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WHAT CONSTITUTES ‘FAILURE TO NOTIFY’ NATIONAL MEASURES?

Szilárd Gáspár-Szilágyi¹

Department of Law, Aarhus University.

Abstract

“The inclusion of article 260(3) TFEU adopted as part of the Lisbon Treaty changed the landscape of infringement proceedings. The provision grants the Commission the power to propose monetary sanctions already during the initial Court litigation against a Member State that ‘failed to notify’ national measures transposing a directive. This article analyses the concept of ‘failure to notify’ and points out that the current interpretation adopted by the Commission is only one of several possible interpretations. The author concludes that article 260(3) TFEU as it stands now is vaguely drafted and is prone to lead to judicial uncertainty. It further increases the already heavily criticized Commission discretion. Furthermore, the lack of proper guidelines of what constitutes ‘failure to notify’ can lead to the arbitrary launching of non-communication proceedings as well as further complicate the internal Commission bureaucracy. It would have been advisable to create a system where the Commission was empowered to propose sanctions during the initial Court proceedings, regardless of the grounds for launching infringement proceedings.”

I. INTRODUCTION

In order to improve the functioning of infringement proceedings and the transposition of directives, the Treaty of Lisbon brought new changes. Article 260(3) TFEU empowers the Commission to suggest monetary sanctions already during the first litigation, against Member States that failed to notify transposition measures.² The new article also influences the date from which sanctions are counted. Thus, Member States that failed to communicate their transposing measures are liable from an earlier date.³ This ultimately affects the level of sanctions that can be imposed, a number that depending on the Member State’s ability to pay, can easily reach several millions of euros.⁴

¹ The author is a PhD-candidate at the Department of Law of Aarhus University. During his previous internship at the European Commission he was given the task of handling multiple infringement cases and the difficulty in applying article 260(3) TFEU in practice prompted him to write this article. The views expressed in this article are his own and not of the European Commission. He would also like to express his gratitude towards professors Birgitte Egelund Olsen and Karsten Engsig Sørensen for their constructive comments.

² Commission Communication, *Implementation of Article 260(3) of the Treaty*, at C12/2, OJEU of 15.01.2011 [hereinafter *Implementation of Article 260(3) of the Treaty*].

³ *Idem*, paras.27-28.

⁴ In *Commission v France* (C-304/02) [2005] E.C.R. I-06263 the lump sum was set at 20 million euros. In *Commission v Poland* (C-48/12) [2012] case in progress, the Commission suggested a daily penalty of 71,521.58 euros from the day the judgment is delivered. In *Commission v Sweden* (C-270/11) [2012] case in progress, the Commission

Multiple acts or omissions can trigger infringement proceedings, therefore, the current analysis shall focus only on the ‘failure to notify’ national measures as a ground for launching non-communication proceedings⁵. Due to the infancy of the new provision and the lack of sufficient case-law, it is hard to draw any solid conclusions at this point in time. This topic should form the basis of future academic debates, once the case-law of the Court of Justice will provide more abundant sources.

In order to achieve a better understanding of the issues involved, the analysis shall commence with a succinct presentation of the changes brought by the Lisbon Treaty with regard to infringement proceedings. This shall be followed by a tri-partite analysis of the notion of ‘failure to notify’. Firstly, an overview of the events that paved the way for the inclusion of article 260(3) TFEU is included and how the drafters of the article interpreted ‘failure to notify’. Secondly, the Commission’s broader interpretation of ‘failure to notify’ shall be analysed as a ground for launching non-communication proceedings. Thirdly, some conclusions shall be drawn from the scarce amount of new case-law. Before concluding, the practical effects of ‘failure to notify’ shall be analysed in several scenarios in order to portray how difficult it is to apply this notion in practice and the different results it might lead to.

II. INFRINGEMENT PROCEEDINGS AFTER LISBON

Prior to Lisbon, the procedure for imposing sanctions against infringing Member States was a replica of the article 226 TEC (article 258 TFEU) mechanism. Thus, for a monetary sanction to be imposed there was once again the need for a letter of formal notice, a reasoned opinion and Member State observations.⁶ Due to this procedure, it took several years until a Member State could actually be sanctioned.

