

**NON-BINDING ENFORCEMENT OF EU LAW: INTERPRETATION OR  
CENTRALIZATION AND NORM ASSIMILATION?**

Paper to be presented at EUSA Twelfth Biennial International Conference,  
Boston, Massachusetts, March 3-5, 2011

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**ABSTRACT**

This paper explores the European Commission's practice of establishing groups of experts from the EU member states with a view to identifying and clarifying issues of interpretation of directives. This turn towards management of compliance with directives has a number of advantages compared to traditional enforcement according to the general EU infringement procedure stipulated in Article 258 TFEU. For instance, the Commission can tackle non-compliance in a broadly inclusive and pre-emptive manner. The method, however, also raises a number of policy issues. Specifically, management of compliance implies both interpretation and behavioural assessment, i.e., two central powers of the Court of Justice according to the general EU infringement procedure. Whereas norm development through interpretation has often been analysed in relation to the Court of Justice, it has not been comprehensively analysed in relation to the examined groups of experts. It is argued that the method may bring about norm harmonisation, norm-setting and internalisation. Moreover, because the process outcomes are non-binding they are not supervised by the Court of Justice. Thus, a rule of law problem occurs to the potential detriment of the member states and the "EU legislator" and in particular the European Parliament.

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<sup>1</sup> The views expressed are those of the author. This paper is a preliminary draft. Please do not quote without prior permission.

## INTRODUCTION

The Commission has established a number of non-binding enforcement procedures concerned with member state interpretation and correct application of EU law. Whereas infringement proceedings according to the general EU infringement procedure stipulated in Article 258 TFEU are initiated against one member state and remain predominantly elitist, the supplementary procedures examined in this paper involve all EU member states. The procedures are established on an *ad hoc* basis and cover a broad spectrum of EU policy areas ranging from, for instance, temporary agency work, air safety to law regulating the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.<sup>2</sup> This provides the Commission with an exceptional possibility to monitor member state compliance. Moreover, it enables the Commission to exert influence on the interpretation of EU law and to assess member state application of EU law. Significantly, the latter two functions correspond to the Court of Justice's core functions according to the general EU infringement procedure.<sup>3</sup>

This paper analyses the described development in relation to enforcement of directives. It proceeds in three sections. The first section discusses some of the shortcomings of the general EU infringement procedure. Against this background, section two documents and describes the proliferation of expert groups with member state representatives established with a view to managing member state compliance with directives. The third section analyses the ways in which the Commission's role in managing compliance through expert groups, resembles its role according to the general EU infringement procedure. In addition, it discusses the advantages in terms of effectiveness of supplementing traditional enforcement with management of compliance. In addition, the section problematises the

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<sup>2</sup> See e.g. Report from the Commission – 27<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2009), p. 5, and Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2008/840 final.

<sup>3</sup> In case T-258/06, *Germany v Commission* [2010] ECR I-nyr, the General Court reaffirmed that “*according to the system embodied in Articles 226 EC to 228 EC, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice*”. This was already established by the Court of Justice in joined cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paras 15 and 16, and Case C-191/95 *Commission v Germany* [1998] ECR I-5449, para 45.

Commission's turn towards management of compliance. Clearly, member state compliance is in the general interest of the EU. However, the procedures as well as the centralization and norm assimilation potentially brought about by the procedures are not transparent. Moreover, because the process outcomes are non-binding they are not supervised by the Court of Justice. Thus a rule of law problem occurs to the potential detriment of the member states, the "EU legislator" and in particular the European Parliament, individuals and legal entities.

## 1. LIMITATIONS OF THE GENERAL EU INFRINGEMENT PROCEDURE

Clearly, member state compliance is a prerequisite for the effectiveness of EU law. By contrast, non-compliance prevents the rationale of the internal market to materialize and it has short and long term implications and costs for business. Non-compliance may in addition have consequences for the further development of the EU as a political and economic union as it may deter member state governments from taking on further and deeper commitments.<sup>4</sup> Similarly, it hampers the individual rights of citizens.<sup>5</sup> The establishment of a European citizenship, what Advocate General Colomer called a European *status civitatis*,<sup>6</sup> is at the heart of the EU as a political Union. Thus compliance in this area of law, for instance, is central to the credibility of the EU polity as something more than an economic community.

One of the core roles attributed to Commission in the Treaty on European Union (TEU) is to monitor member state compliance with EU law.<sup>7</sup> According to the general EU infringement procedure stipulated in Articles 258 and 260 TFEU, the Commission can seek

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<sup>4</sup> Compare GW Downs, D Rocke, and P N Barsoom 'Is the Good News about Compliance Good News for Cooperation?' (1996) IO 50, 379–406.

<sup>5</sup> Significantly, citizenship creates justiciable rights because of the Court of Justice's coupling of citizenship of the Union and the right to equal treatment.

<sup>6</sup> Opinion of Advocate Colomer in Case C-258/04, Office national de l'emploi (ONEM) vs. Ioannis Ioannidis [2005] I-08275, para 46.

<sup>7</sup> Article 17 TEU.

a declaration by the Court of Justice that a member state has failed to apply, implement and enforce EU law and eventually request the Court of Justice to award pecuniary sanctions.<sup>8</sup> This procedure has proven a robust tool against infringements both during the pre-judicial stages where the vast majority of cases are terminated and also in cases before the Court of Justice.<sup>9</sup> Member state governments do value genuine compliance as evidenced by the fact that they have strengthened the Commission's enforcement powers over time.<sup>10</sup> The Maastricht Treaty introduced financial sanctions against repetitive infringements. In addition, the Lisbon Treaty introduced a fast-track sanctioning mechanism targeting failure to notify member state measures transposing a directive. It also reinforced Article 260 TFEU against repetitive infringements by relieving the Commission of its obligation to issue a reasoned opinion. Perhaps more importantly, the Commission's enforcement powers were broadened substantially in scope as the former treaty pillar structure was brought to an end by the Lisbon Treaty. Thus the Commission in its role as guardian of the treaties appears a noticeably stronger supervisor than it was prior to the Lisbon Treaty.

The procedure laid down in Article 258 TFEU comprises two consecutive stages, the pre-litigation stage of an administrative nature and the contentious stage before the Court. The purpose of the pre-litigation procedure is to give the member state concerned an opportunity to comply with its obligations or to avail itself of its right to defend itself against the complaints made by the Commission.<sup>11</sup> The fact that the pre-litigation procedure allows the member state to voluntarily put an end to an infringement is of great practical significance as mentioned above. In addition, the pre-litigation stage ensures a clearly

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<sup>8</sup> L. Prete and B. Smulders, *The Coming of Age of Infringement Proceedings* (2010 CML Rev.), S. Andersen, *Procedural Overview and Substantive Comments on Articles 226 and 228 EC* (2009, Yearbook of European Law 2008, Vol. 27).

