxford University Press, Oxford, 2006)
- U Sverdrup, 'Compliance and styles of conflict management in Europe' ARENA Working Papers WP 08/03, <http://www.arena.uio.no/publications/>.
- J Tallberg, *European Governance and Supranational Institutions: making states comply* (Routledge, London, 2003).
- MA Theodossiou, 'An analysis of the recent response to non-compliance with the Court of Justice Judgments: Article 228(2) EC' (2002) 27 *European Law Review* 25.
- S Tierney, 'European Citizenship in Practice? The First Annual Report of the European Ombudsman' (1996) 2 *European Public Law* 517.
- CWA Timmermans, 'Judicial Protection against Member States: 169 and 177 revisited' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration. Essays in*

Honour of Henry G. Schermers Volume II (Martinus Nijhoff, Dordrecht, 1994).

A Tomkins, 'Transparency and the Emergence of a European Administrative Law' (1999) 19 *Yearbook of European Law* 219.

T Tridimas, *The General Principles of EU Law* (2nd Edition, Oxford University Press, Oxford, 2006).

J Usher, 'Variable Geometry or Concentric Circles: Patterns for the EU' (1997) 46 *International and Comparative Law Quarterly* 243.

JA Usher, *General Principles of EC Law* (Longman, London, 1998)

J Venit, 'Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Market Law Review* 545.

E Vos, 'Reforming the European Commission: What Role to Play for EU Agencies' (2000) 37 *Common Market Law Review* 1113.

N Walker, 'The White Paper in Constitutional Context' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>.

JHH Weiler, 'The Commission as Euro-Skeptic: A Task Oriented Commission for a Project-Based Union, A Comment on the First Version of the White Paper' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>.

JHH Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 1.

JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

P Wennerås, 'A New Dawn for Commission Enforcement under Article 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) 43 *Common Market Law Review* 31.

D Wincott, 'Looking Forward or Harking Back? The Commission and the Reform of Governance in the European Union' (2001) 39 *Journal of Common Market Studies* 897.

M Wind, 'The Commission White Paper: Bridging The Gap Between The Governed And The Governing?' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* Jean Monnet Working Paper 6/01, <http://www.jeanmonnetprogram.org/papers/index.html>

J Ziller, 'European Models of Government: Towards a Patchwork with Missing Pieces' (2000) 54 *Parliamentary Affairs* 102.

Documents from EU institutions

Code of Good Administrative Behaviour, adopted by Resolution of the European Parliament 6 September 2001, can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

Code of Conduct for Commissioners, European Commission, SEC 1487/2 at http://ec.europa.eu/commission_barroso/code_of_conduct/code_conduct_en.pdf.

Commission Communication 'A Framework for Target-Based Tripartite Contracts COM

(2002) 709 final.

Commission Communication 'Application of Article 228 of the EC Treaty' SEC (2005) 1658.

Commission Communication 'Better Monitoring of the Application of Community Law' COM (2002) 725 final/4 16.5.2003.

Commission Communication 'Towards a Reinforced Culture of Consultation and Dialogue' COM (2002) 277 final 5.6.2002.

Commission Communication on 'Relations with the Complainant in Respect of Infringements of Community Law' COM (2002) 141.

Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents OJ L 46 18.2.1994.

Commission of the European Communities (2000) *Reforming the Commission* COM 200 White Paper.

Commission Opinion on amendments to the regulations and general conditions governing the performance of the Ombudsman's duties COM (2002) 133 final 6.3.2002.

Council Decision 93/731/EC 20 December 1993 on public access to Council documents OJ L 340 31.12.1993.

Council Decision 2004/752/EC 2 November 2004 establishing the European Union Civil Service Tribunal OJ L 333 9.11.2004 p 7.

Council Directive 85/337/EEC 27 June 1985 on Environmental Impact Assessment OJ L 175 27.6.1985 p 40.

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ L 1 4.1.2003.

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 83 27.3.1999.

Decision of European Ombudsman on Complaint 01/4/2003ADB.

Decision of European Ombudsman on Complaint 1273/2004/GG.

Decision of European Ombudsman on Complaint 1288/99/OV.

Decision of European Ombudsman on Complaint 1288/99/OV.

Decision of European Ombudsman on Complaint 1437/2002/IJH.

Decision of European Ombudsman on Complaint 206/27.10.95/HS/UK.

Decision of European Ombudsman on Complaint 2229/2003/MHZ.

Decision of European Ombudsman on Complaint 2333/03/99.

Decision of European Ombudsman on Complaint 39/2002/OV.

Decision of European Ombudsman on Complaint 995/98/OV.

Decision of the European Parliament 2002/262/EC, ECSC, Euratom of 14 March 2002 amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions

governing the performance of the Ombudsman's duties OJ L 92 9.4.2002.

Declaration on the future of the Union, Treaty of Nice OJ C 80 10.3.2001, Declaration 23 at p 80.

Eighteenth Annual Report on Monitoring the Application of Community Law (2000) COM (2001) 309 final, all reports can be found at http://ec.europa.eu/community_law/eulaw/index_en.htm#infractions.

European Governance: A White Paper COM (2001) 428.

European Ombudsman Own Initiative Inquiry 01/4/2003ADB.

European Ombudsman Own Initiative Inquiry 303/97/PD.

Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission OJ 1999 C119/5.

Final report of the discussion circle on the Court of Justice CONV 636/03 25 March 2003.

Laeken Declaration, European Council, December 2001, the text can be found at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf, Declaration No 23 annexed to the Treaty of Nice.

LSE response paper to the governance consultation '*Taking Governance Seriously*' http://ec.europa.eu/governance/index_en.htm.

Nineteenth Annual Report on Monitoring the Application of Community Law (2001) COM (2002) 324 final.

Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM (2003) 624 final.

Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies COM (2003) 622 final.

R Prodi, President of the European Commission 'The European Union and its citizens: a matter of Democracy' European Parliament Strasbourg, 4 September 2001, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/365&format=HTML&aged=1&language=EN&guiLanguage=en>.

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 31.5.2001.

Report from the Commission on Monitoring the Application of Community Law (2003), Overall Position, Twenty-First Annual Report SEC (2003) 1638 COM (2004) 839 final.

Report of the European Parliament: 'Report on the Commission's 18th and 19th Annual Reports on monitoring the application of Community law 30 April 2003' Committee on Legal Affairs and Internal Market, A5-0147/2003 final.

Report of the European Parliament: 'Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law' Committee on Legal Affairs, 24 March 2006 A6-0089/2006 final.

Seventeenth Annual Report on Monitoring the Application of Community Law (1999) COM

(2000) 92 final.

Sixteenth Annual Report on Monitoring the Application of Community Law (1998) COM (1999) 301 final.

The European Convention 'Draft Treaty establishing a Constitution for Europe' CONV 850/03 18 July 2003.

The European Convention 'Updated explanations in relation to the text of the Charter of Fundamental Rights' CONV 828/1/03 REV 1 18 July 2003.

The European Ombudsman Annual Report 1996, the text of all the reports can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

The European Ombudsman Annual Report 1996.

The European Ombudsman Annual Report 1997.

The European Ombudsman Annual Report 1998.

The European Ombudsman Annual Report 1999.

The European Ombudsman Annual Report 2000.

The European Ombudsman Annual Report 2001.

The European Ombudsman Annual Report 2002.

The European Ombudsman Annual Report 2003.

The European Ombudsman Annual Report 2004.

The European Ombudsman Annual Report 2005.

The European Union Charter of Fundamental Rights, Title V: Citizens' Rights, Article II-101 OJ C 310 16.12.2004.

Treaty establishing a Constitution for Europe OJ C 310 16.12.2004.

Twentieth Annual Report on Monitoring the Application of Community Law (2002) COM (2003) 669 final.

Twenty-First Annual Report on Monitoring the Application of Community Law (2003) COM (2004) 839 final.

Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final.

Twenty-Third Annual Report on Monitoring the Application of Community Law (2005) COM (2006) 416 final.

European Court of Justice cases (in numerical order)

Case 7/61 *Commission v Italy* [1961] ECR 317.

Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

Case 48/65 *Lütticke v Commission* [1966] ECR 19.

Case 7/68 *Commission v Italy* [1968] ECR 428.

Case 7/69 *Commission v Italy* [1970] ECR 111.

Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

Case 26/76 *Metro SB-Großmärkte GmbH & Co KG v Commission* [1977] ECR 1875.

Case 141/78 *France v UK* [1979] ECR 2923.

