Articles

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Administrative Practice as a Failure of a Member State to Fulfil its Obligations under Community Law

Alicja Sikora[I]

Legal secretary at the Court of Justice of the European Communities

Abstract

This article aims at analyzing the concept of administrative practice as a subject matter of the Article 226 EC proceedings. Emphasizing the constant evolution of the notion of a 'failure to fulfil obligations' by a Member State and the related dynamics of the procedure established by Article 226 EC, this article examines the process of identification of administrative practice as a distinct subject matter of the infringement proceedings and seeks to set out a general framework for understanding this concept, as opposed to a 'regulatory' or 'legislative' breach. The analysis demonstrates that the infringement proceedings concerning administrative practice contain a number of particularities, which have bearing on traditional procedural concepts underlying the application of Article 226 EC.

Introduction

General supervision of the observance of the EC Member States' obligations under the Treaty is a subject of utmost importance in Community law. The Treaty provides for various mechanisms allowing the judicial proceedings against defaulting Member States, among which the crucial instrument is the general enforcement procedure envisaged in Article 226 EC, based on the actions brought by the Commission.[2]

The object of an infringement action is a finding and declaration by the Court of Justice of the European Communities ('the Court') of a Member State's failure to fulfil its obligations. The notion of a 'failure to fulfil obligations' has an objective nature and is not dependent on fault. It signifies any shortcoming with respect to a Member State's obligations under Community law.[3]

I The views expressed are purely those of the author.

2 This study does not intend to address other legal procedures relating to infringements of Community law committed by Member States, such as those envisaged in Articles 227 EC, 88 EC or 228 EC.

3 See for instance Case 7/68 *Commission* v. *Italy* [1968] ECR 423, at 428; Case C-404/99 *Commission* v. *France* [2001] ECR I-2667, at 51. Bibliography on this issue abounds. For further developments see, among others: P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials*, Fourth edition, (Oxford, University Press, 2008), at 428-459; A. Barav, 'Failure of Member States to fulfill Community obligations', [1975] *CMLRev*, 369 at 372; A. Dashwood,

A failure to fulfil obligations can be found not only in the exercise of the Member States' regulatory powers, but also through an administrative practice developed by national public entities.[4] Originally, however, the concept of administrative practice was most often identified as an ancillary aspect of the Commission's actions.[5] Gradually, the administrative practice has become an autonomous subject matter of the Article 226 EC proceedings. This development is at the basis of a recent Commission's practice relating to identifying and pursuing 'general and persistent' breaches of Community law, which has been widely noted in literature.[6]

1 Administrative Practice in the Framework of the Article 226 Proceedings

The concept of administrative practice as a failure to fulfil Community law obligations has a number of features distinguishing it from other types of breaches of Community law attributable to Member States. In particular, it may be opposed, on the one hand, to the infringements concerning the exercise of legislative or regulatory powers and, on the other hand, those relating to singular breaches concerning the application of law by the administration in a Member State.

First, in comparison with the 'legislative' breaches, the particularity of infringements related to administrative practice mostly concerns the level at which the breach can be identified. The development of case law and the large definition of infringements attributable to a Member State developed by the Court shows indeed that the breach may be due to any act or omission

R. White, 'Enforcement Actions under Articles 169 and 170 EEC', [1989] 14 *ELRev* 388 at 391; H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, paragraph 1230, (Kluwer Law international, 2001) at 603; A. Arnull, *The European Union and its Court of Justice*, (Oxford University Press, 2006) at 34.

4 See K. Lenaerts, I. Maselis, *Procedural Law of the European Union*, paragraph 5-007, (London: Sweet & Maxwell, 2006), at 132-133.

5 See for instance, Case 298/86 *Commission* v. *Belgium* [1988] ECR 4343; Case C-185/96 *Commission* v. *Greece* [1998] ECR I-6601; Case C-187/96 *Commission* v. *Greece* [1998] ECR I-1095.

6 See K. Lenaerts, 'The rule of law and the coherence of the judicial system of the European Union', [2007] *CMLRev* 44, p. 1625, at 1636; P. Wenneras, 'A new dawn for Commission enforcement under Articles 226 and 228 EC: General and persistent (GAP) infringements, lump sums and penalty payments', [2006] *CMLRev.* 43, p. 31; J. Hamer, 'General and persistent breach of EC environmental law', [2005] *ELRev* at 326; M. Giandotti, 'Violazione generalizzata e strutturale di una direttiva e inadempimento degli obblighi di diritto comunitario', [2005] *Diritto pubblico comparato ed europeo*, at 1470; A. Schrauwen, 'Fishery, Waste Management and Persistent and General Failure to Fulfill Control Obligations', [2006] *Journal of Environmental Law*, Vol 18, at 291.

on the part of the State, not only those of the government and the legislature, but also those of the judiciary and local or regional entities.[7]

The notion of administrative practice as a breach of Community law does not, however, merely focus directly on an author of an infringement, e.g. a responsible entity, but also emphasises the nature of an action which is adopted or which was failed to be adopted by the latter. It relates to the acts or omissions in the course of application of law by the administration in a Member State. In this context, the notion of administration must be considered in its material sense as any administrative activity of a State.[8]

In this regard, an infringement of Community law may result from an administrative action adopted within a framework of legislation which is not in itself objectionable. For instance, in case *Commission* v. *France,*[9] the Court clearly stated that the fact that a national law or regulation conforms in formal terms to the Treaty is not sufficient to show that a Member State has fulfilled its obligations under Community law. According to the Court, 'under the cloak' of a formally correct general provision, the administration might very well adopt a systematic attitude leading to an infringement of the Treaty.[10]

This observation was reiterated in several more recent judgments, where the Court confirmed that 'a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law'.[11]

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7 In the light of an early judgment in Case 77/69 *Commission* v. *Belgium* [1970] ECR 237 at 15: 'the liability of a Member State under Article 169 (now 226 EC) arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of constitutionally independent institution'. For further developments see: A. Barav, 'Failure of Member States to fulfill Community obligations', [1975] *CMLRev*, 369 at 372; A. Dashwood, R. White, 'Enforcement Actions under Articles 169 and 170 EEC', [1989] 14 *ELRev* 388 at 391; H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, paragraph 1230, at 603; (Kluwer Law international, 2001); K. Lenaerts, I. Maselis, *Procedural Law of the European Union*, paragraph 5-007, at 132-133; (London: Sweet & Maxwell, 2006).