The Lisbon Treaty partially changed the situation. Article 260(3) TFEU comes as an exception to article 260(2) TFEU. It does not require a separate case before the Court in order for sanctions to be imposed against a Member State that has failed to notify national measures transposing a directive. The Commission reasoned that this innovation is meant “[...] to give a stronger incentive to Member States to transpose directives within the deadlines [...]” as prompt

suggested a daily penalty under article 206(2) TFEU of 40,947.20 euros for each day that the national measures do not comply with the previous judgment, running from the day of the first judgment until the moment of compliance.

⁵ In Commission parlance “non-communication” proceedings are cases where the Member State concerned failed to fulfil its obligation to notify measures transposing a directive. *Supra* n.2 at 4. In more detail in Sections II and III.

⁶ D. Chalmers, *European Union Public Law*, Cambridge University Press (2010), at 343 [hereinafter Chalmers]

transposition of directives is essential in “safeguarding the general interest pursued by Union legislation [...] and protecting European citizens who enjoy individual rights under such legislation.”⁷

The reasons behind the new innovation are certainly laudable, but the article fails to give any indications as to what exactly does ‘failure to notify’ national measures encompass. Is it total failure to notify national measures or does it include partial failure? Furthermore, where is the dividing line between failure to notify national measures and failure to transpose a directive correctly as they constitute grounds for the launching of different infringement proceedings?

In practice the Commission differentiates between *non-communication*, *non-conformity* and *incorrect application* proceedings. According to the Commission, non-communication proceedings equally cover cases of complete failure to communicate/notify national measures and cases when the Member State indicates that its communication is only partial.⁸ Non-conformity cases are launched when the fully transposed measures are not in line with the directive. Proceedings for incorrect application are launched following individual complaints or after the Commission’s own investigations. In this later scenario, although the measures have been transposed correctly they are not applied properly in practice. It must also be pointed out that in Commission practice failure to communicate or failure to notify are used interchangeably.

Before the Lisbon changes, the Commission relied⁹ on the self-declaration of transposition⁹ of the Member States when deciding which Member State transposed the directive fully, partially or did not transpose it at all. The introduction of article 260(3) TFEU awoke the fear in the Commission, that Member States might actually notify full transposition, when only partial transposition occurred. This way they could avoid non-communication proceedings, which already bear a monetary sanction from the day following the deadline for transposition of the directive.¹⁰

In order to combat this possibility, the Commission introduced a new step in its internal procedural rules when “full-transposition” had been declared; namely the *prima facie* analysis. It is meant to ascertain whether “in an evident manner” the communication/notification is not complete as to the geographic and material scope of the directive. In the contrary, a letter of formal notice

⁷ *Implementation of Article 260(3) of the Treaty*, para.21.

