FAILING TO COMPLY WITH EU LAW: PROCEDURES, SANCTIONS & POTENTIAL SOLUTIONS

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INTRODUCTION
Introduction

Role of the Court of Justice of the EU:

to ensure that in the interpretation and application of the Treaties the law is observed (Article 19 TEU).
Introduction

Three jurisdictional levels within the Court:

- Court of Justice
- General Court
- Specialised Courts:
  - The European Civil Service Tribunal
  - The (future) European Patent Tribunal
Court of Justice accomplishes three main functions:

1. Ensure that Member States comply with EU Law (INFRINGEMENT PROCEDURES; lodged with the CJ).
2. Control that EU Institutions (Commission, Council, Parliament) and other EC bodies do not act illegally (ANNULMENT ACTIONS; filed with CJ or GC, appeal with CJ).
3. To settle upon questions of interpretation or validity of EU Law rules to make sure that they are understood and applied in the same way in all Member States (PRELIMINARY REFERENCES; lodged with the CJ).
OVERVIEW OF THE ART. 258 TFEU PROCEDURE
It aims at obtaining a declaration by the CJEU that the conduct of a Member State (MS) infringes EU Law so that the MS terminates that conduct / that a MS “has failed to fulfil an obligation under the Treaties” (art. 258 TFEU)

Action of objective nature = the only question raised is whether or not the defendant MS has breached EU Law
Legal basis

- Article 17 TEU = the Commission “guardian of the Treaties”
- Article 258 TFEU = infringement procedure
- Article 260 TFEU = infringement procedure in case of non/bad execution of an CJEU Judgment
An infringement procedure can be initiated when a MS state breaches:
- A provision of Primary Law
- A norm of Secondary Law (= a binding act of the EU Institutions)
- An international agreement concluded by the EU
- General principles of Law
- A decision of the CJEU
What is meant by “failure to fulfil”? The infringement may result from:

- Both of an act (active behaviour) or out of a failure to act (inaction) on the part of the MS
- Both a legal behaviour or an administrative practice can constitute an infringement
In practice, distinction of 3 types of infringements:

- Non-communication of measures transposing Directives: automatic infringements, fast process.
- Non-conformity of national measures: the Directive has been transposed but not correctly.
- Bad application of EU law: the national texts are correct, specific application is not compliant.
  - In this case, possible parallel actions.
- It is always a Member State
- The notion of Member State covers:
  - Any organ of the State (legislature, executive and judiciary)
  - Central, regional and local authorities
  - Even private companies controlled by public authorities
Identity of the parties. Applicants

- **Applicants:**
  - Commission (art. 258 TFEU)
  - Member States (art. 259 TFEU)
  - Which standing for individuals? The role of the individuals’ complaints

- **Defendant: exclusively Member States**
Overview of the procedure

- The pre-litigation phase of the procedure:
  - Opening of the case
  - Pre 258 Letter
  - Letter of Formal Notice
  - Reasoned Opinion

- The litigation phase of the procedure

- Art. 260 procedure
How is the Commission informed about an alleged infringement?
- Complaints by individuals
- Media
- National Official Journals
- Controls
- Petitions / questions by the European Parliament
- Other sources (i.e. conformity studies)

Research phase
The Pre258 Letter

- Regardless if the case is opened or not
- Pre258 = a request for information
  - The Commission has no powers of investigation
  - Art. 4, 3 TEU: obligation of MS to cooperate with the Commission
- No formal requirements
- Not included in the procedure
- Sent to the MS via its Permanent Representation in Brussels
- Delay of 2 months for answering
- Potential follow-up:
  - The matter is filed
  - No answer or no relevant explanation provided ⇒ formal opening of the pre-litigation phase
Letter of Formal Notice

- Content: brief summary of the alleged infringement
- Purpose: to delimit the subject matter of the dispute and to provide the MS, which is asked to submit observations, with the information necessary in order to prepare its defence
- (normally) 2 months for answering:
  - Possibility to fix any other delay considering the complexity of the matter
  - Possibility of extension
- Unfounded allegations
- MS remedies its failure to fulfil its obligations
- Reasoned opinion
Reasoned Opinion

**Purpose**
- To define the subject-matter of the dispute in the eventual litigation phase
- To prescribe a time limit within which the MS must put an end to the infringement (normally, 2 months)

**Content:**
- Coherent and detailed statement of the reasons which lead the Commission to believe that MS in question has failed to fulfil its obligations under the Treaty
- Indication of the measures to be taken to remedy the situation of infringement
Reasoned Opinion

Potential follow-up:

The matter is filed
No answer or persistence of the infringement on the period prescribed in the reasoned opinion → Opening of the litigation phase
Phase of the procedure before the CJEU

The formal start of the litigation phase puts an end to the possibilities of negotiation with the Commission on the modalities to cease the infringement.

