Introduction

Marise Cremona

This collection of essays derives from the course of specialized lectures given at the Academy of European Law in July 2009. The aim of the lectures was to examine different aspects of EU law enforcement, including court-based enforcement procedures at Union and national level but also looking at the broader non-court-based mechanisms and processes designed to promote compliance. This immediately raises the question of the relationship between, and the meaning given to, the concepts of 'compliance' and 'enforcement', both used in the title of this work. It will be helpful, in approaching the legally-oriented discussion in the remainder of the book, to bear in mind the contrasting approaches of scholars from the disciplines of political science and international relations explored by Lisa Conant in Chapter 1.

In the literature on compliance in the context of international legal regimes in general and the EU in particular, compliance is the more generic term, whereas enforcement has a more specific coercive meaning. A distinction is made between the two alternative compliance strategies of enforcement and management.[1] An enforcement strategy is based on the theory that states will sometimes have an interest in non-compliance and will tend to comply when the incentives to do so are higher than the costs of non-compliance. The enforcement strategy will therefore emphasize the need to increase non-compliance costs through coercion methodologies based on monitoring and sanctions. It might also be argued that the greater the degree of commitment and the greater the depth of cooperation required in a particular treaty system, the greater the incentive to renege on those commitments and the greater the need for enforcement.[2] Following this approach, an enforcement system which rarely has recourse to sanctions may reflect a relatively low level of commitment (less deep integration) in the specific treaty regime; conversely, a treaty regime that makes major demands on its members but rarely uses sanctions to promote enforcement is likely to be a weak or ineffective system.

A management strategy on the other hand, is based on the theory that non-compliance is not often the result of deliberate policy-choices by the state, but rather flows from failures in the system itself, such as rule ambiguity, or failures

[1] In addition to Conant in Chapter 1, for a helpful summary see J. Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union', 56 *International Organisation* (2002), at 609.

[2] G.W. Downs, D.M. Rocke, and P.N. Barsoom, 'Is the Good News about Compliance Good News about Cooperation?', 50 *International Organization* (1996), at 379.

in the State's capacity to manage compliance. The management strategy will thus emphasize problem-solving, capacity building, rule interpretation, and transparency. The distinction between these two approaches to compliance is useful in helping to analyse different processes and procedures. However the essays in this book reflect the argument that these strategies need not be seen as incompatible alternatives, but that on the contrary an effective compliance regime is likely to contain elements of both. Although seen by some as alternative approaches to compliance, in practice a system which combines elements of both, of which the EU is a good example, is most effective.

> In the EU, monitoring, sanctions, capacity building, rule interpretation, and social pressure coexist as means for making states comply. In the daily practice of the EU compliance system, these instruments are mutually reinforcing, demonstrating the merits of combining coercive and problem-solving strategies.[3]

The fundamental starting point for all discussion of compliance mechanisms within the context of the European Union legal order is a pair of principles: (1) that the primary responsibility for ensuring the implementation of Union law lies with the member states,[4] and (2) 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.[5] At the basis of all compliance procedures is the principle enshrined in Article 4(3) TEU. This so-called loyalty obligation not only supports obligations found elsewhere in the Treaties, it has also formed the basis for the development by the Court of Justice of specific obligations relating to the enforcement of Union law: for example the action for damages in breaches for Union law norms and other principles relating to the enforcement of Union 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 (enforcement and management approaches) and levels of enforcement, both at Union and national levels, 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. The EU system has been driven by the strength of its autonomous institutions, especially the Commission and the Court of Justice. Indeed, Snyder argued in 1993 that the 'new challenge of compliance' for the Union arising out of the single market programme of the

[3] J. Tallberg, *supra* note 1, at 614.

[4] Art 291(1) TFEU. '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.' EC Commission, Governance White Paper 2001, 25 July 2001, COM (2001) 428, p 25.

[5] Arts 17(1) and 19(1) TEU.