<sup>9</sup> According to Report from the Commission, 27th Annual Report on Monitoring the Application of EU Law (2009), COM/2010/538 final, around 77 percent of complaints were closed before the first formal step in an infringement proceeding at the end of 2009. Ca. 12 percent of the total were closed before the reasoned opinion and around ca. 7 percent before a ruling from the Court of Justice.

<sup>10</sup> Moreover, they have continued to broaden the scope of the Court of Justice's jurisdiction. See Peter Biering, "Has the Court of Justice ever taken Integration too far?" in (Henning Koch *et al.*) *Europe. The New Legal Legal Realism. Essays in Honour of Hjalte Rasmussen* (DJØF, 2010).

<sup>11</sup> Case 293/85 *Commission v Belgium* [1988] ECR 305, paragraph 13; Case C-1/00 *Commission v France* [2001] ECR I-9989, paragraph 53, and Case C-362/01, *Commission v Ireland*, paras 15-16.

defined dispute before the Court of Justice.<sup>12</sup> It is well established case law that an action for infringement can only be based on the arguments and pleas in law already set out in the reasoned opinion.<sup>13</sup> This in turn reflects that the Court of Justice does not draw up legal opinions. It rules on the actual facts of the main action. Hence, the subject matters of infringements cases are inherently very concrete. For these reasons pursuing individual infringements according to the general infringement procedure is resource-intensive. Moreover, genuine compliance is complicated to establish and thus to monitor. First, it requires in-depth knowledge of the national instruments adopted with a view to ensuring the effectiveness of directives. Second, what constitutes correct interpretation and application of EU law is often contestable. Enforcement of directives thus requires both close scrutiny and policy decision-making. Third, as discussed above, infringement proceedings are inherently case-specific. Fourth, although other member states can intervene if the Commission decides to refer a case to the Court of Justice, infringement proceedings overall are not inclusive in nature.

## **2. MANAGEMENT OF COMPLIANCE THROUGH EXPERT GROUPS**

### **2.1 Different Types of Implementation Expert Groups**

According to Article 288 TFEU a directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods. One of the strengths of directives is that they are implemented within the framework of the national legal systems. However directives also pose a number of challenges for the member state and especially so concerning the results to be achieved. Directives can be implemented into national law completely or incorporated by reference to the directive and if possible, accompanied by an administrative guidance. Incorporating directives into domestic law verbatim is no guarantee for compliance though, as the member states still have to apply and enforce the directives on a day-to-day basis.

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<sup>12</sup>Case C-362/01, Commission v Ireland, para 17.

<sup>13</sup>Case C-210/91 Commission v Greece [1992] ECR I-6735, para 10.

Compliance may prove particularly complicated when directives and their policy objectives are formulated in general and unquantifiable terms. Then again, seemingly specific, precise and clear EU provisions may also prove ambiguous. Significantly, this leaves member states open to individual complaints as well as to Commission infringements proceedings. Despite the advantages of directives in terms of flexibility and proportionality, directives may thus at the same time create legal uncertainty for the member states in the implementation phase.

In the light of the discussed limitations of the general infringement proceedings and the particular challenges (in addition to benefits) posed by directives, it is no surprise that the Commission has examined ways to enforce EU law other than the general infringement procedure. Notably, the Commission has taken a range of initiatives targeting improved application of EU law in the member states.<sup>14</sup> The Commission's strategies include *“preventive measures, including increased focus on implementation and enforcement issues in impact assessments, improved implementation planning on new legislation, creating implementation networks and assisting Member States with correlation tables”*.<sup>15</sup> As part of this strategy the Commission endeavours to manage compliance with certain directives through expert groups.<sup>16</sup>

An example of this is the working group entitled the Capital Requirements Directive Transposition Group (CRDTG) set up by the Commission with a view to ensuring consistent implementation of the Capital Requirements Directive (CRD).<sup>17</sup> The group is composed of member state representatives, business stakeholders and the Committee of European Banking Supervisors. Among other things, the group addresses the accuracy of

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<sup>14</sup>'A Europe of Results', COM(2007) 502.

<sup>15</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Third strategic review of Better Regulation in the European Union, COM/2009/15 final, para IV, 3.

<sup>16</sup>Report from the Commission, 27th Annual Report on Monitoring the Application of EU Law (2009) COM(2010) 538.

<sup>17</sup>Commission Decision of 5 November 2003 establishing the European Banking Committee (OJ L 2004, L 3/36). Described in Commission Staff Working Document, “Situation in Different Sectors” - Accompanying document to the Report from the Commission, 27th Annual Report on Monitoring the Application of EU Law (2009) COM(2010) 538, para 9.2.1.2 (Report on work done in 2009), para 9.2.2.2., p. 280, and

the transposition and whether provisions are adequately implemented, based in particular on the outcomes of CRDTG.<sup>18</sup> The Commission's Internal Market and Services Directorate General (DG MARKT) has established an interactive website called Your Questions on Legislation (YQOL) where firms, trade associations and public organisations and other stakeholders can submit questions relating to the single market.<sup>19</sup> Notably, the CRDTG's answers are made publicly available on the dedicated webpage. One advantage of this approach is of course that individuals have access to information and encouraged by the answers may want to challenge member states before domestic courts. Another advantage is that the Commission can make available guidance to the member states responsible for national implementation of the directive. On the webpage the Commission explicitly states that the service does not cover the application of legislative acts by member states or their interpretation. Thus, the Commission acknowledges the prerogatives of the Court of Justice according to Article 19 TEU to ensure that in the interpretation and application of the Treaties the law is observed.<sup>20</sup> However, the distinction between guidance and interpretation can be somewhat ambiguous. This is illustrated by a response from the UK HM Treasury addressed to the Commission, in which the UK comments that it is of the understanding that the expert group "*exists to provide interpretation of the Directive rather than formal guidance*", and suggests that the Commission reflects further upon this option.<sup>21</sup>

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<sup>18</sup>2006 Activity Report from the European Banking Committee: >[http://ec.europa.eu/internal\\_market/bank/docs/ebc/ebc-activity-report\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/ebc/ebc-activity-report_en.pdf) <.

<sup>19</sup><http://ec.europa.eu/yqol/index.cfm>. More specifically, the questions and answers concern the Capital Requirements Directive, the Markets in Financial Instruments Directive, the Electronic Money Directive and the Payment Services Directive.

<sup>20</sup>See the case-law cited in footnote 3 on the division of powers between the Commission and the Court of Justice according to the general infringement procedure. See also S. Andersen, 'The European Commission's Quest for Strengthened Powers of Enforcement', Paper prepared for the 4th Convention of Central and East European International Studies Association (CEEISA), University of Tartu, Estonia, 25 – 27 June 2006, ><http://tinyurl.com/669gyxu>< accessed on 20 January 2011.

