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EUROPEAN UNION LAW

PhD THESIS

LIABILITY OF MEMBER STATES OF THE EUROPEAN UNION FOR FAILURE TO FULFIL OBLIGATIONS UNDER THE TREATIES

- SUMMARY -

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The elaboration of the PhD Thesis took into consideration the relevant doctrine, the legislation, the case-law, the official documents issued by the institutions of the European Union, published and considered relevant, including online bibliographic resources, by 31st July 2018.

ABBREVIATIONS

art.	- article
C-	- case before the Court of Justice in Luxembourg
v.	- versus
ECHR	- European Court of Human Rights
CJEU	- Court of Justice of the European Union
coord.	- coordinator
ICSID	- International Centre for Settlement of Investment Disputes
LGDJ	- Librairie Générale de Droit et de Jurisprudence
nr./no.	- number
TFEU	- Treaty on the Functioning the European Union
TEU	- Treaty on the European Union
EU	- European Union
vol.	- volume

PLAN OF THE PHD THESIS

The topic of the thesis, although customized for a distinct category of obligations, corresponds to the field of research which underpins the concepts of responsibility, compliance, implementation and liability that do not only defines the field of research relevant to the thesis but cover and systematize some aspects of liability of European Union Member States.

The structure of the thesis is divided into seven chapters, which comprise sections and subsections that lead the analysis to the elements of detail necessary to highlight the specificity of the topic approached in order to build a logical and cursive structure of the text.

Chapter I. Introductory Aspects

Section I. *European Union law - a new legal typology*

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Chapter II. Member States' liability under European Union law

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Chapter III. Liability of Member States for breach of obligations under European Union law

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ACTUALITY AND CONTEXT OF THE RESEARCH

Through the subject of present scientific research, we intend to bring to the attention of the legal doctrine the complex problem of the responsibility of the member states in the context of overcoming the first decade of Romania's membership in the European Union, as well as the 25th anniversary of the Maastricht Treaty especially the passing of over 65 years since the establishment of the first Community in which this new and original legal construction originated.

The paper aims to answer a series of practical questions: *When, why and how can a Member State of the European Union be liable? What are the sanctions for non-fulfilment of obligations under the Treaties? Do the EU institutions succeed in coping with the obstacles inherent to an extent Union through the policies and mechanisms created in the effort to align the diverse legal systems? Does the Member State comply with EU law voluntarily or under threat of sanctions?*

The thesis is conceived as a multidisciplinary study combining notions specific to European Union law with elements of general theory of law, public international law and concepts from the national law of the member states, especially the Romanian law.

The issue of State liability cannot be independently assessed neither by international law nor by the national law of the Member States from which it borrows application concepts and practices, but from which it maintains autonomy and even supremacy in some cases.

The European Union combines the supranational with the national in a legal framework with new qualitative determinations. The autonomy of the European Union law system is enshrined in the judgments of the Court of Justice in Luxembourg which mention either a legal order of international law or an autonomous legal order. European Union law is an autonomous system with its own resources and enforcement mechanisms for judicial control.

The obligation to comply with European Union law rests with each Member State in its territory, along with the liability for its violation, regardless of which state or government body is responsible for the violation.

The Member States of the European Union enjoy a national procedural autonomy in the application of European Union law, but are held to respect the principle of the effectiveness of EU law: the principle of equivalence and the principle of practical opportunity.

Among the tasks entrusted to the Commission under Article 17 of the Treaty on European Union is ensuring the proper application of European Union

law. The main component of this task is for the Commission to monitor the extent to which Member States comply with EU law and respond to non-compliance.

The fundamental treaties of the European Union empower the European Commission to pursue and ensure respect for the original or derived EU legislation both by the Member States and by the European Union's institutions.

One of the main possibilities that the Commission has at its disposal, under Article 258 TFEU, is to open a proceeding for failure to fulfil obligations known in the practice and EU law doctrine as the *infringement procedure*.

