

**"Compliance mechanisms in regional integration systems:  
An EU - Latin American Comparison"**

Marise Cremona, European University Institute, Florence  
Marta Ferrari-Haines, Notre Dame University, London

**Introduction**

Several similarities appear to exist between the economic-political rationale underpinning the market integration objectives of the European Union, the Andean Community and Mercosur – essentially, an incremental transformation into a fully-fledged single political-economic unit encompassing each partner’s markets. In contrast, however, the legal regimes established in order to instrumentalise and regulate such a commitment are markedly dissimilar. While the founders of both the EU (originally the EEC and then the EC) and the Andean Community chose to adopt a definite legal regime at the very outset and to do so in supranational terms (in spite of the latter’s different scope) Mercosur’s founders did not. Indeed, rather than pre-determining in the 1991 Asuncion Treaty the regulatory framework for the purported regional market, the founders of Mercosur opted to set themselves a four-year deadline to do so. By then, i.e. 31 December 1994, Mercosur was to be integrated at market level and Mercosur’s definitive institutional and normative system would be installed through a new Agreement. The integrative acts to be performed during the intervening 1991-1994 years – termed the Transitional Period – were framed under a provisional intergovernmental legal framework. It is true that at no time did Mercosur countries commit to replacing this regime with a supranational one. The commitment under the Asuncion Treaty, indeed, was confined to adopting a “*definite*” legal system for the common market. By December 1994 Mercosur was integrated as a Free Trade Area only and thus, through the Protocol of Ouro Preto 1994, the Member States launched the Customs Union and in adopting Mercosur’s legal system retained an intergovernmental model. At the same time the timetable for achieving a common market and for any eventual institutional amendment was postponed *sine die*.

Unlike Mercosur, the Andean Community of Nations (ANCOM) evolved from the Cartagena Agreement 1969 (Andean Pact Treaty, as amended by Trujillo Act 1996 and Protocol of Sucre 1997) not as a diplomatic regime but as a Community Law system.

Thus, the European Union, ANCOM and Mercosur countries adopted very different arrangements with respect to the crucial legal issue of regional integration i.e. the relationship between regional law and domestic law. While the juxtaposition of regulatory authority in the former two regimes is structured under the principles of supremacy and direct effect administered within an autonomous Community legal regime, in Mercosur regulatory authority remains centred on Member States, operating through political diplomacy i.e. lacking any institutional regulatory

autonomy. A reformulation is not however discounted under Mercosur's principles of gradualism and flexibility.

As a result, in its progression toward a common market, Mercosur's compliance and enforcement mechanism scheme is one of international law, being at its most problematic on matters of domestic implementation and the applicability of secondary legislation. Recently, as described below, imaginative measures have been introduced to counter insufficiencies in the system and arbitral awards have reiterated the implementation obligations of Member States. Basically, Mercosur countries have agreed to submit their Treaty commitments to greater stricture – albeit keeping within international law principles. Indeed, where before Mercosur obligations had the same legal status as any other ordinary obligation of international law, now such obligations have been removed from the general international law treatment, and are subject to further enforcement duties. On the other hand, Mercosur obligations have a lesser legal status than Human Rights Treaties that some Member States have constitutionalised.

It will be argued that Mercosur countries have continuously reiterated their adherence to the intergovernmental model, and that the system has not become a Community system in spite of the effect of the recent up-grading measures and of arbitral awards. Rather, Mercosur Member States have progressed a long way in retaining their integration commitment under an international law framework. This, indeed, may account for the true dynamism and originality of Mercosur and puts into question the mechanically repeated argument that Mercosur's difficulties are due to its lack of a supranational legal system and would be immediately resolved by an EU-style regime.<sup>1</sup>

In its 2001 White Paper on Governance the European Commission proposed five principles which underpin good governance: *openness, participation, accountability, effectiveness and coherence*. Rightly, the Commission sees governance as going beyond policy development and law-making, to include effective implementation and adequate enforcement. These principles are relevant when considering compliance mechanisms in the Union context.

This paper, for reasons of practicality, will focus on compliance in the post-legislative context: how to ensure that the rules incorporated in, or adopted within, a regional integration system are complied with by the Members of that system? However we should also remember that compliance is a part of good legislative and regulatory design; well-designed and appropriate regulation which embodies the five principles of good governance is more likely to meet with high standards of compliance.

The fundamental starting point for all discussion of compliance mechanisms within the context of the European Community legal order is the principle that ultimately it is the role of the institutions (and in particular the Commission and the Court of Justice) to ensure that the law is observed. There is no room, therefore, for any form of “self-help” compliance enforcement by one Member State in respect of another: direct

---

<sup>1</sup> This paper focuses on salient aspects of compliance mechanisms in Mercosur and ANCOM with no attempt in providing a full description available in many excellent reports.

State-to-State retaliation or counter-measures by another Member State, are not permitted within the Community system. The Court of Justice has even held that a failure on the part of one Member State to implement Community regulatory procedures does not justify other Member States in the imposition of health or welfare-based trade restrictions:

A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law.<sup>2</sup>

At the basis of all compliance procedures is the principle enshrined in Art 10 EC:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

This so-called loyalty obligation not only supports obligations found elsewhere in the Treaty (such as the prohibition of discrimination), it has also formed the basis for the development by the Court of Justice of specific obligations relating to the enforcement of Community law: for example the action for damages in breaches for Community law norms and other principles relating to the enforcing of Community-law based rights at the national level.

In fact it is perhaps the development of enforcement mechanisms at national level, based on enforceable rights, that is seen as typifying and exemplifying EU compliance; it is their effectiveness which is often cited as the basis for the remarkable reach and penetration of EU norms into national systems, harnessing and even extending the enforcement mechanisms available within the domestic legal order.

However the particular characteristic and strength of the EU's compliance system might be said to lie in its combination of methodologies and levels of enforcement, both the Community level (Section A, Part I) and the national level (Section A, Part II) as well as the breadth of the scope of the compliance obligation, extending not only to Member States' implementation of Treaty-based and secondary norms but also affecting their exercise of domestic competences (Section A, Part III).

## **SECTION A. Compliance within the EC System**

It is time to recognise that the Union has moved from a diplomatic to a democratic process, with policies that reach deep into national societies and daily life. (EC Commission, Governance White Paper 2001, p.30)

---

<sup>2</sup> C-5/94 *R. v MAFF Ex p. Hedley Lomas* [1996] E.C.R. I-2553 at para.20, citing Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* [1964] E.C.R. 625 and Case 232/78 *Commission v France* [1979] E.C.R. 2729, para.9. It is possible, although rare, for one Member State to bring an action against another for breach of a Community law obligation: Art 227 EC.

## **Part I: Compliance Mechanisms at Community level**

### ***1) direct (formal) enforcement actions***

The European Commission has laid prime responsibility for compliance with the Member States:

Ultimately the impact of European Union rules depends on the willingness and capacity of Member State authorities to ensure that they are transposed and enforced effectively, fully and on time. Late transposition, bad transposition and weak enforcement ... The prime responsibility ... lies with national administrations and courts. (Governance WP, p.25)

In Part II, we will examine the way in which national administrations and national courts are involved in compliance.

However, this pinning of responsibility on the Member States does not remove the importance of the Commission, backed up by the ECJ, as the “guardian of the Treaty”, the institution whose first-mentioned duty set out in Art 211 EC is to “ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.”

Indeed, the Commission sees itself as having an important role in this respect:

The Union is based on the rule of law. Monitoring closely the application of Community law is an essential task for the Commission if it is to make the Union a reality for businesses and citizens. The Commission will therefore pursue infringements with vigour. (Governance WP, p.25)

This duty is given expression, as far as formal proceedings are concerned, in Art 226 EC<sup>3</sup>:

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

As this wording suggests, enforcement actions have two stages: an administrative stage and a legal stage. The administrative stage (the “infringement procedure”) itself is in three parts: the Commission must first give the Member State notice of its view that there may be a breach of a Community obligation which it does by way of a formal letter. The State then has the opportunity to “submit its observations” and in

---

<sup>3</sup> In order to keep this paper to a manageable length and also in order to highlight issues of principle, we are here considering only the general enforcement competence of the European Commission, not the specific rules that apply in state aids and competition cases; nor will we consider the special procedures which may be taken in case of serious breach of fundamental rights by a Member State under Art 7 TEU; nor compliance mechanisms under the TEU generally.

practice this may lead to an exchange of views. If the Commission is reassured by the State's replies to its letter it may decide to take the case no further. If however it considers that there has been a failure on the part of the Member State the Commission delivers its "reasoned opinion".

The administrative stage involves contact between the Commission and the Member State and the duty of cooperation between the Member States and the Community institutions enshrined in Art 10 EC (which is the basis of all compliance principles) comes into play to support the process, the aim of which is to resolve the matter before it gets to the Court.

