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Correct Application of EU Law by National Public Administrations and Effective Individual Protection: the SOLVIT Network

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Abstract

This article aims at developing a two-fold analysis. First of all, it discusses the threat that national administrations pose to the integration of the internal market when they infringe EU law in individual decisions. Secondly, it focuses on the SOLVIT network, which provides an alternative to national Courts in protecting the citizens and undertakings that are adversely affected by those infringements. Attention will be paid to the SOLVIT structure as a 'cooperation network', to its activity and to how it relates to both the European Commission and the European Ombudsman. In the final part, some conclusions will be drawn as to the effectiveness of the mechanism.

1 Introduction

Over the last ten years, the role played by the decisions of national public administrations in the integration of the internal market has become a matter of increased interest to both European institutions[2] and Member States.[3] Since the correct application of EU law by national authorities in individual cases is acknowledged as a key issue in the European integration process,[4] different mechanisms have been put forward, aimed at preventing unlawful decisions by those national authorities and

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[2] N. Diamandouros, 'The European Ombudsman and the application of EU law by the member States' [2008/2] *REALaw*, 5-37. Report from the Commission, 26th annual report on monitoring the application of community law – 2008, of 15 December 2009, COM(2009) 675 final.

[3] See, in this sense, the Public Procurement Network at http://www.publicprocurementnetwork.org/.

[4] See, footnote n. 12 and A. Rosas, 'Ensuring uniform application of EU law in a Union of 27: the role of national courts and authorities', speech at the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries – Rethinking good administration in the European Union – Strasbourg, 14-16 October 2007, at https://infoeuropa.eurocid.pt/.

also at resolving the actual problems when they occur. This is the aim of the SOLVIT network, set up in 2002, to provide a mechanism for the informal resolution of disputes between citizens (or undertakings) and those national public administrations which allegedly acted in breach of EU law. SOLVIT consists of a network of national Centres which are connected by a database run by the Commission. Its structure, which is based on the principle of cooperation between different levels of administrations, is rather complex (as opposed to the simplicity of its informal decision procedure). This unique mechanism provides a new way of 'governing' the ongoing challenges and problems of the internal market. Since its inception, despite the non-binding nature of its decisions, it has been offering effective protection to European citizens (and undertakings) against national administrations; at the same time, it has been fostering the development of a common (European) administrative culture, based on the correct application of EU law and on the more general principles of good administration.

2 National Public Administrations and the Internal Market: Introductory Remarks

It is commonly acknowledged by the administrative law community that the exercise of the rights and liberties that the EU Treaties confer on individuals can in practice be frustrated by ill-founded decisions of national public administrations (PAs). What is less acknowledged, however, is that unlawful individual decisions of national public administrations can also result in a major threat to the correct functioning of the internal market and to its effective integration.

Citizens and undertakings wishing to take up their free movement opportunities, normally, have to address themselves to national public administrations in order to have their professional qualifications recognised, to be issued an authorization to carry out an economic activity, or to be granted permission to market a product, and so on. The competent administration might make a decision which is not in compliance with internal market rules.

The unlawful individual administrative decision results in an obstacle (which we refer to as 'decisional' obstacle) to internal market integration; an obstacle which 'works' at a micro level, namely that of the individual being prevented from freely moving and working throughout Europe.

For the purpose of this article, a further clarification is required.

A public administration's decision conflicting with the EU can be deemed as a 'decisional' obstacle even when the national regulatory framework is not in compliance with EU law and the administration concerned is then 'lawfully' applying an unlawful national regulation. Although in this case the internal market problem is in primis structural and is caused by a

national regulatory barrier, nevertheless, it must be remembered that PAs are under the obligation to ensure observance of EU law and they have to disapply national regulations which conflict with it.

The correct application of EU law by national public administrations has been clearly and expressly indicated by the European Commission as crucial for the enhancement of a more integrated and well-functioning internal market.[5] Among its proposals[6] for a new 'European governance', the Commission indicates the strengthening of administrative capacity at a national level as a key part of its strategy for a better application of EU law. In order to achieve this objective, the Commission strongly advocates that cooperation between national administrations should be fostered.

The misapplication of internal market rules by public administrations ultimately raises major issues regarding individual protection. This is all the more true when an individual has to face an administration of a Member State other than his own and when the case involves small claims[7] that are very unlikely to be brought before a Court of a different Member State. Moreover, the long and costly Court process might not provide effective protection, especially within specific areas of the internal market or in situations where an immediate decision is needed.

It is within this context, that the Commission adopted the Communication *Effective problem solving in the internal market: 'SOLVIT'*.[8] The Commission set up an on-line database to connect a network of already existing Co-ordination Centres (one for each Member State) in a unified system (SOLVIT). The Centres had been established in application of the *Single market action plan* (1997),[9] to help citizens and businesses that faced problems resulting from alleged misapplication of internal market rules by public administrations in a Member State other than their own.

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5 Commission Recommendation, of 29 June 2009, on measures to improve the functioning of the single market, 2009/524/EC, of 7 July 2009, OJ L 176, passim.

6 Commission of the European Communities, White Paper on European governance, of 25 July 2001, COM(2001) 428 final, 25 ff.

7 The Commission stresses that: 'Article 3 of the Treaty sets out the aim of abolishing all obstacles to free movement of goods, persons, services and capital between the Member States to create what is known as an Internal Market. Citizens and businesses, particularly small businesses, alike would benefit if there were a way of resolving informally the problems which arise when rules intended to achieve that aim are not applied correctly'. Recommendation on principles for using SOLVIT – the Internal Market Problem Solving Network, C(2001)3901, of 7 December 2001, OJ L 331, 2.

8 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, of 27 November 2001, Effective Problem Solving in the Internal Market ('SOLVIT'), COM(2001) 702 final.