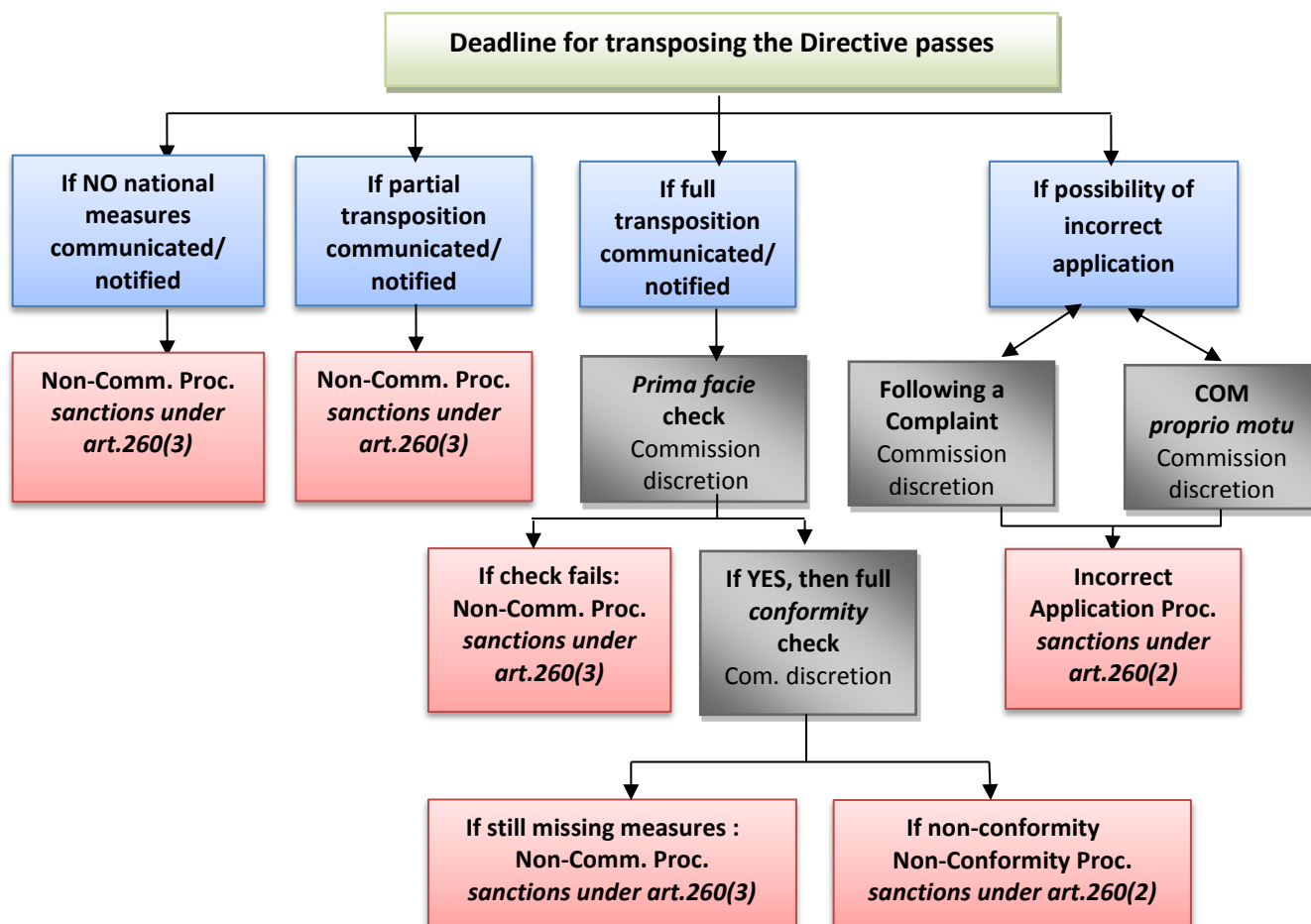
⁸ European Commission, *Controle de l’application du droit communautaire – Manuel des procedures*, SEC(2005) 254/5, cadre 48 as amended in 2011.

⁹ In practice the Member States’ notification/communication of their national transposing measures appears in the NIF database. If no national measures have been communicated or only partial transposition has been notified, the Secretariat General shall give an infringement case number to the infringing Member State for reasons of non-communication. It shall then refer the case to the relevant Commission Unit.

¹⁰ *Implementation of Article 260(3) of the Treaty*, paras.26-27.

shall be drawn up and non-communication proceedings opened. The opening of such proceedings is also possible later on, if during the conformity-check stage the Commission official discovers that not all measures have been communicated.¹¹

Figure 1 illustrates in a graphic manner¹² the types of infringement proceedings and the sanctioning procedures, following the Lisbon changes.



III. 'FAILURE TO NOTIFY' AT THE BIRTH OF ARTICLE 260(3)

On a more thorough look at the *travaux préparatoires* of the Lisbon Treaty one finds that the current article 260 TFEU is an exact replica of article III-362 of the Constitutional Treaty.¹³ During the European Convention in 2003 the Discussion Circle on the Court of Justice concluded that the

¹¹ European Commission, *Controle de l'application du droit communautaire – Manuel des procedures*, SEC(2005) 254/5, cadre 48 as amended in 2011.

¹² The figure illustrates in a simplified manner what in practice is a complex internal process.

¹³ Lisbon Treaty – *Comments and preparatory works for the EU Reform Treaty November 2009*, available at <http://www.lexnet.dk/law/download/treaties/Ref-2007.pdf>, last visited 23.03.2012.

sanctioning system under article 228 TEC was not “efficient enough”. Besides other improvements, the Discussion Circle suggested to grant the Commission the possibility to initiate in the same action before the Court, proceedings for failure to fulfil obligations and proceedings for the imposition of sanctions. It argued that this would speed up and simplify the imposition of sanctions during “non-communication” proceedings.¹⁴

The Discussion Circle also mentioned that in practice a distinction is made between cases of ‘non-communication’ and cases of ‘incorrect transposition’. The former refers to the lack of *any transposition measures* while the latter case arises when, in the Commission’s view, the transposition measures do not comply with the directive. In ‘incorrect transposition’ cases the new sanctioning proceedings would not apply.¹⁵ Several months later the *Praesidium* mentioned that paragraph 3 (now article 260(3) TFEU) was a result of a suggestion submitted by the Commission to the Discussion Circle, which was decided to be taken up.¹⁶