8 On the notion of administration in a material sense focusing on the specifics of administrative State activity and organizational sense as a totality of administrative organs, see: J. Schwarze, *European Administrative Law*, Sweet and Maxwell, 1992, at 12.

9 Case 21/84 *Commission* v. *France* [1985] ECR 1355, see L. Gormley, *Protectionist Administrative Practices*, [1985 *ELRev*, p. 449-451

10 See *Commission* v. *France*, *supra*, at 11.

11 Case C-212/99 *Commission* v. *Italy* [2001] ECR I-4923, at 31 that has already given rise to the procedure under Article 228 EC in Case C-119/04 *Commission* v. *Italy* [2006] ECR I-6885; Case C-278/03 *Commission* v. *Italy* [2005] ECR I-3747 at 13; Case C-441/02 *Commission* v. *Germany* [2006] ECR I-3449 at 47; Case C-342/05 *Commission* v. *Finland* [2007] ECR I-4713 at 22.

Secondly, in comparison with the infringements concerning individual instances of administrative activity, it is important to recall that in the context of enforcement of Community law the Commission is empowered to criticize any breach of Community law regardless of its nature, dimension or duration. The Court has early stated that 'where a Member State fails to fulfil its obligations under the Treaty or under secondary legislation, it does so regardless of the frequency or the scale of the circumstances complained'.[12] Thus, admittedly, there is no 'de minimis rule' in the context of Article 226 proceedings.[13]

As a consequence, in its role as a guardian of the Treaty the Commission may ask the Court to find that a Member State has failed to fulfil its obligations under Community law in a specific instance limited to one or several individual acts adopted by the national administration.[14]

This consideration must be confronted with the requirements developed in the context of infringements related to the existence of administrative practice. In the latter context, the Court has ruled that administrative practice may constitute the subject-matter of an action for failure to fulfil obligations only when it is, to some degree, consistent and general in nature.[15] In view of this requirement, the Commission's action concerning the infringement arising from a single administrative decision, a single factual situation or single omission is clearly distinguished, by its nature, from an action concerning general administrative practice. In the application relating to administrative practice, individual decisions or situations are brought forward only to illustrate a wider practice.[16]

That distinction is of particular importance from the perspective of effective enforcement of Community law. The acts of national administration are submitted to the review by the national judiciary. Thus, individual infringements committed by the administration in the course of application of

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[12] Case C-209/89 *Commission* v. *Italy* [1991] ECR I-1575, at 19, Case C-45/91 *Commission* v. *Greece* [1992] ECR I-2509; Case C-387/97 *Commission* v. *Greece* [2000] ECR I-5047, Case C-365/97 *Commission* v. *Italy* [1999] ECR I-7773; Case C-404/99 *Commission* v. *France*, *supra* note 2, at 51.

[13] See for instance the Opinion of A.G. Alber in Case C-298/99 *Commission* v. *Italy* [2002] ECR I-3129 at 81 and the Opinion of A.G. Colomer in Case C-45/95 *Commission* v. *Italy* [1997] ECR I-3605 at 31. In particular, the fact that the infringement had in reality no adverse effects is irrelevant, see recently, Case-19/05 *Commission* v. *Denmark* [2007] ECR I-8597 at 35.

[14] See in particular, Joined Cases C-20/01 and C-28/01 *Commission* v. *Germany* [2003] ECR I-3609, at 30; Case C-157/03 *Commission* v. *Spain* [2005] ECR I-2911, at 44; Case C-503/03 *Commission* v. *Spain* [2006] ECR I-1097 at 59 and Case C-441/02 *Commission* v. *Germany* [2006] ECR I-3449 at 45.

[15] Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331, at 28.

[16] See Case C-248/05 *Commission* v. *Ireland* [2007] ECR I-9261.

Community law are also dealt with by national courts. This implies a question whether the Commission should bring such individual infringements to the attention of the Court in all cases, or only if they show an underlying general problem, which is not being properly addressed within the national system of remedies.

Indeed, the infringement actions concerning individual administrative decisions seem to be few and restricted to some specific areas of Community law, such as public procurement,[17] environmental law[18] or the right of residence.[19]

In this respect, it should, however, be noted that the fact that infringement committed by administration is subject to proceedings before the national judiciary does not in any way preclude the Commission from bringing forward the same infringement in an action under Article 226 EC. In fact, the Court has ruled, explicitly, that 'the fact that proceedings have been brought before a national court to challenge the decision of a competent authority which is the subject of an action for failure to fulfil obligations and the decision of that court cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission'.[20] The reason underlying this pronouncement relates to the fact that the two procedures have different objectives and effects and, thus, the existence of judicial remedies at national level cannot prejudice the bringing of an action under Article 226 EC.

Still, it was suggested that the Members States could argue that at least until the case pending before the national jurisdiction is finally determined, it should not be possible for the Commission to bring an infringement action concerning that particular case. The same author admits, however, that it would be much harder to remedy the breach, if the Commission had to wait with its action until the case is conclusively determined on the national level.[21]

The different objectives pursued by the proceedings before the national judiciary and the infringement action brought by the Commission, which does not seek to protect individual interests, have been recently noted in the context of a case related to the prescription period for national remedy.[22]

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[17] See Joined Cases C-20/01 and 28/01 *Commission* v. *Germany* , *supra* note 13.

[18] Case C-45/91, *Commission* v. *Greece* [1992] ECR I-2509.

[19] See Cases C-157/03 *Commission* v. *Spain*, *supra* note 13 and C-503/03 *Commission* v. *Spain*, *supra* note 13.

[20] Case *Commission* v. *United Kingdom*, C-508/03, paragraph 71.

[21] See J. Komárek, *Infringements in application of Community law, some problems and (im)possible solutions, REALaw*, Vol. 0, Nr I, 87-89, 2007.

[22] See Opinion of A.G. Trstenjak of 9 September 2008 in Case C-445/06 *Danske Slagterier*, at 98-100.

2 Identification of Administrative Practice as an Infringement of Community Law

In order to better grasp the concept of administrative practice as a failure of a Member State to fulfil its obligations, it is worth having a look at the origins of the case law relating to this issue.

