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INFRINGEMENT PROCEDURES BEFORE THE COURT OF JUSTICE OF THE EU

Abstract: The infringement procedure becomes very important topic for Republic of Croatia, because we enter European Union in July this year. The aim of this paper is to draw the attention of seriousness of this procedure and to provide a complete review of the infringement procedure before the European Court of Justice. The “infringement procedure” empowers the European Court of Justice (ECJ) to conduct judicial review of Member States, or to control the compliance of the laws of the Member States with European Union (EU) law. It is the only procedure in which the European Court of Justice is authorized to directly control the validity of the law of the Member States. European Commission enjoys discretion to initiate this procedure, we hope that we would have some additional time to adapt European Union law.

Keywords: European Union, Court of Justice of the EU, Infringement procedure, breaches of the EU law

1. INTRODUCTION

The efficient enforcement of decision is a necessary element of any system. Accordingly, it is necessary to provide on implementation of decisions and by doing so to guarantee an effective and stable existence of a system. The “infringement procedure” empowers the European Court of Justice (ECJ) to conduct judicial review of Member States, or to control the compliance of the laws of the Member States with European Union (EU) law. It is the only procedure in which the European Court of Justice is authorized to directly control the validity of the law of the Member States. The Republic of Croatia enters the European Union in July this year, and it may, in future, in certain point encounter infringement procedure before the European Court of Justice.

In this paper we will try to analyze the infringement procedure in accordance with the Articles 258, 259 and 260 of the TFEU. In the beginning of this paper in Chapter 2, we deal with the issue of development of infringement procedure from early approach to procedure today. Chapter 3 comprises important aspects of action brought by the European Commission against a Member State in Article 258 TFEU. We will see the legal basis of infringement procedure, the role of the Commission and individuals in the procedure, the purpose of infringement procedure and what constitutes a breach. In the Chapter 4 we will go step by step through all phases of infringement procedure. There are two main phases, pre-litigation phase and litigation phase. The pre-litigation

phase is characteristic for having both informal and formal stages. The litigation phase is the final stage of the procedure before the Court of Justice and its judgment is merely declaratory.

In the Chapter 5 we will deal with certain types of breach by Member States of EU law. It is important to know that the breach may conduct not only the Member State but they can be brought for the failure of any state agency, including courts and local and regional government, even if it is constitutionally independent of the central government which is, in practice, the body against whom the action is taken. The chapter 6 considers the states defences in infringement procedure. The Member States raised various defences, often acceptable in international law but without success in the EU legal order, to justify their non-compliance with obligations. We have mentioned herein a few. The chapter 7 is dedicated to the Article 259 TFEU and actions brought by one Member State against another Member State. The last chapter of this paper considers the sanctions that may be imposed. Following the Lisbon Treaty, the Court of Justice may impose two types of fines: the penalty payment and the lump sum payment.

2. DEVELOPMENT OF INFRINGEMENT PROCEDURE

The “infringement procedure” is one of the most important mechanisms foreseen by the founding fathers to ensure that EU law is thoroughly and uniformly applied. Infringement procedures against the Member States in European Union law have experienced a remarkable transformation from a process which was rarely used, opaque and policy-driven procedure, to become a common, fairly transparent and highly technical procedural avenue for the enforcement of EU law.¹

In its early approach it seemed based on a traditional intergovernmental approach on roles and relationships, which has seemed more political than judicial in the way, it developed. Until the passing of TEU (1992)², no sanction was provided against Member States founded by the European Court of Justice (ECJ) in breach of their obligations. They were only required “to take the necessary measures to comply with the judgment of the Court of Justice”.³ For example in the Case 69/86 Commission of the European Communities v Italian Republic, Court had held that although “Article 171 of the EEC Treaty does not specify the period within which a judgment must be complied with, it is beyond dispute that the action required to give effect to a judgment must be set in motion immediately and be completed in the shortest possible period”.⁴

Where a state failed to comply with these obligations the Commission could only seek to enforce the judgment by further proceedings for breach of original Article 171 (225 EC; now Lisbon, Article 260 TFEU). While few such actions were taken in the early days of the Community, their number increased alarmingly in the course of the 1980s. As a result Article 228 was amended by the TEU to allow the Commission, subject to the Court’s approval, to impose fines and penalties on Member States which had failed to comply with a judgment against them in Article 226 proceedings.⁵

1 Luca Prete and Ben Smulders, “The Coming of Age of Infringement Procedures”, 2010 47(1) CMLRev., 9, 13

2 Treaty on European Union, Official Journal C 191, 29 July 1992

3 Consolidated version of the Treaty establishing the European Community, Official Journal C 325, 24 December 2002

4 Commission v Italian Republic, C-69/86, 12.02.1987, Para 8

5 Josephine Steiner and Lorna Woods, „EU law“, tenth edition, Oxford University Press, 2009, p.256

We can say that sometimes it is enough to alter a single word to give a radically new meaning to an entire system of legal norms. This has happened in the case of the Treaty of Lisbon, where, in various provisions on the jurisdiction of the Court of Justice of the European Union – particularly in Articles 258 and 259 of the Treaty on the Functioning of the European Union (ex Articles 226 and 227 EC) the formula “this Treaty” is replaced by “the Treaties”.⁶ The consequence of this amendment is that the Court will have comprehensive jurisdiction to find that Member States have failed to fulfill an obligation under the EU Treaty. This jurisdiction has so far applied to the EC Treaty, while in matters regulated by the EU Treaty the Court has a restricted sphere of competence, which is explicitly defined in the TEU itself.⁷ This extension of the Court jurisdiction does not seem very spectacular at the first sight, but the change of the one word in this case, closes gaps in infringement procedure and provides a legal certainty.