If a Member State does not comply with European Union law, the Commission has the power to determine that State to comply with the EU rules which were violated and, where necessary, it may present the case to the Court of Justice.

The main purpose of this action is to determine the Member States which have breached the European Union law to comply willingly with that rule, and if not to compel by threatening with penalties. Penalties imposed on Member States by Article 260 TFEU (penalties in the form of lump sums and/or periodic penalty payment) are not intended to compensate for damage but to create economic pressure on the Member State responsible for the cessation of that infringement.

The procedure of ensuring compliance with European Union law also works as a valuable means of settling disputes between Member States amicably without a judicial process but also as an instrument available to individuals (natural and legal persons) to complain to the Commission in relation to infringements of European Union law.

Effective, correct and timely implementation of EU legislation is essential in order to maintain a solid foundation for the European Union and to ensure that the expected impact of European policies is in the hands of the citizens.

THE IMPORTANCE AND UTILITY OF THE SCIENTIFIC ENDEAVOR

Through the topic and the analysis, this doctoral thesis constitutes, in the Romanian legal environment, a work with a pronounced character of novelty both due to the structure and to the current issues addressed. We consider it useful at this moment to emphasize the main results of this doctoral research:

- framing EU law into a new typology of law in the context of international and internal law with which it interferes, but also with which it has distinct features;

- a thorough examination of the concept of 'accountability' and the evolution of the principle of State liability in EU law;

- identifying and analysing the most important types of breaches of EU law and forms of accountability of the Member States in European Union law;

- highlighting the features characteristic of EU Member States' accountability procedures;

- revealing the features characteristic of the new legal typology;

- identification and analysis of the consequences of the initiation of proceedings for failure to fulfil obligations by the Member States of the European Union;

- analysis of informal mechanisms for solving problems related to the correct application of EU legislation;

- select, systemize and analyse the case-law of the Court of Justice of the European Union in defining the concept of accountability of the Member States as well as the elements specific to the procedure of accountability in the context of the divergence between the positions of the Member States and the EU institutions.

The legal doctrine in the Member States with a tradition in the European Union is rich and very diverse in addressing this issue. However, the accession of new states, as well as the jurisprudential evolution, but also the changes of economic and political realities, lead to the conclusion that the subject has yet to be exhausted and must be constantly updated.

The novelty of our research lies also in the way we analyse the topic, as well as the approach and explanation of this subject, which has not yet been dealt with in such a manner in the Romanian doctrine.

We consider that the systematisation and the analysis of the forms of liability of the Member States in European Union law, the procedures for accountability, the consequences of the opening of the infringement procedure, the Member States' defences before the Court of Justice, the derogatory procedures, the problems related to the correct application of EU law and the comparative analysis of the accountability of states in international organizations are also an important and useful approach to the legal world due to the practical and very current applicability but especially the potentially costly financial perspective for EU Member States.

The research has highlighted the problems and challenges posed by the application of European Union law and which are inevitably numerous and varied.

In this PhD thesis, we aim to contribute to the development of research both in the field of European Union law and in terms of compliance with EU law.

PURPOSE AND OBJECTIVES OF THE RESEARCH

The aim of the thesis is to examine the liability of the Member States of the European Union in the context of non-fulfilment of obligations under the Treaties and accountability through the common procedure, but also through derogatory procedures and informal mechanisms created to prevent excessive recourse to the judiciary, as well as compliance with EU law ensuring the functioning and ultimately the viability of the European Union.

In the scientific research activity, the following main objectives were pursued:

- ✓ the historical evolution history and specificity of European Union law, with emphasis on the features that support the idea of a new legal typology;
- ✓ determining the relationship between liability in international and domestic law with responsibility in European Union law;
- ✓ establishing the role that the infringement procedure has in the process of applying European Union law;
- ✓ identifying the types of violations and parties in this procedure;
- ✓ clarification of the stages of the procedure for establishing the non-fulfilment of the obligations;
- ✓ highlighting the role of the European Commission in initiating the procedure;
- ✓ highlighting the role of the case law of the Court of Justice of the European Union in the evolution and application of the responsibility of the Member States for failing to fulfil their obligations under the Treaties;
- ✓ analyse how Member States apply the provisions on the application of EU law;
- ✓ identification of the measures to be taken at both Union and national level to ensure the most effective application of European Union law.
- ✓ investigating the responsibility of the states from a historical perspective, as well as from the perspective of comparative law.

