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The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate

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THE MONITORING OF THE APPLICATION OF COMMUNITY LAW: A NEED TO IMPROVE THE CURRENT TOOLS AND AN OBLIGATION TO INNOVATE

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Abstract

This paper aims to make a state of play of the monitoring of the application of Community law. Indeed, despite numerous Treaty reforms and several enlargements, this control is still governed by the same principles.

First, I have tried to analyse the different mechanisms to control this application**:** ex-ante mechanism such as the notification Directive (98/34/EC), ex-post mechanism such as infringement actions and hybrid mechanism such as Solvit.

Second, I have proposed several ideas in order to improve the current situation. One of the main arguments is to suggest a new mechanism able to deal with the lack of transposition of Directives. Furthermore other aspects are explored such as the necessity to include the European Parliament in the control of the application of European law.

I. Introduction

The European Community is at a key moment of its history because for the first time, it has accepted 10 new Member States. Accordingly, it launched a discussion process without precedent: the Convention on the Future of Europe.[1] The aim was to provide solutions to the problems encountered by the development of European integration. The intergovernmental Conference decided to broadly follow the main points developed by the Convention. However, the fate reserved for the draft Constitution by the French and Dutch citizens implies at the very least that this text will need to be modified, for these two states[2].

In any case, even if the draft European Constitution rises from the ashes, aspects dealing with the Community judicial remedies are unfortunately insufficient. For instance, the important case of the individual applicant within the framework of the action for annulment is tackled[3], but the even more important question to know what can be done regarding the increase of non application of EC law by Member States remains unanswered. The need to find solutions concerning the control of the application of EC law is today more and more important.

The establishment of the internal market was a genuine success. The deadline of 1993[4] was respected and a vast majority of the 1985 White Paper measures[5] were adopted at the appropriate time. Admittedly, all the sectors did not profit in the same way from the establishment of a single market without frontiers. The Commission and Member States[6] are aware of this fact. Indeed, the services and the freedom of establishment are the subject of a

[1] http://european-convention.eu.int
[2] See the current discussions concerning the action to be taken on the text of the European Constitution, Agence Europe n°9035 of 27 September 2005, n°9036 of 28 September 2005 and n°9151 of 15 March 2006. See also plan D set up by the Commission aiming to reopen the debate www.europa.eu.int
[3] Article III-365 of the draft constitutional Treaty
[4] The Community internal market: 1993 report, European Commission, Luxembourg: EC, 1994, 2v.
[5] The completion of the internal market: White Paper of the Commission for submission to the European Council (Milan, 28-29 June 1985), European Commission COM final 1985/310/EC.
[6] European Council conclusions of Lisbon of 24 March 2000 which envisaged the drafting of a specific action concerning the field of services before the end of 2000.

particularly ambitious programme aiming to bring back the service market at the same opening level as the market of the products.[7]

The Commission also set up a system of monitoring the progress of the internal market.[8] The aim is to follow constantly the development and ensure a periodical assessment. This monitoring of the internal market is a valuable instrument because it makes it possible to show the positive achievements but also the problems encountered.

However, an effective internal market must be above all an internal market which enables private applicants to profit from the rights which result from it.[9] The Treaty of Rome established a number of legal tools which makes it possible to ensure that EC law arising from the Treaty is respected. Each one of these tools is connected to the others and forms, in practice, a system of Community legal remedies.[10]

Within the framework of the monitoring of the application of Community law, the main tool is the infringement procedure, Article 226 (former Article 169). The Commission is the main actor of this procedure. As guardian of the Treaty, the Commission must ensure that the rights of the internal market are implemented correctly in all the Member States. But today, the Commission cannot fulfil its role properly, because available tools are no longer sufficient to remedy the current problems. Indeed, even if this sounds commonplace, it must be stressed that this legal system was set up at a time when the Community was composed of 6 States. Today, there are 25 States and soon 27[11] or even more in the future. It is therefore normal that the old mechanisms are no longer adapted to the current challenges. Of course, it does not mean that the mechanisms for monitoring the application of Community law have not

[7] Communication from the Commission to the Council and the European Parliament: an internal market strategy for services / UE, European (2000) 888 of 29/12/2000 p. 6, pursuant to the requests made by the States at the European Council of Lisbon.

[8] Communication of the Commission of 21 January 2004, Report on the implementation of the Strategy for the internal market (2003-2006) COM (2004) 22 final.

[9] For an analysis of the difficulty encountered for the application of the judgments in another Member State see "Les effets des jugements nationaux dans les autres Etats membres de l'Union Européenne, Colloque du 24 mars 2000, Université Jean Moulin Lyon 3 faculté de droit centre des Etudes Européennes, Bruylant 2001 Bruxelles » more particularly the excellent article of Judge J-P Puissochet

[10] Berrod F., La systématique des voies de droit communautaire, Paris: Dalloz, 2003.

[11] The accession of Bulgaria and Romania is planned for 1 January 2007, see inter alia Communication from the Commission to the Council and to the European Parliament, of 13 November 2002, "roadmaps for Bulgaria and Romania" [COM (2002) 624 final - Not published in the Official Journal].

evolved. New tools have been introduced[12], but it seems that it did not enable to hold back the surge of cases related to the non application of Community law, as shown by the increasing number of enforcement Actions against Member States. Indeed, the number of the infringement procedures did not cease growing progressively with the development of European integration.[13] This constant rise is logical because it is the result of several factors. First of all, better knowledge on the part of citizens and companies of their rights, secondly an increase in the number of Member States and finally an increase in the competences of the European Community implying more Community legislations.

Consequently, two possibilities are opened to the Commission. Firstly, to implement a filter in order to limit the number of infringement procedures; or secondly, to fight for a drastic reform of tools to control the application of Community law. [14]

The first option implies the setting up of a selectivity policy in the treatment of the infringement procedures. This option is certainly tempting prima facie because it makes it possible to solve instantaneously the problem of the increasing number of complaints. However, as any shock therapy, it will have serious side effects for the patient, here, citizens and companies. Indeed, this method raises numerous interrogations of a legal, factual and political nature which make it inapplicable.

First of all, the increasing number of complaints received by the Commission is related to the fact that citizens and companies consider the latter as more capable of settling the problems that they encounter in the implementation of Community law. Following that statement, we can already conclude on the general satisfaction of complaints handling and therefore the necessary intervention of the Commission on the matter.

Secondly, the debate on the differentiated treatment of the complaints raises the problem of the role of the Commission in general. According to Article 211 of the Treaty, the Commission takes care of the application of the provisions of this Treaty and of the provisions

[12] See as regards the application of this article: L'obscure clarté" de l'article 228 par. 2 TCE / Bénédicte Masson. Revue trimestrielle de droit européen 2004, v. 40, n. 4, October-December, p. 639-668.

[13] Turner C. et Munoz R. "Revising the Judicial architecture of the European Union" 19 Yearbook of European Law, Oxford University Press 2000, p. 1-95

[14] The author stresses the fact that any proposal which would involve an amendment of the Treaty does not fall within the competence of the Commission because, within the framework of the intergovernmental Conference it depends on the willingness of the Member States, see the procedure of amendment of the Treaty which is in Article 48 EU.

taken by the institutions under the terms of it (…). The Commission cannot suddenly decide to use its role of guardian of the treaties only for certain types of complaint.

Thirdly, the major problem of such a system is to find on the basis of what criteria one should decide on the selection of cases will be done by the Commission. Would it for instance be that before starting any infringement procedure, one should check how often the complaint has occurred, e.g. several complaints on the same subject are necessary to launch a procedure. But such an approach has the inevitable consequence that the damage related to the incorrect or non-application of the Community law has created a larger number of obstacles before the Commission decides to tackle it.

Lastly, the same policy should be implemented at the level of the entire Commission. This would need to ensure that the Commission's various services develop similar criteria and avoid having more severe criteria in one sector and more flexible ones in another.

Consequently, even if the application of the principle of selectivity seems attractive at first sight, it raises numerous difficulties in its practical implementation and could ultimately imply the weakening of the Commission's role and by way of consequence of the protection of citizens and companies.

However, it seems to be more and more likely that selectivity will be applied. Indeed, in a recent document the Commission asked for the first on the way to implement selectivity.[15]

The other solution would be to re-examine in detail the tools which the Commission has to ensure the monitoring of the application of Community law. It can then be decided whether to reform these tools or to create new ones.

An inventory of tools at the disposal of the Commission to ensure the application of Community law shows three types of instruments:

Firstly, ex-ante control tools, i.e. aiming to make sure that the measures that Member States intend to take are in conformity with Community law.[16] This type of tool has the advantage of

[15] http://ec.europa.eu/internal_market/strategy/docs/consultation_en.pdf Specifically question "19) What is your experience (if any) of the Commission's infringement policy in the field of the internal market? Which type of infringement cases should we handle as a priority?"

acting before the obstacles produce negative effects. The major positive aspect is that operators do not have to undergo negative consequences.

Moreover, it is easier and quicker to modify a national law, when it is at a draft stage**.** Logically, the Commission has more opportunity to see its requests satisfied at this stage than once they are adopted. Indeed, if the request of changes arises only after the entry into force of the law, even if the Member State agrees to change it following the arguments of the Commission or in relation with the decisions of the European Court of Justice, there will inevitably be an appreciable lapse of time before it is cancelled and replaced. This is of course due to the legal and political decisions necessary to make these changes.

Secondly, *a posteriori* control tools, consisting of checking the national measures once they are adopted in the legal order of the Member States. This involves the traditional control of the compatibility of national law in relation to Community law. This encompasses mainly enforcement actions (Articles 226-227-228). The Commission is the main actor of this procedure, with the exception of Article 227. [17] This procedure aims to force Member States to fulfil their obligation but to give as well a uniform interpretation of EC law. Indeed, it is not only a question of checking the transposition of a directive, or communicating the national implementation measures but also of applying correctly the obligations laid down in the Directive, therefore, this implies a checking of national measures. The action on preliminary reference in interpretation (Article 234) also fits, in certain cases, into this logic aiming at checking the interpretation of the Community law in order to make sure that EC law is uniformly applied.

