

Handling Infractions



A guide for Scottish Government officials

European Relations Division
Directorate for Culture, Europe & External Affairs
The Scottish Government

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Introduction

This guidance has been prepared by the European Relations Division in the Directorate for Culture, Europe and External Affairs to assist policy officials in the Scottish Government in exercising their responsibility for responding to infraction proceedings resulting from the improper implementation of EU obligations within their policy areas.

Additional guidance for policy officials is available at the following links:

Influencing EU Policy

<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Influencing-EU-Policy>

Explanatory Memoranda

<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Explanatory-Memoranda>

Implementing EU Obligations

<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Implementing-EU-Policy>

Part 1: The Role of the Scottish Government in Handling Infractions

Monitoring the application of EU law

1. The European Commission monitors the application of EU law to ensure the correct and timely transposition of EU law into the domestic law of the Member States. If the European Commission has evidence that a Member State is not fulfilling its EU obligations, it will begin legal proceedings to rectify the situation, known as infringement – or infraction – proceedings.
2. The powers which allow the European Commission to carry out infraction proceedings are provided for in Articles 258 and 260 of the Treaty on the Functioning of the European Union (“TFEU”). It is also possible for a Member State to bring infraction proceedings against another Member State under Article 259, but this is very rare.

Working with the UK Government

3. Infraction proceedings may be brought against the UK for matters in respect of which the Scottish Government has failed to properly implement or transpose EU law.
4. Paragraphs **B4.23 – B4.26** of the EU Concordat of the Memorandum of Understanding (“MoU”) on Devolution¹ set out the underlying principles governing the roles and responsibilities of the UK and Scottish Government in respect of such infraction proceedings. In particular, the MoU outlines the following:
 - Where an infraction case relates solely to the implementation of EU obligations in Scotland, in relation to a matter falling within the responsibility of the Scottish Government, the draft response to the European Commission will be prepared by the Scottish Government and agreed at official, and where necessary, Ministerial level, with relevant UK Government departments.
 - Where an infraction case partly concerns implementation of a devolved or non-devolved matter in the UK including Scotland, the lead Whitehall department will prepare the draft reply in consultation at official or Ministerial level, as appropriate, with the Scottish Government.
 - Where an infraction case involving implementation by the Scottish Government is referred to the Court of Justice of the European Union (CJEU), the Scottish Government will contribute to the preparation of the UK’s submission to the Court. The Scottish Government would take the lead for

¹ The Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013)

(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf)

cases wholly concerned with implementation in relation to a matter falling within its responsibility, agreed (as appropriate) with the relevant UK Government departments.

5. It is, therefore, essential that policy officials in the Scottish Government contribute to the UK Government's response to infraction cases where the matter falls within devolved competence or concerns the implementation of a non-devolved matter in Scotland.

The European Relations Division

6. The European Relations Division in the Directorate for Culture, Europe and External Affairs supports the implementation of EU obligations across the Scottish Government.

7. We monitor the progress of infractions proceedings and provide advice and support to Scottish Government policy officials on handling infractions, where appropriate.

8. Notice of new infraction cases will be sent by Cabinet Office to the European Relations Division, which will in turn contact the appropriate policy lead and advise on the next steps.

9. **It is, therefore, essential that policy officials ensure that any developments regarding a particular infraction case are communicated to the European Relations Division on EUObligations@gov.scot.**

10. For more information on the European Relations Division and the wider work that we do, visit www.gov.scot/topics/international/europe and read the [Action Plan on European Engagement](#).

Part 2: An Overview of Infractions

The purpose of infractions

11. The purpose of the infractions process is to ensure that Member States are complying with their EU obligations.
12. Often, the Commission will first conduct informal inquiries into alleged infringements, in order to provide Member States with the opportunity to demonstrate to the European Commission that they have transposed and are implementing the EU law correctly and thereby avoiding the need for formal infringement procedures.
13. If no solution can be found at an early stage, the Commission may launch formal infringement proceedings and eventually refer the Member State to the Court of Justice of the European Union (“CJEU”) for a decision as to whether there has been a breach.

Types of infractions

14. When infraction proceedings are launched, it will typically fall into one of the following categories:
 - Non-communication – This is where the Member State has not transposed a Directive on time, or where it has not communicated the details of the transposing measures to the Commission via the correct channels. Under Article 258 TFEU, the Commission may apply a faster process to non-communication cases than other types of infraction, and these cases attract fines much faster too. Guidance on notifying transposition measures to the Commission is provided in paragraphs 90-94 of Implementing EU Obligations, available at <http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Implementing-EU-Policy>.
 - Incorrect implementation – This is where the Commission alleges that the Member State has not implemented a directive correctly or fully.
 - Incorrect application – This is where the Commission alleges that the Member State is not complying with a directive properly in practice, despite transposing it into its national law.