The development of infringement procedure is the most visible in the Article 260 TFEU, how the process changed through the history and became more effective in its execution. In the original Treaty of Rome⁸ there were no provisions made for sanctions against Member States that had failed to comply with EEC law. Article 169 EEC (ex 226 EC, now 258 TFEU) set out the procedure under which the Commission acted, leading to a reference to the ECJ if the Commission could not resolve the matter.⁹ However, the only sanction available to the Court was to require compliance. If compliance was not achieved then the Commission could start a second case, this time under article 171 EEC (228 EC, now 260 TFEU), but again all the ECJ could do was to require the Member State to remedy the infringement. It was assumed that a Member State would be shamed into compliance by having its infringements dealt with in public by the ECJ.¹⁰

When TEU was signed in Maastricht in 1992, it was clear that Community could no longer rely on the method of “shamed into compliance” and it needed to find a new way to force a Member State into compliance.

The author of new version of Article 171 EEC (now TFEU) was in that time president of ECJ, Ole Due, who first suggested that the ECJ should be allowed to impose a financial penalty.¹¹ This suggestion was improved by the submission of the UK Government which suggested the system of lump-sum payments and periodic penalties adopted by the Inter-Governmental Conference (IGC) and now forming article 260 (2) TFEU. Under article 260(2) TFEU the Commission has to recommend an appropriate financial penalty when it commences an action and the ECJ then has the option of imposing a sanction, if it finds that the case against a Member State is proven.

The Commission took time to decide how to use its new powers. It issued a memorandum in August 1996 and guidelines in February 1997. In the memorandum the Commission stated that the object of the infringement procedure was to get the Member State to comply as quickly as possible.¹² Although not ruling out the future use of lump-sum penalties, the Commission’s preferred approach was to use periodic penalties.¹³

6 Dietrich Murswiek, “The Stealthy Development of the Treaty on European Union into the Supreme European Constitution”, University of Freiburg, 2009, p.1

7 Ibid.

8 Treaty establishing the European Economic Community, 25 March 1957

9 Ian Kilbey, “The interpretation of Article 260 TFEU (ex 228 EC)”, Sweet & Maxwell and its Contributors, 2010

10 Ibid.

11 Ibid.

12 Memorandum on applying Article 171 of the EC treaty, Official Journal C 242, 21.08.1996

13 Kilbey (n 9)

The Commission commenced actions that could have led to the imposition of a financial penalty, but these were withdrawn once the Member State remedied its infringement. The Commission continued to withdraw cases from consideration by the ECJ, where infringements had been remedied, until January 2007.

The Commission had announced, in December 2005¹⁴, that it would change its working practices regarding the imposition of a financial penalty. This change of practice was a result of the ECJ imposing both a lump sum and a periodic penalty. Previously it had been thought that only one type of penalty could be imposed; the Treaty clearly saying that the penalties were alternatives.

The current position is that the Commission seeks, in every case under Article 260(2) TFEU commenced since January 1, 2007, both a lump-sum and a penalty payment.

3. ACTION BROUGHT BY THE EUROPEAN COMMISSION AGAINST A MEMBER STATE (ARTICLE 258 TFEU)

This chapter focuses on the question of the legal basis of infringement procedure, the role of the Commission and the individuals in procedure. It also answers the question: What is the purpose of infringement procedure and what constitutes a breach?

The answer to the question what the legal basis of infringement procedure is, is provided by 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”.¹⁵

This is the basis for Commission action against Member States for failures to fulfil obligations under the Treaties and in doing so, the Commission is acting under its duty as the guardian of the Treaties to ensure that the Treaties and other EU measures are complied with.¹⁶ This is also the view of Court of Justice. In the judgment on *Commission v Germany* in 2003 we can see that Court knows how important the role of the Commission is, and held that “...in exercising its powers under Article 258 TFEU the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission’s own rights. The Commission’s function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bring it to an end. Given its role as guardian of the Treaty, the Commission alone is

¹⁴ Communication from the Commission, Application of Article 228 of the EC Treaty, SEC (2005) 1658

¹⁵ Consolidated version of the Treaty on the functioning of European Union, Official Journal C 83/160, 30 March 2010

¹⁶ Nigel Foster, „EU law directions“, 2nd Edition, Oxford University Press, 2010, p.168

therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceeding should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations...”¹⁷

The Commission has no investigation service, complaints are brought on the basis of information gained from diverse sources, for example through the press, from European Parliament questions or petitions, through direct correspondence from individual or other complaints, or modern technological sources such as databases indicating when Member States have failed to notify implementation of a directive.¹⁸

The role of individuals is not as important as the role of the Commission, but it constitutes a significant source for detection of infringements and creation of more participatory Community. We can say that this is a decentralized procedure because individuals can not bring an action for failure to fulfillment to the Court. They have, however, the opportunity to file a complaint¹⁹ to the Commission, which is bound to examine it. Complaints must be submitted in writing, by fax or by e-mail. Following registration by the Commission’s Secretariat-General, the complaint will be assigned an official reference number. The Commission takes a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General. The complainant will be notified in advance by the relevant department of the Commission if it plans to propose that the Commission closes the case. The Commissions services keep the complainant informed of the course of any infringement procedure. The identity of the complainant will only be disclosed if the complainant agrees.

In the 29th Annual Report on monitoring the application of EU law there were 3115 new complaints. The three Member States against which the most complaints have been filed were Italy (386 complaints), Spain (306) and Germany (263). Citizens, businesses and organisations reported irregularities especially in connection with environment, internal market & services and justice affairs.²⁰ In 2011 there were 3078 processed complaints.

