

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Administrative procedures
linked with Article
258 TFEU proceedings:
an academic perspective**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

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Article 258 TFEU proceedings:
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BRIEFING NOTE

Abstract

This briefing note considers the administrative procedures of Article 258 TFEU and the relationship between the complainant and the European Commission. It sets out the legal framework for Article 258 TFEU, analysing it through the lens of good governance and legitimacy in the EU. It considers the potential for development of the administrative process in terms of the new legal landscape after Lisbon, and the challenges encountered by the European Parliament in holding the Commission accountable in relation to its 'guardian' function.

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LIST OF ABBREVIATIONS

AGRI	Agriculture and Rural Development Committee
ALDE	Group of the Alliance of Liberals and Democrats for Europe
BAS	Brake-assist systems
CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CMO	Common market organisation
CoR	Committee of the Regions
CULT	Culture and Education Committee
ECOSOC	Economic and Social Committee
ECTS	European Credit Transfer System
EPP-ED	Group of the European People's Party and European Democrats
FAO	Food and Agriculture Organisation of the United Nations
FPS	Frontal protection systems
GDP	Gross Domestic Product
GM	Genetically-modified
Greens/EFA	Greens/European Free Alliance
GUE/NGL	Confederal Group of the European United Left - Nordic Green Left
IFI	International Fund for Ireland
IND/DEM	Independence/Democracy Group

EXECUTIVE SUMMARY

Background

This report considers the administrative procedures linked with Article 258 TFEU ('the infringement procedure') and the relationship between the Commission and complainant in respect of the centralised enforcement of EU obligations. According to Article 17 TEU, the Commission is charged with the duty of ensuring the application of EU law, or acting as 'guardian of the Treaties'.¹ Article 258 TFEU has two distinct phases: the administrative phase and the judicial phase. This report will provide an overview of the legal framework governing the administrative phase. It will also assess the administrative 'guarantees' provided by the Commission's Communication on Relations with the Complainant,² and analyse the potential areas for development in the future.

This briefing note is written from the perspective of examining the EU institutions' claims to legitimate governance.³ It therefore concentrates on aspects of the infringement procedure that might lead to better governance, in particular, not just the effectiveness of the application of EU law, but also embracing the Commission's own principles of good governance as detailed in its White Paper.⁴ Accordingly, the report focuses on issues such as accountability, participation, coherence and transparency as well as efficiency and effectiveness. The infringement process is one of the few areas of interaction between the citizen and EU institutions, and as such, that process of interaction should be one which demonstrates that the EU institutions take seriously the values of good administration.

Aim

- To provide an overview of the legal principles involved in the administrative phase of the infringement procedure;
- To identify areas of potential development, including Treaty articles and the Charter of Fundamental Rights;
- To assess the implications of the Commission's new working method
- To identify future challenges for the Parliament in relation to Commission accountability.

¹ C-431/92 Commission v Germany [1995] ECR I-2189.

² Commission Communication on 'Relations with the Complainant in Respect of Infringements of Community Law' COM (2002) 141.

³ I have written on this topic in great detail in the following publications, M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, London, 2009), M Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33 *European Law Review* 777, M Smith, 'Inter-institutional dialogue and the establishment of enforcement norms: a decade of financial penalties under Article 260 TFEU' (2010) 16 *European Public Law* 574, M Smith, 'Developing administrative principles in the EU: a foundational model of legitimacy?' (2011) *European Law Journal*, (forthcoming), and M Smith, 'Processes and forms of accountability: the European Parliament, the Commission and enforcement of EU obligations' (2011) (forthcoming).

⁴ European Governance: A White Paper COM (2001) 428.

GENERAL INFORMATION

KEY FINDINGS

- Two administrative processes for dealing with potential infringements. The original infringement procedure where contacts are made between the DG and Member State via correspondence and package meetings and the Commission's new working method where complaints are logged and all communication is tracked via an IT system.
- The old and new systems have different 'time-limits' governing interaction between the Member State, Commission and complainant. Not all Member States are involved in the new working method, and not all types of infringement are dealt with using the new working method. There is much scope for confusion and differential treatment between complainants and Member State depending on which process is used.

