

European Union Law

Topic 4: Jurisdiction of the ECJ.

Lecture 2 (of 3);

Enforcement Actions against Member States

Aim:

To provide a review of the jurisdiction of the ECJ previously exercised under Arts.226 and 227EC; and to note the power of enforcement that was developed under Art.228EC [See now **Arts.258-260 TFEU**, respectively, post *ToL*].

Objectives:

After carefully studying the following notes and other prescribed readings for this lecture you should be able to:

1. Discuss the provisions and procedures provided for under **Arts.258** and **259 TFEU**; and
2. Critically evaluate the impact of the provisions of **Art.260 TFEU**; and
- 3.. Explain how the doctrine of Direct Effect, the principle of State Liability and **Arts.4(3) TEU** and **267 TFEU** have been used to attach liability to a Member State that has failed to fulfill its Treaty obligations.

Introduction

By contrast with the general rule under public international law, EU Law provides for an effective enforcement regime against a Member State in breach of its Treaty obligations. The principal enforcement actions brought before the ECJ are actions brought by either the Commission on behalf of the EU, or by another Member State against a Member State that has failed to fulfil its Treaty obligations (**Arts.258** and **259 TFEU**, respectively). Under these enforcement provisions, neither natural nor legal persons can bring actions against *Member States*¹.

(N.B.: (i) A State may be liable to an individual under the doctrine of Direct Effect; and (ii) State liability to an individual that was established in *Francovich* (and modified in *Factortame*), was via liability being imposed on the State for its breach of *Art.10EC* (now **Art.4(3) TEU**) following an *Art.234 EC* reference (now **Art.267 TFEU**)for a preliminary ruling.).

¹ By contrast, Member States can be made responsible for the actions of its citizens: *Case C-265/95, Commission v France* – failure of France to take adequate measures to prevent violent and criminal damage to imported Spanish strawberries by protesting French farmers.

Actions Taken Against Member States

The EC Treaty provides for two types of action to be taken against Member States that are in breach of Community law:

- (i) Action by the **Commission** under **Art.258 TFEU**;
- (ii) Action by other Member States under Art.259 TFEU.

(A) Duties imposed on Member States and Enforcement actions initiated by the Commission.

Art.4(3) TEU provides that:

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Community. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The necessity for Community law to be obeyed was expressed by the ECJ more than 40 years ago in Case 6/64, Costa v. ENEL, where it was said that failure to uphold it meant that the 'legal basis of the Community [now Union] itself would be called into question.'

“Failure” and “obligations”

If a Member State is to be held liable for its failure to fulfill its Treaty obligations, then it's necessary to clarify what is meant by 'failure' and 'obligations'.

Failure

To quote *Kaczorowska*², the ways in which a Member States can fail to honour their Treaty obligations:

“May consist of some action taken by a Member State, such as the application of national law incompatible with EU law, the adoption of a legislative act contrary to EU law, or an express refusal to fulfill an obligation imposed by EU law. [It may also arise] from a failure to act [e.g.] for non-implementation of EU directives within the prescribed time limit”.

Breach of Obligations

Let it suffice to say that the breach must be in respect of “a pre-existing, specific and precise obligation”³ and that, in essence, it will refer to a breach of a Treaty provision, or a breach of binding secondary legislation or of a general principle of Union law.

² *Kaczorowska, A. European Union Law*, 2nd edn., 2010. Abingdon: Routledge, p390. My emphasis.

³ *Ibid.*, with Case 7/71, Commission v France, being cited as authority for the point.

Enforcement via the power of the Commission as ‘Guardian of the Treaties’

Art.17(1) TEU provides, in part, that:

“The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. *It shall oversee the application of Union law under the control of the Court of Justice of the European Union*”.

Exercising this duty may involve the Commission in taking proceedings against the defaulting State in the ECJ. This power is provided for in **Article 258 TFEU** which states that:

If the Commission *considers* that a Member State has failed to fulfil an obligation under the Treaties, it **shall** deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion in the period laid down by the Commission, the latter **may** bring the matter before the Court of Justice.

