

Fordham International Law Journal

Volume 19, Issue 3

1995

Article 7

How to Improve Compliance with European Community Legislation and the Judgments of the European Court of Justice

Rolf Wägenbaur*

*

Copyright ©1995 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

How to Improve Compliance with European Community Legislation and the Judgments of the European Court of Justice

Rolf Wägenbaur

Abstract

It is well known that Member States of the European Community ("EC") do not always comply with Treaty provisions or with directly applicable secondary Community legislation. There are, however, legal remedies in the case of noncompliance of Treaty provisions or directly binding regulations. Citizens may bring claims against Member States in national courts or may lodge a complaint with the Commission. The situation is more complicated with claims based on directives because directives must be implemented by Member State legislation. Member States are responsible for adapting their existing legislation or establishing new legislation. Often, this is done late, long after expiration of the period for Member State compliance, or else, in many cases, the transposition does not fully comply with the text or the spirit of the directive. A number of remedies are available in the event of noncompliance. European Court of Justice ("ECJ" or "Court") case law has extended the principles of direct applicability to directive provisions that are clear and unconditional. In the Francovich case, the Court went beyond this and found that citizens can have an action for damages if they suffer a financial loss when a Member State fails to implement a directive in due time. Finally, one of the innovations of the Maastricht Treaty on European Union ("TEU") is the possibility of ordering a Member State that fails to comply with an ECJ judgment to pay a lump sum or penalty. This new provision must be seen in the context of the Treaty provisions for infringement proceedings against Member States. Before turning to this provision, I would like to refer to some other ideas on how to improve the quality of Community legislation in order to improve Member State compliance.

HOW TO IMPROVE COMPLIANCE WITH EUROPEAN COMMUNITY LEGISLATION AND THE JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE

*Rolf Wägenbaur**

INTRODUCTION

The European Community ("EC") is a Community based on the rule of law. In the words of Walter Hallstein, the first President of the EEC Commission, it is a "Communauté de droit," a "Rechtsgemeinschaft."¹ This statement incorporates quite a number of elements. The most important element is that the Community acts under a Treaty or, indeed, a set of Treaties that form its constitution.²

This constitution is characterized by institutions which develop and administer the establishment of "an ever closer union among the peoples of Europe."³ For this purpose, the Community institutions are granted legislative, administrative, and judicial powers. Member States are bound by this Community action, the characteristics of which have been established, over the years, by the European Court of Justice ("ECJ" or "Court"). Among the characteristics established, the principles of direct applicability and of supremacy of Community law over national legislation are most important.

It is well known that Member States do not always comply with Treaty provisions or with directly applicable secondary Community legislation. There are, however, legal remedies in

* Rechtsanwalt, Former Director in the EC Commission Legal Service. This Essay was adapted from a paper presented at the Second Congress of the European Association of Legislation, Rome, March 24 - 25, 1995.

1. WALTER HALLSTEIN, *DIE EUROPÄISCHE GEMEINSCHAFT* 51-77 (1979).

2. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

3. EEC Treaty, *supra* note 2, pmbl., 298 U.N.T.S. at 14, 1973 Gr. Brit. T.S. No. 1 at 1.

the case of noncompliance of Treaty provisions or directly binding regulations. Citizens may bring claims against Member States in national courts or may lodge a complaint with the Commission. The situation is more complicated with claims based on directives because directives must be implemented by Member State legislation. Member States are responsible for adapting their existing legislation or establishing new legislation. Often, this is done late, long after expiration of the period for Member State compliance, or else, in many cases, the transposition does not fully comply with the text or the spirit of the directive.

