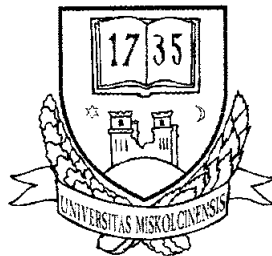


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# **EUROPEAN INTEGRATION STUDIES**

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## **THE INSTITUTIONALISATION OF INFRINGEMENT PROCEDURES IN EC LAW – THE BIRTH OF A COMMUNITY SANCTION**

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### **1. Infringement procedures in the Treaty establishing the European Economic Community (EEC)**

The founding States of the EEC introduced two Articles – 169 and 170 – aiming to create the possibility for the Commission as the guardian of the Treaty and for the Member States to bring action before the Court of Justice of the European Communities against Member States violating Treaty obligations.

The Treaty provides for two infringement procedures. Each of them is divided into two phases. In the first (administrative) phase on the basis of a letter of formal notice and a reasoned opinion of the Commission the Commission and the Government of the Member State in question attempt to resolve the problem at their respective level of administration. In case of failure the second (contentious) phase is commenced before the European Court of Justice. The procedures in their original form are closed by the judgment of the Court establishing the violation of the Treaty (the secondary legislation) by the Member State (or rejecting the allegation). The Member State, the infringement by which was established by the Court, is obliged to comply with the judgment as soon as possible meaning that it must take all the necessary measures to eliminate the violation.

According to Jacqué "the infringement action marks the specific nature of Community law. In a classic international legal system the fulfilment of treaty obligations by states can be assured via the principle of reciprocity which allows the parties not to perform their obligations in case of a violation on the part of the other party(ies). In a federal system the federal judiciary is empowered to declare null and void the act of a state violating federal law. This option does not exist in the Community legal order."<sup>1</sup>

Regulating the procedure between the Commission and the Member State first in the Treaty and reserving a role for the Commission in procedures between the Member States (Article 170 EC) suggest that the founders wished to give priority to the first procedure avoiding at the same time possible tensions between the Member States and emphasising the position of the "supranational" institution, the Commission. This is reflected in the fact that under Article 170 (227) EC judgments were delivered only in three cases by the Court of Justice.<sup>2</sup>

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<sup>1</sup> Jean Paul Jacqué, *Droit institutionnel de l'Union européenne*. 3e édition, Dalloz, Paris, 2004, p. 669.

<sup>2</sup> Case 141/78 *France v United Kingdom* European Court Report 1979 p. 2923, Case C-388/95 *Kingdom of Belgium v Kingdom of Spain* European Court Report 2000 p. I-3123, Case C-145/04 *Kingdom of Spain v. United Kingdom* Rec. 2006 p. I-7917.

It must be highlighted that the infringement procedure in this original form did not contain any forms of sanction. The judgment of the Court did not indicate the measures the Member State in question has to take to comply with Community law. The Court did not rule upon the time limit of compliance. It only stated that the Member State must make immediate steps to comply and end the infringement as soon as possible.<sup>3</sup>

In case of non-compliance with the judgment (the Member State failed to make the necessary measures in a reasonable period of time) the only possibility was to start a new procedure under Article 169 EC.

It is well known that infringements procedures went under important changes in the last decades as regards the provisions regulating them and in terms of their functioning. These changes had different rationales. The objective of this paper is to identify the most important changes and to explore their factual and institutional background.

## 2. The first period: 1958-1977

In the first period the Article 169 EC procedure has been considered as of *ultima ratio*. The Commission initiated the formal procedure only in case of the failure of informal efforts to solve the problem and important Community interests were at stake. The general perception was that the procedure has a strong political dimension so the Commission followed a relatively prudent policy taking into consideration the "sensitivity" of Member States.<sup>4</sup> In his classical work Audretsch put it this way: "Recourse to the formal infringement procedure and initiating proceedings before the Court against a Member State was to be avoided as much as possible. Indeed, already the act of sending a warning letter was considered as an (unfriendly) political act, and even more so was the issue of a reasoned opinion or decision, and, ultimately, recourse to the Court. Only after it had been proved that all informal efforts remained without effect was a formal step to be taken. That step, as such, was considered as an *ultima ratio*. For that reason, every formal act was decided upon separately, since it was considered as a political act, having political consequences."<sup>5</sup>