METHODOLOGICAL SUPPORT OF THE PHD THESIS

The completion of the thesis required a thorough insight into the views expressed on the Member States' responsibility for breach of EU law, the case-law of the Court of Justice, institutional treaties and secondary legislation.

In this context, several specialized papers - treatises, courses, monographs, articles from the country and abroad - have been studied, analysed and implemented. In view of these works, the PhD thesis highlights the comments of

the Romanian and foreign doctrines in order to support and highlight our own opinions and conclusions expressed on the debated issues, judiciously and in a personal way.

In our approach we turned to the established methods of scientific research of legal phenomena:

- *the historical method* has been used to identify the rationale and context in which the principle of Member States' liability has arisen, the evolution of the procedure for establishing the failure to fulfil obligations, the derogatory procedures and the informal tools for solving problems related to the correct application of European Union law, as well as the evolution of the vision and practice of the EU institutions as derived from primary and derived law and the case-law of the Court of Justice of the European Union;

- *the comparative method* has been used to highlight the characteristics of Member States' liability under EU law as compared to the liability of States in other jurisdictions - we mention the responsibility of States under the European Convention on Human Rights (Council of Europe) and the Convention on the Settlement of Disputes Relative to Investments between States and Persons of Other States (ICSID). We have also applied the comparative method when dealing with the Member States' liability for violation of the EU Charter of Fundamental Rights by applying the European Convention on Human Rights as well as derogating procedures from the common procedure for Member States to be accountable to EU law;

- *the logical method* has been used to synthesize the views of the mentioned authors on the subject investigated, as well as to present their own conclusions;

- *the sociological method* has been used automatically as law is a social reality and the rule of law has important consequences in the social, political and economic environment of the Member States and implicitly in the individual destiny of the citizens;

- *the quantitative method* has allowed the systematization of the relevant EU legislation and very abundant jurisprudence of the CJEU. We intend to use this method in conducting the jurisprudential exam, in order to identify situations that are most entrenched in practice. At the same time, the analysis involved the statistical data provided in the annual reports on EU law enforcement monitoring carried out by the European Commission, the Internal Market Scoreboard, the Eurobarometer, and the Court of Justice's annual reports on judicial activity.

The methodology of the research was completed by types of interpretations specific to the legal field:

- *grammatical or literal interpretation* was particularly necessary in the analysis of the case-law of the Court of Justice, whose language versions in the Romanian language are virtually indispensable for the period before Romania's accession. This interpretation method in some cases implied a semantic analysis of the text by comparing the various language variants, of course giving priority to the meaning of certain terms in European Union law.

- *systematic interpretation* was not only necessary, but also indispensable given the interference-based systems of law (inter-EU-internally) and, in particular, the different types of legislation to be applied concurrently or alternatively to ensure the proper compliance or application of EU law;

- *teleological interpretation* has been useful in interpreting institutional and derived law treaties by the filter provided by the case law of the EU Court of Justice.

Our own contribution to documentation, elaboration and substantiation of the expressed points of view is materialized in the systematization of a large amount of information incident to the treated legal area, as well as in the approach and analysis of the problems.

GENERAL PRESENTATION OF THE PHD THESIS

CHAPTER I have an introductory character, being devoted to the presentation of general aspects of European Union law as a new typology of law and its relationship with international law and national law of the Member States.

The European Union, as an international integration organization, differentiates itself from the usual, classical international organizations, due to the independence of the institutions vis-à-vis the Member States, the institutionalization of the creation and application of the law.