However, the preparatory works only add to the confusion created around article 260(3) TFEU and run contrary to Commission practice. According to both the *Praesidium* and the Discussion Circle, a non-communication procedure shall be launched when the Member State has not taken any transposition measures. Thus, when a total ‘failure to notify’ national measures occurred. As previously mentioned, in Commission practice non-communication proceedings can also be launched when ‘partial transposition’ has been notified. Furthermore, non-communication proceedings can also be launched when ‘full transposition’ has been notified, but during the *prima facie* or conformity check phase, missing measures are found. Consequently, in Commission practice the reasons for launching non-communication proceedings are much broader than those referred to during the preparatory works of the Constitutional Treaty.

The question arises of how ‘failure to notify’ should be interpreted. Which approach should the Court of Justice follow if a Member State challenges an action brought by the Commission, on grounds that the action should be one of non-conformity and not non-communication? According to article 32 of the Vienna Convention on the Law of Treaties¹⁷ (1969) “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion” if the general rules of interpretation of article 31 leave the meaning

¹⁴ European Convention, *Final report of the discussion circle on the Court of Justice*, CONV 636/03, 25 March 2003, para.28, available at <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00636.en03.pdf>, last visited 23.03.2012.

¹⁵ *Idem*, at 11, footnote 2.

¹⁶ European Convention, *Praesidium, Articles on the Court of Justice and the High Court*, CONV 734/03, 12 May 2003, at 15, available at <http://register.consilium.europa.eu/pdf/en/03/cv00/cv00734.en03.pdf>, last visited 29.03.2012.

¹⁷ Vienna Convention on the Law of Treaties [VCLT], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, last visited 29.03.2012.

ambiguous or obscure, or lead to a “a result which is manifestly absurd or unreasonable”. Without going into further detail on the more complex issue of the interpretation of European Law, it must be pointed out that the Court of Justice has denied any binding or even persuasive force to the will of the contracting parties of the Treaties.¹⁸ Thus, relying on the preparatory works before the Court in order to interpret the notion of ‘failure to notify’ would not yield great results.

Already during the Discussion Circle several voices were not in favour of paragraph 3. One of the criticisms was that “cases of non-transposition may be hardly discerned from cases of non-complete-transposition. If Member States could simply avoid the penalty being imposed by claiming transposition, the provision [would] not improve the current enforcement system.”¹⁹ Others pointed out that it is inappropriate to impose financial sanctions for the mere fact of non-notification of measures transposing a framework law (directive).²⁰ A further criticism was that the question of “whether a Member State has implemented a certain framework law or not, is not always simple. The proposed procedure can cause situations that are open to differing interpretations.”²¹ A similar suggestion to that of paragraph 3 stated that “particularly in the case of late, incomplete, or incorrect implementation of directives” the Commission should be allowed to already suggest sanctions during the initial Court proceedings.²²

The inclusion of article 260(3) TFEU stirred quite some controversies, and rightful ones, as the failure to notify measures transposing a directive seems to be a vaguely defined concept. According to the *Praesidium* and the Discussion Circle, ‘non-communication’ would refer to the complete failure to notify/communicate national measures. However, others draw the attention on the difficulty to delineate what constitutes total failure to communicate national measures, partial transposition; late, incomplete or incorrect transposition.

¹⁸ On the issue of interpretation of EU Law and the role of the preparatory works *see also* G. Itzovich, *The Interpretation of Community Law by the European Court of Justice*, 19(5) German Law Journal pp.537-560 (2009), at 554.

¹⁹ European Convention, *Suggestion for amendment of article 228 by Ms Maria Berger, Mr Caspar Einem, Mr Hannes Farnleitner, Mr Gerhard Tusek*, available at <http://european-convention.eu.int/Docs/Treaty/pdf/882/global882.pdf>, last visited 23.03.2012.

²⁰ European Convention, *Suggestion for amendment of ex Article 228 by Danuta Hubner*, available at <http://european-convention.eu.int/docs/treaty/pdf/882/Art%20III%20263%20H%C3%BCbner%20EN.pdf>, last visited 23.03.2012.

²¹ European Convention, *Suggestion for amendment of ex Article 228 by Ms / Mr. Teija Tiilikainen, Antti Peltomäki, Kimmo Kiljunen, Jari Vilén, Hannu Takkula and Esko Helle*, available at <http://european-convention.eu.int/docs/treaty/pdf/882/Art%20III%20263%20Tiilikainen%20EN.pdf>, last visited 23.03.2012.