In the first three years after the entry into force of the EEC Treaty the Commission did not resort to bringing an action under this Article. The first action for infringement brought under Article 169 EC took place on 20 March 1961 against Italy.<sup>6</sup> Between 1961 and 1967 only two actions were brought per year. In 1966 and 1967 no action was launched. It might be suggested that this is due to the "*politique des chaises vides*" of France causing a serious tension between the Community institutions and the Member States, and also amongst the Member States. It is quite understandable that the Commission did not wish to deepen the crisis. Until 1970 13, between 1970 and 1975 15 judgments were given.

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<sup>3</sup> Case 169/87 Commission v France.

<sup>4</sup> Ami Barav, Failure of Member States to fulfil their obligations under Community law. Common Market Law Review, 1975., pp. 369-383.

<sup>5</sup> Audretsch, H-A. H., Supervision in European Community Law. Second revisited edition. North-Holland, Amsterdam-New York - Tokyo, 1986., p.279.

<sup>6</sup> Affaire No. 7:61, Commission de la Communauté économique européenne contre Gouvernement de la République italienne. Recueil de la jurisprudence de la Cour de justice des Communautés européennes, 1961.,p. 633.

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### **3. 1973: Three new Member States accede to the Community – 1977: The Commission launches a new enforcement policy**

The enlargement of the Community with the United Kingdom, Denmark and Ireland had important consequences in respect of enforcement proceedings. Not only the number of the Member States – the number of State organs liable to violate Community obligations – grew, but also these countries had a different attitude *vis-à-vis* the law in general and Community law in particular. Consequently, it was not completely by chance that the new enforcement procedure of the Commission was launched under the presidency of a Brit, Roy Jenkins.

The new policy can be characterised by five decisive elements:

1. The Commission made an attempt to get rid of the political character of enforcement actions and to change its character as an action of last resort.
2. The Commission - denying their political nature - decided similar cases in a single procedure.
3. The Commission introduced a stricter system of supervision as regards the implementation of directives (in particular, concerning whether the Member State had failed to implement the directive in the time available).
4. In the case that the Commission gained knowledge of an infringement of Community law it commenced the procedure - quasi automatically. If the first stage of the procedure failed to bring the desired results, the Commission moved to the second stage without hesitation.
5. The Commission considered as its duty to inform the citizens and the political actors of the infringements found and the procedures commenced.

### **4. The single market requires a new enforcement policy**

The Single Market project was incorporated into primary law by the Single European Act in 1987 under a Frenchman, Jacques Delors, who managed to direct the Commission – and presumably the Community as a whole – towards the realisation of ambitious objectives rooted in real life.

The Single Market project was transformed into an action programme by the Commission's White Paper which envisaged the legislation of almost three hundred directives until 1992. It was realised that if the Member States did not implement these directives in time and in a correct manner, the great project could easily fail, its advantages would not be realised.

The Commission followed the direction set by Roy Jenkins. It decided to control the transposition of directives systematically and in case of non-implementation it initiated the procedure without any special consideration. It also invited the interested parties to submit complaints which still plays a significant role as a source of information for the Commission about the violation of Community law by the Member States. In order to ensure accessibility for the potential complainants the Commission introduced a complaint form.<sup>7</sup>

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<sup>7</sup> Complaint to the Commission of the European Communities concerning the failure to comply with Community law - in 1999 the complaint form was published in the Official Journal.

Although the use of the complaint form is not obligatory, one might consider it as an important step in the process of the institutionalisation of the enforcement procedure. The availability of the form would make the interested parties use it and its use can easily become quasi official. The form also renders the management of complaints simpler and more efficient. In addition, the form (and the information attached to it) plays an instructive role and serves as a first filter in handling complaints and it can help to avoid parallel procedures (administrative, judicial, before the ombudsman).