9 See, Communication from the Commission, of 4 June 1997, Action plan for the single market, CSE (97) 1 final.

SOLVIT is designed to provide for a quick and cost-effective, although not binding, system for the settlement of disputes. Its operation is based on the 'mutual cooperation' between different levels of administration: the national Centres participating in the network, the national administration which allegedly infringed EU law, and ultimately the European Commission.

SOLVIT was intended as a response to what we have been referring to as 'decisional' obstacles, in cases where, due to the particular nature of the dispute, a Court intervention would not be an adequate redress mechanism.

According to SOLVIT background documents, cases where the 'decisional' obstacle is the consequence of a regulatory barrier fall outside its scope of intervention.[10]

In practice, however, the Centres have repeatedly dealt with cases of non-compliance with EU law by national regulations. Quite interestingly, they often succeeded in convincing the administration to act in accordance with the principle of supremacy of European law and consequently to disapply the unlawful regulation. Even more interestingly, following the Centres' recommendations, Member States have sometimes amended national rules in order to make them compliant with EU law. In this respect, as will be explained later, SOLVIT has played a supporting role to that of the Commission under Article 258 TFEU.

In sum, this unique cooperation arrangement, which in fact is a unified system integrated through an on-line tool, is aimed at both tackling and preventing 'decisional' obstacles. Moreover, SOLVIT works at different levels. It helps to resolve a specific dispute due to an (unlawful) administrative decision. At the same time, it fosters the correct application of EU law by PAs, even in cases where they have to act in disregard of national regulations. In order to prevent decisional obstacles from occurring, SOLVIT fosters more structural changes in national administrations' activity and it promotes amendments in the national regulatory framework, which is often the very cause of the unlawful administrative behaviour.

3 The Incorrect Application of EU Law by National Public Administrations as an Obstacle to European Integration: From Prevention to Removal

Over the last few years,[11] the European Commission has constantly acknowledged that national administrations' activity plays an

[10] In this respect, see also: F. Cafaggi and H. Muir Watt, 'The Making of European Private Law: Regulation and Governance Design', *European Governance Papers*, at http://www.eui.eu, 27-28.

[11] 'The Single Market will only deliver its full potential if barriers that remain – and, of course, any new ones that emerge – are removed. This may require legislative action to fill gaps in the Single Market framework, but it also calls for a significant change in national administrations' attitudes towards the Single Market'. Communication from the Commis-

essential role for European integration (the correct application[12] of EU law depends, among other things, 'on national authorities taking correct decisions'[13]); hence, the strengthening of the administrative capacity to implement Union law at a national level is crucial in order to foster a 'better governance'[14] of the internal market.

Quite interestingly, Article 197 TFEU,[15] under the heading of 'administrative cooperation', makes it clear that 'the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, is to be regarded as a matter of common interest'. Consequently, the Union has to support Member States. In this sense, the Commission specifies that the 'Union and national administrations, working together, should develop a common administrative culture which offers a high level of service and allows problems to be quickly resolved'.[16]

Public administrations acting in breach of EU law raise a barrier to European integration whose effects and impact on the internal market vary depending on different circumstances: namely, on whether the misapplication of an internal market rule is an 'administrative practice', commonly followed throughout the country, or is one unlawful individual decision; on whether the administration concerned is acting in application of an unlawful national rule or, on the contrary, the national regulatory framework is consistent with EU law. Needless to say, national public administrations can affect internal market integration when they act in breach of the general

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sion, of 4 June 1997, Action plan for the single market, CSE (97) 1 final, 6; Commission Recommendation, of 29 June 2009, on measures to improve the functioning of the single market, 2009/524/EC, of 7 July 2009, OJ L 176, passim.

12 According to the European Commission, the correct application of EU law is one of the key issues for enhancing the European project in the 21st century: 'the European Union's success in achieving its many goals as set out in the Treaties and in legislation depends on the effective application of Community law in the Member States'. Communication from the Commission, of 5 September 2007, A Europe of results – applying community law, COM(2007) 502 final, I introduction. See, also, Communication from the Commission, of 20 November 2007, A single market for 21st century Europe, COM(2007) 724 final. On the topic,cf., P. Nicolaides, 'Enlargement of the EU and effective implementation of community rules: an integration-based approach', EIPA (1999), Working Paper 99/W/04, at www.eipa.nl/index.asp.

13 Communication from the Commission, of 5 September 2007, A Europe of results – applying community law, COM(2007) 502 final, 6.

14 On the use of alternative 'governing techniques',cf., E. Szyszczak, 'Experimental governance, the open method of coordination', [2005] *European Law Journal*, 12, 4, 486.

15 Newly introduced by the Treaty of Lisbon.

16 Communication from the Commission to the European Parliament and the Council, The strategy for Europe's Internal Market, COM/99/0624 final, operational objective 1 (Citizens 3), 5.

principles of 'good administration', for instance, when they delay or avoid their response to an application.

With regard to the first instance, it is well established[17], that when the misapplication of an internal market rule or principle (by national public authorities) is 'to some degree, of a consistent and general nature',[18] the Member State concerned can be held responsible for failure to fulfil its obligations in accordance with Article 258 TFEU, even if the applicable national legislation complies with that rule or principle.[19] For example, (according to the Court of Justice of the European Communities) Italy[20] failed to fulfil its obligations under the freedom of movement regulations,[21] because State schools, when recruiting teaching staff, regularly did not take in to account the professional experience previously acquired by EU nationals in other Member States. By the same token, the Federal Republic of Germany[22] was held in breach of Article 28 EC (now 34 TFEU) due to the competent authorities' practice of classifying as 'medicinal products' preparations lawfully produced or marketed as food supplements in other Member States, because they exceed a specific daily amount of vitamins and minerals.

In these cases, the decisional obstacle raised by public administrations' activity is considered equivalent to a regulatory barrier, as it has similar effects.[23]

On the contrary, if a regulatory barrier does exist within a Member State, national public administrations cannot rely on it to justify their unlawful individual decisions. Public administrations have to ensure the observance

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[17] Case C-21/84 *Commission* v *French Republic* [1985] ECR 1355. The French Republic was considered having failed to fulfill its obligations under Article 28 EC (now 34 TFEU), because of the French postal administration's practice of refusing to approve postal franking machines from another Member State, without proper justification. See also, Case C-156/04 *Commission* v *Greece* [2007] ECR I-4129, par. 50.

