

Enforcement of EU Law

References:

Steiner and Woods, *EU Law* (OUP 13th edition, 2017) Chapters 7 and 11

Ewan Kirk, *EU Law, Law Express* (Pearson 6th edition 2019) Chapter 3

Updated in 2020.

- International treaties vary considerably as to the institutional mechanisms for their enforcement and as to who is entitled to enforce a treaty and against whom. **Some treaties rely essentially on political negotiation and diplomacy between states.**
- The European Union **has a developed enforcement mechanism in creating a set of independent courts to enforce the treaties and allocate** an enforcement role to the **European Commission.**
- The Court of Justice of the European Union (CJEU), which also includes the General Court, has the responsibility of ensuring that the law under the EU treaties is applied.
- **Article 19(1) TEU** states that “the Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. “Member States shall provide remedies to ensure effective legal protection in the fields covered by Union law”.
- **Article 4(3) TEU:** states that “the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties of resulting from the acts and institutions of the union.

SimpleStudying advice:

Article 4(3) indicates, the obligation to “ensure fulfilment of all obligations arising from treaties”. This is not only placed with one institution such as Parliament but also **underpins all institutions** including governments, courts and any state associated institutions.

Breach of an obligation by a Member State

Under the Treaty of the Functioning of the European Union (**TFEU**), two principal avenues are available to bring cases to the Court of Justice of the European Union (**CJEU**) to allege a breach of an obligation by a Member State:

- 1) **Infringement proceedings brought by the European Commission against a Member State (Article 258 TFEU)**
- 2) **Action brought by a Member State against another Member State (Article 259 TFEU).**

Member States may not seek to resolve disputes between themselves affecting EU law by recourse to procedures other than those specified in the Treaty.

Case 459/03 *Commission v Ireland* [2006] ECR I-4635

Principle: A breach of obligation can be in the form of either an act or omission.

Held: The court found that Ireland was in breach of EU law for having initiated arbitration proceedings against the UK under the UN Convention on the Law of the Sea **rather than before the CJEU in relation to a dispute over the Sellafield nuclear recycling plant.**

Article 258 TFEU

- Article 258 TFEU provides the European Commission with a key role in enforcement as the **'Guardian of the Treaties'**. Infringement proceedings brought by the Commission represent a model of public **Centralised enforcement**.
- If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
- If the state concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the CJEU.
- Also, the Commission is empowered to bring a Member State directly before the CJEU under **Article 108 TFEU** (infringement of Union rules on state-aid provision), **Article 114 TFEU** (improper use of derogation powers provided by art 114) and **Article 248 TFEU** (measures taken by the Member State to protect essential security interests or to prevent serious internal disturbances).

SimpleStudying Advice:

Article 258-259 TFEU regard the punishment of a member state for not complying and to ensure that the Member state rectifies the problem. When applying this in an exam situation, first-class students would appreciate this in a problem question and refer to the rights that the CJEU has under **Article 258-259 (TFEU)**.

The Pre-Contentious Stage

Approximately 70% of cases are resolved without even having to initiate the formal stages of the **Article 258 TFEU process**. This involves the Commission in negotiation and discussion with the Member State to resolve any conflict with its obligations under the treaties.

Letter of Formal Notice (Stage 1)

The 'Article 258 TFEU Letter' sent by the Commission to the Member State notifies its intention to initiate proceedings and sets out the grounds why the Commission think that the Member state is in breach of its obligations.

The letter allows the Member State to submit its observations and to delineate the scope of the dispute so as to allow the Member State to prepare its defence. Here, it is sufficient for the Commission to define broadly in **what way it considers the Member State to be in breach**.

According to the Commission, **85% of cases are solved at this stage.**

Reasoned Opinion (Stage 2)

Article 258 TFEU requires that before a dispute is sent to the CJEU, the Commission must have sent a 'reasoned opinion' to the Member State.

The Commission must set out a coherent statement of the reasons which have led it to conclude that the Member State is in breach of its obligations. The Commission will normally set out a time-limit for compliance and if not, the Member State must be given a reasonable time to comply.

The legal consequence is that the Commission cannot introduce matters before the Court which has not specified in its grounds for complaint contained in the Reasoned Opinion.

Application to the Court (Stage 3)

Only 7-8% of cases reach this stage.

If a state has complied within the deadline set by the Commission, an action before the CJEU is inadmissible.

However, if after the expiry of the deadline for compliance the Member State has rectified its breach, an action before the CJEU remains admissible as this increases legal certainty.

CJEU Decision (Stage 4)

Rulings of the CJEU in infringement proceedings are declaratory in nature. They simply declare the existence of a breach. Failure to abide by a ruling of the CJEU is itself a breach of EU law and may give rise to further legal action.

Case 247/87 *Star Fruit v Commission* (1989) ECR 291

Principle: “...it is clear from the scheme of Article [258] of the Treaty that the Commission is not bound to commence the proceedings ...[and] has a discretion which excludes the right of individuals to require that institution to adopt a specific position.”

What does the Commission do?

- The Commission investigates the complaint and decides whether to close the case (in one year). In doing so, the Commission must keep the complainant informed at each step of the procedure. If the Commission decides to close the case, the complainant is invited to submit any comments before the Commission takes its final decision.

SimpleStudying Advice: If an essay question in the exam asks you to discuss the powers of the Commission and whether the Commission can exercise these powers freely, the following point can be made:

There is a tension between the Commission being able to freely exercise its discretion as it sees fit and a more participatory model that recognises the interests of private parties in the outcomes of the infringement procedure. You should use the case of ***Star Fruit*** to highlight that the Commission does have the discretion to initiate proceedings, however, you should also mention that there are limitations to the use of these powers i.e. the Commission has limited investigatory resources.

