

EIPA Briefing 2020/3

Sharpening the teeth of the infringement procedure

Juan Diego Ramírez-Cárdenas Díaz

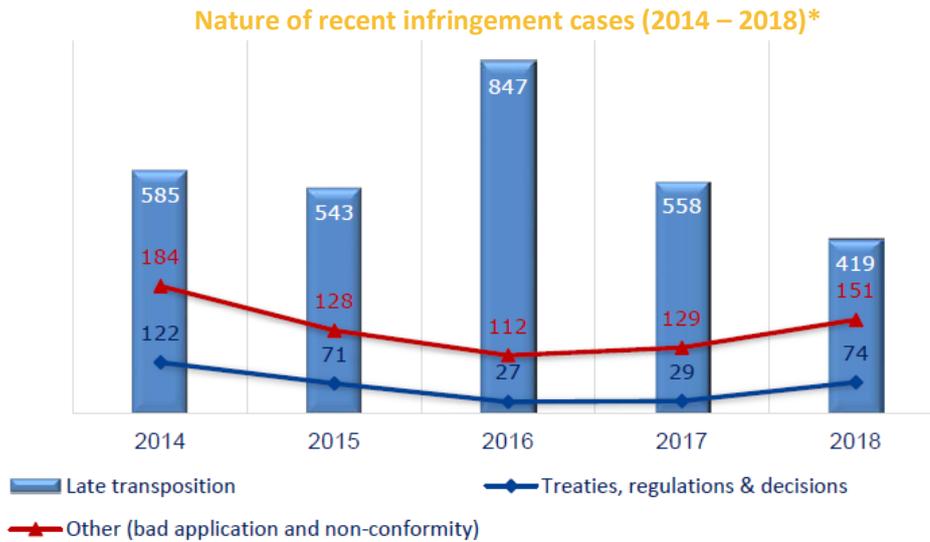
It has taken almost ten years for the Court of Justice of the European Union (CJEU, Court) to apply Article 260(3) TFEU. This allows it to impose a financial sanction on an EU Member State already at the conclusion of the first infringement procedure (Article 258 TFEU), in a case of failure to notify the transposition measures of a directive. In its much-awaited judgement in Case [C-543/17, Commission v Belgium](#), the Court for the first time formulated an extensive interpretation of the notification obligation covering not only ‘non-communication’, but ‘partial communication’ of transposition measures as well. This ruling will have important practical implications for the work of state authorities responsible for EU law harmonisation. It also equips the EU with a new device to put pressure on Member States to transpose directives in a timely way.

The motivation behind Article 260(3) TFEU

The Treaty of Lisbon introduced important modifications into the infringement procedure with the aim of making it more effective. One of these changes was the insertion of a new Article 260(3) in the TFEU, specifically penalising the failure of a Member State to notify measures transposing a directive adopted under a legislative procedure. In such a situation, the European Commission (EC) may propose to the Court that it impose financial sanctions (a lump sum and/or penalty payment) on the defaulting Member State already at the stage of the first infringement procedure, pursuant to Article 258 TFEU.

This new provision is intended to solve the persistent and widespread problem of late transposition of directives. The Commission, as guardian of EU legality, has seen combatting late transposition as a priority and welcomed this. It explained how it would make use of the mechanism in two Communications in [2011](#) and [2017](#).

The Commission stressed that ‘the Article 260(3) instrument should be used as a matter of principle in all cases’ of late transposition, which is the cause of most new infringement cases.

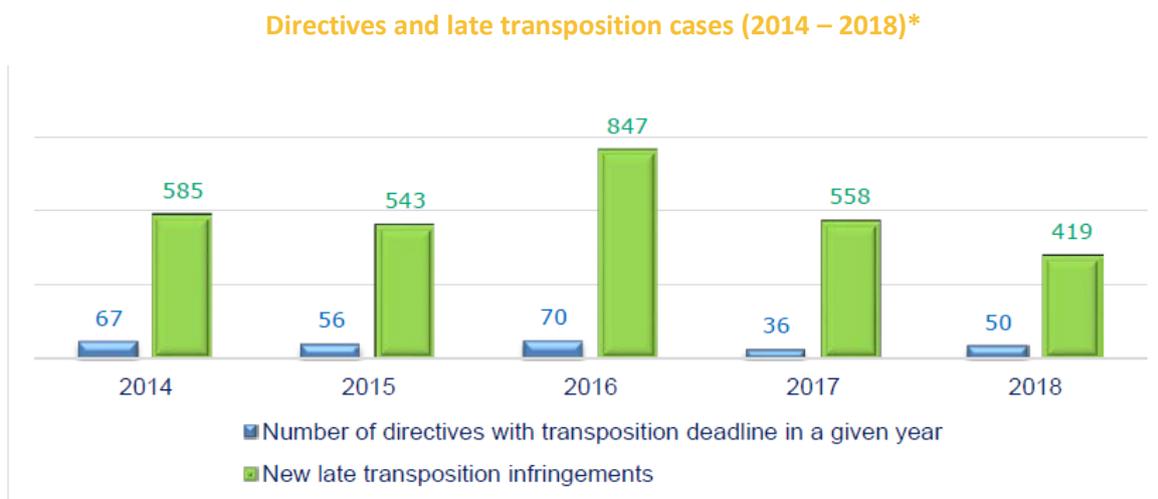


*Source: 2018 Annual Report ‘Monitoring the Application of Union Law’, European Commission

The new Treaty provision immediately generated a debate about its scope of application. Does the notion of a breach of the ‘obligation to notify measures transposing a directive’ exclusively refer to cases of complete failure to transpose and total absence of notification, or does it encompass incomplete or partial transposition as well?

