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EDITORIAL COMMENTS

A revival of the Commission's role as guardian of the treaties?

Lack of empirical data on the impact of infringement procedures

The Commission's annual reports on the application of EU law give a view of its activities as guardian of the treaties. For instance, they show that whilst the number of Member States of the EU has more or less doubled since 2004, the number of infringement cases the Commission opened on the basis of Articles 258 and 260 TFEU has halved in that same period:

2004	2005	2006	2007	2008	2009	2010	2011
4489	3567	3255	3408	3433	2892	2092	1548

A similar trend can be noted in relation to the number of complaints lodged with the Commission in connection with the same procedures:

2004	2005	2006	2007	2008	2009	2010	2011
2653	2518	2345	2666	2223	1659	1289	Not yet available

The number of infringement cases brought by the Commission to the Court, either on the basis of Article 258 TFEU or 260 TFEU, also shows a negative trend, with the exception of applications based on Article 260 TFEU, which in 2011 increased substantially:[1]

	2004	2005	2006	2007	2008	2009	2010	2011
Art. 258	202	166	189	211	209	134	120	63

1. The increase of Art. 260 TFEU applications in 2011 may be due to the entry into force of the Lisbon Treaty, which reinforces the powers of the Commission under that provision. See also, Editorial, "Statistics of judicial activity", (2012) EL Rev., 229. As regards State aid control, the number of decisions whereby the Commission prohibits State aid is relatively low but stable, i.e. on average 30 p.a. (see its bi-annual "scoreboards"). The Commission has direct and exclusive decision-making powers in this area, so these figures cannot simply be compared to Arts. 258/260 TFEU procedures.

Art. 260	5	2	4	4	1	2	1	7

What do these figures tell us? That Member States' compliance with EU law has spectacularly improved in recent years? Difficult to believe; but, admittedly, there are no reliable data on the extent to which the Member States comply with the tens of thousands of pages of EU *acquis*. Nor do we know what the precise impact is in this respect of Commission infringement procedures, the supervision of EU law by EU agencies and national authorities (e.g. in sectors such as financial services, transport, energy, telecommunications, pharmaceuticals or food) or by individuals through private enforcement via national courts (e.g. as regards EU rules having direct effect). Would an explanation for the figures quoted above be that, in line with various reforms the Commission decided over the last decade,[2] its preventive action is finally bearing fruit – examples such as proposals for what it calls "better" or "smart" legislation, its assistance to national administrations on ways to implement directives and regulations, its information campaigns and its training programmes for national civil servants and judges? Or is its action as guardian of the treaties, as laid down in Article 17(1), *second* sentence TEU, now more focused in that it is guided by pre-established priorities, e.g. in the field of environmental protection? Moreover, the Commission's policy for many years has been to promote certain forms of alternative dispute settlement (e.g. SOLVIT, EU-pilot[3]); would that be a reason for the radical drop in cases? Or has the Commission decided to be less confrontational *vis-à-vis* Member States, so that instead of "prosecuting" them in the context of formal infringement procedures it puts more emphasis on "harmoniously assisting" Member States when facing the huge challenges of globalization and, more recently, of the economic and financial crisis? Perhaps this would prompt the Commission to make more use of its prerogatives as initiator of policies and legislation on the basis of the *first* sentence of Article 17(1) TEU. Against that background and given the Commission's scarce human resources, one could imagine that those claiming to be the victim of a concrete violation of EU law by a Member State are nowadays less inclined to lodge a complaint with the Commission – even if it is free of charge – aware as they are of the fact that the Commission's discretionary powers under Articles 258 and 260 TFEU allow it to pay less attention to complaints than it did in the past. This would, however, contrast with the expectations possibly raised by the

2. See for an overview e.g. Prete and Smulders, "The coming of age of infringement proceedings", (2010) CML Rev., 56–60.

3. See Commission Communication "A Europe of Results – Applying Community Law", COM(2007)502 final of 5 Sept. 2007 and Commission Report "EU Pilot Evaluation", COM(2010)70 final of 3 March 2010. These communications are part of the Commission's wider policy aimed at better regulation, which according to some authors (e.g. Azoulai, *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux* (Bruylant, 2009)), actually means: "moins légiférer, mieux executer".