### **5. The Intergovernmental Conference and the introduction of sanctions into the EC Treaty**

Despite the efforts of the Commission in the second half of the 1980s the number of breaches of Community law increased considerably. At the same time, non-compliance with the judgments of the Court of Justice was becoming more frequent.

The Commission and the Court expressed the view that some form of sanctioning is needed against the Member States that do not comply with the Court's judgments finding a breach of the Treaty. It was feared that non-compliance would make the enforcement procedure inefficient in practice and put the authority of the Court in danger.

The question was to be settled at the level of primary law so it was included into the agenda of the Intergovernmental Conference deciding on Treaty modifications, and, of course, it depended on the unanimous will of the Member States. The proposal for the negotiation of the issue of sanctions came from the United Kingdom. The other Member States supported the British proposal because they also were disturbed by the non-execution of the Court's judgments.

According to the proposal the Court after a second administrative and judicial procedure could sanction the failing Member State. The United Kingdom and the other Member States hoped that the second procedure would be extremely rare so the sovereignty of the Member States will not be in danger. Following the modifications made to the EC Treaty by the Maastricht Treaty in 1993 the new paragraph 2 of Article 171 (now 228) provides:

*If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.*

After the Maastricht Treaty three years were needed for the Commission to adopt a memorandum on the application of the pecuniary sanction procedure expressing that the Commission is ready to make use of it.

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## **6. 1996: The reform of the Commission's enforcement policy**

### **6.1. The 1996 Communication of the Commission on the application of the Article 228 (2) EC procedure<sup>8</sup>**

In the Communication the Commission expounded the principles of its policy concerning the Article 228 (2) EC procedure. The Commission declared that while it has the power to choose between two pecuniary sanctions – the lump sum and the penalty payment, it considers the penalty payment as generally the most appropriate instrument to achieve the objective (bringing the infringement to an end) of the procedure.

According to the Communication the Commission intends to calculate the amount of the penalty payment on the basis of three criteria: the seriousness of the breach, its duration, and the necessity for a dissuasive effect of the sanction.

As regards the matter of seriousness the Commission will take into consideration the importance of the provision of Community law that was infringed. In assessing this the Commission will have regard to the nature and the scope of the rule in question neglecting its position in the hierarchy of norms.

An infringement of the principle of non-discrimination must always be regarded very serious. The violation of fundamental rights and the four freedoms is also regarded serious. The effects of the infringement on general or particular interests will have to be determined on a case-by-case basis. The impact on the functioning of the Community must be taken into account as an impact on the general interest. When taking the interests of individuals into account the Commission does not set out to obtain redress for the damage and loss suffered, since such redress may be obtained by other means. Instead, it will take into consideration the effects of the breach from the point of view of the individual and the economic operators concerned.

The Commission considered that the duration of non-compliance in procedures under Article 228 (2) EC must be considerable.

The amount of penalty payments proposed by the Commission was to have a deterrent effect. That is why the Commission will not indicate only a symbolic amount and the amount will be set at a higher rate if there is any risk of the repetition of non-compliance. The amount will have to cancel out any economic advantage which the Member State might gain from the infringement.

### **6.2. The method of calculating the penalty payments provided for pursuant to article 171 of the EC Treaty<sup>9</sup>**

Penalties will be calculated on the basis of a uniform flat-rate amount of 500 ECU (today: euros) per day. The flat-rate amount is multiplied by two coefficients reflecting the seriousness (on a scale from 1 to 20) and the duration (on a scale from 1 to 3) of the infringement. To achieve a deterrent effect the result will be multiplied by a factor "n"

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<sup>8</sup> Commission Communication of 5 June 1996 "Information from the Commission – Memorandum on applying Article 171 [today 228] of the EC Treaty" official Journal 1996 No C 242, p. 6.

<sup>9</sup> OJ C 63, 28/02/1997 p. We have to note that according to the Fourteenth Annual Report (see footnote 23) the Commission formally adopted the method of calculation on 8 January 1997.

reflecting the ability of the Member State to pay (based on its GDP) and the number of votes it holds in the Council. This factor ranges from 1 for Luxembourg to 26,4 for Germany.