A number of remedies are available in the event of noncompliance. ECJ case law has extended the principles of direct applicability to directive provisions that are clear and unconditional. In the *Francovich*⁴ case, the Court went beyond this and found that citizens can have an action for damages if they suffer a financial loss when a Member State fails to implement a directive in due time. Finally, one of the innovations of the Maastricht Treaty on European Union⁵ ("TEU") is the possibility of ordering a Member State that fails to comply with an ECJ judgment to pay a lump sum or penalty.⁶ This new provision must be seen in the context of the Treaty provisions for infringement proceedings against Member States. Before turning to this provision, I would like to refer to some other ideas on how to improve the quality of Community legislation in order to improve Member State compliance.

I. MEASURES IN ORDER TO HELP IMPROVE THE QUALITY OF EC LEGISLATION

Delayed implementation of a directive or implementation that does not always comply with the content or spirit of the directive can at times be blamed on Community institutions. If Community texts were simpler and clearer, Member States would have less difficulties implementing them or would be likely to make fewer errors of interpretation of Community texts. It is understandable that the ECJ requires, as it has on a number

4. *Francovich v. Italy*, Joined Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357, [1991] 2 C.M.L.R. 66 [hereinafter *Francovich*].

5. TEU, *supra* note 2, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 (amending EEC Treaty).

6. EC Treaty, *supra* note 2, art. 171(2), [1992] 1 C.M.L.R. at 687.

of occasions, "clear and unequivocal texts." It is less obvious that this is a subject for a European summit. This is nevertheless what took place at the Edinburgh European Council in December 1992.⁷ The conclusions of the EC Presidency refer to the necessary practical steps to improve the quality of Community legislation and even suggests a number of potential steps.⁸ This idea has been further developed by the EC Council. On June 8, 1993, the Council adopted a resolution on the drafting quality of Community legislation. This Resolution suggests a list of ten points that should be kept in mind. "Clarity" and "simplicity" are the master words, most frequently appearing. Such an initiative was certainly important. What is even more important is that the adoption of such a resolution shows that Member States and Community institutions are aware of the problem and are looking for remedies.

The initiatives taken so far are insufficient. It is not enough that a single institution adopts more precise rules on how to legislate, if the others do not follow in the adoption of similar legislation. For instance, the Commission is bound to prepare the Legislation drafts, but drafts are also handled by the EC Parliament and EC Council. What is really necessary and might help further improve things is an inter-institutional arrangement, a kind of code of conduct concerning the drafting of legislation, particularly the drafting of directives. The Commission as well as the Parliament and Council, the other two legislative bodies, would adhere to this code. The Commission, however, has favored other measures and remedies to encourage more effective legislation.

For the future, the Commission is committed to promulgating less legislation, but legislation that is better written. With the achievement of the internal market in 1993, the proliferation of community legislation has already dropped sharply. What remains is to improve the quality of future legislation. I believe that in order to achieve this goal, the initiatives taken by the European Association of Legislation⁹ can play a useful role.

7. Conclusions of the EC Presidency from the Edinburgh European Council, December 1992, 12 *E.C. BULL.*, no. 1, at 28-29 (1992).

8. Council Resolution of 8 June 1993, O.J. C 166/1 (1993) (concerning quality of drafting of Community Legislation).

9. The European Association of Legislation was founded in Bad Homburg, Germany in 1991.

II. PENALTIES TO ENFORCE COMPLIANCE WITH COMMUNITY LAW

EC Treaty Article 169 empowers the Commission to bring a Member State before the ECJ if it breaches its obligations under the Treaties and fails to take the necessary remedial action after a reasoned opinion of the Commission has been addressed to it.¹⁰ Article 170 offers the Member States comparable methods to "prosecute" each other, but only after a complaint has been lodged with the Commission, who, in turn, has found that no action is warranted.¹¹ Commission infringement proceedings under Article 169 are a regular occurrence. Article 170 actions are, for all intents and purposes, a purely theoretical possibility and will not be considered in this paper.