We have seen the legal basis and roles in infringement procedure but now we need to clarify purposes of the infringement procedure, why is this so important for the EU and so many attention is paid to that. So, Josephine Steiner says about next purposes of the infringement procedure: “firstly, it is necessary to ensure compliance by member state with their cimmunity obligations; secondly, it provides a procedure for the resolution of disputes between the commission and member states over matters of community law; and finally, a third one is for a case when cases reach the ECJ they serve to clarify the law for the benefit of all Member States”²¹.

Also there can be one more aim of the procedure such as „a declaration that there is a failure and a member state which violated is being punished in accordance with the procedure”²² as the Court stated in a case *Commission v France*. Such declaration can assist to comply with the EU law by another Member States.

Another important aspect of infringement procedure is a question what constitutes a

17 Joined Cases C-20/01 and C-28/01 *Commission v Germany*, Para 29,30, 10 April 2003

18 Paul Craig and Grainne de Burca, „EU law, text, cases and materials“, fifth edition, Oxford University Press, 2011, p.410

19 See how to make a complaint use http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm (accessed on 13.12.2012)

20 Report from the Commission, 29th Annual Report on monitoring the application of EU law, COM(2012) 714 final

21 Steiner, Woods (n 5) p 257

22 *Commission v France*, C-333/99, 1 February 2001, Para 23

breach? The Article 258 is silent as to what constitutes a breach of a duty. The Court of Justice has determined that a breach can be constituted not only by an act of a Member State but also by the failure to act by a Member State.²³ A failure to act is most often seen in the form of a Member State failing to implement EU legislation, mainly Directives, or failing to remove national legislation which is in conflict or inconsistent with EU legislation.

4. THE DIFFERENT PHASES OF INFRINGEMENT PROCEDURES

The Commission's 29th Annual Report on Monitoring the Application of Community Law for 2011 showed that the number of open infringement cases has been falling year on year - 2100 cases in 2010 and nearly 2900 cases in 2009. Statistics confirm that Member States make serious efforts to settle their infringements without Court procedures. But there has been a significant increase in late transposition in 2011, compared to the previous year. The Commission launched 1185 late transposition infringements in 2011, compared to 855 in 2010, and 531 in 2009. Compared to the end of 2010, 763 late transposition cases were open at the end of 2011, representing a 60% increase.²⁴ The four most infringement-prone policy areas in 2011 are environment, transport, internal market and taxation.²⁵

We can say that the infringement procedure has two main phases: pre-litigation phase or administrative phase, which starts the procedure and the litigation phase or judicial phase, which finishes the procedure. But, some authors say that there is more series of stages, like in the book *European Union Law* from Chambers, Davies and Monti, who say "that infringement proceedings are best seen as a series of stages which, extrapolated out, comprise:

- an informal letter to the Member State;
- a letter of formal notice to the Member State that it is in breach of EU law,
- the submission of observations by the Member State,
- the issuing of a reasoned opinion by the Commission setting out the breach of EU law,
- a period for the Member State to comply with the reasoned opinion and submit observations,
- referral to the Court by the Commission,
- judgment by the Court".²⁶

The nature of infringement procedures may change with progress to the different phases of the procedure. The pre-litigation phase adheres to procedural characteristics different from those applicable in the judicial phase before the Court of Justice.

²³ Foster (n 16) p 169

²⁴ 29th Annual Report (n 20)

²⁵ Ibid.

²⁶ Damian Chalmers, Gareth Davies and Giorgio Monti, „European Union law“, second edition, Cambridge University Press, 2010, p.332

4.1. PRE-LITIGATION PHASE OR ADMINISTRATIVE PHASE

In the pre-litigation phase, there is both formal and informal stage between the Commission and the Member State, this is designed to achieve compliance by persuasion²⁷.

In practice the infringement procedure starts much earlier than the issuing of reasoned opinion as referred to by Article 258 TFEU. It starts in Pre-litigation phase which is the phase prior to the bringing the matter before the Court of Justice. It is based on several exchanges of letters between the Commission and the Member States administration.

The main actors of the administrative phase of the infringement procedure are the Commission and the Member State concerned. The procedure notoriously excludes the involvement of third parties.²⁸ It is important to remember that a complainant does not have a right that the Commission should bring an action, this decision lies within the Commission's broad discretion. The purpose of this pre-litigation stage is to enable the Member State to conform voluntarily with the requirements of the Treaty.²⁹

The letter of formal notice represents the first formal stage in the pre-litigation procedure, during which the Commission requests a Member State to submit its observations on an identified problem, regarding the application of Community law within a given time limit³⁰ (usually two months). If the Commission accepts the arguments set forth by the Member State, it closes the file, otherwise it issues a reasoned opinion and then the procedure enters its second phase.

The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the Member State concerned has failed to fulfil one or more of its obligations under the Treaties or secondary legislation. If the Commission is not satisfied with the answer of the Member State, the Commission may lodge an application to the Court. Referral by the Commission to the Court of Justice opens the litigation procedure.³¹

4.1.1. INFORMAL LETTER

Most recently the focus has been put on trying to solve cases even before the pre-litigation phase by sending an informal letter, or "pre-258 letter". This is informal phase and not necessarily part of the pre-litigation procedure.

The purpose of the letter is to try to remedy the situation, even before the pre-litigation phase starts. In the letter the Commission describes the national measure and factual situation which appears to violate EU law and sets out the legal ground of the infringement.³² As the pre-258 letter is informal act, there are no formal requirements to be applied, it is request for information. The Commission sets a deadline for the Member State to submit its observations,

²⁷ Steiner, Woods (n 5) p 259

²⁸ Ibid.