1990s required an integration of the administrative mechanisms applied by the Commission and the judicial measures administered by the Court of Justice.[6] To this one might add the effect of the recent enlargements of the EU, which has both highlighted the challenges of compliance and helped to suggest new compliance methodologies.[7]

In Chapter 2 Edoardo Chiti uses the term 'governance' to refer to the 'steering or guiding' instruments designed to complement coercive enforcement within the EU. He argues that compliance is 'not only an outcome, but also a practice': compliance 'does not refer to the simple result of obedience, but to the overall process through which obedience is gradually constructed'. This chapter examines the instruments designed to steer this compliance process, ranging from the essentially hierarchical to more horizontal methods based on learning, negotiation, and consensus-building, to assess the extent to which they represent 'new' forms of governance and some of the issues of efficacy and legitimacy that they raise. As Chiti comments, it is not yet possible to make a definitive assessment of the efficacy of these 'new' administrative compliance systems: the detailed empirical studies have not yet been done, a point made also by Conant.[8] Questions may be asked concerning the capacity of national administrations to participate fully in the emerging European administrative structures, the risks of regulatory capture, variable protection for private parties and risks of sectoral fragmentation within national administrations. Chiti ends with some reflections on the possible impact of the new Article 197 TFEU, the basis for EU action to support administrative cooperation and capacity building.

A second strand in our analysis of the EU system of compliance and enforcement is concerned with the level at which the compliance mechanism operates: the regional (EU) level or the national level, which may be referred to (as by Piqani in this collection) as centralized and decentralized models of enforcement respectively. Indeed, we can refine this distinction and distinguish between compliance systems that operate 'from above', those that operate 'from below' and those that operate at a 'horizontal' level.[9] Horizontal compliance takes the form of inter-state action at the regional or international level; this is the only mechanism available within some international systems such as the WTO, but is relatively unimportant (although available[10]) within the EU. Compliance 'from above', requires the ability

[6] F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993), at 19.

[7] U. Sedelmeier, 'Pre-Accession Conditionality and Post-Accession Compliance in the New Member States', in W. Sadurski, J. Ziller and K. Zurek (eds), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe*, RSCAS EUI 2005; J.T. Checkel, 'Compliance and Conditionality', Arena Working Paper WP 2000/18, <http://www.arena.uio.no/publications/> last accessed 12 December 2011.

[8] See also J.A.E. Vervaele, 'Transnational Cooperation of Enforcement Authorities in the Community Area', in J.A.E. Vervaele (ed), *Compliance and Enforcement of European Community Law* (1999).

[9] For this distinction, applied in the context of the WTO, see A. Tancredi, 'EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre?', 15 *European Journal of International Law* 933 (2004), at 959.

[10] Art 259 TFEU.

of the system's institution(s) to instigate compliance proceedings autonomously, as for example enforcement actions instigated by the European Commission. One of the Commission's primary tasks under Article 17 TEU is to 'ensure the application of the Treaties and of measures adopted by the institutions pursuant to them'. This duty is given expression, as far as formal proceedings are concerned, in Article 258 TFEU,[11] a procedure which Harlow and Rawlings argued in 2006 'has taken on a new lease of life, partly perhaps as a consequence of EU enlargement, demonstrating a much sharper cutting edge.'[12]

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 organizations 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 Court of Justice under Article 267 TFEU. Such enforcement actions have two stages: an administrative stage and a judicial stage. The administrative stage (the 'infringement procedure') itself is in three parts: a letter of formal notice from the Commission to the member state setting out its view that there may be a breach of an EU obligation, the observations in answer by the member state, and then—if it so decides—the Commission's reasoned opinion. Thus the administrative stage involves discussion between the Commission and the member state in an essentially bilateral procedure. The duty of cooperation between the member states and the Community institutions enshrined in Article 4(3) TEU (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 Court of Justice if the member state does not comply in time with the reasoned opinion.[13] As Sibylle Grohs points out in Chapter 3, the primary purpose of the Article 258 TFEU procedure is 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. In turn, the emphasis of the Court on the Commission's discretion[14] means that it would be

[11] Art 258 TFEU provides, 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, 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 of the European Union.'

[12] C. Harlow and R. Rawlings, 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure', 31 *European Law Rev* 447 (2006), at 448.

[13] Case C-317/92, *Commission v Germany*, [1994] ECR I-2039, para 5; Case C-422/92, *Commission v Germany*, [1995] ECR I-1097, paras 16–18.