The Commission has discretion within this administrative process (for example to negotiate a compliance schedule) and also as to whether or not to bring the case before the ECJ if the Member State does not comply in time with the reasoned opinion.

Article 169 is not intended to protect the Commission's own rights but provides one of the means by which the Commission ensures that the Member States give effect to the provisions of the Treaty and the provisions adopted under the Treaty by the institutions.

... the Commission is not obliged to act within a specified period .... The Commission is thus entitled to decide, in its discretion, on what date it may be appropriate to bring an action and it is not for the Court to review the exercise of that discretion.<sup>4</sup>

... the right to choose the time for bringing an action is not affected by the fact that negotiations on harmonization are in progress within the Council, and that in any event such negotiations do not exempt the Member States from compliance with the applicable Community provisions so long as the provisions under discussion have not entered into force.<sup>5</sup>

In the Governance White Paper the Commission set out a list of priorities in bringing full enforcement actions against Member States:

**Priority attached to treatment of possible breaches of Community law**

The Commission will focus on:

- The effectiveness and quality of transposition of directives as the most effective way of avoiding individual problems arising at a later stage.
- Situations involving the compatibility of national law with fundamental Community principles.
- Cases that seriously affect the Community interest (e.g. cases with cross-border implications) or the interests that the legislation intended to protect.
- Cases where a particular piece of European legislation creates repeated implementation problems in a Member State.
- Cases that involve Community financing.

---

<sup>4</sup> Judgment of 10 May 1995 in Case C-422/92 *Commission v Germany* [1995] ECR I-1097 at paras 16 and 18.

<sup>5</sup> Judgment of 1 June 1994 in Case C-317/92 *Commission v Germany* [1994] ECR I-2039 at para 5.

Such cases should be handled as a priority in the framework of formal infringement procedures. In other cases, other forms of intervention could be explored before launching formal infringement proceedings. (Governance WP, p.26)

In its 2002 Communication on Monitoring, the Commission was even more specific about its priorities.<sup>6</sup> It is therefore defending its discretion but is keen to show that its exercise of that discretion is not arbitrary.

The 2002 document prioritises:

*(a) Infringements that undermine the foundations of the rule of law*

– Breaches of the principles of the primacy and uniform application of Community law (systemic infringements that impede the procedure for preliminary rulings by the Court of Justice or prevent the national courts from acknowledging the primacy of Community law, or provide for no redress procedures in national law: examples include the failure to apply the redress procedures in a Member State and national court rulings that conflict with Community law as interpreted by the Court of Justice).

– Violations of the human rights or fundamental freedoms enshrined in substantive Community law (e.g. interference with the exercise by European citizens of their right to vote, refusal of access to employment or social welfare rights conferred by Community law, threats to human health and damage to the environment with implications for human health).

– Serious damage to the Community's financial interests (fraud with implications for the Community budget, or violation of Community law in relation to a project receiving financial support from the Community budget).

*(b) Infringements that undermine the smooth functioning of the Community legal system*

– Action in violation of an exclusive European Union power in an area such as the common commercial policy; serious obstruction of the implementation of a common policy.

– Repetition of an infringement in the same Member State within a given period or in relation to the same piece of Community legislation; these are mainly cases of systematic incorrect application detected by a series of separate complaints by individuals.

– Cross-border infringements, where this aspect makes it more complicated for European citizens to assert their rights.

– Failure to comply with a judgment given by the Court of Justice against a Member State on an application from the Commission for failure to comply with Community law (Article 228 of the EC Treaty).

*(c) Infringements consisting in the failure to transpose or the incorrect transposal of directives, which can in reality deprive large segments of the public of access to Community law and actually are a common source of infringements.*

---

<sup>6</sup> Commission Communication on the Better Monitoring of the Application of Community Law, COM(2002)725 final/4, p.11.

Instead of using the formal procedure the Commission may opt for the informal compliance mechanisms mentioned below. Many cases therefore do not get as far as the ECJ.

Cases come to the Commission in a number of ways: individual complaints, via the European Ombudsman, petitions to the European Parliament, through the Commission's own investigations or monitoring procedures. It is not possible for the Council of Ministers, or the European Parliament, or private individuals or organisations to bring enforcement actions before the Court of Justice; they have to rely on informing the Commission of alleged infringements, and (in the case of natural and legal persons) the possibility of bringing an action in national courts, possibly with a reference to the ECJ under Article 234 EC. The Commission has said that the primary purpose of Article 226 is not to protect the individual but to induce a Member State to come into line and this is reflected in the fact that wherever possible the Commission will try to negotiate compliance rather than resorting to the Court. Other Member States can bring an action under Art 227 EC but this is rarely used. Member States prefer either to use diplomatic channels or to leave the Commission to take action.

Role of individual complaints: Anyone may file a complaint to the Commission alleging a breach of Community law obligations by a Member State; they do not have to demonstrate an interest. the Governance White Paper argues that although important and taken seriously this may not be most effective method for an individual to enforce his/her rights, as following a ruling by the ECJ after a lengthy procedure there may still be need to bring an action before national courts. While in principle the Commission is prepared to investigate every complaint, it will apply its priority criteria and in practice very few complaints result in infringement proceedings being formally opened:

“In 2001, only 7% of complaints registered by the Commission were followed by a letter of formal notice, and only 1% by a reasoned opinion.”<sup>7</sup>

Following a report by the European Ombudsman the need to keep complainants informed has been recognized and the Commission is now more explicit about the administrative procedures which it will follow in relation to a complaint.<sup>8</sup> Nevertheless, the Commission stresses the “bilateral” nature of the Art 226 EC procedure (i.e. between the Commission and the Member State).

If the administrative procedure does not lead to an informal solution, and more particularly, if the Member State does not comply with the Commission's reasoned opinion within the time laid down, then the matter may be brought to the Court of Justice – again the Commission has a discretion at this point. Note that the Commission only gives an opinion: it is not binding on the Member State, and

---

<sup>7</sup> COM (2002)725 final/4, p.13.

<sup>8</sup> These are set out in the Commission's Communication to the European Parliament and European Ombudsman on relations with the complainant in respect of infringements of Community law, COM(2002) 141 final.

therefore it is up to the Commission to take the matter further if it wishes to enforce its view.<sup>9</sup>

The Court of Justice does not have power to declare national law invalid. It may only issue a ruling that there has (or not) been a breach by the Member State of its obligations. The Treaty, in Art 228, then imposes an obligation on the Member State “to take the necessary measures to comply”. Failure to do so may result in further Court action under Art 228 EC, considered below.

In general then, the Member States are left to decide for themselves how to bring their law into line with Community law. Retaliatory or safeguard measures, or other trade defence mechanisms such as anti-dumping or countervailing duties are not a normal part of the Community legal order. However at present there is an exception to this position, applicable only to the “new” Member States (the ten who joined in 2004). A new type of safeguard measure was introduced in the Fifth Accession Treaty for a temporary period of three years after accession in case a breach of obligation by a new Member State. The procedure, which is also found in the Sixth Accession Treaty applicable to Romania and Bulgaria, is Commission-led and the “appropriate measures” are adopted by the Commission. In its Strategy Paper on Enlargement published in October 2002, the Commission considered that existing rules, such as the general Article 30 EC or specific sectoral safeguard provisions might not be adequate to protect non-economic interests (for example, food safety) in case of a failure on the part of a new Member State to comply with internal market legislation. The European Council Conclusions in Brussels in October 2002 and Copenhagen in December 2002 endorsed this approach and the new “internal market clause” duly appears in the Act of Accession.<sup>10</sup>

The clause applies where “a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market”.<sup>11</sup> It is temporary in the sense that it may only be invoked for the first three years after accession, but measures adopted under it may continue beyond this period “as long as the relevant commitments have not been fulfilled”. Measures must be proportional and priority shall be given to measures which least disturb the functioning of the internal market. A second, similar, clause applies to failures to implement commitments relating to mutual recognition in criminal matters (under Title VI of the TEU) or civil matters (under Title IV of the EC Treaty).<sup>12</sup> In this case it is stated that measures may take the form of temporary

---

<sup>9</sup> Under the ECSC Treaty, in contrast, the administrative stage ended with a formal decision by the Commission which it was then up to the Member State to challenge before the Court.

<sup>10</sup> Act of Accession, Article 38.