²⁹ Infringements of EU law, available at http://ec.europa.eu/eu_law/infringements/infringements_en.htm, (accessed on 17.12.2012)

³⁰ Ibid.

³¹ Ibid.

³² Alicia Hinarejos, „Judicial Control in the European Union: reforming jurisdiction in the Intergovernmental Pillars“, Oxford University Press, 2009, p.66

it is usually four till eight weeks. The letter makes clear that in case the Member State does not answer, it will initiate the proceeding under Article 258.

In case of non transposition directives the Commission does not issue pre 258 letter, it sends immediately “a letter of formal notice”. The pre-258 letter aims to clarify the legal situation in the Member State concerned, and to make sure whether there is really a breach of EU law.³³

The Member State should reply the pre-258 letter bearing in mind that if the Commission does not accept its arguments, it will open the pre-litigation phase of the procedure. The Member State has no formal requirements but it should handle every plea of the Commission.

The EU Pilot is a project launched by the Commission in 2007. It started operating in April 2008, with 15 volunteer Member States.³⁴ EU Pilot deals with enquiries and complaints from citizens and business raising a question of the correct application of EU law. EU Pilot is used when clarification is required from Member States of the factual or legal position. Explanations or solutions are to be provided by Member States within a short timeframe, including remedial action to correct infringements of EU law. The Commission services review all Member State responses and further action may be taken to enforce EU law if required.

The use of EU Pilot is intended to replace sending of administrative letters by the Commission services (so-called “pre-258 letter”) to Member States participating in EU Pilot. However, it has taken some time for this practice to be phased-out.³⁵

The EU Pilot has been extended and is now being fully used by 25 Member States.³⁶ Its application has been broadened, fine-tuned and strengthened. The Commission considers that EU Pilot is no longer a project in its early and experimental phase, but a well-established working method that delivers results for the Commission, the participating Member States and citizens.³⁷

4.1.2. LETTER OF FORMAL NOTICE AND MEMBER STATE OBSERVATIONS

If the matter is not clarified or resolved informally between the Commission and the Member State at this stage, the state will be formally notified of the specific infringement alleged by means of a letter from the Commission.³⁸ So we can say that formal proceedings begin with the ‘letter of formal notice’ to the Member State setting out the Commissions reasons for suspecting an infringement. The reason for this is that Article 258 TFEU only allows the Commission to issue a reasoned opinion once the Member State concerned has had the opportunity to submit observations.³⁹

The Member State is usually given two months to reply, except in cases of urgency. The deadline can only be extended if the Commission allows such an extension. The Member State must apply for such an extension and it is usually not allowed more than once in the course of the procedure.

³³ Ibid, p.67

³⁴ Report from the Commission, EU Pilot evaluation report, 3 March 2010, SEC (2010) 182

³⁵ Ibid.

³⁶ Report from the Commission, Second Evaluation Report on EU Pilot, 21.12.2011 SEC (2011) 1629/2

³⁷ Ibid.

³⁸ Craig, de Burca (n 18) p.413

³⁹ Chalmers, Davies, Monti (n 26) p.335

In this phase there follow discussions between the Commission and the Member State, with a view to negotiating a settlement. The Member State may ask for a technical meeting with the Commission's experts in order to clarify uncertain points of the Commission's arguments, or to discuss a draft law which is aimed at remedying the breach of EU law.

The Commission is not required to set out in detail all arguments in this letter, an initial brief summary of the grounds of complaint is sufficient, provided that it contains all the elements which are necessary for the Member State to prepare its defence.

The letter of formal notice is seen as central to safeguarding the rights of defence, it is also seen as framing the dispute.⁴⁰ The Commission can only take complaints to a Member State that is specifically set out in the letter of formal notice. Anything not mentioned there will be deemed inadmissible.⁴¹ However, the Commission can subsequently bring in new evidence to clarify the grounds on which it is making the complaint, on condition that this does not alter the subject-matter of the dispute.⁴²

When answering the letter of formal notice the Member State may:

- remedy the breach and inform the Commission on the measures taken,
- undertake obligations to remedy the situation within a short period,
- try to convince the Commission that its legislation does not breach EU law.

4.1.3. REASONED OPINION AND THE PERIOD FOR NATIONAL COMPLIANCE

If the Commission accepts the arguments set forth by the Member State, it closes the file, but if Member State does not reply or does neither remedy the legal situation nor manage to convince the Commission that such a breach does not exist, the Commission issues a "reasoned opinion".

Together with the letter of formal notice, the reasoned opinion is the official means by which the Commission communicates to the state the substance of complaint against it, and specifies a time period within which the violation of Community law must be remedied.⁴³

Once the reasoned opinion has been issued, the Commission must afford Member State sufficient time both to respond to the views it sets out, and comply with the opinion. The minimum time limit laid down will depend upon a number of factors. These include the urgency of the matter and when the matter was first brought to the attention of the Member State by the Commission.

While there are no time limits in respect of the stages leading up to the reasoned opinion thereby giving both parties time for negotiation, the Commission will normally impose in its reasoned opinion a time limit for compliance.⁴⁴ Accordingly, the Commission cannot proceed to the second stage until the time expired. That period of time is important and can be under the ECJ's review and ECJ can even dismiss an action as in case *Commission v Belgium*, where the ECJ stated that "the period of 15 days to comply with the reasoned opinion were too short and were not permissible in view of the complexity of the matter and the scope of the amendments

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Craig, de Burca (n 18) p.418

⁴⁴ Steiner, Woods (n 5) p.262

that had to be made to the relevant rules in order to bring them into line with Community law”⁴⁵. “It should be pointed out first that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligation under Community law and, on the other, to avail itself of its rights to defend itself against the complaints made by the Commission”.⁴⁶

The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the Member State concerned has failed to fulfil one or more of its obligations under the Treaties or secondary legislation. This should include “the legal and factual context to the dispute”⁴⁷ and take account of any resolutions submitted by the Member State.