Case 232/78 *Commission v France* [1979] ECR 2729.

Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

Case 102/79 *Commission v Belgium* [1980] ECR 1473.

Case 96/81 *Commission v Netherlands* [1982] ECR 1791.

Case 201/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

Case 84/82 *Germany v Commission* [1984] ECR 1451.

Case 323/82 *Intermills v Commission* [1984] ECR 3809.

Case 293/83 *CICCE v Commission* [1985] ECR 1105.

Case 29/84 *Commission v Germany* [1985] ECR 1661.

Case 142/84 and C-156/84 *BAT and Reynolds v Commission* [1987] ECR 4487.

Case 169/84 *Cofaz v Commission* [1986] ECR 391.

Case 40/85 *Belgium v Commission (Boch II)* [1986] ECR 2321.

Case 293/85 *Commission v Belgium* [1988] ECR 305.

Case 240/86 *Commission v Greece* [1988] ECR 1835.

Case 226/87 *Commission v Greece* [1988] ECR 3611.

Case 47/87 *Star Fruit v Commission* [1989] ECR 291.

Case C-35/88 *Commission v Greece* [1990] ECR I-3125.

Case C-64/88 *Commission v France* [1991] ECR I-272.

Case C-48/89 *Commission v Italy* [1990] ECR I-2425.

Case C-87/89 *Sonito v Commission* [1990] ECR I-1981.

Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461.

Case C-146/89 *Commission v UK* [1991] ECR 3533.

Case C-374/89 *Commission v Belgium* [1991] ECR-I 367.

Case C-56/90 *Commission v UK* [1993] ECR I-4109.

Case C-255/90 *P Louis Burban v European Parliament* [1992] ECR II-2253

Case C-189/91 *William Cook v Commission* [1993] ECR I-2487.

Case C-431/92 *Commission v Germany* [1995] ECR I-2189.
Case C-191/95 *Commission v Germany* [1998] ECR I-5449.
Case C-265/95 *Commission v France* [1997] ECR I-6959.
Case C-388/95 *Belgium v Spain* [2000] ECR I-3123.
Case C-3/96 *Commission v Netherlands* [1998] ECR I-3931.
Case C-328/96 *Commission v Austria* [1999] ECR I-7479.
Case C-387/97 *Commission v Greece* [2000] ECR I-5047.
Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419.
Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.
Case C-338/00P *Volkswagen AG v Commission* [2003] ECR I-9189
Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.
Case C-278/01 *Commission v Spain* [2003] ECR I-14141.
Case C-494/01 *Commission v Ireland* [2005] ECR I-3331.
Case C-141/02P *Commission v T-Mobile Austria GmbH, formerly max-mobil Telekommunikation Service GmbH* [2005] ECR I-1283.
Case C-304/02 *Commission v France* [2005] 12 July 2005 nyr.
Case C-320/03 R *Commission v Austria* [2005] ECR I-9871.
Case C-344/03 *Commission v Finland* [2005] ECR I-11033.
Case C-119/04 *Commission v Italy* [2006] 18 July 2006 nyr.
Case C-145/04 *Spain v UK* [2006] 12 September 2006 nyr.
Case C-177/04 *Commission v France* [2006] 14 March 2006 nyr.
Case C-385/04 *Commission v UK* [2005] 10 November 2005 nyr.

Court of First Instance cases (in numerical order)

Case T-24/90 *Automec srl. v Commission (Automec II)* [1992] ECR II-2223.
Case T-7/92 *Asia Motor France a.o. v Commission (Asia Motor II)* [1993] ECR II-669.
Case T-37/92 *BEUC and NCC v Commission* [1994] ECR II-285.
Case T-49/93 *SIDE v Commission* [1995] ECR II-2501.
Case T-95/94 *SYTRAVAL v Commission* [1995] ECR II-2651.
Case T-167/94 *Detlef Nölle v Council* [1995] II-2589.
Case T-105/95 *WWF UK v Commission* [1997] ECR II-313.
Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289.
Case T-194/95 *Carvel and Guardian v Council* [1995] ECR II-2765.

- Case T-124/96 *Interporc Im-und Export GmbH v Commission* [1998] ECR II-231.
- Case T-182/97 *Smanor SA v Commission* [1998] ECR II-271.
- Case T-188/97 *Rothmans International v Commission* [1999] ECR II-2463.
- Case T-309/97 *Bavarian Lager Company v Commission* [1999] ECR II-3217.
- Case T-14/98 *Hautala v Council* [1999] ECR II-2489.
- Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313.
- Case T-191/99 *Petrie and Others v Commission* [2001] ECR-II 3677.
- Case T-211/00 *Kuijer v Council* [2002] ECR II-1729.
- Case T-392/02 and T-392/02 R *Solvay Pharmaceuticals BV v Council* [2003] ECR II-1825.
- Case T-139/06 *France v Commission* (action brought on 12 May 2006).

European Court of Human Rights

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland Application No. 45036/98 [2006] 42 EHRR 1.

Appendix 1 – Interview Data

It was necessary to conduct elite interviews, particularly with regard to the Commission, due to the nature of the thesis topic, i.e. looking at the behaviour and attitudes of the actors involved in the infringement process. In relation to the Commission, it was particularly vital as this was the only means of accessing basic organisational information because of the difficulty in obtaining access to documentation relating to the infringement process. One of the central issues in Article 226, in terms of legitimacy and good governance, is the political and secretive nature of the Commission's handling of infringement investigations and actions. This restricts the degree to which elite interview data can be cross-checked, because the information gathered through elite interviews is not available in any other form. Documents detailing the internal procedures of the Commission are unavailable for public scrutiny, particularly those documents which detail the internal decision-making process of Commission officials in the administrative phase of Article 226. Whenever possible, I have attempted to draw out some common themes across the range of staff and different DGs. Interviews with other key actors outside of the Commission were primarily used to gather background information and identify key sources of documentary evidence.

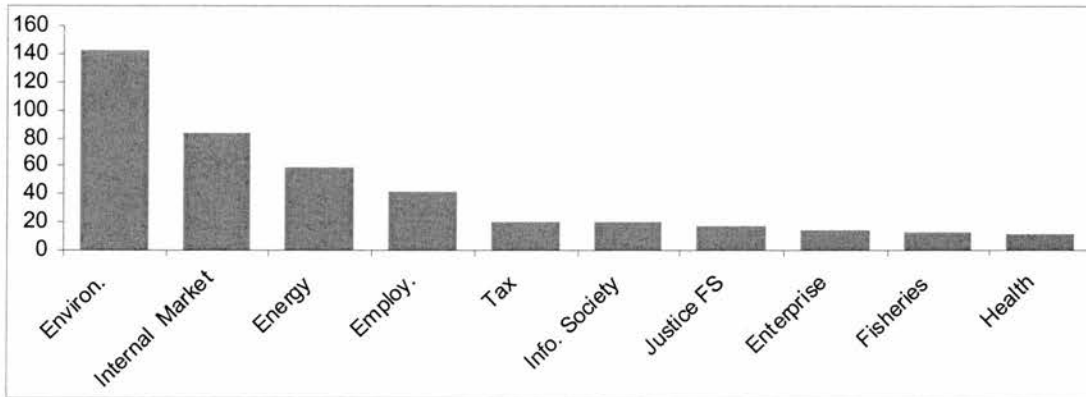
Selection of Commission staff for elite interview

The Commission is currently made of 17 policy focused Directorates General (DGs)¹. These are DG Agriculture and Rural Development, DG Competition, DG Economic and Financial Affairs, DG Education and Culture, DG Employment, Social Affairs and Equal Opportunities, DG Enterprise and Industry, DG Environment, DG Fisheries and Maritime Affairs, DG Health and Consumer Protection, DG Information Society and Media, DG Internal Market and Services, DG Justice Freedom and Security, DG Joint Research Centre, DG Regional Policy, DG Research, DG Taxation and Customs Union, DG Transport and Energy. Out of these 17 Directorates there are only 10 DGs which generate significant numbers of Article 226 infringement cases (see Figure 12 below). I selected staff from eight of these 10 DGs (depending on availability of staff) to use for the purpose of elite interviews.

¹ See http://ec.europa.eu/dgs_en.htm.