### **6.3. A real sanctioning procedure?**

If a legal sanction is defined as a negative legal consequence of an unlawful act or omission, we may suggest that the new pecuniary sanction is not a genuine sanction or rather it is not a complete sanction. In case the Member State fails to comply with the previous judgement of the Court of Justice it can elude any negative consequence, if it complies with that judgment until the point in time when the Court of Justice in a 228(2) EC procedure declares once again that the breach of Community law persists and imposes a penalty payment (which is due only from the delivery of the judgment). (Imagine that the court sanctions the thief for a penalty payment due until the day when he or she returns the stolen object.)

### **6.4. 1997: The Commission brings action under Article 228 (2) against Greece<sup>10</sup>**

Nine months after the publication of its Communication on the Method of calculating the penalty payments<sup>11</sup> the Commission brought an action under Article 228 (2) EC against Greece.<sup>12</sup> The Commission applied for a declaration that by failing to take the necessary measures to comply with the judgment of the Court of 7 April 1992 in Case C-45/91 Commission v Greece [1992] ECR I-2509 the Hellenic Republic failed to fulfil its obligations under Article 171 of the EC Treaty. It also applied for an order requiring the Hellenic Republic to pay to the Commission a daily penalty payment of 24 600 ECU for each day of delay in implementing the measures necessary to comply with the judgment in Case 45/91 starting from the notification of the judgment of the Court.

## **7. 1997: The European Ombudsman enters the scene**

Often, individuals lodging a complaint with the Commission disappointed with the decision of the Commission not to initiate an infringement procedure turned to the European Ombudsman.

It must be remembered that the complainant does not have procedural rights in enforcement procedures. Consequently, the action brought by an individual asking the Court to annul the

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<sup>10</sup> Case C-387/97 Commission v Greece European Court Report [2000] p. I-5047.

<sup>11</sup> Commission Communication of 28 February 1997 "Information from the Commission – Method of calculating the penalty payments provided for pursuant to Article 171 [today: Article 228] of the EC Treaty" O.J. 1997 No C 63, 28/02/1997, p. 2.

<sup>12</sup> According to the Fourteenth Report on monitoring the application of Community law (1996) COM/97/299 final, the Commission decided for the first time on penalty proposals in several cases concerning two Member States on January 1997.

decision of the Commission refusing to start an enforcement procedure is inadmissible.<sup>13</sup> The same applies to the Article 231 EC procedure.<sup>14</sup>

### **7.1. The decision of the European Ombudsman in case No 303/97/PD<sup>15</sup>**

The European Ombudsman started an inquiry on his own initiative into the administrative phase of infringement procedures before the Commission aiming to examine how the Commission handles complaints in this phase.

The allegations the Ombudsman investigated concerned the excessive time taken to process complaints, the lack of information about the ongoing treatment of the complaint, and the failure to give reasons as to how the Commission reached the conclusion that there is no infringement by the Member State.

The Ombudsman was of the opinion that the Commission should provide procedural rights to citizens in enforcement procedures.

*"I therefore suggested that the Commission might communicate to registered complainants a provisional conclusion that there is no breach of Community law and its findings in support of that conclusion, with an invitation to submit observations within a defined period, before making its final decision."*

In response, the Commission acknowledged that complainants have a place in infringement proceedings and that in the pre-litigation phase they enjoy procedural safeguards which the Commission has constantly developed and improved. The Commission declared that it is ready to continue along those lines.

*"6. Furthermore, the Commission stated that all complaints that reach the Commission are registered and that no exceptions are made to this rule. Once the Commission receives a complaint it acknowledges its receipt by a letter sent to the complainant with an annex attached explaining the details of the infringement proceedings. Once the complaint is registered the complainant is informed of the action taken in response to the complaint including representations made to the national authorities concerned. The complainant is also informed about the outcome of the investigation of his complaint whether no action was taken on its basis or in fact, infringement proceedings were instituted. The complainant is also notified whether other proceedings concerning the same issue are already under way."*

*As for deadlines for processing complaints, the Commission has stated that under its internal rules of procedure, a decision to close a file without taking any action or a decision to initiate official infringement proceedings must be taken on every complaint*

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<sup>13</sup> Case 48/65 Luetticke v Commission [1966] ECR 19, Case 87/89 Sonito and others v Commission [1990] ECR I-1981

<sup>14</sup> Case 247/87 Star Fruit v Commission [1989] ECR 291

<sup>15</sup> Decision of the European Ombudsman in the inquiry 303/97/PD into the Commission's administrative procedures in relation citizens' complaints about national authorities.