Commission's communication on "relations with complainants in respect of infringements of Community law",[4] which was adopted in 2002 in response to criticism from the European Ombudsman, whose mandate includes checking whether the Commission properly administers infringement proceedings. Admittedly, all these considerations are of a rather speculative nature failing empirical data to underpin them. But that doesn't mean that effective enforcement of the law is not a serious matter and that not having clear information about it is not regrettable: *executio finis et fructus legis est.* Indeed, also in the EU context, execution is the end and the first fruit of the law. Paul Kirchhof, former member of the German Constitutional Court, made this very clear in a recent newspaper article, in which he claimed, in the context of the management of the euro crisis, that "instability" of the law weighs heavier than "instability" of finances:

> "Without law there is no peace. We would return to the law of the jungle, and struggle of everyone against everyone else. Without law as precondition for all exercise of public authority there is no modern constitutional state, no European Union. Without law, the political mandate has no basis. Council, Commission, its president, Parliament and European Court of Justice would have no legitimacy or legally defined tasks. Government leaders, ministers, members of parliament, could engage in public debate, but could not take decisions for citizens."[5]

Enforcement of Internal Market rules and growth-enhancing policies at EU level

Despite the downturn in formal infringement procedures initiated by the Commission, at the highest political level of the EU – that is to say the European Council – a trend can be discerned to attach more importance to the need for Member States to comply with EU law. On 12 March 2012, at the request in particular of Mario Monti, Prime Minister of Italy and former EU Internal Market and Competition Commissioner, the European Council concluded that particular efforts were needed in order to bring the EU back on the path to growth and jobs. To that end, the Internal Market should be brought to a new stage of development by strengthening its governance and improving

4. Commission document COM(2002)141 final of 20 March 2002.

5. *"Ohne Recht gibt es keinen Frieden. Wir würden zum Faustrecht, zum Kampf aller gegen alle zurückkehren. Ohne Recht als Voraussetzung für jede Hoheitsausübung gibt es keinen modernen Verfassungsstaat, keine Europäische Union. Ohne Recht fehlt dem politischen Mandat seine Grundlage. Rat, Kommission und ihr Präsident, Parlament und Europäischer Gerichtshof wären ohne Legitimation und rechtlich definierte Aufträge. Regierungschefs, Minister, Abgeordnete dürften öffentlich debattieren, aber nicht für die Bürger entscheiden."* Paul Kirchhof, "Verfassungsnot", *Franfurter Allgemeine Zeitung* of 12 July 2012.

its implementation and enforcement. The European Council therefore called on the Commission to take action, which the latter did by adopting three months later a communication "On better governance for the Single Market",[6] in which it proposed to focus its enforcement efforts on sectors with the largest growth potential. For the period 2012–2013, the sectors identified were services and network industries. In these areas, the Commission called on Member States to commit to zero tolerance for late and incorrect transposition of Directives. The Commission, for its part, committed to provide enhanced transposition assistance in order to smooth out potential problems. In case of infringements, procedures should take no more than 18 months on average (currently 25.5 months) and Member States should comply with Court rulings within 12 months. The communication concludes with an invitation to Member States to take the necessary steps to implement these actions and to comply with the targets proposed, the Commission intention being to work "in partnership" with them to that end. In the context of their so-called "Compact for Growth and Jobs", concluded on 25 June 2012, the Heads of State or Government welcomed the Commission's communication on governance; however, they also decided that the European Council should review progress as regards enforcement of the Internal Market rules by the end of 2012. Given the fact that they are the very target of enforcement action, it looks somewhat paradoxical that Member States are inducing the Commission to vet them. At the same time, it shows how strong their conviction has become that without proper enforcement of Internal Market rules, it is pointless to adopt them and that the policy objectives these rules are intended to serve simply will not be met.