The reasoned opinion issued by the Commission delimits the subject matter of the dispute, so that it cannot thereafter be extended under the litigation phase. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty. The Member State must reply within the given time-limit.

If the Commission is not convinced by the Member States arguments or the Member State does not remedy the breach, the Commission may bring an action before the Court.

Once the period set out in the reasoned opinion has elapsed there is nothing a Member State can do to prevent the matter being heard by the Court.

Compliance by the Member State with the reasoned Opinion after the deadline set out in the latter but before judgment will not therefore prevent the Court’s declaring that the Member State has acted illegally.⁴⁸ The reasons are, first, that the unwieldy nature of the procedure would, otherwise, be unable to capture breaches of a relatively short duration⁴⁹, and secondly, that Member States could, otherwise, manipulate the procedures by simply bringing their conduct to an end shortly before judgment was given.⁵⁰

4.2. LITIGATION PHASE

The formal start of the litigation phase puts an end to the possibilities of negotiation with the Commission on the modalities to cease the infringement. The Court of Justice has exclusive jurisdiction in this matter.

In proceedings under Article 258 TFEU for failure to fulfil obligations it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is therefore the Commission’s responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions.⁵¹

45 *Commission v. Belgium*, C-293/85, 2 February 1988, Para 10

46 *Ibid.* Para 13

47 Chalmers, Davies, Monti (n 26) p.338

48 *Commission v Spain* C-446/01, 12 June 2003

49 Chalmers, Davies, Monti, (n 26)

50 *Ibid.*

51 *Ibid.*

It is settled case-law in that connection that, in an action under Article 258 TFEU, the letter of formal notice sent by the Commission to a Member State and the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended.

The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.⁵²

Non-compliance with EU law is a matter of fact, a Member State may not plead provisions, practices or situations prevailing in its domestic legal order (difficulty to achieve a compromise between the ministries concerned, no session of the Parliament because of legislative elections, the act to be adopted needs qualified majority which can not be reached for political reasons etc.) to justify failure to observe obligations arising under Community law.⁵³

According to settled case law, the merits of an action for failure to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, since the Court does not take account of any subsequent changes.⁵⁴ It means in practical terms that the Commission may bring an action to its end even if the Member State has complied in the meantime with EU law. It falls however under the discretion of the Commission to withdraw its action if it deems so.

In its final judgment the Court simply states the failure of the Member State to fulfil its obligations under the Treaty. It does not have the power to impose sanctions as it is only possible under Article 260 TFEU for non compliance with a judgment under Article 258 TFEU. However the Lisbon Treaty has foreseen a possibility under Article 260 (3) to impose a lump sum or penalty payment on a Member State already under the procedure of Article 259 TFEU if the case is about non notification/transposition of a directive and the Commission deems it appropriate to propose sanctions to the Court already at this stage.⁵⁵ In any other case it remains only possible to impose sanctions on the Member State under a second procedure under Article 260 (3). Member States must comply with the judgment of the Court otherwise the Commission will engage the procedure under Article 260 TFEU for imposing financial sanctions.

4.2.1. INTERVENTION OF MEMBER STATES IN INFRINGEMENT PROCEDURES

Member States may intervene in infringement procedures initiated against other Member States either to support the Commission or to support the defendant State. This is possible only at the litigation phase and individuals can not intervene in procedure.

Member States may apply for intervention within a period of six weeks after publication of a notice on the procedure in question in the Official Journal of the European Union.⁵⁶

⁵² Commission v Belgium, Case C-422/05, Para 25, 14 June 2007

⁵³ Commission v France, Case C-121/07, 9 December 2008

⁵⁴ Commission v Greece, Case C-200/88 Para13, Commission v Ireland ,Case C-354/99, Para. 45; Commission v France, Case C-233/00 Para 30

⁵⁵ Steiner, Woods (n 5) p.263

⁵⁶ Anthony Arnall, „The European Union and its Court of Justice“, second edition, Oxford University Press, 2006

The President of the Court has the power to allow a Member State to intervene in a certain case. If he does so, the Member State may lodge a statement of intervention and present its argument in favor of the party supported by it. The intervening State is bound by the legal arguments of the party it supports.

Usually Member States intervene in order to support the defendant State if the legislation of that State is similar to their legal rules and there is a risk that an infringement procedure against them will soon be initiated by the Commission on the same ground. The judgment delivered in the first infringement case will certainly decide the outcome of a potential infringement procedure initiated against the intervening State, thus it has good reasons to do all its best to influence this outcome by presenting legal arguments.