In the administrative phase the Commission is responsible for uncovering potential infractions, investigating them, and where appropriate, following the procedure laid down in the Treaty, refer infringing Member States to the Court of Justice. The Commission employs various techniques in order to discover potential infringements: it conducts own initiative investigations and receives complaints and petitions forwarded from the European Parliament. The Commission then contacts the Member State in order to determine the relevant facts and to try and resolve any infringement as fast as possible and thereby obviating the need for any court proceedings. The Commission must proceed through the steps mandated by the Treaty, that is, the requirements of a formal letter and a reasoned opinion before referring the case to the Court. These are considered essential procedural guarantees in order to ensure that Member States' rights of defence are respected.⁵

There are now two administrative processes for resolving infringements. The first is the traditional infringement procedure where contacts and meetings with Member State occur in the traditional way (between the DG and the relevant contact in the Member State) including the use of package meetings. Non-notification of transposal measures will continue to be detected via the NIF database which tracks notifications by Member States.

The new mechanism for handling the administrative stage of the infringement procedure is the use of a new IT system where all contact with the complainant, DG and Member State are logged and tracked on-line, including a designated contact point in each participating Member State. The Commission appears to favour the use of the new IT system in order to manage most infringements, although it is not clear what criteria the Commission will use to judge whether infringement investigations will continue using the new or old method.

⁵ For a general description of the legal process see D Chalmers *et al*, 'European Union Law' (CUP, Second Edition, 2010), ch 8.

The new process⁶ for managing infringements will operate in the following way. Complainants will contact the Commission who will record eligible complaints and acknowledge receipt of the complaint.⁷ Where appropriate the Commission will then log the complaint and will dispatch a notice of the complaint to the Member State. From this point onward a 10 week deadline⁸ for a response to the complaint begins to run – the Member State can either reject or accept the complaint.⁹ If the Member State accepts the complaint the Member State is expected to remedy the issue directly with the complainant as appropriate without further involvement of the Commission. The Commission will be notified of the response by the Member State and will assess whether the proposed solution is in conformity with EU law.¹⁰ The Commission must then write to the complainant indicating whether it is closing the file or requesting further information or additional action from the Member State. At this point the complainant has four weeks to respond to the Commission with new information after which the Commission can close the file, resubmit it to the Member State or begin the old infringement process.

The Commission has slightly amended this process from its original proposal, and has stated that it will communicate the Member State's responses, and its own evaluation, to the individual directly.¹¹ The original intention was for the Member State and citizen to communicate with each other, thereby cutting the link between the Commission and the citizen. This is a positive development. If the Commission is ultimately not satisfied with the Member State's response using this new method, the Commission may decide to initiate infringement proceedings.

If the Commission considers it necessary to move into the formal infringement process as laid down in Article 258 TFEU, it may issue of a formal notice to the Member State. If the alleged infringement is subsequently not remedied to the Commission's satisfaction, it may then issue a reasoned opinion. Both the formal letter and reasoned opinion are interpreted to be acts of the Commission and accordingly the College must take these decisions,¹² and the Commission now has monthly meetings in order to facilitate more timely decision taking.

⁶ Originally intended for processing complaints only, but has now been extended (but not to non-notification cases which make up the majority of the Commission's infringement work). For a detailed critique of this process see M Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33 *European Law Review* 777). See also the note written for Rapporteur of the JURI Committee attached as Annex to this document.

⁷ The Commission used to have only 15 days to accomplish this under the previous regime. Now it appears that there is to be no time limit.

⁸ The Commission can shorten the deadline or grant an extension depending on the circumstances.

⁹ If the Member State rejects the complaint, providing due justification to the Commission, the case will be closed.

¹⁰ Again according to putative deadline of 10 weeks.

¹¹ Report from Commission 'EU Pilot Evaluation Report' COM (2010) 70/provisional p 4, and Commission Staff working document.

¹² C-191/95 *Commission v Germany* [1998] ECR I-5449.