<sup>21</sup>UK Response to the Commission on the Mortgage Funding Expert Group and Mortgage Industry and Consumers Expert Group Reports (February 2007), ><http://tinyurl.com/5sa2knc>< accessed on 19 January 2011.

Another type of expert group is composed exclusively of national officials representing the member states. In terms of composition, this type of group is similar to the Council working groups and COREPER. The notion “expert group” however indicates that the work is less about policy making and more about problem solving. The member states are thus providing expertise on the application of EU law and as suggested by the rhetoric, the method is one of cooperation. An example of the latter type of expert group is the Expert Group on the implementation of the Services Directive set up by the Commission. In addition to the bilateral meetings between the Commission and the member states, the Expert Group discusses specific questions pertaining to the implementation of the directive.<sup>22</sup> The purpose is twofold, namely to examine the member states' interpretation of the directives and whether they are consistent and, in addition, to assemble member state accord for priorities for action.<sup>23</sup> The remainder of section 2 will examine the second type of group of experts composed solely of member state representatives in more detail looking specifically at the group of experts concerned with implementation of the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (the Residence Directive).<sup>24</sup>

## **2.2 The Expert Group on the Implementation of the Residence Directive**

Poor transposition of the Residence Directive prompted the Commission to initiate infringement proceedings against 19 member states between June 2006 and February 2007 alone. The Commission accounts for this in a 2008 report in which it also provides an overview of the transposition of the directive and its day-to-day application by the member

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<sup>22</sup>Commission Staff Working Document, “Situation in Different Sectors” - Accompanying document to the Report from the Commission, 27th Annual Report on Monitoring the Application of EU Law (2009) COM(2010) 538, para 9.2.1.2 (Report on work done in 2009).

<sup>23</sup>Ibid. The aim and work of the group is set out by the Commission on page 46 ff. in Annex 1 to Report [...] >[http://ec.europa.eu/atwork/synthesis/aar/aar2007/doc/markt\\_annex1.pdf](http://ec.europa.eu/atwork/synthesis/aar/aar2007/doc/markt_annex1.pdf) <.

<sup>24</sup>Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77–123).



states.<sup>25</sup> The report also sets out the Commissions endeavours to develop supplementary methods to bring about member state compliance. Among other initiatives, the Commission has established a group of experts from member states “*to identify difficulties and clarify issues of interpretation of the Directive*”.<sup>26</sup>

This group of experts has singled out central issues that require clarification including questions pertaining to criminality and abuse. According to case-law the application of EU law does not extend to cover abusive practices.<sup>27</sup> In addition, Article 35 in the Residence Directive explicitly stipulates that member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the directive in the case of abuse of rights. The risk is that member states apply a broad interpretation of the notion of abuse thereby mitigating the individual rights anchored in the directive. Compliance in this aspect is particularly difficult to monitor by the Commission from Brussels because the member states enjoy a margin of discretion (within the limits imposed by the Treaty, of course) and given that the Commission does not have access to the facts of specific cases. The Commission faces similar problems when supervising the implementation and application of member state safeguards based on grounds of public policy, public security or public health.<sup>28</sup> Implementation of the Residence Directive has proven complicated as evidenced by the polemics concerning France's deportation of Roma EU citizens.<sup>29</sup> The Commission has put infringement proceedings on a halt allowing France an opportunity to demonstrate that it bases expulsion orders on a specific individual examination of each case.<sup>30</sup> This

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<sup>25</sup>Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2008/840 final.

<sup>26</sup>Ibid.

<sup>27</sup>See e.g. C-212/97 Centros [1999] ECR I-1459, para 24 and case-law cited.

<sup>28</sup>Chapter VI of the Residence Directive allows member states to restrict the right of EU citizens and their family members on grounds of public policy or public security.

<sup>29</sup>The decision by France to expel from its territory Roma EU citizens from Romania and Bulgaria prompted the Commission to initiate an exchange between the Commission and the French authorities on the transposition and application of EU law and the Residence Directive. Specifically, the Commission was of the opinion that France had not transposed the Residence Directive in national law in a manner that rendered those rights completely effective (Letter from the Commission on file with the author).

<sup>30</sup>Letter from the Commission.

approach whereby the Commission effectively circumvents the burden of proof was politically feasible because of the particular circumstances of the specific case. According to Article 258 TFEU though, the Commission must prove the existence of an infringement.<sup>31</sup> Consequently, the Commission cannot generally rely on the member states substantiating compliance at the Commission's request.

The priority areas set out by the Commission in its 2008 report pertaining to criminality and abuse reflected several member states' concerns and the Council supported the idea of reinforcing member state compliance with the Residence Directive through a group of experts. Thus, in 2008 the Council requested the Commission to provide “*guidelines for the interpretation of that Directive early in 2009 and to consider all other appropriate and necessary proposals and measures*”.<sup>32</sup> In addition, at a Justice and Home Affairs Council meeting in 2009 the Council endorsed the Commission's pledge to issue guidelines with information and assistance pertaining to member state compliance with a view to “*facilitate effective application of the Directive*”.<sup>33</sup> The UK moreover asked that the Commission should set out consequences when the responsibilities under the Residence Directive were not met.<sup>34</sup>

The European Parliament has likewise been an ardent supporter of the Commission in its attempts to develop supplementary means to ensure member state compliance with the Residence Directive.<sup>35</sup> In 2007, it called on the Commission to make a detailed member state compliance assessment of the Residence Directive.<sup>36</sup> The European Parliament

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<sup>31</sup>The member state in turn must contest substantively and in detail the information produced and the consequences thereof. See e.g. Case C-272/86 *Commission v Greece* [1988] ECR 4875, para 21.

<sup>32</sup>Press release 2908th meeting of the Council, Justice and Home Affairs, Brussels, 27 and 28 November 2008, 16325/1/08 REV 1 (Presse 344), pp. 27-28.

<sup>33</sup>Press release, 2927th Council meeting, Justice and Home Affairs, Brussels, 26 and 27 February 2009, 6877/09 (Presse 51), p. 10.

<sup>34</sup>House of Lords Written Ministerial Statements 5 March 2009, Volume No. 708, Part No. 42, ><http://tinyurl.com/5vweych>< accessed on 23 January 2011.

<sup>35</sup>Resolution of the European Parliament of 2 April 2009 on the application of Directive 2004/38/EC (2008/2184(INI)).