What Articles 169 and 170 actually provide is a full-dress court procedure culminating in a judgment. If the ECJ finds that the Member State in question has failed to fulfill its Treaty obligations, the Member State is required by Article 171 to "take the necessary measures to comply with the judgment."¹² The Court's judgment, therefore, is essentially declaratory, neither depriving national law of its effect nor creating new law. It is for the Member State to consider what action it must take to comply with Community law, and that may entail changing its law, whether by amendment or new enactment. The same applies in a pending action when the ECJ orders interim measures at the application of one of the parties, except that here the Court's

10. EC Treaty, *supra* note 2, art. 169, [1992] 1 C.M.L.R. at 686. "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." *Id.*

11. *Id.* art. 170, [1992] 1 C.M.L.R. at 686.

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

....

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 opinion shall not prevent the matter from being brought before the Court of Justice.

Id.

12. *Id.* art. 171, [1992] 1 C.M.L.R. at 687. "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 judgement of the Court of Justice." *Id.*

order will generally specify exactly what remedial measures are to be taken by the Member State.

Originally, there were no provisions imposing penalties on Member States that did not meet their obligations under ECJ final judgments or interim orders. For a long time it was even assumed that there would be no need for penalties. A whole generation of Community law scholars was assured that the authority of the Court's judgments was such that no Member State would dare defy a judgment made against it in an infringement proceeding. As Thomas Oppermann recently wrote, "the effectiveness of the Community legal order rests on the loyalty to the Treaties shown by Members, who will have to take the requisite implementing measures in their own interests and their common interest in having the Community operate efficiently and smoothly."¹³ In the early days of the Treaties, Ernst Wohlfarth stated, "[t]he point is that there is a general assumption that Member States will comply with the Court's judgments."¹⁴ A declaratory judgment by the ECJ, therefore, was presumed to be sufficient grounds for the offending Member State to put an immediate end to its infringement of the Treaty, and this was borne out in practice in the early years. But as the Commission began to routinely bring actions against Member States allegedly infringing the Treaty, the number of judgments not immediately complied with similarly began to rise. The Court's authority seemed to be coming under threat.

In the 1980's, the Commission adopted the practice, when no effect was given to the first judgment, of commencing a second infringement proceeding with respect to that omission, but this produced no tangible improvement in the discipline shown by Member States. The Commission's Eleventh Annual Report to Parliament on its monitoring of the application of Community law¹⁵ states that on its cut-off date of December 31, 1993, there were eighty-two outstanding cases where Member States had not complied with Article 169 judgments given against them in Article 169 infringement proceedings, and nine cases in

13. Thomas Oppermann, *Die dritte Gewalt in der Europäischen Union*, 1 DEUTSCHES VERWALTUNGSBLATT 901, 902 (1994).

14. ERNST WOHLFARTH ET AL., *DIE EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT, KOMMENTAR* 485-86 (1960).

15. Commission's Eleventh Annual Report to Parliament on the Application of Community Law, O.J. C 154/1 (1994).

which a second judgment, given under Article 171, had been disregarded as well.

The situation was not dramatic, but the time nevertheless had come to fill in this gap in the Treaty's enforcement rules. In the period prior to the ratification of the TEU, different quarters called for Treaty amendments.¹⁶ As a result, Article 171(2) was added to the EC Treaty by the TEU.¹⁷ This provision provides for penalties where a Member State fails to comply with a second judgment given against it:

(2). If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State 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 judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing 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.

This procedure shall be without prejudice to Article 170.¹⁸

An identical provision was written into the Treaty Establishing the European Atomic Energy Community¹⁹ ("Euratom

16. Penalties for infringements of Community law were the subject of the XVth Congress of the Federation Internationale pour le Droit European (Lisbon, 1992). See C.W.A. Timmermans, *Community Report*, in 2 FIDE REPORTS POUR LE XV CONGRES; LA SANCTION DES INFRACTIONS AU DROIT COMMUNAUTAIRE 17 (1992). Giuseppe Tesauo, *General Report*, in 2 FIDE REPORTS POUR LE XV CONGRES; LA SANCTION DES INFRACTIONS AU DROIT COMMUNAUTAIRE 425 (1992). The country reports consider special features of national law. See also Similiter Tesauo, *Verfahren zur Einhaltung des Gemeinschaftsrechts durch die Mitgliedstaaten*, in SANKTIONEN ALS MITTEL ZUR DURCHSETZUNG DES GEMEINSCHAFTSRECHTS, Annual Congress of the European Law Academy, Trier, Germany 1994 (forthcoming) [hereinafter Similiter Tesauo].