An example for intervention of Member State can be observed in the case *C-47/08 Commission v Belgium*. In this case, the Commission asked the Court to declare that, by reserving access to the profession of notary exclusively to its own nationals, the Belgium had failed to fulfil its obligations under Article 43 EC and the first paragraph of Article 45 EC. In this case there are more interveners, on the side of Commission there is United Kingdom of Great Britain and Northern Ireland and on the side of Belgium there are Czech Republic, French Republic, Republic of Latvia, Republic of Lithuania, Republic of Hungary and Slovak Republic.⁵⁷ Court declares that, by imposing a nationality condition for access to the profession of notary, the Kingdom of Belgium has failed to fulfil its obligations under Article 43 EC.⁵⁸

5. TYPES OF BREACH BY MEMBER STATES OF EU LAW

Article 258 is very general in its description of Members State violation for the purposes of infringement procedure. The Commission must simply consider that a state “has failed to fulfil an obligation under Treaties”⁵⁹. This may include actions as well as omissions on the part of states, failure to implement directives, breaches of specific Treaty provisions or of other secondary legislation, or of any rule or standard which is an effective part of EU law.⁶⁰

Certain kinds of breach, for example non-transposition of a directive, are far more often the subject of infringement proceedings than others. Thus, breaches may arise from the Treaties, secondary legislation, international agreements, decision of the Court of Justice and general principles.

According to Craig and de Burca these are some types of breach by Member States of EU law:

- a) Breach of the obligation of sincere cooperation under Article 4 (3) TEU - the obligation of sincere cooperation has been held to entail positive obligations on states not just to avoid violating EU law itself, but also to prevent others from frustrating the provisions of the Treaty.⁶¹

⁵⁷ *Commission v Belgium*, Case C-47/08, 24 May 2011

⁵⁸ *Ibid.*

⁵⁹ Article 258 TFEU (n 15)

⁶⁰ Craig, de Burca (n 18) p.423

⁶¹ *Ibid.*

- b) Inadequate implementation of EU law – in many cases, the cause of the Commissions complaint is not the complete failure to transpose or to implement Union legislation, but rather inadequate implementation.
- c) Breaches which interfere with EU external relations – Reflecting the growing activities of the EU in the field of international relations, several infringement proceedings brought by the Commission in recent years concerned conduct by Member States which either is alleged to violate an international agreement binding on the EU, or which otherwise violates the obligation of sincere cooperation by jeopardizing EU objectives in the external relations field.⁶²
- d) Systemic and persistent breaches of general practices – The Commission has at times used the infringement procedure to monitor ongoing Member State implementation of a particular set of laws, and in some cases to challenge relatively minor breaches where they are part of a pattern of inadequate implementation and compliance in practice⁶³.

6. STATE DEFENCES IN INFRINGEMENT PROCEDURE

A breach of EU law can arise from any part of a state and is not restricted to purely governmental action or inaction.⁶⁴ Thus the Member States are responsible for breaches caused by actions of the legislature, the executive, local and regional authorities.

The Member States have raised various defences, often acceptable in international law but without success in the EU legal order, to justify their non-compliance with obligations.⁶⁵ The best defence is clearly to say that there was no breach⁶⁶, or to deny the obligation⁶⁷. It may be conditional, for example, on a time limit that has not expired.

The Commission is also under an obligation to prove that the breach exists and in doing so the Commission may not rely on any presumption. In the absence of a procedural irregularity, or a failure on the part of the Commission to prove the alleged infringement, or a misunderstanding by the Commission of what national law or Community law requires, the range of defences available to Member States is therefore limited.⁶⁸

These are the most common defences:

- Reciprocity – this ground has been pleaded numerous times by Member States with idea that the obligation to comply with EU law is a reciprocal one which depends on

⁶² Ibid. p.424

⁶³ Ibid.

⁶⁴ See the Case 77/69 *Commission v Belgium*, the Government of Belgium pleaded that it should not be held responsible for the negligence of the Belgian Parliament which being out of session was not able to implement a Community Directive in time.

⁶⁵ *Foster* (n 16) p.173

⁶⁶ Ibid.

⁶⁷ *Steiner, Woods* (n 5) p.263

⁶⁸ *Arnall* (n 56) p.44

full compliance by other Member States has long been rejected by the ECJ.⁶⁹ For example this was rejected by the Court in case *Commission v Luxembourg and Belgium*.⁷⁰ The Court said that “the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable... Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs”⁷¹.

- Force majeure - a defence based on force majeure was rejected in *Commission v Italy*⁷², where a data-processing centre had been bombed, which might have actually allowed the defence to be used if it was not for the fact that the delay in implementing directive was four-and-a-half years, far too long for the Court.⁷³
- Constitutional difficulties – another defence which is frequently raised and consistently rejected by the Court. It is based on constitutional, institutional or administrative difficulties⁷⁴ within a Member State. Community measures being the cause of political or economic difficulties raised by the UK in Case 128/78 *Commission v UK (Tachographs)* in which the UK pleaded that the cost and interruption to industry of fitting tachographs in lorry cabs would cause extreme difficulties.⁷⁵
- Factual application – another popular but equally unsuccessful defence rests on the argument that while Community law may not be applied de jure, administrative practices ensure that EC law is in fact applied⁷⁶. That argument was provided in *Commission v France* in case 167/73, in an action based on the French Code Maritime. The code was clearly discriminatory, since it required a ratio of three Frenchmen to one foreigner in certain jobs⁷⁷. The French governments argument that the code was not enforced in practice was unsuccessful. The Court has said that the mere maintenance in force of such legislation “gives rise to an ambiguous state of affairs by maintaining, as regards those subject the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law”⁷⁸.
- Domestic law is in compliance – a variation on the defence of “factual application” is either that existing domestic law already adequately implements the corresponding European rule, or that the legislation that has been adopted to give effect to such a rule will be interpreted by the courts in accordance with it⁷⁹.
- A threat to public ordered, treaty derogation and many other defences are being used.