<sup>36</sup>Resolution of 15 November 2007 on the application of Directive 2004/38/EC, OJ C 282 E, 6.11.2008, p. 428.

endorsed the Commission proposal to draw up interpretative guidelines and also recommended that the Commission should monitor compliance with its guidelines. It furthermore proposed a range of specific methodologies to ensure member state implementation including that the Commission should develop “*guidelines with common criteria in relation to the minimum amount regarded as "sufficient resources" and to clarify on which basis Member States should take into account "the personal situation of the person concerned" under Article 8(4) of Directive 2004/38/EC*” and “*develop in its guidelines a uniform interpretation mechanism of the normative categories of "public policy", "public security" and "public health", and to clarify how taking account of considerations such as residence period, age, state of health, family and economic situation, social and cultural integration, and links with the country of origin, are relevant for the expulsion decision provided for in Article 28(1) of Directive 2004/38/EC.*”<sup>37</sup> Following up on its recommendation that the Commission should monitor compliance with its guidelines, the European Parliament moreover suggested that the Commission should go as far as setting a deadline for the implementation of the (non-binding) guidelines, after which infringement proceedings would be brought.<sup>38</sup> The latter proposal thus suggests a twinning of general interpretative guidance and infringement proceedings according to Article 258 TFEU. Finally the European Parliament proposed a mutual evaluation system essentially similar in method to the group of member state experts on implementation that the Commission has since established.

As demonstrated, the Commission's initiative to establish a group of experts concerned with member state compliance with the Residence Directive enjoys a high degree of support both from the Council and the European Parliament. This support is a prerequisite for the method's effectiveness given that the procedure and the procedural outcomes are non-binding. Importantly, the support strengthens the working group's authority and adds to the out-out legitimacy.

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<sup>37</sup>Ibid.

<sup>38</sup>Ibid.

### **3. MANAGING COMPLIANCE WITH DIRECTIVES: EFFECTS AND IMPLICATIONS**

#### **3.1 Why the Commission's Role Resemble its Role According to the General Infringement Procedure**

From the outset, the Commission's role in the examined implementation group of experts composed of the Commission and member state expert appears rather different from the Commission's role according to the general infringement procedure. Most notably, infringement proceedings are directed at one member state at a time. The initial correspondence is elitist and it remains confidential despite of the individual complaints in this regard and the criticism voiced by the European Parliament, by some of the member states and in the literature on Article 258 TFEU.<sup>39</sup> This confidentiality allows member states to enter informal exchanges of views with the Commission and to discuss solutions with a view to complying. The disadvantage of elitism and thus confidentiality, however, is that specific cases do not become comprehensive learning opportunities for other member states. Moreover, although the Commission may enquire member states about compliance matters the general infringement procedure does not comprise any sort of monitoring mechanism, i.e., supervision takes place on an *ad hoc* basis.<sup>40</sup> Thus, although the Commission at times initiates clusters of proceedings against member states, the general infringement cannot function as a method to examine in a comprehensive manner exactly *how* the member states interpret and implement specific provisions of EU law. By contrast, this is one of the core qualities of groups of experts concerned with implementation. Significantly, managing compliance through groups of experts allows the Commission to sort out concrete legal obligations and to assess how the member states interpret, implement, apply and enforce them. At the same time, there are resemblances between the

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<sup>39</sup>See e.g. Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden v Association de la presse internationale ASBL (API) and European Commission (C-514/07)*, *Association de la presse internationale ASBL (API) v European Commission (C-528/07)*, *European Commission v Association de la presse internationale ASBL (API) (C-532/07)* [2010], ECR I-nyr and M. Smith, *Centralised Enforcement, Legitimacy and Good Governance* (Routledge, 2010).

<sup>40</sup>Individual complaints to the Commission constitute an important source of information. See Jonas Tallberg, *European Governance and Supranational Institutions—Making States Comply* (Routledge, 2003).

Commission's powers and means according to the two types of procedures. Notably, the Commission relies heavily on learning, persuasion and bargaining in both. This should be understood against the background that although the Commission may refer a member state to the Court of Justice, it lacks actual, binding steering capacity.

A European Union based on the rule of law, but 'which lacks all forms of physical coercion'<sup>41</sup>, cannot meaningfully claim authority without participant collaboration through a minimum of compliance. There is a correlation between this lack of ultimate regime authority and the institutional powers of the Commission under Articles 258/60 TFEU. The political conditions underlying these regime features resemble the lack of steering capacity sometimes used to explain the emergence of governance modes of steering. In the same vein, the member states are not in a hierarchical relationship with the Commission according to the general infringement procedure, although the Commission may initiate and advance infringement proceedings and request the Court of Justice to impose sanctions on a defaulting member state. For the present discussion of the Commission's tools of enforcement, it should be born in mind that the Commission possesses no general institutional powers of negative sanction.<sup>42</sup> Whether an infringement exists in the first place is for the Court to establish.<sup>43</sup> A threat of fines is thus dependent on, first, the Court of Justice establishing an infringement and, second, the Court of Justice making an independent decision to award sanctions. There exists no guarantee that the Court of Justice will meet a Commission request for fines due to the Court of Justice's unfettered powers in this regard. For these reasons, a warning or a threat under Article 260 TFEU is less potent than is often assumed in literature. Interestingly, a reasoned opinion of the High Authority under Article 88 ECSC was of a binding nature and could only be challenged by the member state before the Court of Justice. Considering Articles 258 TFEU and 88 ECSC together, the procedures' main objectives are identical, namely to obtain an amicable agreement between the Commission working in the general interest of the EU and the

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<sup>41</sup>Claus-Dieter Ehlermann, 'Wilberforce Lecture' 1992 *Common Market Law Review* 29, pp. 213-227, p. 216.

<sup>42</sup>The Commission merely possesses warning powers.

<sup>43</sup>Article 260 TFEU.

member state through negotiation<sup>44</sup> and 'primarily, to put an end to the failure to comply with Community law'.<sup>45</sup> Yet, in comparison, the changes in the Commission's institutional powers are profound. Significantly, the relationship between the supervisor and supervisees takes a more heterarchical form under Articles 258/60 TFEU. In considering the procedures' identical purposes it is apparent that it is merely the method that has changed character. Law structured problem-resolution is put before supranational governing. Article 258 TFEU, therefore, marks an important shift away from a steering based approach in which the Commission could issue directives to the member states.

With the obligation to pursue friendly agreements according to the general EU infringement procedure, the Commission appears a facilitator with procedural powers of 'hierarchical control'<sup>46</sup> rather than a steering centre. At the same time, the Commission's absolute discretion regarding whether to initiate and forward proceedings allows room for less legalistic ways of approaching non-compliance. In such a process- rather than command-based enforcement regime, the significance of the main actors' relative powers is downplayed and the parties' problem-solving capacity through negotiation is accentuated. Under Article 258 TFEU, 'hierarchical control' is combined with a significant degree of autonomy to implement and enforce EU law enjoyed by the member states, which are primary responsible thereof.<sup>47</sup> Such a functional division of competence and the procedural features of Article 258 TFEU share several traits central to governance. First, the Commission is intended to negotiate compliance solutions with member states bilaterally and offer the necessary legal and technical assistance. Second, in addition to the political and interpretive deliberation taking place, the parties engage in fact-finding and assessment. Thus, formally and informally the general infringement procedure depends to a large degree upon an

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<sup>44</sup>T-309/97, *The Bavarian Lager Company Ltd v Commission* [1999] II-03217, para 46.