[18] Here the Court is 'describing the nature of an administrative practice; and it is in this context that the concepts of generality and consistence must be understood'. L. Gormley, 'Protectionist administrative practices', [1985] *European Law Review*, 451.

[19] Case C-278/03 *Commission* v *Italy* [2005] ECR I-3747, par. 13; The Italian Republic was held responsible of having failed to fulfill its obligations under Article 39 EC (now 45 TFEU), because of the administrative and contractual practices applied by some public universities, which resulted in the non-recognition of the acquired rights of former foreign-language assistants, even though such recognition was guaranteed to all national workers. See, also Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, par. 47.

[20] Case C-278/03 *Commission* v *Italy* [2005] ECR I-3747.

[21] Even though the applicable national legislation complied with those regulations.

[22] Case C-387/99 *Commission* v *Germany* [2004] ECR I-3751.

[23] However, on the particular nature of infringement proceedings concerning administrative practices, see, A. Sikora, 'Administrative practice as a failure of a member State to fulfil its obligations under community law', [2009] *Review of European Administrative Law*, 1, 4.

of EU law[24] and they have to disapply national law provisions which conflict with it. In fact, obligations arising under EU law provisions 'are binding upon all the authorities of the Member States and it is not only the national Courts, but also administrative bodies, which are under a duty to set aside any national rule which is an obstacle to the full effectiveness of Community law'.[25]

According to the European Commission documentation[26] and to Article 197 TFEU,[27] Member States have the duty to prevent 'decisional' obstacles and they have to foster the correct application of EU law.

One way to do so is by making initial and life-long training in EU law available to civil servants.[28] More importantly, however, cooperation between the competent internal administrations and 'cross-border cooperation' should be enhanced.[29]

It is commonly acknowledged that cooperation amongst public administrations has become a key feature of the unique system of European governance.[30] In this sense, internal market regulations (such as the Services Directive[31] and the Directive on the recognition of professional qualifications)[32] impose administrative cooperation and exchange of information obligations between national and European administrations.

In order to improve communication and the exchange of information between Member State administrations the Commission has launched the

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[24] Under certain circumstances, this obligation reaches the point that the authority has to review an administrative decision that became final by virtue of a judgment delivered by a national Court. Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.

[25] Case C-103/88 *Fratelli Costanzo* [1989] ECR 1839; Case C-198/01 *CIF* [2003] ECR I-8055.

[26] Commission Recommendation, of 29 June 2009, on measures to improve the functioning of the single market, 2009/524/EC, of 7 July 2009, cit., passim.

[27] Article 197 TFEU, n. 2 stipulates that 'the Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include (.....) supporting training schemes'.

[28] Communication from the Commission, of 5 September 2007, A Europe of results – applying community law, cit., 6.

[29] Commission Recommendation, of 29 June 2009, on measures to improve the functioning of the single market, cit., passim.

[30] A.A.H. Turk and H.C.H. Hofmann, 'An introduction to EU administrative governance', in H.C.H. Hofmann and A.H. Türk (edited by), *EU administrative governance* (Cheltenham 2006) 1 and ff., Commission of the European Communities, White Paper on European governance, of 25 July 2001, COM(2001) 428 final, 25 f.f.; Commission Staff working document, of 20 November 2007 SEC(2007) 1521, The single market: review of achievements accompanying document to the Communication from the Commission, A single market for 21st century Europe, COM(2007) 724 final, 5.3.

[31] Directive 2006/123/EC of 12 December 2006 on services in the internal market, Chapter VI.

[32] Directive 2005/36/EC, of 7 September 2005, Article 8.

Internal Market Information System (IMI)[33] an electronic tool based on a single user interface common to all Member States,[34] which is hosted and maintained under the responsibility of the European Commission. The system is designed to allow new forms of administrative cooperation that would not be possible without the support of an electronic database.

Fostering cross-border administrative cooperation, exchanging relevant information and enhancing civil servants' awareness of European regulations have been acknowledged by the Commission as crucial steps that both Member States and the Commission should take in order to prevent 'decisional' obstacles.

However, if a problem occurs and the administration does take an unlawful decision, the correct application of EU law requires that the affected individual is given access to an effective and adequate redress mechanism.

The term 'adequate' is used to stress that a long and costly Court process is not always the right response to an internal market problem. Citizens and undertakings might need a quick response, or might be unwilling to spend money on a cross-border Court action.

In this sense, the setting up of out-of-Court mechanisms of redress and in particular the setting up of 'specific networks of Ombudsmen or mediators'[35] was proposed by both the Commission and legal scholars.[36] The path that was actually followed by the Commission was slightly different and more informal than that of creating a network of national Ombudsmen dealing with these specific issues. In particular, it chose to rely on pre-existing national coordination Centres, set up in accordance with the provision of the 1997 *Internal market action plan*,[37] Centres aimed at finding swift and pragmatic solutions to problems which citizens and businesses encountered in exercising their rights under the internal market rules. The Commission designed a database to connect the Centres and the result was a new integrated system called SOLVIT.

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33 All the relevant information at http://ec.europa.eu/internal_market/imi-net/index_it.html.

34 Plus EFTA countries.

35 Commission of the European Communities, White Paper on European governance, of 25 July 2001, COM(2001) 428 final, 25 ff.

36 The European Ombudsman Annual Report 2005, 119, at http://www.ombudsman.europa.eu/: 'M. Poiares Maduro, Advocate-General at the Court of Justice of the European Communities, was the keynote speaker in this session. In his view, ombudsmen have two clear institutional advantages over Courts as far as the application of EU law is concerned: firstly, in an area such as free movement, judicial redress is not effective, because of the expense and the length of time involved. Ombudsmen are therefore particularly well placed to address citizens' concerns in this area; secondly, ombudsmen can perform a key role in educating public authorities about their obligations regarding the implementation of EU law. They have the moral authority to encourage the public administration to give full effect to EU law provisions'.

