

Infringement Proceedings in EU Law

Luca Prete

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Infringement Proceedings in EU Law

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Editor

Prof. Andrea Biondi is Professor of European Law and Director of the Centre of European Law at King's College London

Introduction & Contents/Subjects

As the process of European integration assumes an increasingly complex character, the EU legal system continues to undergo sweeping changes. The European Monographs series offers a voice to thoughtful, knowledgeable, cutting edge legal commentary on the now unlimited field of European law. Its emphasis on focal and topical issues makes the series an invaluable tool for scholars, practitioners, and policymakers specializing or simply interested in EU law.

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*Ad Alexandra,
l'altra metà della mela
Ad Aurelia,
che illumina le nostre vite*

Foreword

The Court of Justice of the European Union is unique. It is unique first and foremost because of its wide range of competences, one of which being so-called infringement proceedings. In contrast to other international courts or dispute settlement bodies, under Articles 258-260 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice not only has jurisdiction to adjudicate on the contracting parties' obligations under the Treaties, but also the power to impose financial sanctions for breaches of these obligations. While it is true that other international courts, most notably the European Court of Human Rights, can find and sanction the infringements of the Contracting Parties, infringement proceedings under Articles 258 and 260 TFEU are simply unique because of the scope of the different obligations undertaken by Member States in the European Union.

The extent of Member States' obligations explains, in part, the importance of infringement proceedings in the functioning of the European Union. In the absence of the European Commission's constant surveillance and recourse to, where needed, infringement proceedings brought before the Court of Justice to define authoritatively the scope of the Member States' obligations, it is safe to say that, for one thing, there would simply be no internal market. Therefore, a study of the role and functioning of infringement proceedings in European Union law is evidently of great practical interest but also, as Luca Prete demonstrates in this book, of great theoretical interest.

The author's extensive experience with the European Commission's Legal Service in handling infringement proceedings, as well as an equally long-standing experience working at the Court of Justice as a legal secretary (*référéndaire*) in various cabinets made him well-equipped to undertake such a study.

In his book, Luca Prete provides the reader with a comprehensive overview of all aspects of infringement proceedings in the EU legal order. Beginning with the development of the procedure in the light of various Treaty amendments, the study thereafter covers both the substantive and procedural aspects of infringement proceedings extensively. No doubt some of those aspects are well-known, but the level of detail is commendable. The thoroughness of the study is also evident with regard to its examination of the consequences flowing from the Court of Justice's rulings. The discussion of the highly topical question of the interpretation of Article 260(3) TFEU on

failures on the part of Member States to notify measures transposing a directive should be noted. Indeed, despite the fact that the Court of Justice has yet to rule on the correct interpretation of that provision, it is fascinating, in my view, to note the effectiveness, in practice, of that provision in Member States' eagerness to comply swiftly, i.e., before the Court has delivered a ruling. Luca Prete offers a welcomed and detailed analysis of all these issues.

The book also focuses on the Commission's policy as concerns infringement proceedings and their future treatment. Those parts are, in fact, my personal favourites, partly since the workings of the Commission are not readily assessable for an outsider, but also for the clear views presented on how to make the infringement procedure, both at the level of the Commission and of the Court's procedure, even more effective. One may not agree with all the proposals put forward by the author, but the book's initial discussions are very useful in understanding the author's concerns underpinning the subsequent suggestions for reform. Perhaps because of my Swedish origin, I personally took great interest in the author's examination of how transparency could enhance the infringement proceedings system.

Overall, Luca Prete's book is clearly of great theoretical and practical value. For all those interested in the historical development, the general features as well as the future challenges for infringement proceedings, this book is clearly a must-have.

Nils Wahl, Advocate General at the Court of Justice
16 November 2016

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This book is essentially based on the PhD thesis which I completed at the Vrije Universiteit Brussel, under the supervision of Professor Tony Joris. I would like to express my sincere gratitude to him for his support, advice and – more importantly – friendship. I would also like to thank the other members of the jury – Professor Dirk Arts, Professor Inge Govaere, Professor Advocate General Juliane Kokott, Professor Marc Maresceau and Professor Stefaan Van der Jeught – for reviewing my thesis and providing me with many helpful and interesting comments. A special thank you goes to my current boss, Advocate General Nils Wahl, who kindly accepted to write the foreword to this book. I would also like to thank Rosemary Stanley, Maria Krausenboeck, Laura Simmonds and Michael Rhimes for the linguistic revision and everyone at Kluwer for their kind and professional assistance. There are also many other people, too many to name them all, especially at the Court of Justice and in the Commission's Legal Service, to whom I am in debt for the time they took to discuss with me a variety of legal issues. Most of all, I have to express my deepest gratitude to my family: my parents for encouraging me, since I was a kid, to be critical and intellectually curious; my wife and daughter for bringing joy and love in every day of my life.