1. THE LEGAL FRAMEWORK OF THE ADMINISTRATIVE PHASE

KEY FINDINGS

- There is nothing in the Court of Justice's case law, or the Treaty articles, that prevents the Commission from changing its internal working methods, including the adoption of legally binding time-limits for action.
- Complaints currently have no legal rights in relation to the administration of the infringement process; they cannot compel documentation, require the Commission to provide reasoned decisions or expect the Commission to act in accordance with the standards of diligent complaint handling.

1.1. Time Limits

The Court of Justice has not (so far) provided much guidance as to how the Commission should carry out its duty as guardian of the Treaties. It has consistently held that it is not for the Court to decide what objectives are pursued in an infringement action.¹³ The Court has been more helpful with regards to the protection of Member States' rights of defence where the Court has merely stated that the Commission must not act unreasonably, i.e. the Commission cannot bring proceedings too quickly without justification, or take too long as either type of conduct may interfere with the Member States' ability to present a proper legal defence.¹⁴ However, what conduct constitutes too much speed or not enough has never been set down in concrete terms by the Court, and timetabling action under Article 258 remains at the complete discretion of the Commission.¹⁵ Whilst there are sound executive reasons to justify the Commission's discretion as to *whether* to bring an action before the Court, it is harder to justify no regulation of basic administrative processes, including the decision *when* to bring an action.

The Parliament has expressed concern regarding the lengthy period of time taken by the Commission when investigating potential infringements.¹⁶ One reason put forward by the Commission for long delays has been the lack of cooperation by Member States in responding to requests for information or correspondence from the Commission throughout its investigation. One of the important aspects of the Commission's new working method is the establishment of central contact points in the Member States to facilitate a swifter administrative process. The Commission does also have the additional recourse to infringement proceedings in respect of the Member State failing to cooperate by way of Article 4 (3) TEU which contains the duty of loyal cooperation. It is settled case-law that the

¹³ Case 416/85 Commission v UK [1988] ECR 3127.

¹⁴ C-333/99 Commission v France [2001] ECR I-1025, Commission v Netherlands [2007] ECR I-3267.

¹⁵ Member States have raised this defence in cases where the administrative phase has been conducted in a matter of weeks, or prolonged over a number of years without much success. The Court has considered as reasonable a time-limit of two weeks to respond to a formal letter or reasoned opinion where the Commission has justified this as urgent, see for example Case C-328/96 Commission v Austria [1999] ECR I-7479.

¹⁶ For example see Report of the Legal Affairs and Internal Market Committee 'Report on the 18th and 19th annual report on monitoring the application of Community law' (2000 and 2001) A5-0147/2003, European Parliament resolution on the Commission's 21st and 22nd annual reports on monitoring the application of Community law (2003 and 2004) P6_TA (2006)0202, European Parliament Resolution of 24th April 2009 on the 25th annual report from the Commission on monitoring the application of Community law (2007) P6_TA(2009) 0335.

Commission can bring infringements proceedings for breach of this obligation in the course of an investigation in potential infractions.¹⁷

In summary, there is nothing in the Court's case law from preventing the Commission in adopting a set of binding time-limits for action in relation to Article 258 TFEU. Indeed, given the new IT system which has been adopted on the basis of a more efficient and effective way of dealing with infringements, it should not be too difficult to adopt a legally binding set of time-limits for action.

1.2. Complainants' rights

As the case law currently stands, complainants have no legal rights whatsoever in relation to the administrative phase of Article 258 TFEU, despite representing a huge resource for the Commission in uncovering potential infractions.¹⁸ There are three avenues of interest for complainants:

- The potential for complainants to compel the Commission to bring proceedings under Article 258 TFEU;
- A legally protected role for the complainant in the administrative phase;
- Transparency and access to documentation.

