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Infringement Procedure

Monitoring Community Law and the Infringement Procedure

Summary of procedures and rules:

The Commission's role in monitoring the implementation of Community law is based on Article 211 of the EC Treaty, which says that "*the Commission shall ensure that the provisions of this (EC) Treaty and the measures taken by the institutions pursuant thereto* (= secondary legislation such as directives and regulations) *are applied*. The basic procedure, through which the Commission exercises its role, is called infringement proceedings.

Infringement proceedings are based on Articles 226 and 228 of the EC Treaty. These articles give the Commission the right to bring Member States before the European Court of Justice if the Commission considers that they have failed to implement Community law, that is, the treaties and secondary legislation.[1]

Thus, Articles 226 and 228 play a major role in the 'system' for ensuring that EC law is actually respected and implemented by the Member States. The Commission is required to ensure the uniform application of Community law, inform the Member States of suspected infringements, negotiate with them with a view to reaching an out-of-court settlement, and, if these measures fail, ultimately bring the matter before the Court, whose decision is final. Infringement procedures fall into four categories depending on their purpose:

 Infringements of the Treaties, regulations and decisions, which the Member States have to apply directly, as such ;

 Failure to notify national measures transposing a directive. Through notifying the measures they have taken to transpose (integrate into) directives the Member States show that they have done this - and how they have done it;

 Non-conformity with Community law of national legislation transposing a directive. Member States are obliged to transpose a directive in such a way that the objectives of the directive will be achieved - if the national law transposing the directive is applied correctly;

 Incorrect application of a directive in a Member State. Even when the law on paper is conform with EU law it is not always applied correctly by authorities in Member States (be it the Government, regional or municipal authorities, etc.).

An infringement proceeding on the basis of **Article 226** normally involves the following stages:

 It starts with a pre-litigation (before going to court) stage. Opening of this first, informal stage can be the

result of a petition, or a complaint to the Commission, or it can follow from questions by members of the European Parliament, or on the European Commission's own initiative, etc.

- Usually a letter is first send a ***letter of formal notice*** to the Member State concerned, which gives the Member State a certain time to comment on the allegations or suspicions of an infringement of EU law:

- It is worth noting that, despite the fact that this letter is called "formal notice", it is not mentioned in the EC Treaty, but belongs to the procedures developed by the European Commission itself;

- If the European Commission is not satisfied with the reply from the Member State to the letter of formal notice, it issues a ***reasoned opinion***, and again sets a dead line for reply from the Member State;

 During this stage it is still possible for the European Commission to stop its action on an alleged, or even o a confirmed infringement, and close the case - which often happens.

 If the case is not closed, the European Commission may bring it before the Court of Justice;

 It is still possible, even after that the case has been brought before the European Court of Justice for the European Commission to drop the case and withdraw it from the Court;

 If the case is not withdrawn, the Court will deliver a ruling which the Member State is obliged to follow and implement and which brings the infringement proceedings based on Article 226 to a close in the case concerned;

- No penalty or sanction is imposed at this stage. However, the Commission can request, and the Court can order, if it considers it required "that application of the contested measure be suspended" (***Article 242*** EC Treaty), and in any case before it order "any necessary interim measures" (***Article 243*** EC Treaty).

Nevertheless, if a Member State does not comply with the judgment of the Court of Justice the Commission can bring the member state once more before the Court, this time on the basis of **Article 228** of the EC Treaty, and request that the member state is fined.

- The procedure is, basically similar to the procedure when applying Article 226, with the Commission sending the member state at least a letter of formal notice with a dead line for the member state to reply, before bringing the matter before the Court of Justice.

- The Commission must define the daily fine or one-time lump sum (or both), which it considers that the Member State should e ordered to pay.

- The daily fine must be paid as long as the infringement goes on and is, basically, aimed a changing the behaviour of the Member State in question, whereas the lump sum is more like a punishment for what the Member State has done.

- The Court of Justice is not bound by the Commission's request and can decide to impose a different amount of penalty than the one requested by the Commission.

- Earlier the Commission always asked for - and the Court ordered - either a daily fine or a lump sum. However, in an important ruling against France for a persistent failure to correctly apply EU law on conservation of fish stocks, France was ordered both to pay a daily fine until the infringement ended and a lump sum because of the long time the infringement had been going on.[2]

Comments, views and positions:

The Greens and European Free Alliance group and its members have long called for - and worked for - a reform of the infringement proceedings. Monica Frassoni, as "rapporteur" for the European Parliament' on behalf of the Legal Affairs Committee, report on how EU law has been applied by the Member States has presented several critical remarks and constructive proposals concerning the infringement proceedings, which also have received the support of the Parliament as a whole.

As can be seen already from the description above of the procedures, these are complex, involve many stages, and easily can take quite a long time, even if the Member State concerned would comply with dead lines and provide the European Commission with the information requested. Unfortunately, this is often not the case. On the contrary, Member States quite often seem to play time - and .the European Commission too often appears to allow this. As a result the already long procedures drag out even more - with the danger that, for instance, the threat of environmental destruction that a petition has denounced is a completed fact while the proceedings are still running.

However, the length of the procedures is not, in the view of the Greens/EFA Group the only problem with the current rules and practices in infringement proceedings. While it is true that the Treaties given the European Commission discretion (the right to decide) about whether or not to take a Member State to the Court of Justice over an infringement we, nevertheless, consider that the Commission is obliged to respect basic principles of EU law and good administration when using this power of discretion.