Enforcement of rules established outside the EU Treaty in order to ensure the proper functioning of the EMU

Also outside the EU Treaty framework, more particularly in the context of the so-called Fiscal Compact,[7] the vast majority of Member States have very recently been pushing for more Commission (and ECJ) supervision of their own conduct, at least some aspects thereof. The Fiscal Compact aims at strengthening fiscal discipline and introducing stricter surveillance within the euro area, in particular by establishing a "balanced budget rule" (the "Golden Rule"), defined in Article 3(1) of that treaty. Under its Article 3(2), the contracting parties are under a duty to transpose that rule into national law, "preferably of a constitutional nature", and adhere to it throughout their

6. Commission document COM(2012)259 final of 8 June 2012.

7. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed by 25 Member States in Brussels on 2 March 2012.

national budgetary process. By virtue of Article 8 of the Fiscal Compact Treaty, the ECJ is given jurisdiction to assess whether the Golden Rule has been transposed in accordance with Article 3(2). Clauses inserted on the basis of Article 273 TFEU in international agreements between Member States regularly foresee that the Court is competent to decide on disputes relating to the application and interpretation of a treaty concluded between these Member States. Article 8, which according to its third paragraph is deemed to be such a clause, however, goes much further as it is, to a large extent, inspired by the infringement procedures under Article 258 and 260 TFEU to which it explicitly refers: if Article 8 is activated, there will be a first judgment of the Court that is binding on the parties to the proceedings as they must take the necessary measures to comply with the judgment within a period set by the Court. If a contracting party considers that another contracting party has not complied with the Court's judgment, it may bring the case before the Court, which in a second judgment "may impose a lump sum or a penalty payment of maximum 0.1% of its GDP." Because Article 8 is based on Article 273 TFEU, only Member States may bring the matter before the Court. However, some Member States, such as Germany and the Netherlands, insisted on (i) an independent assessment and (ii) an automatic procedure. For these reasons, Article 8 "invites" the Commission to present "in due time" a report on the transposition of the Golden Rule by each contracting party. If the Commission concludes in that report that a Member State has failed to transpose the Golden Rule in its national legal order in accordance with Article 3(2), Article 8(1) provides that "the matter *will* be brought before the Court by one or more contracting parties". In other words, there is no discretion and in this respect the procedure differs from the infringement procedure under Article 258 TFEU. Again, the depth of the economic and financial crisis seems to have prompted some Member States to acknowledge the virtues of enforcement up to a point that they are even willing to engage in creative rule-making outside the EU treaty framework so as to ensure that the Court and the Commission can control whether these Member States comply with at least some of their commitments.[8] Formally speaking though, as pointed out above, the Court's jurisdiction is based on Article 273 TFEU and as regards the Commission, according to the 10th recital of the Fiscal Compact Treaty, it is acting "within the framework of its powers, as provided by the TFEU, in particular Articles 121, 126 and 136 thereof".[9]

8. The question whether a jurisdiction and, if so, which and according to which law such a jurisdiction may hear legal disputes other than those relating to the question whether the Golden Rule has been transposed into national law is not addressed by the Fiscal Compact.