37 Communication Action plan for the single market, of 4 June 1997, CSE (97) 1 final.

4 SOLVIT: Cooperation Between Different Levels of Administrations

In the Communication *Action plan for the single market*[38] (of 4 June 1997), the Commission (in accordance with the 1996 Council Resolution on *cooperation between administrations for the enforcement of legislation on the internal market*[39]) proposed that 'each Member State should designate a coordination centre within its administration responsible for ensuring that problems raised by other Member States or the Commission are solved by the national or regional authorities directly concerned within strict deadlines'. In other words, a 'problem solving network' was to be set up, which subsequently should have been bound by 'telematic links developed under the second interchange of data between administrations (IDA) programme' (which was launched with two Decisions of the European Parliament and of the Council, of 12 July 1999[40]).

In the year 2001, the Commission adopted the Communication *Effective Problem Solving in the Internal Market: 'SOLVIT',*[41] whose aim was to improve the efficiency of the 'problem solving network'.

In order to do so, it drafted a complex system made up of three 'pillars': namely, the pre-existing cooperation network, an on-line data base connecting the Centres, and principles for Centres to follow when dealing with the cases (which are set out in the 2001 Recommendation on *principles for using SOLVIT*).[42]

Whereas the structure of the SOVIT network is rather complex, its activity is simple and informal.

To be more specific, one should note that national Centres are part of the Member States administrative structure and are subject to the law of Member States; while the on-line data base (which connects the Centres) is managed and controlled by the Commission. Hence, one might conclude it has a structure which is 'centralized' and 'decentralized'at the same time. Moreover, SOLVIT is both an on-line alternative dispute resolution (ODR)

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[38] Op. cit.

[39] Of 8 July 1996, (96/C 224/02), OJ C 224 of 1 August 1996.

[40] Decision 1719/1999/EC of the European Parliament and of the Council of 12 July 1999 on a series of guidelines, including the identification of projects of common interest, for trans-European networks for the electronic interchange of data between administrations (IDA); and Decision 1720/1999/EC of the European Parliament and of the Council of 12 July 1999 adopting a series of actions and measures in order to ensure interoperability of and access to trans-European networks for the electronic interchange of data between administrations (IDA).

[41] Cit.

[42] Recommendation of the Commission on principles for using SOLVIT – the Internal Market Problem Solving Network, of 7 December 2001, OJ L 331.

mechanism[43] and a cooperation network between national administrations, which is aimed at solving individual problems, but also at improving the administrative EU law implementing capacity at national level, and consequently at fostering the correct application of EU law.

This particular structure, based on mutual cooperation and on-line techniques, allows for a decisional procedure, which is easily accessible, free of charge and which offers a quick solution to internal market problems.

As stated above, the entire system draws on the principle of mutual cooperation, which in this case works at three different levels: at a cross-border level (between the two Centres involved in the decision procedure); at a national level (between the Centre and the national administration, which allegedly acted in breach of EU law) and at a supranational level (between the Centres and the European Commission).

In the first form of cooperation, the Centre in the Member State of the applicant (Home Centre) on receiving a complaint has to make a preliminary assessment; the Centre of the Member State in which the cross-border problem occurred (Lead Centre) has to take steps to resolve the problem.

More specifically, the applicant (without having to meet any particular requirement as to standing) can submit the case to his Home Centre (in his own language).

The Home Centre verifies whether the case could be better resolved by other means (such as, for example, the Euro Info Centres Network) or whether legal proceedings would be more appropriate. The Centre also ascertains whether the problem falls within the scope of the SOLVIT mechanism. In this regard, it has to verify whether the problem has a cross-border dimension, whether it involves the application of internal market rules and a dispute between an individual and a national public administration.

If the claim is, prima facie, well founded, and it is not already the subject of legal proceedings, the Home Centre forwards the case to the Lead Centre by entering it into the database and making all the relevant information available.

The Lead Centre verifies whether there has actually been a breach of EU law. Its course of action can be twofold. On the one hand, it can dismiss the case and give reasons for the rejection. On the other hand, it can confirm acceptance of the case, and then it is responsible for resolving the problem, by *cooperating* with the public administration concerned (within 11 weeks).[44] To be more precise, the LC proposes a solution which is not binding on the administration (or on the applicant). The final decision is taken by the national administration, to which the actual solution of the problem is due. When a solution is found, the Lead and the Home Centres should confirm their agreement and inform the complainant.

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[43] On the advantages and problems related to the use of ODR, see, J. Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge 2009) passim.

[44] In exceptional cases, the two Centres may agree to extend it up to other four weeks.

Cooperation between national administrations is the very principle that governs the overall system. This cooperation is significantly facilitated by the shared data-base. The on-line tool makes the recourse to SOLVIT easier for the individual, who can readily submit a complaint and interact with the national Centre. Furthermore, it places SOLVIT in the context of the various Commission initiatives aimed at improving electronic cooperation among national public administrations: the already mentioned IMI, and the project on interoperability solutions for European public administrations (ISA).[45]

SOLVIT Centres cooperate among themselves and with national public authorities. However, the Centres also work in strict interaction with the European Commission.

In practice, the role of the Commission in relation to the system involves the management of the data-base[46] and of the web-site (through which citizens are informed and can submit their complaints); however, the Commission is not by any means involved in the problem solving process.

According to the 2001 SOLVIT background Recommendation,[47] the Commission is also responsible for ensuring that 'all proposed solutions should be in full conformity with Community law'. And, in this respect, in 2004 it adopted a staff working document[48] aimed at setting out in operational terms the approach to exercise its activity. Letter C) par. 6 of the staff working documents specifies that, 'the DG internal market will organise periodic evaluations of the performance of SOLVIT network including the range of solutions implemented in particular to check for any evident problems'. Moreover, letter B) par. 5 states that 'the parties to the proposed solution retain all their legal rights including the possibility of complaining to the Commission that they are not satisfied with the proposed solution or lack of solution'.