[14] Case 416/85, *Commission v UK*, [1988] ECR 3127, paras 8–9. A. Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' 4 *EL Rev* 442 (1979); F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* 19 (1993), at 30.

difficult to challenge a Commission decision not to bring an action in a specific case, even if that appeared to be part of a systematic policy.[15] Over the last decade the Commission, while defending its discretion at each stage of an enforcement action, has attempted to show that its exercise of that discretion is not arbitrary by publishing its priorities.[16] 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 and in informing individual complainants of the reasons why a case might be discontinued.[17]

In Chapter 3 Sibylle Grohs provides an insight into how the procedure envisaged in the Treaty works in practice, from the perspective of a sector where enforcement against member states has been particularly important: environmental policy. Although the general procedures for handling complaints are the same across the Commission, the individual Directorates-General have different approaches, depending on the number and type of complaints they receive. In the field of environment, cases of alleged 'bad application' of Union law are relatively more frequent but are also harder to establish since, as Grohs points out, the Commission does not have inspectors that it can send to member states to verify conflicting claims *in situ*. Here again, it is negotiated compliance rather than Court action that is most important. Grohs's conclusion is that although the direct enforcement procedure led by the Commission will remain important, the Commission is also encouraging the improvement of enforcement procedures at national level, through national courts.

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. The next three chapters, by Dougan, Piqani, and Nollkaemper, indeed focus on different aspects of compliance seen from a national perspective. As Piqani says, 'The mandate conferred by the Union upon national courts to fully and correctly apply EU law and set aside national law when it conflicts with EU law is one of the many pre-emptive tools for avoiding non-compliance by Member States'.

Michael Dougan offers a rich analysis of both bases for the use of criminal sanctions to enforce EU law: first the ability of member states to choose to include in their national systems criminal penalties for the enforcement of EU law rules, and second the possibility of 'own sanctions', the possibility of criminal sanctions

[15] Actions bought by private litigants against the Commission for failure to act under former Art 232 EC, or for an annulment of the Commission's alleged decision not to proceed with a case against a member state have been rejected by the Court on the ground of the Commission's discretion: Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case C-87/89, *Sonito v Commission*, [1990] ECR I-1981.

[16] EC Commission, Governance White Paper 2001, 25 July 2001, COM (2001) 428, p 26; Commission Communication on the Better Monitoring of the Application of Community Law, COM (2002)725 final/4, p 11.

[17] 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.

at the national level being required directly by EU law itself. In the first case, under the *Greek Maize* case law,[18] a member state's choice of remedies is constrained by the principles of equivalence, effectiveness, and proportionality as well as non-discrimination. A key issue identified by Dougan is the relationship between this basis for criminal sanctions and the closely related *Rewe/Comet* case law concerning the member states' duty to ensure the effective judicial protection of individuals whose rights derive from the Union legal order.[19] Here we have two forms of decentralized enforcement—the public sanction and the private remedy; to what extent can member states meet their Article 4(3) TEU obligations of effective enforcement of Union law by facilitating private remedies?

In the second place, EU law may itself provide that criminal sanctions must be imposed at national level. In order to understand the complexity of the current position, Dougan takes us back to the debates over possible Community competence before the entry into force of the Lisbon Treaty, the evolution of the position both before and after the Maastricht Treaty, the *Environmental Crimes* and *Ship Source Pollution* rulings which established derived Community powers to adopt criminal enforcement measures,[20] and then the effects of the Lisbon Treaty, especially the new legal basis for establishing minimum criminal law measures in order to 'ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures'.[21] As he says, a number of questions remain over the relationship between the derived powers established through the *Environmental Crimes* and *Ship Source Pollution* rulings and the new express power granted by Article 83(2) TFEU. The interplay between these different constitutional frameworks for the imposition of criminal sanctions is also an important factor in considering the safeguards developed by the Court and based on fundamental rights, such as the principle of non-retroactivity, which offer a minimum level of judicial protection for individuals faced with criminal sanctions. As against the risk of application of different standards of judicial protection depending on the constitutional basis of criminal proceedings, Dougan argues that the Court-developed principles of judicial protection are potentially 'a powerful unifying force which is capable of overreaching the underlying constitutional complexities, so as to shield individuals . . . from significant and unjustified differences in the levels of judicial protection guaranteed to them under Union law.' However, as he also argues, real problems exist—from doctrinal uncertainties to broader issues such as the absence of direct external fundamental rights scrutiny (at least until the envisaged future accession of the EU to the European Convention on Human Rights).