At present the legal position is as follows. It is settled case-law that, in the current circumstances, complainants cannot force the Commission to bring proceedings under Article 258. Decisions to launch or not to launch infringement proceedings are not decisions which produce legal effects according to the Court's jurisprudence, and therefore they cannot be the subject of an action for annulment.¹⁹ Furthermore, complainants have no legally protected role in the operation of the administrative phase. Despite attempts and missed opportunities in the case law, there is so far no obligation on the Commission to conduct the administrative phase of the infringement process according to the principles of good administration.²⁰ The obligation to conduct its interactions with complainants according to the standard of diligent complaint handling, accepted by the Commission and the Court as appropriate in other enforcement provisions, does not apply to Article 258 TFEU.²¹

There is no legally binding obligation to register complaints, no duty to provide reasons for decisions (to initiate or not to initiate infringement proceedings) and no legally binding duty to keep the complainant informed of the progress of their complaint. There is no duty to act impartially, fairly and objectively that can be enforced before a court of law.

In relation to access to documentation, the Court has ruled that investigations carried out by the Commission in relation to Article 258 TFEU are protected from disclosure in the

¹⁷ Case C-137/91 *Commission v Greece* [1992] ECR I-4023, Case C-456/03 *Commission v Italy* [2005] ECR I-5335.

¹⁸ In 2008 for example complainants represented around 47% of the source of potential infringements, source Twenty-Sixth Annual Report on Monitoring the Application of Community Law (2008) COM (2009) 675 final.

¹⁹ Case 48/65 *Lütticke* [1966] ECR 27, C-371-89 *Emrich* [1990] ECR I-1556. See also Case C-87/89 *Sonito v Commission* [1990] ECR I-1981.

²⁰ Case C-141/02P *Commission v T-Mobile Austria GmbH, formerly max-mobil Telekommunikation Service GmbH* [2005] ECR I-1283.

²¹ *Ibid.*

Regulation on Access to Documents.²² Information held by the Commission in relation to an investigation can be withheld unless the applicant can prove there is an 'overriding public interest in disclosure'. Even where there is a significant period of time between the conclusion of the investigation and the request for information, the exception has been held to apply. To my knowledge there has never been a successful application to release documents in relation to an infringement investigation.²³ Although this is not a 'blanket' exception in the Regulation, the requirement to prove an overriding public interest in disclosure is especially hard to prove given the complainant does not really know what documentation the Commission holds.²⁴

²² Relating to documents held by the Council, Commission and European Parliament. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145 31.5.2001.

²³ Case T-105/95 *WWF UK v Commission* [1997] ECR II-313. See also Case T-309/97 *Bavarian Lager Company v Commission* [1999] ECR II-3217, Case T-191/99 *Petrie and Others v Commission* [2001] ECR-II 3677.

²⁴ The Commission has proposed extensive amendments to this legislation, see Commission Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents COM (2008) 0229 final 30.4.2008. None of the amendments change the position in relation to information held in respect of an infringement investigation.

2. THE SOFT LAW CODE – PROCEDURAL ‘GUARANTEES’

KEY FINDINGS

- The soft law ‘guarantees’ are not rights that are capable (currently) of being enforced in a court. They fall far short of the Ombudsman’s Code of Good Administrative Behaviour.
- Any changes made to these ‘guarantees’ as a result of the Commission’s new working method may undermine the promises made in the Communication and any changes should be made in consultation with the Ombudsman.

2.1. Commission Communication on Relations with Complainant

Despite the fact that a recent article may suggest that that the guarantees contained in the Commission’s Communication²⁵ are legally binding (or legislative in character),²⁶ they have no legally binding force at all. They do not (at present) contain rights that can be enforced before a court of law, and although complainants can complain to the Ombudsman on the basis of maladministration if these guarantees are not respected, his only sanction is to report to Parliament. It appears that these guarantees only apply to investigations that are conducted under the old administrative process, since the guarantees in the Communication seem to conflict with the timetable and administrative steps set out in the Commission’s new working method. Since the Commission prefers to deal with complainants primarily using the new working method, this has significant implications for the usefulness of this Communication.

In essence the commitments given by the Commission in the Communication can be summed up as follows. The Commission undertakes to record all genuine complaints in a central registry held by the Secretariat General of the Commission, and to formally acknowledge receipt of all correspondence within fifteen days. Within one month of this first formal acknowledgment, the Commission undertakes to send a further acknowledgment with a formal case number. If the Commission decides not to register the complaint, it must notify the complainant of this decision by writing, setting out the reasons for this decision, and informing the complainant of any alternative avenues of redress.