The Commission brings the matter before the CJEU.

Definition of the alleged infringement in the application by the Commission.

The MS can always take measures in order to eliminate the infringement at issue in time before the end of the litigation phase.
The CJEU either finds the infringement made or dismisses the application
Judgement of declaratory nature
Duty of the MS to take the necessary measures to comply with the judgement
However, the EJC may not set a period of time for the compliance with the judgement. Only time reference possible: to comply with the judgement “as soon as possible”
SANCTIONS FOR FAILURE TO COMPLY WITH THE JUDGMENT. THE ART. 260 PROCEDURE

- Recent guidelines in the calculation of lump sums & penalty payments
- The impact of the Treaty of Lisbon: the new Art. 260 (3)
Legal basis

Art. 260, 1 & 2 TFEU

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgement of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

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

This procedure shall be without prejudice to Article 259.
3. When the Commission brings a case before the Court of Justice of the European Union pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.
The COM, as guardian of the Treaties, is responsible for ensuring that the Art. 258 TFEU judgement finding a breach of EU Law is complied with.

If the MS does not comply with the judgement, the COM may initiate a new infringement procedure and an action before the Court.
Purpose of the procedure

- **Purpose:**
  - An **objective procedure**: to determine whether the MS has truly failed to comply with the original judgement
  - The Court may impose a financial penalty on the MS: **lump sum or penalty payment**
  - A **corrective purpose**: these penalties are not intended to compensate for the damage caused by the MS concerned, but to place it under economic pressure inducing it to put an end to the breach established
Identity of the actors in the procedure

- **Applicant: the Commission**
  - It determines whether to initiate the art. 260 procedure
  - It decides whether to bring the case before the Court or not
  - In bringing the case before the Court, it gives its view on the type of penalty and the actual amount to be paid by the MS concerned

- **Defendant: a Member State**

- **The Court of Justice:**
  - It assesses the suitability and effectiveness of any measures which the MS has taken in compliance with the original judgement
  - It establishes whether a MS has failed to comply with the judgement and to fulfil its obligations under art. 260 TFEU
  - Court's discretion as per the determination of the penalty (cf. infra)
Overview of the procedure

- **Pre-litigation phase:**
  - Written notice to the MS from the COM
  - If the MS fails to take the necessary measures within the time-limit laid down by the COM, it may be brought before the ECJ
  - The former requirement of *reasoned opinion* in the procedure is removed. The procedure is now simplified and becomes more expedient

- **Litigation phase**
Historical evolution of the procedure

- Up until 1993, former art. 171 TEC only allowed for a declaration of failure to comply with an infringement judgement
- The Maastricht Treaty introduces the possibility of imposing economic sanctions in the form of lump sums or penalty payments
- Very reserved use of this possibility:
  - Very few cases brought before the Court
  - The COM only asked for the imposition of penalty payments
  - The COM only drew guidelines for the calculation of penalty payments, but not for lump sums (COM Communications of 1996 and 1997)
Historical evolution of the procedure

- **Three fundamental judgements:**
  - Case **C-387/97 COM v Greece of 4 July 2000** ⇒ the Court imposes a penalty payment for a first time
  - Case **C-278/01 COM v Spain of 25 November 2003** ⇒ the Court elucidates on the criteria for the determination of a penalty payment and its modalities of application
  - Case **C-304/02 COM v France of 12 July 2005:**
    - The Court can impose a lump sum **AND** a penalty payment simultaneously
    - The Court asserts that it has **complete discretion** in determining the appropriate economic sanctions under art. 260 (2) regardless of the COM submission
  - The impact of the **Treaty of Lisbon (cf. infra)**
In the event that the Court finds that original judgement has not been complied with, a lump sum or penalty payment may be imposed (art. 260(2) paragraph 3)

