

THE INFRINGEMENT PROCEDURE AND ITS IMPLICATIONS IN PRACTICE

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Abstract:

The paper addresses the issue of the infringement procedure, i.e. the procedure initiated as a result of a violation by a member state of the European Union legislation, having as a legal basis Articles 258-260 of the Treaty on the Functioning of the European Union TFEU (former Article 226-228 of the Treaty establishing the European Community TEC). The application of these provisions is closely related to the provisions of Article 17 paragraph (1)¹ of the Treaty on European Union (TEU), according to which the European Commission, in order to promote the general interest of the Union, aims to ensure the application of the Treaties by the states that have ratified them and the measures adopted by the institutions for that purpose, and also supervises the application of EU law under the control of the Court of Justice of the European Union. Through this procedure, the European Commission fulfills one of its fundamental tasks: supervising the application/implementation of European legislation.

Keywords: *infringement of EU law, letter of notification, non-compliance, admissible complaint, pecuniary sanctions*

Preamble

The concrete application of European Union law is essential to the achievement of the objectives set out in the Treaties and to the increase in the credibility of the institutions among citizens.[1] In this respect, the member states have responsibilities for transposing the directives within the deadlines established and as precisely as possible, as well as for the correct application and enforcement of the Union law as a whole², and for the Commission to monitor the application of Union law and the compliance of the legislation of the member states with the EU law.

Where the Commission identifies a possible failure to fulfill obligations, it shall initiate a bilateral dialogue with the respective member state, which shall resolve the

¹ Article 17 (1) TEU: "The Commission promotes the general interest of the Union and takes appropriate initiatives to that end. This ensures the application of the treaties, as well as of the measures adopted by institutions pursuant thereto. The Commission supervises the application of the Union law under the control of the Court of Justice of the European Union (...)".

² Article 291 paragraph (1) of the TFEU.

matter as expeditiously and effectively as possible in accordance with the Union law. If the problem-solving efforts are not successful, the Commission may initiate infringement proceedings for non-fulfillment of obligations³, in accordance with Article 258 of the Treaty on the Functioning of the European Union (TFEU). If a member state fails to comply with the Commission's opinion, the Commission may refer the matter to the Court of Justice under Article 258 TFEU if the conditions set out in Article 260 paragraphs (2) or (3) are fulfilled, even requiring pecuniary penalties.[2]

The use of the expression "infringement procedure" is not unitary: it is sometimes used to describe only the pre-contentious stage (the informal phase), sometimes it is used to refer to the contentious stage before the European Court of Justice (the formal phase).

In practice, three types of infringement of EU law have been identified that trigger the Commission to initiate the infringement proceedings [3], namely:

- a) omission of notification of the national normative acts transposing and implementing the directives, the member states being obliged to notify both the transposing and the implementing legislation;
- b) non-compliance of the national legislation with the requirements of the European norms, the member states being the ones that have to ensure full compliance of the national legislation with the EU requirements;
- c) inappropriate application of the Union's normative acts, the member states being responsible for the full implementation of the European transposition provisions.

The European Commission is the one to find that certain provisions of the legislation of a member state are in breach of the Union law. There has been highlighted the existence of several ways of identifying the cases of breach of the EU law by the member states that may lead to the opening of the infringement procedure. [4]

Such is the automatic notification of omissions of national transposition legislation, the European Commission receiving an informational system that allows for such referral and the automatic triggering of the procedure for such cases [5].

³ The procedures establishing the failure to fulfill the obligations may be initiated, as well, based on other provisions of the EU law, for example Article 106 of the TFEU, corroborated with Articles 101 and 102 of TFEU.

A second way is the complaint lodged with the European Commission by any natural or legal person having as object any measure (legislative, regulatory or administrative) or practice of a member state which is considered to be incompatible with the EU norms.

The complaint shall be any written notification to the Commission denouncing measures or practices contrary to Union legislation in the member states. The definition of a reclamation/complaint is also extremely varied and involves any means of transmission (by mail or e-mail) that has to be treated properly.

For an easier processing of the complaints, starting with December 2014, the Commission will provide the applicants with a standard form published in the Official Journal of the European Union or on the European Commission's website⁴. The complaints must be submitted in writing, by letter, fax or email. In formulating the complaint, the complainant must not demonstrate that they have the status to act or the fact that they are directly and principally affected by the infringement they denounce.