Thirdly, besides these two types of controls, there have been different tools aiming at the establishment of a mechanism of resolving dispute out of Court. The SOLVIT System[18] connects together directly the national administrations of each Member State in charge of a specific sector in order to find a solution to a precise and concrete problem encountered by citizens and companies. Another tool to mention is the fast track mechanism[19] known as "the

[16] The notification directive of 83/189/EEC of 28 March 1983, OJ n° L 109 of 26/04/1983 p. 8-12, codified by Directive 98/34/EC of 22 June 1998, OJ n° L 204 of 21/07/1998 p. 37–48.
[17]D. Simon, Le système juridique communautaire, 2001, 3° edition, sp. p. 631 and s.
[18]Muñoz R., Le système SOLVIT: résoudre en dix semaines certains obstacles au marché intérieur, Journal des Tribunaux de Droit Européen No.2. April 2003, p. 97-100.
[19] Munoz R., Comment pallier les manquements du recours en manquement, Revue Europe, February, p.4-6.

strawberry regulation" which deals with cases arising from repeated breaches of Community law.

This article intends to carry out the assessment of these procedures of monitoring of the application of Community law and to propose new ones in order to adapt to the developments of the European Community.[20] Certain changes can be envisaged by a simple modification of the secondary legislation. For others changes, amendments to the Treaty will be required.

II. The monitoring of the application of Community law: the various forms of control

A. Ex-ante control: Directive 83/189/EEC [21]– 98/34/EC[22]

1. Presentation

The main example[23] of this type of mechanism is the notification procedure of Directive 98/34/CE. This instrument deals with national measures which are outside the harmonised field of the Community legislation. i.e., when there is no Community legislation on the matter or when Community legislation regulates a sector only partially.

[20]The case of the preliminary reference procedure will not be approached. National courts and the European Court of Justice : a public choice analysis of the preliminary reference procedure, George Tridimas, Takis Tridimas, International Review of Law and Economics 2004, v. 24, n. 2, June, p 125-145.

[21]Directive 83/189/EEC of 28 March 1983, OJ n° L 109 of 26/04/1983 p. 8-12, codified by Directive 98/34/EC of 22 June 1998, OJ n° L 204 of 21/07/1998 p. 37 –48; Concerning this procedure see inter alia: S. Lecrenier, Le contrôle des règles techniques des Etats et la sauvegarde des droits des particuliers, Journal des Tribunaux Droit européen Year 5, n°35, January 1997, p.1-9 and S. Weatherill, Compulsory notification of technical draft regulations: the contribution of Directive 83/189 to the management of the Internal Market Yearbook of European Law, 1996, n°16, p. 129-205

[22]The author stresses that numerous ideas result from discussions during the time spent in DG ENTERPRISES and more particularly the numerous exchanges of view with Mrs S. Lecrenier Head of Unit at the European Commission.

[23]There also exists in certain matters of the obligation to notify as within the framework for example of Directive 93/43/EEC on the hygiene of food products, OJ L 175/93 and Regulation 315/93/EEC laying down Community procedures for contaminants in food, OJ L37/93.

This directive requires Member States to notify the Commission of national measures containing technical rules[24] at a draft stage. This procedure was initially set up in 1983 by Directive 1983/89/EEC and has seen its scope widened[25] over the years. It now includes all industrial products, fishing and agriculture products. Another Directive, namely Directive 98/48/EC[26], was adopted in order to apply such notification procedure to information society services.

Once the national draft measures are notified to the Commission, it has three months to react. During this time lapse, these drafts are translated into all the official languages of the Community. Then, they are sent to the Commission services, to all the Member States and are put on a public web site for comments. [27] The Commission and Member States can adopt observations and detailed opinion, the latter having the characteristic to involve blocking the measure for three additional months.

This instrument aims therefore to establish a dialogue between the Commission and the Member States but also between the Member States themselves in order to avoid future breaches of Community law. It must be noted that official comments from the Member States are today definitely more numerous than those from the Commission.[28]

2. State of play

The notification procedure has now existed for more than 20 years and has made it possible to check more than 10,000 draft national measures containing technical rules. The assessment of

[24]Directive 98/34/EC of 22 June 1998 (OJ n° L 204 of 21/07/1998 p. 37 –48), Article 1 §9 'technical regulation`, technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.
[25]The Commission drew up this directive in order that Member States notify the national measures at the draft stage, with a view to analysing if the national measures containing technical regulations could generate obstacles to free movement of goods. This directive was amended three times, twice in the sector of products (Directives 88/182/EEC of 22 March 1988 and 94/10/EC of 23 March 1994) in order to by increase its scope of application, codified by Directive 98/34/EC of 22 June 1998 (OJ n° L 204 of 21/07/1998 p. 37 –48).
[26]Directive 98/48/EC of 20 July 1998, OJ n° L 217 of 05/08/1998 p. 18 –26.
[27]http://europa.eu.int/comm/enterprise/tris/index_fr.htm
[28] Note n°27.

this procedure is particularly positive by establishing a genuine dialogue between the Commission and the Member States. Indeed, the Commission and Member States can discuss and exchange their points of view on each notified measures. The other advantage is that it allows companies to be informed of the draft measures containing technical rules which will enter into force in the forthcoming months in each Member State.

Thus, companies can be ready to fulfil national legal obligation but can also contact the authorities of the issuing Member State, or of their own Member State and/or of the Commission if they consider that the envisaged measure is likely to involve unjustified obstacles within the internal market.

It must however be stressed that one of the reasons which explains the success of this procedure is that the Court of Justice made a particularly important judgement[29] in which it indicated that if a Member State does not notify its measure at a draft stage, then technical rules contained in the national text adopted without notification is regarded as never having existed and cannot therefore produce a legal effect. Vis-a-vis such a consequence, Member States prefer therefore notifying rather than incurring such a sanction.

The Commission publishes every three years a report on the application of this directive.[30] In general, it appears that this procedure is particularly well tested and gives rise to a genuine exchange between the Member States and the Commission.

The development of the scope of the notification procedure since the first directive of 1983 has been revealing regarding the interest that such a mechanism can have. Thus, if at the start it was envisaged that the Member States notify only certain draft technical measures, now, after the successive modifications, Member States have to notify all draft technical measures dealing with industrial, fishing and agricultural products. Moreover, since the introduction of this notification procedure in the field of information society in 1998, 70 draft regulations have been checked between beginning of 1999 and February 2003[31], now the last figure shows more than 171 notifications.

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[29]Case C-194/94, CIA Security International of 30 April 1996, ECR I-2201; Simon, D., Revue Europe, 1996 June, nº 245 p.11-12.

[30]http://europa.eu.int/comm/enterprise/tris/index_fr.htm

[31]XX° Commission Report, COM (2003) 669 final: http://europa.eu.int/comm/enterprise/tris/reps_2002_1999_IS/COMM_PDF_COM_2003_0069_F_FR_ACTE.pdf

B. A posteriori control: The procedure for enforcement action

1. Article 226 procedure

In 2001, there were 3360 ongoing infringement files[32] compared to 3541 in 2002. Obviously all these cases do not end up in front of the Court of Justice.

The procedure for enforcement action foresees an administrative (or pre-contentious) phase and only then, a contentious phase. At the time of the pre-contentious phase, the various stages of the procedure (letter pre-226, letter of formal notice and reasoned opinion) make it possible to reduce considerably the number of infringement files. Indeed, the number of formal notices is definitely less high than the number of detailed opinions or than the number of referral to the Court of Justice.

As an indication, in 2001[33], 1050 letters of formal notice were sent, against 569 reasoned opinions. During the same period of time, "only" 162 cases were submitted to the Court of Justice. It must be stressed that these figures are in constant increase from one year to another.[34] The total number of infringement procedures initiated by the Commission increased by 15% (going from 2,356 in 2002 to 2,709 in 2003). Thus, on 31 December 2003[35], there were 3,927 ongoing infringements cases: i.e. 1.855 cases in which a procedure was initiated, 999 cases where a reasoned opinion had been sent, 411 cases referred to the Court of Justice.

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[32] http://www.europa.eu.int/comm/secretariat_general/sgb/droit_com / pdf/dg_fr31-12-2001.pdf

[33] http://www.europa.eu.int/comm/secretariat_general/sgb/infringements/19report_2001_fr.htm, Annex 2, p.19 Document 2.1.

[34] Decrease can be noticed for certain years but that is linked to artificial inflation the previous year due to specific litigation.