The wording of this 2004 Document provides that the Commission should exercise a control activity over the network, however, in practice, the evaluations carried out and the complaints that are indeed referred to the Commission do not have any legal consequences.

On the contrary, the Commission works in cooperation with the Centres to facilitate their activity. It provides advice and assistance or any relevant information. Moreover, as we will see in paragraph 6, the Commission cooperates with the Centres in order to tackle cases of non-compliance of national regulations with EU law.

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[45] At http://ec.europa.eu/isa/programme/index_en.htm.

[46] The SOLVIT Support Team maintains the database in good working order and provides training and explanatory material.

[47] Recommendation on principles for using SOLVIT – the Internal Market Problem Solving Network, C(2001)3901, of 7 December 2001, cit., 1.

[48] Setting out the approach for assessing the conformity of solutions proposed by the SOLVIT network with Community law, (2004), of 17 September 2004, SEC(2004) 1159.

All in all, it is necessary to stress that the relationship between SOLVIT and the European Commission can also be seen from a different perspective. If the Commission cooperates with SOLVIT in its problem solving activity, SOLVIT for its part cooperates with the Commission to reduce its workload in relation to Article 226 EC (now 258 TFEU). This second form of cooperation will be the subject of paragraph 6.

5 Internal Market Problems and SOLVIT Intervention: Some Examples

The SOLVIT Network has been set up to help citizens and businesses when they run into a 'cross-border problem'; namely, 'a problem confronting an individual or business in a Member State involving the application of internal market rules by a public authority in another Member State'.[49]

SOLVIT intervention is particularly significant within specific areas of the internal market, where quick and/or cost effective solutions are needed. In particular, Commission statistics[50] show that 28% of the cases handled are social security cases, 22% involve the recognition of professional qualifications, and 20% concern free movement of persons and European citizenship. Problems also occur in relation to market access for products, access to education, employment rights, motor vehicle registration, etc.

A closer look at the cases the network has dealt with[51] indicates that the vast majority of them involve 'cross-border problems' related to maternity benefits, pensions, or recognition of health insurance rights. In particular, they involve situations where citizens of a Member State, who have been working in another Member State for a period of time, are not allowed to join their national health insurance system, because they paid part of their contributions in the host Member State. At the same time, cases involve situations where contributions to the pension scheme of the host Member State are not taken in to account in the home Member State, to the effect that citizens are refused payment of their pension allowances. SOLVIT Centres also

[49] Recommendation on principles for using SOLVIT – the Internal Market Problem Solving Network, cit., 2.

[50] 2008 Report, Development and performance of the SOLVIT network, at http://ec.europa.eu/solvit/.

[51] SOLVIT cases are currently published on the Commission web-site, with a brief description of the problems raised by the applicants and of the actions taken to resolve them. In order to have a wider picture, this author had to rely on the collaboration of officials from national Centres.

helped to enforce cross-border patient's rights under the European health insurance scheme.[52]

Recognition of professional qualifications is one of the other main policy areas in which SOLVIT cases occurred. Indeed, cases have been resolved where fully qualified professionals, who wanted to open a branch of their business in another Member State, had their applications rejected by the competent authorities, on the grounds that their diplomas were not in compliance with the relevant host State regulations.

Various SOLVIT cases involve the correct application of Article 28 EC (now 34 TFEU) and of the mutual recognition principle. More specifically, SOLVIT facilitated market access of products legally produced and sold abroad, when that access had been refused due to a particular ingredient present in the product, or due to the lack of certain certificates required by the legislation of the host State, and so on. Other cases involve discrimination against migrant workers in the access to schools, who were required to pay school fees that nationals did not have to pay. In other cases, SOLVIT Centres helped to resolve a public procurement problem by addressing mistakes in the awarding procedure.[53] They also facilitated the recognition of permanent residence rights of citizens residing in a Member State for more then five years, when the authorities had unlawfully requested that they proved they possessed sufficient financial resources or produced a contract of employment.

At times, SOLVIT Centres have tackled cases of maladministration due to a misunderstanding about the procedure to be followed or, more frequently, due to the fact that a public administration avoided replying to an application.

SOLVIT is aimed at resolving individual problems caused by 'decisional obstacles' caused by public administrations' incorrect application of European rules and principles in a cross-border dimension, when, because of the particular nature of the situation, the recourse to a national Court would (or could) be ineffective.

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[52] An Italian and an Austrian citizen were on holiday in the Netherlands when they had to undergo an urgent medical treatment. Upon return home they received invoices from the Netherlands and they were expected to pay for the medical services. SOLVIT contacted the hospitals and the invoices were redirected to the national heath authorities.

[53] The tourism service of one of the French overseas territories launched a public call for tenders inviting interested parties to submit offers to provide services. More details could be requested by postal letter or by fax. A Belgian consultant interested in participating submitted a request for the details by fax but never received the necessary documents to enable him to submit an offer. SOLVIT France intervened with the relevant authorities, which admitted that there had been mistakes in the procedure. Consequently, they annulled the initial call and launched a new procedure to allow all companies to participate on equal terms.

In accordance with SOLVIT background documents,[54] Centres should dismiss cases that do not fit this description; and, in particular, they should not deal with cases where the individual problems are ultimately caused by a national regulatory barrier.

We have to stress, however, that in practice quite the opposite happens. Interestingly, SOLVIT intervention has exceeded the ambit outlined by the Commission's documentation. In the words of the *Dassonville*[55] judgment, the network has actually been dealing with all the decisional obstacles that are 'capable of hindering, directly or indirectly, actually or potentially', European integration.