<sup>11</sup> It is not entirely clear what the phrase “commitments undertaken in the context of the accession negotiations” means; in particular whether it means something different from Community law obligations in the ordinary sense. In a unilateral Declaration by six of the candidate countries, they state that in their view the safeguard clause will only apply in the context of breaches of obligations arising out from the Treaties (including the Act of Accession): Joint Declaration No.22 by the Czech Republic, Estonia, Lithuania, Poland, Slovenia and the Slovak Republic. They also state their understanding that this procedure is “without prejudice” to the jurisdiction of the Court of Justice under Article 230 EC (enforcement actions).

<sup>12</sup> Act of Accession, Article 39.

suspension of relevant provisions in the relations between a new Member State and any other Member State or States.

The decision to impose these safeguard measures will be taken by the Commission, acting with a view to preventing a serious breach in the functioning of the internal market. They are thus clearly not unilateral retaliatory measures by one Member State against another, and at least in theory they would be motivated by internal market objectives rather than national interest. The role of the Commission is notable, particularly in the fact that it is given an enforcement role in relation to matters falling within the so-called “Third Pillar” of the European Union (police and judicial cooperation in relation to criminal matters), and is linked to its crucial role in the accession process. In its October 2002 Strategy Paper, the Commission explicitly links the need for these new clauses with its continued monitoring of the candidate states and the commitments made by them in the accession negotiations: Commission monitoring will be a continuation of its regular pre-accession Progress Reports and assessment of compliance with the Copenhagen criteria (across all three Pillars). A link is made by the Commission between this monitoring and its Annual Report on Monitoring the Application of Community Law issued for all Member States. However the Annual Reports, as we shall see, are essentially a “naming and shaming” exercise. This monitoring exercise, in contrast, may lead to specific safeguard measures of a kind which does not exist in relation to the fifteen “old” Member States.

## ***2) penalties***

The Commission has no power to order Member States to comply with Community law (or to compensate individuals). In the first instance, under Art 226 or 227 EC, the Court also only has the power to determine that there has been an infringement. In most cases, this is sufficient in fact, and the Member State will amend its legislation or take other remedial action. However the Treaty of Maastricht introduced a stronger enforcement mechanism in the form of financial penalties which may be awarded against a Member State by the Court following a further action by the Commission:

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

---

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.<sup>13</sup>

In 2004 there were 144 findings by the Court of Justice that a Member State was in breach of its obligations under the Treaty.

Under Art 228 the Commission has discretion whether to bring a second case to the Court for non-compliance with an earlier judgement, and it also has the power to recommend the penalty it deems appropriate, but it is the Court which fixes the penalty. A penalty payment may be set as a per day quantum until the breach is remedied.

There have only been a few cases brought under this provision:

C-387/97 *Commission v Greece*, relating to disposal of dangerous waste.

C-278/01 *Commission v Spain*, relating to quality of bathing water.

Case C-304/02 *Commission v France*, judgment of 12 July 2005, is an interesting example of a case brought under Art 228, since the original breach by France (established back in 1991 in case C-64/88 *Commission v France*) related to its failure to ensure that Community rules (on minimum size of fish sold on the market) were effectively enforced: the relevant Community rules required Member States to establish effective, proportionate and persuasive enforcement measures. So we have several layers of enforcement here. The Commission requested a periodic penalty payment. The Court in fact held that it was possible under Art 228 to impose both a periodic penalty payment and a lump sum penalty as they had different functions, the former being essentially persuasive (as to future conduct) and the latter dissuasive (as to past conduct).

Following this case, the Commission issued a Communication on 13 December 2005 on the application of Art 228.<sup>14</sup> It took the view that in the light of the judgement it should issue guidelines as to its approach to penalty payments and quantum. In future, the Commission argues, it will ask for both periodic penalty payments, to take effect from the date of the Art 228 judgement, and a lump sum, to cover the infringement between the earlier judgement on non-compliance and the Art 228 judgement. The latter is designed to encourage States to remedy the situation as quickly as possible. The periodic payments are worked out according to a “formula”, which multiplies a basic amount by figures representing level of seriousness (scale of 1-20), duration of the breach (scale of 1-3) and a coefficient based on the GDP of the country and its number of votes in the Council (ranging from 0.36 for Malta to 25.4 for Germany).

We have already mentioned the possibility of safeguard measures established as a transitional measure in the Fifth Accession Treaty (Arts 38-39); in such cases the Commission is enabled to adopt “appropriate measures”. These are not defined but

---

<sup>13</sup> Art 228 EC.

<sup>14</sup> SEC (2005) 1658. It replaces earlier Communications of 1996 and 1997.

may include (for example) monitoring and inspection procedures, or even marketing bans or frontier controls. Such measures are not unheard of in cases of emergency (c.f. the ban on export of British beef following the outbreak of BSE) but these clauses envisage such a measure as an alternative enforcement methodology (under Art 38 they may be applied “If a new Member State has failed to implement commitments undertaken in the context of the accession negotiations”).

### ***3) informal compliance mechanisms***

A number of complementary mechanisms may be used by the Commission alongside or instead of formal infringement proceedings under Art 226 EC. For example, where there are many infringements in a specific sector, the Commission may propose an overall negotiation with a Member State, or “package meetings” which deal with a number of cases at once.

Annual reports are published by the Commission on monitoring the application of Community law.<sup>15</sup> Among other things, these set out the transposal rates for directives for each Member State. There are separate annual surveys in some sectors, such as state aids and environmental law.<sup>16</sup> The Commission keeps regular scoreboards on the implementation of Directives by Member States, presented by State and by sector.<sup>17</sup> It is also possible to check implementation Directive by Directive.

Special scoreboards are instituted in some sectors, e.g. the internal market. Some Directives provide for a report by the Commission after a certain period which allows the Commission to report on the implementation record. And specific records kept for State Aids notifications and infringements.

These methods all aim to use peer pressure and what the Commission calls “mutual monitoring” (“naming and shaming”).

Other ways in which Commission encourages compliance include:

(1) Interpretative communications on a specific matter of Community law (both the Treaty and secondary legislation).

(2) The obligation to notify the Commission of draft technical regulations arising from Directives 98/34/EC (goods) and 98/48/EC (information society services) in the non-harmonised sectors of the internal market.

...

---

<sup>15</sup> For example The 23<sup>rd</sup> Annual Report on Monitoring the Application of Community Law (2005), 24 July 2006, COM(2006)416 final.

<sup>16</sup> See for example the Seventh Annual Survey on the Implementation and Enforcement of Community Environmental Law 2005, SEC(2006) 1143.

<sup>17</sup> [http://ec.europa.eu/community\\_law/eulaw/index\\_en.htm](http://ec.europa.eu/community_law/eulaw/index_en.htm)

(4) Anticipation of major events, linked, for example, to infrastructure projects: experience shows that when investments have to be made on a national scale the national authorities involved are occasionally inclined to take insufficient account of Community regulations.<sup>18</sup>

Where an infringement has already taken place and cannot be reversed (e.g. an import licence has been wrongly required) the Commission, instead of bringing infringement proceedings, may obtain from the Member State a recognition that an infringement has taken place, together with an undertaking to put mechanisms in place to prevent it happening again (e.g. instructions to national authorities).

There is more emphasis now on cooperation between the Member States and the Commission during the transposal time for Directives, in order to identify and resolve problems, or difficulties in interpretation of the text. This cooperation is an application of Art 10 EC (the principle of loyal cooperation).

It should be added that the fact that the only defence which a Member State to which a decision has been addressed can raise in legal proceedings such as these is that implementation of the decision is absolutely impossible does not prevent that state - if, in giving effect to the decision, it encounters unforeseen or unforeseeable difficulties or perceives consequences overlooked by the Commission - from submitting those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case the Commission and the Member State concerned must respect the principle underlying Article 5 of the Treaty [now Art 10], which imposes a duty of genuine cooperation on the member states and community institutions; accordingly, they must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid.<sup>19</sup>

The Commission would like to see more cooperation at this stage, and even the adoption in some cases of transposition guidelines by the Commission for the Member States.<sup>20</sup> It would also like to improve contact arrangements with Member State officials responsible for implementation, which are sometimes complex, especially in federal systems, including single coordination points.

The Commission has argued that the combination of co-regulation and voluntary norms (for example in the new approach directives on technical standards) can result in better levels of compliance, as norms are internalised more effectively.<sup>21</sup> It is not

---

<sup>18</sup> Better Monitoring, 2002, p.5.

<sup>19</sup> Judgment of 15 January 1986, Case C-52/84 *Commission v Belgium*, [1986] ECR 89, para 16; see also Case C-94/87 *Commission v Germany*, [1989] ECR 175 paras 8-10.

<sup>20</sup> This mechanism has been used particularly in the environmental sphere: see the Seventh Annual Survey on the Implementation and Enforcement of Community Environmental Law 2005, SEC(2006) 1143, at p.8.