*within a maximum period of one year from the date on which it was registered, except in special cases, the reasons for which must be stated.*

*As for informing the complainant of the draft decision rejecting the complaint, the Commission has stated that in several cases, the complainant is informed beforehand that the complaint will be rejected, often with a statement of the reasons for the proposed rejection. The Commission declares itself prepared to extend this practice, leaving aside cases where the complaint is obviously without foundation and cases where nothing further has been heard from the complainant."*

It is not without importance that the Commission – although the Treaty is silent on the procedural rights of individuals and the case law of the Court of Justice is also very reluctant to accept these rights – appears to acknowledge on its own initiative that individuals are provided procedural safeguards.

Apart from the above, the Commission did not make any concrete promise to improve the situation of complainants. (If we do not consider that certain important details of the internal procedure of the Commission are divulged (the letter of receipt) and especially that a maximum of one year deadline is set on deciding whether to initiate an infringement procedure.) It may also be noted that the Commission did not feel obliged to give the opportunity to the complainant to make observations on the "negative" decision of the Commission.

## **7.2. The European Ombudsman's decision on the complaint 995/98/OV against the European Commission on 30 January 2001.**

The decision taken by the European Ombudsman in case No 995/98/ OV contributed significantly to the institutionalisation of the procedure under Article 226 EC. In this case, according to the complaint the competent services of the Commission reached the conclusion that a manifest breach of the directive in question had taken place and proposed to send a letter of formal notice to the Greek authorities. However, the Commission decided conversely. According to the complainant this amounts to a breach of the Commission's duty under Article 226 of the EC Treaty.

On the basis of the inquiries into the complaint the Ombudsman made some critical remarks in his decision.

*"The Commission's letter to the complainant, despite its complex drafting, is naturally to be understood as meaning that the Commission closed the case because it considered that there had been no infringement of Community law. The Ombudsman's finding is that this was not the reason for the Commission's decision to close the Thessaloniki metro case. The Commission, therefore, failed to provide the complainant with adequate reasons for its decision to close the file on the complaint. This constitutes an instance of maladministration."*

*"The Commission failed to provide the complainant with adequate reasons for its proposed decision to close the file. The Commission did not, therefore, give the complainant a genuine opportunity to address all the relevant issues in his observations. The Commission*

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*denied the complainant a fair opportunity to be heard before it closed the file on his complaint. This constitutes an instance of maladministration.”*

The Ombudsman noted that an opportunity for a complainant to submit observations necessarily includes, amongst others, the following elements:

- (i) sufficient time in which to prepare and submit any observations;
- (ii) sufficient information as to the basis of the proposed decision, so that the complainant may address the relevant issues in his observations.

The Ombudsman in his further remarks suggested that the Commission should consider establishing a clear procedural code for the treatment of complaints analogous to existing codes relative to competition matters. According to the Ombudsman

*”[The] establishment of such a code would mark an important step towards making a living reality of the citizen’s right to good administration, as recognised in the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000.”<sup>16</sup>*

It can be noted that in case of a positive reaction to this argument by the Commission a small door might open through which the Charter could enter into the real life of the Union without gaining legal recognition.

## **8. The code of procedure of the Commission**

Shortly after the decision of the European Ombudsman the Commission published on 20 March 2002 the advised code of procedure called “Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law”.<sup>17</sup>

Here, the main elements of the code will be summarised from the perspective of the institutionalisation of the infringement procedure.

- Any correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission.
- The Secretariat-General of the Commission shall issue an initial acknowledgement of all correspondence within fifteen working days of receipt.

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<sup>16</sup> The Article 41 of the Charter (Right to good administration ) says:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
  - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and professional and business secrecy,
  - (c) the obligation of the administration to give reasons of its decision.