<sup>45</sup>C-276/99 *Germany v Commission* [2001] I-8055, para 25.

<sup>46</sup>Expression borrowed from Renate Mayntz, 'From Government to Governance: Political Steering in Modern Societies', Summer Academy on IPP: Wuerzberg, 7-11 September 2003, p. 6. Can be found at [www.ioew.de/governance/english/veranstaltungen/Summer\\_Academies/SuA2Mayntz.pdf](http://www.ioew.de/governance/english/veranstaltungen/Summer_Academies/SuA2Mayntz.pdf). The author is concerned with governance generally and not with the EU infringement procedure specifically.

<sup>47</sup>See, e.g., the answer given by Mr. Fischler on behalf of the Commission to Written Question P-1052/2000, OJ 72 E, 6/3/2001, pp. 17-18.

'iterative process of deliberation and knowledge-creation'.<sup>48</sup> Third, the absolute discretion of the Commission throughout the infringement procedure has allowed the Commission to experiment with alternative or complementary methods of bringing about compliance in addition to the general infringement procedure. This way, the general EU infringement procedure bears some resemblance with non-binding regulatory modes of governance. The most general and significant trait is the scope for process and the procedural framework which allows for rule-structured influence on actor behaviour.<sup>49</sup> Because the administrative phase of Article 258 TFEU is characterised by secrecy and because the Court of Justice is not foreseen to review any type of formal compliance agreement reached between the member state and the Commission, the pre-judicial phase puts emphasis on enabling action.<sup>50</sup> This is significant to the day-to-day problem-solving capacity of the EU. In this sense, informal and formalized prejudicial dialogue under the general infringement procedure is to quite some length comparable in terms of methodology to the processes taking place in group of experts on implementation despite the difference in terms of composition.

There persists one significant difference between traditional enforcement proceedings according to Article 258 TFEU and management of compliance through groups with national experts on implementation not addresses in this section. Specifically, the Commission has judicial recourse according to the former procedure. This difference is somewhat academic though given that the Commission may always initiate proceedings against a member state. Indeed the European Parliament suggested that the Commission should combine the general infringement procedure with non-binding guidelines to bolster

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<sup>48</sup>Gráinne de Búrca, 'The Constitutional Challenge of New Governance in the European Union', 2003 *European Law Review* 28:6, pp. 814-839, pp. 823 ff. The author is not concerned with the general EU infringement procedure according to Article 258 TFEU.

<sup>49</sup>Compare Gunnar Folke Schuppert, 'Governance im Spiegel der Wissenschaftsdisziplin' in (Ed.) Gunnar Folke Schuppert, *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien*, (Baden-Baden, Nomos, 2005), pp. 371-469. The author is not concerned with the general EU infringement procedure according to Article 258 TFEU.

<sup>50</sup>Considerations to domestic politics, actual or potential domestic court proceedings and diplomatic relations in the EU would significantly narrow down the scope for finding amicable settlements if there was no confidentiality. The ensuing economic and political cost would be momentous.

compliance with the Residence Directive.<sup>51</sup> As will be discussed in section 3.3, the potential and actual twinning of the procedures makes the Commission's role in managing compliance potentially much more vigorous than it appears at first sight.

### **3.2 The Types of Non-Compliance Dealt with in the Implementation Group**

The examined type of procedure in the expert group likewise has a number of traits often used to characterise governance modes, although this is far from being readily defined notion.<sup>52</sup> Thus, the procedure allows for flexibility, peer-review, peer-learning and not least informal exchange of views with the Commission and the member states. Significantly, the procedural outcomes are non-binding. This makes the procedure particularly attractive from a member state point of view; not least in relation to implementation of directives. The type of learning that can take place and the scope for member state differences will of course depend on the type of directive at hand. As mentioned, directives are binding, as to the result to be achieved, upon each member state to which it is addressed, but leave the choice of form and methods to the national authorities.<sup>53</sup> This entails that the member state shall adopt all the measures necessary to ensure that the directives are fully effective, in accordance with the objective that the directives pursue. Thus, there is a clear division of power between the EU and the member states when it comes to adoption of transposition measures with a view to complying with any given directive. As pointed out by the Court of Justice, the types of obligations which directives impose on the member states vary significantly.<sup>54</sup> Certain directives involve member state legislative measures and require that compliance with those measures is subject of review be that of a judicial or administrative nature. By contrast, other directives require member states to take the

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<sup>51</sup>Resolution of 15 November 2007 on the application of Directive 2004/38/EC, OJ C 282 E, 6.11.2008, p. 428.

<sup>52</sup>Stafano Bartolini, An Introduction in (Eds. Adrienne Héritier and Martin Rhodes) *'New Modes of Governance in Europe. Governing in the Shadow of Hierarchy'* (2011, Palgrave Studies in European union Politics).

<sup>53</sup>Article 288 TFEU.

<sup>54</sup>Case C-60/01, *Commission v France*, [2002] ECR I-5679, paras 25-28.



necessary measures to ensure that certain broadly framed objectives are attained and at the same time leave the member states some leeway in deciding the nature of the measures to be taken. Then again, other directives require the member states to obtain very precise, specific or even quantifiable results within clearly established deadlines.<sup>55</sup>

In a 2007 communication, the Commission sets out what it considers some of the reasons behind the many pending infringement files. Among the reasons the Commission points out that member States *i)* may pay insufficient attention to the correct interpretation and application of the law, *ii)* may be late with implementation work and the communication of national transposition measures, *iii)* may encounter difficulties of interpretation and choice of procedural options, and/or *iv)* may transpose a directive or interpret a regulation in a way that does not comply with the EU measure in question.<sup>56</sup> The first two situations relate to the member states' effort and willingness to implement in a timely manner. Moreover, non-compliance in those situations may also come down to internal organization, domestic political hindrances and the resources allocated to implementation.<sup>57</sup> These types of non-compliance essentially reflect procrastination, lack of commitment and poor internal organisation. The examined group of experts may of course put pressure on defaulting member states in this regard. However, the group aims at the latter types of reasons for non-compliance (i.e., *iii* and *iv*).<sup>58</sup> Concerning the latter two types of reasons for (alleged) non-compliance there is a considerable scope for processes other than merely compelling compliance through, for instance, peer-pressure. In this specific context, peer-learning does not relate necessarily to best practices, but also to *how* to implement directives correctly. Notably, the group of experts deals with the interpretation of binding law. The subsequent

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<sup>55</sup>Ibid. The Court of Justice provides examples of the different types of directives.