[35] XXI Commission Report on the monitoring of the application of Community law Brussels, 30 December 2004, COM (2004) 839 final, see sp. p. 4; http://europa.eu.int/eur-lex/lex/LexUriServ/site/fr/com/2004/com2004_0839fr01.pdfhttp://europa.eu.int/eur-lex/lex/LexUriServ/site/fr/com/2004/com2004_0839fr01.pdf

More worrying: for 69 cases, the procedure of Article 228[36] had already been started. It is also interesting to consider the judgments of the Court in which Member States were condemned but had not yet carried out these judgements[37] as laid down in the XXI° Commission Report.
Moreover, in 2002, 33.6% of the cases of infringement had been opened for more than 2 years.[38]
Lastly, in the majority of cases referred to the Court of Justice, the Member State is condemned. Thus, in 2004, on all the judgements for infringement procedure adopted by the Court of Justice, Member States had been condemned in more than 92% of the cases.[39]

The 226 action is one of the cornerstones of the Community system. It appears as an exception within the framework of the international relations between the States not only for its nature but also because it is repeatedly used by the Commission. However, even if the central role of this procedure in the establishment of the Community must not be underestimated, it has to be noted that it has numerous disadvantages which have increased after the deepening and widening of the Community.
First of all, it is an a posteriori approach. i.e. it acts only once the problem has caused damage, sometimes irreparable, to the citizens and/or to the companies such as, for example, the bankruptcy of a company. Consequently, Article 226 procedure has the disadvantage of acting, most of the time, too late.[40]

Secondly, the time of treatment of the complaints is the major problem of the procedure. Indeed, if, in comparison with disputes before national jurisdiction, the procedure cannot be considered as unreasonably long, it must be stressed that very often this period in front of the Community jurisdictions is added to the period in front of the national jurisdictions. Thus,

[36]XXI quoted Report note 36, annex II, table 2.3.; see also for a detailed presentation of new cases http://europa.eu.int/eur-lex/fr/com/rpt/2003/act0669fr02/1.pdfhttp://europa.eu.int/eur-lex/fr/com/rpt/2003/act0669fr02/1.pdf sp. p.9
[37]http://www.europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/rapport_annuel/annexe5_fr.pdf
[38]Annex I of the XXI Report sp. p.3 http://www.europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/rapport_annuel/annexe1_fr.pdf
[39]The annual report 2004 of the Court of Justice indicates that of the 155 cases based under Article 226, Member States were condemned 144 times http://curia.eu.int/fr/instit/presentationfr/rapport/stat/st04cr.pdf sp. p. 179.
[40]Tomasevic D., L'usage du référé devant la Cour de justice à l'encontre des Etats membres de la Communauté européenne, RMUE, No. 4. 1999. p. 25-43.

when the Member State does not obey and decides to go before the Court of Justice, an infringement procedure lasts at least several years.
Moreover, this long procedure also applies in the case of an "obvious" breach of Community law. It can be the case, for example, if the State does not communicate the national measures of implementation of a Community directive.[41]

Thirdly, one must take account of the fact that the increasing number of referrals to the Court of Justice following an infringement procedure for breach of Community law takes a part in the obstruction of the European legal system, implying at the same time the slowing down of the treatment of other cases by the Court.

Fourthly, generally, once the infringement procedure is finished, the complainant will have to launch a national procedure for damages caused by the non application of the Community law.[42] All this implies an even longer time for an effective treatment of the complaints and especially for the recovering of the damage suffered by the interested parties.

Fifthly, Article 226 procedure is less problematic for big companies than for SMEs which however account for 95% of the Community industry.[43] Indeed, the biggest companies will have more financial facility to launch a procedure at Community level. It is economically still viable for a multinational to carry on complaints and to await the results of the Commission analysis and the judgement of the Court of Justice. Whereas an SME would have to close its doors if it has to wait till the end of the procedure. Consequently, it will have either to give up selling its product, or change its production and adapt it to the conditions imposed by the State of destination which at the same time means overbidding the price of the product.

Sixthly, States are also used to playing with the delays of this procedure. For instance, it is possible for a State to violate with impunity Community law for several months, or even several years, and then to comply just before the referral to the Court of Justice in order to

[41]Even if in the case of non-communication of the transposition measures, the Commission does not proceed to send a pre-226letter.
[42] Takis Tridimas Liability for breach of Community law: growing up and mellowing down? Common Market Law Review 2001, v. 38, n. 2, April, p. 301-332.
[43] http://epp.eurostat.cec.eu.int

avoid a condemnation. Article 226 does not make it possible to deal with this type of violation whilst it happens quite often and penalises States which comply with EC law.

Lastly, for the Commission, the cost in terms of human resources of the current approach is very heavy. Indeed, it must initiate numerous Article 226 procedures and mobilise numerous civil servants in order to follow them.

It is therefore necessary to reform the current system of Article 226 procedure in order to create a genuine more reactive mechanism and thus meeting the citizens and company expectations. It is not a question of denying old mechanisms but more an opportunity to propose ways to adapt the current system in order to enable it to answer to the challenges of a Europe of 25.

2. The specific and worrying case of the transposition of the directives

The directive is one of the instruments at the disposal of the Community Institutions pursuant to Article 249 TCE. It has as its specific character to envisage the aims of a measure and to leave to the Member States the choice of the means to achieve the goals defined in the directive. However, Member States encounter several difficulties at the time of the directive transposition and the Commission seems to be overwhelmed by the extent of the task it has to achieve.

Moreover, directives which are not transposed or only partially so within the assigned time should be added and directives which are badly transposed are also added to this list. Another particularly important point which must be underlined is the number of transposition of Community directives within the time prescribed by the Directive and which are not subject to Article 226 procedure. Therefore, the number of directives which give rise to a 226 procedure represents only the visible part of the iceberg.

Lastly, it must be stressed that "problematic" directives i.e., the directives which were not transposed, differ from one State to another. This detail is of significance, indeed in a sector where a directive is not transposed, the internal market is not harmonised and obstacles persist. But if for example, each State does not transpose 5 different directives, it is not "just" in 5 sectors that there will be potential obstacles but probably in five times 25 sectors i.e. 125 sectors.

Lasts figures from the Commission show that, the average rate of communication of national measures of implementation on the 7th September 2005[44] is 98.88% (knowing that it does not prove in any way that the adopted measures are correct and are not likely to involve a procedure for bad transposition). This rate is in constant increase as a result of the repeated efforts of the Commission which decided to check systematically that States forwarded these documents.

However, vis-a-vis these good results, it must be known that if “only” 1,12% of non communication of national implementation measures represents, due to the number of directives (2601), almost 30 directives by State. Applying the calculation that we made earlier, it gives us 25 times 30 i.e. 750 sectors where harmonisation is not effective. However, the author is aware that in many cases it is the same directive which is not transposed in more than one country.

Indeed, when reading the XIX annual report[45] on the monitoring of the application of Community law, it is clear that the main reason for launching infringement procedures is the non-communication by the Member States of the national measures of implementation. Regarding formal notices sent in 2001[46], for 13 Member States, at least 50% of the letters of formal notice concern cases of non-communication. Moreover, for 9 Member States, the cases of non-communication account for 60% or more of letters of formal notice. If one continues analysing the results for the following phase, which is the phase of the detailed opinion, figures remain high. For 10 Member States, 50% of the detailed opinions sent by the

[44] http://www.europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/mne_country_20050907_en.pdf sp. p.2
[45] See note 32
[46] See note 32, specifically Table 2.2.1. Formal notices sent in 2001 by legal basis and Member State, page 20.

Commission during 2001 concern cases of non-communication of the national measures of transposition.

Lastly, as regards the referral of the Court of Justice, figures remain high despite a slight decrease, because for 6 States, the cases of non-communication account for 50% or more of the cases brought to the Court of Justice. Furthermore, for 4 states, this type of cases concerns almost 70% of the cases.

Figures of previous reports (1998, 1999 and 2000), support this analysis[47]. Indeed, for previous years also, the principal reason of letters of formal notice, of reasoned opinions and of referral of the Court of Justice is the non-communication of the national transposition measures. Consequently, it is clear that the cases of non-communication of national implementation measures represent a large majority of cases for which the Commission is responsible within the framework of Article 226 procedure.

All these figures are even more evocative when the other cases related to the transposition of directives having involved the opening of a 226 procedure are added. Indeed, there are three hypothetical cases: first of all, the cases of non-communication that we have just approached, then, the cases of nonconformity and finally the cases of incorrect application. The cases of nonconformity are the ones where the Member State transposed a directive in time and have communicated the national transposition measures but have wrongly transposed the obligations of this directive. The cases of incorrect application concern cases where the directive was transposed correctly but was badly implemented by the national authorities.

These 3 cases cover 80% or more of the letters of formal notice[48] and of the detailed opinions for all 15 Member States and 80% or more referrals of the Court of Justice for 13 Member States, as laid down in the XIX° report.

These figures are confirmed by the following reports. Indeed, the very last report (XXI°) shows comparable results. It is even possible to note an increase of the impact of non transposition and nonconformity on 226 actions. As regards the sending of the letters of formal notice, the non-communication of directives accounts for 60% of the cases for 14

[47]See the site of the Secretariat General of the European Commission: http://www.europa.eu.int/comm/secretariat_general/sgb

[48]See note 36.

States out of 15. It must be noted that it goes up to 70% for 10 of these States and reaches more than 80% for 4 of them.

Concerning reasoned opinions, the non-communication accounts for more than 50% of the cases for 14 States out of 15 and this figure increases to more than 70% for 4 States.

Lastly, the referrals account for more than 50% for 8 States. Moreover, if the cases of nonconformity are added, cases which could normally be avoided in the event of effective control of the transposition, they account for more than 50% for 11 States.

It appears therefore necessary and important to take measures in order to sort out these types of dispute with other tools than Article 226. This would enable the institutions to tackle this constant increase of cases linked to the implementation of Directives obligations.[49]

3. The current reactions vis-a-vis this situation

a. Member States

Firstly, Member States must interpret the obligations contained in the directives. However, due to linguistic problems or following modifications of these Community texts during the legislative process, it appears sometimes difficult for the relevant ministries in the various Member States to understand clearly the obligations arising from the directives. It means that the various experts in charge of the transposition have to carry out an interpretation of the content of the directive in order to ensure its transposition.

But it should be noted that there is a solution to this problem of interpretation provided for in the directives themselves and in the Treaty. First of all, most of the directives have a clause which requires Member States to transmit national measures of transposition. It enables the Commission to know how far the Member State is in the implementation of the transposition measures and what are the problems it encountered. It is therefore an indicator because if the

[49] On the latest figures available: found http://ec.europa.eu/comm/secretariat_general/sgb/droit_com/pdf/mne_country_20060308_en.pdf

majority of States did not provide these intermediate measures, then the Commission can deduce that there is a problem.