Figure 12

Article 226 cases by sector (2004)



Source: *Annual Monitoring Report 2004*.²

I have interviewed a cross section of both policy fields and staff of different seniority, ranging from Desk Officers to Unit Heads. The Commission staff agreed to be interviewed on the basis that they would remain completely anonymous, such is the sensitivity of the subject matter. Accordingly, where reference to interview comments has been made in the thesis, each official is referred to with the generic title 'Commission Official'. To differentiate between officials I have assigned each interviewee a letter (Commission Official A etc) which in no way relates to either the name of the interviewee or the DG. To ensure confidentiality is respected, I have not identified a particular official's comments alongside a reference to a DG, since due to the fact that only a small number of staff in each DG deal with infringements, this may have led to the official being identified by default.

Table 5

Table of Commission Interviews

<i>Interviewee</i>	<i>Date</i>
Commission Official A.	25 October 2005
Commission Official B.	25 October 2005
Commission Official C.	25 October 2005
Commission Official D.	25 October 2005
Commission Official E.	24 October 2005
Commission Official F.	24 October 2005
Commission Official G.	26 October 2005
Commission Official H.	26 October 2005
Commission Official I.	6 April 2005

² Twenty-Second Annual Report on Monitoring the Application of Community Law (2004) COM (2005) 570 final.

Format of interview and data

All of the elite interviews were conducted in the format of semi-structured open interviews³. Table 6 below contains a sample of the questions asked of Commission officials. A transcript of the answers has not been included in the Appendix due to issues of confidentiality⁴. The general purpose of the interviews was to find out how the actual practice of conducting infringement investigations and the administrative phase of Article 226 was undertaken, to what extent this differed from any commentary contained in the Annual Reports, and to try and draw out some common themes across the DGs as to what factors influenced the way in which individual infringement cases were handled across the Commission. It was also important to identify the main characteristics of the internal decision-making procedure, which is not detailed in any available documentation. The main finding was that outside the formal quarterly meetings of the College of Commissioners, there appeared to be few consistencies in the organisation and administration of infringement investigations, and each Directorate's internal culture and organisation heavily influenced its approach to infringements.

Table 6

A sample of questions asked of all the Commission interviewees.

Standard questions asked across the DGs

Describe the complete process of investigating a suspected infringement when the suspected infringement comes to light as a result of internal monitoring by DG staff.

Is there a formal internal procedure detailed in the Staff Internal Manual for handling infringement investigations?

Describe the complete process of investigating a suspected infringement when the suspected infringement comes to light as a result of a complaint or a Petition from the European Parliament.

Describe the complete decision-making chain from when a suspected infringement is discovered to eventual referral to the Court of Justice.

Explain the internal structure of [DG]. How many officials deal with infringement investigations? Is there a dedicated unit?

³ Information was recorded by note-taking rather than recorded by dictaphone to encourage a more open conversation with Commission officials.

⁴ This is for the same reason that 'Commission Official A' is used rather than Commission Official and the name of the DG. Since most answers contain information which identifies the policy field and particular organisation of each DG, it would indirectly enable identification of the Commission officials providing the answers.

How many staff are dedicated solely to dealing with complaints relating to Article 226 infringements?

What factors influence the success or failure of an infringement investigation reaching the judicial stage of Article 226?

To what extent does the formal decision-making role of the College of Commissioners hamper or facilitate the efficiency of the infringement process?

How does the investigating official relay the substance and facts of the suspected infringement to College of Commissioners?

To what extent is there co-ordinated action across the DGs to ensure a consistent approach is taken to handling infringement investigations?

To what extent is decision-making in infringement investigations a political rather than legal decision-making process?

What factors affect the viability of infringement case?

To what extent does [Commission official] support the initiative to give greater power to individual officials to take decisions on whether infringement cases ought to proceed? Does this lead to de-politicisation of the process, or does it move the political pressure 'downwards'?

To what extent is the Legal Service of the Commission involved in dealing with infringement cases before the decision is taken by the College to refer the case to the ECJ?

Who dictates the DGs internal policy approach to handling infringements?

What is [DG] your particular difficulty with pursuing infringements investigations?

Is the approach to infringements in [DG] essentially reactive or proactive? What are the pros and cons of this approach?

To what extent is the difference in background of the internal staff a factor in different approaches to the decision making in infringement cases?

To what extent has the Commission been working proactively with the Ombudsman in relation to handling of complaints?

What issues have arisen in relation to the Ombudsman's investigations into complaint handling from the perspective of Commission officials?

What does the Commission see as the Ombudsman's appropriate role in infringement complaints?

What is the reasoning behind the recent focus on Article 226 cases being initiated for non-cooperation by the Member States in providing information?

How has the recent case of Commission v France (Article 228) been received by the Commission? Does it support this approach of double penalty?

To what extent does the policy field of the DG drive the entire policy and internal management of infringement investigations?

To what extent does the type of infringement (i.e. non notification, non transposition, inaccurate transposition, misapplication etc) under consideration affect the decision-making process?

What effect has enlargement had on [DG] ability to effectively pursue infringements?

What is the role of the Secretariat General in the infringement process?

To what extent has the obligation of the DG changed in recent years in relation to collating and providing information for the Annual Report?

Other elite interviews

I also interviewed a number of other key actors, detailed in Table 7 below. These interviews were also conducted in the style of a semi-structured open interview. Data has been quoted from only one of these contributors (see Table 8).

Table 7

<i>Other elite interviews</i>	
<i>Interviewee</i>	<i>Date</i>
Mr. Olivier Verheecke, Principal Legal Advisor, Office of European Ombudsman.	5 April 2005
Mr. Edward Dirrig, Office of Diana Wallis MEP, European Parliament [not quoted].	26 October 2005
Mr. P. Nikiforos Diamandouros, The European Ombudsman [not quoted].	29 November 2005

Table 8

Interview, Mr Olivier Verheecke

Principal Legal Advisor, Office of European Ombudsman 5 April 2005.

Why was the Ombudsman initially interested in complaints about the Commission's handling of Article 226 complaints?

The Ombudsman chose this area in the beginning because there was a large volume of complaints coming in from citizens in relation to Article 226, and the types of complaints being received were at a very basic level of administrative procedure (not being informed of progress on complaints etc). This was considered unacceptable.

What types of complaints are included in the category of 'failure to fulfil obligations under Article 226' complaints to the Ombudsman?

It is true that the way the complaints are classified mean that some complaints relating to Article 226 are put under different categories in Annual Report statistics. The Article 226 complaints category relates only to those complaints which allege there has been a failure to ensure a Member State fulfils its obligations under the Treaty. This relates to the substance of the claim itself and where the Commission has not properly carried out its task as guardian. This is usually formulated using the terms in the Commission's Communication on Article 226. The Communication contains procedural guarantees only, although this might not be the only aspect of the complaint, it may be multi-faceted.

Part of the complaint might require the EO to look into whether the complaint has been properly investigated by the Commission. Although he cannot substitute the eventual judgement of the Commission since this is a discretionary power, nevertheless the Commission must exercise this power within the limits of the law and that discretionary power is not a *carte blanche*. The decision must be reasoned, and everything must be communicated to the complainant. This reasoning was developed in the Metro case [Macedonia Metro].

How do you distinguish, for purposes of categorisation, as to what type of maladministration is being alleged where there is more than one type of maladministration involved?

It could be true that complaints which relate to a lack of transparency or undue delay by the Commission in relation to the Article 226 process would not be categorised as an Article 226 complaint, but under a different heading. So straight statistical breakdown from the Annual Report might not reveal the true number of complaints relating to the process of Article 226.

Does the Ombudsman consider that he has achieved all that can be achieved for complainants in relation to the Commission's handling of Article 226 complaints?

No, this is considered a work in progress and not at all as completely finished. Many new

developments might be made depending on the types of complaints received, since these complaints keep coming in, in relation to Article 226.

One of the most important areas to be monitored is the giving of reasons. It is important that the Commission fully communicates its reasoning as to why it is closing the file or why it considers there is no infringement.

Why do you think there is still resistance from the Commission in providing full and frank reasoning in Article 226 cases, particularly in relation to reasons why the Commission decides not to pursue the complaint?

Perhaps due to the Ombudsman's continued work in this area the Commission is keen to give as neutral a reasoning as possible.

How has the Ombudsman's relationship with the Commission evolved since the first own initiative inquiry into Article 226?

In the beginning when Ombudsman started the initial inquiries, there was definite resistance to the EO interference, to the extent that the Commission invoked the case law, to which the Ombudsman responded that they must exercise their discretionary power within the limits of the law. Over the years, the Commission has come to collaborate much more with the Ombudsman in this sensitive area to the extent that the Commission even refers the complainants to the Ombudsman in its Communication. In the beginning this would have been unthinkable; so it now accepts that the Ombudsman has the mandate with respect to the procedural steps of the infringement process and this is a very positive development.