69 Ibid. p.45

70 Joined Cases 90 and 91/63, *Commission v Luxembourg and Belgium*, 13 November 1964

71 Ibid.

72 *Commission v Italy*, Case 101/84 11 July 1985

73 *Foster* (n 16) p.173

74 *Steiner, Woods* (n 5) p. 265

75 *Foster* (n 16) p.173

76 *Steiner, Woods* (n 5) p. 265

77 Ibid.

78 *Commission v French Republic*, Case 167/73, 4 April 1974, Para 41

79 *Steiner, Woods* (n 5) p. 266

7. ACTION BROUGHT BY ONE MEMBER STATE AGAINST ANOTHER MEMBER STATE (ARTICLE 259 TFEU)

In accordance with provisions of the Treaty the infringement procedure can be initiated not just by the Commission, but also by one of the Member States. There is a special article in Treaty which regulates the question, that article is the Article 259 TFEU⁸⁰. In accordance with the article:

“A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.”⁸¹

Thus, according to the article 259 TFEU, a Member State should firstly take a case before the Commission which should consider the observations of both sides and then issue a reasoned opinion within three months, otherwise, if the Commission does not issue any opinion, this Member State can bring an action before the ECJ. States also have the option of intervening in a case brought by the Commission to support its allegations.⁸²

Main difference between Article 259 and Article 258 is that the procedure is initiated by the State and the reasoned opinion is not a necessary part of the procedure in order to take an action before the Court. However in spite of that “member states usually prefer to ask the Commission to bring actions under Article 258 TFEU because this is a less politically obvious and contentious manner in which to secure compliance of EU law in the interests of the member state concerned”⁸³. Accordingly, there are not many cases when one Member State initiated the infringement procedure against another Member State.

In 2000 Spain brought an action against the UK concerning the way in which the UK extended voting rights in European Parliament elections to residents of Gibraltar.⁸⁴ The Commission encouraged the two states to resolve the dispute amicably and declined to issue a reasoned

80 Article 259 TFEU (n 15)

81 Ibid.

82 Craig, de Burca (n 18) p.432

83 Foster (n 16) p.178

84 Kingdom of Spain v United Kingdom, C-145/04, 12 September 2006

opinion, “given the sensitivity of the underlying bilateral issue”⁸⁵, but the ECJ ultimately upheld the conduct of the UK and found against Spain.

8. SANCTIONS UNDER ARTICLE 260 TFEU

In this chapter we will discuss the possibility of imposing financial sanctions on a Member State that has failed to implement a judgment. This procedure has got teeth from the entry into force of the Maastricht Treaty (then was arranged by Article 228 TEC). It was intended to provide a sharper incentive for Member States to comply with ECJ rulings against them.

If a Member State has not taken the necessary measures to comply with a judgment of the Court of Justice, the Commission may refer the matter to the Court of Justice. Following its amendment by the Lisbon Treaty in 2009, Article 260⁸⁶ provides:

“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 judgment of the Court.

If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 259.

When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.”⁸⁷

Two changes were introduced into Article 260 by the Lisbon Treaty in 2009.

85 Craig, de Burca (n 18) p.433

86 Article 260 TFEU (n 15)

87 Ibid

The first is that the Commission is no longer obliged, as it previously was under paragraph 2, to issue a reasoned opinion before bringing a Member State before the ECJ for non-compliance with an Article 258 ruling⁸⁸. This amendment is likely to make the penalty procedure somewhat speedier and more efficient.

The second change is in the newly-introduced paragraph 3, which provides that the Commission may move directly to seek a pecuniary penalty against a Member State where a Member State has failed to notify measures transposing an EU directive⁸⁹.

The discretion of the ECJ, in accordance with that section, is limited in a way that the Court cannot extend the amount of the sanctions specified by the Commission, however it can decrease it. In this way we can say that such an amendment pursues the aim to protect right of the Member States to defence.⁹⁰

The final decision on the imposition of the sanctions laid down in Article 260 TFEU lies with the Court of Justice, which has full jurisdiction in this area. Nevertheless the Commission, as guardian of the Treaties, plays a determining role in so far as it is responsible for initiating the Article 260 procedure and, if necessary, bringing the case before the Court of Justice with a proposal for the application of a lump sum and/or penalty payment of a specific amount. The payment obligation shall take effect on the date set by the Court in its judgment.⁹¹

The Commission has therefore issued a Communication on the Application of Article 228 of the EC Treaty⁹². According to the Commission the fixing of the sanction must be based on the objective of the measure itself, which is to ensure effective application of Community law.⁹³

The Commission considers the calculation should be based on three fundamental criteria:

- the seriousness of the infringement,
- its duration,
- the need to ensure that the penalty itself is a deterrent to further infringements.⁹⁴

Until 2005 there were only two cases - Cases C-387/97 *Commission v Greece*⁹⁵ and C-278/01 *Commission v Spain*⁹⁶, where the Commission decided to bring an action initiated under ex-Article 228 EC to an end, and where the Court opted for applying financial sanctions, penalty payment in both cases.

The judgment of the Court of Justice in Case C-304/02 *Commission v France*⁹⁷ concluded that the two kinds of financial sanction (penalty and lump sum) can apply cumulatively for the same infringement, and applied this principle for the first time. Since then the number of procedures based on ex-Article 228 (Article 260 TFEU) has significantly grown.

88 Craig, de Burca (n 18) p.434

89 Ibid.

90 Ibid.

91 Ibid.

92 Application of Article 228 of the EC Treaty (n 14)

93 Ibid.

94 Craig, de Burca (n 18) p.435

95 *Commission v Hellenic Republic*, C-387/97, 4 July 2000

96 *Commission v Spain*, C-278/01, 25 November 2003

97 *Commission v France*, C-304/02, 12 July 2005

8.1. THE PENALTY PAYMENT

The penalty payment must facilitate compliance as rapidly as possible with the earlier judgment establishing an infringement of Community law. Its amount must be decided upon according to the degree of persuasion needed for the Member State in question to alter its conduct.