To be more specific, Centres have decided cases even when the situation was not 'cross-border'. Consequently, they have acted like national Ombudsmen, dealing with cases of misapplication of national regulations. To look at one example, a Sicilian municipality (that of Niscemi) refused to certify a photocopy of a claimant's identity card because, under Italian legislation, citizens are entitled to self-certify their legal status. The refusal took place even though the claimant's future employer in Germany required the certificate in question. The Centre was able to solve the problem by pointing out (and convincing the PA concerned) that self-certification is provided for by the Italian legislation as a service to its citizens, and that they are not bound to avail themselves of such a possibility.

By the same token, Centres have accepted cases where the entity, which allegedly acted in breach of EU law, could not be considered a 'public authority' in accordance with national legislation. An example of this kind of case involves Romanian church authorities. A French citizen complained about discriminatory entry fees for tourists to Romanian monasteries. The ticket price for non-Romanians was twice as high as that for Romanian citizens. As this policy was contrary to EU principles, the Romanian SOLVIT Centre persuaded the church authorities to establish non-discriminatory entry fees for the monasteries.

Most importantly, Centres have been tackling structural problems due to an unlawful national regulatory framework. These cases, referred to as SOLVIT PLUS, deserve closer attention and will be the subject of the following paragraph.

According to the Commission Annual Reports[56] on SOLVIT, the fact that a large number of complaints which are outside its scope are still referred to the network, is one of the main problems affecting the system. In 2008,

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[54] Recommendation on principles for using SOLVIT – the Internal Market Problem Solving Network, cit.; and Communication from the Commission, Effective Problem Solving in the Internal Market ('SOLVIT'), cit.

[55] Case C-8/74 *Dassonville* [1974] ECR I-837.

[56] All the Reports can be found on the SOLVIT web site: http://ec.europa.eu/solvit/.

the Commission published a staff working document[57] containing an action plan for the streamlining of a whole range of existing information and assistance services including SOLVIT, which should bring about a better filtering of cases at the point of entry.

It is undeniable that the large number of non-SOLVIT cases dealt with by the network is an obstacle to its effectiveness, especially since Centres generally remain understaffed. Despite this, it nonetheless shows the important role that SOLVIT is playing for European integration, in particular, for the growth of a common administrative culture based on the correct application of EU law and of the more general principles of good administration.

6 SOLVIT PLUS Cases and Article 226 EC (now Article 258 TFEU)

SOLVIT was set up to deal with 'individual' problems caused by administrative misapplication of internal market rules. More specifically, a typical SOLVIT case involves a misconduct by an administration when the national regulatory framework does conform to EU law. SOLVIT Centres are required in principle to dismiss cases where the individual-administrative problem 'hides' a more structural one. Nevertheless, the Centres have developed a different practice, by agreeing to deal with and to decide cases where the 'internal market problem' was, on the contrary, caused by a national barrier raised either by a specific regulation or by an unlawful administrative practice.

In cases such as these (referred to as SOLVIT PLUS cases),[58] SOLVIT Centres resolved the individual problem by either getting the administration to disapply the concerned unlawful regulation or to move away from the unlawful practice. Moreover, the Centre reported the issue to the relevant national authorities to have the specific regulation amended or to have the practice changed by the issuing of specific guidelines.

Overall, with SOLVIT PLUS cases the Centres have been playing an important role for the integration of the internal market by helping to resolve structural problems and to remove regulatory barriers. In practice, they have been playing a role complementary to that of the Commission under Article 226 EC (now 258 TFEU).

The importance of this role has been acknowledged by the Commission itself. One of the key features of the new internal market governance, which the Commission has indicated for the 21st century, is the search for a more efficient management of infringements; the recourse to infringement

[57] Action plan on an integrated approach for providing single market assistance services to citizen and business, of 8 May 2008, SEC(2008) 1882.

[58] A list of SOLVIT PLUS cases is available on the SOLVIT web-site and also on the annual Reports.

proceedings should be reduced, inter alia, by fostering the use 'of alternative problem solving mechanisms and preventive measures'.[59]

In the 2002 Communication on *Better Monitoring of the application of Community law,*[60] the Commission[61] indicates SOLVIT as one of those mechanisms, whose use should be increased when the case at issue does not qualify as a priority one. In this respect, the 2004 Staff working document *setting out the approach for assessing the conformity of solutions proposed by the SOLVIT network with Community law*[62] specifies that the Commission would work in strict cooperation with SOLVIT, by referring to it minor infringement cases: 'for non priority suspected infringements, the Commission services can decide to refer complaints it has received to SOLVIT with a view to finding a rapid and pragmatic solution on the condition that complainants have accepted beforehand that their identity will be divulged to the SOLVIT Centres involved'.[63]

Another point is worth making. In 2008, the Commission launched a Pilot Project[64] aimed at fostering a more efficient and effective dialogue between Member States (more specifically Member States Contact Points) and the Commission when dealing with inquiries and complaints in relation to national breaches of EU law. In other words, it is aimed at fostering the collaboration between the Commission and Member States at a pre-infringement stage by way of a newly developed IT system (The EU Pilot IT application).

SOLVIT is expressly taken into consideration by the Pilot when the case at issue involves a cross-border problem faced by an individual due to the misapplication of an internal market rule by a national PA. In this respect, the Pilot reads as follows: 'should such issue be submitted to the Commission, and should the Commission wish for some clarification of the issue to be obtained from the Member State the relevant service will submit the issue

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[59] Communication from the Commission, A Europe of results: applying community law, cit., 8.

[60] Of 11 December 2002, COM(2002)725 final.

[61] Legal scholars have also already highlighted the importance of fostering alternative means of redress in order to reduce some of the workload of the Commission when dealing with infringement cases: 'the most effective way for the Commission to deal with Article 226 complaints could be to forward them to a non judicial authority, such as an Ombudsman, in the relevant Member State. This way of handling complaints would promote decentralization in enforcement, whilst not obliging the complainant who has chosen a non-judicial route to take the grievance to a national court'. I. Harden, 'What future for the centralized enforcement of community law?' [2002] *Current Legal Problems,* 512.

[62] Of 17 September 2004, SEC(2004) 1159.