The Commission very much had the attitude that the Article 226 process was a bilateral process between the Commission and the Member State, but the Ombudsman saw this as a serious problem. He saw the process very differently as a three way process between the Commission, Member State and complainant. The person who lodges the complaint is an important factor. They are the people bringing the complaints to the Commission in the first place. In its role as guardian of the Treaty the Commission should follow the correct procedures when dealing with these complaints, as well as taking account of the more general 'spirit of transparency'. It was important that it was not a completely secret procedure between the Member State and the Commission. It was important that a proper procedure was adhered to.

A culture change within the Commission cannot happen overnight. It's a long process to change the approach to infringements from being bilateral and a forum of negotiation, notwithstanding the Communication. Despite this, there have been steps forward and there has been a considerable change between when the Ombudsman began and now in re-moulding the process.

Has there been a change in the type of complaints received in relation to Article 226 since the production of the Communication detailing the complainants' procedural 'guarantees'?

The two main areas the EO still receives complaints about are undue delay and lack of reasoning. The Commission takes too long to inform complainant of its decisions or the complainants remain unconvinced as to the Commission's motivations for closing the file.

Explain the Ombudsman's definition of maladministration.

This is a good definition as it covers legality and beyond. The current EO uses this and there is no problem with it. It could be changed since it is not a legally binding definition – it is only the what the Ombudsman considers maladministration – so it is not set in stone. The Charter of Fundamental Rights is not legally binding but breach can be considered as maladministration by the EO.

EO considers it binding on those institutions which proclaimed it – Council, Commission and Parliament.

Though there is the definition in AR 1997, the CGAB gives a full explanation of this definition, and this goes further.

Given the nature of Article 226 complaints, the Ombudsman's power to compel truthful testimony from individual Commission Officials is of vital importance. Is the Ombudsman going to try and amend the current regulations governing this?

The Ombudsman may be taking up this point again in the future as it was not satisfactorily resolved last time amendments were made. The Ombudsman does feel that there might be some problem in obtaining the truth from officials because of the wording of this provision in the Ombudsman's governing legislation. The EP and Council must legislate, along with an Opinion from the Commission is necessary before a change in this legislation can occur.

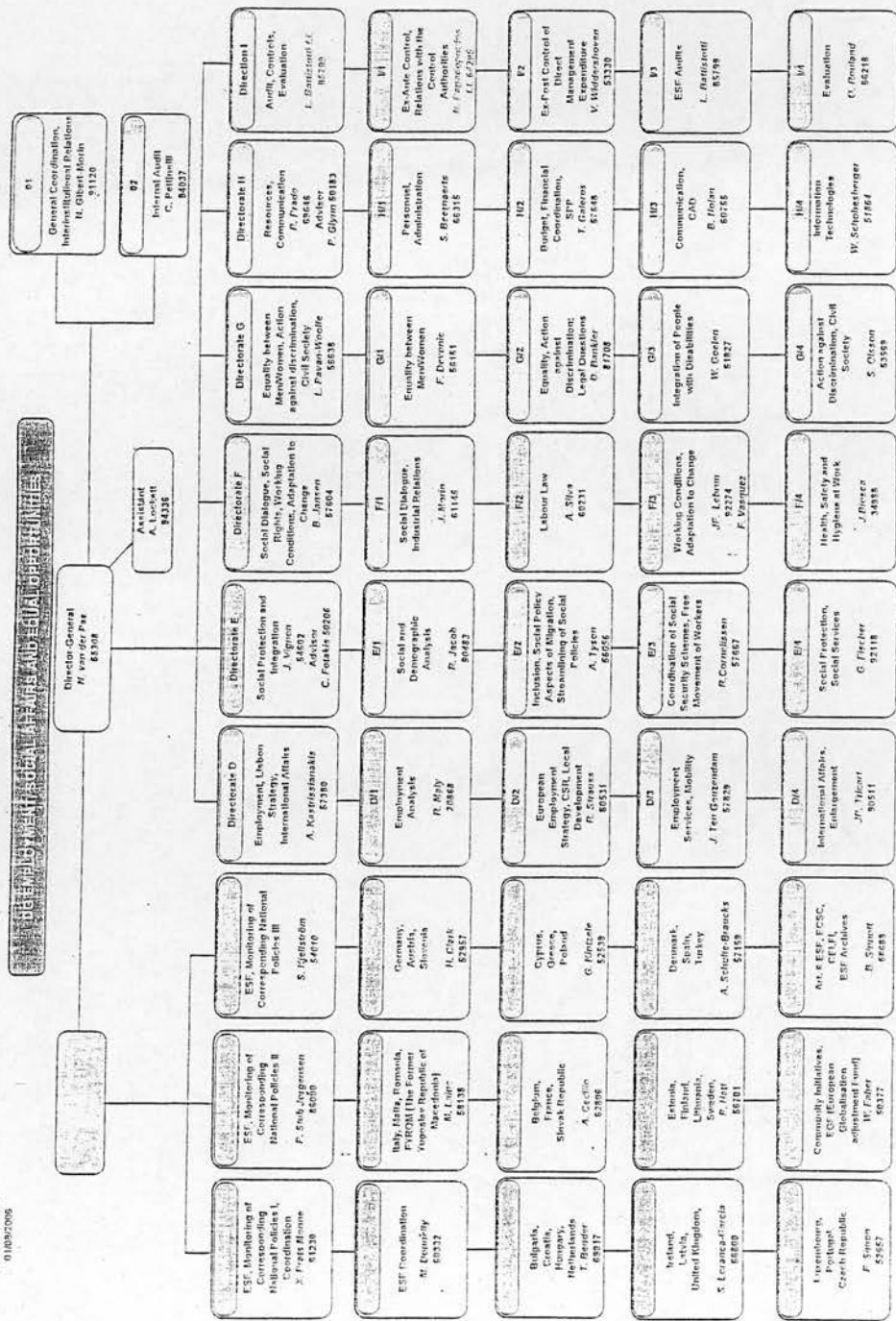
What will convince the Ombudsman that further work needs to be done in relation to improving the position of complainants in relation to the Commission's handling of infringement complaints?

The first Ombudsman opened the door on Article 226 and this Ombudsman will take the process forward. This is dependent on the complaints received – though there has already been an OII there could be another if the right complaints come in.

The Ombudsman already applies the Charter in other cases (such as the age discrimination case), but not as yet in relation to the Article 226 complaints.