One of the first examples, in which an infringement related to administrative practice was clearly distinguished from a legislative infringement, may be found in a case against France concerning the import of wines. Here the Court declared that *by delaying* the release for consumption of table wines imported in bulk from Italy and therefore restricting the imports of such wines, France failed to fulfil its obligations under Article 30 EEC (now – Article 28 EC) as well as under the Community regulations in the wine sector.[23]

However, it is in a later French case concerning postal franking machines[24] that the Court first ruled on the conditions under which administrative practice can be considered as a distinct infringement in the meaning of Article 226 EC. In this case, the Commission brought an action for a declaration that *by refusing*, without proper justification, to approve postal franking machines imported from another Member State, France had failed to fulfil its obligations under Article 28 EC. Originally, the Commission objected to both the French legislation concerning the use of such machines and the administrative practice of the French postal authorities. However, owing to the amendment of the criticised legislation, the Commission's action concerned subsequently only the question of the compatibility with Community law of the attitude adopted by the French post office towards the plaintiff company, a leading UK manufacturer that has attempted unsuccessfully, since January 1973 (the Commission lodged its action on January 23, 1984), to obtain approval to commercialise its products in France. After having considered that the attitude of the French administration constitutes a self-standing question, Advocate General Lenz took the view that although the practice of French postal authorities related to only one company, the practice constituted a breach of the Treaty. The Court followed the suggestion of the Advocate General and declared that by refusing, without proper justification, the approval of postal franking machines from another Member State, France had failed to fulfil its obligations under Article 28 EC.

In this context, the Court held, for the first time, that in order to constitute an infringement, a practice adopted by a Member State's administration must show a certain degree of consistency and generality.[25] Thus, it was early considered that isolated or rare administrative errors are not sufficient

[23] Case 42/82 *Commission* v. *France* [1983] ECR 1013.

[24] Case 21/84 *Commission* v. *France*, *supra* note 8.

[25] Case 21/84 *Commission* v. *France*, *supra* note 8, at 13.

to demonstrate a breach of a Member State's obligations through administrative practice, unless they are evidence of an underlying more general problem.

A case against Belgium related to the selling price of tobacco products constitutes another early example of identification of administrative practice as a distinct breach of Community law.[26] The Commission had discovered that the Belgian authorities interpreted their legislation, contrary to Directive 72/464/EC, as entitling them to fix a uniform retail selling price applicable to each manufactured tobacco product.[27]

In his Opinion, Advocate General Cruz Vilaça pointed out that the Commission admitted that the legislation in question *did not exclude* the possibility of the correct application of the Directive. However, according to the Commission, the administrative practice relying on the interpretation of that legislation was incompatible with Community law. The Advocate General emphasized the ambiguous formulation of the Commission's action saying: 'the action brought by the Commission [...] seeks a declaration that the Belgian legislation laying down the rules on the retail selling price of certain categories of manufactured tobacco is contrary to Community law, since the tax authorities in Belgium infer from it that they are entitled to fix a uniform imposed selling price for each product of the same group and of the same trademark'. As a result, he took the view that the Commission's action was confined to the administrative practice.[28]

Following a similar reasoning, the Court also considered the application as concerning administrative practice of the Belgian authorities and dismissed it, due to insufficient evidence.

Given a relatively small number of such early examples of cases identifying a breach of Community law through an administrative practice, it is remarkable that the Court has already clearly stated the requirements related to this type of actions, noting that the alleged practice has to be general and consistent, as well as attaching a particular importance to the Commission's duty to provide sufficient and reliable evidence.

3 Horizontal Character of the Commission's Action Related to Administrative Practice

Although the general traits of actions related to administrative practice can be seen in early case law, the real significance of this type

[26] Case 298/86 *Commission* v. *Belgium* [1988] ECR 4343.

[27] The Commission considered that such a price system was contrary to Article 5 (1) of Directive 72/464/EEC, which provides that 'manufacturers and importers shall be free to determine the maximum retail selling price for each of their products'.

[28] Opinion of A.G. Cruz Vilaça in *Commission* v. *Belgium*, *supra* note 25, at 58 and 59.

of actions has become manifest in more recent years, in the context of the Commission's attempt to prioritise its monitoring powers.[29] In this regard, an important feature of actions concerning administrative practice is that the Commission's powers are not limited to pursuing violations of Community law in each particular situation. The Commission may rather use those situations as evidence of a general practice and seek a declaration of a wider infringement derived from that practice.[30]

A crucial comment concerning the significance of such 'horizontal nature' of an infringement action was made by Advocate General Geelhoed in his Opinion in the landmark case against Ireland concerning implementation of the Framework Directive on Waste (75/442/EEC).[31] Here the Advocate General described the Commission's action concerning a general infringing practice of a Member State as innovative, and said that this type of action could considerably affect the way in which the Commission performs its duty under Article 211 EC. According to the Advocate General, traditional enforcement proceedings, where the Commission acts against specific instances of non-compliance established only *ex post facto*, resemble, in some domains, the 'treatment of symptoms' (*Kurieren am Symptomen*) rather than a response to a general problem. A possibility of inferring from a series of factual elements that there is a situation of general or structural non-compliance with Community law would open, in his view, the way to more effective enforcement of Community law. In fact, while reading the discussed Opinion, it is hard to resist the impression that the Article 226 EC is already undergoing an evolution.

Since the above mentioned case against Ireland, the Commission seems to have more often relied on a 'horizontal' approach.

In a case against Germany concerning expulsion of foreigners,[32] the Commission found that the German legislation inadequately transposed the Community law requirements, giving rise to an administrative practice of adopting expulsion orders in breach of Directive 64/221/EEC. The Commission stated that the purpose of its action was not to examine individual cases but that 'the expulsion cases mentioned in its application are cited merely as examples in order to illustrate the general nature of an administrative

[29] See Communications of the Commission: White Paper on European Governance, COM (2001) 428 final; Better monitoring of the application of Community law, COM (2002) 725 final and A Europe of Results – Applying Community law, COM(2007) 502 final.

[30] See Case C-494/01 *Commission* v. *Ireland, supra* note 14, at 27, Case C-248/05 *Commission* v. *Ireland, supra* note 15, at 64.

[31] See Opinion of A.G. Geelhoed in Case C-494/01 *Commission* v. *Ireland, supra* note 14.