<sup>21</sup> "Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance, even where the detailed rules are non-binding." Governance White Paper, p.21.

always the case, therefore, that compliance rates improve with the compulsory nature of the norm.

## **Part II: Compliance Mechanisms at the National Level**

### ***1) Direct enforcement***

**EU law is part of the national legal order** and must be enforced as such. Despite longstanding co-operation with the European Court of Justice, national lawyers and courts should be made more familiar with Community law, and assume responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation. (Governance WP, p.25)

Perhaps one of the most characteristic features of the Community legal order is the way in which some norms are held to become automatically part of the national legal order and as such enforceable directly in the national courts. In this way, national courts are enlisted as “Community courts”, and indeed citizens can enforce their rights directly. As the Court of Justice put it in the seminal case *van Gend en Loos*:

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 [now Articles 226 and 227] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States.<sup>22</sup>

The point made in the first paragraph cited here is often repeated by the Commission in the context of its response to individual complaints. The infringement procedure in the Court of Justice cannot itself compensate individuals or declare national law invalid, and may be too late. For speedy action to stop an infringement and actual compensation national remedies are more effective, and below we will briefly consider Community rules relating to the availability of such remedies.

### ***2) Indirect enforcement and implementing regimes***

Not all Community law becomes automatically incorporated into national law and so has such an immediate and direct effect. The failure to implement a Directive poses specific issues at national level, as the Directive has not been made part of the domestic legal order and its effects are therefore more limited than that of a Regulation or directly applicable Treaty provision. The Court of Justice has refused to allow Member State authorities to hide behind their failure to implement and has thus

---

<sup>22</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1962] ECR 0001.

ruled that non-implemented Directives may nevertheless provide certain rights for individuals enforceable against the defaulting Member State. Still, the Directive does not of itself impose obligations on individuals and so if not implemented it cannot be enforced directly against other individuals or citizens.<sup>23</sup>

In three ways in particular, a non-implemented or badly implemented Directive may have an impact:

First, individuals may rely on such a Directive against the authorities of the Member State. This results from the binding nature of Directives as regards the Member States.

It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations - or those of State entities - with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights.<sup>24</sup>

Second, national courts are under an obligation where possible to interpret national law consistently with the Directive. This not a direct enforcement of the Directive but is rather a principle of interpretation of national law. Also operative within the third pillar (Pupino)

... when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 [now 249] of the Treaty.<sup>25</sup>

This principle of interpretation has been held also to apply to legislation adopted under the Third Pillar (provisions in the TEU on police and judicial cooperation in criminal matters).<sup>26</sup>

Third, there is a Community law based right to compensation from the State where loss can be shown to have been caused by a failure to implement a Directive in time:

Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the damage suffered.<sup>27</sup>

---

<sup>23</sup> Case 152/84 *Marshall* [1986] ECR 723, para 48.

<sup>24</sup> Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325 at para 23.

<sup>25</sup> Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325 at para 26; see also Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, para 8.

<sup>26</sup> *Pupino*

<sup>27</sup> Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325 at para 27; see also Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357, para 39. Note that this right applies not only where there has been a failure to implement a Directive but also where has been a breach of primary Community law such as a Treaty provision: Joined Cases C- 46/93 and C-48/93

Here are three ways, in which non-compliance may be sanctioned: direct enforcement of the Directive against the State, a conforming interpretation of national law, and compensation for any damage caused.

All this suggests the need to encourage Member States to implement Directives. The need to improve implementation capacity, which forms part of the pre-accession process for accession States, is now being applied more generally. The Commission encourages exchanges of good practice through the use of expert committees and networks, or the setting up of *ad hoc* groups of experts in particular fields:

The Commission has set up such groups of government experts in the field of the directives on the posting of workers (96/71/EC) and the “anti-discrimination” directives (2000/43/EC and 2000/78/EC). These groups met before the transposal date and provided a forum for discussion and the exchange of best practice.<sup>28</sup>

Technical advisory groups have also been established under some of the environmental directives.<sup>29</sup>

National contact points may be set up where individual rights are concerned, for example in implementing the directive on recognition of qualifications.<sup>30</sup>

Much of this good practice with respect to the implementation of directives is contained in a Recommendation adopted by the Commission in 2004.<sup>31</sup> The Recommendation is directed at ensuring that Member States have established effective transposition procedures within their state administrative structures, including procedures for working with national Parliaments to ensure timely transposition.

We should also mention the use of Agencies, although we cannot go into detail in this paper. In some sectors indirect enforcement takes place via regulatory agencies, such as competition and data protection agencies. Enforcement at national level is also assisted by national or local ombudsmen.

### ***3) National procedural rules***

---

*Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

<sup>28</sup> Better Monitoring, 2002, p.2.

<sup>29</sup> For example the ORNIS Committee under Article 16 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

<sup>30</sup> Directive 2005/36/EC on the recognition of professional qualifications OJ 2005 L 255/22, which consolidates and simplifies a large number of earlier Directives, provides in Art 57 for a network of single contact points, one in each Member State; it is due to be implemented by 20 Oct 2007.

<sup>31</sup> Recommendation of 12 July 2004 on good practices concerning transposition, 12.7.2004, OJ L 2004 L 98/47.

As part of the implementation process for Directives, Member States will need to consider enforcement mechanisms, using their own national “toolkit”. In some cases, Directives will themselves spell out certain minimum enforcement standards or requirements; Art 11 of the Directive on distance marketing of financial services is a typical example:

Member States shall provide for appropriate sanctions in the event of the supplier's failure to comply with national provisions adopted pursuant to this Directive.

They may provide for this purpose in particular that the consumer may cancel the contract at any time, free of charge and without penalty.

These sanctions must be effective, proportional and dissuasive.<sup>32</sup>

and these provisions may include the need to adopt criminal sanctions:

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence ... .

However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.<sup>33</sup>

The subject matter of Directives varies so much that it is difficult to identify common norms, but the Court has developed a number of principles in relation to effective remedies *at the national level*, for breaches of Community law, which apply alongside national rules on remedies. It should be said that these principles developed by the Court of Justice apply to the enforcement of Community law rights whether derived from a Directive, from Treaty law or from a Regulation.

- infringements of Community law should be penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance;
- the penalty must be effective, dissuasive and proportionate to the infringement;<sup>34</sup>
- the national authorities must proceed with respect to infringements of Community law with the same diligence as that which they bring to bear in implementing corresponding national laws;

---

<sup>32</sup> Directive 2002/65/EC concerning the distance marketing of consumer financial services OJ 2002 L 271/16.

<sup>33</sup> C-176/03 Commission v Council, 13 September 2005.

<sup>34</sup> See for example case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

There is another side to enforcement at national level, and that is the remedies available to individuals to enforce Community law norms against the State or State authorities. There is no right without a remedy, and the possession of a directly effective right (*van Gend en Loos*) would not mean much were the remedies to enforce that right absent or ineffective.

In an early case the principle of redress following a Court of Justice judgment was made clear:

if the Court finds that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that state is obliged ... to rescind the measure in question and to make reparation for any unlawful consequences thereof.<sup>35</sup>

More recent cases have held that the right of an individual to seek compensation in a national court for a failure by a Member State to comply with Community law does not depend on a prior ruling by the Court of Justice, nor is it adversely affected by a decision of the Commission not to pursue infringement proceedings in a particular case.

In the *Humblet* case the Court refers to the need both to make reparation and to rescind the offending measure. Enforcement at national level through the courts goes further than requiring compensation. It may even require the national court to “set aside” a provision of national law. In *Simmenthal* the Court confirms that any national court, as an organ of a Member State, has as its task in a case within its jurisdiction, to protect the rights conferred upon individuals by Community law. It then spells out the implications of this:

Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand, and the national law of a Member State on the other, is such that those provisions and measures not only by their entry into force render *automatically inapplicable any conflicting provision of current national law* but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. ...

Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and *must accordingly set aside any provision of national law which may conflict with it*, whether prior or subsequent to the community rule.<sup>36</sup>

The wording here is careful: the Court of Justice is not telling the national court to declare conflicting national law invalid, but is rather holding that it must be regarded as “inapplicable” and “set aside”. Thus, the Court’s approach does not conflict with national constitutional requirements reserving the finding of invalidity to constitutional courts, or which do not envisage such a possibility at all.

---

<sup>35</sup> Case C-6/60 *Humblet v Belgium* [1960] ECR 559.

<sup>36</sup> Case 106/77 *Simmenthal* [1978] ECR 629, at paras 17-18 and 21 of the judgement (emphasis added).