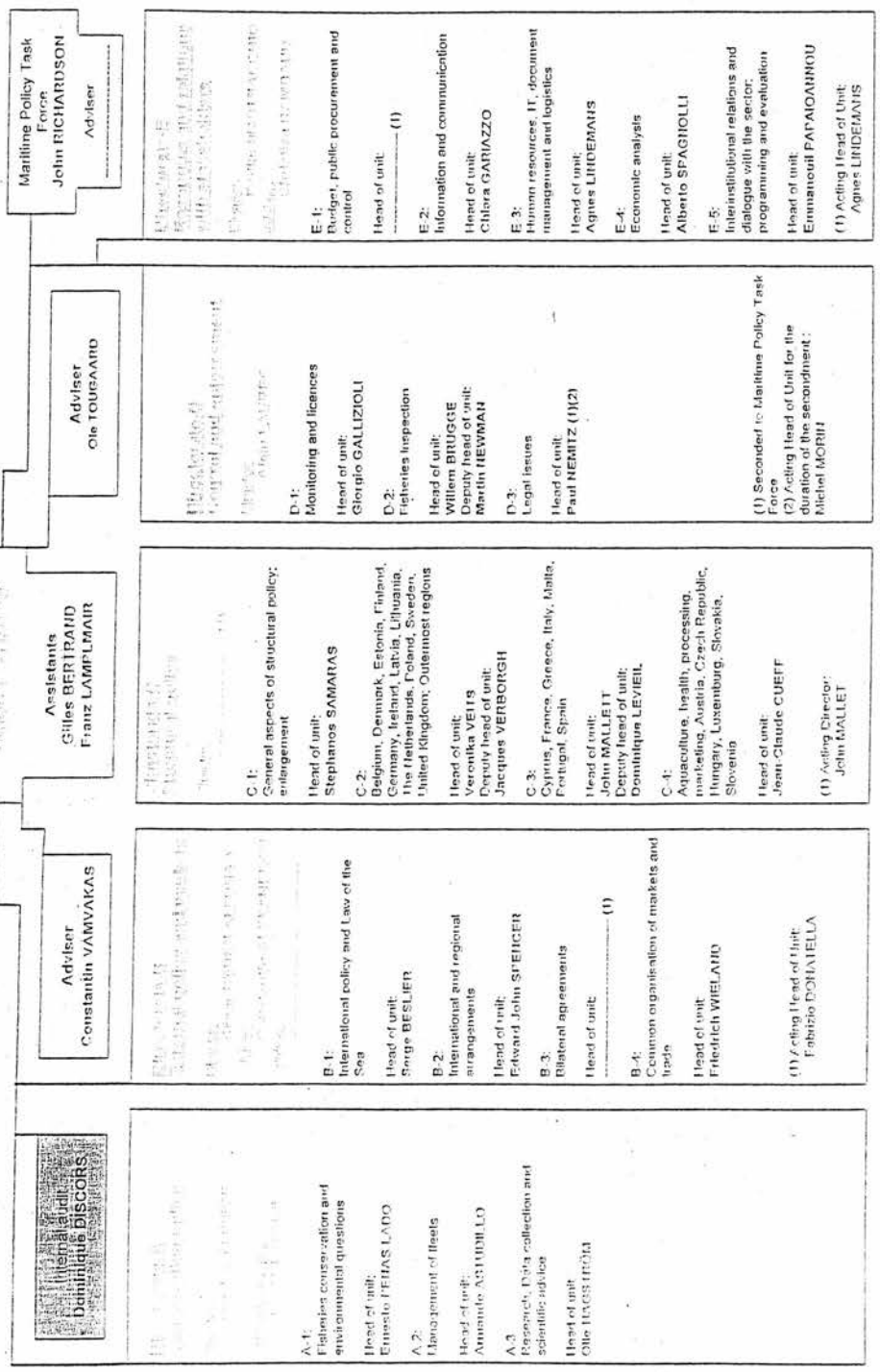
Appendix 2 – DG Organisational Charts

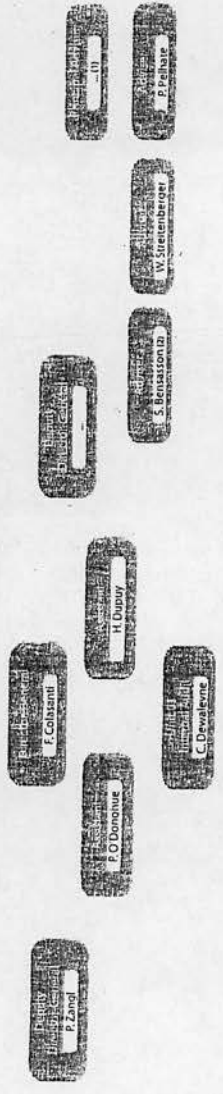
Version 14 EN
01/06/2005



Directorate-General for Fisheries and Maritime Affairs

1999-2000 January 2007



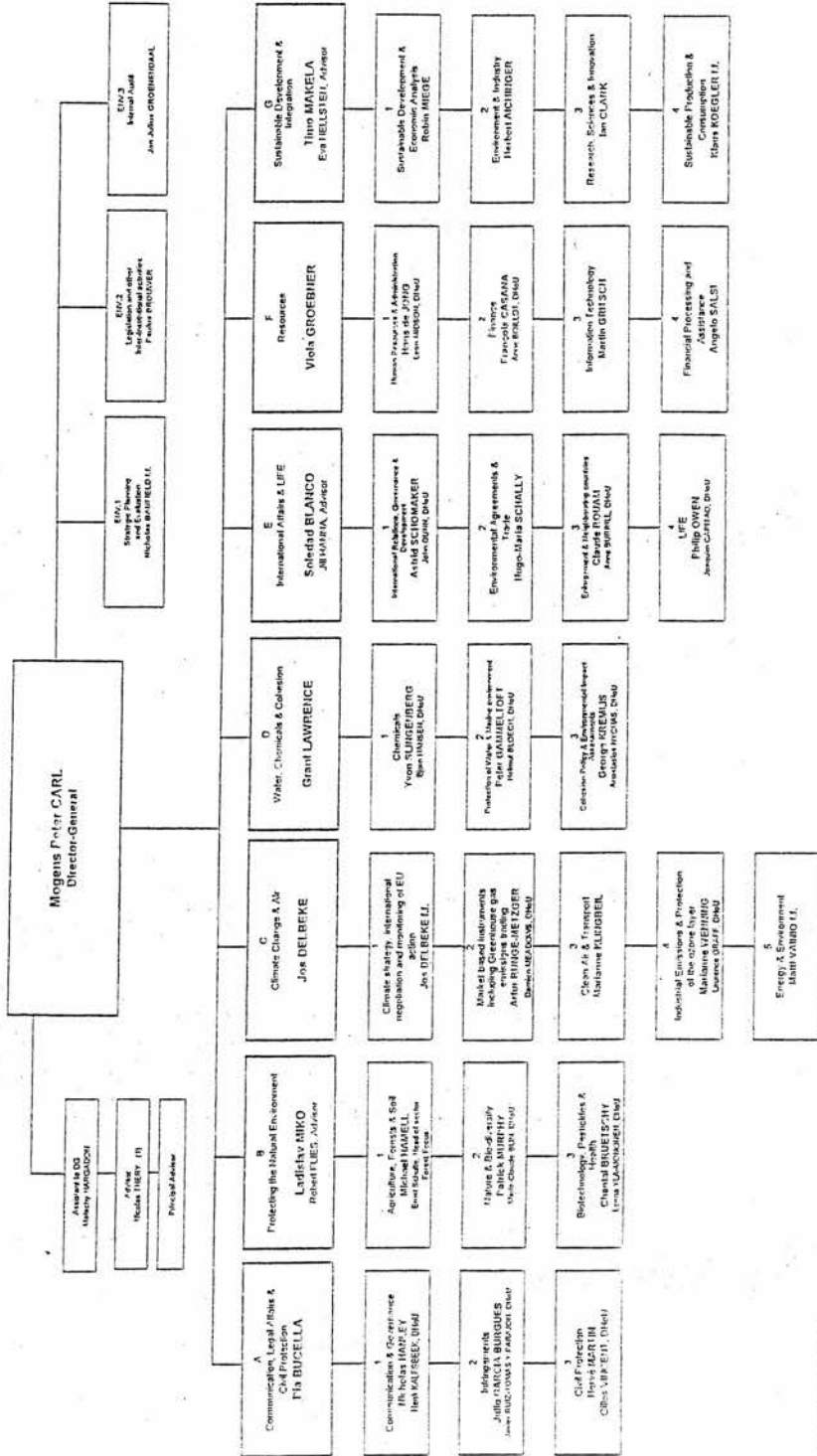


Directorate B B. Hertzels Respect	Directorate S W. Schwarzgrubner General Affairs	Directorate A G. Paulper Audiovisual Media Internet	Directorate B B. Langheine Electronic Communications Policy	Directorate C S. Binns Urban Strategy & Policies for the Information Society	Directorate D J. da Silva Converged Networks & Services	Directorate E H. Foister Digital Content & Cognitive Systems	Directorate F U. Dahlzon Emerging Technologies & Infrastructures	Directorate G R. Zobel Components & Systems	Directorate H F. de Brune ICT addressing Societal Challenges
Unit B1 C. Dibb Human Resources	Unit S1 J. Cotto Planning & Coordination	Unit A1 J.-E. de Cockhorne Audiovisual & Media policies	Unit B1 P. Scott Policy Development	Advisor J.C. Healy	Unit D1 R. Zimmermann Future Networks	Unit E1 W. Poeh Innov. & Emerging Technologies (E1) - Products	Unit F1 W. Poeh Innov. & Emerging Technologies (E1) - Products	Advisor S. Prucell	Advisor B. Schmelln
Unit B2 J. Pérez Charquie Budget & Finance	Unit S2 A. Panch Management Support	Unit A2 A. Silver MEDIA programme & media literacy	Unit B2 F. Radford Implementation of Regulatory Framework (B)	Unit C1 A. Bucher Urban Strategy & 2010	Unit D2 L. Rodriguez-Rocello Networked Media Systems	Unit F2 — (H)	Unit G1 D. Biernaert Nanoelectronics	Unit H1 G. Cornyn ICT for Health	Unit I1 G. Cornyn ICT for Health
Unit B3 M. Lucifora Information Systems Development & Support	Unit S3 E. Frost Inter-organisational Relations	Unit A3 M. J. Heibel Internet, Network & Information Security	Unit B3 G. Fagagnoli Implementation of Regulatory Framework (B)	Unit C2 K. Rouliana Strategy for ICT Research & Development	Unit E2 R. Concion Content & Knowledge	Unit F3 — (H)	Unit G2 A. de Albuquerque Microsystems	Unit I2 D. Boster eGovernment & eIP Operations	Unit J1 P. Timmers ICT for Inclusion