[63] Commission Staff working document setting out the approach for assessing the conformity of solutions proposed by the SOLVIT network with Community law, cit., 4.

[64] EU pilot on Community law: Guidelines, cit., 1, at http://ec.europa.eu/index_it.htm.

to SOLVIT.[65] In other words, all contacts taken with Member States before a letter or a formal notice stage of an infringement proceeding concerning individual cross-border Community law issues (i.e. involving two or more Member States) encountered by a citizen or organization in relation to the functioning of the internal market should be put into SOLVIT'.[66]

The EU Pilot seems to have added another role to the ones already carried out by the SOLVIT network. It should act like a sort of pre-infringement information-gathering tool, that could facilitate the Commission's activity. As it is stressed in the document itself, SOLVIT could also end up resolving the problem (if this is the case, of course, the difference between the EU Pilot and SOLVIT tends to fade).

In conclusion, SOLVIT is helping to reduce and facilitate the Commission's activity in relation to Article 226 EC (now 258 TFEU), by dealing with non priority cases that are referred to it either by the Commission or by the individual concerned.

Contradictory as it may seem, SOLVIT intervention can also favour the opening of infringement proceedings. As said above, letter C) par. 6 of the above cited 2004 staff working document, states that the Directorate-General for the internal market 'will organise periodic evaluations of the performance of the SOLVIT network including the range of solutions implemented in particular to check for any evident problems. This includes identifying patterns of misapplication of Community law, which may, for example, be caused by incorrect implementation of a EU Directive. The Commission retains the right to take appropriate action against Member States in such cases'. In other words, if the Commission during the exercise of its control activity, becomes aware of a national regulation that is in breach of EU law, it can start an inquiry and, if necessary, commence infringement proceedings. This can occur also on the request of the applicant, who in accordance with par. 5 (letters B and C) of the above mentioned working document, has the right to complain to the Commission if not satisfied with SOLVIT's proposed solution.

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[65] EU pilot on Community law: Guidelines, cit., 1.

[66] Ibid. Moreover, needles to say, 'all cross-border EU law issues (i.e. involving two or more Member States) encountered by a citizen or organization in relation to the functioning of the internal market (Article 14(2) of the EC Treaty) which are not the subject of a formal infringement proceeding should be put into SOLVIT'. European Commission, EU pilot evaluation report, of 3 March 2010, SEC(2010) 70, 2.3.

7 Is SOLVIT a 'National' or a 'European' Administration?

SOLVIT is characterized by a particular structure, which is both 'centralised' and 'decentralised' at the same time. In fact, the system is made up of a network of national Centres and a database run by the Commission. Furthermore, the proposed solution for the internal market problem is an agreed outcome of a cooperation procedure between two different national Centres.

This raises the question of whether the system is to be considered as one, and Centres are therefore to be considered as European administrations, even though they are formally part of the national administrative structure; or, on the contrary, whether SOLVIT Centres are to be taken into consideration separately as national administrations in every respect.

Clearly, the most evident consequence of SOLVIT centres being considered as 'European administrations', is that their activities would fall within the mandate of the European Ombudsman, who would then be entitled to investigate if they acted in breach of the general principles of good administration.

In March 2006,[67] the European Ombudsman was called upon to review the action of the Irish SOLVIT Centre. He clearly expressed the view that 'as regards the national SOLVIT centres, the Ombudsman would like to point out that, although the SOLVIT network has been created by the Commission and the Member States in order to solve problems facing EU citizens and businesses due to the misapplication of internal market law, the SOLVIT centres themselves are not Community institutions or bodies, but form part of the national Ministries, in most cases, the Ministry of Foreign or Economic Affairs'.

A complaint had been submitted to the Ombudsman by a Greek national (of Irish origin) who applied to the Irish Medical Council in order to have her Greek medical qualification as a surgeon registered in Ireland. As the Irish Medical Council did not recognise her qualification, the complainant referred the case to the Commission, to the Greek SOLVIT Centre (which then forwarded the case to the Irish one) and also made a Petition to the European Parliament. In all three instances the complaints were unsuccessful.

Then the complainant lodged a complaint with the Ombudsman, alleging that the Commission had failed to properly investigate the case. She also lodged a complaint against the SOLVIT Centres, alleging that the official from the Irish SOLVIT office provided false statements concerning her case as a result of which her petition to Parliament was dismissed.

[67] Decision of the European Ombudsman, of 24 March 2006, on complaint 1781/2004/OV, at http://ombudsman.europa.eu.

As far as the SOLVIT complaint was concerned, the Ombudsman dismissed the case. He claimed that the Treaty empowers the Ombudsman to inquire into possible instances of maladministration only in relation to the activities of 'Community institutions and bodies'.[68] Hence, 'the Ombudsman has thus no power to investigate alleged maladministration in a national SOLVIT Centre'.

This conclusion is formally correct, as the national SOLVIT Centre is certainly not a European administration. The Centre is part of a national administrative entity, most likely a Government Department. By the same token, the Centre officials are national civil servants.

It has to be stressed, however, that SOLVIT is not just a cooperation mechanism between different national administrations. SOLVIT is a unified system connected by an on-line database managed by the Commission and the very essence of the SOLVIT system is this integrated approach.

It is surely true that the Centres are subject to national administrative law and that they have to follow national administrative procedures, regulations and principles. Nonetheless, in December 2003, the Centres and the Commission adopted a set of common quality and performance standards,[69] aimed at ensuring a high level of SOLVIT services consistently throughout the network. The standards are of a two-fold nature. Some of them draw on the most general principles of good administration: transparency, effectiveness, avoidance of undue delay, duty to give reasons, etc. Others have the scope of limiting the differences between national Centres' activities. These differences can in fact undermine the overall effectiveness of the system, whose principal aim is to provide the same level of protection against national administrations' misapplication of EU law throughout Europe. More specifically, the agreed performance rules have to ensure that individuals can count on a high quality of service, regardless of the Country where they submit the problem, and that all the Centres show an equivalent commitment in solving the cases. A particularly interesting example is the rule in accordance to which the Lead Centre, when proposing the solution, has to check with the SOLVIT data-base to ascertain whether similar cases have already been solved satisfactorily and, if so, has to ensure that the applicant can benefit from the same treatment.