This last case is demonstrative of a tension between the need to protect Community law rights and the fact that remedies and procedural rules are largely a matter of national law. The balance between the two has changed over the years. In 1977 the Court emphasised the role of national procedures, albeit subject to some basic conditions:

Applying the principle of cooperation laid down in article 5 [now 10] of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law  
....<sup>37</sup>

Procedures and remedies are seen at this stage as essentially a matter of national law, although the Court in this case gives concrete expression to the underlying principle that a remedy should be provided by establishing two underlying conditions that national procedural law should satisfy: First, the conditions imposed by national law must not be less favourable than those relating to similar actions of a domestic nature (equivalence, or non-discrimination). Second, the conditions and time-limits should not make it impossible in practice to exercise the rights which the national courts are obliged to protect.<sup>38</sup>

During the 1980's the Court developed the principle that national authorities in establishing penalties for breaches of Community law by individuals, should ensure that the penalties are effective, dissuasive and proportionate to the infringement,<sup>39</sup> and the idea that national remedies should be effective has also coloured the Court's approach to remedies for breaches of Community law by the State. The national procedural provision must be seen in its context:

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law ...

For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that

---

<sup>37</sup> Case 33/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] ECR 1989, paras 20-21.

<sup>38</sup> Later cases used the formula "excessively difficult" rather than "impossible in practice": see case C-312/93 *Peterbroek Van Campenhout v Belgium* [1995] ECR I-4599, and case C-430-431/93 *Van Schijndel & Van Veen* [1995] ECR I-4705.

<sup>39</sup> See text at note 34.

provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.<sup>40</sup>

In such statement we can see the Court attempting to strike a balance between national procedural autonomy and the principle of effective remedies.<sup>41</sup>

In 1990, in the *Factortame* judgement, the Court took one step further the *Simmenthal* ruling that national courts may be required to set aside a national law which conflicts with Community law. Where the national court is unclear as to whether or not there has been an infringement it may request a ruling from the Court of Justice under Art 234 EC.<sup>42</sup> This preliminary ruling procedure will delay proceedings in the national court (for up to two years). The Court of Justice has taken the view, therefore, that national courts must be able to offer interim relief, including the suspension of a national law, pending the final decision:

It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.<sup>43</sup>

Given that in English law at the time there was no possibility of interim relief in respect of a legislative act, this ruling is getting very close to the invention of a new remedy.

The following year a further step was taken: a new Community law remedy in damages was established where the failure to implement a directive causes loss to an individual.<sup>44</sup> This right to damages (under certain conditions<sup>45</sup>) is based on the Treaty

---

<sup>40</sup> Joined cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paras 17 & 19.

<sup>41</sup> Jacobs, 'Enforcing Community Law Rights and Obligations in National Courts: Striking the Balance' and de Búrca, 'National Remedies for Breach of EC Law: The Changing Approach of the ECJ', both in Lonbay and Biondi (eds.) *Remedies for Breach of EC Law* (Wiley 1997).

<sup>42</sup> Although it should be noted that these references formally concern the interpretation of Community law, in practice the Court is frequently asked questions which are designed to establish the presence or otherwise of a breach of Community law by a Member State.

<sup>43</sup> Case C-213/89 *R. v. Sec of State for Transport ex p. Factortame* [1990] ECR I-2433, para 21.

<sup>44</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357.

<sup>45</sup> "The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties." Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357, para 40. For further development of these conditions, see Joined Cases C- 46/93 and C-48/93 *Brasserie du*

Article with which we started - Article 10 EC – as well as being “inherent in the system of the Treaty”.

Note that this is a Community law remedy, enforced through the national courts, rather than a national remedy. Unlike the previous case law on national remedies, such as *Simmenthal* and *Factortame*, it was developed in the context of Community law obligations (on Member States) which are not directly effective within the national legal order, including non-implemented directives. Since then it has also been applied more broadly to breaches of other rules of Community law, including directly effective Treaty provisions.<sup>46</sup>

### **Part III: The Scope of Compliance**

#### ***1) Compliance in applying and implementing Community law***

- Substantive scope:

Violation of Treaty norms and secondary legislation; general principles of law.

- Substantive scope:

Breach of obligations under a Community or mixed agreement. Under Art 300(7) EC Member States are bound by agreements concluded by the Community. For example C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943; C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325.

- Violations by the organs of the State: executive, legislature or judiciary.

A failure by the legislature to pass legislation is not an excuse: where an action is brought for failing to implement Community law, such as a directive, Member States have often based their defence on difficulties with their political or parliamentary systems (a change of government, parliamentary elections); such factors do not provide a defence:

... a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits laid down in Community directives.<sup>47</sup>

As far as the judiciary is concerned, it is only recently that for the first time the point was directly addressed by the Court of Justice; in general the Commission has been inhibited by the possibility that such a case might seem to call into question the independence of the judiciary. However in *Köbler* the Court made it clear that the

---

*Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

<sup>46</sup> Joined Cases C- 46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

<sup>47</sup> Case 280/83 *Commission v Italy* [1984] ECR 2361, para 4.

State may be liable for a judicial decision contrary to Community law and rejected the argument that the independence or authority of the judiciary was thereby prejudiced:

In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 34).

In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.<sup>48</sup>

- A Member State may also be liable for a failure effectively to enforce Community law.

For example the ECJ found France in breach of its Treaty obligations by failing to prevent obstruction and destruction of imported agricultural goods by protesting groups of French farmers:

Article 30 [now Art 28] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 [now Art 10] of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.

...  
... the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them.<sup>49</sup>

Following this case, the Commission proposed the adoption of a Regulation providing for intervention where an obstacle to the free movement of goods occurs or is threatened; the Regulation actually adopted is much weaker, providing only for the Member State to “take all necessary and proportionate measures” and to keep the Commission informed.<sup>50</sup>

- The *Pupino* case:

The principle of loyal cooperation (based on Article 10 EC) applies also to the third pillar. This case has far-reaching implications, in that it demonstrates the Court’s willingness to export principles developed in the context of the EC Treaty to the Third Pillar. The case itself concerned the principle of conforming interpretation of national

---

<sup>48</sup> Case 224/01 *Köbler v. Austria* [2003] ECR I-10239, paras 32-33. See further Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana*, judgment of the Court of 13 June 2006.

<sup>49</sup> Case C-265/95 *Commission v. France*, judgement 9 December 1997, paras 32 and 52.

<sup>50</sup> Council Regulation 2679/98/EC of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States 1998 OJ L 337/8.

law but we recall that a number of other important principles have also been based on the principle of loyal cooperation, including liability in damages for breach of Community law obligations. To what extent might these also be extended to the Third Pillar?

## ***2) Compliance with Community law norms in exercising domestic competence***

A number of examples illustrate that even where exercising its own domestic competence, Member States are bound by principles of Community law, such as non-discrimination.

- tax cases:

Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law ...<sup>51</sup>

- open skies:

Although the conclusion of bilateral air transport agreements was not in general within exclusive Community competence, Member States were in breach of their Community law obligations of non-discrimination in the context of the right of establishment by negotiating bilateral agreements containing ownership and control clauses which limited the benefits of the agreement to national companies, without extending such benefits to all Community companies established in their territory.

Articles 52 and 58 of the Treaty thus guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State (see Case C-307/97 *Saint-Gobain v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, paragraph 35), both as regards access to an occupational activity on first establishment and as regards the exercise of that activity by the person established in the host Member State.<sup>52</sup>

Since, under the bilateral agreement, Community companies established in Germany did not have the same rights of access to the US market as German companies, Germany had infringed Article 43. It did not matter that the advantages were granted by the US:

Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Federal Republic of Germany, accords to its own nationals. ... [T]he direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way.<sup>53</sup>

---

<sup>51</sup> Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-0225, para 21.

<sup>52</sup> Case C-476/98 *Commission v Germany* (open skies) [2002] ECR I-9855, para 148.

<sup>53</sup> *ibid.*, paras 153-154.

- FHR and UN sanctions: T-253/02, *Ayadi*, and T-49/04, *Hassan*, judgments 12 July 2006.
- Art 307 EC

### 3) *Procedural compliance*<sup>54</sup>

Three recent cases involving external action illustrate that Article 10 EC imposes procedural constraints on Member States. In the first pair of cases, Germany and Luxembourg were found to be in breach of their obligations under Article 10 EC by concluding bilateral agreements with third countries on the transport of goods and passengers by inland waterway.<sup>55</sup> The agreements were concluded after a decision by the Council to authorise the Commission to negotiate a multilateral agreement with a number of third countries. In neither case did the Court accept the Commission's argument that Community competence in the field was exclusive, based on *AETR*; existing Community legislation was concerned only with market access for Community carriers and thus would not be "affected" by such a bilateral agreement. However, the Court held that the Member States were in breach of Article 10 EC ("that duty of genuine cooperation"<sup>56</sup>) by continuing bilateral negotiations after the mandate had been agreed in the Council without cooperating with or consulting the Commission. The adoption of the mandate is the start of a "concerted Community action" which imposes obligations of cooperation on the Member States; this obligation may not extend to a duty of complete abstention, but does require close cooperation and consultation with the Commission in order to avoid undermining the Community's multilateral negotiation, as well to ensure consistency between the positions adopted.<sup>57</sup> Although therefore there is explicitly stated to be no exclusive Community competence, the Member States were in fact constrained in their freedom to conclude bilateral agreements in the field. Note however that the obligation arose out of the decision of the Council to open Community negotiations; and that the breach of Article 10 EC lay not so much in continuing bilateral negotiations as in the absence of consultation and coordination with the Community institutions (especially the Commission).