Unit B4 B. de Bruijn Information Technology Infrastructure & Services	Unit S4 Z. Sabovic Legal Aspects	Unit A4 J.-F. Soutziet Interinstitutional Relations	Unit B4 R. Herbold Radio Spectrum Policy	Unit C3 P. Johnston Evaluation & Monitoring	Unit E3 P. Hanson Cognitive & Technology Enhanced Learning	Unit F4 P. Bilot New Infrastructure Paradigms & Experimental Facilities	Unit G3 K. Gilman Embedded Systems & Content	Unit I3 P. Timmers ICT for Inclusion	Unit J2 M. Nagy-Horváth Sustainable Growth
			Unit B5 P. Kirkhou Procedures related to Network Regulatory Measures	Unit C4 S. Bouygues Information & Communication	Unit E4 J. Hernandez-Rios Digital Libraries & Public Sector Information	Unit F5 J. Bus Security	Unit G4 A. Vitis ICT for Transport	Unit I4 M. Nagy-Horváth Sustainable Growth	Unit J3 W. Van Puybroeck Administration & Finance
				Unit C5 M. Muller IST Operations	Unit E5 C. Maloney Cognitive Systems & Robotics	Unit F6 J. Macnicke Administration & Finance	Unit G5 Th. Van der Pijl Photonics	Unit I5 W. Van Puybroeck Administration & Finance	
				Unit C6 L. Malhotra Administration & Finance	Unit E6 R. Swetshain eContent & Sales Internet	Unit F7 Y. Feyerherm Administration & Finance	Unit G6 — (H)	Unit I6 R. Iborra-Idas Administration & Finance	

01.01.2017
 (1) Preferred EMBIS
 (2) Recommended by CECEOT
 (3) Part of this work is based in Luxembourg
 (4) Work in progress
 (5) Not yet started
 (6) Reserved EMBIS

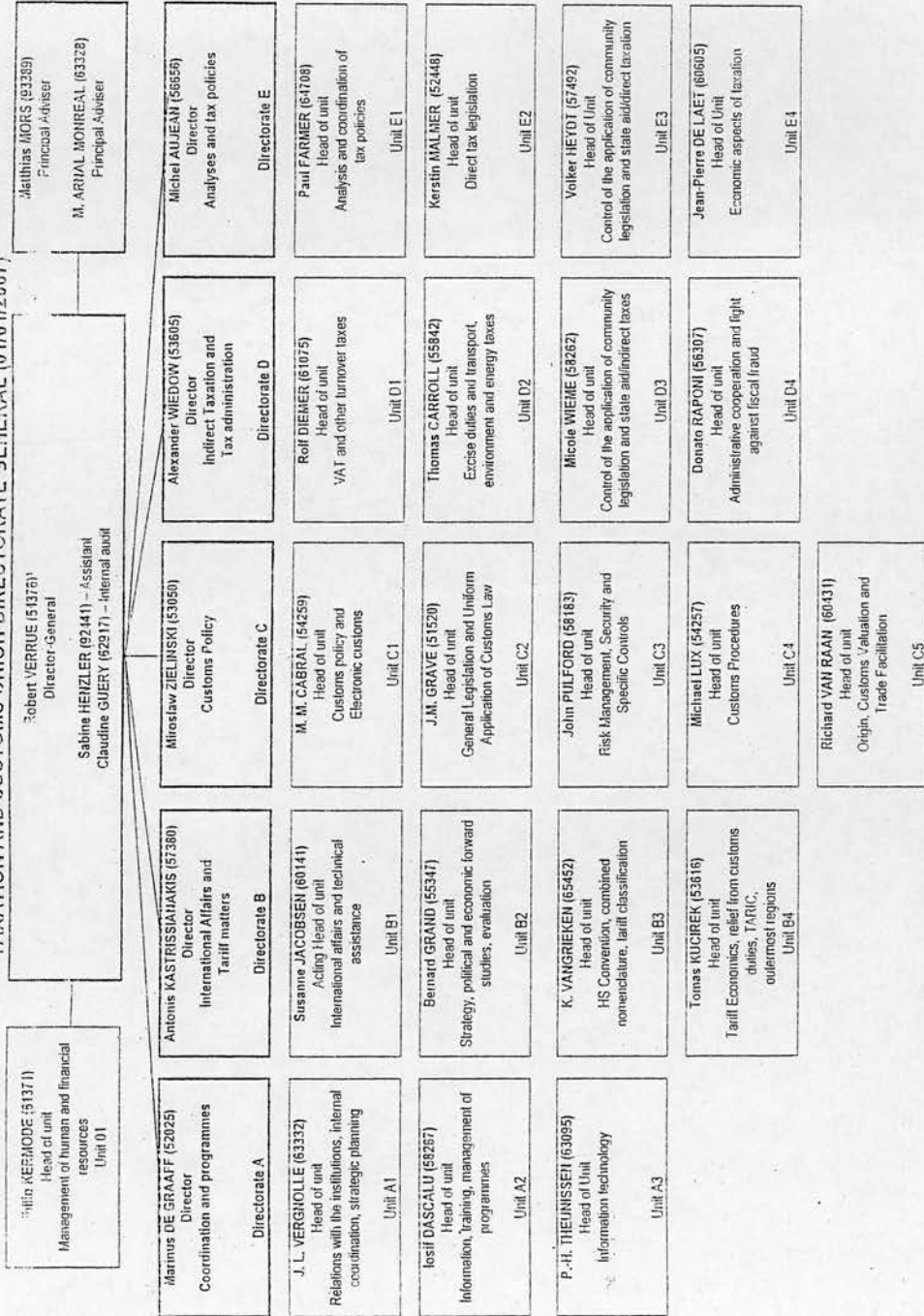
DG ENVIRONMENT

16.09.06



1) 24-09-2006 from DG ENV

TAXATION AND CUSTOMS UNION DIRECTORATE GENERAL (07/01/2007)

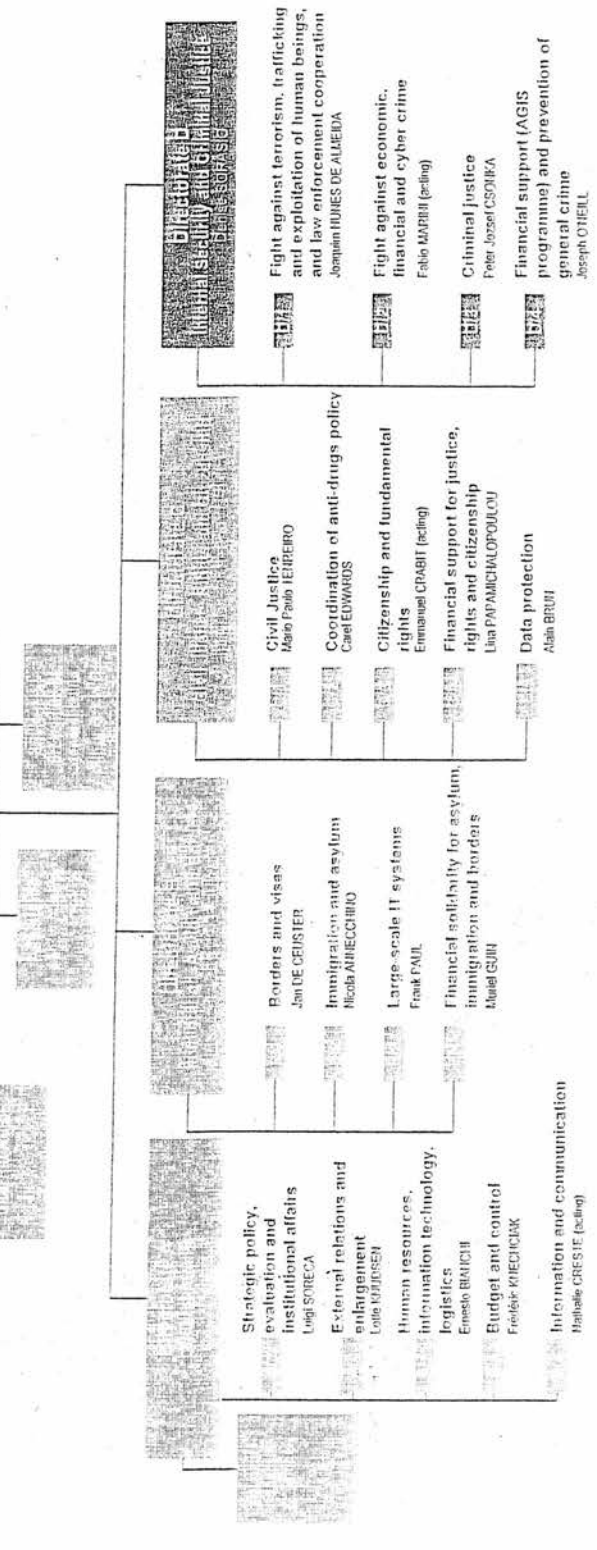


¹ If you wish to call one of our officials from outside the Commission the internal number has to be preceded by + 32 2 29 (internal number)