Another possibility for the Member State is to inform the Commission of its interrogations concerning the interpretation of certain Articles of the directive. Pursuant to Article 10 of the Treaty, Member States must do everything to cooperate in the implementation of the Community law. Consequently, the civil servant in charge of the file in the Member State which encounters difficulties in the interpretation of the directive can contact the service in charge of the control of the transposition of the directive at the European Commission in order to raise the difficulties encountered at the time of the drafting of the transposition measures.

If each Member State takes a different measure but which allows the directive to be interpreted in the same way, it is not likely that this will create obstacles to freedom of movement. However, in the hypothetical case where Member States have divergent interpretations, then it becomes difficult to ensure the consistency of the Community system and obstacles to freedom of movement will appear whilst the aim of the harmonisation measure was to avoid such obstacles. The solution is then to ask either via a preliminary reference or via an infringement procedure to the Court of Justice to interpret the Article of the Directive in question.

Secondly, some directives require the involvement of several ministries inside the same Member State and the use of various legal tools. This can create certain difficulties of coordination in order to transpose the directives. Consequently, it can happen that certain parts of the directives are not transposed or are transposed very late due to the multiplication of the measures aiming at their transposition despite the various attempts by the Member States to rationalise the transposition of the directives.[50]

Lastly, apart from certain exceptions, States do not monitor at all or only a little the application of the obligations arising from the directives. This lack of follow-up makes the officials' work difficult because if there is a lack of political will to ensure a transposition on

[50]See the case of France described in: Jean-Luc Sauron, L'administration française et l'Union européenne, 2000, La documentation française « Connaissance de l'administration française », sp. p. 127 à 167.

time, then it will be difficult, or even impossible, for the officials in charge of the file to force the other ministries to act.

b. The Commission

The Commission has a relatively passive role during the transposition phase. Its function becomes more active at the time of a posteriori control, once the date of transposition has passed.

Moreover, at the time of the receipt of these intermediate measures, the Commission does not have sufficient means to analyse in detail these measures in a period of time sufficiently short as to ensure that comments arrive before the end of the period of transposition.

The Commission under a Communication[51] evokes possible solutions vis-a-vis the limits of the 226 procedure. This text, full of good wills, is only suggesting very good old solutions which have proven insufficient, as we demonstrated above.

The Commission knows that the infringement procedure is not adequate to deal with these types of cases therefore it had fixed as a main goal the prevention of infringements. To this end, it developed three lines: greater transparency and knowledge of Community law, better cooperation between the Commission and the Member States and finally a larger communication of the transposition measures.

To improve this dialogue, the Commission proposes strengthening preventive cooperation between the Commission and the Member States. To this end, it recommends a broader use of the tools which have already proved their worth. It includes the interpretative Communications, the reporting obligation under Directive 98/34/EC, the regular publication of the statistics of the national measures of transposition of the directives in the annual report on the monitoring of the application of Community law, the anticipation of certain major events and finally a better exchange of information and of good practices.

Moreover, the Commission proposes launching a specific Community law training programme for administrations, legal specialists and national barristers.

[51] Communication of the Commission on the improvement of the control of the application of the Community law, COM (2002) 725 final/3 of 20 December 2002.

The second objective put forward is the accompaniment and facilitation of a good transposition of directives. Indeed, the transposition rate did not reach the levels recommended by the European Council of Stockholm. Several measures are therefore proposed.

First of all, the Commission intends to increase the transparency level on the matter. Indeed, it is envisaged that a specific site gathering all the information concerning the national transposition measures is created. Moreover, the use of electronic means should encourage the sending of these measures in time and to the service concerned.

Then, the Commission wants to develop cooperation before the deadline of the transposition period. This approach aims to solve the problems before the non transposition of the European directives has produced negative consequences for private individuals and companies. There are three type of actions aimed at improving cooperation between the Commission and the Member States. The Commission intends initially to extend the practice of the "package meetings". Through these meetings, the Commission will try to encourage each Member State to set up unique "coordination bodies" responsible for the application of Community law. Then, the Communication stipulates that the Commission services will contact the relevant Member States in the month of the adoption of the directive and will propose their technical assistance. Moreover, the Commission commits itself to analyse certain preliminary drafts of national transposition measures in order to check their compatibility with Community law.

The other action, in this area, envisages the establishment of a contact point for discussion regarding transposition in coordination with the Member States. Its aim is to give interpretations and clarifications on the contents and the scope of the Community obligations.

Lastly, the Communication aims to improve the quality of the national transposition measures. Accordingly, the Commission has the intention to require Member States to provide a table of concordance showing clearly what measures have been taken in order to transpose each article of the Directive. Moreover, for this transmission, a standard electronic model will have to be used and the Secretariat-General of the Commission will become the central and single point of receipt of the national transposition measures. Lastly, the Commission wants to develop a network of databases with all the national transposition measures (known as the EULEX III project).

The third line aims to increase public information on Community law. To this end, the Commission intends to develop greater accessibility of Community law for citizens. To this end, the databases EUR-LEX and the gate mentioned previously should be put at the disposal of European citizens. Moreover, the Commission is exploring how to develop specific means allowing a better participation of citizens as well as easier access to information. On this last point, the Commission takes the example of the Aarhus Convention[52] in the framework of the environmental policy.

c. The European Court of Justice

On a preliminary basis, it should be noted that this paper is not intended to deal with the current efforts made to improve the efficiency of the Community legal system with a single exception: it will briefly address the issue of enforcement actions for noncommunication of the national transposition measures.

The Court of Justice treats today 226 actions for noncommunication of the national implementation measures through a rapid and standardised procedure. The opinion of the Advocates General is thus also shortened and rationalised.[53]

The judgements of infringement were also standardised. This set of measures has shortened much if not nearly all the phases before the Court of Justice, such as, for example, translations.

The Court of Justice has thus gained valuable months in the treatment of 226 actions. The time of treatment of direct recourse is today 20 months.[54] However, even if this figure shows the will of the Court of Justice to quickly treat the cases of obvious failure, it remains considerably long in relation to the practical consequences of the judgement. Indeed, the judgement only recognises the infringement and does not impose more to the State than the obligation to remedy this infringement within a reasonable time.

[52] http://europa.eu.int/comm/environment/aarhus

[53] See inter alia the discussions concerning the approach of the Court of Justice: Francis G. Jacobs "Recent and ongoing measures to improve the efficiency of the European Court of Justice", 2004, E.L.Rev., p. 823-830.

[54] http://www.curia.eu.int/fr/instit/presentationfr/index_cje.htm

C. The creation at the end of the 1990s of alternative mechanisms

Facing the challenges that the monitoring of the application of Community law represents, the Commission, due to the repeated refusals of the Member States to modify Article 226 procedure at the time of the various intergovernmental Conferences[55], had to develop solutions without amending Article 226. Consequently, it adopted ad hoc mechanisms aiming at filling the gaps of the infringement procedure.
This does not involve at all amendments of Article 226 but complementary alternative mechanisms which deal with problems which are specific such as the incorrect application of Community law or the foreseeable breaches of Community law.

Two mechanisms, which differ both by their objectives and by their respective scope, enter into this category: firstly, SOLVIT[56] which applies to the internal market and secondly, the mechanism of Regulation 2679/98/EC[57], which concerns only the free movement of goods.

The SOLVIT mechanism aims to solve the problems of the incorrect application of Community law by the national administrations. This involves therefore the cases where States transposed Community law but did not apply it correctly. This refusal can arise from several reasons like, for example, the simple fact that the administrations in charge of applying the specific piece of legislation have not been informed yet of the new Community legislation. Another reason could be the mechanical application of national measures without

[55]Mattera, A., La procédure en manquement et la protection des droits des citoyens et des opérateurs lésés, RDUE, n°3, 1995 p.123-166
[56]Communication from the Commission to the Council, to the European Parliament, to the Economic and Social Committee and to the Committee of the Regions of 27 November 2001, an effective system of resolution of the problems in the internal market (SOLVIT), COM (2001) 702 final; Recommendation of the Commission of 7 December 2001 "laying down the principles for the use of SOLVIT" - the network of resolution of the problems in the internal market, C (2001) 3901 final; Council Resolution "Internal market, Consumers and Tourism" of 1 March 2002, see: http://europa.eu.int/comm/internal_market/solvit/council-conclusions/conclusions_fr.pdfhttp://europa.eu.int/comm/internal_market/solvit/council-conclusions/conclusions_fr.pdf
[57]Council Regulation (EC) n°2679/98 of 7 December 1998, on the functioning of the internal market in relation to the free movement of goods among the Member States OJ of 12 December 1998, L 337/8

taking into account the existence of EC principles such as the prohibition of discrimination on the basis of nationality.

The second mechanism is Regulation 2679/98/EC, it aims to prevent foreseeable obstacles. It develops a fast warning mechanism between the Member States. For example, Member States could use it if they are informed of an imminent obstacle, like a strike which would block an important motorway axis, for instance.

1. The Solvit mechanism

a. Presentation

This system is based on three simple principles. Firstly, on the principle that the non application or the incorrect application of the Community law arises most of the time because the national administrations are not informed of Community law. It might be enough therefore to inform these national administrations which automatically realise that they are contravening Community law.

The second principle is that when a problem arises, it is preferable to know how the national administration works so as to be able to know who to contact in order to end the breach of Community law. To this end, it is therefore preferable that the request emanates from a centre established in the State responsible for the breach, a centre composed of people who know very well their own national administration, than from an administration of another Member State or of a Community institution.

The last principle is that requests are dealt with in a diligent way if persons know each other. This involves therefore creating a centres' network in all the Member States and ensuring that these centres know each other and communicate easily among themselves.