The book reflects the state of the law on 15 November 2016. All views expressed in this book are my own.

Comments are welcome at: luca.infringements@gmail.com.

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CHAPTER 1

Introduction

§1.01 THE IMPORTANCE OF THE SUBJECT

On 10 December 1952, after being sworn in with his six fellow-Judges in the *Grande Salle du Palais de Conseil* in Luxembourg, Judge Pilotti, first President of the Court of Justice of the European Coal and Steel Community (ECSC), which would later become the Court of Justice of the European Union,¹ said:

vaste et délicate, la mission confiée à notre Cour est de garantir aux parties intéressées, qu'il s'agisse des États eux-mêmes, d'entreprises ou de simples particuliers, le respect des limites entre lesquelles doit s'exercer l'action des organes de la Communauté pour répondre aux exigences d'ordre social qui ont amené les gouvernements participants à prévoir son exercice.²

It is not surprising that the first President of the Court saw controlling the actions of the European institutions as central to that Court's role. Under the system created by the 1951 Treaty of Paris establishing the ECSC, the High Authority (later to become the European Commission) had a key role in virtually all activities of that Community. The High Authority even made the decisions as to whether Member States had infringed rules of the Treaty, although Member States could then appeal such decisions before the Court. So, initially, the Court's control over breaches of the ECSC Treaty committed by the Member States was purely indirect.

The importance of this new task of controlling Member States' behaviour, albeit indirectly, did not pass unnoticed among the first to comment on the newly created judicial institution. In 1956, Judge Delvaux wrote:

[La Cour de Justice] est une juridiction indépendante, un tribunal suprême, devant lequel les membres de la Communauté peuvent porter leurs grief contre les

1. The Court of Justice of the European Union is, presently, made up of two courts: the Court of Justice ('Court') and the General Court ('GC').

2. See *Chronique de la Politique Etrangère*, Volume VI – N. 1, January 1953, 68-69.

décisions de la Haute Autorité ou celles des États membres. ... Cette Cour ... est aussi arbitre entre les droits des États membres et les droits de la Communauté. On peut même la considérer comme l'embryon d'une Cour fédérale. ... La création de la Cour de Justice de la C.E.C.A. constitue un progrès considérable dans la voie de la justice internationale: elle peut imposer à des organismes internationaux, comme à des États, le respect de la légalité.³

Other scholars of that time also stressed the important and unusual nature of the infringement procedure, especially when, following the entry into force of the Treaties of Rome – which established the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) – the Court became the judicial institution for all three Communities and was assigned a more central role in determining whether Member States had breached the Treaties.⁴

Some years later, the significance of 'actions for failure to fulfil obligations' (commonly referred to as 'infringement proceedings'⁵) for the uniform application of Community law was widely acknowledged and recognized. In his 1976 book *L'Europe des Juges*, former Court President Lecourt, wrote: 'Un fait essentiel demeure: les arrêts de manquement ne restent pas lettres mortes. En dépit de lenteurs ou de négligences, la règle de droit rencontre en ce domaine l'efficacité.'⁶ It is worth noting that President Lecourt was writing at a time when a mere forty infringement cases had been lodged before the Court, with only thirty of them eventually leading to a final ruling.⁷ Nowadays, some forty years later, the importance of infringement proceedings can be easily appreciated if one considers that, on a yearly basis, the Commission brings around sixty cases of possible infringements before the Court.⁸ And, as many commentators have stressed, Member States generally tend to comply with the Court's rulings, even if there are occasionally some long delays.⁹

3. L. Delvaux, *La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier – Exposé sommaire des principes* (R. Pichon & R. Durand-Auzias, 1956), 11-12. See also J. De Richemont, *La Cour de Justice – Code annoté, guide pratique* (Librairie du Journal des Notaires et des Avocats, 1954), 261 and 275. More recently, M. Rasmussen wrote: 'while it had been expected that the [Court] should control the High Authority, the weakness of the latter meant that the Court instead focused on protecting the Community against transgressions of the member states': see M. Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice* (1986) *J Eur Integr Hist* 14: 85.