Almost ten years after the new provision entered into force, the Court finally addressed the tricky issue of defining a ‘notification obligation’ in Case C-543/17, Commission vs Belgium, thus also providing guidance for the practical application of the Article 260(3) enforcement tool.

Case C-543/17, Commission v Belgium: The first jurisdictional application of Article 260(3) TFEU



*Source: 2018 Annual Report ‘Monitoring the Application of Union Law’, European Commission

Despite the significant number of late transposition cases initiated by the Commission - 758 cases were still open at the end of 2018 - very few were finally referred to the Court under Article 260(3) TFEU. There were only nine referrals in 2018. Moreover, the defendant Member States then adopted the required transposition measures during the judicial proceedings in all cases, prompting the Commission to withdraw its applications before the Court could deliver its ruling. The Commission withdrew 13 cases in 2018.

This Commission practice encouraged Member States to procrastinate in their transposition duties. The Commission therefore decided to revise its approach in its 2017 Communication. Since then, the Commission systematically asks the Court to impose a lump sum and a penalty payment, and pledges not to withdraw the action for the sole reason that a Member State rectified the transposition.

In Case C-543/17, the Commission considered that, 18 months after the transposition deadline, Belgium had not adopted all the measures required to transpose Directive 2014/61/EU of the Parliament and the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications.

During the pre-litigation phase, Belgium managed to transpose a large part of the Directive. Nevertheless, the Commission stated that it had not received the notification of transposing measures of relevant parts of the directive at the expiry of the deadline set in the reasoned opinion, which is a formal request made to the Member State by the Commission in the pre-litigation phase before turning the matter to the Court. It decided then to lodge an application before the Court under Article 260(3) TFEU, requesting that Belgium would be ordered to pay an appropriate daily penalty payment.

Belgium made further progress in the course of the court litigation, notifying the Commission about new transposing measures. Yet, at the time of the hearing, the Commission considered that the transposition of some provisions by the Brussels-Capital region was still pending and maintained its application. Consequently, proceedings continued their course, allowing the Court to rule on the applicability of Article 260(3) to the case and to give its very first interpretation on this enforcement mechanism.

The judgement of the Court and its legal implications for Member States

The judgement of the Court puts an end to the doubts as to the scope and use of Article 260(3) TFEU which had haunted both the Commission and the Member States since 2009. First, in a clear and an unambiguous manner, the Court defines the notion of ‘notification obligation’. Second, it specifies the criteria the Court will consider in the determination of the penalty payment to be imposed on the defaulting Member State.

Contrary to the arguments of Belgium and the intervening Member States, which advocated limiting the application of Article 260(3) TFEU to instances of total absence of notification, the Court clarified that it also applies to cases of partial failure to communicate transposition measures. Regarding the extent of the Member States' obligation to notify transposition measures, the Court states that the notification must ‘provide sufficiently clear and precise information on the measures transposing a directive’, and ‘state, for each provision of the directive, the national provision or provisions ensuring its transposition’. Without this information, the Commission would not be in a position to determine whether the Member State had genuinely and fully transposed the directive.

As a consequence of the judgement, the Commission has made clear to all Member States that they will be considered in breach of their obligation to notify if they fail to indicate in a sufficiently clear and precise manner which provision(s) of national legislation transpose(s) which provision of the directive. If a Member State provides such information but, upon examination, it appears that certain transposition measures are clearly lacking or do not cover the whole territory of the Member State, the Commission will pursue the infringement under Article 260(3) TFEU.

Member States have wondered whether, as a result of the judgement, the Commission would impose the use of correlation tables as notification instruments. Even if they can be useful to that effect they are not mandatory. The judgment leaves Member States the choice of the form of notification. Hence, what matters is that the selected notification methodology allows the Commission services to identify for each obligation laid down by a directive the corresponding provision(s) of national law.

Finally, the judgement rejected outright the proposition that instances of non-conformity of the transposition could be assessed under Article 260(3) TFEU. The Court vigorously stated that cases of non-communication and non-transposition are to be distinguished from cases of incorrect transposition. The latter are pursued exclusively under Article 258 TFEU.

Conclusions

After many years of uncertainty, this judgement firmly settled how to interpret the notion of failure ‘to notify measures transposing a directive’. By also including situations of partial notification within the scope of Article 260(3) TFEU, the Court has opted to reinforce the punitive dimension of the infringement procedure. This new enforcement tool should also help the Commission to reduce the burden of dealing with an ever-increasing number of cases for late transposition.

It is evident that this new sharpening of the teeth of the procedure will result in an improved record of Member States transposing directives in a timely fashion. However, the question remains as to how far this timely transposition will also be conform. It is a proven fact that most cases of non- or partial transposition of directives, are not intentional, but result from technical incapacity, or a lack of time, money or other resources of the Member State to comply with the highly technical requirements of directives. Consequently, many Member States have regarded the different phases of the infringement procedure as an opportunity to obtain supplementary guidance from the Commission, and some extra time, in order to complete and conclude the required transposition. After the ruling in Case C-543/17 and the resulting new approach of the Commission on the use of the Article 260(3) mechanism, this extra grace period is gone.