Consequently, each Member State must have a SOLVIT centre[58] and these centres are connected among themselves by a common database, the SOLVIT database. All the mails are sent electronically. The SOLVIT mechanism is therefore a network of contact points in the

[58] http://europa.eu.int/comm/internal_market/solvit/index_fr.htm

administrations of each Member State. These centres aim to solve the trans-national cases related to the incorrect application of the Community law by a national administration.

Thus, if a citizen (or a company) of a Member State encounters a problem in another Member State in the application of the rights that he gains from Community law, he can contact by electronic mail, telephone, fax … the "origin" coordination centre (it is the centre of the country from which the complainant is a national). An essential point for the success of the procedure is that the citizen or the company must formulate the encountered problem clearly. Indeed, the more the problem is identified clearly, the more it can easily be solved. The contacted "origin" coordination centre becomes the centre responsible for informing the citizen or the company of the follow up given to their case.
The "origin" coordination centre will then contact the State where the problem arises. The centre of this country becomes the "leader" coordination centre. This centre will firstly have to indicate if it accepts the case. It has a week to take this decision. In the affirmative, it means that it commits itself to give an answer within the next 10 weeks[59]. The answer can be positive or negative. Consequently, a particularly important aspect is that the centre does not commit itself to solving the case, but it makes the commitment to ensure that everything possible is done to help find a solution to the encountered problem. Once the case is accepted, the "leader" coordination centre will contact the services of the national administration of its country concerned regarding the case. It will question them and ask why Community Law had not been applied correctly. Once the 10-week deadline is over or before, it will have to contact the "origin" coordination centre to indicate the conclusions of its discussions with the national administrations and the possible solution which was found.
In its turn, the "origin" coordination centre will inform the citizen or the company of the consequences which were given to the request.

This mechanism can appear complex prima facie, but it proves simple in its implementation. The system is better understood by showing practical cases resolved concretely by the SOLVIT mechanism since its entry into force on 22 July 2002. For example, recently, a Czech citizen wanted to be established in Germany as an independent workman in the

[59]This period can exceptionally be extended to 4 additional weeks.

building sector. The German local authorities claimed that he must have a work permit to be able to provide services in the building sector, but refused to deliver it to him. The SOLVIT centre in Germany contacted the local authorities in order to specify to them that no work permit was required for self-employed workers. Following these contacts, the Czech worker received an authorisation of establishment. This solution was found in four weeks.[60]

b. Inventory

The SOLVIT mechanism works very well. Indeed, as shown by the Solvit 2004 Report[61], it appears that it makes it possible to solve concretely the cases of incorrect application of Community law in more than 75% of the handled cases. These figures are confirmed by the latest report.[62]

Thus, without this system it would have been necessary for the individual or the company to fill in a complaint form, for the Commission to agree to take the case and to start the 226 procedure. It is easy to see the advantage of such a system with so quick results compared to the time that the infringement procedure would have taken.

Solvit makes it possible therefore to find solutions to numerous cases which would have been handled by the Commission or possibly by the Court of Justice. It is even possible to say that Solvit makes it possible to deal with breaches of Community law which passed through the net of Article 226. Indeed, very often companies and citizens decided not to complain to the Commission and preferred giving up their rights rather than bear the cost of proceeding with the infringement procedure. Thus, thanks to this system, there is a better application of the Community law. Solvit has therefore filled in some gaps of the 226 action and should encourage citizens and companies to take advantage of their rights.

[60] This case is taken from the SOLVIT site where numerous other examples are listed http://www.europa.eu.int/solvit/site/index_en.htm

[61] http://ec.europa.eu/solvit/site/docs/news/2004-report_en.pdf

[62] http://ec.europa.eu/solvit/site/docs/news/2005-report_en.pdf

2. The cases of specific breaches of Community law: Regulation 2679/98/EC[63]

a. Presentation

This regulation aimed to supply a solution to a sensitive problem which is the multiplication of repeated cases of infringements limited in time. This regulation fell under the logic of the judgement of the Court of Justice[64] which condemned the French government because of the destruction by French farmers of Spanish strawberries at the beginning of each season. Indeed, repeated and specific violations are a serious problem, and they must be treated in an urgent way. The multiplication of cases of repeated violations comes because Community law now applies to all sides of economic and political life. The mechanism set up by this regulation is intended to foresee certain breaches of Community law and to act before these produce negative effects.[65]

The purpose of the regulation is to set up a system of prevention, information and repression of actions of people that intended to disturb the internal market. But by rebound and because of Article 28, the responsibility for the existence of these obstacles comes back to the Member States. They have indeed the obligation not to adopt measures which represent obstacles to free movement of goods and they must also take all the measures necessary to facilitate this freedom of movement. Prima facie this system seems to want to answer to the principal deficiencies of Article 226 (namely the lack of transparency in the work of the Commission and the reduction of deadlines). However a more careful look shows that it raises more questions than it answers problems of Article 226.

First of all, under this regulation the Commission can take a "notification", but it intervenes only *a posteriori* i.e. when the obstacle is already carried out. Consequently, in relation to the system of the 226 action, it does not bring any added value. Moreover, it is only the Commission that considers that the obstacle occurred; the other Member States no longer intervene at this stage of the procedure. This is the same as the system of Article 226. Secondly, do the deadlines imposed by the Commission really bring changes or not compared

[63]Council Regulation (EC) n°2679/98 of 7 December 1998, on the functioning of the internal market in relation to the free movement of goods among the Member States OJ of 12 December 1998, L 337/8

[64]Judgment of 9 December 1998, Commission c. France, C-265/95, p. I-6959

[65]For more information on this mechanism see Mattera A., Un instrument d'intervention rapide pour sauvegarder l'unicité du Marché intérieur : le règlement 2679/98. RMUE 1999, N°2, p.9-33 et Carlos Gimeno Verdejo, La réponse communautaire aux blocages des réseaux de transport : application et perspectives d'avenir du règlement n° 2679/98 en vue de la protection du marché intérieur. CDE 2002, n°1-2, p. 45-93.

to the procedure of Article 226? The question is to know what the links of this regulation with Article 226 are and, more precisely, what aspects of the procedure of Article 226 this notification wants to replace.

Thirdly, a careful reading of Article 5 of the Regulation shows that the notification includes a period of time in order "to eliminate the obstacle" which is "fixed according to the urgency". Consequently, it is neither fixed nor limited in time. The 5-working day deadline is applied "only as from the reception of the text of the notification" and intends only to force the Member State to inform the Commission of the measures taken or to declare that there is no violation according to the State. Consequently, the full timing of the procedure might be comparable to Article 226 procedure. Lastly, the regulation does not say anything to regulate a case where the Member State does not comply with Community law within the time imposed by the regulation. That raises therefore the problem to know what is the legal strength of such “Commission notification”.

b. Inventory

The Commission has made a report[66] on the procedure as required by the Regulation itself. It shows clearly that this mechanism did not have the expected success for two reasons.

Firstly, the aim of this regulation at the time of its implementation was to find a solution to specific breaches of Community law. However a careful look at the text shows rather that it involves a warning mechanism of potential violation for the Commission and the other Member States, but not a solving mechanism.
Secondly, the power of the Commission was considerably weakened compare to the original proposal of the Commission. Consequently, States have not really followed, in general, the obligations of this regulation. Indeed, certain States did not follow the obligation and have not warned other States of imminent obstacles to free movement of goods that they were informed of.

[66]COM (2001) Commission Report in the Council and in the European Parliament on the application of Regulation (EC) nº2679/98: http://europa.eu.int/comm/internal_market/fr/goods/reg267998.htm

III. Proposals for reform of the current systems and development of new methods

The monitoring of the application of Community law must remain in the hands of the Commission for two reasons. Firstly, the Commission is independent. Secondly, Article 226 has proven its effectiveness during more than fifty years. The actual failure of the infringement procedure is not linked to the Commission but rather to the tools available. This statement must be underlined before proposing alternative methods.

A. Reform the current systems

1. The infringement procedure

Before starting the analysis of the potential changes to be envisaged to reform the procedure of Article 226, one must emphasise an important point: each reform proposed in this part of the article cannot, on its own, reverse the current tendency and solve all the problems that we raised above. Only the joint and simultaneous adoption of several measures could have a real impact.

a. Various ways of shortening the "administrative" phase

We have already indicated the various stages of Article 226 procedure. One of these phases, the pre-contentious phase, is punctuated by three stages (pre-226 letter, letter of formal notice and detailed opinion). Admittedly, the delays between the different phases were considerably

shortened by the Commission[67], especially for cases of non communication of the national implementation measures. However, it could be desirable to change in a more radical way the enforcement action procedure. We will present these proposals for change while trying to put ahead the positive and negative effects that such choices could involve.

Firstly, the pre-226 letter should be abandoned – it was not foreseen anyway in the original treaties. The pre-contentious phase is composed today of a three stages phase. This involves a long process of exchange of mails. The Treaty stipulates that the State must be called on to make its comments, after which the Commission delivers a reasoned opinion. Article 226 never says that the Commission must send a warning to the relevant state of its intention to send a letter of formal notice before formally sending it. Moreover, there is no maximum time period to await the response of the Member State, even if the Commission applies the principle of reasonable time period.
It seems therefore that in practice additional stages have been added to a procedure which is already rather long. Admittedly, deleting this phase will not solve all the problems of the procedure. However, it will decrease the bureaucracy of the procedure and imply less administrative work for the Commission (the sending of all these letters is a heavy workload delaying the whole process).

Secondly, time limits for answers between each phase of Article 226 procedure should be applied in a stricter way. The infringement procedure is a succession of measures aiming to inform the State of the charges against it whilst providing the opportunity for it to present its argument against these allegations. It creates a kind of dialogue between the Member State and the Commission.
The succession of letters necessarily slows down the treatment of the files. Indeed, the Commission must first send a pre-226 letter, then, as a result of the answer or in case of no answer, it must analyse the file more in-depth. Then a letter of formal notice is sent and it must wait for the response of the State or, if the State does not answer, it must send a reasoned

[67] Commission Communication - Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission OJ C 119, 30.4.1999, p.5 and Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law - COM (2002) 141 final, 10 October 2002, p.5-8

opinion and again await the response of the State. If the answer is not satisfactory or if the State does not answer then it can refer the case to the Court of Justice.