Thus, **Art.258 TFEU** gives rise to a two-stage procedure: an *administrative* or pre-litigation stage and a *judicial* stage. The pre-litigation stage must be completed before proceedings in the ECJ are undertaken. The reasons for adhering to the pre-litigation procedure are:

- it enables the Commission to ascertain the precise nature and extent of the infringement alleged.
- it provides the Member State concerned with an essential guarantee in respect of its right of defence.
- It gives both parties the opportunity of clarifying in co-operation with one another sometimes complex legal solutions, and thus reaching an amicable solution.

(i) The Administrative Stage.

Initially [the ‘fact-finding’ stage], the Commission investigates the possibility of a breach by a Member State of its failure to comply with its obligations. The obligations may arise under the EC Treaty, under secondary legislation or via agreements made by the Union with third countries under **Art.218(1) TFEU**. Whilst this is an informal stage, Member States are under a duty to cooperate with the Commission: Case C-375/92, Commission v. Spain. If it is believed that there is a case to answer, the administration procedure then begins with the Director General responsible for the Union policy in question writing to the Member State that is accused of violating its obligations: this is the *letter of formal notice*. The State is informed of the Commission’s belief that there is a breach of an obligation under the Treaty, e.g., and the State is invited to comment on its alleged non-compliant behaviour. This is an essential procedural requirement: Case 51/83, Commission v Italy. If the Commission receives what it deems an unsatisfactory explanation from the Member

State then it (the Commission) *may*⁴ continue with the formal pre-litigation procedure by delivering a *reasoned opinion*.

The Reasoned Opinion

The reasoned opinion delivered to the Member State is *confidential*: it is *not legally binding, nor can it be challenged*: *Case 48/65, Lutticke*⁵. However, it must set out the reasons of fact and law which, in the opinion of the Commission, have led to the Member State failing to fulfil its obligations; and the Member State must be informed of the measures that the Commission considers necessary to bring the failure to an end. Providing the reasoned opinion contains a coherent statement of the reasons that has convinced the Commission the Member State has failed to fulfil its obligations, then there is no requirement that the Commission's case should be set out in full: *Case 7/61, Commission v. Italy (Re Ban on Pork Imports)*.

In essence, delivery of the reasoned opinion exhausts the administrative or pre-litigation stage. The Commission *may* then exercise its discretion in deciding whether to take proceedings before the ECJ. Statistics show that whereas the number of reasoned opinions issued between 1999 and 2001 increased from 460 (1999) to 569 (2001), the number of referrals to the ECJ dropped in each year from just under 180 (1999) to just over 160 (2001) for the then 15 Member States. The figures would appear to indicate the success of the administrative stage, especially since only 189 referrals were made in 2006 (from 680 reasoned opinions) – by which time there were 25 Member States in the EU.

Reasons for *not* proceeding with an *Art.258 TFEU* action

Reasons for *not* proceeding with an *Art.258* action were expressed by *Advocate General Roemer* in *Case 7/71, Commission v. France*. The reasons included:

- (i) the possibility of reaching an amicable settlement if formal proceedings are delayed;
- (ii) the effects of the violation of the State's obligations are relatively minor; and
- (iii) the possibility of the Union provision in question being amended in the near future.

If a State has agreed to rectify a breach of its obligations it must be given reasonable time to do so. If a State has been given insufficient time to comply with the Commission's reasoned opinion then the ECJ may dismiss an *Art.258 TFEU* action on the grounds of inadequate time limits. This is one of the possible outcomes at the second (judicial) stage.

⁴ i.e., The Commission has a discretionary power to commence infringement proceedings.

⁵ Though, of course, in theory, this may be the subject of a complaint to the Ombudsman under *Art.228 TFEU* (*N.B.*: In the second Lutticke case, *Case 57/65*, which was brought before the German courts, Lutticke succeeded in obtaining a ruling under *Art.267 TFEU* that *Art.110 TFEU* was directly effective. Accordingly, Lutticke recovered the levy it had paid on imported milk powder. This was the same levy it had failed to recover when the Commission exercised its discretion not to take action under *Art.258 TFEU* against Germany).

(B) Enforcement Actions by a Member State.