This means, as has been stated by the European Ombudsman, that "*even if the Commission enjoys discretionary powers in respect to the opening of infringement procedures, these are nevertheless "subject to legal limits as established by the case law of the Court of Justice which requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms".* [3]

Our members in the Committee on Petitions have also persistently worked for improving the procedures and for a stronger role of the European Parliament in ensuring that the procedures are applied correctly and infringements efficiently dealt with. One of the most importantl tools used for this purpose is represented by the amendments tabled to resolutions. It happens so often that our members can agree with most of the content of a certain document but nevertheless be against particular proposals contained on it. Tabling amendments they try to get the most complete result in favour. Sometimes they succed, sometimes not.

Recently also the Committee of Inquiry into the crisis of the Equitable Life assurance society made critical comments on, and proposals for improving the procedures, which we consider go in the right direction.

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[1] Note that also the Member States have this right (Article 227 EC). However, while member states might use this option in order to protect their specific national interests, they would not be inclined to bring another member state before the ECJ in order to protect a common public interest, such as the environment - in fear of being targeted in their turn, etc.

[2] In case C-304/02, the Court of Justice has ordered France to pay the Commission a lump sum of EUR 20.000.000 and a penalty payment of EUR 57.761.250 for each period of six months from the delivery of this judgment at the end of which the judgment in Case C-64/88 Commission v. France has not yet been fully complied with.

[3] See the European Ombudsman's Decision complaint 995/98/OV.

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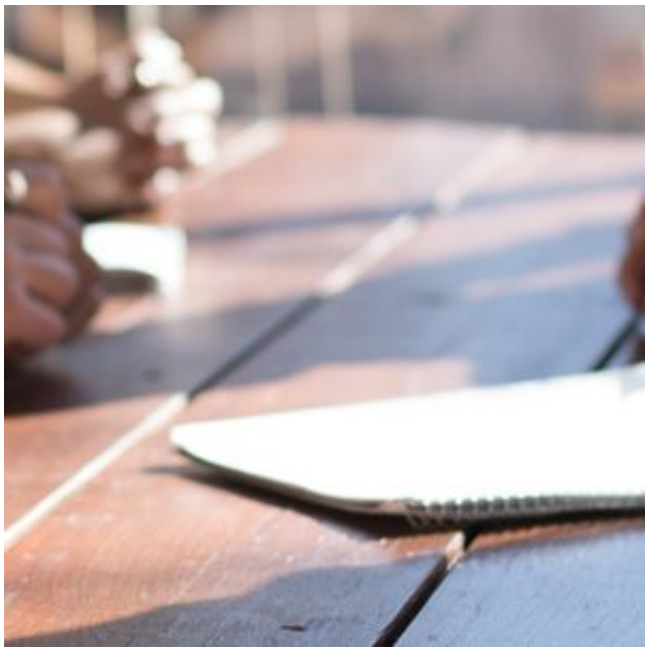

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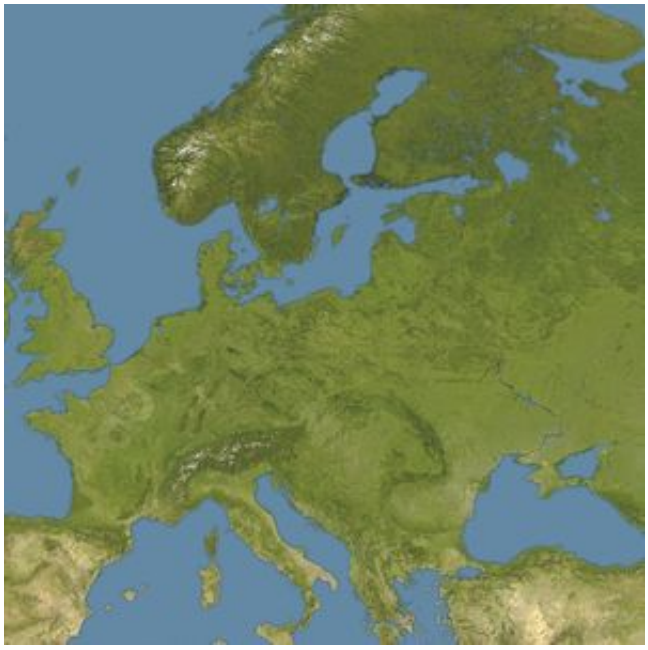

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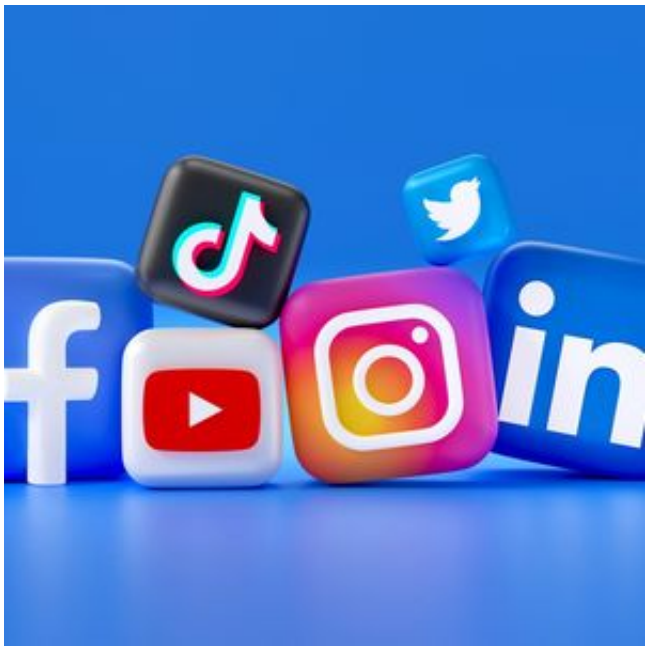

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