The *Sellafield* case<sup>58</sup> provides a further example of the implications of Article 10 EC as a constraint on the exercise by Member States of their external powers, in this case the ability to engage in dispute settlement procedures under a Convention to which

---

<sup>54</sup> This section is based on the Report by Marise Cremona (Community Rapporteur) to the FIDE Congress 2006.

<sup>55</sup> Case C-266/03 *Commission v Luxembourg* [2005] ECR I-04805; Case C-433/03 *Commission v Germany* [2005] ECR I-0000, judgment 14 July 2005.

<sup>56</sup> C-266/03 *Commission v Luxembourg* [2005] ECR I-04805, para 58.

<sup>57</sup> C-266/03 *Commission v Luxembourg* [2005] ECR I-04805, paras 57-62.

<sup>58</sup> Case C-459/03 *Commission v Ireland*, judgment of 30 May 2006.

they are party. The Commission argues that Ireland is in breach of its obligations under Articles 10 and 292 EC in submitting a dispute with the United Kingdom under the Law of the Sea Convention (UNCLOS) to dispute settlement procedures established under that Convention. The allegation of a breach of Article 292 EC raises complex issues which we will not discuss here. AG Poiares Maduro was of the view that Ireland was in breach of its obligations under Article 10 EC, independently of Article 292, by failing in its duty of cooperation. This breach was based, not on the initiation of dispute settlement proceedings *per se*<sup>59</sup> but on the failure to inform and consult with the Community institutions before initiating the UNCLOS procedure. Poiares Maduro argued that such consultation could have clarified the Community law dimension of the dispute, and could also have raised the possibility of using Community law remedies in relation to the alleged violation of the Convention (infringement proceedings against the UK). The Court agreed:

... the obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings concerning the MOX plant within the framework of the Convention.<sup>60</sup>

A recent example of successful prior consultation in the case of an international dispute between two Member States is provided by the Belgium/Netherlands “Iron Rhine Arbitration”.<sup>61</sup> Here, the Commission was consulted and accepted the Member States’ view that there were no substantive issues of Community law likely to be affected by the arbitration.<sup>62</sup>

As in the earlier cases, the infringement in the *Sellafield* case lay in the failure to consult in advance of taking action. This must therefore be regarded as an important requirement placed on Member States where there is a possibility that their actions in the external sphere might impact on the Community legal order or even on Community policy-making.<sup>63</sup>

## **SECTION B. Compliance within the ANCOM and MERCOSUR Systems**

---

<sup>59</sup> On this point, AG Poiares Maduro took the view that Art 292 operates as a *lex specialis* in relation to the general principle established in Art 10, and that therefore Art 10 was unnecessary as an additional ground of complaint (AG Opinion paras 54-55). The Court agreed: see judgment of 30 May 2006, paras 168-171.

<sup>60</sup> Case C-459/03 *Commission v Ireland*, para 179.

<sup>61</sup> The dispute on the Iron Rhine railway line was submitted to an arbitral tribunal under the PCA in 2003 and the award was handed down in May 2005 (available on <http://www.pca-cpa.org/ENGLISH/RPC/#Belgium/Netherlands>).

<sup>62</sup> See Award of the Arbitral Tribunal (note 59) at paras 13-15. In their letter to the Commission the Member States undertook to comply with Art 292 EC should a question of Community law arise in the course of proceedings.

<sup>63</sup> c.f. the obligation on the Member States to inform and consult each other within the Council in the field of the Common Foreign and Security Policy, found in Art 16 TEU.

## **Part I. The Legal Framework of Mercosur and ANCOM**

Like EC law, ANCOM can be characterised as an autonomous Community law system whereas Mercosur is best characterised as a special regime of international law. Sourced in Treaties and in secondary legislation, Mercosur's institutional format is purely intergovernmental both in its make-up and operationally. In ANCOM, as in the EC, the participation of Member States' representatives in the Council does not prevent it from functioning in supranational terms, i.e. as regards voting and the legal effect of its acts. In contrast, the law-making organs in Mercosur – the Council of the Common Market (CMC), Common Market Group (CMG) and the Mercosur Trade Commission (MTC) – possess no actual regulatory competence and all their acts (unanimously adopted) are binding on Member States at international law only. In other words, secondary legislation in Mercosur (CMC Decisions, CMG Resolutions and MTC Directives) has no legal force beyond international law: it cannot by itself penetrate the national legal orders. This feature was expressly provided for by the Protocol of Ouro Preto (POP): secondary legislation is obligatory and, where necessary, must be incorporated into the national legal systems, pursuant to the procedures applicable in each Member State. In addition, under Mercosur's simultaneous applicability system, domestic enforceability of secondary legislation is not attained until implementation by all Member States has been carried out. This together with the fact that no deadline was generally provided for implementation, reiterating the full centrality of the Member States in the system, led to the recent introduction of the corrective measures discussed later. Dispute resolution in Mercosur is by way of *ad hoc* arbitration.

ANCOM institutions (.....) and the Court of Justice of the Andean Community (1979 incorporated to Cartagena Agreement, as amended by Trujillo Act 1996 and Cochabamba Protocol 1996. ANCOM's Treaty, as the future EU Constitution, expressly provides for the underlying principles of immediate applicability, supremacy, and direct effect, as reiterated by the following rulings of the Andean Community Court of Justice

### ***Supremacy***

*El derecho de la integración, como tal, no puede existir si no se acepta el principio de su primacía o prevalencia sobre los derechos nacionales o internos de los países miembros... En los asuntos cuya regulación corresponde al derecho comunitario, según las normas fundamentales o básicas del ordenamiento integracionista, se produce automáticamente un desplazamiento de la competencia, la que pasa del legislador nacional al comunitario" (Tribunal de Justicia del Acuerdo de Cartagena, Proceso 2-IP-90, Sentencia de 1.990)*

*"Hay – se ha dicho- una ocupación del terreno con desplazamiento de las normas que antes lo ocupaban, las cuales devienen inaplicables en cuanto resulten incompatibles con las previsiones del derecho comunitario ('preemption'). La norma interna sin embargo, podría continuar vigente aunque resulte inaplicable, y permanecer en estado de latencia hasta que el derecho comunitario que la desplazo se modifique*

*eventualmente y le deje libre el terreno, si es que la norma nacional llega a resultar compatible con él". (Tribunal de Justicia del Acuerdo de Cartagena, Proceso 2-IP-88, Sentencia de mayo 25 de 1.988)*

### ***On Direct effect***

*En cuanto al efecto de las normas de la integración sobre las normas nacionales, señalan la doctrina y la jurisprudencia que, en caso de conflicto, la regla interna queda desplazada por la comunitaria, la cual se aplica preferentemente, ya que la competencia en tal caso corresponde a la comunidad. En otros términos, la norma interna resulta inaplicable, en beneficio de la norma comunitaria. Así lo ha señalado reiteradamente el Tribunal de Justicia de las Comunidades Europeas (ver principalmente Sentencias Costa/ENEL de 15 de junio de 1964, y la Sentencia Simmenthal de 9 de marzo de 1978) en concordancia, en este punto, con el espíritu de las normas de la integración andina. Este efecto de desplazamiento de la norma nacional, como resultado del principio de aplicación preferente, resulta especialmente claro cuando la ley posterior -que ha de primar sobre la anterior de acuerdo con principios universales de derecho- es precisamente la norma comunitaria.*

Thus, the legal status of Member States, the regional institutions and of secondary legislation in each of the two systems may be summed up follows:

- in Mercosur Member States themselves are the exclusive legal *subjects*/have legal capacity;
- in ANCOM, like the EC, the Member States, Community institutions, secondary legislation and individuals, come within the scope of the rule of law of the Community;
- there is a duty to incorporate secondary into national legal systems where applicable in EC/ANCOM, as well currently in Mercosur but under different principles/effect, explained later;
- In Mercosur, but not in ANCOM, as regards all *secondary legislation* enforceability depends on internal transposition and on simultaneous implementation to be applicable at the domestic level;
- equally, in Mercosur, to be invoked before national courts: judges only apply implemented Mercosur measures;
- in Mercosur, all type of regulatory measures are adopted by unanimity with all national representatives being present;
- MERCOSUR countries are subject to a duty of loyalty (Art 38) comparable to Article 10 EC whereby Member States must carry out their implementing duties and domestic agencies apply the corresponding Mercosur rules;

- Mercosur's CMG, like the EC Commission and ANCOM's Secretariat, is the guardian of the Treaty but, in contrast, has only compliance-inducing but no enforcement mechanism.