The Power to fine

- **Article 260(1) TFEU** states that “if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the **State shall be required to take the necessary measures to comply with the judgement of the Court**”.

Case 304/02 *Commission v France* (2005) ECR I-6263

Facts: France failed to comply with control measures for fishing activities. Despite repeated inspections, a reasoned opinion and supplementary opinion issued, France still failed to comply with the judgement in the ***Commission v France (1991)*** case.

Held: The CJEU held that France failed to fulfil its obligations under Article 60 TFEU. The Court held that a penalty payment was to be imposed on a half-year basis.

SimpleStudying Advice: When applying the case of ***Commission v France*** to an exam question, you should make the point that – the Commission has to power to impose fines where a Member State has failed to fulfil an obligation under the Treaties. You should then mention the fact that France repeatedly failed to comply with the control measures for fishing activities (**facts**) and state that France was made to pay a fine for this consistent breach of its obligations (**outcome**).

Action by a Member State against another Member State

- **Article 259 TFEU states** - a “Member State which considered that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice of the European Union”.
- However, before bringing the matter to the CJEU, the **Member State should bring the matter before the Commission**. If the Commission does not deliver an opinion **within three months** of the date matter on which the matter was brought, then the Member State should bring the matter before the CJEU.

The Limitations of Centralised Enforcement

The discretion given to the Commission

Under Article 258 TFEU, the Commission can simply decide not to bring proceedings. The Commission negotiates on a daily basis with the Member States in reaching agreement on EU legislation and, accordingly, it may not wish to pursue litigation at the same time as trying to negotiate with a state on a draft legislative proposal.

The Commission also has limited investigatory resources and may wish to target those resources on breaches which are significant to the operation of EU policies. This is problematic for an individual complainant for whom a breach of the treaty may be very important but less important for the strategic objectives of the Commission.

The absence of remedies other than declaratory relief and (rarely) fines are also an impediment to effective enforcement.

Article 267 TFEU – Preliminary Rulings

- **Article 267 TFEU** outlines that the CJEU shall have jurisdiction to give preliminary rulings concerning:
 - A) Interpretation of the Treaty
 - B) Validity & interpretation of Acts of the institutions
- **Article 267 (3) TFEU** states that ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ has an obligation to refer.
- **Article 267 (2) TFEU** makes provision for courts to have the discretion to refer.
- The ‘**abstract view**’ is that a lower court against whose decision there is no further appeal in a particular case can refer to the CJEU
- The ‘**Concrete view**’ is that the final Court of Appeal in a Member State is obliged to refer to the CJEU.

Effects of Preliminary Rulings

- The court that has referred the ruling is bound by the CJEU’s decision.
- It is a matter of discretion whether the national courts want to refer a similar question.

The Doctrine of "Acte Clair"



- This doctrine determines when the national courts have to refer a question to CJEU.
- It attempts to narrow the number of obligations to refer to.
- Usually, national courts will err on the side of safety and refer regardless.

Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (1982) ECR 335

Facts: The Italian Supreme Court asked the CJEU if Article 267 TFEU created an 'absolute obligation' to refer.

Held: The CJEU held that a final Court of Appeal can rely on an earlier ruling of the court provided that the point of law would be clear to all courts in the EU.

Principle:

In relation to the doctrine of *Acte clair*, there is no obligation to refer if the question is: A) irrelevant B) materially identical to a question already asked C) so obvious as to leave no scope for reasonable doubt.

SimpleStudying Advice:

This topic is **likely to appear in a problem question**. When applying this to a problem question a first-class student would mention the following:

- The doctrine of *Acte Clair* refers to narrowing the floodgate of questions for the **CJEU, who already have an onerous task**.
- The ***Cilfit case*** clearly establishes that this obligation must be absolute and will be rejected if the question is irrelevant i.e. to with domestic affairs, identical to previous questions, and obvious.

Problem with preliminary rulings

- **Acte clair** is difficult to satisfy. Therefore, in order to be on the safe side, national courts often refer.
- The CJEU will then throw out the case if it considers it inadmissible.



- The CJEU has been overwhelmed by the workload of late referrals and there is a need for reform of the obligation to refer.

Timeline for preliminary hearings

- Cases take on average, 17 months to be heard.
- The CJEU at times prioritises urgent cases that concern detention, deportation or children.

SimpleStudying Advice:

In an essay question, you should mention that the CJEU can also decline to refer on the grounds that the questions are too hypothetical.

Additional reading

Europe as a democratic institution? (Professor Weiler's comments):

JHH Weiler, (2012) Deciphering the Political and Legal DNA of European Integration in *Philosophical Foundations of European Union Law*, J. Dickson and P. Eleftheriadis (OUP, 2012)

- The structure of European governance is the reason for the failure of political accountability.
- At the most primitive level of democracy, a European citizen cannot directly influence the outcome of any policy choice facing the community and Union.
- The principle of accountability and the principle of representation are comprised of the very structure and process of the Union.
- There is an extraordinary decline in voter participation in elections for the European Parliament.
- In Europe as a whole, the rate of participation is below 45%, with several countries, notably in the East, with a rate below 30%. The correct comparison is, of course, with political election to national parliaments where the numbers are considerably higher.



- The 'question of Europe' as a central issue in political discourse was for long regarded as an 'English disease'. There is a growing contagion in the Member States in North and South, East and West, where political capital is to be made among non-fringe parties by anti-European advocacy.
- **Europe incapable to protect its values and aims?**
- European idealists view: '**ever closer union among the people of Europe**', with peace and prosperity as icing on the cake.
- The Treaty of Paris, with its explicit reference to supra-nationalism, represents a radical and unprecedented exercise in the legalisation of a transnational regime, far exceeding the innovation of the ECHR.