<sup>56</sup>'A Europe of Results', COM(2007) 502, p. 4.

<sup>57</sup>Situation *i)* and *ii)* resemble what Falkner *et al.* in their study on compliance categorize as 'a world of domestic politics', and 'a world of neglect'. The authors operate with a third category; 'a world of law observance'. G Falkner, O Treib, M Hartlapp, S Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press, 2005).

<sup>58</sup>Similarly, the "Expert Group on the Implementation of the Services Directive" aims at ensuring "*a similar level of understanding by all the Member States of the work required and the priorities for action*". Commission Staff Working Document 'Situation in the Different Sectors', Accompanying document to the Report from the Commission 27th Annual Report on Monitoring the Application of EU Law (2009), SEC/2010/1143 final, section 9.2.1.2.

section will consider what implications this has for the member states' autonomy when implementing directives.

### **3.3 Interpretation or Centralization and Norm-Assimilation**

#### **3.3.1 The Policy Space Reserved to Member States when Implementing Directives**

The Commission has developed a host of different types of nonbinding, problem-solving procedures with member state representatives from various levels of domestic government to complement its direct enforcement actions. Thus there is a more general turn towards enabling,<sup>59</sup> facilitating<sup>60</sup> and multilateral<sup>61</sup> methods used to obtain better compliance rates, which has emerged through Commission institutional practice. Significantly, this picture of a multilayered co-operative web corresponds to core organisational traits of governance. It also suggests that enforcement with EU law at this point calls for additional and more refined methods than merely compelling compliance by threat of court proceedings and pecuniary penalties. The on-line problem solving network SOLVIT for instance allows member states to work together to solve problems caused by the misapplication of internal market law without legal proceedings. Specifically, it provides a mechanism to handle concrete problems that citizens and businesses experience. The group of member state experts on implementation examined in this paper is somewhat different in it does not involve citizens, business representatives or stakeholders other than the member states. The composition rather mirrors the Council. The group of experts is not intended to tackle specific instances of non-compliance. Instead it deals with general problems of non-compliance and how member states transpose, implement and enforce EU law. Moreover, the group of experts investigates and tackles compliance issues pre-emptively. Thus, the implementation expert group engages in interpretation concerning issues that in principle

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<sup>59</sup>Package meetings, including technical guidance.

<sup>60</sup>SOLVIT programme establishing administrative cooperation to resolve specific citizen problems within the Internal Market.

<sup>61</sup>Peer review.

belong to the member states when implementing directives. This may come at a cost for the autonomy reserved to the member states according to Article 288 TFEU.

Zürn has developed a theoretical framework, which accounts for legal regimes beyond the nation-state displaying a high degree of compliance. Taking the European Union as a successful government construction, the author acknowledges the significance of traditional Principal-Agent enforcement means such as 'effective monitoring mechanisms and sanctions'.<sup>62</sup> However, an additional and central element is that of legalization understood as, on the one hand, juridification and, on the other, legal and civil internalization. The latter refers to supremacy and direct effect. These processes are seen to be in a dynamic cycle.<sup>63</sup> Clearly, supremacy and direct effect are principal traits of the aggregate enforcement picture and they do to a significant degree explain the level of compliance displayed by the EU. Juridification concerns rule requirements such as 'clarity, pertinence, stringency, adaptability and a high degree of consistency, both within themselves and in relation to other laws'<sup>64</sup> and the function of delegation of authority. Falling back on Abbott *et al.* the concept of juridification is taken to cover legal obligation, rule precision and third party delegation of implementing, supervisory and adjudicative power.<sup>65</sup> Those authors' contention is that the EU generally displays a high degree of obligation, precision and delegation. In their terminology a 'precise rule specifies clearly and unambiguously what is expected by a state ... (in terms of both the intended objective and the means to achieve it)'.<sup>66</sup> Often, but not necessarily always, such precise rules set out the conditions of application in detail.<sup>67</sup> Zürn draws a link between both precision and delegation and the

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<sup>62</sup>Michael Zürn, 'Introduction: Law and Compliance at Different Levels' in (Eds) Zürn, Michael and Christian Joerges, *Law and Governance in Postnational Europe, Compliance beyond the Nation-State* (Cambridge, Cambridge University Press, 2004), see intro.

<sup>63</sup>Ibid, pp. 24-25.

<sup>64</sup>Ibid, p. 23.

<sup>65</sup>Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalization' 2000 *IO* 54:3, pp. 401-419.

<sup>66</sup>Abbott *et al.* (2000), p. 412.

<sup>67</sup>Abbott *et al.* (2000), p. 413.

question of ambiguity.<sup>68</sup> The central argument is that a high degree of autonomy and power conferred to authorities in order to undertake interpretation and adjudication, but also fact finding and implementation, corresponds to the higher degree of juridification displayed.<sup>69</sup>

The member state commitments covered by Articles 258/60 TFEU are binding hard law and clearly impose constraints on member state behaviour thus hinting at some stringency. The corresponding enforcement procedure is ultimately characterised by a high degree of delegation in that the Court of Justice is empowered to hand down binding judgements.<sup>70</sup> Both the compulsory nature of the substantive law and the mentioned delegation to the Court of Justice points towards a command centred approach and it suggests some steering capacity. Nonetheless, the criteria of rule precision and also the type of powers delegated to the Commission and the Court of Justice need some further consideration in the specific EU context. One sort of ambiguity is characteristic of most international treaties as well as EU law, reflecting the fact that obligations have been negotiated in a diplomatic setting. Because the EU is a supranational law regime with supremacy, this ambiguity may be politically necessary in order to compensate for the member states' increasing loss of regulatory autonomy. Even if one understands the notion of compliance in a neutral fashion as 'a state of conformity between an actor's [state's] behaviour and a specified rule',<sup>71</sup> compliance can often take numerous forms. Frequently, there remains a margin for interpretation. Absolute specificity is rare. This is a matter of substantive flexibility.<sup>72</sup> Thus,

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<sup>68</sup>Michael Zürn (2004), p. 23.

<sup>69</sup>Michael Zürn (2004), p. 24.

<sup>70</sup>See generally Abbott *et al.* (2000).

<sup>71</sup>Kal Raustiale and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in (Eds) Walter Carlsnaes, Thomas Risse and Beth A. Simmons, *Handbook of International Relations* (London, SAGE, 2002), p. 539.

