

Committee on Legal Affairs  
The Chairman

Réf. D(2010)27767

Erminia Mazzoni  
Chair, Committee on Petitions  
ASP 08F136, Brussels

309376 09.06.2010

**Subject:** Petition 1028/2009 by Isaac Ibáñez Garcia

Dear Chair,

I would like to thank you for submitting this petition for consideration by the Committee on Legal Affairs.

*The petition*

The petitioner, Isaac Ibáñez Garcia, notes that the treaties are virtually silent on the procedure which the Commission should follow when fulfilling its obligations as "guardian of the treaties". He observes that the procedure currently applied consists mainly of Commission internal procedures refined by Court of Justice judgments. He outlines several specific infringement cases, one of which has lasted 12 years and is still not resolved.

By analogy with the situation in his Member State, and taking inspiration from the activities of the European Ombudsman in this field and Parliament's recommendations following the committee of inquiry on the *Equitable Life crisis*, he makes a case for a "procedural code" in the form of a Union regulation setting out the various aspects of the infringement procedure which could be covered, including notifications, time-limits, the right to be heard, the obligation to reason decisions and access to the file. According to the petitioner, this initiative would respect the Commission's discretion inherent in the infringement procedure whilst also enhancing legal certainty.

*Appraisal*

Maintenance of respect for the Union's rule of law is crucial to make it a reality for businesses and citizens. In that respect, it is noteworthy that the central mechanism for ensuring Member State compliance, namely the Commission's Infringement Procedure under Article 258 TFEU (ex. 226 EC) (hereinafter "the Procedure"), is governed by a brief two

paragraph Treaty article, unamended since 1957, augmented only by a series of soft law measures, with officials using an unpublished manual of procedures<sup>1</sup>.

The Procedure essentially envisages a course of dialogue between the Commission and Member States it views as being in breach of Community law. If no resolution to the situation is arrived at the Commission can deliver a reasoned opinion in which it states its grounds for complaint and stipulates a deadline for compliance ("the administrative phase"); Member States which fail to comply with this can be brought before the Court of Justice which will adjudicate on the existence of the infringement, and in certain cases be able to order the payment of a lump sum or penalty payments ("the judicial phase"). Within the broad scope of this scheme, the Commission has traditionally enjoyed a wide discretion in formulating procedures during the administrative phase<sup>2</sup>.

There is, having said this, a discernible trend in the Procedure's development over the lifespan of the Union<sup>3</sup>. This has seen what once constituted a quasi-diplomatic exercise, offering almost unfettered discretion to Commission and Member States alike, take on more and more of the features characteristic of classical administrative procedures. The impetus for this evolution has undoubtedly been generated by the increasing complexity of the Commission's task in monitoring and enforcing Union law as a result of the enlargements and increases in Community competence and legislative output. The fact that the Treaty of Maastricht introduced a possibility of Member States being subject to potentially heavy financial penalties for non-compliance with Union law reinforced the need for a more predictable procedure with clear rights of the defence<sup>4</sup>.

The European Court of Justice<sup>5</sup> and latterly the European Ombudsman<sup>6</sup> have been important contributors to the trend noted above. In particular, the Court's case-law affords Member States' certain rights of the defence once the Procedure enters its judicial phase. However, such a piecemeal approach falls short of providing legal certainty for all participants in the Procedure. In this connexion, Parliament has also played an increasing role by responding to

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<sup>1</sup> The most prominent are the following: Commission Communication on *Better Monitoring of the Application of Community Law*, COM(2002)725 final; Commission Communication on *Relations with the Complainant in respect of Community Law*, 2002 O.J. (C 244); Commission Communication, *A Europe of Results - Applying Community Law*, COM(2007) 502 final; and Commission Report, *EU Pilot evaluation report*, COM(2010) 70 final.

<sup>2</sup> See Case T-309/97 *Bavarian Lager*, Case T-191/99 *Petrie*, Case 247/87 *Star-Fruit* and Case C-87/89 *Sonito*.

<sup>3</sup> Harlow, C. & Rawlings, R., 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure', *E.L. Rev* (2006), 31(4), 447-475.

<sup>4</sup> Article 260 TFEU (ex 228 EC); Commission Communication on *the Application of Article 228 of the EC Treaty*, SEC(2005)1658; previous communications and decisions were OJ C 242, 21 August 1996, p.6, OJ C 63, 28 February 1997, p.2 and PV(2001)1517/2 of 2 April 2001.

<sup>5</sup> As against the Commission's traditional treatment of the administrative phase as the focus of the overall procedure, the ECJ have increasingly looked to re-characterise it as a precursor to the judicial procedure. The Court has for example generated procedural safeguards which it has branded 'essential guarantees'; see for instance Case 293/85 *Commission v Belgium* on the necessity that the grounds for breach of Community law stated in the reasoned opinion match those upon which the subsequent court case is taken.

