

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Diagram 3a

**The infringement proceedings:
enforcement action of the Commission¹ (art. 258 FEU Treaty²)**

I. Admissibility of the enforcement action

1) *Jurisdiction of the European Court of Justice*

- in all litigations in the field of Union law (→ "obligation under the Treaties"), however
 - except in matters of the Common Foreign and Security Policy (art. 275 FEU Treaty)
 - strongly restricted in matters of the Judicial Cooperation in Criminal Matters and Police Cooperation (art. 276 FEU Treaty)
- exclusive jurisdiction of the Court of Justice (no jurisdiction of the General Court)

2) *Capacity to sue and to be sued*

- a) Capacity of the *Commission only* to act as applicant party (cf. art. 258 sub-sect. 2 FEU Treaty)
- b) Capacity of the *member states only* to act as defendant party (cf. art. 258 sub-sect. 1, 2 FEU Treaty)
 - no infringement proceedings against Länder, Comunidades Autonomes, Régions or other regional or local authorities

3) *Preliminary proceedings*

- unnecessary in cases under art. 108(2) sub-sect. 2, 114(9), 348 FEU Treaty
- usually preceded by informal proceedings (informal contact with the competent national institutions)

 - a) *Formal notice* of the Commission inviting the member state to submit observations (art. 258 sub-sect. 1)
 - information of the (national) government of the member states about the initiation of the formal proceedings
 - information about the facts that, according to the opinion of the Commission, constitute a failure to fulfil obligations
 - information about the (allegedly) violated provisions of Union law
 - invitation to submit observations on the allegation within a period laid down by the Commission
 - b) Observations of the member state or expiration of the period for observations
 - c) *Reasoned opinion* of the Commission with request to comply within a set period of time (art. 258 sub-sect. 1)
 - d) Fruitless expiration of the period for compliance (art. 258 sub-sect. 2)

4) *Suitable subject-matter for an application*

- a) Allegation of a violation of Union law ("failure to fulfil an obligation under the Treaties")
 - aa) Allegation of a violation of primary law
 - also of the Charter of Fundamental Rights of the European Union (see art. 6(1) EU Treaty)
(only when implementing Union law or encroaching on the economic fundamental freedoms, see art. 51 of the Charter)
 - also of general principles of law
 - bb) Allegation of a violation of secondary law
 - = of the obligations deriving from art. 4(3) EU Treaty read together with art. 288 sub-sect. 2, 3 or 4 FEU Treaty³
 - also of international treaties concluded by the Union resp. formerly the Community (cf. art. 218 FEU Treaty)
- b) The same allegation (based on the same facts and legal reasons) as in the preliminary proceedings
 - otherwise, the Commission must give again the opportunity to submit observations and to comply with its request

5) *Legal interest in bringing proceedings*

- a) Commission is convinced that the member state has failed to fulfil its obligation
 - mere doubts or assumptions are not sufficient
- b) General interest in bringing proceedings
 - DISPUTED for those cases where the member state has complied with the reasoned opinion after expiration of the period laid down but prior to taking legal action or to the end of the oral procedure before the Court of Justice (ECJ: (+) if there is a risk of repeated Treaty violations, if the subject-matter is relevant for possible state liability or if the legal issues are especially significant for the functioning of the Union)

¹ = action of the Commission under art. 258 FEU Treaty for failure to fulfil obligations.

² Formerly (until the Treaty of Lisbon came into force) art. 226 EC Treaty.

³ Formerly art. 249 sub-sect. 2, 3, 4 EC Treaty.

II. Well-foundedness of the enforcement action

- The enforcement action is well-founded if the defendant, by the conduct complained about, actually has violated Union law (has "failed to fulfil an obligation under the Treaties"). The alleged facts must be true, the defendant must be accountable. The violation must not concern (only) provisions or matters, with respect to whom the Court of Justice has no jurisdiction (cf. art. 275, 276 FEU Treaty).
- important examples: violation of provisions of the FEU Treaty, failure to apply a regulation; failure to transpose or to transpose correctly a directive, violation of an economic fundamental freedom or of the general prohibition of discrimination (art. 18 FEU Treaty)
- consequence: declaratory judgement (cf. art. 260(1) FEU Treaty⁴)
 - no annulment of measures of the member states by the ECJ!
 - new: in case of a failure to transpose directives, on request of the Commission, the Court of Justice may impose a lump sum or penalty payment (art. 260(3) FEU Treaty).

Diagram 3b

The infringement proceedings: action of another member state⁵ (art. 259 FEU Treaty⁶)

- rare in practice...

I. Admissibility of the legal action of the member state

1) Jurisdiction of the European Court of Justice

- see above (Diagram 3a, I.1)

2) Capacity to sue and to be sued

- reserved to the member states (cf. art. 259 sub-sect. 1 FEU Treaty)

3) Preliminary proceedings

- unnecessary in cases under art. 108(2) sub-sect. 2, 114(9), 348 FEU Treaty

a) Bringing the matter before the Commission (art. 259 sub-sect. 2)

- information about the facts that, according to the opinion of the member state, constitute a failure to fulfil obligations
- information about the (allegedly) violated provisions of Union law
- request that the Commission may initiate the proceedings under art. 259 sub-sect. 3

b) Hearing of both member states by the Commission (art. 259 sub-sect. 3)

- invitation to submit their own case and their observations on the other party's case within a period laid down by the Commission

c) Reasoned opinion of the Commission or failure of the Commission to deliver an opinion within three months (art. 259 sub-sect. 4)

4) Suitable subject-matter for an application

- see above (Diagram 3a, I.4)

5) Legal interest in bringing proceedings

- DISPUTED for those cases where the member state has fulfilled its obligations after the reasoned opinion of the Commission but before the applicant state takes legal action or prior to the end of the oral procedure before the Court of Justice

II. Well-foundedness of the legal action of the member state

- see above (Diagram 3a, II.)
- consequence: declaratory judgement (without the possibility to impose a lump sum or penalty payment)

(Date: Diagram3 (Cases-EULaw))

⁴ Formerly art. 228(1) EC Treaty.

⁵ = action of another member state under art. 259 FEU Treaty for failure to fulfil obligations.

⁶ Formerly art. 227 EC Treaty.