Up until COM v France, the practice of the COM was to systematically ask the Court to impose penalty payments

Consequence: MS complied only at a late stage of the procedure, this late compliance before the ruling not resulting in any sanction

Necessity to re-examine the question of the use of the financial sanctions
Lump sum or penalty payment

- Can the Court impose a lump sum and penalty payment simultaneously?
  - Art. 260 can equally be understood in the cumulative as the alternative sense.
  - The objectives of these two sanctions are complementary:
    - Penalty payment serves to induce a MS to put an end as soon as possible to a breach of obligations which would tend to persist (Persuasive function).
    - Lump sum is based on the assessment of the detrimental effects on public and private interests caused by the failure to comply with the initial judgement (Dissuasive function).
C-304/02 COM v France applies this principle of cumulative use for the first time:

- It is possible to impose both a penalty payment and a lump sum simultaneously, in particular where the breach of Community law obligations has both continued for a long period and is inclined to persist (point 82 of the judgement).

- Surmounting the reticence of MS:
  - Violation of the principle of non bis in idem?
  - Violation of the principles of legal certainty and transparency?

- In its judgement the Court ordered France to pay:
  - A penalty payment of EUR 57,761,250 for each period of 6 months
  - A lump sum of EUR 20,000,000
**Lump sum or penalty payment**

- **Practical consequences of C-304/02 COM v France:**
  - COM includes now in its applications to the Court a specification of:
    - **both the penalty payment** by day of delay after the delivery of the judgement under art. 260 TFEU
    - **and a lump sum** penalising the continuation of the infringement between the first judgement and the one delivered under art. 260 TFEU
  - The recourse to the lump sum alone is not excluded
  - In cases where a MS rectifies the infringement after the referral to the Court and before the art. 260 TFEI judgement is delivered, the COM will no longer withdraw its action for that reason alone
Criteria to fix the amount of the sanction

- Art. 260 TFEU says the COM “shall specify the amount of the lump sum or penalty payment to be paid by the MS concerned which it considers appropriate to the circumstances”
- Although not required by the Treaty, the COM has established guidelines as per the application of this article and the calculation of these sanctions:
  - Memorandum on the applying art. 171 TEC (OJ 1996 C242)
  - COM Communication of 28 February 1997 Information from the COM – Method of calculating the penalty payments provided for pursuant art. 171 TEC (OJ 1997 C63)
  - Communication from the COM on the application of art. 228 TEC – SEC(2005)1658
  - Communication from the COM on the application of art. 260 TFEU – SEC(2010)923/3
Criteria to fix the amount of the sanction

- **Rationale of these predetermined criteria:**
  - they enhance *legal certainty* and the *effective application* of EU law due to the application of foreseeable and consistent criteria
  - they guarantee *proportionality* and *equal treatment* for all MS
  - they reinforce the *deterrent effect* of the sanctions and encourage early compliance with judgements by the MS
Criteria to fix the amount of the sanction

**General principles**

- The fixing of the sanction must be based on the objective of the measure, that is, to ensure the application of EU law
- Calculation rules are based on three fundamental criteria:
  - **Seriousness** of the infringement
  - its **duration**
  - the need to ensure that the sanction is **deterrent**
- The sanction should be appropriate to the circumstances and proportionate both to the breach found and to the ability to pay of MS
- It is a “other revenue” of the EU on the system of the EU’s system of own resources.
**Fixing the amount of the penalty payment**

- PP is the amount penalising non-compliance with the judgement, the penalty running from the day when the 2nd of the Court was served on the MS up to that on which the MS bring the infringement to an end.

- **How is it calculated?**
  - Multiplication of a standard flat rate amount by a coefficient for seriousness and a coefficient for duration.
  - Multiplication of the result obtained by an amount fixed by country (n factor: capacity of MS to pay & votes in the Council).
Criteria to fix the amount of the sanction

Fixing the amount of the lump sum

- **Two stage method:**
  - By the setting of a minimum fixed lump sum and
  - A method of calculation based on a daily amount multiplied by the number of days the infringement persists; this method will apply when the result exceeds the minimum lump sum
Court’s discretion

- Commission’s suggestions are a **useful** point of reference **but they cannot bind** the Court.