[32] See Case C-441/02 *Commission* v. *Germany, supra* note 10. According to the Commission, the lack of legislative precision allowed the national administration to adopt expulsion orders in breach of Directive 64/221/EEC. The Court dismissed the Commission's application as regards the majority of claims due to insufficient evidence.

practice that is contrary to Community law because it is based on legislation which does not transpose the requirements of the Community rules with sufficient clarity'. It added also: 'The fact that the Commission cites specific cases does not in any way mean that no other cases should be regarded as being examples of infringement of Community law'.[33]

In a recent case against Finland concerning wolf hunting, the Commission emphasized as a preliminary point, that by its action it does not seek to object to specific instances of application of Community law, but rather to address the relevant administrative practice of the Finnish authorities, as a whole.[34]

In a number of cases Member States attempted to object to the use by the Commission of its powers under Article 226 EC in such a general way. In a case against Germany concerning free movement of food supplements,[35] the German government raised, as a preliminary point, the plea of inadmissibility of the Commission's action claiming that it related to all vitamins and mineral substances, without distinction or reference to any specific case. Rejecting this argument, the Court underlined that the case concerned a national practice of automatically classifying vitamin preparations as medicinal products, which could constitute the subject-matter of an action for failure to fulfil obligations.[36]

Even more important, in a recent case against Italy the Commission dealt, in the single set of proceedings, with the question of waste disposal throughout all Italian territory.[37] Italy invoked inadmissibility of the Commission's action, relying on the general and undefined nature of the alleged failure to fulfil obligations. According to the Italian government, such a general approach made it impossible for a Member State to present a detailed defence either in fact or law.

In its response, as a justification of such a 'horizontal' approach, the Commission pointed out that, first, it permits the Court to identify and correct the structural problems underlying the infringement more effectively and, second, it simplifies the process of monitoring compliance with Community law in the environmental field.

In that regard, the Court held that the 'EC Treaty does not contain any rule which precludes the overall treatment of a significant number of situations on the basis of which the Commission considers that a Member State has, repeatedly and over a long period, failed to fulfil its obligations

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33 See *Commission* v. *Germany*, *supra* note 10, at 27 and 46 in fine.

34 Case C-342/05 *Commission* v. *Finland* [2007] ECR I-4713 at 21 and 32.

35 Case C-387/99 *Commission* v. *Germany* [2004] ECR I-3751, see D. Simon, 'Les compléments alimentaires vitaminés sont-ils des médicaments?', [2004] *Europe Juin Comm.* nº 199, at 20.

36 See *Commission* v. *Germany*, *supra*, at 42.

37 Case C-135/05 *Commission* v. *Italy* [2007] ECR I-3475.

under Community law.'[38] This strong pronouncement which put an end to the discussion on such wider use of the Commission's monitoring powers, clearly precludes the Member States from successfully invoking similar defences.

Furthermore, the 'horizontal' nature of the Commission's action relating to administrative practice affects, to a certain extent, the application of procedural conditions underlying the use of Article 226 EC. In particular, it has an impact on setting the time limits for the production of additional evidence by the Commission and the treatment of cases where a Member State has complied with its obligations, at least with respect to some situations, before the expiry of the time-limit set in the reasoned opinion. This horizontal character has also an influence on various aspects related to the burden of proof of the alleged breach of Community law.[39]

Finally, the use of such wider enforcement actions may have significant implications in regard to the compliance with the judgment of the Court and the possible application of Article 228 EC.

4 The Notion of 'General and Consistent' Practice

Keeping in mind the 'horizontal' nature of the Commission's action related to administrative practice, with all the ensuing consequences for the defaulting Member State, it seems reasonable that the finding of such an infringement should be dependent on strict requirements concerning its general and consistent character.

In this regard, it is well established case law that 'although a State's action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature'.[40]

The criteria relating to 'consistent and general nature' have not been given a more detailed definition by the Court. Some indications for their interpretation can nevertheless be drawn from the existing case law. In

[38] See *Commission* v. *Italy*, *supra* note 52, at 20.

[39] See chapter 5 below. See also Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 36-39, with a comment by P. Wenneras, 'A new dawn for Commission enforcement under Articles 226 and 228 EC...', *supra* note 5, at 40-43.

[40] See Cases C-21/84 *Commission* v. *France*, *supra* note 8; C-187/96 *Commission* v. *Greece* [1998] ECR I-1095, at 23; C-185/96 *Commission* v. *Greece* [1998] ECR I-6601, at 35; C-387/99 *Commission* v. *Germany*, *supra* note 34, at 42; C-494/01 *Commission* v. *Ireland*, *supra* note 14 , at 28; C-287/03 *Commission* v. *Belgium* [2005] ECR I-3761, at 29, C-441/02 *Commission* v. *Germany*, *supra* note 10, at 50; C-342/05 *Commission* v. *Finland*, *supra* note 33, at 33; C-248/05 *Commission* v. *Ireland*, *supra* note 15, at 65.

particular, where the general and consistent practice is alleged by the Commission, the Court takes into consideration the number of instances in which the Community law obligations have been infringed, the nature of the infringement, i.e. the seriousness of the breach, and the duration of a breach.[41] The Court's interpretation of the criteria of a general and consistent practice is strict and is conducted in the light of facts of each concrete case. In consequence, the importance of these factors varies in different situations.

Thus, in several early cases, the key aspect of the Court's reasoning was the character of an infringement rather than a precise number of examples submitted by the Commission.

In such situations a general infringement could be demonstrated on the basis of a single example of defective application of law. In the case against France, discussed above, the attitude of French postal administration was considered by the Court to be an impediment to imports contrary to Article 28 EC even though it concerned a single foreign undertaking. The Court also held that 'the generality of administrative practice must be assessed differently according to whether the market concerned is one on which there are numerous traders or whether it is a market, such as that in postal franking machines, on which only a few undertakings are active. In the latter case, a national administration's treatment of a single undertaking may constitute a measure incompatible with Article 28 EC'.[42] Although in its more recent case law the Court has regularly referred to the criteria of generality and consistency of administrative practice, the number of traders operating in the concerned market was never again *expressis verbis* used by the Court in the assessment of these criteria.

A quite similar example is a case against Germany, initiated by the Commission following a complaint from an undertaking, whose application for authorization to import and market a garlic substance in capsule form was refused by the Federal Ministry for Health on the ground that the product was not a foodstuff but a medicinal product. This administrative decision was considered by the Court as an obstacle to intra-Community trade.[43] This single case seems also to have been accepted as an illustration of the general practice of the German authorities, which was explicitly alleged by the Commission, and not disputed by Germany. In particular, Advocate General Kokott underlined that the Commission's complaint was directed against the existence of an administrative practice.[44]

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[41] See Opinion of A.G. Geelhoed in Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 43-46, concerning general and structural character of an infringement.