To have a realistic view of the inherent slowness of this procedure, one must realise that the Commission has to translate the various documents at each stage of the procedure, and additionally, it must also consult the services concerned by the subject as well as the Legal Service.

Shorter deadlines between each phase are thus imperative. In the Communication related to the infringement procedure,[68] the Commission indicates that "Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General. Where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing". It still remains far too long. Indeed, it must always be borne in mind that an extra 20 months (on average) has to be added for the procedure before the Court of Justice. Once the State has received the letter of formal notice and that discussions have taken place, there should only be a very short time period for the rest of the procedure in cases where the Commission intends to prosecute the state. Indeed, the state is fully aware of the charges against it and has already had an exchange of views on the issue with the Commission.

Thirdly a better information system should be set up for interested parties and the other Member States. The various documents concerning Article 226 cannot be revealed to the public. Persons carrying out the complaint are obviously kept informed; but on the whole, there is not enough publicity made about the procedure even if the policy of the Commission within the framework of the non transmission of the national implementation measures has radically changed these last years with the publication of press releases.[69]

However, an interesting point is the non information of the other Member States on the ongoing procedures. This aspect is interesting because if the other States were fully aware that the Commission is suspecting another country of contravening the law, they might support the

[68] See note 67.

[69] See for example the following press releases: IP/05/1037 et IP/05/1007, www.europa.eu.int

Commission intervention very early in the procedure (e.g pre-contentious phase). In comparison, Directive 98/34/EC[70] is a good example of a procedure where States play an important role. Indeed, in this case, Member States know the position of the Commission as from the "administrative" phase and indicate if they share the point of view of the Commission. Statistics[71] about this procedure show that most of the time cases considered as problematic by the Commission are also considered as such by Member States.

Fourthly, the Commission should produce an act stating clearly during what time period the State has not complied with Community law in order to facilitate actions for damages before national jurisdictions. The aim of the infringement procedure is to put an end to the breaching of Community law. However, during the period that the failure is treated by the Commission, the breach of Community law entails financial consequences for citizens and economic operators. Moreover, as we have already underlined, once the procedures before the European Court of Justice are finished, actions before national jurisdictions still have to be launched in order to ensure that the State liability is possible for the violation of Community law.

Lastly, it is necessary to develop a faster mechanism to treat the cases of non-communication of national implementation measures. The Commission has decided to react in face of the increase of non-communication of national transposition measures. Indeed, it sends automatically the letter of formal notice if the State did not communicate these transposition measures in time. However, it works only if the State did not send any national implementation measures to the Commission. It can happen that a State sends only some implementing measures, and in this case, the Commission has to check all the documents received in order to identify which obligations contained in the directive have been transposed and which have not. This automatic sending is already a noticeable improvement, but in this case, sending a letter of formal notice followed by a reasoned opinion seems to be useless. Indeed, the State knows what Community obligation it should have transposed and what contravening facts are in play. The Commission should thus have a specific tool to regulate the cases of non-communication. One could imagine Article 226 giving a specific power to

[70]See the procedure of the notification Directive note n°21, sp. Article 8 of the Directive.
[71]Report concerning the application Directive 98/34/EC note n°31.

the Commission in the event of non-communication (e.g. decision from the Commission condemning the incriminated State for not having respected its obligations).

The principal criticism which could be made to the first three proposals is that the precontentious procedure makes it possible at present to solve a large majority of cases.[72] However, it should not be forgotten that even if after some time the State ends up complying with Community law, the fact that this Community obligation was not applied correctly for some time has generated obstacles to the establishment of the internal market and has thus implied damages for companies and citizens.
Concerning the last aspect, it may happen that a State decides to notify "all and anything" to fulfil their reporting obligation and avoid a “Commission Decision”.

b. Proposals of amendment of Article 226

Consequently, the other possible solution is to develop new mechanisms and/or to improve the existing mechanisms in order to adapt them to the current challenges. As we underlined in the introduction, the system was not designed for a Europe of 25 members. It is therefore normal to change the system now to avoid having to do so in a hurry. Consequently, the question to be raised is: what are the possible alternatives?

Concerning Article 226
As within the ECSC framework[73] there should be a system enabling the Commission to take a decision against a Member State in cases where the State has not changed its position at the end of the administrative procedure (pre-226 letter, letter of formal notice and detailed opinion). The Member State would have the possibility of requesting its annulment within two months following the adoption of the decision by the Commission, pursuant to Article 230. This solution would have the advantage of considerably shortening the period of treatment of Article 226 cases. It should be mentioned that this proposal was the subject of

[72]See the figures of the XXI quoted report note 36 and D. Simon note n°18, sp. p. 656 and 657.
[73] Mattera note n°55 sp. p. 158 and Article 88 of the ECSC Treaty

considerable criticism on the part of the "British Institute".[74] We do not share this point of view and think that such a procedure could be put in place in the case of the non-communication of the national implementation measures. In such cases, the State had different opportunities to redress the situation but did not take them. Indeed, it could have complied within the deadline; the fact not to have complied on time is in itself a breach of Community law. Moreover, during the discussion phase, it could have accepted to communicate these measures but if it did not, then there is no doubt as to the deliberate will on the part of the state not to comply with a Community obligation known since a very long time.

Another possibility would be to give to the Commission the opportunity of requiring temporary measures to the Court of Justice before the end of the administrative period in order to avoid that States use in their favour the slowness of the administrative procedure.

Concerning Article 228

The condemnation of the State in relation to Article 228 should be automatic. Thus, if after the Court decision, the State did not take any measure in order to redress the fault within a specific time period; it should be automatically condemned to pay a periodic payment per day of delay. Indeed, at present, the infringement procedure and the fixing of a periodic payment is a very long procedure. One must add the average period of the Article 226 action and only then, if the Member State does not comply with the Court decision after a reasonable period, can the Commission start once again the whole process explained above (pre-contentious phase, contentious phase) in order to fix a periodic penalty payment to the incriminated State. Lastly, the mechanism referred to above could also apply to Article 228: namely that the "Commission Decision" would intervene only in the second phase after a 226 decision of the Court.

[74]British Institute of international and comparative law, "The role and future of the European court of justice", European Law Series, British Institute, London, 1996

c. Would modifying the role of the Commission, according to the stage of the procedure, be a solution?

The Commission has the opportunity to decide the proceedings within the framework of the infringement procedure. This means that it is the only one to decide to pursue a complaint or to end the procedure.

This is due to the specific role of the Commission in the institutional architecture of the Community. The Commission is the guardian of the treaties and thanks to its independence it has the possibility to check the problems encountered in the implementation of Community law for all the four freedoms.

Private operators have often requested that the Commission should no longer be able to decide on the opportunity of proceedings. This is understandable. Indeed, if a company encounters problems in the application of the rights which arise from Community law and that it is a real case of breach of Community law then it is difficult to understand why the Commission would not start an infringement procedure.

It should first be mentioned that in recent years, the Commission has already seen its power in the field of Article 226 framed by a specific procedure to follow in the field of the management of complaints. This framework has been set up following several complaints lodged by companies with the Ombudsman.[75] The Commission therefore decided to publish a Communication [76]aiming to make the procedure more transparent. The communication replaces and considerably amends a previous text.[77]

It seems essential to leave the Commission as the "master" of the procedure of the infringement procedure. However, there should be a possibility of reopening a file if a private individual complains to the Ombudsman and if the latter decides in favour of the complainant.

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[75]The case which started the adoption of this Commission Communication is the one dealing with the infringement of public procurement rules during the tender of the Thessaloniki underground. This case is developed in the 2001 report of the Ombudsman, http://www.euro-ombudsman.eu.int/report01/pdf/fr/rap01_fr.pdfhttp://www.euro-ombudsman.eu.int/report01/pdf/fr/rap01_fr.pdf, page 119 and following.

[76]This text showed the standard complaint form and gave certain general indications. Non-observance of Community law by a Member State: standard form for the complaints to be submitted to the Commission of the European Communities OJ C 119, 30.4.1999, p.5-7

[77] Communication from the Commission to the European Parliament and to the European Ombudsman concerning the relations with the complainant as regards infringements of Community law COM (2002) 141 final of 10 October 2002, p.5-8. For an analysis of the contents of this Communication : Munoz R., La participation du plaignant à la procédure d'infraction au droit communautaire diligentée par la Commission, Revue du Marché Commun, 2003, n. 472, October-November, p. 610-616.

Such an approach can be tempting for companies but has negative aspects for the Commission. Indeed, it will likely mobilise numerous resources if the number of enquiries addressed to the Ombudsman increase, which is inevitable if such a system is set up. A solution could be to limit this appeal, for example, to the respect of certain specific rules of procedure.

2. Development of the ad hoc mechanisms

a. The development and the strengthening of the Solvit system

Solvit is a tool which improves the application of Community law. Indeed, it is a real alternative to Article 226 procedure.

It is therefore necessary to allow a greater development of this system. However, it cannot be done without three elements: better information, a greater implication of the Member States and an increased control on the part of the Commission.

In order to ensure its performance, this system should have strong financial and administrative support from the Member states. One should avoid falling into the traps experienced before.[78] There must be therefore a real political implication on the part of each State. Member states have already made a statement in the Council on the "Internal market", stating that they would do everything possible to ensure the success of this system.[79] However, there are still considerable differences between States as shown by comparisons at the disposal of the Solvit centres and by the number of solved cases per country.[80]

[78]Indeed, SOLVIT is based on a mechanism which had been set up several years ago but which had not succeeded, see http://europa.eu.int/comm/internal_market/en/update/action/planfr.pdf, see inter alia page 7.
[79] http://europa.eu.int/solvit/site/background/index_en.htm
[80]Commission Report on Development and Performance of the SOLVIT network in 2004 SEC (2005) 543 on 19 May 2005, sp. p 8 to 16.