- Whether penalty payments, lump sum fines, or both, will be imposed on a MS, and which amounts will be fixed in the end, **is exclusively for the Court, in the performance of its judicial function, to decide.**
Failure to comply with the judgement constitutes a new infringement of art. 260 TFEU.

It may therefore give rise to a finding of liability on the part of the MS concerned.
The impact of the Treaty of Lisbon

- Former Art. 228 TEC becomes Art. 260 of the Treaty on the Functioning of the EU
- Paragraph 1 of Art. 228 (2) TEC was modified:
  - If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
  - The requirement of reasoned opinion in the procedure is removed. The procedure is then simplified and becomes more expedient
A point 3 is added to the article:

- 3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

- Failure to notify transposition measures are amongst the most important breaches of Community. Hence, in this cases, possibility to sanction this infringement with the imposition of an economic sanction at the stage of the first procedure.
Motivation of the Art. 260, 3 TFEU Instrument

**Motivation of this instrument:**
- to give MS a stronger incentive to transpose directives within deadlines and to ensure EU legislation is genuinely effective
- Fundamental to protect EU citizens who are often conferred rights by these directives

**Features of this instrument:**
- The COM may ask at the stage of the Art. 258 TFEU proceedings that a lump sum and / or penalty payment is imposed on the MS
- The judgement will recognize simultaneously the existence of the breach and will impose the sanction
- The Court will not exceed the amount specified by the COM
Use of the Art. 260, 3 TFEU Instrument


- The same principles inspiring the use of Art. 260(2) TFEU apply to paragraph 3

- The COM can have recourse to this new instrument “when it deems appropriate”

- It covers 2 hypothesis:
  - Total failure to notify transposition measures
  - Partial notifications of these measures
Use of the Art. 260, 3 TFEU Instrument

- Lump sum or penalty payment or cumulative use of both
- In most cases, penalty payment may prove sufficient
- They are calculated according to the same methods used under Art. 260 (2)
- NB! Coefficient of duration: to be calculated as of the day following the expiry of the transposition period
- The proposal of the COM is not binding on the Court. However, the former will not be able to surpass the limit stated by the COM
INFRINGEMENT OF EU LAW BY CANDIDATE COUNTRIES
Accession to the EU is subject to the compliance by candidate countries of a number of conditions or criteria

Third Copenhagen criteria:
- The ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union (capability to take on the *acquis communautaire*)
Infringement of EU Law by Candidate Countries

- **Obligations of membership: all legal commitments agreed in the EU:**
  - All EU Law: Primary and Secondary
  - CFSP instruments and former JHA instruments
  - Law stemming from EU agreements with 3rd States
  - Case-law of the Court of Justice of the EU

- **Ability to take obligations: establishment of effective administrative bodies to ensure application of EU Law**

- **Aims:** the candidate country must express its satisfaction with regard to further EU integration
Infringement of EU Law by Candidate Countries

- In order to comply with these obligations, the Candidate Country has to undertake two tasks:
  - Adoption of legislation (or Harmonisation)
  - Its implementation
Infringement of EU Law by Candidate Countries

- **In case of non compliance of these obligations:**
  - No legal sanctions on the part of the EU; Candidate Countries are not subject to the jurisdiction of the Court
  - However, political consequences: progress in the accession negotiations and final entry is subject to respect of these obligations
Infringement of EU Law by Candidate Countries

- **Where to find these obligations?**
  - EUR-Lex; systematisation in negotiation chapters
  - Particular framework of conventional relations between the EU and the Candidate Country
  - Particular negotiating framework with the Candidate Country
  - Accession Partnerships & European Partnerships

- **Who monitors this compliance?**
  - European Commission
  - Annual Progress Reports
Infringement of EU Law by Candidate Countries

- Consequences of the (lack of) compliance with these obligations:
  - Granting of the status of Candidate Country
  - Moment of opening of accession negotiations
  - Rhythm of the accession negotiations (opening and closing of chapters)
  - Access to pre-accession assistance and aid
  - Final date of entry in the EU
Do You Have Any Questions?

We would be happy to help.

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