The Commission undertakes to contact complainants and inform them in writing after each decision has been taken in response to their complaint. This would be carried out by the relevant DG investigating the complaint. The Commission goes on to state that ‘at any point during the procedure complainants may ask to explain or clarify to the Commission officials (...) the grounds for their complaint.’²⁷ The choice of wording is instructive – the complainant may ask to explain, but is not entitled to a hearing to be given an explanation. The Communication contains a clause on time-limits. The Commission undertakes to keep all investigations to one year, after which time the Commission must decide to close a case

²⁵ Commission Communication on ‘Relations with the Complainant in Respect of Infringements of Community Law’ COM (2002) 141.

²⁶ L Prete and B Smulders, ‘The Coming of Age of Infringement Proceedings’ (2010) 47 *Common Market Law Review* 9 p 13.

²⁷ Communication on Relations with Complainants, n 25.

or begin the infringement process by issuing a formal notice (unless there are exceptional circumstances). It is of course in the Commission's own interest to keep to this (generous) time-limit in order to ensure the efficient and effective enforcement of EU law.

The Communication also addresses the issue of the outcome of infringement investigations. The Communication is carefully worded to leave the complainant (and the Ombudsman) in no uncertainty as to the Commission's view:

'After investigating a complaint, Commission officials may ask the College of Commissioners either to issue a formal notice (...) or to close the case definitively. The Commission will decide on the matter at its discretion. This discretion shall cover not only the desirability of opening or terminating an infringement procedure but also the choice of complaint. Complainants will be informed in writing of the decision taken (...) and any subsequent decisions taken on the matter.'²⁸

This makes clear that even where an infringement has been uncovered by the Commission officials, they are under no obligation to proceed with an investigation or to inform the College. So the discretion enjoyed under the infringement procedure does not only extend to the political decision-making of the College, but also to individual officials with the DG. This is further clarified in the section entitled 'simplified procedure for closing cases'. The Communication states that where there has not been a formal letter dispatched (i.e. the case has never been referred to the College); the case may be closed by a procedure that does not include any notification to the College at all.

This procedure may be applied in cases where complaints are considered:

'groundless or irrelevant; or that there is no evidence, or insufficient evidence, to substantiate the complaint. The procedure may also be applied where the complainant shows no further interest in prosecution of the complaint.'²⁹

The Commission has made it quite clear, repeatedly and in the beginning of this very Communication, that Article 258 TFEU does not represent an avenue that is to be utilised for citizens to defend their legal interests, and secondly, that complainants do not have to demonstrate an interest in order to complain. So citizens do not have to have an interest (legal or otherwise) to complain, but they must have an interest for the Commission to continue to investigate the complaint. The Commission's duty to investigate, however, relates to its duty as guardian of the Treaties and upholding the rule of law, and not because a citizen demonstrates continuing interest in the suspected infringement: regardless of whether the citizen cares, the Commission ought to.

The Communication will notify the complainant when it is proposing to close a case in order to give the complainant the opportunity to respond to this decision. The letter will set out the grounds on which the Commission is basing its decision to close the case, and will invite the complainant to submit comments within a period of four weeks. Where the complainant does not respond, or where the complainant cannot be contacted for reasons for which he/she is responsible, or where the complainant's observations do not persuade the Commission to change its decision, the case will be closed. The Commission has up to a

²⁸ Communication *ibid* clause 9.

²⁹ Communication *ibid* clause 11.

year to marshal its arguments in favour of closure, yet the complainant has a mere four weeks to refute such arguments.³⁰

The guarantees within this Communication fall far short of the Ombudsman's Code of Good Administrative Behaviour,³¹ nor are they equivalent to the right to good administration as contained within the Charter of Fundamental Rights (see below). In the interests of good governance these guarantees should be extended, although the new working method of the Commission may put even these few promises at risk of being overturned.