If the Commission does not wish to pursue an Art.258 TFEU action against a Member State, perhaps evidenced by not delivering a reasoned opinion within three months of the date on which the matter was brought before it, then the opportunity arises for another Member State to pursue an action under **Art.259 TFEU**.

Article 259 TFEU⁶ provides that:

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

Thus, it is essential that the procedural preconditions are satisfied by the complainant State and the Commission if the ECJ is to hear an action by the complainant State against the Member State that has, allegedly, failed to fulfil an obligation under the EU Treaties. The procedure begins with the complainant Member state bringing to the attention of the Commission the alleged violation by another Member State of an obligation under the Treaties and it ends with the Commission either failing to deliver an opinion within the specified time or deciding that it does not intend pursuing the matter any further - in which case the complaining Member State is free to pursue the matter itself. **Art.344 TFEU** provides that no other form of dispute resolution is permissible and that only the ECJ has the jurisdiction to hear the dispute.

That a reasoned opinion has been delivered by the Commission does not preclude a Member State that is dissatisfied with the opinion from bringing proceedings before the ECJ. This occurred in one of the few cases of one Member State bringing an action before another in the ECJ: Case 141/78, France v. U.K. (Re Fishing Net Mesh Sizes) [1979] ECR 2923. Here, the U.K. had enacted an Order in Council which regulated the size of the mesh of fishing nets. This was done in an attempt to conserve fishing stocks. However, fishing policy is a matter within the competence of the [EU] and the Council of Ministers

⁶ *Ex.Art.227EC* pre-ratification of the Treaty of Lisbon.

had earlier passed a resolution allowing Member States to introduce conservation measures on condition that prior consultations were held with the Commission. The U.K. had failed to enter into such consultations prior to the enactment of the Order in Council. Accordingly, France complained to the Commission that this was contrary to Union law. The Commission agreed but did not take the U.K. before the ECJ. France then took direct action against the U.K., as it was entitled to under **Art.259 TFEU** by taking proceedings before the ECJ.

HELD: U.K. was in breach of Community [Union] law because:

‘... by not previously notifying the other Member States and the Commission of the measure adopted and seeking the approval of the Commission, the U.K. has failed to fulfil its obligations under [inter alia] Art.[4(3)] of the [TFEU] ...’

(ii) The Judicial Stage.

An enforcement action taken by one Member State against another is a rarity, given the qualification in **Art.259(2) TFEU** and that *Case 141/78, France v UK*, is, for most practical purposes, a ‘one-off’. However, if enforcement action against a Member State is to be taken under **Art.258 TFEU**, then the discretion of the Commission to pursue it⁷ before the ECJ must be taken in the context of its **Art.17(1) TEU** duty to take appropriate action to ensure that every breach is rectified. If proceedings are taken, it is the national governments that appear before the ECJ as defendants, although proceedings are brought against the State or any agency of the state, whether executive, legislative or judicial. In *Case 77/69, Commission v Belgium*, it was said that the responsibility of the State is engaged ‘whatever the organ of the State whose action or inaction constitutes a failure, even if it concerns an institution which is constitutionally independent.’ However, to date, no action has been taken in respect of violation of Union law by a national court. The opportunity to do so arose when the French *Conseil d’Etat* failed to comply with its obligation under **Art.267(3) TFEU** (ex.*Art.234(3)EC*) in the *Cohn-Bendit* case. It would appear that the ECJ does not wish to undermine judicial independence, a risk which might be precipitated if it were to do so. Instead, the ECJ appears to be content with publicising the failure of national courts to uphold Union law in its annual reports on the monitoring and application of Union law.

‘New’ violations cannot be raised by the Commission in proceedings before the ECJ: the Court will only entertain alleged violations contained in the reasoned opinion already delivered to the Member State alleged to be in breach of its obligations. That a State is no longer in breach of its obligations is no bar to the Commission continuing an **Art.258 TFEU** action: *Case 7/61, Commission v. Italy (Re Ban on Pork Imports)*.

⁷ The Commission took over 200 Art.258 TFEU actions against Member States in 2003

Defences Available to Member States.