[42] See *Commission* v. *France*, *supra* note 8, at 13.

[43] See Case C-319/05 *Commission* v. *Germany* [2007] ECR I-9811, at 81.

[44] See Opinion of A.G. Kokott at 39 and 40 explaining that 'if the adoption of a decision of general application on the importation and marketing of a product is refused on the ground

Evidently, the number of examples of infringement brought forward by the Commission may be relevant in order to establish the existence of administrative practice, as it is closely linked to the criterion of generality.

Thus, for instance, in a case against Belgium, the Court dismissed the Commission's action, which had not shown the existence of an administrative practice with the characteristics required by the Court's case-law,[45] mainly because the Commission has referred to a single example of such practice, contested by Belgium.

In a more telling example, in a case against Finland concerning the transparency of measures regulating the prices of medicinal products for human use,[46] the Commission argued that there was an administrative practice of insufficient statements of reasons in decisions refusing to accept the prices of medicinal products. However, given a limited number of examples relied upon by the Commission, the Court held that: 'generalised failure on the part of the administrative authorities to comply with the directive cannot be inferred from a few defective cases in practice.'[47] In this case, the Court relied, in dismissing the Commission's action, not on the absolute number of instances in which the Community law obligations had been infringed but rather on the relatively small percentage of unreasoned decisions, which were moreover inconsistent with a rule of national law requiring the administration to give reasons.

In a case against Germany related to the right of residence, the Court has, on the one hand, emphasized the existence of individual incidents of infringements but, on the other, dismissed the Commission's complaint alleging the existence of an administrative practice incompatible with

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that it constitutes a medicinal product, even though the elements of the definition of medicinal product under Community law are not satisfied, that official action must be regarded as a failure to comply with the prescribed definition and thus an infringement of Community law in so far as that official action is based on an administrative practice'.

45 Case C-287/03 *Commission* v. *Belgium*, *supra* note 39, at 27-30. The Commission alleged that by applying in a discriminatory and disproportionate manner the national provisions concerning consumer protection, Belgium has failed to fulfil its obligations under Article 49 EC. As an illustration the Commission referred to a single case of an undertaking organizing a customer loyalty program 'Air Miles'.

46 Case C-229/00 *Commission* v. *Finland* [2003] ECR I-5727 concerning a failure to fulfil obligations under Directive 89/105/EEC relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems. In its defence, the Finnish government pointed out that its national procedural law imposed an obligation for any administrative decision to be properly reasoned. Further, it supplied data, not challenged by the Commission, according to which, among the decisions given by the relevant authority in 1999, only 133 out of 3 266 were flawed, representing only 4.1% of all decisions in that year.

47 Case C-229/00 *Commission* v. *Finland*, *supra* note 45, at 53.

Community law. The Commission's application was rejected, again, mainly because of insufficient evidence.[48]

The general and consistent nature of the alleged infringement is often proved by referring to the duration of the administrative practice. In a public procurement case against Italy,[49] the Commission brought an action concerning a long-standing and continuous practice of directly awarding contracts for the purchase of helicopters to meet the requirements of several military and civilian corps of the Italian State, without any competitive tendering procedure required in particular by Directive 93/36. The fact that the incriminated practice might have lasted for some 30 years was not disputed by the Italian Government.[50] The Court admitted, without difficulty, that the practice in question was indeed consistent and long standing.

The general nature of the administrative practice can also be examined in the context of the territorial extent of the alleged infringement. In a case against Ireland concerning groundwater pollution, the Commission claimed that Ireland had not taken countrywide measures for the purpose of protecting groundwater from indirect discharges of substances from septic tanks. The Court accepted that several examples of defective application of the Directive 80/68/EEC produced by the Commission showed that the Directive has or could have been infringed in several particular instances. However, in respect of the wider infringement alleged by the Commission, the Court held that 'such defective application, geographically confined as it is, cannot provide grounds for inferring that there exists throughout the Irish countryside an administrative practice relating to indirect discharges into groundwater of effluents from septic tanks that possesses the characteristics required by the Court's case law'.[51] In consequence, the Commission's claim was rejected, in so far as it invoked the infringement of a general nature relating to indirect discharges throughout the Irish countryside.

An important aspect relating to the consistency of the alleged practice concerns the role of national judiciary. In fact, in several cases the Member States relied on the fact that the practice invoked by the Commission had been successfully challenged before the national courts.

For instance, in the aforementioned case against Finland concerning the administrative practice of giving insufficient statements of reasons in

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[48] See Case C-441/02 *Commission* v. *Germany*, *supra* note 10, at 55. According to the Court: '[...] although the German Government does not deny that expulsion orders may have been made in isolated cases without the requirements of Community law being adequately taken into account, the Commission's complaint [...] must be rejected as being unfounded'.

[49] Judgment of 8 April 2008, C-337/05 *Commission* v. *Italy*, not yet reported.

[50] Opinion of A.G. Mazák in *Commission* v. *Italy*, *supra* note 48, at 44-45.

[51] See Case C-248/05 *Commission* v. *Ireland*, *supra* note 15, at 115. Concerning territorial dimension of an alleged infringement see also Opinion of A.G. Stix-Hackl in Case C-121/03 *Commission* v. *Spain* [2005] I-7569 at 3-4 and 23-25.

decisions relating to medicinal products, the Finnish government argued that the Supreme Administrative Court had set aside several decisions of the administration invoked by the Commission in order to establish the general practice. In this regard, Advocate General Tizzano remarked that the examples invoked by the Commission did not prove that the alleged administrative practice was either substantial or widespread but, on the contrary, revealed a proper functioning of the system of national judicial remedies.[52]

In a case against Germany concerning expulsion orders, several defective decisions brought forward by the Commission as an example of the alleged practice have been set aside on appeal.[53] Also, rejecting the related Commission's claim, the Court mentioned that Germany refuted the reliability of the examples invoked by the Commission, since in some cases the complaints introduced by the persons concerned by such administrative decisions were successful.[54]

Finally, in a case against Belgium concerning the alleged discriminatory application of the national legislation relating to customer loyalty programmes, the Advocate General considered that the examples given by the Commission did not prove discriminatory administrative practice, noting in addition that the Belgian government showed the existence of proceedings brought before the Belgian courts against the situations similar to those invoked by the Commission.[55]

In the three above cases, the Court dismissed the Commission's action due to the lack of sufficient evidence. Thus, it seems that the existence of effective judicial review of administrative decisions can be used as an element proving that the infringements of Community law committed by the administration in a Member State are rather isolated errors than a symptom of widespread national practice.