The filing of an application is not automatic, it involves an internal procedure that does not allow the complaint to be registered in the main complaints register if: it is anonymous; it does not refer, implicitly or explicitly, to a member state; it denounces actions or omissions by a private person or private group; it does not contain a complaint [6]. It may also be the case for the Commission services to decide not to register correspondence as complaint, with the obligation for them to inform the applicant by means of an administrative letter, stating the reasons for the rejection, as mentioned in the Code of Good Administrative Behavior [7]. In order to further simplify the management of complaints and provide for better quality services to citizens and businesses, in 2014, the Commission has connected the SOLVIT⁵ problem solving service with the CHAP Complaints Internal Complaint Tool⁶.

⁴ The Form is accessible on the portal Europe Rights and opportunities, offering connections between different services of solving problems and treating complaints at national and EU level.

⁵ SOLVIT is an informal problem-solving tool provided by national administrations, set up in 2002 by the Commission and the Member States to help citizens reach swift solutions to cross-border issues in cases, where national authorities have not complied with EU law.

⁶ CHAP (Complaint handling/Accueil des plaignants) is the informational tool of the Commission for the Registration and Management of Complaints and Requests for Information on the Application of EU Law by Member States.

Once the complaint has been received, the Commission has the discretionary power to decide on it. Within one year, the Commission must either close the case or move to the next stage. The complainant is informed, through the General Directorate dealing with the respective domain, over the actions taken by the Commission in response to their complaint, over the decision to initiate the infringement procedure against a state, and over any legal action.

In the third category of ways to identify cases of breach of EU law [8] by member states that may lead to the opening of the infringement procedure, there are the Commission's own investigations, regarding: the member state reports on how Union acts have been implemented in each member state; the questions addressed by the European Parliament as a result of which the Commission may self-incriminate and initiate infringement proceedings; the petitions received by the European Parliament and forwarded to the Settlement Committee. From their analysis, the Commission can conclude that a member state has not complied with EU law.

The relevance of the informal phase of the infringement procedure

In general, when identifying the infringement case, non-conformity is taken into account - failure to comply with EU law by incorrect transposition of a European act or the incorrect application of the provisions of a European act or non-communication – lack of notification (communication) of the national execution measures.

The informal (pre-contentious) phase aims at bringing the member states to the optimal level of harmonization of the Union law, giving them the opportunity to address the identified problem before it comes before the EU Court of Justice, and also to voluntarily solve the problems.

This phase is not covered by the treaty. As a matter of principle, the European Commission sends a letter requesting clarifications on the issues with which it has been informed or it has discovered following its own investigations [9]: incomplete documentation; non-compliance with deadlines; the lack of public access to the information underlying the decision; violation of the public's right to participate in decision-making; lack of motivation for the decision by right and in fact.

The pre-contentious phase of the infringement procedure comprises several stages [10]:

1. The letter of formal notice is the document stating what the infringements of Union legislation are. In fact, this letter represents the formal opening of the infringement procedure and the Commission has the role of investigative authority. The purpose of this letter is to provide the notified member state with the opportunity to present its observations/explanations regarding the issue set out in the letter.

The letter of notification is of a legal nature and, usually, presents only one case of infringement, but there may be situations where there is an annex to the letter in which other infringement situations are presented. The period of reply to this letter is normally of 2 months and the holiday period can not be invoked as a reason for extending. The member state can write as an answer the arguments regarding the identified problem. It is recommended that the member state contact the Commission immediately after having received the notification letter in order to resolve the identified problem as quickly as possible.

2. The observations of the member state, based on Article 258 of TFEU, are made in response to the formal letter received from the European Commission. This procedural step is, in fact, the right of the state to defend itself, thus guaranteeing the protection of its interests. However, the member state can not rely, in its favor, on the provisions, practices or circumstances existing in its national law to justify the non-compliance with the obligations imposed by Union law, even if they are of a constitutional nature.

3. The reasoned opinion is adopted by the Commission and transmitted to the State if it has not replied to it or considers the reply to be unsatisfactory (Article 258 of TFEU) after examining the comments received from the state concerned. As a rule, the reasoned opinion is considered a final “alarm signal” and contains the Commission’s requirement that the member state take the necessary measures to eliminate the breach of European law.

4. The response of the member state to the reasoned opinion shall include the measures taken by the State to comply with the Commission’s opinion. The deadline for compliance is set by the latter, and if the State does not make the necessary changes, the Commission shall refer the case to the CJEU in order to start the contentious procedure.