9. Other recent examples where it was decided to confer monitoring tasks on the Commission can be found in Arts. 4 and 5 of Council Regulation (EU) No 47/2010 of 11 May

Enforcement of EU rules in order to ensure the proper functioning of the EMU

The Fiscal Compact complements the so-called "Six Pack" which is firmly based on the EU Treaties, in particular Article 136 TFEU and which was adopted four months before the conclusion of the Fiscal Compact.[10] Under two of the six regulations which constitute this legislative package, that is to say Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area and Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances, the Commission has again been given quite formidable powers in relation to the imposition of sanctions, which can take the form of obligations for Euro Area Member States to lodge deposits with the Commission or to pay fines.[11] In all these cases, it is for the Council to adopt such a sanction on a recommendation of the Commission, but that decision is deemed to be adopted *unless* the Council decides by qualified majority to reject the Commission recommendation *within* 10 days of the Commission's adoption thereof, a procedure commonly referred to as: "reverse QMV". The infringements which can trigger those sanctions vary, but relate, directly or indirectly, to non-compliance with certain provisions of the Stability and Growth Pact (SGP). Perhaps the most interesting type of infringement arises when a Euro Area Member State fails to comply with the so-called "Country-Specific Recommendations", which the Council addresses annually to that Member State. The presentation of the Country-Specific Recommendations is a key moment in the "European Semester" of economic policy coordination. Taking the EU's growth strategy (Europe 2020) as a starting point, the Commission sets out every year Europe's economic policy priorities, in the so-called "Annual Growth Survey". The priorities presented therein must be endorsed by the European

2010 establishing a European Financial Stabilization Mechanism (EFSM), O.J. 2010, L 118/1–4, allowing the Commission to decide on the release of instalments of a loan on the basis of its findings that the beneficiary Member State accords with its adjustment programme and with the conditions the Council attached to the financial assistance. Similar monitoring tasks, to be executed jointly with the ECB and where appropriate the IMF, can be found in two agreements concluded by the Euro Area Member States outside the EU framework: Art. 3 of the European Financial Stability Facility Framework (EFSF) Framework Agreement of 7 June 2010 and in Art. 13(7) European Stability Mechanism (ESM) Treaty of 2 Feb. 2012.

10. O.J. 2011, L 306/1–47. See for an in-depth analysis of the Fiscal Compact and the Six Pack, Anthpöhler, "Emergenz der europäischen Wirtschaftsregierung – Das Six Pack als Zeichen supranationaler Leistungsfähigkeit", (2012) ZaöRV, 353–393. Antpöhler claims that through the Six Pack the European Commission has been given such wide powers that it has become the economic government for the Euro Area.

11. See Arts. 3–7 of Regulation (EU) 1173/2011 and Arts. 3–4 of Regulation (EU) 1174/2011.

Council. On that basis, all Member States submit their medium-term budgetary plans (called "Stability Programmes" for Euro Area Member States and "Convergence Programmes" for the others) and the structural reform measures planned for the following 12 months ("National Reform Programmes"). The Country-Specific Recommendations are the Commission's response to these. They are based on a detailed assessment of the economic, employment and budgetary situation and policies in each country. Where required, the Commission spells out further budgetary steps, structural reforms and growth-enhancing measures which Member States should adopt over the next 12 months. The recommendations must then be endorsed by the European Council and formally adopted by the Council. These Country-Specific Recommendations are based, *inter alia*, on two Regulations, which are also part of the Six Pack: Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Council Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances. Since the entry into force of the Six Pack, the fact that a Euro Area Member State does not comply with the Country-Specific Recommendation – relating to its Convergence Programme or to an excessive macro-economic imbalance – can trigger a procedure leading ultimately to a Council decision, adopted by reversed QMV, imposing a sanction on that Member State on the basis of a combined application of these two regulations and the two referred to above.[12]

It remains to be seen what use will be made in practice of these new powers. Jörg Asmussen, member of the Executive Board of the ECB, argued in a recent speech[13] that one of the reasons Member States accumulate large fiscal and economic imbalances is what he called "excessive politeness and the culture of non-intervention among Ministers [of Finance]". He even went as far as claiming that another reason was "the pre-emptive obedience on the part of the Commission when presenting its proposals and recommendations" under the SGP, and concluded that "it seems, the lesson still has not been learnt completely: deadlines for the correction of excessive deficits are being relaxed; the corrective tools that are available even under the new procedures, are simply not being used as the cases of Spain and Cyprus in the recently conducted macroeconomic imbalance procedure illustrate. If mutual surveillance is meant to be effective, this needs to be changed."