4. See, e.g., W. Feld, *The Court of the European Communities: New Dimension in International Adjudication* (Martinus Nijhoff, 1964), 45. See also A. Tizzano, *La Corte di Giustizia delle Comunità Europee* (Jovene, 1967), 180 ss.

5. This is how this judicial action will be referred to in this work. The terms 'infringement procedure(s)' should be understood as a synonymous.

6. R. Lecourt, *L'Europe des Juges* (Bruylant, 1976), 231.

7. *Ibid.*, 227.

8. In year 2015 the Commission launched thirty-seven new infringement cases before the Court (57 cases in 2014, 54 cases in 2013, 58 in 2012, 73 in 2011, and 128 in 2010). See the 2015 Annual Report of the Court, p. 78 (available on the Court's website).

9. Cf., e.g., K.P.E. Lasok, T. Millet, *Judicial Control in the EU: Procedures and Principles* (Richmond, 2004), 42. For analyses on Member States' compliance records with adverse rulings of the Court see D. Panke, *The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law* (2007) *JEPP* 847; and P. Nicolaidis, A.M. Suren, *The Rule of Law in the EU: What the Numbers Say* (2007) 1 *EIPAscope* 33.

These infringement cases constitute a significant part of the Court's overall activity, since they represent, around 10% of the new cases brought before the European Union's highest judicial body each year.¹⁰ While it is true that a large number of these cases (mostly those where the infringement is not contested by the Member State concerned) are allocated to a chamber of three judges, many cases are heard by a chamber of five judges or even by the Grand Chamber.¹¹ For instance, between 1 January 2010 and 31 December 2015, the Grand Chamber of the Court handed down no fewer than twenty-eight judgments in various infringement cases. Thus, it is evident that infringement proceedings account for a substantial proportion of EU case-law, and place a considerable burden on the Court.¹²

However, the undoubtedly impressive number of cases initiated before the Court is trivial in comparison with the alleged infringements investigated every year by the Commission. For instance, in 2013, the Commission received 3,505 new complaints from citizens, businesses, Non-government Organizations (NGOs) and other organizations. In the same year, the Commission processed more than 3,000 complaints, and launched investigations of its own motion in more than 2,000 cases.¹³ Most cases are, however, resolved informally. In fact, over the same period, the Commission initiated formal infringement procedures in 761 cases, but issued only 217 reasoned opinions.¹⁴ As Kapteyn noted, the whole system of infringement proceedings is clearly intended to avoid, rather than obtain, the Court's condemnation of the defaulting Member States.¹⁵ The Commission itself has openly stated that its objective is to use 'the [Article 258 TFEU] procedure to settle infringement cases rather than to sanction them at all costs'.¹⁶ On this basis, Snyder argued that '[t]he main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process'.¹⁷

These figures concerning the cases handled by the Commission are impressive but not astonishing, considering that Member States have to comply not only with the EU Treaties – following the entry into force of the Lisbon Treaty, the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU)

10. To be precise, in 2015, infringement proceedings represented circa 5% of the Court's new cases (9% in 2014, 8% in 2013, 9% in 2012, 11% in 2011, and 20% in 2010). See the 2015 Annual Report of the Court, p. 76. In past years, the percentage was even higher: e.g., 25% in 2009, 35% in 2008, 36% in 2007 and 2006. See the 2009 Annual Report of the Court, pp. 82 and 85.

11. It is interesting to note that in the past all infringements were heard by the Court's Plenum: see A. Mattera, *Le marché unique européen – ses règles, son fonctionnement* (2nd ed., Jupiter, 1990), 697.

12. A. Arnall, *The European Union and Its Court of Justice* (2nd ed., Oxford University Press, 2006), 35.

13. European Commission, Report from the Commission – 31st Annual Report on Monitoring the Application of EU Law (2013) ('Commission's Annual Report'), pp. 6-9.

14. *Ibid.*, pp. 10-13.

15. P.J.G. Kapteyn, *Administration of Justice*, in McDonnell, Kapteyn, Mortelmans, Timmermans (eds), *The Law of the European Union and the European Communities* (4th ed., Kluwer, 2008), 421-510.

16. Commission's Eight Annual Report, point 5.

17. F. Snyder, *The Effectiveness of European Community Law* (1993) MLR 30. On this issue see also D. Chalmers, A. Tomkins, *European Union Public Law – Text and Materials* (Cambridge University Press, 2006), 350.