The final two chapters in this collection consider the role of national courts in ensuring or inducing (to use the term adopted by Nollkaemper) compliance. Darinka Piqani focuses on national constitutional courts and in particular what

[18] Case 68/88, *Commission v Greece*, [1989] ECR 2965.

[19] Case 33/76, *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland*, [1976] ECR 1989; Case 45/76, *Comet BV v Produktschap voor Siergewassen*, [1976] ECR 2043.

[20] Case C-176/03, *Commission v Council*, [2005] ECR I-7879 and Case C-440/05, *Commission v Council*, [2007] ECR I-9097.

[21] Art 83(2) TFEU.

she sees as their role in facilitating compliance by member states. On the one hand the EU law mandate of constitutional courts (as all national courts), based on *Simmenthal*[22] and the *Rewe/Comet* case law,[23] is to ensure the full application of EU law, and on the other hand their national constitutional mandate is to uphold national constitutional provisions—even where in tension with EU law. One aspect of the constitutional courts' management of this dual role is to separate the questions of EU-compliance review and constitutional review. On the one hand, if EU-compliance is not characterized as a constitutional issue per se it may be ensured through ordinary courts as well as constitutional courts, and application of the *Simmenthal* doctrine need not be seen as a constitutional issue. On the other hand, where constitutional limits of both EU law and national law are at stake, constitutional courts have continued to assert the need for a possible review of the application of EU law, whether on grounds of fundamental rights, of limits to EU competence or (in the German Constitutional Court's *Lisbon* judgment) of 'national identity'. To what extent does this review pose a threat to compliance within the EU system? As Piqani points out, 'there is a discrepancy between what courts say and what they in fact do'. The language may speak of constitutional reservations, but in practice EU law itself is not disapplied. She sees this not as sign of weakness or failure of nerve, but rather of a willingness to accommodate and dialogue which—at least potentially and if taken seriously—may improve true compliance. Accommodation may take place via a constitutional critique of the national implementation of an EU measure, or by signalling the need for constitutional amendments. Courts may also play a role in 'judicial harmonization' even before the accession of a candidate state, and Piqani finds a positive correlation between the pre-accession disposition of constitutional courts and their post-accession willingness to reconcile constitutional law with EU law obligations.

André Nollkaemper's contribution in the final chapter assesses the contribution of national courts to compliance, making a comparison between EU law and international law. The value of the comparison rests in the 'common roots' of international and EU law, especially as regards reception into national legal orders, and in the fact that EU law may be seen as a particularly successful (in terms of compliance) form of integration, its techniques offering a possible model, despite the fact that 'there is only limited evidence that it as such has an influence on states or that states intentionally seek that model'. As this perhaps suggests, the classical EU law tools of compliance such as direct effect and primacy are not completely separated from or unknown to international law, although as Nollkaemper demonstrates, many of the classic theories of international law and international relations do not attribute much significance to courts as agents of compliance. One of the key differences, of course, lies in the insistence of the EU Court of Justice that questions concerning the relationship between EU law and national law are to be decided by EU law (and therefore by the Court of Justice itself). As regards international law, on the other hand, practice varies between states, this variation being both a

[22] Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629.
[23] See note 19.

cause and an effect of its relative weakness. While national courts tend, as regards both international and EU law, to insist on a constitutional reservation protective of fundamental constitutional principles, Nollkaemper argues that 'questions of ultimate authority are not decisive for explaining general patterns of compliance or non-compliance'—a conclusion that reflects Piqani's discussion of the role of constitutional courts in the previous chapter. It needs also to be remembered that EU law itself has an impact on the operation of international law within the legal systems of the EU member states, so that we need to think in terms of a triangular relation between national, international, and EU law.[24] From this point of view, by aligning the positions of at least the EU member states as regards at least some international treaties, the EU Court of Justice has an impact on compliance with international as well as EU law.

[24] S. Besson, 'European Legal Pluralism after *Kadi*', 5 *European Constitutional Law Review* (2009), at 237.