12. See in particular Art. 4 of Regulation (EU) 1173/2011 and Art. 6 of Regulation (EU) 1176/2011, read in conjunction with Art. 3(1) Regulation (EU) 1174/2011 and Art. 3(2) of the same regulation.

13. Speech by Jörg Asmussen, "Building deeper economic union: what to do and what to avoid", Policy Briefing at the European Policy Centre, Brussels, 17 July 2012.

Whatever the correctness of these allegations, fact of the matter is that more tools are available to the Commission in order to enforce effectively the SGP than was the case in 2004, when it still had to go to Court in order to seek and obtain the annulment of *inter alia* Council conclusions insofar as they contained, contrary to the procedures set out in the SGP, a decision to hold the excessive deficit procedure against France and Germany in abeyance.[14] Also telling is that in that same year it was impossible to find an agreement in the IGC on certain European Convention proposals to facilitate the decision making in the context of the excessive procedure.[15] The difference in attitude in 2004 as compared to the prevailing view in 2012 in respect of the need for strict enforcement by the Commission can be easily explained: the banking crisis since 2008 and the sovereign debt crisis since 2009.

Enforcement of the rule of law

Claims that the rule of law is violated in a given Member State are by far the most delicate to handle for the EU institutions, including the Commission. By their nature, they go to the heart of democracy and touch upon the values on which the Union is founded (Art. 6 TEU). This is illustrated by the problems which have arisen recently in connection with, for example, France, Hungary, Romania and Bulgaria.

In this journal, an article has already been published on the situation of Roma in France[16] and two editorials have been devoted to the problems in Hungary, highlighting the enforcement challenge they pose to the Commission to uphold the rule of law in the EU context.[17] Eventually, the Commission decided to bring two cases against Hungary before the Court of Justice, claiming two infringements of a rather technical nature: one based on an alleged violation of the independence of the data protection authority as protected by Directive 95/46, the other founded on an alleged discrimination of judges on the ground of age as prohibited by Directive 2000/78. But with respect to certain reforms amounting allegedly to more direct violations of the rule of law insofar as they affected the independence of Hungary's judiciary, the Commission decided to follow a different route: it took advantage of the leverage it derived from its position in the negotiations with Hungary on the latter's request for balance-of-payments assistance under Regulation

14. Case C-27/04, *Commission* v. *Council* [2004] ECR I-6649.

15. See e.g. the initial version of Art. III-76(6) of the draft EU constitution.

16. Dawson and Muir, "Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma", (2011) CML Rev, 751–775.

17. Editorial comments: "*Fundamental rights and EU membership: Do as I say, not as I do!"*, (2012) CML Rev., 481–488 and "*Hungary's new constitutional order and 'European Unity'*", (2012) CML Rev., 871–884.

332/2002. On 25 April 2012, the Commission finally agreed to enter into these negotiations, after having obtained from Hungary *inter alia* commitments "to take tangible steps to ensure compliance with EU law on all the issues that are relevant for the stable and independent legal environment that lies at the heart of the investors' confidence and influences macroeconomic stability". The Hungarian authorities also had to commit to address promptly and fully certain recommendations of the Venice Commission, the Council of Europe's advisory body on constitutional matters, on key priority areas in the field of the judiciary reform. The Commission stated publicly that it expected these commitments to be fully implemented before the negotiations could be concluded.[18] It is not known yet whether this is the actually the case.