With regard to the criterion of seriousness of an alleged infringement, the leading example is a case against Ireland concerning inadequate implementation of the Framework Directive on Waste (Directive 75/442).[56] This case also constitutes one of the most important Court's decisions relating to a breach of the Community law arising from a widespread administrative practice in a Member State.

In this case, in order to illustrate the general and structural nature of the deficiencies which characterized the application of the Directive in Ireland, the Commission submitted no less than twelve examples related to dumping, storage and disposal of waste in Ireland over the course of twenty five

[52] See Opinion of A.G. Tizzano in Case C-229/00, *supra* note 45, at 73.

[53] See Opinion of A.G. Stix-Hackl in Case C-441/02 *Commission* v. *Germany*, *supra* note 10, at 57.

[54] Case C-441/02 *Commission* v. *Germany*, *supra* note 10, at 52.

[55] See Opinion of A.G. Léger in Case C-287/03 *Commission* v. *Belgium*, *supra* note 39, at 47.

[56] See Case C-494/01 *Commission* v. *Ireland*, *supra* note 14.

years. In view of this evidence, the Court ruled that 'the Irish authorities maintained a general and persistent approach of tolerance towards numerous situations betraying a breach of the requirements laid down in Articles 9 and 10 of the Directive'.[57] Significantly, the Court also held that such a tolerant approach was indicative of a large-scale administrative problem, which was sufficiently general and long-lasting to show the existence of a national practice which failed to correctly implement the Directive.

In his Opinion, Advocate General Geelhoed stated that 'a general and structural infringement may be deemed to exist where the remedy for this situation lies not merely in taking action to resolve a number of individual cases which do not comply with the Community obligation at issue, but where this situation of non-compliance can only be redressed by a revision of the general policy and administrative practice of the Member State in respect of the subject governed by the Community measure involved'.[58]

As a consequence of the notion of 'general and structural' infringement employed by the Advocate General,[59] the discussed case has opened a debate concerning a possibly novel type of infringement committed by a Member State.

As the Court did not adopt the terminology used by the Advocate General and phrased its judgement in a slightly different manner,[60] the views expressed by commentators of the judgment were markedly divided.

While admitting the use of different terminology and other subtle differences in the approaches adopted by the Court and by its Advocate General, some authors put forward that this case establishes a new concept of a 'general and persistent infringement'.[61] Thus, some authors refer to a Treaty infringement of general and structural nature, implying that this constitutes a somewhat new category of infringement.[62]

It was also suggested in the literature that the Court did not, in assessing the breaches committed by a Member State, adopt any new criteria that would allow for distinguishing a new category of general and persistent infringement, but referred to its earlier cases concerning infringements committed through an administrative practice. The same author remarks

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[57] See Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 132.

[58] See Opinion of A.G. Geelhoed in Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 48.

[59] See Opinion of A.G. Geelhoed in Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 2 and 43. For further description of the A.G. Geelhoed Opinion, see P. Wenneras, 'A new dawn for the Commission enforcement …', *supra* note 5.

[60] The Court emphasized 'a systemic and consistent tolerance of situations not in accordance with the Directive' and held that the failure to fulfil obligations was general and persistent in nature.

[61] See P. Wenneras, 'A new dawn for the Commission enforcement …', *supra* note 5, at 32.

[62] See J. Hamer, 'General and persistent breach …', *supra* note 5 and M. Giandotti, 'Violazione generalizzata …', *supra* note 5.

that the Court did not state whether the infringement of general nature is more serious that an isolated case of defective application of Community law.[63]

Independently of different stances taken by the commentators in this discussion, one should stress the importance of the discussed judgment.[64] It has not only had a particular impact on the understanding of the notion of breach of Community law by reason of administrative practice, it also highlighted and clarified a number of the related procedural conditions in cases where the failure to fulfil obligations arises from an administrative action of a Member State.[65] Moreover, the possibility to identify and condemn the infringements of a systemic nature clearly focuses on making the enforcement of Community law more effective.

In this regard, it was rightly emphasized that allowing the Commission to bring an action not only in relation to individual incidents of infringement, but also as regards a Member State's 'general and persistent breach', augments the Commission's enforcement powers.[66]

Moreover, in its more recent case law the Court has continued to refer to the notion of a structural and general breach by a Member State of the Framework Directive on Waste, relying more specifically on the nature of such infringement.

Thus, in two cases, respectively, Greece and France were found to have infringed several provisions of the Directive by tolerating illegal landfills, illustrated by a large number of sites, the existence of which was admitted by their governments.[67] In yet another case in the same domain, this time against Italy, the Commission challenged important shortcomings in waste management.[68]

In view of the serious dimension of the practices and omissions, in particular, as regards the adoption of all the necessary measures to ensure the correct implementation of Community law, the Court considered these cases as illustrating the 'structural and general' breach of Community law.[69] Thus, without referring to any new type or category of infringement, the case law certainly reflects a new perspective in the assessment of failure to fulfil obligations by a Member State.

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[63] A. Schrauwen, 'Fishery, Waste Management ...', *supra* note 5, at 292 and 294.

[64] This case was referred to by the commentators as a 'landmark case' or even as 'pathbreaking', see P. Craig, G. de Burca, *EU Law...*, at 447.

[65] About procedural conditions see infra Chapter 5.

[66] K. Lenaerts, 'The rule of law ...', [2007] *CMLRev*, at 1636.

[67] Judgment of 6 October 2005, C-502/03 *Commission* v. *Greece*, not yet reported; Case C-423/05 *Commission* v. *France* [2007] ECR I-47.

[68] See *Commission* v. *Italy*, *supra* note 36.

[69] See *Commission* v. *Italy*, *supra* note 36, at 22.

5 Procedural Dimension of the Infringement Proceedings Related to Administrative Practice

The most striking illustration of the particularity of the discussed case law is that, in this context, the Court has been called upon to interpret a number of procedural conditions underlying the Article 226 EC proceedings.