5. The Commission's decision to refer CJEU ("Saisine") is the last step of the pre-litigation procedure, intervening within a maximum period of 18 months from the date of initiation of the infringement procedure. If the member state does not comply with the provisions of the reasoned opinion within the prescribed time limit, the Commission may refer the matter to the Court of Justice of the European Union (CJEU) under Article 258 of TFEU.

There must be no more than 18 months between the decision to initiate the infringement procedure (formal letter of notice) and the submission of the action to the CJEU. During this time, the Commission may at any time take the decision to refer the case to the CJEU. The Commission's decision to refer the case to CJEU seeks to confirm the Commission's legal position in the reasoned opinion. This decision represents the start of the litigation procedure.

Even if a member state recognizes a breach of EU law, but can not solve the problem because of the structure of its national administrative system, established in accordance with constitutional rules, this can not be invoked to justify the non-compliance.[11] As a consequence, the member state concerned is obliged to modify its national system in order to ensure the uniform application of the Union law. The Commission is obliged to take into account all the replies and arguments of the member state and can not rely on internal coordination issues to justify that a particular document submitted by the member state has not been considered.

Aspects of the infringement procedure before the Court of Justice of the European Union (the contentious phase)

The contentious phase of the infringing procedure takes place in the following 7 stages:

1. The first step is to refer to the Court. The Legal Service of the European Commission prepares a written document together with the General Directorate responsible for the respective field. The action must be brought at the latest within one month of the date on which the Commission decided to refer the case to the CJEU (from "saisine"). Practically, the referral to the Court of Justice opens the litigation procedure.

A decision to submit is implicitly revoked if the Commission subsequently decides to send a supplementary letter of formal notice or a reasoned opinion. Therefore, if the progress in that case so requires, the Commission must take a new decision to forward [12].

2. The resolution of the case by the CJEU is the second stage. By its judgment, the CJEU determines whether or not the subject of the dispute is or is not a violation of European norms. If the CJEU finds that a member state has breached any of its obligations under the Treaties, this state is required to take the necessary measures to comply with the ruling of the Court (Article 260 of TFEU). It follows that the CJEU only establishes whether or not the subject matter of the dispute is a violation of EU rules but does not have the competence to specify the concrete measures that need to be taken in that member state; the concrete measures to remedy the situation are the responsibility of that member state.

3. The implementation of the CJEU decision. One month after the final decision of the CJEU, the Commission sends a letter to the State concerned reminding it of the obligation to take the necessary steps to ensure compliance with the breached European legislation and to report to the Commission within three months on the measures taken or expected to be taken. The final decisions of the CJEU are binding on the member states and there is no appeal procedure. One observation to be mentioned is that the European Ombudsman can not be referred to regarding these decisions.

4. The member state's observations refer to the possibility for the State concerned to send a reply to the Commission on the steps it has taken to comply with the CJEU decision. This possibility is the right of that State to defend itself and demonstrate how it considers necessary to respect the decision of the CJEU.

5. The letter of delay is sent by the Commission if it considers that the member state has not taken the necessary measures to comply with the CJEU decision (Article 260 of the TFEU), specifying which provisions of the CJEU decision have not been met and the deadline for taking these measures. The TFEU has introduced, however, on the basis of Article 260, the possibility of suppressing this stage of the procedure.

The procedures related to Article 260 [13] will be enunciated in this form considering the existing similarities with the steps already presented in the pre-contentious procedure: a second letter of formal notice; a new motivated opinion; the referral to the CJEU regarding

the conviction of the member state concerned to pay certain fines and/or commencing sums (late payments).

6. The referral to the Court of Justice for failure to comply with its decision by the European Commission, if that state has not complied with the decision of the CJEU within the prescribed time-limit, seeking to oblige that State to pay a global amount or penalties until the date on which it complies with the first decision of the CJEU (Article 260 of TFEU). The Commission shall indicate the amount of the lump sum or penalty payment that the member state is required to pay and which it considers appropriate to the situation (Article 260 of TFEU).

As early as 12 July 2005, the European Court of Justice ruled⁷ that the Community judicature has the option of imposing both a global sum (fines) and a penalty. Thus, the CJEU has established the possibility for judges to impose in the future a global fine, taking into account the already accumulated delays, and not only a non-retroactive daily payment. The final decision on the type and amount of pecuniary sanctions applied belongs to the CJEU, which may not closely follow the Commission's proposal.