Steiner notes that: ‘Many defences to an action under Article [258 TFEU] have been attempted; few have succeeded. The best defence is clearly to deny the obligation(!).’⁸ ‘Defences’ which are based on grounds frequently cited in public international law cases – such as those based on reciprocity, necessity and *force majeure* - have already been rejected. According to *Kaczorowska*⁹, this is because “The philosophy of Art.258 TFEU requires that the defaulting Member State put an end to the violation of EU law as soon as possible, and thus some defences recognized under public international law have been rejected by the ECJ”.

The New Remedy under Art.260 TFEU.

Prior to amendments made by the ‘original’ TEU [‘Maastricht’], the only ‘remedy’ under **Art.[260 TFEU]** was a declaration by the ECJ that the Member State had violated its obligations and that it should take the necessary steps to comply with the judgment of the court. Now, however, *irrespective of whether action is taken against a Member State under Art.258 or Art.259 TFEU*, where the ECJ has found that the Member State has failed to fulfil its obligations under the Union Treaties, then the State ‘***shall be required to take the necessary measures to comply with the judgment of the Court of Justice.***’ In short, it means that the Commission is empowered to ‘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’: **Art.260(2)TFEU**. The fines, which are imposed by the ECJ, result from this *second* action brought before the ECJ by the Commission [first action establishes liability; second action is for the fine if the Member State has not rectified its Treaty violation]. Moreover, there is no requirement for a reasoned opinion to be delivered prior to a second court case being brought by the Commission.

Art.260 TFEU contains no guidance on the limits of the fines or penalties which may be imposed, nor or how they are to be enforced. Notwithstanding this ‘omission’, the first case on the penalty payments provisions was *Case C-387/97, Commission v. Greece*. This case related to the disposal of toxic waste and the penalty payment imposed on Greece by the ECJ was €20,000 per day. [The sum of the fine had reached €5,400,000 by the time the breach had been rectified]. More significantly, perhaps, the ECJ held that the criteria to be taken into account to ensure that the penalty payments had coercive force and that Union law would be applied uniformly and effectively were:

- The duration of the infringement;
- Its degree of seriousness; and
- The ability of the Member State to pay the penalty.

⁸ *Steiner, J.*, et al *EU Law*, 9th edn., 2006. Oxford: OUP, p232. The same quotation from the 4th edn of Steiner was cited in *Kaczorowska*, op cit fn.2, p403.

⁹ Op cit. fn 2, p403.

(N.B.: (i) Interim measures may be prescribed by the ECJ under **Art.267 TFEU**; and (ii) It should be recalled that in Joined Cases C-6/90 and C-9/90, *Francovich*, that whereas the ECJ decided that, under certain conditions, an individual who suffered harm as a result of the failure of a Member State to fulfil its Treaty obligations could bring an action against that Member State, it was **NOT** an **Art.258** or **259 TFEU** action. This is discussed in more detail in the next section).

In Case C-304/02, *Commission v. France*, the Commission complained that France had not rectified its breach of Union law for which it had been found liable under **Art.258 TFEU** proceedings in Case C-64/88. Accordingly, the Commission requested that a penalty payment be levied on France by the ECJ. The **Advocate General** agreed with the Commission and he suggested ‘a **lump sum** of €115,522,500’ be levied on France with a ‘*periodic penalty payment* of €57,761,250 for each six-monthly interval that the Commission establishes that the infringement subsists.’

However, the ECJ remitted the findings for the **Advocate-General** to deliver a second opinion on, *inter-alia*, the jurisdiction of the Court to impose both a lump sum *and* a penalty payment. When the A-G affirmed the ECJ had full jurisdiction to do this, the lump sum the ECJ ordered that France had to pay was €20,000,000 (July 2005), but the periodic payment remained in excess of €57,000,000 for each six-monthly interval that the Commission established that the infringement subsisted. The first periodic penalty payment discussed by the Commission (on January 12th 2006) was announced on March 1st 2006 when it was reported in (2006) *The Times*, March 2nd, p43, that:

“France’s reputation for flouting the rules of the European Union was reinforced yesterday when it was fined £40 million [~€57 million] for continuing to disobey laws against catching undersize fish.

“The European Commission, which imposed the penalty, also ruled that France would be fined again in six months if it failed to impose controls on the landing and marketing of smaller fish. ...

Undoubtedly, the threat of action under **Art.228EC** will prove very persuasive in future!