First, as regards the delimitation of the subject matter of proceedings, according to a well established procedural rule, the claims put forward in the pre-litigation phase limit the scope of the application to the Court.[70]

In the context of an application related to administrative practice in a Member State, this rule means that once the subject-matter of the proceedings was defined as relating exclusively to an administrative practice, the Commission cannot extend or alter its scope by invoking the provisions of national legislation allegedly incompatible with the Community law.[71]

Moreover, if the Commission fails to prove the existence of the administrative practice according to the standards required by the case law, it cannot seek a declaration of a breach based on specifically identified situations, which have merely served as an illustration of a general practice. Thus, in consequence, even if the concerned Member State admits the lack of compliance with Community law in some particular instances,[72] or the existence of such shortcomings in particular situations is accepted by the Court in the light of the evidence,[73] the Commission's action will not be upheld, in so far as the Commission has alleged the existence a general and consistent administrative practice.

In such situations, if the Commission's action is limited to administrative practice, it will be dismissed in its entirety, since the scope of the dispute cannot be transformed at the stage of the judicial proceedings.

On the other hand, nothing prevents the Commission from combining both the individual cases and the administrative practice in one application.

As a matter of fact, the Court held that 'without prejudice to the Commission's obligation to satisfy in each and every case the burden of proof which it bears, in principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a

[70] See for example: Case C-67/99 *Commission* v. *Ireland* [2001] ECR I-5757 at 22; Case C-228/00 *Commission* v. *Germany* [2003] ECR I-01439, at 26; Judgment of 11 September 2008 in Case C-316/06 *Commission* v. *Ireland*, not yet reported, at 16.

[71] See Case C-494/01 *Commission* v. *Ireland* , *supra* note 14, at 128.

[72] See Case C-441/02 *Commission* v. *Germany*, *supra* note 10, at 55.

[73] See Case C-494/01 *Commission* v. *Ireland*, *supra* note 15, at 114.

general practice contrary thereto, which the particular situations illustrate where appropriate'.[74]

The Commission has likewise an option of challenging, in a single case, both the incorrect transposition of Community law by legislative measures and the related administrative practice, illustrated by specific instances.[75]

Second, as regards the possibility for the Commission to invoke in its application new elements of infringement which have not been referred to during the pre-litigation stage of proceedings, it may be recalled that the Commission's application must be founded on the same grounds and pleas as the reasoned opinion.[76] The Court has, however, admitted some flexibility in this respect, holding that the Commission may set out its complaints in greater detail in its application to the Court on the condition that it does not alter the subject-matter of the dispute.[77]

With regard to this condition, in the context of the discussed case law, the Court held that 'in so far as the action seeks to raise a failure of a general nature to comply with the Directive's provisions, the production of additional evidence intended, at the stage of proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent, cannot be ruled out in principle'.[78] According to the Court, 'in producing fresh evidence intended to illustrate the grounds of complaint set out in its reasoned opinion, which allege a failure of a general nature to comply with the provisions of a directive, the Commission does not alter the subject-matter of the dispute'.[79]

Third, the cases involving an administrative practice incompatible with Community law also let the Court interpret the requirement of admissibility of the Commission's action, relating to the existence of infringement on the expiry of the period prescribed by the reasoned opinion.

The question whether a Member State has failed to fulfil obligations is determined by reference to the situation at the end of the period laid down in the reasoned opinion. The Commission's infringement action has no purpose if the Member State complies with the reasoned opinion within the prescribed period.[80]

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[74] See Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 27.

[75] See Case C-441/02 *Commission* v. *Germany*, *supra* note 10.

[76] See Case C-279/94 *Commission* v. *Italy* [1997] ECR I-4743, at 24; Case C-35/96 *Commission* v. *Italy* [1998] ECR I-3851, at 28; Case C-228/00 *Commission* v. *Germany*, *supra* note 68, at 26.

[77] Case C-256/98 *Commission* v. *France* [2000] ECR I-2487, at 30-31; Case C-67/99 *Commission* v. *Ireland* [2001] ECR I-5757 at 23; *Commission* v. *Finland*, *supra* note 63, at 46, judgment of 12 October 2004 in Case C-328/02 *Commission* v. *Greece*, not yet reported, at 32.

[78] See Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 37.

[79] See Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 38.

[80] See, for instance, Case 240/86 *Commission* v. *Greece* [1988] ECR 1835, at 16.

The interpretation of this requirement in the context of infringement related to administrative practice is largely conditioned by the fact that the Commission does not merely claim the existence of a series of individual infringements, but aims at the sanctioning of a wider practice. Thus, the elimination of specific instances of infringement brought forward by the Commission does not necessarily render the Commission's action inadmissible. In this regard, the Court held that: 'the fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end'.[81]

Finally, the most complex procedural aspect of Article 226 actions relating to administrative practice concerns the burden of proof.

Its' one particularity arises from the nature of the evidence which the Commission is obliged to produce before the Court. The characteristics of the discussed actions require a submission from the Commission of substantive evidence demonstrating the breach of Community law in relation to individual factual situations,[82] illegal administrative decisions,[83] or examples of inconsistent interpretation, in practice, of the national legal framework implementing Community law.[84]

Moreover, the Commission has an obligation to demonstrate, through these particular examples of misapplication of Community law, the existence of a general and consistent pattern constitutive of an administrative practice.[85]

A particular character of the requirements incumbent on the Commission in this context was noted by Advocate General Léger in his Opinion in a case concerning the administrative practice adopted by the Belgian authorities. The Advocate General pointed out the atypical nature of the infringement actions relating to the application of national provisions, as opposed to the legislative infringements, remarking on the necessity of sufficiently documented and detailed proof of the alleged practice.[86]

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[81] See Case C-494/01 *Commission* v. *Ireland, supra* note 14, at 32.

[82] Case C-248/05 *Commission* v. *Ireland, supra* note 15.

[83] See Cases C-229/00 *Commission* v. *Finland, supra* note 45; C-434/01 *Commission* v. *United Kingdom* [2003] ECR I-13239; C-441/02 *Commission* v. *Germany, supra* note 10; C-342/05 *Commission* v. *Finland, supra* note 10. See comment on Case C-441/02 *Commission* v. *Germany,* by A. Rigaux, 'Pratique nationale contraire et preuve du manquement', [2006] *Europe Juin Comm.* nº 183 at 10-12.

[84] Case C-408/03 *Commission* v. *Belgium* [2006] ECR I-2647; Case C-287/03 *Commission* v. *Belgium, supra* note 39.

[85] See case law cited at *supra* note 39.

[86] See Opinion of A.G. Léger in Case C-287/03 *Commission* v. *Belgium, supra* note 39, at 41-43.