However, in view of the overall good results of the system, the Commission should continue to develop it, but it should check the way the law is interpreted and it should also ensure a uniform application of Community law. Indeed, the decisions taken by the Solvit centres have to be taken in the framework of Community law, as stated in the Solvit Communication.[81] To ensure that this commitment is respected, the Commission must check in a very strict way the decisions taken by the various centres. Indeed, Community law is a very complex matter which requires real expertise and an approach different to that of a purely national approach. The Commission, as guardian of the treaties, must make sure that the decisions of these centres are in line with the Community position on the subject. Specific trainings will also have to be set up if the Commission realises that a centre did not implement Community law correctly.

Lastly, the Commission must inform more widely all citizens and companies of the existence of this mechanism by publicity campaigns. In fact, Solvit is known for the moment only by some beneficiaries. However, this increased publicity must go together with a real development of the system so as to ensure that new cases could be treated exponentially. Indeed, if the system is known by the general public, the number of cases will undoubtedly increase.

b. The real development of the mechanism of Regulation 2679/98/EC

The idea of such a regulation must be taken up but its application should be made more flexible as the Member States had made the procedure too heavy. The Commission should have the power to penalise the non-observance of the obligations to inform each other that Member States have. Indeed, the idea to have more information is very good because it makes it possible to limit the harmful consequences of an obstacle if this obstacle is foreseeable. But one must be able to force the States to give this type of information.

Moreover, we should come back to the original idea that the authors of this regulation had, namely to prevent cases similar to the one of the Spanish strawberries which were systematically destroyed by French farmers. The purpose was thus to prevent a specific type

[81] Note n°56.

of violation (repeated violations) and to ensure that the Commission could respond quickly on this repeated infringement.

In fact, Article 226 is not the tool to deal with such violations: due to its slowness and strict and long character of its procedure, it is not possible to cope with such violations. Consequently, there is still a need to develop an efficient mechanism aiming to deal specifically with repeated infringement within certain time limits.

3. Improvements of the notification procedure

This procedure works particularly well. It would thus be interesting to develop its scope ratione materiae and personae. Work has already started in this direction. Indeed, the Commission is exploring the possibility of implementing a notification procedure for services. DG Enterprises launched a study in order to analyse how many measures are adopted by states in the framework of the free movement of services.[82]

It should also be noted that the notification procedure was already imposed to the current new Member States before their adhesion in order to prepare them to apply it but also in order to ensure the right application of the acquis.[83] It must also be stressed that this procedure applies with certain limits to Turkey.

Lastly, it is possible to mention that the experience of the notification procedure has inspired a very similar notification procedure at international level with the adoption of an International Convention under the Council of Europe.[84] This notification procedure might apply to all the Member States of the Council of Europe plus the States which are observers such as the United States.

[82]Working document of DG ENTERPRISES http://europa.eu.int/comm/enterprise/tris/rslt_svr_fr.pdf
[83]See note 29
[84]Moscow Convention adopted within the Council of Europe at the conference 24° of the European Ministers for Justice in Moscow of 4-5 October 2001

B. A general recasting of the approach vis-a-vis the infringements of Community law: development of new instruments

There might be three ways to reform in depth the monitoring of the application of Community law. The first way is to find a solution to the problem of the non communication of the national implementing measures of directives which, as we saw earlier, represent the large majority of cases of letters of formal notice and of reasoned opinion.
The second way is more general and aims at recasting the general approach of the monitoring of the application of Community law. A possibility would be to develop a platform aiming to manage the relations between the states and the Commission services.
Lastly, it would be possible to create a body whose aim would be to follow the transpositions or to make sure of the application of the Community law in general.

1. A new ex-ante mechanism to deal with the non-communication of the national transposition measures and cases of non conformity

a. The ex-ante notification of the national implementing measures[85]

The system allowing for an a priori control of all the national implementing measures transposing the Community directives could consist of the following:

Firstly, its scope should be limited, as it was for Directive 83/189/EEC at the time of its creation; the aim being, in the future, if the mechanism shows its effectiveness, to extend it to each new directive referring to the internal market.
The fact of limiting it to some directives will allow for the gradual introduction of this control.

The mechanism could work as follows: directives should comprise of a legal obligation, such as a standard article in the final provisions, requiring Member States to notify to the

[85] EU Law for the Twenty-First Century: Rethinking the New Legal Order, Volume 1 (Co-editor with P. Nebbia), Oxford: Hart Publishing, 2004, 496, Chapter 7, R. Munoz

Commission at the draft stage all the foreseen national measures which are aimed at implementing the obligations of a directive before its adoption.
If the State does not have the draft measures yet, it could at least indicate the adoption timetable and as soon as the drafts are available, it should notify them to the Commission. Then, a "rendez-vous clause" should make it compulsory for representatives from Member States to meet together with the Commission services in order to discuss the transposition at a specific moment. Thus, if the directive should be transposed within 18 months, the Member States should have to meet 10 months following the publication of the directive in the Official Journal of the European Communities, for instance.
The notified texts should then be analysed by the services in charge of the directive in order to ensure that the national transposition measures are in accordance with the aims of the directive. Member States should have access to each others draft measures so that if one country encounters a problem in the transposition of a measure, it could check how other Member States have dealt with it.

If the Member State notifies its national implementing measure, then the Commission services will be able to check the contents of these measures and, to ensure their conformity with the aims of the directive and with general Community law. In that way, the Commission will be able to ensure that the transposition of Community law is effective and uniform in all the Member States. Therefore, such a system would make it possible to treat all the cases of non-communication and the cases of bad transposition.
Another added value would be that if it appears that many countries have problems to interpret the obligations of the directive, the Commission will be able to take measures to make it more understandable.

b. Advantages and disadvantages

Advantages

We will deal quickly with some of the advantages of such a mechanism because we will develop other elements in the following part, in answer to the potential criticisms of this mechanism.

The first advantage is that such mechanism will make it possible to solve the majority of cases of breach of Community law due to the non (or bad) transposition of obligations before it creates concrete obstacles within the internal market.
Consequently, companies and citizens will no longer have to wait for their rights to be violated and for not being allowed to sell their products to require the effective monitoring of the application of Community law. Furthermore, it must be recalled that if few cases go before the Court of Justice, most of them have to go through what is called "the administrative phase". This is the period of negotiation between the Commission and the Member States, and it can sometimes take more than two years during which the obstacles to the internal market remain.

The second advantage is related to the length of the enforcement actions procedure. Such a system would definitely shorten the procedures in cases related to the non- (or bad) transposition.[86]

Thirdly, this mechanism will help rationalise the monitoring of transpositions and will also ensure access of citizens and companies to the national implementing measures.

Lastly, the limitation of disputes in front of the Court of Justice will give it more time to deal with its other cases. It can then induce a quicker time of treatment of these other cases.

[86]The author underlines once again that quite obviously in "political" cases, States will always prefer not to respect directive obligations. However, these cases represent only a limited percentage of cases of non transposition or of bad transposition of directives.

Criticisms

We will in this part gather criticisms which can be made concerning the introduction of such a mechanism. We will try to give brief replies to these potential criticisms.

The first negative aspect might be that implementing such a mechanism might be very heavy if we consider the number of national implementing measures that States have to adopt for each directive.
In answer to this comment, we can compare with the number of notifications which are made and treated each year by the Commission within the framework of the notification procedure. Indeed, in 2005, the Commission had dealt with 700 notifications.[87] This number includes only the notified texts. It does not take into account all the mail sent for each notification (detailed opinion, comments, etc.). In fact, the Commission treats the sending of all these documents via a computer system which has now proven its worth. Therefore, the same approach can be developed for the ex-ante control of national transposition measures.

The second foreseeable criticism could be that these national implementing measures will need to be translated if the Commission wants to analyse its content and compare it to the original obligations of directives.
Four answers can be given. Firstly, in any case these implementing measures will have to be read and compared to the original obligations. At some point, this translation will thus have to be made, at least partially. Secondly, translations in the framework of the directive on notification are managed efficiently via a contract which requires high quality and sometimes very technical translations to be given in all the official languages of the Community in a very short period of time. The third element is that the translations of these measures would not be used only for the Commission services, but they could also be placed at the disposal of all Member States and companies. This would give them access to the national implementing measures of each directive translated into all the languages of the Community. Lastly, it is

[87]Statistics concerning technical regulations notified in 2004 within the framework of the notification directive 98/34/EC (2005/C 158/05)

possible to impose limitations if the text exceeds e.g. fifty pages as is the case, for instance, under the notification directive 98/34/EC.[88]

The third criticism concerns the human resource necessary to develop such a mechanism. Indeed, the reception, management and analysis of these national implementing measures will certainly involve numerous people.
This comment is true, but has to be balanced. Indeed, if such a mechanism implies more human resource beforehand, it will require less resource later as there should then be less procedure under Article 226 which normally includes a very long administrative phase. Moreover, the monitoring of the application of Community law is in anyway compulsory. It is one of the main tasks of the Commission. Lastly, it will in any case involve a net gain for the internal market because the majority of problems will be solved before generating any obstacle and consequently, there will be no cost to bear by companies and citizens. Thus, the money currently lost by companies in cases of no or bad transposition will be reinvested in the economy.