²² European Convention, Discussion Circle on the Court of Justice - *remarks by Mr. Thom de Bruijn, alternate member of the convention, on the draft final report of the Court of Justice discussion circle*, 14 March 2003, available at <http://european-convention.eu.int/docs/wdcir1/8805.pdf>, last visited 23.03.2012.

IV. 'FAILURE TO NOTIFY' FROM THE COMMISSION'S PERSPECTIVE

According to the Commission's Communication on the Implementation of article 260(3):

"[...] Article 260(3) concerns both the *total failure to notify any measures* to transpose a directive and cases in which there is only *partial notification* of transposition measures. Such a case might occur either where the transposition measures notified do not cover the whole territory of the Member State or where the notification is incomplete with respect to the transposition measures corresponding to a part of the directive. Where the Member State has provided all necessary explanations on *how it believes it has transposed the entire directive*, the Commission may consider that the Member State has not failed to meet its obligations to notify transposing measures, and therefore Article 260(3) does not apply. Any dispute regarding the *sufficiency* of the transposition measures notified or the rules of law existing in national law *will be dealt with under the normal procedure* on the correct transposition of the directive, under Article 258 of the Treaty."²³

In the Commission's view, the article 260(3) TFEU sanctioning mechanism applies regardless of whether no national measures have been communicated, or whether partial transposition has been notified. It also seems that the Commission will apply some form of good faith test when determining if the infringement amounts to partial transposition or incorrect transposition.²⁴ However, when a dispute arises due to the "sufficiency of the transposition measures", sanctions cannot be imposed under article 260(3) TFEU, but following the regular procedure.

In *Lütticke v Commission*²⁵ the Court reasoned that article 169 TEEC (now article 258 TFEU) "empowers" the Commission to set in motion the infringement proceedings. Furthermore, under article 260(3) TFEU the Commission can have recourse to the new sanctioning mechanism "when it deems appropriate". However, in exercising this discretionary power, the Commission considers that as a matter of principle it should be used in all proceedings falling under article 260(3).²⁶

It seems that article 260(3) TFEU shall not apply to cases where, although the transposition of the directive is *prima facie* complete, it turns out that the transposition is substantively incorrect.²⁷ However, the line between the grounds for launching non-communication and non-conformity proceedings can be a thin one. As mentioned in Section II, the Commission altered its internal procedural rules and introduced the *prima facie* analysis with the role of checking whether Member State fully transposed the directive when they notify 'full transposition'. The only guideline given

²³ *Implementation of Article 260(3) of the Treaty*, para.19; highlights added by author.

²⁴ P. Wennerås, *Sanctions against Member States under article 260 TFEU: Alive, but not kicking?*, 49 *Common Market Law Review* pp. 145-176 (2012), at 167. [hereinafter Wennerås].

²⁵ *Lütticke v Commission* (48/65) [1966], E.C.R. 00019 at 27.

²⁶ *Implementation of Article 260(3) of the Treaty*, paras.16-17.

²⁷ Wennerås at 167.

by the Commission is that officials are asked to ascertain whether in terms of the *geographical scope* and the *material scope* the measures transpose the directive fully. In the contrary, non-communication proceedings shall be launched. When examining the geographical scope, particular attention should be given to certain territories and federal States. Partial *material* transposition shall be found when the Member State admits that subsequent national measures are still needed for transposing the directive.²⁸

The analysis of the proper delimitation of the geographic scope should not pose significant problems. This, however, does not hold true as to the need for transposing subsequent measures. Should a quantitative or a qualitative approach be used? Does it matter which article had not been transposed or does the number of transposed articles carry more weight? Which proceedings should be launched if only a handful of unimportant articles are missing?

Furthermore, the usefulness of the *prima facie* check is questionable and does not seem to help in the delimitation of the notion of ‘failure to notify’. Firstly, the internal guidelines do not offer proper guidance to the Commission official(s) handling the file. Thus, the discretionary power in the hands of the official(s) is remarkably high.²⁹ The official has to decide, based on insufficient guidelines, what constitutes ‘failure to notify’ and what are grounds that regard the ‘sufficiency’ of transposition measures.