The Commission has acknowledged that the changes to the management of the infringement process will require an 'adaptation' of those hard fought for procedural guarantees contained in the 2002 Communication which were brought about after the sustained efforts of the first Ombudsman.³² This is not elaborated upon in the 2007 Communication and the working group may wish to seek explicit clarification from the Commission on what the consequences of the new working method will be on these procedural guarantees. It would be good administrative practice to ensure that any changes to the Communication are agreed in consultation with the Ombudsman.

It seems likely that the 15 day deadline the Commission previously had to register and acknowledge a complaint will be abandoned.³³ Issuing decisions might still take place once the process is completed, but potentially the complainant will no longer have the guarantee to be heard by the Commission throughout the investigative stage, or to be able to bring fresh evidence at any point during the investigation. Similarly the complainant may not be able to expect regular updates by the Commission at each stage that a decision has been taken or expect that a file will be closed after one year or progressed to the next stage. The Member States are under no obligations to abide by these administrative guarantees, the only time-limit being imposed is a 10 week deadline for Member States to respond to the Commission's initial inquiry.

³⁰ At the end of the Communication, the Commission reiterates that it handles all requests for information in accordance with the Regulation on Access to Documents 1049/2001, but as I have already noted, this does not enable access to documents connected with infringement investigations.

³¹ Code of Good Administrative Behaviour, adopted by Resolution of the European Parliament 6 September 2001, can be found at <http://www.ombudsman.europa.eu/home/en/default.htm>.

³² Commission Communication 'A Europe of Results – Applying Community Law' COM (2007) 502 final 5.9.2007. p 7.

³³ Parliament and the Ombudsman have expressed repeated concern regarding the registration of complaints.

3. LEGAL DEVELOPMENT OF ADMINISTRATIVE PHASE

KEY FINDINGS

- Scope for adoption of a horizontal regulation of administrative procedures under Article 298 TFEU, or a bespoke regulation on the administrative phase of the infringement process.
- Potential for development of administrative protections through litigation of Article 41, the right to good administration, now legally binding in the Charter of Fundamental Rights.

3.1. Lisbon Amendments

The main amendment to the treaties that may be of interest to this working group is a new article, Article 298 TFEU, which is located within the section of the Treaty entitled 'Legal Acts of the Union'. This Article states that 'In carrying out their missions, the institutions, bodies, offices and agencies of Union shall have the support of an open, efficient, and independent European administration'. This article provides a legal basis for the adoption of regulations to this end.³⁴ Prior to the proclamation of the Charter of Fundamental Rights, the previous Ombudsman campaigned extensively for his Code of Good Administrative Behaviour to be adopted as a horizontal regulation, and this new addition to the Treaties could provide the basis of such an instrument so long as it is limited to the bodies mentioned above. Such horizontal regulation must explicitly bind the Commission in respect of the administrative phase of Article 258 TFEU, or the Court of Justice is likely to read in an exception. Adoption of binding rights in a horizontal instrument need not limit the Commission's discretion, but could be of a merely procedural nature (time-limits, duty to give reasons etc). Nonetheless, it would help create the administrative legitimacy that is currently lacking relation to EU bureaucratic interaction with citizens.³⁵

In the alternative, the Ombudsman's Communication on complainants rights, or a bespoke instrument regulating the administrative phase of the infringement procedure, could also be adopted under this provision. Such an instrument does not need to impinge upon the Commission's unlimited discretion to commence (or not) infringement proceedings, nor need it give complainants standing to challenge such discretion. Discretionary choices need to be made by the Commission in relation to the pursuit of infringements, for sound policy reasons and administrative efficiency. It could be a fairly limited instrument that sets out basic procedural steps to be undertaken, together with time-limits (including necessary exceptions and a reasonableness doctrine), and importantly the necessity to provide reasoned decisions. It could include a duty to undertake diligent complaint handling as is required in other enforcement provisions in the Treaties. None of these suggestions conflict with the Court's jurisprudence, which is based on an absence of legally binding standards, to the contrary.

³⁴ But not harmonisation of national administrative procedures, merely the Commission's support for national administration and their implementation of EU law.