The fourth criticism could be that such a system will increase time limits for adoption of measures. Indeed, the transposition procedure is particularly long because in each State it implies several ministries and the adoption of numerous measures. Consequently, the fact of having to wait for the analysis of the Commission could further slow down the transposition periods. It is easy to answer such an argument by stating that within the framework of the notification procedure, the deadlines imposed on the Commission are particularly short and binding. Indeed, the Commission has only three months[89] to deliver its opinion on the text. It must be stressed that these three months also include all the translation periods. Lastly, on this aspect it should be noted that under the directive on the services of the information society certain time limits were shortened.[90]

[88]The only limitation concerns the texts which make up of more than 50 pages, those are translated only in French, English and German but that represents a minority of the notifications.
[89]Article 9§1 of Directive 98/34/EC, note 21.
[90]Directive 98/48/EC of 20 July 1998, OJ n° L 217 of 05/08/1998 p. 18 –26, see specifically Article 9§2 on the standstill period as a result of the sending of a detailed opinion.

The fifth criticism is to stress that States can decide not to notify their national implementing measures. If Member States have not notified their draft national transposition measures within the prescribed time, the Commission could make contact directly with the State in order to ask for the notification of these measures. If despite that, a State still refuses to provide its draft measures, the Commission could begin a procedure for failure of non observance of its notification duties even before the directive enters into force.

The last criticism probably is the most difficult to counter argue. It is the natural reservation of the States to accept the establishment of such a mechanism. It is clear that politically, States are not likely to want such a mechanism to be implemented. However, they should be told that this mechanism does not have the objective to involve itself in their national sphere but rather to provide them with a system to better implement Community obligations. But what should mainly be stressed is that each State would ultimately benefit from the introduction of such a mechanism. Indeed, economically speaking, it can have positive impacts by producing an effective harmonisation. For instance, companies from a State will no longer have to give up a market due to the non or bad transposition of Community law.

2. The development of a platform

a. Presentation of such a system

Within the framework of the infringement procedure there are already mechanisms which allow for the targeting of controls and the development of specific contacts between the Commission and the Member States. They are called "réunion paquet". These meetings have existed for more than 15 years and enable the officials of the Commission to meet people in charge of the transposition files in each Member State but also to meet people in charge of the treatment of the infringement files. This approach has made it possible to find numerous solutions before the implementation of the infringement procedure. Furthermore these meetings made it also possible to close down infringement procedures which had been initiated.

This mechanism has already proved its worth today and is used in an extensive way. It would be interesting to wonder how this method could be developed more in-depth.
It should be added to this that if the Community keeps on growing, it will be increasingly difficult to manage the application of the Community law only from Brussels, even through "package meetings". A possible solution would be to have teams of officials who would make the tour of the capitals, twenty-five today, in order to ensure a proper application of Community law while other teams, in Brussels, would manage the legislative follow-up and fulfil the Commission initiative function.

An alternative could be the following: to set up platforms in each Member State which would be responsible to ensure a proper application of Community law. This would not necessarily mean creating additional bodies but could work by setting up Community delegations in each European capital.

By doing so, it would be possible first of all to make sure of effective and real control of all the legislation of the Member States and secondly to have some kind of "direct contacts" between the national administrations and the Commission within the framework of the transposition of the directives.
These "contacts" would be useful not only within the framework of the procedure of the control of the application but also in order to build links with the socio-economic actors of each state whether companies or civil society interlocutors. These links could also be extended to other branches of state power and for instance could give rise to links strengthened with the national parliaments.

Such contacts could consist of a team of Commission civil servants operating in each State or, for smaller countries, of regional teams regrouping 2/3 countries. Commission representatives would be the interlocutors of the national administrations, companies, citizens…
Their role would not be to sanction countries but to manage cases in a way which takes into account the reality of each country and to help to find solutions taking care of the country specificities. Moreover, concerning the cases of transposition of directives, it will contribute

to avoid non- or bad transposition. This mechanism can thus be put in parallel with the idea that we developed previously i.e. the notification of the draft national measures of transposition.

Finally, such a mechanism would make it possible to develop several elements which are missing today: a direct link with the Member States, a forum of discussions and meetings and a relay with citizens.

b. Critical analysis

For the Commission

A first obvious consequence is the splitting of the powers of the Commission as there will be several centres for discussion on the implementation of Community law.
However, as a matter of comparison, there are already delegations in third countries and the Community has decided to further develop such delegations for implementing specific tasks of the Community.[91] This approach was decided because it was obviously very difficult to follow the implementation of Community projects from a long distance. For the issue dealt with here, the problem is less the distance than the number of cases and the variety of subjects covered. For these reasons, we think that such an approach could be helpful. Lastly, the Community delegations in third countries are in constant contact with Brussels.

There are solutions to this issue of the splitting of the Commission's powers. One of them could be to set up a general follow-up mechanism of the discussions within the framework, either of the application of the Community law or of the monitoring of the complaints.
This would undoubtedly imply considerable coordination work. Once again previous experiences will be very useful such as the notification procedure which combines the necessity to work in a very coordinated way and a procedure for exchanging views within a very short time limit. The SOLVIT system can also be seen as a good example. SOLVIT envisaged from the very beginning to include the monitoring of complaints lodged by private

[91] http://europa.eu.int/comm/development/index_fr.htm

individuals and companies so as to be able to take measures at Community level if a problem occurred in several States or in order to make sure that the solutions proposed by the Solvit centres are in compliance with Community law.

Another undeniable consequence of such a mechanism might be its financial cost. But it should be compared to the economic cost of the non- or bad implementation of Community law for companies and citizens.

Lastly, from a human resource perspective, there will have to be at least some turnover of staff from one platform to another and back to Brussels, as it exists today for delegations in third countries.

For the Member States

Once again, the problem which is probably the most difficult to surmount will be the non willingness of the Member States to develop such delegations because it might increase the effectiveness of the control of the Commission. They might also see such a system as a way to permanently control their national measures.

3. The implication of the European Parliament in the control of the transpositions

The European Parliament should play a role in the implementation of Community law.
Indeed, due to the increasing role of the European Parliament in the legislative sphere, it would be legitimate to give it more opportunity to monitor the adoption of Community acts, mainly directives.
It will also make it possible to use contacts that the European Parliament has with the various national parliaments.
These contacts will probably have to be developed more in depth. In practice there is already a cooperation mechanism which could be used effectively; it is the COSAC (the Conference of bodies specialised in European Community Affairs of Parliaments of the European

Union).[92] This body was created in Madrid in May 1989[93] in order to strengthen the role of the national parliaments in the Community process. This is a cooperation body which brings together, every two months, the members of the committees responsible for European affairs of each national parliament and the European Parliament.[94]
The COSAC was recognised formally at the time of the Amsterdam Treaty in 1997 with the introduction of a specific protocol on "the role of the national parliaments".[95] This protocol gives to the COSAC the opportunity of submitting to the European institutions any contribution that it will judge suitable.[96]

It is therefore possible to use these meetings as a platform for tackling subjects related to the transposition of Community directives. In fact, in a way, the COSAC has already began this work through its biannual reports[97] where it invites national parliaments to exchange their best practices about Community law.

Therefore, this body could serve as a starting point to establish a more active monitoring of the national transposition measures.
National Parliaments have to act in order to improve national implementation of Community Directives. Of course, this implication might vary from one Member State to another due to the different constitutional power of the national Parliaments. In this framework the European Parliament[98] can be the relay of this checking of national implementation of community Directives.

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[92]Houser Matthieu, La COSAC, une instance européenne à la croisée des chemins, RDUE, 2005, n°2, p.343-361. The web site : www.cosac.org
[93]The first meeting took place in Paris in November 1989.
[94]Candidate States have the right to send representatives.
[95]Protocol n°9 on the role of the national parliaments in the European Union 1997.
[96]Protocol n°9 item 4: The Conference of bodies specialised in Community Affairs (…) can submit any contribution that it considers suitable for the attention of the institutions of the European Union, in particular on the basis of measure projects that representatives of governments of the Member States can decide by mutual agreement to transmit it, in view of the nature of the question.
[97]http://www.cosac.org/fr/documents/biannual
[98] At the moment the European Parliament is working on the monitoring of the application of European law. See McCarthy , 23rd March 2006, Report of the Committee on the Internal Market and Consumer Protection, Report on the Implementation, Consequences and Impact of the Internal Market Legislation in Force.
http://www.europarl.europa.eu/omk/sipade3?PROG=REPORT&SORT_ORDER=D&S_REF_A=%25&LEG_ID=6&AUTHOR_ID=2173&NAV=X&L=EN&LEVEL=2&SAME_LEVEL=1

V. Conclusions

The obstacles to the free movement of goods, capital, services and to the freedom of establishment are in themselves obstacles to the establishment of a effective internal market without frontiers. The multiplication of complaints of citizens and companies are certainly related to the fact that they are more informed of their rights and so more able to require their proper enforcement.

The battle to be fought is consequently even more important than it appears. It is the credibility of the Community system which is at stake. At present, Community citizens are not fully aware of the role that Community law has in their daily life. Although the Community is trying to raise this awareness through efforts like the action called "Citizen first", if it is not have the means to answer to the foreseeable increase of complaints, it will lose credibility. Indeed, if now, a citizen complains (rightly) that one of its rights has been denied by a Member State, and if the answer to him is that his case cannot be dealt with because it does not fit in with the priorities agreed by the Commission, all previous efforts will be lost.

It is true that for the moment, the entry of ten new members did not result in an exponential increase of the number of infringements on the contrary.[99] However, these States will surely also encounter at some point problems in the application of Community law.[100] To give an idea, the five States which have least communicated their national implementing measures are: Luxembourg, Italy, Greece, Portugal and France, i.e. five "old" Member States. [101]

[99] http://europa.eu.int/comm/secretariat_general/index_fr.htm
[100] http://www.europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/mne_country_20050907_fr.pdf
[101] The term "old" is taken here in opposition to the new States which joined the Community at the time of the last enlargement with the Athens Treaty.