European Union law cannot be conceived and cannot exist outside international law, or outside the national law of the Member States. The interaction between them is obvious, but the autonomy of the EU law system (especially if there are certain antinomies between them, given, on the one hand, by the international legal personality enjoyed by the European Union with the entry into force of the Treaty of Lisbon and, on the other hand, the powers that the Member States have agreed to exercise in common with the Union), there are some limitations that make ambiguities about their correct and concurrent application.

For the subject under discussion, the interaction of the three legal systems is mainly highlighted by the constitutive elements of responsibility (illicit conduct, imputability of this conduct to a subject of international law and

prejudice), which have been taken over in international law mutatis mutandis from the general theory of accountability domestic law, and EU law in the international legal order, as found in the Draft Articles on State Responsibility for Illicit International Deeds, of the United Nations International Law Commission.

State liability in EU law is, however, delimited by the responsibility of States in international law, primarily through the sphere in which they produce their effects. In the case of international law, the responsibility of the states is analysed in the international society, based on the international relations established between the subjects of international law, in the case of EU law the analysis of state responsibility is done within the European Union, an international integration organization based on the relations between states and The Union as a result of their accession.

The application of European Union law is done either by the institutions of the Union or by the institutions of the Member States. The distinction must therefore be made between the application of EU law directly by the EU institutions and its application by the Member States, the first being the exception, and the second rule. In order to ensure the application of EU law by the Member States, mechanisms have been put in place to ensure compliance with the obligations assumed by the States under the Treaties.

The analysis of the principles of European Union law is imminent, especially as we are in the presence of a new typology of law that cannot be imagined without establishing an attachment to a number of general principles that mark the entire evolution of European Union law, stem from the nature of European construction and its organization and give expression to the functioning of the Union itself.

Among the main functions of these principles, we will emphasise on the fact that they bring about additions when there are situations that are not regulated by the Treaties, and that of helping to interpret the EU law. In this regard, the Court of Justice has a key role to play in the interpretation, application and removal of many gaps by creating principles specific to EU construction.

Analysing the provisions of the Treaties, the main purpose of the principles is to facilitate judicial control both in terms of the powers of the institutions of the European Union and of the actions of the Member States.

Of particular relevance are the principles governing the application of European Union law in the domestic law of the Member States, in particular the principle of immediate application, direct application and priority application, to which are added the principle of loyal cooperation, the principle of the Member

States' autonomy, the principle of the effectiveness of EU law and the principle of effective judicial protection, which completes the framework for the application of European Union law.

The legal basis of state accountability in international law and European Union law is closely linked to the principle of responsibility and the notions of liberty, rights and obligations, social phenomenon, liability and sanction.

Also, the mechanisms by which State liability can be attributed to the system of European Union law are based on the same constant, namely the principle of State liability arising from a continuous evolution of the case-law of the Court of Justice having as its starting point the judgment in *Francovich and Bonifaci v. Italy*.

In this respect, the chapter contains a summary of the relevant jurisprudence highlighting the contributions made by CJEU in the development of the principle of liability: *(i)* Francovich and Bonifaci v. Italy;[1] *(ii)* Brasserie du Pêcheur SA v. Germany;[2] *(iii)* The Queen v. Secretary of State for Transport, ex parte Factortame Ltd. and others;[3] *(iv)* Erich Dillenkofer, Christian Erdmann, Hans-Jurgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Germany;[4] *(v)* Konle v. Austria;[5] *(vi)* Haim c. Kassenzahnartzliche Vereinigung Nordrhrein;[6] *(vii)* Gerhard Köbler v. Austria;[7] *(viii)* Traghetti del Mediterraneo Spa v. Italy.[8]

According to that case-law, the concrete conditions for incurring State liability for damage caused to individuals are three, namely: the rule of law infringed confers rights for individuals, the breach is sufficiently serious and there is a direct causal link between the breach and the damage suffered by injured persons.

The final part of this chapter is a brief introduction for the next chapter, pointing out the lack of a concrete definition of the state, in general, or of a Member State of the European Union, in particular, in the CJEU decisions, which further characterized and detailed the principle of state liability for breach of European Union law.