³⁵ For more on this topic, see M Smith, 'Developing administrative principles in the EU: a foundational model of legitimacy?' (2011) *European Law Journal*, (forthcoming).

3.2. The Charter of Fundamental Rights

The main innovation in the Charter in respect of administrative rights is the inclusion of the right to good administration contained in Article 41.³⁶ The right to good administration is, in broad terms, explained as the right of an individual to have his/her affairs handled impartially, fairly, and within a reasonable time by the institutions. The right to good administration itself is composed of three distinct rights. The first part ensures that individuals have the right to be heard before 'any individual measure which would affect him or her adversely is taken'. This is a particularly important aspect since potentially it has a much wider remit than the current approach to standing under Article 263 TFEU and thus could expand an individual's access to court. It is also possible that 'individual measure' is not restricted to measures having legal effects and could easily be interpreted to cover administrative decisions without legal effects. This would widen the type of decisions that would require a fair hearing of some description. The second part is the right of access to 'his or her own file' and the third part states that there is an obligation on the administration to give reasons for its decisions.³⁷

Depending on the interpretation given to this provision by the Court of Justice, there is scope for some development of the administrative phase of Article 258 TFEU, but as yet there have been no cases decided by the Court post incorporation of the Charter by Article 6 TEU.

³⁶ Charter of Fundamental Rights of the European Union OJ C 303/1 14.12.2007, now legally binding as a consequence of Article 6 TEU which states that , 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union...which shall have the same legal value as the Treaties'.

³⁷ The right to good administration in the Charter further includes the right to reparation. This is a reflection of the provision on non-contractual liability, formally Article 288 EC and now Article 340 TFEU. It also includes the right to correspondence with the institutions in the individuals (community) language. This right is contained in Article 20 (2) (d) and Article 25 TFEU.

4. CHALLENGES FOR THE EUROPEAN PARLIAMENT

KEY FINDINGS

- Assessing the Commission's discharge of its guardian function, and assessing Member States' implementation of EU obligations, should be recognised as separate functions for Parliament's Committees. Holding the Commission accountable should continue to be the responsibility of the Legal Affairs and Petitions Committee, but Member State implementation should be dealt with by subject specialist committees.
- Accessing crucial information on the administrative phase of Article 258 TFEU continue to be a problem for Parliament and outside actors. This information asymmetry hinders the relevant Committee's ability to establish genuine dialogue and accountability in relation to the Commission's guardian function. Without access to crucial information, genuine accountability cannot be established.
- The Commission's new working method should be able to provide Parliament with much more detailed and accurate data regarding the administrative practices across DGs.

4.1. Differing functions under review

There are several challenges for the European Parliament to engage with in relation to the infringement process. There are two distinct elements of the infringement procedure that are of interest to Parliament: firstly, the proper enforcement of EU obligations by Member States and secondly, the proper supervision of the Commission in carrying out its role as guardian of the Treaties. These two distinct roles need to be appreciated as such in order for the Parliament to be as effective as it can in relation to improving conditions for European citizens. In terms of Parliament's attempts to hold the Commission accountable in the exercise of this executive function, these two elements have in the past been looked at interchangeably. This is not necessarily the most effective method of achieving accountability.³⁸

4.2. Reporting by Parliament

It is vital the Committee on Legal Affairs, together with the Petitions Committee, continue to be responsible for supervision of the Commission in carrying out its guardian function. This includes, inter alia, the relationship between the complainant and the Commission and the timely and proper execution of the infringement procedure itself. Other Committees in Parliament however should take a more proactive role in looking at the enforcement of pieces of legislation in their particular areas of expertise: for example, citizens rights under the LIBE Committee, Fisheries by PECH etc. Although some Committees do take an active interest in enforcement (e.g. ENVI on environmental enforcement) this is not as standardised or intense as it might be. These Committees should be responsible on reporting back on the subject sections of the Commission's Annual Monitoring Reports, and

³⁸ For more detailed analysis of Parliament's role, see M Smith, 'Processes and forms of accountability: the European Parliament, the Commission and enforcement of EU obligations' (2011) (forthcoming).

the Legal Affairs and Petitions Committee could then be more focused on the guardian function. This would help to ameliorate the information asymmetry between the Commission and Parliament in relation to enforcement, which is the main obstacle to establishing genuine accountability and an effective discourse between Parliament and the Commission.

