



# Who is afraid of the infringement procedure?

Some observations beyond the text of the treaties



- > How is it possible that there is even an infringement in the era of 'no-goldplating'?
- > Copy/paste is the rule
- > Example: the Chinese Wall-rule in the new EIA Directive
  - Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.
- > We don't know what it means. So just ad verbatim copying it. Leave it to practice and the courts!



>And it starts with....???

>Article 258 TFEU

- 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 Court of Justice of the European Union.



- > No it does not, but with the Pilot procedure
- Since 2008: "EU Pilot" is an online platform which Member States and Commission's services use to communicate and clarify the factual and legal background of problems arising in relation to the conformity of national law with EU law or the correct application of EU law. As a general rule, EU Pilot is used as a first step to try to resolve problems, so that, if possible, formal infringement proceedings are avoided. Currently all 28 Member States are participating in EU Pilot.
  - Complaints of NGO's and individuals are feeded into the Pilot



## > Advantages

- Informal, handled at the level of civil servants; if the case goes to Court, upper bosses are informed.
- Avoiding unnecessary problems
- Attitude Commission: empathic, cooperative, seeking solutions
- Filterering effect: success rate of 70%

## > Disadvantages:

- Everybody seems to be very pleased with the pilot phase, except NGO's (black box, non-transparent); *Spirlea* case T-306/12, appeal pending C-562/14 P
- Pilot is getting "proceduralised"; is there a pre-pilot phase?

## > But what again are the objectives of the infringement procedure?



## >After the Pilot

- Commission's attitude becomes more adversarial as the procedure continues
- When at the Court: only one thing counts: winning the case
- E.g. *Commission/Sweden*, C-607/10 juncto C-243/13 on IPPC/IED directive: only small number of old installations, which required changing existing permit conditions and the Commission started a 260-fine procedure within 8 months, although the Swedes cooperated exemplary! And why are these judgments only full text available in French and Swedish?

## >When the case is lost: political reactions at national level can be

- Offensive: using the judgment towards change
- Defensive of national policy.



## > Fines and Commission's rather extensive interpretation of the treaty

- Case C-320/13, Commission/Poland (renewable energy) trying to stretch its competences under Article 260(3); direct fines for failure to notify
- The CJEU asked the Commission if it was treating Poland's introduction of renewable-energy laws as both incorrect and delayed. He said "in this sense, yes."
- Jurian Langer, (Dutch government), said there is a "distinction" set out in the EU's Lisbon Treaty when dealing with penalty procedures, "between a duty to notify and a duty to take correct transposition measures. The way the Commission is dealing with this case implies it will always seek a penalty payment and will refrain from doing so only in exceptional cases, Langer told the court"
- AG's opinion in line with the view of the Commission!
- Case withdrawn just a couple of days before judgment!



- > Competition Law enforcement as a model?
  - Is there a difference?
  - Who is nowadays enforcing competition law on a daily basis: NCA's, supervised by national courts.
  - Enforcement by the Commission is an exception.
- > With 28 MS and 400+ Directives the infringement-procedure cannot be regarded a sustainable solution to the enforcement-deficit
- > It must be done locally
- > And it must be done Aarhus-proof.



- > But local enforcement works only if:
  - Access to justice
  - Low costs and no severe procedural barriers
  - Non-deferential review of national courts
- > These conditions must be harmonised at EU level (and I am not optimistic on this to be realised shortly)
- > And indeed in my country public authorities are more afraid of the Dutch Council of State
  - Consequences of an annulment are severe
  - Consequences of preliminary rulings are severe



But what if local enforcement does not work?

> For inspiration(?) a Dutch treat as desert

> Act on Compliance with European Law by public entities

- Binding 'guidance'
- In stead of
- Paying the bill



## Final Curtain

- > "Who is afraid of the infringement procedure?"
- > "I am Richard"
- > "I am"