More recently, exceptional events in Romania became a major source of concern for the Commission and were dealt with through recommendations in its so-called Cooperation and Verification Mechanism Report (CVMR) adopted on 18 July 2012.[19] In this report, the Commission suggested that the Romanian Government's commitment to respect the rule of law was called into question by the challenging of judicial decisions, undermining of the Constitutional Court, overturning of established procedures and overriding of key checks and balances in order to remove the Romanian President from office by referendum. On the day of publication of the CMVR, however, it was reported that the Prime Minister had committed in writing to the Commission to implement measures addressing the Commission's concerns, including the commitment to revoke emergency ordinances, to restore powers of the Constitutional Court and to implement the Court's rulings on the forthcoming referendum concerning the impeachment of the Romanian President. On 29 July that referendum took place, and it appeared that a majority of the votes cast were in favour of dismissing the President, but on 21 August 2012 the Romanian Constitutional Court declared it invalid due to the lack of the (50%+1) participation quorum provided for by Romanian law. The same day, the Commission issued a statement that it would continue to monitor the

18. European Commission, press release No IP 12-047 of 25 April 2012.

19. Commission document COM(2012)410 final. Upon accession of Romania on 1 Jan. 2007, certain weaknesses remained in the areas of judicial reform and the fight against corruption that could prevent an effective application of EU laws, policies and programmes, and prevent Romanians from enjoying their full rights as EU citizens. Therefore, the Commission undertook within the Cooperation and Verification Mechanism (CVM) to assist Romania to remedy these shortcomings and to regularly verify progress against four benchmarks set for this purpose. These benchmarks are interlinked and should be seen together as part of a broad reform of the judicial system and the fight against corruption for which a long term political commitment is needed (cf. Commission Decision 2006/928/EC of 13 Dec. 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, O.J. 2006, L 354/56).

situation very closely and would pay particular attention to the developments following the referendum in its next report under the Cooperation and Verification Mechanism, to be issued before the end of the year. In this context, the question arises, of course, what the Commission could do if, despite the Constitutional Court's ruling, concerns as to the respect of the law were to persist. Insofar as these concerns cannot be linked to a concrete infringement of EU primary or secondary law, arguably, only the procedure set out in Article 7 TEU could be contemplated – provided, of course, the conditions contained therein are effectively met.[20]

The day it adopted the CVMR concerning Romania, the Commission also issued the CVMR concerning Bulgaria, in which it concluded that as regards the management of the judiciary, weaknesses existed in pursuing judicial integrity, in the consistency of disciplinary practice, and in transparent and objective judicial appointments, appraisals and promotions.[21] As for the fight against corruption, the coordination of different authorities was considered to be still insufficient and reforms required more direction and commitment to results. The steps taken in the fight against high-level corruption and organized crime still lacked convincing results, according to the report.

Concluding remarks

Although in purely *quantitative* terms, the Commission's enforcement activities seem to have decreased substantially over the last ten years, there are indications that with respect to at least some types of infringements that are *qualitatively* very important, on the one hand, Member States are willing to entrust the Commission with new enforcement powers (e.g. growth and stability pact) and induce it to make full use of its existing powers (internal market), and, on the other hand, the Commission itself is increasingly aware of its responsibilities as guardian of the treaties (rule of law) while not necessarily having recourse to formal infringement procedures ((pre-)conditionality of aid programmes, CVMR).

This renewed interest for the Commission's role as guardian of the treaties prompts the question whether in exercising this task it should be subject to more control than it currently is, for instance in order to avoid inertia, discrimination, abuse or *détournement de pouvoir*. Even though the powers it has in this context are, as a rule, nor direct or exclusive, the use thereof may have such an impact on the effective enforcement of EU law that a minimum

20. See for the Commission's views on the nature and scope of this procedure its Communication on "Article 7 TEU – Respect for and promotion of the values on which the Union is based", Commission document COM(2003)final of 15 Oct. 2003.