17. See Diez-Hochleitner, *Le traité de Maastricht et l'inexécution des arrêts de la Cour de Justice par les Etats membres*, REVUE DU MARCHÉ UNIQUE EUROPÉEN 111 (1994).

18. EC Treaty, *supra* note 2, art. 171(2), [1992] 1 C.M.L.R. at 687.

19. Treaty Establishing the European Atomic Energy Community Community,

Treaty").²⁰ The European Coal and Steel Community Treaty²¹ ("ECSC Treaty"), for no apparent reason, was left unchanged.²² The ECSC Treaty does contain Article 88 which can be seen as the forerunner of Article 171(2), though it provides for a somewhat different response to infringements by Member States.²³ Article 88, however, seems never to have been applied,²⁴ suggesting that we should consider whether the solution adopted for the EC and Euratom Treaty is likely to achieve the desired effect.

III. MEASURES TO COMPLY WITH ECJ JUDGEMENTS

An initial problem with the new clause in Article 171(2) is that it does not define what is meant by "measures." This ambiguity was already present in the pre-TEU Article 171.²⁵ When this early Article was drafted, the Commission did not need to state clearly what was to be done to comply with judgements. There was no possibility of a proceeding for the failure to comply with Article 171 itself and in practice nothing was done. In Article 171(2) proceedings, however, the Commission will have to specify what measures must be taken, for this is how the Commission will establish the gravity of the infringement and thus justify the lump sum or penalty payment that it considers the ECJ should impose.

There is no particular difficulty where the Member State has simply neglected to issue the necessary implementing measures

Mar. 25, 1957, art. 143, 298 U.N.T.S. 167, 219 [hereinafter Euratom Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'1 Pub. Off. 1987).

20. *Id.* art. 143, 298 U.N.T.S. at 219.

21. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 167 [hereinafter ECSC Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'1 Pub. Off. 1987).

22. *See id.* (Showing no similar amendment)

23. *Id.* art. 88, 261 U.N.T.S. at 221. Article 88 provides that:

If the State has not fulfilled its obligation by the time limit set by the High Authority, or if it brings an action which is dismissed, the High Authority may, with the assent of the Council acting by a two-thirds majority:

(a) suspend the payment of any sums which it may be liable to pay to the State in question under this Treaty;

(b) take measures, by way of derogation from the provisions of Article 4, in order to correct the effects of the infringement of the obligation.

Id.

24. *See Timmermanns, supra* note 16, at 17.

25. EEC Treaty, *supra* note 2, art. 171, 298 U.N.T.S. at 75, 1973 Gr. Brit. T.S. No. 1 at 57.

such as transposing a directive. The measures that must be taken in a case such as this will be to transpose the directive. Matters will be somewhat more complicated where the Member State enjoys some discretion in rectifying its infringement. In a case of tax discrimination contrary to Article 95 of the EC Treaty, for example, there is the choice between lowering the tax burden on imported goods and raising the tax on home-produced goods. The ECJ cannot interfere with the Member State's exercise of its discretion in such a circumstance, and a purely declaratory judgment will suffice. In Article 171(2) proceedings the Commission will not be able to escape considering the alternatives.