7. The CJEU decision – if, following the examination of the complaint made by the Commission, the Court finds that the member state has not complied with its ruling, it may impose a lump sum or a periodic penalty payment (Article 260 of TFEU) until the fulfillment of the obligations specified in the first judgment. The European Commission proposes to the CJEU the financial penalties, indicating their amount.

TFEU provides for the possibility for the CJEU to impose financial penalties as soon as it identifies a breach of European legislation as a result of failure to transpose the European normative acts, without the need for a second request from the Commission, under Article 260 paragraph 3.

In determining the amount of pecuniary sanctions, the Commission considers three fundamental criteria [14]: the gravity of the infringement, the duration of the infringement (the period of time when the failure to comply with the European provisions persists, from the date of the first decision issued) and the national factor (“n”) settled for each member

⁷ Decision of the Court of Justice of 12 July 2005, Commission/France, has confirmed that the two types of pecuniary sanctions (penalties with commodity title and lump sum) may cumulate for the same violation and has applied this principle for the first time.

state⁸ (representing the ability of that State to pay and taking account of its economic and political importance). In 2012, the Commission adopted a Communication [15] on the implementation of Article 260 of TFEU updating the data used to calculate the lump sum and penalties to be proposed by the Commission to the CJEU in the infringement proceedings.

It has been shown in the literature that the possibility of applying financial sanctions to a state which has not complied with a finding of infringement has been introduced by the Maastricht Treaty. The European Commission wanted to develop a unitary and consistent system for the attribution of sanctions by issuing a communication on the sanctioning regime that was published in 1997. Thus, in order to ensure transparency, the Commission published the criteria it applied to indicate to the Court of Justice the value of the financial sanctions they estimate appropriate to the circumstances of each case. The Commission's estimation was based on three fundamental criteria: the gravity of the infringement; the duration of the infringement; the need to ensure that the deterrent effect of the sanction can avoid recurrence.

Since 2005, the Commission has included in its applications before the Court of Justice on the basis of Article 260 of TFEU, the following indications: the payment of a penalty on each day of delay after a pronounced ruling; the payment of a lump sum as a sanction for the continuation of the violation between the first decision for non-execution and the decision pronounced according to Article 260. The Commission used special situations only in respect to a lump sum payment, for example in cases of repeated infringements. The most appropriate penalty for determining the member state to comply as quickly as possible was the Commission's sanctioning periodic penalty payments. The Commission does not waive the possibility of requesting a lump sum payment; however, its practice under Article 260 was the imposition of periodic penalty payments [16].

It has become imperative to amend the sanctioning method in order to rectify as soon as possible the violations of the member states and thus to reduce the number of complaints of the Court according to the provisions of Article 260.

⁸ For Romania, the Commission settled the minimum lump sum at 1.740.000 Euro and the value of the national factor "n" at 3.28 (penalties can be comprised between 2.000 – 124.000 euro/day of delay).

With regard to the severity coefficient of the infringement, the Commission considers two parameters closely related to the underlying violation: the importance of the breached European norms and the impact of the breach on the general and particular interests. When assessing the significance of the breached European provisions, the Commission will rather consider their nature and extent than their rank in the hierarchy of norms. For example, a violation of the principle of non-discrimination should always be considered very serious, regardless of whether the violation results from violation of a principle established by the treaty itself, or by a directive or regulation. The violations of fundamental rights and the four fundamental freedoms (movement of persons, goods, capital and payments, services) enshrined in the treaty must be regarded as serious. The clarity or ambiguity of the violated European norm is an important factor, as well as the lack of cooperation within the procedure provided for in Article 260.

The effects of the breach on general or particular interests concern aspects such as: loss of own resources for the Union; serious or irreparable damage to human health or the environment; economic or non-economic damage suffered by individuals and economic operators; the volume of the population affected by the violation.

Conclusions

The effective enforcement of the EU law has continued to face major challenges in 2016 and in the first half of 2017. The member states have stepped up their efforts to complete the transposition before the judgments of the Court of Justice. However, in conjunction with the other cases under Article 258 and Article 260 paragraph (3) of the TFEU, which were initiated in the previous years, there have been several pending cases, which propose daily penalty payments.

We believe that only by a correct and timely transposition of EU law into national legislation, as well as a clear legislative framework could the violations of EU law be considerably reduced and, hence, the number of complaints, to the benefit of all individuals, natural or legal persons.[17]

The European Commission must ensure, as the guardian of the Treaties, the strengthening of cooperation with the member states in order to prevent the occurrence of breaches of the Union law and to speed up the process of rectifying violations of EU law where necessary.

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