21. Commission document COM(2012)411 final of 18 July 2012.

of checks and balances seems to be justified. There is no doubt that the Commission is politically accountable to the European Parliament, which managed to reinforce certain provisions in the Framework Agreement it concluded with the Commission in 2010, thus increasing somewhat its right to obtain information about the Commission's infringement procedures.[22] However, so far, the Parliament has made no use of these specific provisions, whereas its recent resolutions on the Commission's annual report on the application of EU law are rather repetitive and do not seem to have a visible impact. The only new development relates to Article 298(2) TFEU, introduced by the Lisbon treaty, which according to a recent EP resolution[23] would be an appropriate legal base for legislation governing the pre-litigation phase under Articles 258–260 TFEU. The resolution calls in particular for the adoption of a regulation on the basis of Article 298 TFEU, setting out the various aspects of the infringement procedure, including notifications, binding time-limits, the right to be heard, the obligation to state reasons and the right for every person to have access to her/his file, in order to reinforce citizens' rights and guarantee transparency. In the Commission's view, however, it is questionable whether Article 298 can serve *at all* as a legal basis for legislation regulating the (specific) responsibilities directly conferred on the Commission by the treaties in the area of infringement procedures. In defending that position it relies on well-established case law, according to which the Commission has discretion on whether and when to introduce cases before the EU judicature, and the Court will in principle not question the manner in which such discretion is exercised.[24] Interestingly, the ECJ approach in this respect seems to differ from the position taken by the EFTA Court in a recent judgment[25] that suggests, if interpreted *a contrario*, that by acting with undue delay in an infringement procedure, the EFTA Surveillance Authority may effectively violate the EEA agreement.

22. See para 44 of the Framework Agreement between the European Parliament and the European Commission of 20 Oct. 2010.

23. See the European Parliament's Report on the twenty-seventh annual report on monitoring the application of EU law (2009), adopted at its Plenary Session of September 2011 ("the Lichtenberger report").

24. Cf. A.G. Tizzano, stressing in his Opinion in Case C-472/98, *Commission* v. *Belgium*, [2002] ECR I-9741, that there is nothing wrong with the fact that, in deciding whether or not to initiate an infringement procedure, the Commission also takes into account the potential political and legal repercussions of a finding of infringement.

25. See para 68 of the judgment of the EFTA Court of 16 July 2012 in Case E-9/11, *EFTA Surveillance Authority* v. *The Kingdom of Norway*, nyr. See also para 45 of the judgment of the ECJ in Case C-49/11, *Content Services Ltd* v. *Bundesarbeitkammer*, 5 July 2012, nyr, illustrating that occasionally the ECJ seeks inspiration from the case law of the EFTA Court.

According to the Council's former *jurisconsulte* Jean-Claude Piris,[26] the purpose of the EU is "to help and strengthen its Member States, not to weaken and to abolish them". This is certainly true and should be a guiding principle for the Commission when exercising its role as guardian of the treaties. But it is only part of the truth. In his History of the Peloponnesian War and his Melian dialogue, Thucydides reminds us of the fact that "the strong do what they can and the weak suffer what they must". Bearing this in mind, the Commission should be aware that by enforcing the law, not only does it further the achievement of the policy objectives underlying the rule it enforces, but also it may help protect the weaker Member State against the stronger. This can only work if the independence of the Commission *vis-à-vis* the Member States, as enshrined in Articles 17(3) and 18(2) TEU, is fully maintained and if it acts impartially *vis-à-vis* Member States, that is to say regardless of their size and political, financial and economic weight. Already for that reason the idea of merging the posts of President of the European Commission and President of the European Council into an EU super-president, as some advocate because Article 15(6) TFEU only prohibits the President of the European Council holding a *national* office, may prove to be problematic, at least in practice, as one could argue that such a post has a built-in conflict of interest.[27]

26. Piris, *The Future of Europe – Towards a Two-Speed EU?* (Cambridge University Press, 2012), p. 147.

27. See M. Monti and Goulard, "Reconcilier les citoyens avec l'Europe", *Le Monde* 15 Feb. 2012. See also *EU Observer*, "Ministers ponder creation of EU super-president", 20 April 2012.