Directorate General Justice, Freedom and Security

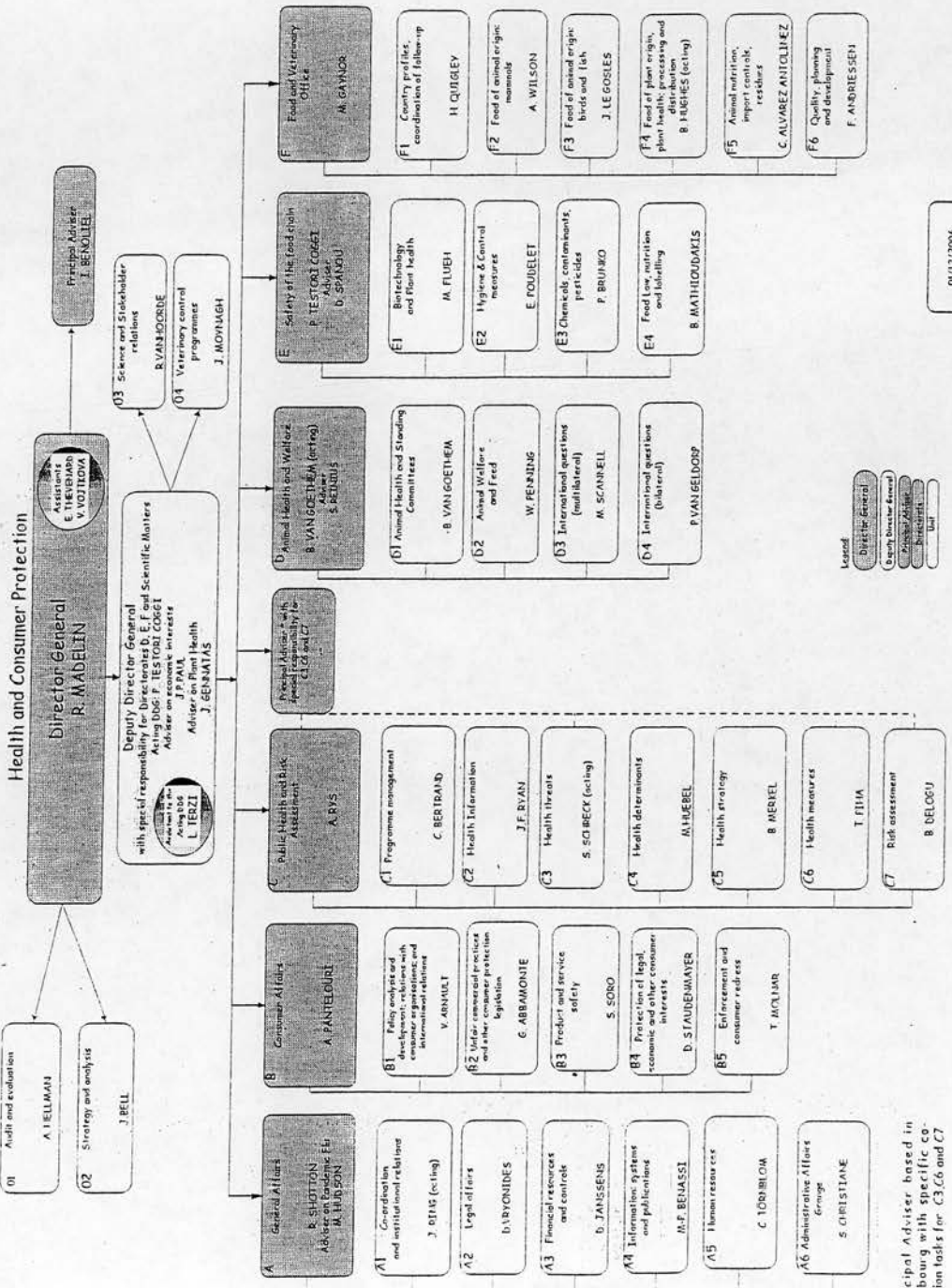
Director-General
Johannes FAULL



Postal address: European Commission - B - 1049 Brussels

Visitors: 46 rue de Luxembourg/Luxemburgstraat - 1000 Brussels

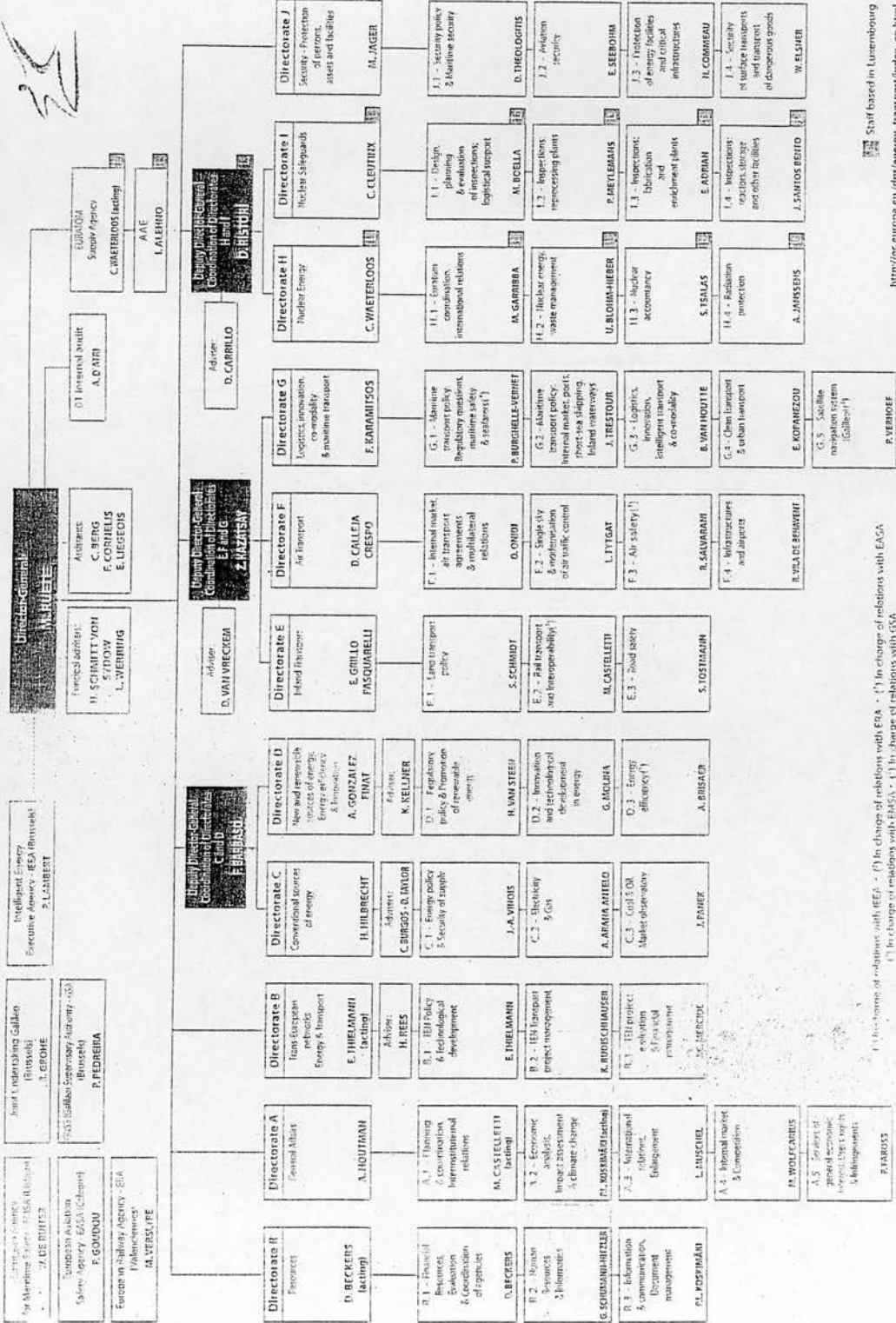
Last update: 01/11/2007



* Principal Adviser based in Luxembourg with specific coordination tasks for C3, C6 and C7