<sup>6</sup> Following the Ombudsman's decision on complaint 206/27.10.95/HS/UK *Newbury by-pass* in which he noted the "considerable dissatisfaction amongst European citizens, some of whom regard the Commission' approach... as arrogant and high-handed", the Commission reacted by conceding complainants the procedural guarantee that they should receive notice of the termination of a non-compliance file along with a reasoned opinion for the same (Commission own-initiative inquiry 303/97/PD, at pp.271 and 272).

individual petitions and to the Commission's annual reports, calling *inter alia* for more transparency and a stronger role for petitioners and complaints in the Procedure<sup>7</sup>. It is indeed paradoxical that, on the one hand, citizens are portrayed as having an essential role in ensuring compliance with Union law on the ground<sup>8</sup>, whilst on the other hand, they are arguably marginalised during any subsequent procedure.

While the uniform application of Union law is one essential goal, the predictability and transparency with which the institutions act are equally fundamental to the Union's legitimacy<sup>9</sup>. Time-limits such as those advocated by the petition at hand<sup>10</sup> have been imposed upon the Commission's discretion in other areas of Union law (competition policy, in particular mergers<sup>11</sup> and state aid) and have thus greatly enhanced legal certainty in those areas<sup>12</sup>. Such limits should be given serious consideration as part of general law of administrative procedure.

Indeed, a comprehensive law of administrative procedure, respectful of the Commission's discretion as to when and against whom to instigate proceedings, but which constrains it within the boundaries of good administrative practice, would bring the evolution of the Procedure noted above to its logical conclusion.

The Procedure can no longer be reasonably characterised as an interaction between bureaucratic elites and is more accurately represented as a participatory exercise in which citizens and businesses, national administrations, the Commission and other EU institutions and bodies all have a part to play. The publication measures advocated by the current petition can only enhance the Union's democratic legitimacy and would, concurrently, incentivise Member States to comply more rapidly<sup>13</sup>. Parliament's resolution on a revised Framework Agreement between the European Parliament and the Commission for the next parliamentary term is instructive in that regard<sup>14</sup>.

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<sup>7</sup> The two latest resolutions are those of 24 April 2009 on the 25th annual report from the Commission on monitoring the application of Community law (2007) (2008/2337(INI)) and of 21 October 2008 on monitoring the application of Community law – 24th annual report from the Commission (2008/2046(INI)).

<sup>8</sup> Commission Communication on *Relations with the complainant in respect of infringements of Community law*, COM(2002)0141 final, OJ 244, p.5, "the Commission has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law".

<sup>9</sup> In his Opinion in Case C-278/01 *Commission v Spain*, 2001 O.J. (C 245) 16, AG Mischo demonstrates that the Commission has treated similar cases differently without any justification, sometimes granting members states a large degree of leeway where compliance was relatively straightforward, sometimes acting rapidly where Member States faced significant obstacles in their efforts to implement.

<sup>10</sup> These include the time-limit for acknowledging receipt, the time-limit for notifying the filing of the complaint and the time-limit for the Commission to commence proceedings through the letter of formal notice.

<sup>11</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29.01.2004, p. 1-22, in particular Article 10 thereof on time limits for initiating proceedings and for decisions.

<sup>12</sup> Gil Ibanez, A.J., "The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228" 68-WTR Law & Contemp Probs. 135 at p7-8.

<sup>13</sup> As noted by the previous European Ombudsman in his speech "The Citizen, the Rule of Law and Openness" to the European Law Conference, Stockholm, June 10-12, 2001.

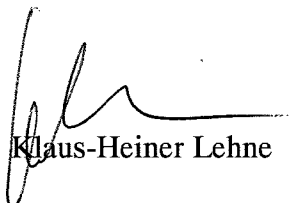
<sup>14</sup> Paragraph 3(e) point 5: "the Commission shall make available to Parliament summary information about all infringement procedures based on the letter of formal notice, including, if so requested by Parliament, on a case-by-case basis and respecting the rules on confidentiality, on the issues concerned by the infringement procedure".

### *Conclusion*

To conclude, the petition raises an important point of principle and is particularly timely given that the Committee, by way of a decision taken on the 23 March 2010, has recently established a Working Group on EU Administrative Law for which Vice-Chair Luigi Berlinguer has been appointed coordinator. The working group has been established to investigate potential legislative initiatives aimed at establishing a general law of EU administrative procedure. The Infringement Procedure will be given detailed attention as an integral part of such a comprehensive framework.

The Legal Affairs Committee adopted<sup>15</sup> this opinion unanimously by 24 votes in favour, 0 votes against and 0 abstentions.

Yours sincerely,



Klaus-Heiner Lehne

cc: Luigi Berlinguer MEP, coordinator of the Working Group on EU Administrative Law  
Isaac Ibáñez García, petitioner

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<sup>15</sup> The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Mara Bizzotto, Piotr Borys, Françoise Castex, Christian Engström, Marielle Gallo, Gerald Häfner, Daniel Hannan, Kurt Lechner, Antonio Masip Hidalgo, Alajos Mészáros, Angelika Niebler, Jutta Steinruck, Dimitar Stoyanov, Alexandra Thein, Diana Wallis, Rainer Wieland, Cecilia Wikström, Zbigniew Ziobro, Tadeusz Zwiefka