<sup>17</sup> COM (2002) 141 final Brussels, 20.3.2002.

- Correspondence registered as a complaint shall be acknowledged again by the Secretariat-General within one month from the date of dispatch of the initial acknowledgement.
- The Commission departments will contact the complainants and inform them in writing of the steps taken in response to their complaint after each Commission decision (formal notice, reasoned opinion, referral to the Court or closure of the case).
- As general rule, the Commission departments will investigate the complaint with the aim of arriving to a decision either to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General. Where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing.
- The complainants will be informed in writing of the decision taken by the Commission (as a College of Commissioners) in connection with their complaint and any subsequent Commission decision on the matter.
- Where a Commission department intends to propose that no further action is to be taken on a complaint, it will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case needs to be closed and inviting the complainant to submit any comments within a period of four weeks.
- Where the complainant's observations persuade the department concerned to reconsider its position, the investigation of the complaint will continue.

It seems likely that that by issuing the code of procedure the Commission made the necessary steps to comply with the requirements provided in the Ombudsman's decision. Regulating correspondence with the complainant, especially, the prior notice given to him of the intended closing of the case supported with the relevant reasons, and the regular possibility of the complainant to submit his observations brings the procedure very far from the situation where the complainant was considered as merely a "source of information". The complainant has almost gained the position of a party in the pre-judicial phase.

### **9. The case law of the Court of Justice – the pecuniary sanction under Article 228 (2) EC takes shape**

It is worth noting that despite the communication of the Commission the cases ended by a judgment of the Court of Justice still revealed a number of questions relating to the functioning of the pecuniary sanction.

#### **9.1. 2 July 2000: Judgment in the case *Commission v. Greece***

In this case the Court confirmed the principles that had been established in the earlier communications.

*"87. These guidelines, setting out the approach which the Commission proposes to follow help to ensure that it acts in a manner which is transparent, foreseeable and consistent with*

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*legal certainty and are designed to achieve proportionality in the amount of the penalty payments to be proposed by it."*

*"92. In that light, and as the Commission has suggested, the basic criteria which must be taken into account in order to ensure that penalty payments have a coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying these criteria, regard must be had, in particular, to the effects of failure to comply on the private and public interest and to the urgency of getting the Member State concerned to fulfil its obligation."*

However, the Court asserted that it is not bound by the proposals of the Commission. They constitute only "a useful point of reference for the Court."

*„89. It should be stated that these suggestions of the Commission cannot bind the Court. It is expressly stated in the third paragraph of Article 171 (2) of the Treaty that the Court, if it finds that the Member State concerned has not complied with its judgment may impose a lump sum or a penalty payment."*

At the end, the Court ordered Greece to pay a penalty payment of 20 000 euros for each day of delay in implementing the measures necessary to comply with its previous judgment from the date of the delivery of its second judgment.

## **9.2. The judgment of the Court in Case Commission v Spain<sup>18</sup>**

In this case the Commission pleaded the Court to order the Kingdom of Spain to pay a penalty payment of 45 600 euros per day of delay in adopting the measures necessary to comply with the judgment in the case C-92/96 Commission v Spain [1998] ECR I-505 from the date of the delivery of the judgment in the present case.

The Court did not subscribe completely to the pleading. It observed that because of two particular circumstances:

*"46. The penalty payment must therefore be imposed not on a daily basis, following the submission of the annual report relating to the implementation of the Directive by the Member State concerned."*

Regarding the character of the penalty payment, the Court stated:

*"50. In order for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the breach which has been found, the amount must take account of progress made by the defendant Member State in complying with the judgment in Commission v Spain. To that end it is necessary to require the Member State to pay annually an amount calculated according to the percentage of bathing areas in Spanish*

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<sup>18</sup> Case C-278/01 judgment of 25 November 2003 ECR [2003] I-14141.

*inshore waters which do not yet conform to the mandatory values laid down under the Directive.”*

This case revealed that the method of calculation of the penalty payment on a daily basis – as it was proposed in the relevant communication of the Commission – is not appropriate in each particular case. Another novelty was that the Court accepted that compliance with its second judgment might take some time (accordingly, there can be a period of time when the Member State in question even after the second judgment declaring its failure will not be obliged to pay while remaining in breach of Community law).