The penalty to be paid by the Member State is the amount, calculated in principle by day of delay penalizing non-compliance with a judgment of the Court, the penalty running from the day when the second judgment of the Court was served on the Member State concerned up to that on which the Member State brings the infringement to an end.

8.2. THE LUMP SUM PAYMENT

The lump sum payment is intended to penalize an infringement committed by a Member State in the light of the effects of that infringement and its duration. It is also intended to prevent the repetition of similar infringements of Community law.

In its judgment in *Case C-121/07 Commission v France*⁹⁸, the Court stated that the imposition of a lump sum payment “must, in each individual case, depend on all the relevant factors pertaining to both the particular nature of the infringement established and the individual conduct of the Member State involved ...”⁹⁹.

The Court may take account of the following circumstances:

- The Member States attitude regarding its Community obligations in the specific area (for instance whether the Member State is repeatedly engaged in unlawful conduct in that specific sector);
- The period for which the infringement continued following delivery of the judgment establishing the infringement (in that regard, the Court may consider whether that delay could be justified)
- The gravity of the infringement (in that regard, the Court may take account of the impact of the unlawful conduct on the relevant public and private interests).

9. CONCLUSION

The infringement procedure is a very important instrument of the EU, which provides efficiency and stability of the EU as a system. The importance of that institute is undoubtful, not only for the EU but also for the interests of all Member States as well.

In this paper we have tried to explain the whole procedure from the first step till the final one. It is at first sight a very simple and short procedure. But, as soon as you go deeper into the topic, you can find that it is never explained enough, you always have a feeling that every case you mention hides a potential threat for our country.

Since we will be a new member state, it is worth mentioning that Member States in last accession to the European Union had a certain time to adjust to European Union law. It is obvious

⁹⁸ *Commission v France*, C-121/07, 9 December 2008

⁹⁹ *Ibid*, Para 68

from the statistics of number of infringement procedures initiated by the Commission per Member State starting from 2004 till 2010.

In this paper we have discovered that we could have potential infringement of EU law if we do not remedy the situation. We have noticed that possibility in Case C-47/08, *Commission v Belgium*, which deals with nationality requirements for public notaries. Belgium lost that case because it had the nationality condition for public notaries in Belgium. Croatian legislation has the same requirement in Article 13 of the Notaries Public Act. It states that for being appointed a notary public, a person must be a citizen of the Republic of Croatia. It is obvious that the Commission would send us an informal letter that we are in breach of our obligations because nationality requirement is contrary to the freedom of establishment provided for in Article 43 of the EC Treaty.

Infringement procedures carry certain positive changes in the procedure as well as some areas which need to be improved.

The positive changes of this procedure were the possibility to impose sanctions: a penalty payment or/and lump sum payment. Besides, the ECJ has developed criteria for imposing sanctions, in order to exclude any accusations that sanctions were not fairly imposed and not transparent.

However, it is necessary to say that infringement procedure is not perfect one, and there is still place for improvement, for example in length of the procedure.

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TUŽBE ZA POVREDU PRAVA EU PRED EUROPSKIM SUDOM PRAVDE

Sažetak

Postupak zbog povrede prava EU postaje važna tema za Republiku Hrvatsku s obzirom na skoro priključenje EU u srpnju ove godine. Cilj ovoga rada je istaknuti ozbiljnost ovoga postupka i prikazati njegov tijek pred Europskim sudom pravde. Postupak zbog povrede prava EU ovlašćuje Europski sud pravde da vrši sudski nadzor na državama članicama i utvrđuje usklađenost nacionalnog zakonodavstva s pravom EU. Ovo je jedini postupka u kojem Europski sud pravde može izravno nadzirati valjanost zakonodavstva država članica. Kako Europska komisija uživa diskreciju u pokretanju ovoga postupka, nadamo se kako ćemo dobiti još neko dodatno vrijeme za usklađivanje s pravom EU.

Ključne riječi: Europska unija, Sud Pravde EU, postupak zbog povrede prava EU, povrede prava EU

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KLAGEN FÜR DIE VERLETZUNG DES EU-RECHTS VOR DEM GERICHTSHOF DER EUROPÄISCHEN UNION

Zusammenfassung

Das Verfahren über die Verletzung des EU-Rechts wird, mit Rücksicht auf den baldigen EU-Beitritt Kroatiens im Juni dieses Jahres, zu einem für die Republik Kroatien wichtigen Thema. Das Ziel dieser Arbeit ist es, die Ernsthaftigkeit dieses Verfahrens hervorzuheben und seinen Verlauf vor dem Gerichtshof der Europäischen Union darzustellen. Das Verfahren über die Verletzung des EU-Rechts ermächtigt den Gerichtshof der EU, gerichtliche Aufsicht über die Mitgliedstaaten zu führen und die Angleichung der Gesetzgebung ihres jeweiligen Nationalrechts an das EU-Recht festzustellen. Dies ist das einzige Verfahren, in welchem der Gerichtshof der Europäischen Union die Rechtswirksamkeit der Gesetzgebung von Mitgliedstaaten unmittelbar aufsehen kann. Da die EU-Kommission über die Diskretionsrechte auf die Einleitung dieses Verfahrens verfügt, hoffen wir, zusätzlich einige Zeit für die Angleichung des kroatischen Nationalrechts dem EU-Recht zu bekommen.

Schlüsselwörter: die Europäische Union, das Europäische Gerichtshof, das Verfahren über die Verletzung des EU-Rechts, Verletzung des EU-Rechts