4.3. Transparency

Following on from the above point, transparency in the operation of the infringement procedure continues to be an issue. It should be noted the Commission has attempted to become more transparent in the form of three Communications on the topic since 2002, and in producing its Annual Reports in significant detail.³⁹ However, Parliament still has difficulties in obtaining key information and candid responses to questions in relation to resources and the operation of the infringement procedure, including information in respect of the Commission's new working method. In addition to this, constant changes to the compiling of information in the Annual Reports makes historical comparisons of performance problematic for Parliament and independent researchers. As has already been established above, other interested actors (complainants, journalists, researchers and Parliament) lack the ability to compel documentation related to the infringement procedure. There is no judicial review of the Commission's actions under Article 258 TFEU. Without legal accountability and transparency which would enable other actors to conduct an independent assessment of the way in which policy choices regarding enforcement are made, the burden of establishing accountability falls to Parliament. However, Parliament too encounters information asymmetry, and this makes it difficult for Parliament to successfully challenge assertions made by the Commission.⁴⁰ It does not have access to independently compiled data, or indeed a systematic independent assessment of the Commission's data and assumptions.

The Commission's new working method allows the Secretariat General to track the actions of case handlers across the DGs and is able to compile accurate data regarding contact times with Member States, resources allocated and time allotted to pursuing infringements. This should provide greater transparency regarding the administrative phase of the infringement process. This data needs to be shared with Parliament (and if possible presented in the Annual Reports) in order to assist the relevant Committees to make a genuine assessment of the enforcement of EU obligations.

³⁹ The Commission would also point to use of press releases in relation to the infringement process, but these are not detailed or consistent enough to add anything to the information contained in the Annual Reports. In other words, this is another way of accessing less detailed information than can be accessed elsewhere.

⁴⁰ For example, that the new working method is more efficient than the previous method, see staff working document, n 11.

5. CONCLUSIONS

Bringing Europe closer to its citizens and embracing techniques of good governance are intrinsically linked. One of the few areas of direct interaction between the (perceived) distant Brussels bureaucracy and the EU citizen is the administrative phase of Article 258 TFEU, where citizens turn to the Commission and Parliament for help in order to access their European rights. As such, it is important that complainants are treated according to principles of good administration. These principles have no implications for the exercise of discretionary or executive choices regarding whether or not to pursue a Member State for breach of their EU obligations. As the Commission continually reminds us, Article 258 TFEU is not a vehicle for citizens to directly enforce their EU rights. It is an instrument dedicated to upholding the rule of law, and the very essence of such a concept is that executive power is wielded according to certain standards that guard against discrimination, bias, unfairness, arbitrariness and secrecy.

This briefing note has attempted to set out the current administrative practices and soft law guarantees that apply to the administrative phase of Article 258 TFEU. It has summarised the distinct lack of legal rights for complainants and the general lack of transparency associated with the infringement process. It has also noted the potential for these relatively weak administrative protections to be eroded further by the Commission's new working method. It has explored possible avenues for change, including the adoption of horizontal administrative rights, bespoke administrative rights for Article 258 TFEU and the possible implications that arise from the Charter of Fundamental Rights and the right to good administration.

The operation of the administrative phase of Article 258 TFEU has undergone some major changes in the last five years. The Commission has issued Communications in order to create more transparency in what had been a secretive bi-polar and diplomatic exercise of executive power. It has made some efficiency gains over the last decade in the administrative phase, although this continues to be somewhat unsatisfactory. Increasing transparency in the administrative operation of Article 258 TFEU, including reporting and operational data, is crucial in order to establish accountability and a genuine dialogue between the Commission and Parliament.

If bringing citizens closer to Europe is more than just rhetoric, serious attention must be given to the few spaces of interaction where citizens actually come into contact with EU institutions. The administrative phase of Article 258 TFEU provides an excellent opportunity to demonstrate what the EU can do for its citizens.

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