Stages of infractions

15. The Commission Infraction Chefs meet every month (except August and December) to consider cases and decide either to instigate new action, progress a case forward, or close proceedings.

16. The formal infringement procedure starts with a letter of formal notice, by which the Commission allows the Member State to present its views regarding the breach observed. If no reply to the letter of formal notice is received, or if the observations presented by the Member State in reply to that notice cannot be considered satisfactory, the Commission will move to the next stage of the infringement procedure, which is the reasoned opinion. If necessary, the Commission will then refer the case to the CJEU.

The EU Pilot

17. Since April 2008, however, the Commission has been running a pilot scheme, aimed at improving the efficiency of the infraction process by providing an early opportunity to investigate claims of breached legislation.

18. It is based on an online portal, which allows the Commission – on its own initiative or in response to a complaint by an individual or organisation – to gather further information from Member States on whether they are implementing EU obligations correctly.

19. The EU Pilot is not part of formal infraction proceedings, but constitutes an informal precursor to them. It is used by the European Commission to gather information on the implementation of EU obligations in a Member State and offers Member States an opportunity to remedy potential infringements voluntarily, at an early stage. However, the Commission is not legally bound to issue an EU Pilot case prior to the formal infractions process.

20. The EU Pilot process is not available in non-communication infractions, where the Commission suspects that not all measures have been notified – in such cases the process begins with the formal Article 258 Letter of Formal Notice.

21. Member States are usually given 10 weeks in which to address and respond to the Commission's concerns, however the lead UK Department will specify an earlier deadline to allow the final UK response to be cleared at various stages before submission to the Commission. Failure to meet a deadline for responding to an EU Pilot case may result in the Commission closing the EU Pilot file and launching formal infringement proceedings.

22. If the Commission is dissatisfied with the response, the Member State does not agree with the Commission, or the Member State fails to rectify the suspected infringement, the Commission may then consider commencing infringement proceedings in the usual way.

23. It is, therefore, essential to treat these pilot cases with the same urgency as a formal infraction.

Article 258 Letter of Formal Notice

24. An Article 258 Letter is the first formal stage in infraction proceedings and is issued when the Commission has concerns about the transposition or implementation of a Directive by the Member State. The letter sets out the basis of the Commission's complaint against a Member State and seeks its views on the issues.

25. The Member State is usually given two months to respond, however the Commission may give less time where it considers it is appropriate to do so.

Article 258 Jumbo Letters

26. "Jumbo" letters are issued where the infraction results from non-notification. Whilst only one jumbo letter will be issued to cover a number of cases, each case counts as an individual infraction. These also have a 2 month deadline, and responses should provide a firm commitment to finalise transposition and notify the Commission.

Article 258 Reasoned Opinion

27. Where the Member State fails to respond, or the Commission is unsatisfied with the response and still considers the Member State to be in breach of its obligations, it will issue an Article 258 Reasoned Opinion. The Reasoned Opinion requires the Member State to comply with its EU obligations (as opposed to merely replying) within a given time limit, usually two months from the date of publication of the letter.

28. The Reasoned Opinion must be dealt with fully and quickly in the light of legal advice and input from other colleagues with an interest.

29. If the Scottish Government does not intend to comply with the Reasoned Opinion, SGLD must be consulted on the strength of the Scottish case and the prospects of the UK successfully defending our position before the CJEU. Any response with a Scottish element needs to be agreed with the UK Government.

Referral to the CJEU Under Article 258

30. If a Member State fails to comply with a reasoned opinion within the prescribed period, or the Commission does not accept the Member State's response and/or considers the Member State to still be in breach, the Commission can decide to refer the matter to the European Court of Justice for a ruling on whether the Member State is in breach of its EU obligations.

31. The Commission will also lodge the formal Article 258 correspondence, including the replies to the formal letter and the reasoned opinion, with the application. When dealing with these early stages be aware that if the matter does

go to the CJEU, any responses from policy officials will form part of the official court proceedings.

32. Under the court procedure, it is usually the CJEU that informs the Member State of the Commission's application. It makes an order for defences to be lodged (this is usually within one month but may be extended to two). Following consideration of the case, the CJEU will issue a judgment which must be complied with. Consideration can be a lengthy process.

33. If the infraction is due to **late or incomplete transposition** (i.e. non-notification cases) of a directive into national law, the Commission can request that the CJEU impose financial penalties on the Member State at this first referral stage.