Secondly, as mentioned in Section II, the conformity analysis has a double role: a) it is meant to check whether the national measures “conform” to the wording and scope of the directive and b) it also grants the Commission official the possibility to launch non-communication proceedings when missing measures are discovered.³⁰ As the latter is also the role of the *prima facie* analysis, it would be wise to create one speedier and more resource efficient check with a double role. This way the continuity of the official(s) handling the file is better ensured. The time-span between the two checks can exceed six months, a period in which the Commission official handling the file often changes. Thus, a situation that constituted a matter of ‘sufficiency’ (non-conformity) for the initial official, might be considered ‘failure to notify’ by the subsequent official. A one step procedure, with a double role would create some certainty as to the grounds of launching non-communication or non-conformity proceedings.

²⁸ *Supra*, n.8.

²⁹ In practice the role of the individual official is important, as her/his findings will also influence the decision of the Legal Services and the College of Commissioners, who ultimately decide whether the case goes before the Court of Justice.

³⁰ *Supra*, n.8.

Lastly, the two stage analysis also creates uncertainty in the judicial proceedings. Suppose the Commission official fails to identify all missing national measures during the *prima facie* check and launches non-communication proceedings. The case then goes before the Court of Justice. Later,³¹ during the conformity check, some missing measures of importance are discovered and the official has the right to launch non-communication proceedings again. However, in the meantime the Court is handling or already handled the initial case. Could two court proceedings be launched for the failure to notify in full the same directive? In such a situation the Member State should be given the right to invoke *res judicata*³² in order to avoid being sanctioned twice for the ‘failure to notify’ the same directive.

The Commission’s interpretation of the notion of ‘failure to notify’ lacks sufficient clarity. It is not clear which articles do necessarily have to be transposed in order not to launch non-communication proceedings, and the non-transposition of which provisions could constitute grounds for the launching of non-conformity proceedings.

V. ‘FAILURE TO NOTIFY’ NATIONAL MEASURES IN CASE-LAW

Before Lisbon, the same article 228(2) TEC rules applied when it came to sanctioning a Member State for non-communication or non-conformity. Thus, it was not paramount for the Court to develop detailed case-law on what exactly is the dividing line between ‘failure to notify’ and lack of conformity.

According to the Commission, article 260(3) TFEU shall only apply to proceedings initiated under article 258 TFEU, following the publication (15 January 2011) of the Communication on the Implementation of article 260(3) TFEU, or “to proceedings initiated before its publication, except those which have already been referred to the Court.”³³ Thus, most of the cases launched under the new procedure are still in their application phase and very few conclusions can be drawn. Similarly, a great number of recent cases brought before the Court concern proceedings launched for the ‘incorrect application’ of the directive, thus they cannot serve as a basis for determining ‘failure to notify’.

³¹ There is no specific date set for the conformity check. In most cases a conformity check is conducted six to twelve months after the *prima facie* analysis.

³² *Res judicata*: a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties, available at <http://oxforddictionaries.com>, last visited 18.03.2012.

³³ *Implementation of Article 260(3) of the Treaty*, para.31 Transitional Rule.

Recently, the Commission brought action against Poland for “failing to adopt all the laws, regulations and administrative provisions necessary to comply” with a directive.³⁴ According to the Commission “the drawing up of the fundamental principles of a draft law to amend the Law on environmental protection and certain other laws” does not lead to the fulfilment of the Member State’s obligation to transpose the directive before the deadline. Furthermore, only two articles of the total of thirty-four have been partially transposed. The Commission suggested a daily penalty of 71,521.58 euros from the day the judgment is delivered until the breach is remedied. It can easily be deduced that the Commission launched infringement proceedings for ‘failure to notify’ national measures based on partial notification and availed itself of its prerogative to suggest sanctions. It shall be seen how the Court will decide on the matter.

In *Commission v Austria*³⁵ the Commission initiated actions against Austria for *failing to notify in full* the laws, regulations and administrative provisions necessary to comply with the directive. Interestingly, the Commission did not suggest sanctions but asked the Court to order Austria to pay the costs.³⁶ This can be explained by the fact that the new procedure only applies from January 2011, while the action was brought in November 2010; thus, under the old procedure. The Court ruled in favour of the Commission, but did not develop further the notion of “failure to notify in full”.³⁷ Due to the confidentiality of the reasoned opinion³⁸, it is difficult to deduce how the arguments of the Commission were formulated.