The picture will look different when it comes to specifying the amount of the penalty to be imposed for a Treaty infringement. This problem has entered many Community law books in their discussions of the *Franco v. Italy* case.²⁶ Furthermore, academic lawyers have always emphasized this aspect of the infringement proceeding.²⁷ Yet, the problem was present from the outset. In 1960, the ECJ, in *Humblet*,²⁸ considered the obligations of the Member States to both repeal legislation found contrary to Community law and repair the effects of unlawful acts done on the basis of this legislation. Incidentally, the Court cited *Humblet* in the *Franco v. Italy* case.²⁹ In subsequent cases, the Court has followed this principle,³⁰ holding that compensation in the form of damages is required if it is not possible to restore the situation that would have existed in the absence of the breach.³¹

26. *Franco v. Italy*, [1991] E.C.R. I-5357, [1991] 2 C.M.L.R. 66.

27. See Pierre Pescatore, *Responsabilité des états membres en cas de manquement aux règles communautaires*, in 27 *IL FORO PADANO* 10, 17-18 (1972); PIERRE PESCATORE, *L'ORDRE JURIDIQUE DES COMMUNAUTÉS EUROPÉENNES* 265 (1973); see generally PIERRE PESCATORE, *THE LAW OF INTEGRATION* (1974); Denys Simon & Ami Barav, *La responsabilité de l'administration nationale en cas de violation du droit communautaire*, *REVUE DU MARCHÉ COMMUN* 165 (1987); see also Answer Given by the Commission to Written Question No E-1808/93 by Rosaria Bindi, O.J. C 289/6 (1994).

28. *Humblet v. Belgian State*, Case 6/60, [1960] E.C.R. at 559.

29. *Franco v. Italy*, [1991] E.C.R. at I-5414, [1991] 2 C.M.L.R. at 114.

30. *Commission v. Italy*, Case 39/72, [1973] E.C.R. 101, 112 ¶ 11, [1991] 2 C.M.L.R. 439, 455 ¶ 11; *Commission v. Germany*, Case 70/72, [1973] E.C.R. 813, 829 ¶ 13, [1973] C.M.L.R. 741, 764 ¶ 13.

31. *Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (AIMA)*, Case 60/75, [1976] E.C.R. 45, 56 ¶ 9, [1976 Transfer Binder] Common Mkt. Rep. (CCH); *Commission v. Italy*, Case 309/84, [1986] E.C.R. 599, 609, [1987] 2 C.M.L.R. 657, 667; *Commission v. Italy*, Case 103/84, [1986] E.C.R. 1759, 1771 ¶ 9, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,334 at 17,090.

Both the Commission and, of course, the ECJ face the singularly daunting prospect of determining what measures should be taken to effect compliance with a judgment. The Commission's reasoned opinion must already state "the points on which the Member State . . . has not complied with the judgment of the Court of Justice."³² This will include the conflicting legislative provisions and also the value of the damage sustained. Despite *Francovich*, there is still considerable uncertainty as to the conditions for and the impact of liability. One hopes that the cases now pending at the ECJ³³ will provide the necessary clarification.

IV. A LUMP SUM OR A PENALTY PAYMENT?

Further difficulties with the application of Article 171(2) will arise in determining "the amount of the lump sum or penalty payment to be paid by the Member State concerned."³⁴ The first question that arises will concern the objective pursued by the judgment itself, which will determine whether a lump sum payment or penalty payment is ordered. The question of the amount comes next and is followed, in turn, by the questions of the administration and distribution of powers between the Commission and the ECJ.

The purpose of a judgment rendered under Article 171(2), imposition of fines, whether they are called lump-sum or penalty payments, is to impose a "punishment" for conduct contrary to the Treaties. An order to pay a lump sum has a primarily punitive and deterrent purpose. The main aim of an order to make a set monetary payment every month from the month following the judgment is to induce the offending Member State to restore conformity with the Treaties as rapidly as possible.