34. In other infraction cases, where the CJEU has ruled that the Member State is in breach of its EU obligations, the case will progress to the Article 260 stages noted below.

Article 260 Letter of Formal Notice

35. Where the CJEU has ruled that the Member State is in breach of its EU obligations, the Commission may issue to the Member State a letter of formal notice under Article 260 inquiring what action the Member State has or is taking to comply with the CJEU's judgment and remedy the breach.

36. The deadline for response is normally 2 months. Failure to respond to an Article 260 letter, or failure to comply with the CJEU's judgment by the deadline set, will result in referral to the CJEU a second time, under Article 260(2).

37. The reply will be issued on behalf of the UK Government and requires clearance between Whitehall and the devolved administrations. Due to the sensitivity of Article 260 proceedings, an intergovernmental meeting may be necessary.

CJEU Referral under Article 260(2)

38. This is the final stage for non-implementation cases. Referral to the CJEU under Article 260 is used to ensure that Member States comply with the court's judgment, usually by imposing financial penalties.

39. The Commission's decision on a second referral to the CJEU on the basis of Article 260 TFEU must always be accompanied by a proposal for a penalty and/or lump sum payment.

Part 3: Handling Infractions

First Steps

1. When you receive notice of an infraction relating to your policy portfolio, you must immediately notify the [European Relations Division](#) and your lawyer in SGLD.
2. You should bear in mind that the infraction proceedings are taken against the UK as the Member State. Therefore, you must liaise closely with the relevant department(s) in the UK Government to feed in the Scottish Government position.
3. You must deal with all correspondence relating to infraction proceedings **promptly and by the deadline** prescribed by the Commission.
4. Where the case has a particular Scottish interest it may be useful to attempt engagement with the Commission directly on the issue. This can enhance the Commission's understanding and improve the likelihood of the infraction being closed. You should bear in mind sensitivities around UK relations if you take this approach.
5. It may also be worthwhile engaging with the other **devolved administrations** and **Member States** to support any evidence given to the Commission on compliance.

Extension requests

40. Responses to infraction proceedings should always be submitted within the deadline prescribed by the Commission, which is usually two months. However, it may be appropriate to request an extension where more time is required to draft a response.
41. In such instances, you should consult with the lead UK Government Department, the European & Global Issues Secretariat ("EGIS") and the relevant UKRep desk officer, to discuss whether an extension should be requested.
42. Where an extension is required, you should provide a draft letter for the UKRep desk officer to send to the Commission, requesting an extension as soon as possible and before the deadline for response. If the extension is granted the Commission will let UKRep know in writing.

Disclosure of information relating to infractions

43. Communications between the Commission and Member States on infractions are generally confidential and should usually not be disclosed to other parties, particularly where a case is ongoing. However, there isn't any prohibition on revealing the existence of infringement proceedings to third parties, as they are published on the Commission website.

Penalties and fines

44. Under Article 260(2) the European Commission may ask the CJEU to apply financial sanctions to the Member State where, following infringement proceedings for a breach of EU law, the CJEU has found the Member State to be in breach of its obligations.

45. The CJEU has discretion to apply financial sanctions consisting of a daily penalty to induce the remedy of the breach, a figure which is then multiplied by the duration of the breach and/or a lump sum, based on an assessment of the effects of the breach.

46. The CJEU will have regard to the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. It also has regard in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfill its obligations.

47. The Scottish Government would be required to pay a percentage of any fine imposed on the UK (potentially up to 100%) if the infringement related to a devolved matter, depending on the extent of our involvement.

48. However, fines are extremely rare and the European Commission works hard with Member States to avoid financial penalties wherever possible. Scotland and the UK as a whole has never received a fine from the CJEU.

49. For further information on how the Commission calculates fines, visit the [Financial Sanctions](#) page of the European Commission website.

Duration of infraction proceedings

50. The duration of the process of each case depends on the type of breach involved.

51. For non-notification infractions, it can take as little as six months for a case to go from the Article 258 Letter of Formal Notice to being referred to the CJEU. It may then take a further 6-12 months for the CJEU to hear the case, depending on how busy the Court is and the severity of the breach.

52. The Commission aims to have dealt with infringement proceedings for non-notification cases within a year by either resolving the case, with the Member State fully transposing and notifying the legislation, or by referring the case to the CJEU. It will then of course take time for the matter to be brought before the CJEU.

53. For cases other than non-notification cases, the process will usually be longer. It usually takes between six months and a year for a case to be referred to the CJEU for the first time, and it can take anywhere from six months to a few years for the matter to be referred to the CJEU for a second time.



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