Directorate-General for Energy and Transport

1 October 2016

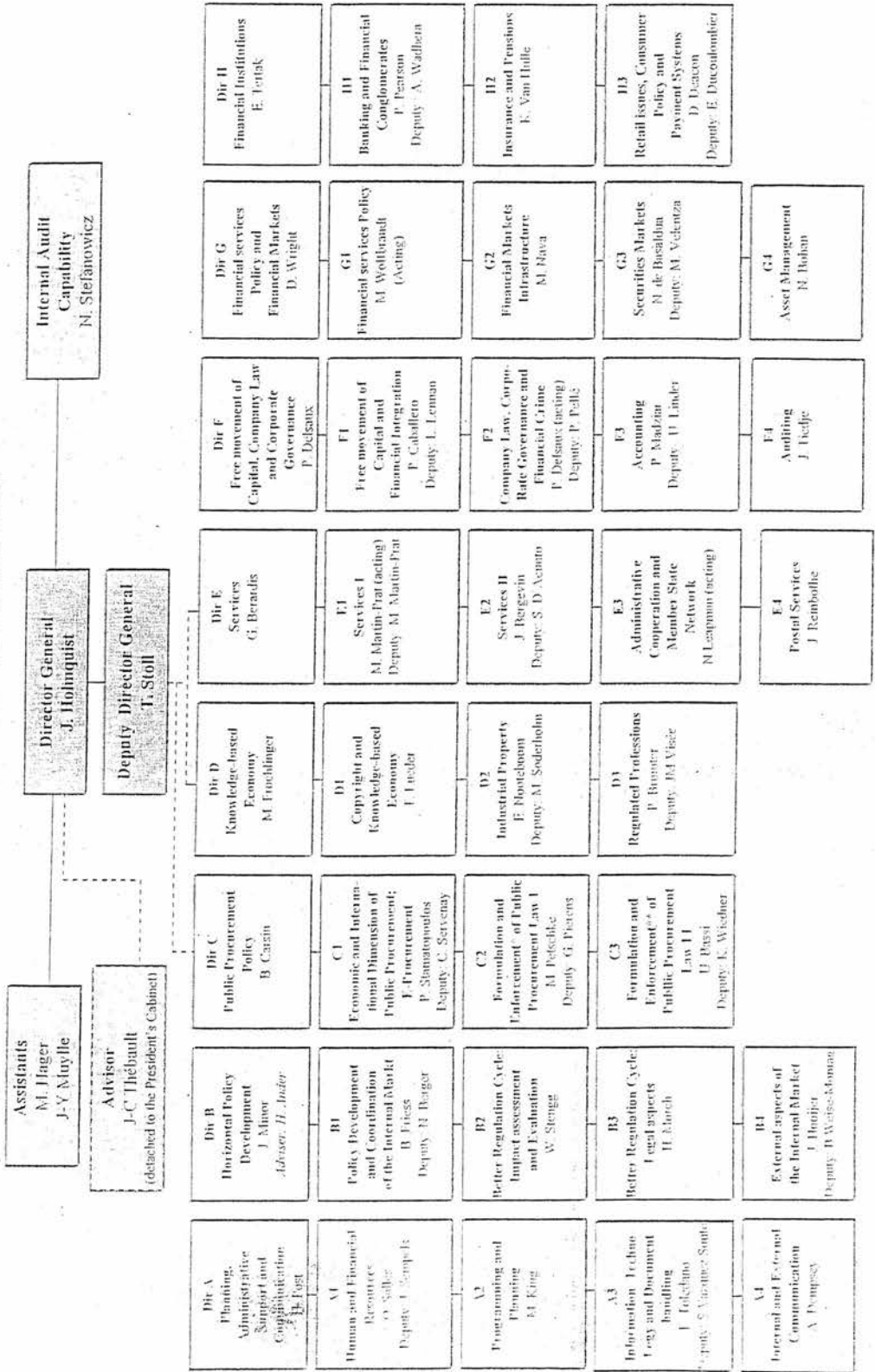


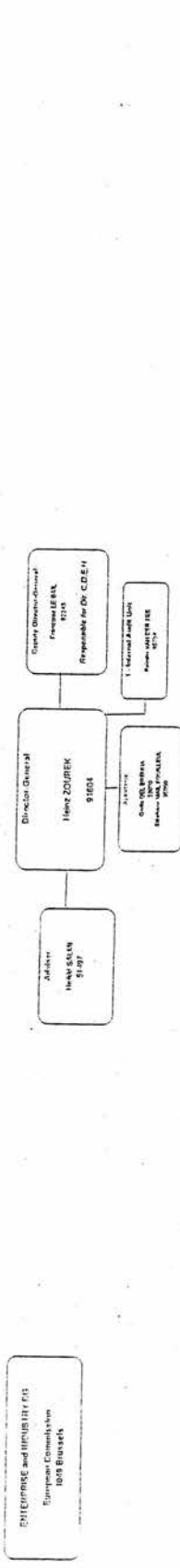
Staff based in Luxembourg

Staff based in Luxembourg

Staff based in Luxembourg

DG Internal Market & Services





Entrepreneurship and Innovation DG E&I European Commission DG E&I		Competitiveness and Industrial Policy		Competitiveness SMEs and Entrepreneurship		Competitiveness, Internal Market for Goods and Sectoral Policies	
<p>A1 - Entrepreneurship S198 Director of Entrepreneurship John Farrell 5033</p>	<p>A2 - Innovation Policy S200 Director of Innovation Policy John Farrell 5033</p>	<p>B1 - Entrepreneurship S198 Director of Entrepreneurship John Farrell 5033</p>	<p>B2 - Innovation Policy S200 Director of Innovation Policy John Farrell 5033</p>	<p>C1 - Regulatory Policy S201 Director of Regulatory Policy John Farrell 5033</p>	<p>C2 - Regulatory Policy S201 Director of Regulatory Policy John Farrell 5033</p>	<p>D1 - Innovation Policy S202 Director of Innovation Policy John Farrell 5033</p>	<p>D2 - Innovation Policy S202 Director of Innovation Policy John Farrell 5033</p>
<p>B1 - Entrepreneurship S198 Director of Entrepreneurship John Farrell 5033</p>	<p>B2 - Innovation Policy S200 Director of Innovation Policy John Farrell 5033</p>	<p>C1 - Regulatory Policy S201 Director of Regulatory Policy John Farrell 5033</p>	<p>C2 - Regulatory Policy S201 Director of Regulatory Policy John Farrell 5033</p>	<p>D1 - Innovation Policy S202 Director of Innovation Policy John Farrell 5033</p>	<p>D2 - Innovation Policy S202 Director of Innovation Policy John Farrell 5033</p>	<p>E1 - Entrepreneurship S203 Director of Entrepreneurship John Farrell 5033</p>	<p>E2 - Innovation Policy S204 Director of Innovation Policy John Farrell 5033</p>
<p>B1 - Entrepreneurship S198 Director of Entrepreneurship John Farrell 5033</p>	<p>B2 - Innovation Policy S200 Director of Innovation Policy John Farrell 5033</p>	<p>C1 - Regulatory Policy S201 Director of Regulatory Policy John Farrell 5033</p>	<p>C2 - Regulatory Policy S201 Director of Regulatory Policy John Farrell 5033</p>	<p>D1 - Innovation Policy S202 Director of Innovation Policy John Farrell 5033</p>	<p>D2 - Innovation Policy S202 Director of Innovation Policy John Farrell 5033</p>	<p>E1 - Entrepreneurship S203 Director of Entrepreneurship John Farrell 5033</p>	<p>E2 - Innovation Policy S204 Director of Innovation Policy John Farrell 5033</p>

[1] The staff of DG E&I is made up of members of the Commission, the European Parliament, and the European Court of Justice. The staff of DG E&I is made up of members of the Commission, the European Parliament, and the European Court of Justice.