### **9.3. 29 April 2004 Advocate General Geelhoed proposes a new interpretation of the pecuniary sanction system**

In case C-304/02 *Commission v France*<sup>19</sup> the Commission – in line with its pecuniary sanction policy, proposed to order France to pay a penalty payment (316 000 euros per day). Advocate General Geelhoed considered that in a case like this the periodic penalty payment is not an adequate pecuniary sanction.

*“94. More generally, I believe that once it has been established that a Member State has acted in violation of its Community obligations, the longer it permits this situation to endure, most probably to the benefit of its own nationals and to the detriment of the nationals of other Member States, the more liable it becomes to the imposition of a punitive measure.”*

*“95. In these circumstances, I am of the opinion that it would be appropriate to respond to the failure of the French Republic to comply with the Court’s judgment of 11 June 1991 by imposing a lump sum as provided for by Article 228 (2) EC. In addition, in view of the fact that the current situation remains defective, a periodic penalty payment should be imposed under suitable conditions until the time that it can be established that the infringement has been terminated.”<sup>20</sup>*

The Advocate General radically opposed the Commission’s interpretation of the objective of Article 228 (2) EC. As to the objective of constraining the Member State to terminate the violation he recalled the necessity of a deterrent effect, that is to say that in particularly serious cases he considers that adjusting the lump sum directly to the persistence of the infringement is the adequate pecuniary sanction.

In his opinion the Advocate General combined the two types of pecuniary sanctions proposing to order France to pay a lump sum and a periodic penalty payment at the same

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<sup>19</sup> Rec. 2005 p. I-6263.

<sup>20</sup> (First) Opinion of Advocate General Geelhoed delivered on 29 April 2004. Advocate General Geelhoed maintained his position in his second opinion in this case delivered on 18 November 2004. See paragraph 48.

time. This seems to be in evident contradiction with the wording of Article 228 (2) EC providing that the Court may impose a lump sum *or* a penalty payment.<sup>21</sup>

#### **9.4. 12 July 2005 The Court follows its Advocate General**

In its judgment the Court practically copied the opinion of its Advocate General by stating:

*"80 The procedure laid down in Article 228 (2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective."*

*"81 Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While an imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular, where the breach has persisted for a long period since the judgment which initially established it.*

*(...)*

*114. In a situation such as that which is the subject of the present judgment, in light of the fact that the breach of obligations has persisted for a long period since delivering the judgment which initially established it and of the public and private interests at issue, it is essential to order the payment of a lump sum."*

#### **10. 2005 The Commission goes even further - New Communication on the application of Article 228 EC<sup>22</sup> – Is a real sanction taking shape?**

After the seminal judgment in *Commission v France* the enforcement policy of the Commission under Article 228 (2) EC became unsustainable. The Commission was forced to reassess its policy in the light of the observations of the Court of Justice. This took place in its 2005 Communication replacing the communications of 1996 and 1997 discussed above.

The Commission followed the direction indicated by the Court. It declared that – and this may be the main novelty of the new policy – it will propose a lump sum not only in "serious cases" but in every application it makes.<sup>23</sup> Remaining close to its earlier concept it will also apply for the imposition of a penalty fixed by the days of delay passed after the delivery of the judgment under Article 228. This way the Commission made a rule from the exception of combining the two kinds of pecuniary sanctions.

<sup>21</sup> This argument was raised by the French, Belgian, Czech, German, Greek, Spanish, Irish, Italian, Cypriot, Hungarian, Austrian, Polish and Portuguese Governments.

<sup>22</sup> Communication from the Commission Application of Article 228 of the Treaty SEC (2005) 1658.

<sup>23</sup> Point 10.3 of the Communication.

The Commission explained this new approach by stating that

*"...any case of persistent non-compliance with the Court's judgment by a Member State, irrespective of any aggravating circumstances, in itself represents an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction."*<sup>24</sup>

In order to avoid arbitrary evaluation, which is a real danger, it is advisable to make clear in advance the elements that will be taken into consideration. The new communication attempts to be of help in this regard. It indicates two kinds of elements: those related to the importance of the rule violated and those related to the harmful effects on the general and private interest.