An order requiring penalty payments would detail the enactment of a directive or other measures necessary for compliance. It is an open question as to whether compensation might be required in this context. Mandatory compensation might

32. EC Treaty, *supra* note 2, art. 171(2), [1992] 1 C.M.L.R. at 687.

33. See *Brasserie du Pêcheur S.A. v. Germany*, Case C-46/93 (Eur. Ct. J.) (pending); *Regina v. Secretary of State for Transport ex parte Factortame and others*, Case C-48/93 (Eur. Ct. J.) (pending). Admittedly these cases concern directly applicable Community law rather than directives. See also *Dillenkofer et al.*, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94 (Eur. Ct. J.) (pending) (regarding damage sustained as result of failure to transpose directive in good time).

34. EC Treaty, *supra* note 2, art. 171(2), [1992] 1 C.M.L.R. at 687.

constitute a "measure" for the purposes of Article 171(1) and the question might, therefore, be answered in the affirmative. The distinction as to purpose between a lump-sum fine and a monthly penalty payment is not so strict as to absolutely exclude the possibility of the two being ordered in conjunction. The text of the Article, however, is such that the possibility is difficult to justify.

The Commission and the Court will usually opt for one form of payment or the other. Penalty payments will in all likelihood dominate, although there is no guidance on this point in the Treaty. Penalty payments are more likely to attain the EC objective of initial compliance because there is little deterrent value in a lump sum fine. If the judgment orders a monthly penalty payment, the measures required of the Member State as well as the procedure for confirming the requisite conditions for the penalty's termination must be absolutely clear.

Article 171(2) has no retroactive effect. It may not be confined to cases where a Member State has failed to give effect to an Article 169/170 judgment rendered after entry into force of the TEU. In view of the number of judgments already given under the pre-TEU Article 171 and not yet implemented, it is perfectly legitimate to ask whether there is jurisdiction to hear and determine a new proceeding under the post-TEU Article for the simple purpose of doing the job properly and imposing the lump-sum or penalty payment. It can be argued that the criminal laws of all the Member States have the *nulla poena sine lege*³⁵ principle and the lump-sums or penalty payments that the ECJ has power to order are at the very least of an "administrative-criminal," or *Verwaltungsstrafrecht* nature.³⁶

The amount of penalty to be ordered is an extremely delicate determination. A symbolic amount of ECU1000 or ECU10,000 may suffice to bring a Member State into compliance. It may, however, be necessary to look to a higher pain threshold of ECU100,000 or even ECU1 million. The Treaty is silent on the matter. The words "the amount which [the Commission] considers appropriate" leave it to the Commission to

35. Literally translated: "No punishment without law."

36. Similiter Tesauro, *supra* note 16 (discussing use of penalties to enforce Community law).

decide what it thinks is appropriate to propose and the ECJ to decide what it considers a proper fine.

General principles of Community law would suggest that the appropriateness of the penalty amount will be measured by reference to two criteria: the gravity of the infringement and the need for an adequate deterrent. The gravity criterion means considering the aggregate impact on Community life. The consideration includes: (1) whether fundamental freedoms are threatened; (2) whether the Member State, or its citizens, derived some special benefit from the infringement of which it or they ought to be deprived; (3) whether other Member States sustained injury to their economies; (4) whether private citizens have been injured; (5) whether there is any prospect of compensation; (6) whether the infringement is likely to be repeated; or (7) whether the infringement is recent or not. Further, mitigating circumstances, where the origin of the infringement lies partly in circumstances beyond the offending Member State's control, will be considered.

Mitigating circumstances are, for example, where the transposal of a directive is within the powers of regional authorities or where Parliamentary enactment of the requisite national implementing measures has been delayed. The ECJ has not, in the past, accepted such pleas to excuse infringements in Article 169 proceedings. This does not mean that the ECJ will not regard such pleas in measuring the penalty. The Court will most likely take mitigating circumstances into account.³⁷ Thus, while immaterial to the initial question of whether an infringement took place, the sincere attempts of Member States to put an end to infringements should be reflected in the amount of the penalty.