The tenor of this Opinion is reflected in the judgment, where the Court held that: 'with regard ... to an action concerning the implementation of a national provision ... proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision. In those circumstances, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable'.[87]

This factual nature of the required evidence must be confronted with the fact that, in most fields, the Commission has no investigatory powers allowing for effective monitoring of application of national law transposing Community rules.[88] Indeed, it is for this reason that it strongly relies on the individual complaints, which reveal the instances of irregular implementation of the Community law.

The latter aspect has led the Court to address, in the landmark case against Ireland, the procedural position of the Member States in the framework of Article 226 proceedings relating to administrative practice.[89]

In this case, the Court has recalled the obligation of Member States to cooperate with the Commission in the framework of Article 226 proceedings, in the light of Article 10 EC, and reminded that in order to facilitate the Commission's tasks of a guardian of the Treaties the Member States have a duty to provide the Commission with the necessary information.[90]

Moreover, since the Commission is not entrusted with proper investigative powers, this requirement may involve a conduct of 'the necessary on-the-spot investigations' by the Member States.[91]

Furthermore, in response to the arguments of the Irish government, which challenged the veracity of the facts alleged by the Commission on the basis of complaints, the Court ruled that once the Commission has adduced sufficient evidence to show a persistent and repeated practice of breach, it

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[87] See Case C-287/03 *Commission* v. *Belgium*, *supra* note 39, at 28. As regards the burden of proof in the context of this case, see also A. Arnull, *The European Union and its Court of Justice*, *supra* note 2, at 43.

[88] See Opinion of A.G. Geelhoed in Case C-494/01 *Commission* v. *Ireland*, at 53.

[89] Case C-494/01 *Commission* v. *Ireland*, *supra* note 14.

[90] As regards Article 10 EC, see also Case 96/81 *Commission* v. *Netherlands* [1982] ECR 1791, at 7-8, Case C-408/97 *Commission* v. *Netherlands* [2002] ECR I-6417, at 15, recently: Case C-82/03 *Commission* v. *Italy*, not yet reported. It should be noted that in a case against Ireland, C-494/01, by mean of a separate claim the Commission challenged the breach of Article 10 EC owing to an omission to reply to the Commission's letter. In the light of abovementioned obligation to provide information this claim was upheld.

[91] Case C-365/97 *Commission* v. *Italy* [1999] ECR I-7773, at 85; Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 45.

was up to the Member State to challenge in detail the evidence provided and the consequences flowing from it. In particular, the Court held that 'where the Commission relies on detailed complaints revealing repeated failures to comply with the provisions of the directive, it is incumbent on the Member State to contest specifically the facts alleged in those complaints'.[92]

In the light of these statements, although the Commission bears the burden of proof of infringement, once the evidence adduced is sufficient to demonstrate a persistent and repeated practice of the authorities, it is for the Member State to challenge this evidence. In its defence, a Member State can either contest the particular facts invoked by the Commission or, having admitted some isolated instances of misapplication of Community law, can dispute the existence of a general and consistent practice. As to the latter aspect, several Member States have successfully raised the fact that a number of administrative decisions invoked by the Commission, although adopted in infringement of Community law, had been reversed by the national courts which proved that they were incidents that could not be regarded as constitutive of general administrative practice.[93]

The discussed interpretation of the burden of proof, in so far as it attempts to balance the Commission's procedural duties with the lack of its investigative powers, constitutes a significant evolution in a pattern of Article 226 proceedings.[94]

6 Conclusions

The developments of the case law related to the proceedings under Article 226 EC evidence that administrative practice is perceived as a distinct and significant subject-matter of the infringement actions.

This type of actions has moreover revealed an opportunity for reaching beyond the standard understanding of the Commission's role in supervising the enforcement of Community law in the Member States. As a consequence, the discussion in the framework of Article 226 EC relates increasingly often to the manner in which the national authorities apply Community law in practice.

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92 See Case C-494/01 *Commission* v. *Ireland*, *supra* note 14, at 44 and 46.

93 See notes 51-54 above and the related text.

94 In this respect, it was argued by some authors that the resulting outcome might come close to a reversal of the burden of proof, see P. Wenneras, 'A new dawn for the Commission enforcement ...', *supra* note 5, at 41.

The debate of infringement committed in the course of application of law has also wider implications, as it may concern not only the practice developed by administrative authorities but also by the national judiciary.[95]

The discussed developments in the case law of the Court are closely linked to a debate relating to the efficiency of monitoring and enforcement of Community law by the Commission.

In its White Paper on European Governance issued in July 2001,[96] the Commission announced that it would conduct surveillance and bring proceedings against infringements by applying priority criteria reflecting the seriousness of the potential or known failure to comply with Community law. Moreover, in its 2002 Communication on better monitoring of the application of Community law, the Commission defined a set of priorities concerning the Article 226 EC proceedings.[97] Among the infringements that undermine the smooth functioning of the Community legal system, the Commission identified a repetition of an infringement by the same Member State within a given period or in relation to the same piece of Community legislation. According to the Commission, these are mainly the cases of systematic incorrect application detected by a series of separate complaints by individuals. On the same lines, in its 2007 Communication entitled 'A Europe of Results – Applying Community law',[98] the Commission indicated that priority should be attached to those infringements which present the greatest risks, widespread impact for citizens and businesses and the most persistent infringements confirmed by the Court.

The evolution of the concept of administrative practice as a failure to fulfil obligations by a Member State reflects many characteristics mentioned in the Commission's policy papers.

Already in its early judgements concerning administrative practice the Court has referred to consistency and generality, as the requirements of such practice leading to a failure to fulfil obligations. These criteria were further developed by the Court in the light of the nature of an infringement, that is, its seriousness and its duration. This has led to the debate on the notion of 'general and persistent' breach of Community law, which was considered as intensifying the Commission's enforcement powers. In the light of the recent case law, the infringement through an administrative practice may be qualified as a widespread and persistent breach by a Member State. It is therefore very likely that such infringements will continue to be considered as a priority by the Commission.

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[95] See Case C-129/00 *Commission* v. *Italy*, [2003] ECR I-14637 with annotation by G. Di Federico and L.S. Rossi, 2005 *CMLRev* 42, p. 829.

[96] See COM (2001) 428 final.

[97] See COM (2002) 725 final, at 11.

[98] See COM(2007) 502 final, at 9.

The constantly evolving case law related to the wider infringements committed by maintaining a general administrative practice addresses a very particular aspect of Community law enforcement, which may allow setting in a greater precision the Court's and the Commission's respective roles in safeguarding correct application of Community law in the Member States.