When evaluating the importance of the Community provision allegedly breached by the Member State

- the infringement affecting fundamental rights or the four fundamental freedoms protected by the Treaty should be considered as serious,
- going against case law established by the Court of Justice will probably be considered as serious.

Concerning the effects of the infringement numerous factors are mentioned:

- the loss of Community own resources,
- the impact of the infringement on the way the Community functions,
- serious or irreparable damage to human health or the environment,
- economic or other harm suffered by individuals and economic operators,
- the financial sums involved in the infringement,
- the Community's responsibility with respect to non-member countries,
- whether the infringement is a one-off or a repetition of an earlier infringement,
- any possible financial advantage that the Member State gains from not complying with the judgment of the Court,
- relative importance of the infringement taking into account the turnover or added value of the economic sector concerned in the Member State in question
- the size of population affected by the infringement.

The guiding principles remain the same. The sanctions proposed have to take into account the principles of proportionality and equal treatment and have to be based on the three classical criteria:

- the seriousness of the infringement,
- its duration,
- the need to ensure that the penalty has a deterrent effect.

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<sup>24</sup> Point 20. of the Communication.

In making a sanction "real" it is desirable that it takes into account the seriousness of the unlawful act or omission it wishes to sanction. Determining the seriousness of a violation is far from being an easy exercise.

Looking at these factors it is apparent that their diversity is impressive and they can serve as indicators for the Member States when facing the possible consequences of their behaviour. We have to wait for the future developments in order to assess the practical weight of these elements.

#### **11. Summary – What new elements were added to infringements procedures since their introduction in the EEC Treaty?**

- a) The submission of complaints has been largely formalised (the complaint form, the complainant is informed of actions taken in pursuant the complaint, the Commission informs the complainant in a letter of the reasons for not instituting a procedure and invites the complainant to submit observation thereon.)
- b) The services of the Commission regularly examine the procedures in order to monitor their progress.
- c) The meetings of the Commission in infringement matters are more frequently held; the decisions of the Commission are published on the Internet site of the Commission.
- d) In case the Commission is not informed of the implementation of directives issuing the letter of formal notice is quasi automatic, informal meetings do not precede it.
- e) The Commission issued more than 100 letters of formal notice and more than 500 reasoned opinions and launched more than 200 infringement actions before the Court. Today, the procedure is less a political act and it is a more a regular procedure.
- f) The Member States with a few rare exceptions refrain from initiating procedures under Article 277 EC against other Member States. It may be suggested that the Member States accepted that their conflicts should be resolved more appropriately by the Commission as an intermediary as opposed to a procedure (Article 227 EC) that resembles procedures under international public law.
- g) Intervention by Member States in procedures initiated by the Commission is relatively rare. Interventions supporting the Commission are even more rare.
- h) It is rather frequent that the Member States, despite the fact that the infringement on their part is clear, take the procedure to the judicial phase.
- i) The judicial procedure remains long. Its length diminishes the effectiveness of the procedure.
- j) The Commission systematically supervises the execution of the Court's judgment. In the "post-judgment" period formal acts are issued systematically.
- k) After the first judgment of the Court the Commission before issuing the reasoned opinion allows the Member State a sufficient amount of time in the circumstances of the case to fulfil its obligations under Community law.

- l) The Maastricht Treaty by modifying Article 228(2) EC introduced the possibility of imposing a pecuniary sanction – a lump sum or a penalty payment – in case the judgment of the Court finding the violation of Community law is not followed by the Member State.
- m) The Court and the Commission on a number of occasions clarified certain questions relating to the application of the pecuniary sanction. The amount of the sanction is determined on the basis of the gravity and the duration of the infringement taking into account the ability of the Member State to pay. The Court ruled that the two types of the pecuniary sanction could be applied cumulatively in a single case. In its 2005 Communication the Commission clarified its policy on the application of the pecuniary sanctions available.

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