

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Diagram 5

The action for failure to act (art. 265 FEU Treaty¹)

I. Admissibility of the action for failure to act

1) Jurisdiction of a European Court

- a) Jurisdiction of the courts of the European Union
 - in all litigations in the field of Union law (→ "in infringement of the Treaties") except in matters of the Common Foreign and Security Policy (art. 275 FEU Treaty)
- b) Jurisdiction within the system of the courts of the European Union
 - aa) Jurisdiction of the General Court (art. 256(1) sub-sect. 1 phrase 1 FEU Treaty)²
 - for actions brought by natural or legal persons
 - for certain actions brought by member states (art. 256(1) sub-sect. 1 phrase 1 FEU Treaty read together with art. 51 of the Statute of the Court of Justice)
 - bb) Jurisdiction of the Court of Justice (art. 256(1) sub-sect. 1 phrase 1 FEU Treaty read together with art. 51 of the Statute of the Court of Justice)
 - for (most of the) actions brought by member states (art. 51 sub-sect. 1 of the Statute)
 - for actions brought by Union institutions (art. 51 sub-sect. 2 of the Statute)

2) Capacity to sue and to be sued

- a) Capacity to sue
 - aa) Member states (art. 265 sub-sect. 1)
 - bb) Union institutions (art. 265 sub-sect. 1)
 - see enumeration in art. 13(1) EU Treaty
 - cc) Natural and legal persons (art. 265 sub-sect. 3)
- b) Capacity to be sued
 - aa) European Parliament, European Council, Council, Commission, European Central Bank (art. 265 sub-sect. 1 phrase 1)
 - bb) Bodies, offices and agencies of the Union (art. 265 sub-sect. 1 phrase 2)

3) Suitable subject-matter for an application

- will be specified by the preliminary proceedings
- a) for actions brought by member states or Union institutions: allegation of a violation of Union law ("infringement of the Treaties") by failing to take a decision ("fail to act") (art. 265 sub-sect. 1)
 - aa) Allegation of a violation of primary law
 - bb) Allegation of a violation of secondary law
 - b) for actions brought by natural or legal persons: allegation of a violation of Union law by failing to take a legally binding decision addressed to a specified person (art. 265 sub-sect. 3)
 - note: the wording "addressed to that person" excludes actions for failure to issue regulations or directives

4) Legal interest in bringing proceedings

- a) No special requirements for actions brought by member states or Union institutions
- b) In case of actions brought by natural or legal persons: allegation of a violation of Union law by *failing to address an act to that person*
 - aa) By failing to address an act to the applicant

¹ Formerly (until the Treaty of Lisbon came into force) art. 232 EC Treaty.

² Formerly jurisdiction of the Court of First Instance under art. 225(1) sub-sect. 1 phrase 1 EC Treaty.

- bb) Also by failing to address an act to a third party, if this act would be of direct and individual concern to the applicant? (→ competitor's complaint)
- α) NEW JURISPRUDENCE (e.g. ECJ, case C-68/95, T. Port) and SOME SCHOLARS: (+), because it is necessary to avoid deficits in legal protection; parallels with the action for annulment
 - β) OTHER SCHOLARS: (-), because the wording of art. 265 sub-sect. 3 is unambiguous ("to address to *that* person")
 - γ) MY PERSONAL POINT OF VIEW: (-), because the *clear and unambiguous wording must be respected as a limit to interpretation*, even if this leads to a deficit in legal protection. The jurisprudent is not entitled to defy the positive law in favour of considerations of pure legal politics. The opposite view deliberately disregards the limits of interpretation and thus the essential difference between Treaty interpretation and Treaty extension in European Union law. The real essence of the reasoning is as follows: "The rule in art. 265 is different but we do not like it." By the standards of legal methodology, this kind of "interpretation" of art. 265 sub-sect. 3 is *arbitrary and indefensible*. Applying art. 265 by *analogy* would represent a defensible but not convincing solution to introduce competitors' complaints at the European Courts. There is a *regulatory gap* (resulting in deficits in legal protection) but it is *not*, as required by legal methodology for any analogy, *unintended* by the member states as the "masters of the Treaties". Note that despite the criticism of the wording with regard to the deficits in legal protection resulting from it, the member states have not corrected it in the Treaty of Lisbon, while in previous cases, they have adapted the wording of the Treaty to a more "generous" practice of the Court at the occasion of the next reform. This indicates that the "masters of the Treaties" do not support the idea of a competitor's complaint under art. 265.

5) *Preliminary proceedings (art. 265 sub-sect. 2 FEU Treaty)*

- a) Call upon the respondent to act (art. 265 sub-sect. 2 phrase 1)
 - specifying the individual act to be taken
 - specifying the (allegedly) violated legal obligation to act and the relevant provisions of Union law
 - threatening to take legal action in case of ongoing inactivity
- b) No statement defining the position of the respondent within two months (art. 265 sub-sect. 2 phrase 2)
 - if the respondent defines its position, only an action for the annulment of this statement is admissible

6) *Suitable respondent*

- the Union institution, body, office or agency that is supposed to issue the sought-after act
- in case of an act to be legislated in the ordinary legislative procedure under art. 294 FEU Treaty: the Council *and* the EP

7) *No expiry of the time limit (art. 265 sub-sect. 2 phrase 2)*

II. Well-foundedness of the action for failure to act

- The action for failure to act is well-founded, if the respondent has violated Union law (that is not relating to the Common Foreign and Security Policy, cf. art. 275 FEU Treaty) by not taking the requested decision.
- consequence: declaratory judgement (cf. art. 265 sub-sect. 1 FEU Treaty), leading to the obligation to take the necessary measures to comply with the judgement (art. 266 FEU Treaty³); the Court will not take the sought-after decision in place of the respondent!

(Date: Diagram5 (Cases-EULaw))

³ Formerly art. 233 EC Treaty.