In her recent opinion in *Commission v Spain*³⁹ Advocate General Kokott held that article 260(3) underlines the importance of the Commission’s discretion regarding infringement proceedings. It grants the right to the Commission to impose sanctions during “the initial proceedings pursuant to article 258 TFEU for failure to notify measures transposing a directive”. However the Advocate General did not enter into more detail on what ‘failure to notify’ means and the Court did not include these observations in its judgment.⁴⁰

Due to the infancy of article 260(3) TFEU and the lack of case-law it is still hard to draw conclusions on what constitute grounds for launching non-communication proceedings and what

³⁴ *Commission v Poland* (C-48/12) [2012] Case in progress. Action brought by the Commission. The action concerns Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe. According to article 33(1) of the directive the deadline for transposition was 11 June 2010.

³⁵ *Commission v Austria* (C-548/10) [2011] Not yet published. The action concerns Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community.

³⁶ *Commission v Austria* (C-548/10) [2010] Not yet published. Action brought by the Commission.

³⁷ *Commission v Austria* (C-548/10) [2011] Not yet published, para.1.

³⁸ In more detail see P. Craig and G. de Burca, *EU Law: Texts, cases and materials*, OUP (2011) at 421.

³⁹ Opinion AG Kokott in *Commission v Spain* (C-526/08) [2010] E.C.R. I-06147, para.72.

⁴⁰ *Commission v Spain* (C-526/08) [2010] E.C.R. I-06147.

constitutes non-conformity. Some conclusions, however, can still be drawn: a) if the case was launched before 15 January 2011, it does not matter whether the underlying reasons are total failure to notify measures, partial transposition, non-conformity or incorrect application as sanctions cannot be imposed during the initial Court proceedings; b) for cases brought after 15 January 2011, the Commission shall initiate Court litigation and suggest sanctions for ‘failure to notify’, when the national measures only set up the “the fundamental principles of a draft law” and when only a handful of provisions were communicated; c) according to the Commission, if during the *prima facie* check phase (and even during the conformity check) it turns out that the geographic and material scope of the directive have not been properly transposed, non-communication proceedings shall be launched due to partial notification.

VI. THE APPLICATION OF ARTICLE 260(3) IN PRACTICE. POSSIBLE SCENARIOS

The scenarios encountered in practice are varied and Member States will transpose a directive in different ways. Some enact new legislation that more or less copies the directive word by word. Other Member States amend existing laws and/or notify national measures that already contain the provisions of the directive.⁴¹ This section shall focus on two commonly encountered scenarios: not all provisions have been transposed and the national provisions refer to subsequent legislation that needs to be enacted.

a) Not all provisions have been transposed

Such a scenario can arise in two situations. Either the Member State notified ‘partial transposition’ or the Member States notified ‘full transposition’, but during the *prima facie* or the subsequent conformity check, missing measures are found. In practice the non-transposition of all measures does not necessarily amount to a ‘failure to notify’. Several factors influence the decision to launch non-communication proceedings, such as: the importance of the missing measures, the number of missing measures, the obligations of the Member State under the directive or the complexity of a Member State’s legal system.

⁴¹ Certain Member State see this as an opportunity to buy additional time and will communicate several hundreds of pages of documents without specifying which provision is to be found in which article of the national law. In such cases the *prima facie* check can be a long and arduous process. Other governments send a table of equivalence showing which transposed measure is to be found in which national provision. This eases the work of the Commission official and also leads to a better quality of the analysis.

If *partial transposition* was notified/ communicated, the Commission official has the role of identifying the missing measures and drawing up the letter of formal notice. However, this is not a straight forward task, as what constitutes partial transposition from a Member State's perspective might be different from the Commission's view. In certain cases the Member State declares 'partial transposition', but after the analysis of the national measures the Commission concludes that the transposing measures actually fully transpose the directive; thus the non-communication proceedings shall be closed.⁴²

Some Member States will notify 'partial transposition' when although they transposed the directive in full they have not yet enacted certain administrative measures. If these measures concern the 'correct application' of the directive, 'failure to notify' national measures does not arise. However, if the directive contains an obligation for the Member State to notify such measures, then the lack of their notification shall constitute 'failure to notify'. It might also happen that a Member State notifies 'partial transposition' but asks for additional time to adopt the missing measures. If a timeline of adoption and a draft of the measures are sent, the Commission will grant such additional time. Such a scenario often arises in practice as certain Member States have more complex legal systems than others. However, the non-communication case will still remain open.