<sup>72</sup>See Christian Joerges, 'Compliance Research in Legal Perspectives' in (Eds) Zürn, Michael and Christian Joerges, *Law and Governance in Postnational Europe, Compliance Beyond the Nation-State* (Cambridge, Cambridge University Press, 2004) on legal indeterminacy.

even when a law is backed by a sovereign, or when law claims sovereignty, some interpretation is required.<sup>73</sup>

Another and interrelated feature of significance is the responsive nature of EU law towards domestic legal and political considerations. The most common legislative form within the EU is that of (framework) directives, with a more or less narrowly defined objective. It is, however, up to the member state legislator to incorporate it into the domestic legal order, if not already observed, and to give effect to it. This is a less intrusive way to integrate supranational law into the national legal systems and a method that also has a political dimension to it. Whereas, in the words of Majone, 'total harmonization reflects a federalist vision of the integration process' and with that a 'federal preemption',<sup>74</sup> the EU body of law is to a large degree based upon optional and minimum harmonization, the principle of mutual recognition,<sup>75</sup> a range of soft law measures and framework directives. Even in areas of exclusive EU competence member states often retain a significant margin for meeting their obligations. Whereas the degree of obligation is incontestably high within the EU, the element of precision is more subtle. That is to say, the objectives of law can have a significant degree of precision and still leave a broad margin of discretion concerning *how* to give law effect. In the specific EU context this flexibility amounts to a substantive virtue with a constitutional expression, namely the doctrine of proportionality. Moreover, it has a procedural dimension under EU enforcement. Thus the corresponding powers of the Commission as well as the Court, as central institutional players and the procedural design of the infringement procedure acknowledge the degree of flexibility as to the manner in which EU law is given effect. Thus although the EU is characterised by unprecedented autonomous powers, there are few examples of powers that can be employed without a high degree of appreciation of the member states either directly or indirectly, including in the enforcement phase. Audretsch, for instance, notes that it 'is to be regarded as a consequence

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<sup>73</sup>See Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge, Cambridge University Press, 1989) on legal realism.

<sup>74</sup>Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005), p. 70.

<sup>75</sup>Giandomenico Majone (2005), p. 71.

of its supervisory task that the Commission ... indicates to the best of its ability how an infringement can be terminated.<sup>76</sup> However, the Commission cannot give compliance directives. This is a consequence of the division of powers foreseen in the Treaty. The Court of Justice remains the single authority of legal interpretation and only the Court of Justice can appraise member state conduct.<sup>77</sup> It is noteworthy that, even in this definitive instance (before the Court of Justice), there is an underlying recognition that the manner in which EU law is applied is not an EU matter as long as the member states give effect to it. The Court of Justice hands down judgements of a declaratory nature<sup>78</sup> and it is not assumed to possess powers to specify the measures to be taken by a member states.<sup>79</sup> When the Court has established the failure to comply, the member state determines the action it will take to comply.<sup>80</sup> Things may be different with what Audretsch denotes '*arrêts éducatifs*,' namely guidance as to 'how the law could be observed'.<sup>81</sup> This is a more open-ended and pragmatic form of communication, which leaves the member state with discretion, or flexibility, in the compliance phase ensuing the judgement. Nevertheless, even when sanctions are imposed neither the Commission nor the Court of Justice can prescribe how a state should comply. The statal autonomy to define the manner in which member states will give effect to EU law thus remains intact. Thus, to summarize, a high degree of juridification and delegation to autonomous institutions occurs in respect of and in interaction with a nucleus of statal self-rule and management.

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<sup>76</sup>See H.A.H. Audretsch, *Supervision in the European Community Law* (Elsevier Science Publishers B.V., 1986), p. 53. Another question is whether there is a legal obligation to do so as, e.g., Advocate General Lagrange argues in his opinion in C-7/61 *Commission v Italy* [1961] ECR 317.

<sup>77</sup>Cases C-393/98 *Ministério Público and António Gomes Valente v Fazenda Pública* [2001] ECR I-1327, C-142 and 143/80 *Amministrazione delle Finanze dello Stato v Essevi SpA and Carlo Salengo* [1980] ECR p. 1413

<sup>78</sup>Opinion of Advocate General Alber in C-260/98 *Commission v Greece* [2000] I-6537, para 76: 'proceedings for failure to fulfil Treaty obligations seek a declaration of principle on the content of the rules of Community law.'

<sup>79</sup>H.A.H. Audretsch (1986), p. 115. The author, however, maps out legal arguments modifying this strict doctrinal assumption.

<sup>80</sup>Opinion of Mr. Advocate General Mischo in C-78/00 *Commission v Italy* [2001] ECR I-8195, para 65.

<sup>81</sup>H.A.H. Audretsch (1986), p. 116. The author falls back on a broad interpretation of ex Article 220 EC.

### 3.3.2 The Commission's Role in Expert Groups and the Potential for (Re-)Negotiating Directives

This section puts forward three hypotheses that are theoretically probable, however require further empirical substantiation. The first hypothesis is that the Commission can exert substantial power through expert groups because of its influence on the subject matter and access to set priorities. Expert group have no power of authoritative interpretation *per se*. The Commission also has no powers of interpretation, as discussed in the above section.<sup>82</sup> However, the Commission is an autonomous semi-political institution and one legitimate way to pursue its policy objectives is exactly through affecting the interpretation of EU law. What the Commission can do generally and in the expert group is to insist on how directives should rightfully be interpreted and implemented. In the expert groups the Commission benefits from the fact that the member states actually want guidance, and from the fact that it appears to have a less hostile role than it does under the general infringement procedure. Given that the various member states are likely to have a host of pooled and dispersed interests on different components of the Commission text, the Commission is less likely to be seen as an absolute promoter of certain member state interests. The Commission has its strongest negotiation power with reference to the substantive issues raised. A key function of the Commission in the procedure is, therefore, to negotiate hard on the components contained in its discussion papers rather than on the stakeholders.<sup>83</sup> The Commission can help define and refine the shared norms of the parties, keep them present during negotiations and by invoking them restrain the scope for inappropriate claims. However, the procedure may well blur the fact that it is perfectly legitimate for a member state to insist on a certain interpretation up until the point the Court of Justice rules against it. Specifically, the expert group engages in processes of communicating back and forth for the purpose of reaching a shared understanding on what constitutes correct interpretation of a given provision. This discourse is contained in an on-going relationship (the working group), which the stakeholders by and large have an interest in maintaining. Thus, there is a

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<sup>82</sup>See e.g. case T-258/06, *Germany v Commission* [2010] ECR I-nyr.

<sup>83</sup>Compare Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement without Giving In* (London, Random House Business Books, 1981).

dual interest in the substance as well as the relationship.<sup>84</sup> This in turn makes hard (bargaining) positions less legitimate.