In other words,

- In Mercosur the compliance system is based on cooperation but with no enforcement mechanisms i.e. enforcement and management functions are performed by Member States themselves;
  - Failure to comply with implementation duties carries no sanction on Member States, although other Member States may resort to arbitration;
  - Mercosur institutions can bring no actions against Member States
  - Individuals have no *locus standi* in Mercosur
  - Andean Court of Justice is entrusted with control of legality – similar to Art 230 EC.
- 
- ANCOM, like the EC, is provided with centralized compliance mechanisms, coexisting with decentralized control through individuals and national courts – provisions similar to Arts 226; 227; 234 EC.
  - dispute resolution bodies in Mercosur decide on disputes only
  - ANCOM has a fully-fledged judicial system
  - Rulings by the Andean Court are directly applicable i.e. do not require to be transposed
  - Mercosur arbitral awards need to be implemented to produce domestic effect.

## **Part II. The Network of Control within MERCOSUR**

### ***1) Compliance and enforcement***

In Mercosur, both the Common Market Group and the Mercosur Trade Commission, and currently the Technical Branch of the Secretariat, are involved in the machinery of compliance and enforcement.

Monitoring requirements are mostly acute as regards the implementation and application of secondary legislation by Member States. In this respect, on many occasions, secondary law has been introduced through Protocols so as to ensure

incorporation as primary legislation. Otherwise, the ordinary implementation procedure of secondary law is as follows:

- On conclusion of the Mercosur legislative stage, Members are mandated to take the necessary measures to incorporate new law into their domestic legal orders and notify the Administrative Secretariat accordingly.
- Entry into force throughout Mercosur, however, only takes place simultaneously for all the Members on the 30th days after the fourth Member has notified the Administrative Secretariat its full compliance with incorporation
- During the said period, Members carry out the publication of the respective measure in their official journals
- In turn, once all notifications by Member States of their publications have been received, the Secretariat notifies Member States on the implementation procedure has been completed and the measure has become enforceable

Against this background, the functions of the Common Market Group are focused, among others, on the proposal of and monitoring compliance with legislation to be adopted by the Council, in accordance with the Treaty of Asuncion and legislation adopted thereunder; as well as setting-up working programmes and approving the budget. It is assisted by the Mercosur Administrative Secretariat.

The Mercosur Trade Commission, on its part, monitors the application of instruments related to the common trade policy. On matters within its competence, the Commission also deals with complaints from private parties, following referrals by its National Sections. At this level, the procedure develops through a written and an oral phase of direct negotiations allowing, if no solution is reached, for a complaint being before to the Commission's Chairperson. Should the claim remain unresolved, the matter will be included in the agenda of the Commission's next subsequent meeting. Failing said meeting to reach a satisfactory decision, the Commission may convene the assistance of an Expert Technical Committee.

The Joint Parliamentary Commission – shortly to be up-graded as the Mercosur Parliament, is not a decisional body, is entrusted with assisting and liaising Mercosur's institutions and national parliaments, towards ensuring legislative implementation and harmonization.

## ***2) Recent Measures Aimed at Reinforcing Mercosur's Legal Structure***

Given the absolute discretion Mercosur countries enjoyed with respect to incorporation, a wide spectrum of measures have been aimed at tackling manifest insufficiencies of the system, especially the fact that no deadlines for implementation were generally set by secondary legislation, and some countries would apply Mercosur measures once incorporated, without awaiting for the simultaneous regime to operate. Also, measures within the competence of the national executive were

enforced solely through acts of the executive – all this conspiring with a minimum level of legal uniformity, especially alarming in terms of individual Mercosur rights and law applied by judges. Here, a scheme of “pre-judicial consultation”, as later explained, is being introduced.

Thus, Mercosur’s legal system has been reinforced as follows:

*(a) At the institutional level*

- **Decisión CMC 18/98** created the Forum for Political Consultation and Coordination (FPCC) to provide political support in areas where coordinated intervention is required;
- **Decisión CMC 30/03** up-graded Mercosur’s Administrative Secretariat into a Technical Secretariat through the creation of a Technical Advisory Section entrusted, among others, to periodically produce reports on the progress of integration and to assess on the legal consistency of secondary legislation. While the control of the system is centred on the CMG, the CMG will instruct the expert section on monitoring implementation compliance by Member States.
- Protocol Creating the Mercosur Parliament

*(b) Mechanisms on incorporation and compliance monitoring*

Rules such as **DEC 23/00; 20/02; 07-08/03; 22/04, CMC 07/03**, aimed at ensuring the direct applicability of Mercosur secondary legislation in Member States markets, have amended the original Treaty system. In particular,

- **Decision 20/02** provides that in the course of new MERCOSUR norms being negotiated, a parallel procedure is triggered of prior consultations with the national agencies responsible for implementation and of assessment of consistency of the new measure within each domestic legal system. Its aim is to ensure that a compatible legal instrument is produced.
- **Decisión 22/04 CMC**: as regards secondary legislation *not requiring national parliamentary approval*, the Decision provides for a three month procedure for its domestic entry into force and application. In addition, the Decision builds upon the prior consultation system of Decision 20/02, in providing for the abolition of any national incompatible legislation, prior to the adoption of new Mercosur legislation. Once adopted, such legislation is to be published in the national Official Gazette during 40 days prior to the date of entry into force. Thereafter, domestic inconsistent legislation of the same or inferior status is deemed inapplicable.

At one of the latest meetings of the CMG, the report of the Secretariat’s legal compliance section on the state of national implementation for the 1991-2001 period identified the existence of:

- unimplemented legislation where deadlines had already elapsed
- legislation not requiring parliamentary legislation remaining unimplemented in all Member States
- legislation remaining under revision for a period of more than four years.
- legislation implemented by all but one Member States, thus preventing full entry into force.

But the procedures will not stop here: in the case of legislation remaining unimplemented beyond its accorded period, the CMG may request the Mercosur Secretariat to refer it back to the respective negotiating forums to consider whether further adjustment of domestic legislation is required and to report back to CMG.

Where entry into force is prevented by domestic delays, CMG will exhort Member States to prioritise implementation in order to allow simultaneous enforceability to take place.

### **Summing-up**

- Secondary legislation imposing new obligations upon Member States, require parliamentary approval.
- Legislation implementing framework agreements, is incorporated by executive acts.
- Further to Award 3, failure to implement may trigger the international responsibility of defaulting Member States (Brazil 6 year delay, tribunal applied international law principles of good faith and *pacta sunt servanda*).

## **Part III. The Network of Enforcement**

### ***1) Dispute settlement within MERCOSUR***

Here, again, countries decided to confine the resolution of MERCOSUR disputes within the mechanisms available within international law principles. Initially, under the Treaty of Asuncion, these were limited to diplomatic negotiations adding, for the “Transitional Period” a regime of *ad hoc* arbitration (Protocol of Brasilia 1991). The 1994 Protocol of Ouro Preto, in turn, extended the system indefinitely, and was replaced in 2002 by the Protocol of Olivos 2002. The disputes covered are those arising between the Members in respect of the interpretation, application or non-compliance with provisions contained in the Treaty of Asuncion, agreements adopted thereunder, or in secondary legislation.

Negotiated solutions are a compulsory initial stage, allowing for subsequent conciliation by the Common Market Group, and *ad hoc* arbitration. With the Olivos Protocol a further stage has been provided for whereby a new body – the Permanent Review Tribunal - may hear appeals from arbitral awards. Alternatively the Tribunal may itself be requested to act as arbitrator, with no further appeal then being available.

Again, in contrast to the EC and ANCOM systems, the Olivos Protocol allows for disputes to be resolved by, and within the legal framework of, an extra- regional institution such as the WTO or another preferential trade system.

Again, once more, in keeping with its international law model, the Olivos Protocol contemplates reprisal measures such as remedy for non-compliance of awards. Further to a procedure of notification to the Common Market Group, should the award fail to be complied with, temporary compensatory measures may be applied against the defaulting MS.