If *full transposition* was notified, the *prima facie* check has to be conducted. The official shall first look at the *geographic* and *material* scope of the directive. Special attention is to be given to federal States. For example, the directive applies to ports with an annual cargo capacity of over X tonnes. In a federal State like Belgium such a measure will most probably affect the port of Antwerp. Thus, only the Flemish region will need to notify the transposition of the measures. In a state like Germany this might apply to both the ports of Hamburg and Bremen, so both Free Cities should notify the transposing measures.

During the *prima facie* analysis or the conformity check certain missing measures might be found. According to the Commission's application in *Commission v Poland*,⁴³ if only a handful of measures have been transposed, non-communication proceedings shall be launched.⁴⁴ However, if only a few national measures are missing, of lesser importance, the Commission will apply some

⁴² Such a scenario might arise for e.g. when the Member State had the obligation to notify the name and address of a newly established body, but failed to notify the address. This is an issue of minor importance and can be corrected by simply sending an informal letter/EU Pilot to the Member State asking them to notify the missing information.

⁴³ *Commission v Poland* (C-48/12) [2012] Case in progress. Action brought by the Commission.

⁴⁴ It is also worth mentioning that in such a case, when 'full transposition' has been notified, but in reality it is only partial, the Commission shall view this as an aggravating factor when calculating the amount of daily penalties.

form of good faith test when determining if the infringement amounts to a failure to transpose or incorrect transposition.

b) The enactment of subsequent national legislation is needed

In *Commission v Poland* non-communication proceedings were launched because only the fundamental principles of a draft law had been set up.⁴⁵ If a Member State just creates the general framework of the transposing measure, but leaves the actual adoption of it to subsequent judicial acts, the Member State has clearly communicated nothing of value. In such a case the Member State failed to notify the transposing measures and non-communication proceedings shall be launched.

Complications might arise when the Member State fully transposes the directive, but leaves the setting up of additional bodies, working procedures, norms to subsequent legislative acts. In such cases it has to be seen what the Member State's obligations are under the directive. For example the directive might provide for the need to set up penalties if certain actors do not comply with the new measures. If the directive does not contain any obligation to notify how the setting up of penalties will function, then it is sufficient to communicate that penalties shall be set up. However, if the notification of the functioning of the penalty system is mandatory, then this will need to be communicated as well. Furthermore, if the directive sets out certain minimum conditions, then these minimum conditions will need to be notified as well.

The practical scenarios are numerous and the dividing line between 'failure to notify' and non-conformity shall be determined *in casu* for each directive and each national measure. The line however is not always clear and what the Commission sees as grounds for launching non-communication or non-conformity proceedings can differ from what Member States deem as such. Commission discretion is further enhanced by this vague notion which carries with it serious financial implications. It is for this reason that Member States should have a better image of what constitutes 'failure to notify' and should be given ample opportunity to challenge the meaning of this notion when non-communication proceedings are launched.

VII. CONCLUDING REMARKS

Due to the relative novelty of article 260(3) TFEU and the lack of thorough case-law in this field it is hard to draw solid conclusions and propose a certain guideline for the definition of 'failure to notify' as a ground for launching non-communication proceedings.

⁴⁵ *Commission v Poland* (C-48/12) [2012] Case in progress. Action brought by the Commission.

In my opinion article 260(3) TFEU as it stands now does not have its place in the TFEU. It lacks any definition and it is prone to have adverse effects on judicial certainty; it further blurs the way Commission discretion is exercised, which is already the subject of heavy criticism. The lack of any proper guidelines in defining what is ‘failure to notify’ might lead to an arbitrary and *in casu* launching of non-communication proceedings and the imposition of sanctions in the initial court proceedings. It also adds the inefficient *prima facie* check to the already intricate internal bureaucracy of the Commission.

The drafters of article 260(3) should have extended the right of the Commission to propose sanctions during the initial Court proceedings to all infringement proceedings. Consequently, the line between non-communication and non-conformity would not have practical significance just as it did not have before Lisbon.

Situations will arise where a Member State shall be sanctioned with considerable sums of money for failing to notify a couple of articles of lesser importance, while other Member States, applying a more important article in a wrong manner with more serious consequences, shall escape sanctioning for several years. It will be up to the Court through its case-law to develop the notion of ‘failure to notify’ as well as the dividing line between the grounds for launching a non-communication or a non-conformity case. This will provide member States the legal tools to challenge the discretion of the Commission when launching non-communication cases.