Actions taken by Natural or Legal Persons against Member States or Emanations of the State.

The EC Treaty does not provide for natural or legal persons to take direct action against Member States before the ECJ. However, it is possible for a Member State to be liable to such a person if it has breached Union law. This was clearly established in Cases C-6 & 9/90, *Francovich v. Italian Republic* (and later modified in Factortame (No’s 3 & 4)). Liability in *Francovich* was established via an **Article 267 TFEU** reference and a finding that the Member State (Italy) had breached its duty under **Article 4(3) TEU**. Initially (i.e., pre-*Factortame (No.3)*), it could be stated that the three conditions that had to be demonstrated before an individual could succeed in claiming compensation for an injury

sustained for violations of Union law where the breach of duty could be imputed to the behaviour of the Member State, were:

- (a) The purpose of the Union measure must have been to create rights conferred on private individuals;
- (b) The contents of those rights must have been identifiable from the contents of the measure; and
- (c) There must have been a causal link between a failure by the Member State to comply with Union law and the injury sustained by the private individual.

Points (a) and (b) can be established via the **Article 267 TFEU** procedure; with regard to point (c) this is for the national courts to decide on the facts of the case. Court procedure and the awarding of damages, if, of course, the plaintiff's case succeeds, are matters for the national courts.

However, in *Factortame (No3)*, the test for state liability was modified with point (b) (supra) being expressed as: 'the breach must be sufficiently serious.' In this case, the ECJ affirmed: "The principle that Member States were obliged to make good damage caused to individuals by breach of [Union] law attributable to the state was applicable where the national legislature was responsible for the breach."

In *Factortame*, the **ECJ Held**, on a reference for an **Article [267 TFEU]** preliminary ruling, that the conditions relating to the nationality, residence and domicile of vessel owners and operators as provided for in the registration system in the **Merchant Shipping Act 1988** contravened **Art.49 TFEU** (ex.Art.43EC) (freedom of establishment).

.....

References

Craig, P & de Burca, G. EU Law: Text, Cases and Materials, 4th edn., 2008. Oxford: OUP, Ch.12;

Fairhurst, J. Law of the European Union, 8th edn., 2010. Harlow: Pearson Longman, Ch.7;

Foster, N. EU Law Directions, 2nd edn., 2010. Oxford: OUP, Ch.7;

Hartley, T.C. The Foundations of European Union Law, 7th edn., 2010. Oxford: OUP, Ch.10;

Kaczorowska, A. European Union Law, 2nd edn., 2010. Abingdon: Routledge, Ch.15.

Potential Workshop / Examination question.

Answer **BOTH** parts of this question

Critically evaluate the potential effectiveness of actions in respect of breaches of Community law brought by:

(A) the Commission under **Art.258 TFEU** proceedings;

AND

(B) individuals who bring claims before their national courts against the relevant national authorities.

Summary

As a minimum, ensure you are able to discuss and analyse:

1. **Art.4(3)** – duties imposed on Member States.
2. **Arts.17(1) TEU** and **258 TFEU** – duties & discretion given to the Commission.
3. **Art. 258 TFEU:**
Administrative Stage:
 - Fact finding;
 - Formal letter;
 - Reasoned opinion – and further action by the Commission is a matter for its discretion.
4. **Art. 260 TFEU**
Fines may be imposed by the ECJ on the MS in breach of its obligations in the *second* action brought by the Commission. The first action establishes liability; the second action is necessary only if the Member State hasn't rectified its breach 'within the time laid down by the Commission'. No reasoned opinion is required for a second action under **Art.260 TFEU**.

The ECJ has the jurisdiction to impose both a lump sum and a penalty payment on the Member State in breach of its obligations: Case C-304/02, Commission v France. Under Art.260(3) TFEU, the Commission is entitled to specify the penalty payment for the ECJ to impose at the hearing of a first case in which a Member State's failure to implement a Directive in a timely manner is determined. Thus, in Case C-121/07, France was ordered to pay a lump sum of €10Million for failing to implement **Directive 2001/118** by the specified date.
5. **Cases C-387/97, Commission v Greece** ; and **C-304/04, Commission v France**.