A penalty's deterrent effect and its relationship to measurement of that penalty is as difficult to analyse as the gravity of the infringement. The threat of a periodic penalty payment has something of a deterrent effect, even if some writers disagree as to its significance.³⁸ Deterrence is really relevant only where infringements are committed intentionally or negligently. If the Parliament of a Member State refuses to pass legislation presented by the Government, there is considerable doubt that

37. *Contra* Andreas Middeke & Peter Szczekalla, *Änderungen im europäischen Rechtsschutzsystem*, 6 *JURISTENZEITUNG* 284, 287 (1993).

38. Diez-Hochleitner, *supra* note 17, at 145.

the threat of a fine would have any valid deterrent effect. Moreover, there is the question whether the penalty should be graduated as between richer and poorer Member States, perhaps on the basis of an analysis of gross national product ("GNP") statistics. There is no doubt that the search for fairness would make the determination of the "appropriate" penalty even more complicated. The same will be true when the Court, in determining the amount to be paid, has to establish whether the penalty should, in fact, be payable by the Member State itself or whether it should be charged to some regional authority that is actually responsible for the infringement. In most cases, the legislation that would permit pin-pointing responsibility for payment has still to be enacted.

In determining lump-sums and penalty payments, the Commission and the Court will be acting in concert, but the Treaty does not specify how to coordinate such dual action. The Commission does enjoy the right of initiative. It is the Commission's decision whether a lump-sum or penalty payment should be imposed. The Commission will be required to indicate not only the amount it considers appropriate but also the full details of the circumstances warranting the Courts view.

Proper criteria will have to be followed for presenting the Commission's view. The difficulty of ranking all the considerations that might come into play cannot be overestimated. Before the ECJ, a Member State will have all the usual opportunities for expressing an opinion on the Commission's evaluation and for attacking this opinion. The Commission routinely refers to its power under Article 171(2) to recommend penalties whenever it issues warning letters calling on Member States to present their observations and again in its own reasoned opinions.³⁹

The use of the mandatory future tense of the verb, "shall specify," suggests that the Commission must always call for a lump-sum or penalty payment to be ordered.⁴⁰ On the other hand, the Commission does have some discretion as to whether it will pursue an action in the first place. It makes little sense to

39. In July 1994 the Commission announced its initiative to the Member States in general terms, specifying the judgments with which Member States had not complied. Commission of the European Communities, *European Social Policy: A Way Forward for the Union*, a White Paper, COM (94) 333 Final (July 1994).

40. EC Treaty, *supra* note 2, art. 171(2), [1992] 1 C.M.L.R. at 687. "The Commission . . . shall specify the amount . . ." *Id.* (emphasis added).

regard the specification of a penalty as compulsory when the proceeding as a whole is basically optional. There may be cases where an action under Article 171(2) is enough in itself to subject the Member State to the requisite discipline without the imposition of a financial penalty. It can be concluded, therefore, that it is in the Commission's discretion whether to apply for penalties, acting selectively and using the power only in cases that seem suitable. Much will, therefore, depend on the Commission's ability to choose cases properly. The risk of discrimination does, indeed, exist. The Commission must be required to give reasons for asking for financial penalties in some cases and not in others.

Regarding the ECJ, there is the concomitant question whether it can order penalties in the absence of a Commission request for them. The relationship between the second and third subparagraphs of Article 171(2) is so close that the negative answer seems obvious. Absent a Commission request, the ECJ can hardly be held to have power to order financial penalties. The next question is whether the Court can depart from the Commission's request and order a penalty payment where the Commission has requested a lump-sum, or vice versa. This must also be answered in the negative, if only on grounds of the *ne ultra petita*⁴¹ rule.⁴²

Enforcing penalties once they have been ordered may prove problematic if a Member State neglects to make the payment within the set time limit. Argument that this will never occur due to the political implications⁴³ is little more than wishful thinking. Enforcement against recalcitrant Member States is excluded by the fact that Articles 187 and 192 have not been amended by the TEU.⁴⁴ It will be difficult to argue that these Articles can be interpreted, in the light of the additions made to Article 171, as to make the second and subsequent paragraphs of Article 192 directly applicable to judgments of the ECJ.