Deprived from access to direct action (no equivalent to Art 230 EC), MERCOSUR provides private parties with a system of complaint procedures but which are solely applicable against any Member States other than their own. Claims may arise out of the application by a Mercosur country of any legislative or administrative provision having a restrictive, discriminatory or unfair competition effect in breach of the Treaty of Asuncion, agreements made thereunder or in breach of Mercosur secondary legislation. Procedures are brought before the National section of the Common Market Group or the Mercosur Trade Commission and admitted or not at their discretion. Based on proof of a norm having been breached or of an actual or imminent damage, a process of consultations and negotiations between concerned National Sections is triggered, which can include informed expert reports, extensive participation by the concerned private party and may eventually lead to inter-state arbitration. Here, however, signalling once more the diplomatic aspect of Mercosur, Member States remain free whether or not to launch the arbitral stage.

## ***2) Principles applied in Mercosur arbitration proceedings***

Introduced in 1991, arbitration was not used in MERCOSUR until 1999. Member States had delayed regulating the system and had resolved conflicts through diplomatic negotiations. Still this is the main route followed although only eleven awards have so far been rendered.

In reaching their decisions arbitrators are mandated, unlike in ANCOM and the EC, to apply international law in addition to Mercosur law. Consistently, several awards have stated the international legal nature of Mercosur. Others, curiously, have insisted in describing Mercosur as “Community Law,” invoking EU Law: a transposition, arguably, unsubstantiated in Mercosur. International law, indeed, in its actual state, would have provided a more consistent authority, as evidenced by WTO case-law itself. Moreover, Mercosur, like ANCOM, as a subsystem of LAIA, is the beneficiary of a wide spectrum of authoritative sources, as well that from the Andean system.

For example, as regards Award I, the teleological method of interpretation and denial of the legality of unilateral State measures

Other Awards have adequately clarified the true legal nature of Mercosur in finding that the legal effect of secondary legislation exists only in the form of international responsibility not reaching the domestic level other than through implementation, thus being incapable of any direct creation of individual rights.

At the same time, there is a clear recognition of the operation of a duty of loyalty underlying Article 38 of the Ouro Preto Protocol, whereby Member States have impliedly committed to implement secondary legislation and not to act obstructively.

Mercosur arbitrators, indeed, apply international law in construing Mercosur law, in particular the Vienna Convention rules *pacta sunt servanda* and good faith performance of obligations. While one award discarded the application of the *non adimpleti contractus*, in another award it was considered to be applicable in Mercosur, albeit to a limited extent.

### ***3) Dispute settlement within ANCOM***

As under EC law, enforcement in ANCOM is ensured through both centralised and decentralised control by individuals and national courts, through provisions similar to Articles 226; 227; and 234 EC.

Further to the Treaty Creating the Court of Justice of the Cartagena Agreement, the Andean legal system is governed by the following provisions:

**Article 2:** Decisions become binding for Member Countries as of the date they are approved by the Andean Council of Foreign Ministers or the Commission of the Andean Community;

**Article 3:** Decisions of the Andean Council of Foreign Ministers or of the Commission and Resolutions of the General Secretariat shall be directly applicable in Member Countries as of the date they are published in the Official Gazette of the Agreement, unless they indicate a later date.

**Article 5:** Member Countries are under the obligation to take such measures as may be necessary to ensure compliance with the provisions comprising the legal system of the Andean Community.

As regards this model, the Andean Court held in Case I-IP-87 *Aktiebolaget Volvo*:

*“... the system is one of division of labour and harmonious collaboration between national judges and the Andean judicial organ...”*

## Case 157-IP-2004

**Primero:** *La interpretación prejudicial es un mecanismo clave del sistema jurisdiccional de la Comunidad Andina pues mediante ella el Tribunal comunitario asegura la aplicación uniforme de las normas que conforman el Ordenamiento Jurídico Andino, y convierte automáticamente en jueces comunitarios a los jueces nacionales de los cinco Países Miembros. Se establece así una cooperación efectiva entre el Tribunal de Justicia de la Comunidad Andina y los órganos jurisdiccionales de los Países Miembros para lograr dicho fin.*

**Segundo:** *El Tribunal Andino se limitará a precisar el contenido y alcance de las normas que conforman el ordenamiento jurídico de la Comunidad Andina, referida al caso concreto. El Tribunal no podrá interpretar el contenido y alcance del derecho nacional ni calificar los hechos materia del proceso. Lo resuelto en la interpretación prejudicial tendrá carácter obligatorio y deberá ser adoptado por el juez consultante y por todos aquellos que conozcan del caso en el marco de sus competencias.*

**Tercero:** *La consulta prejudicial puede ser facultativa u obligatoria. La primera, contemplada en el artículo 122 del Estatuto, se refiere a que los jueces nacionales que conozcan de un proceso en el que se controvierta alguna norma comunitaria, podrán solicitar directamente y mediante simple oficio, la interpretación del Tribunal acerca de dichas normas, siempre que la sentencia sea susceptible de recurso en derecho interno. Si al momento de dictar sentencia no hubiere recibido la interpretación del Tribunal, el juez decidirá el proceso.*

*La consulta será obligatoria, según el artículo 123 del Estatuto, cuando de oficio o a petición de parte, el juez nacional que conozca de un proceso en el cual la sentencia fuera de única o última instancia, en el que deba aplicarse o se controvierta alguna norma de la Comunidad Andina, deberá suspender el procedimiento y solicitar directamente y mediante simple oficio, la interpretación del Tribunal.*

*La sentencia proferida dentro de una Acción de Incumplimiento tiene dos efectos fundamentales:*

*El País Miembro cuya conducta ha sido declarada en la sentencia como contraria al ordenamiento jurídico comunitario, estará obligado a adoptar las medidas necesarias para su debida ejecución dentro de un plazo de 90 días siguientes a su notificación, es decir, cumplir con las obligaciones de hacer o no hacer impuestas por la sentencia. (Artículos 27 del Tratado de Creación del Tribunal y 111 de su Estatuto).*

*En segundo lugar, la sentencia de Incumplimiento constituye título legal y suficiente para que el particular pueda solicitar al juez nacional competente la indemnización de daños y perjuicios, cuando la acción fue promovida por dicho particular. (Artículo 30 del Tratado de Creación del Tribunal y artículo 110 de su Estatuto).*

*Se advierte que la forma en que se logra la coacción para el cumplimiento de la sentencia dictada en un proceso de Incumplimiento, es mediante un procedimiento sumario por desacato a las sentencias*

*En relación con el segundo efecto, que como se dijo consiste en que la sentencia de Incumplimiento constituye título legal y suficiente para que el particular que promovió la Acción de Incumplimiento pueda solicitar al juez competente la indemnización de daños y perjuicios*

#### **4) *The role of national courts***

Notwithstanding its cumbersome implementing procedure, MERCOSUR law is extensively part of the domestic law of Member States, receiving judicial application. Also, the harmonisation of national legislation mandated by the Treaty of Asuncion has reached various areas. On occasions, judges may apply it regardless of specific implementation under the Latin American doctrine deeming norms regulating incorporated treaties not to require further legislative intervention.

Instead, in other cases, courts may refuse to apply that doctrine where a formality is missing. For example, in Brazil the Supreme Federal Tribunal refused to grant its *exequatur* to an Argentine judge's rogatory letter under the Mercosur Protocol on Preventive Measures, because its implementing Legislative Decree 192/95 had not been duly published.

In the ANCOM system national courts are Community courts. The Member States may be subject to an action for non-compliance should the courts fail to apply ANCOM law where appropriate. This situation arose where a court in Peru decided to apply provisions from TRIPS that were incompatible with ANCOM law, resulting in the liability of Peru – an approach preceding *Kobler*.

#### **QUOTE CASES**

**TO ADD: COMPLIANCE RE ENVIRONMENT, LABOUR, COMPETITION,**

#### **5) *Final remarks***

Notable case-law has been developed by the Andean Court in the field of Intellectual Property rights, reasserting the Andean regime *vis-à-vis* TRIPS and on other conflicting matters such a refusal of the right to patent discoveries of new uses.

Mercosur countries have initially adopted and throughout retain control over the process of integration. New measures, arguably, contribute to further reinforcing this approach. Thus, in compliance with its principles of gradualism and flexibility, Mercosur manages to channel the progress of integration through imaginative international law mechanisms. Certainly, as argued elsewhere, countries' self-interest may attain a level of sufficient commonality so as to require a drastic change in the legal nature of their inter-state arrangements. Until such a time if ever, Mercosur's

achievements deserve applause rather than being detracted for its lack of supranational features. For example, while Mercosur allows for a choice of forum it would appear to be more consistent in resorting to WTO law rather than to EU law; in particular in a recent award it dismissed the *Humblet* case as outdated, whereas the ECJ itself reiterated those earlier principles in *Saint Michele*.

## **SECTION C General Conclusions**

To follow.

Marise Cremona  
Marta Ferrari-Haines  
October 2006