In sum, the SOLVIT system is something more than a cooperation network between national administrations; it is an integrated system, which has developed specific rules and principles that are to be followed by all the Centres.

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[68] Article 195 EC (now 228 TFEU), and Article 2, n. 1, of the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, of 9 March 1994, OJ L 113, of 4 May 1994, as amended.

[69] Based on the principles set out in the, already cited, 2001 SOLVIT background Recommendation.

Consequently, a consideration needs to be made. The Centres are not 'European administrations', the definition of which, even in its more extensive interpretation, does not include national authorities.[70] However, it has to be noted that the definition of 'national administrations' also seems not to be entirely adequate in relation to Centres, which are part of an integrated system, which propose an agreed solution, and have to follow specific agreed rules of conduct. All in all, the legal nature of the Centres shares the same difficulty of definition as the entire system, which represents a unique cooperation/dispute resolution mechanism in Europe.

8 The Effectiveness of the SOLVIT Mechanism

Although SOLVIT only became operational in 2002, in this author's opinion, some conclusions can already be drawn as to the effectiveness of the mechanism. According to the Commission documentation (the SOLVIT Annual Reports 2004-2009), the system seems to have lived up to expectations, notwithstanding the small number of cases so far submitted to it (around 1000 in the year 2008).

Statistics show that, although national public administrations are not bound to follow SOLVIT advice, internal market problems referred to the Centres do find a solution in a very high percentage of cases. As the Commission pointed out: the SOLVIT average resolution rate for 2008 was 83%.[71] Considering that around 6% of the cases left unresolved are actually rejected by the Lead Centres (because they fall outside the SOLVIT mandate), it is clear that national administrations tend to act in accordance with the solutions proposed by SOLVIT. This is most likely due to the 'pressure' that administrations receive from Centres that are part of the same national administrative structure and that are normally at a governmental level.

Still, the Commission points out that national administrations could cooperate more extensively. There are two major obstacles in this respect: the unwillingness of several national authorities to resolve problems informally; and the difficulties encountered by the same authorities in working to short deadlines. For these reasons, in its 2008 Report, the Commission suggests that a continuing effort should be made by national Centres to promote their activity with administrations and to establish regular contacts with them, so as to make the SOLVIT method better known and more trusted.

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[70] 'Unless they influenced Community decision making'. K. Heede, *European Ombudsman, redress and control at European level*, (The Hague 2000) 5.1.1.2.

[71] 2008 Report, cit., 5.

The unfamiliarity of public administrations with the mechanism might compromise its effectiveness; however, another hindrance is worth also mentioning.

In accordance with the 2001 Recommendation on *the principles for using SOLVIT,*[72] the Home Centre cannot enter the case in the database if it is already the subject of legal proceedings. Moreover, if an applicant decides, at any stage, to initiate legal proceedings the case should be removed from the database.[73] It remains confirmed, of course, that if the applicant is not satisfied with the proposed solution he can bring the case before a Court of Law afterwards. In practice, however, this is not always feasible. The 11 week period that is necessary for a decision to be taken often exceeds the time limit laid down by national legislations to successfully submit a case to the competent Courts (in Italy, for example, the deadline for starting proceedings before the Administrative Court is 60 days). Moreover, this deadline is not in any way affected by the case being entered into the SOLVIT database.

Hence, the individual who chooses to refer a case to SOLVIT is *de facto* prevented from receiving Court protection. This is probably one of the reasons[74] why the Reports[75] show that undertakings are less likely than individual citizens to submit a case.

The mechanism seems nonetheless to have been effective.[76] SOLVIT was designed to reach individuals and small businesses that could not bear the time and costs necessary to bring a cross-border action in front of a national Court. SOLVIT is then helping those that would otherwise be unlikely to obtain any legal protection and it is designed to find a solution to internal market problems that require a quick response.

It is a fact (as many critics of the system point out) that the network deals with a low number of cases, compared to the number dealt with by national Courts. As already mentioned, according to the Commission's statistics, the number of cases submitted to the system within a year is around 1000.

We have to bear in mind, however, that the network was only set up in 2002. Individuals and undertakings are not yet aware on a large scale of the possibility of referring their problems to a SOLVIT Centre. In addition, just one Centre[77] is set up per Member State. Nevertheless, the system is developing; more and more people are being informed of the existence of SOLVIT

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[72] Op. cit., 2.

[73] Ibid.

[74] They might also have other established channels for addressing their problems, such as the Chambers of commerce. Enterprises are also sometimes reluctant to file complaints against national authorities, as they fear that this may have repercussions on their relations with the authority concerned. 2008 Report, cit., 12.

[75] 2008 Report, cit., 12.

[76] In this sense, see, also, R. Muñoz, 'Le système SOLVIT: résoudre en dix semaines certain obstacles au marché intérieur', [2003] *Journal des tribunaux. Droit Européen*, 97.

[77] Which normally employs two or three people.

by national and European advertising campaigns and conferences. As the Commission pointed out, the SOLVIT case flow has been constantly increasing[78] over the years.

Despite the still low number of cases submitted, SOLVIT provides an effective remedy to a specific kind of internal market problem, offering individuals an alternative to Courts and a mechanism which adequately meets their needs. Moreover, SOLVIT can also play another role, the importance and the effects of which remain to be seen. SOLVIT can deeply affect national administrative law and can foster the correct application of EU law by PAs in a way which is uniform throughout Europe. This is due, in particular, to the shared database that allows SOLVIT Centres to record information on individual cases, to exchange them quickly among themselves, and to develop a common set of principles and standards which are likely to affect national public authorities' activity and national regulations.

[78] 2008 Report, cit., 5.