Assuming for the moment that there is no prospect for such

41. Literally translated: "No outside right to bring action."

42. *Contra* Ulrich Everling, *Umsetzung von Umweltrichtlinien durch normkonkretisierende Verwaltungsanweisungen*, 38 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 379, 381 (1992).

43. Tesauro, *supra* note 16.

44. *See* TEU, *supra* note 2, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 (lacking amendments to Articles 187 and 192).

an interpretation,⁴⁵ the only possibility will be to amend the Community Financial Regulations in such a way as to permit offsetting deductions against a Member State's future claims on the Commission. The requisite action for this is already under way. Precedents have been set in the agriculture and structural funds contexts.⁴⁶ Where a Member State acts contrary to the Treaties in a fashion that has a financial impact, the Commission can retaliate financially.⁴⁷ In the course of the procedure for the clearance of accounts for the Agricultural Fund Guarantee Section expenditure, no reimbursements have been made since 1970 for expenditure undertaken contrary to Community legislation.⁴⁸ For Structural Funds purposes, such as the Social and Regional Funds and the Guidance Section of the Agricultural Fund, the Commission can reduce or halt its financial support to a Member State that is found to have committed or permitted financial irregularities to the detriment of the relevant Fund.⁴⁹ Since these precedents are now many years old, it will be difficult to argue that the Commission has no authority to exercise its rights under Article 171(2) by offsetting amounts due to it against amounts due to the Member States. Notably, lump-sums penalties will be more effective in this context than monthly penalty payments.

CONCLUSION

The new provisions of Article 171(2), written into the EC Treaty in the TEU, should help improve the quality of EC legislation. This provision should, therefore, be welcomed, but not without reservations. There are a number of grounds for misgivings. It is quite obvious that such a provision was needed, since some Member States were not meeting their Treaty obligations in full. It was unacceptable that judgments given by the ECJ

45. *Contra* Middeke & Szcekalá, *supra* note 37, at 288.

46. *Cf.* Reinhard Priebe, *Sanktionen und sanktionsgleiche Massnahmen im Rahmen des Gemeinschaftsfonds - neue Entwicklungen in der Gemeinschaftsgesetzgebung*, in *SANKTIONEN ALS MITTEL ZUR DURCHSETZUNG DES GEMEINSCHAFTSRECHTS*, Annual Congress of the European Law Academy, Trier, Germany 1994 (forthcoming).

47. *Id.*

48. Commission Regulation No. 729/70, O.J. L 94, at 13 (1970), *amended by* Regulation No 2048/88, O.J. L 185/1 (1988).

49. Commission Regulation No. 4253/88, *implementing* Council Regulation No. 2052/88, O.J. L 374/1 (1988), *amended by* Council Regulation No. 2082/93, art. 24, O.J. L 193/20, at 28 (1993).

should be ignored for so long, *a fortiori* where a second judgment found that no effect had been given to the first. This alone illustrates the need for the new rule. There is room, however, for legitimate doubt as to whether financial penalties are a truly effective way of inducing Member States to comply with their Treaty obligations. There is a risk that penalties will reinforce Euro-scepticism in government circles in some Member States. Financial penalties against Member States have been successful as an integration tool where they were accepted voluntarily and correspond to a clear federalist approach. In view of the problems of interpretation and the other doubts the new provisions give rise to, great caution will clearly have to be exercised in their initial application by the Commission. The Commission can and must be selective in its approach and begin with cases where there is no room for dispute. Penalties must be used in exemplary cases where failure to meet a Treaty obligation, coupled with failure to comply with a first judgment, has had a manifestly deleterious effect on the integration process. The first few cases brought by the Commission in the ECJ must be truly convincing. The Commission must not be afraid of giving full publicity to its actions and the reasons behind them. An "educated" public will be more likely to accept penalties. These penalties must not be imposed purely as a matter of routine. Initially, symbolic amounts should suffice.