The second hypothesis is that although the type of dialogue taking place in expert groups in principle should be about objective interpretation it also entails negotiation. As Joerges succinctly asks: "How can you know it is compliance when you see it?"<sup>85</sup> One implication is that the policy space reserved for the member states (see section 3.3.1) effectively becomes void. Another implication is that the Council members may effectively engage in renegotiation of substantive elements of directives. The ensuing norm development is however not governed by the normal legislative procedures. As a consequence, the European Parliament cannot exert its treaty-based influence as co-legislator. Another consequence is that substantive policy developments are outside the control of the Court of Justice because the outcomes are non-binding.<sup>86</sup> Interestingly, the European Parliament seems to suggest that the Commission does know what constitutes compliance in some of its commentaries and recommendations to the Commission (see section 2.2) concerning enforcement of the Residence Directive. As mentioned, the European Parliament even proposed that the Commission should twin its interpretive communications with infringement proceeding to bolster the impact of non-binding interpretive communications. However, although the European Parliament does not seem to fret the ensuing risk of norm development outside its own influence and without judicial review in the specific context of compliance with the Residence Directive, it has raised the above mentioned issues and specifically the Commission's resulting powers in a case between Germany and the Commission concerning public procurement.<sup>87</sup>

The third hypothesis is that the processes in the group of experts contain a high degree of repetition, clarification and gradual alignment, which in turn facilitates internalisation. Thus

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<sup>84</sup> Compare Roger Fisher and William Ury (1981), p. 20.

<sup>85</sup> Christian Joerges, 'Compliance Research in Legal Perspectives' in (Eds) Michael Zürn and Christian Joerges, *Law and Governance in Postnational Europe, Compliance Beyond the Nation-State* (Cambridge University Press, 2004), p. 242.

<sup>86</sup> To this extent, compare case T-258/06, Germany v Commission [2010] ECR I-nyr.

<sup>87</sup> Case T-258/06, Germany v Commission [2010] ECR I-nyr.



although the policy outcomes are non-binding, they may nonetheless have a significant impact on how member states interpret and implement EU law. The meetings form dialectical, creative processes of inventing and considering options for reconciling the parties' interpretations and interests rather than a 'narrowing the gap between positions'.<sup>88</sup> There is ample room for discussing individual member states' perceptions and interests in the process. In terms of negotiation, this has several strengths and suggests why compromises are reached and may to a high degree be internalised. First, exchanging information and in particular understanding what the other parties say in a supranational setting across cultural, linguistic, political traditions is a delicate exercise. Second, this cumbersome and repetitive procedure enables each member state to voice all its interests, including those which may appear to be of minor significance to other member states, and, importantly, enables them to be understood. Third, the procedure implies a high degree of participation and the governments thereby get a stake in the finally agreed interpretation.<sup>89</sup> The extent to which the non-binding policy outcomes are internalised needs empirical substantiation.

### **3.4 The Member States Want Directives *and* Unity of Application**

As a final point it may be considered whether the turn towards management has come about because the member states insist on directives as their preferred regulatory tool and at the same time require unity of application. In 2001, a Commission working group advocated that regulations should be preferred to directives.<sup>90</sup> The principal difference between directives and regulations lies in their scope of application. Whereas regulations are binding in their entirety and directly applicable in all member states, directives leave it to the national authorities to choose the form and methods to achieve a Community result. The Commission's outlook was somewhat in opposition to the EU member states' standpoint

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<sup>88</sup> Roger Fisher and William Ury (1981), p. 61.

<sup>89</sup> Compare Roger Fisher and William Ury (1981).

<sup>90</sup> Handling the Process of Producing and Implementing Community Rules. Report of the Working Group 'Better regulation' (Group 2c) May 2001 (White Paper on European Governance, Work Area no 2), p. 6.

expressed in the protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam. According to that protocol: '*directives should be preferred to regulations and framework directives to detailed measures*' and directives should '*leave as much scope for national decision as possible*'.<sup>91</sup> The Commission's contention was however not motivated by considerations of proportionality, but of enforceability. High levels of compliance are, the working group contended, not merely a matter of enforcement design and powers, but should be seen as closely linked with the type of legislative instruments chosen. It further argued, in this regard, that strict adherence to the proportionality principle works against the interest of the business establishment's interest in that it entails 'a less uniform and more complex legal framework.'<sup>92</sup> In arguing this way, the Commission established a link between its general, i.e., cross-sectoral, argument that regulations often work in the interest of compliance and the interests of civil society. It is clear that succinct and immediately binding obligations are relatively speaking more easily monitored. However, the choice between directives and regulations cannot be regarded as merely a technical matter of enforceability. It is also a policy choice. The characteristics of directives as a legislative tool which make them complicated to supervise might at the same time be their virtue and their very reason for existing. Then again, when discussing pros and cons of directives and regulations, the rule of law problems raised in this paper should be factored in. Arguably, directives are increasingly managed by expert groups in a manner, which render them somewhat comparable to regulations.

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<sup>91</sup> Treaty of Amsterdam, Protocol annexed to the Treaty establishing the European Community, paragraphs 6 and 7. This particular element is left out of Protocol no. 2 annexed to the Lisbon Treaty (OJ C 2010, 83/2006). For a discussion thereof see Bruno de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty', in Jacques Ziller *et al.*, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008, Springer), pp. 96. It is beyond the scope of this section to analyze the amendments in relation to the issues raised in this paper.

<sup>92</sup> Handling the Process of Producing and Implementing Community Rules. Report of the Working Group 'Better regulation' (Group 2c) May 2001 (White Paper on European Governance, Work Area no 2), p. 11.

#### **4. CONCLUSION**

This paper explored the European Commission's practice of establishing groups of experts from the EU member states with a view to identifying and clarifying issues of interpretation of directives. It was maintained that this turn towards management of compliance with directives has a number of advantages compared to traditional enforcement according to the general EU infringement procedure stipulated in Article 258 TFEU. For instance, the Commission can tackle non-compliance in a broadly inclusive and pre-emptive manner.

The method however raises a number of policy issues. Specifically, management of compliance implies both interpretation and behavioural assessment, i.e., two central powers of the Court of Justice according to the general EU infringement procedure. It was argued that management of compliance with directives may bring about norm harmonisation, norm-setting and internalisation. Consequently, the policy outcomes are likely to encroach upon the policy space reserved for member states when implementing directives. Whether this indeed happens needs further empirical substantiation. Moreover, because the process outcomes are non-binding they are not supervised by the Court of Justice. Thus, a rule of law problem occurs to the potential detriment of the member states and the "EU legislator" and in particular the European Parliament.

The Commission has pointed out that regulations in comparison with directives have advantages in terms of enforcement and that the application of regulations is more transparent, which in turn benefits business stakeholders. Yet, member states by and large prefer directives to regulations in accordance with the principle of proportionality. By managing implementation with directives, however, the Commission does effectively manage to contain the member states' regulatory autonomy to some degree when implementing directives. Thus, as a final point, this paper noted that there appears to a discrepancy between the member states insistence on directives as their preferred regulatory tool and the call for unity of application and the demonstrated practice of managing compliance with directives. Whether there is indeed a discrepancy depends on the degree to which compliance with directives is managed.