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[1] Judgement of 19 November 1991, *Francovich și Bonifaci c. Italia*, joint cases C-6/90 and C-9/90, EU:C:1991:428.

[2] Judgement of 5 March 1991, *Brasserie du Pêcheur*, joint cases C-46/93 and C-48/93, EU:C:1996:79.

[3] Judgement of 25 July 1991, *The Queen c. Secretary of State for Transport, ex parte Factortame Ltd și alții*, C-221/89, ECLI:EU:C:1991:320.

[4] Judgement of 8 October 1996, *Dillenkofer și alții c. Bundesrepublik Deutschland*, joint cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, EU:C:1996:375.

[5] Judgement of 1 Jude 1999, *Konle*, C-302/97, EU:C:1999:271.

[6] Judgement of 4 July 2000, *Haim*,C-424/97, EU:C:2000:357.

[7] Judgement of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513.

[8] Judgement of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391.

CHAPTER II continues the analysis and extends it to the main forms of liability leading to the opening of the procedure for failure to fulfil obligations under the Treaties.

In this context, it is of particular importance to understand the scope of the state notion, especially with regard to the inclusion in this notion of institutions, central or local bodies through which the state exercises its authority and, implicitly, the obligations assumed under the statute Member State of the European Union. The issues raised by the interpretation of the notion of Member State as regards both the horizontal dimension of State liability and the vertical dimension of State liability are raised.

Thus, if the division of State's responsibility is on a *horizontal level* between the three legislative, executive and judicial powers, *vertically*, the action for litigation must always be brought against the Member State concerned, even if the violation is the result of an act or omission of a local organ or regional. From the case law of the Court of Justice, a number of infringements attributable to local or regional bodies can be identified, namely: the refusal of local government bodies, including decentralized authorities, such as communes, to directly apply the provisions of an unremitted directive; the lack of full application of the principle of equal treatment between men and women as enshrined in a EU directive by a public authority entrusted with the maintenance of safety and public order acting as an employer; the implementation of a program by a body subordinated to the executive power through a national advertising campaign and having the potential to affect and restrict the free trade of goods between Member States.

The effective enforcement of European Union law is to a large extent carried out by the national judge. As regards the State's liability for damage caused by a judgment of a national court which violates an EU regulation, although challenged in the case-law of the Court, notes the Commission's preference only to publish in the annual reports the failings of certain national courts and the Court's preference for finding a violation by the national legislator rather than criticizing national courts.

As the obligation to comply with European Union law rests with each Member State on its territory, together with responsibility for its violation, the analysis could have been focused on compliance by Member States with the duty of loyal cooperation.

As regards *the duty of loyal cooperation*, it takes the form of two types of obligations (positive and negative) and is the general legal basis of the action against a Member State applicable where there is a lack of a specific legal basis. However, there is no practice in the Court where only this violation has been

found, but only correlative when it has already established a violation of a more specific provision of EU law.

As regards *the duty to respect the principles of the rule of law*, it is one of the fundamental values of the Union and constitutes a constitutionally binding legal principle for the Member States. Respect for the principles of the rule of law is one of the conditions that must be met for a state to become a member of the European Union. While compliance with the Copenhagen criteria is a mandatory rule for EU membership, successive enlargements has shown in time that they may create difficulties for the Union's ability to ensure respect for its fundamental values after a state has become a member.

The only existing mechanism for 'serious and persistent violation of values' is the one provided for in Article 7 TEU, the main limitation being that it has never been implemented (the repercussions are very serious for the Member State concerned, in particular the suspension of the right to vote Council). However, there are two initiatives (one from the Commission and one from the European Parliament) to initiate proceedings against Poland and Hungary.

Although the measures taken by the Commission to initiate infringement procedures under Article 258 TFEU have proved to be an important tool in addressing certain concerns about the rule of law, it is easy to note the legal limitation of these procedures if there is a systemic threat to the rule of law because the Commission can only initiate the procedure if these concerns are also a violation of a specific provision in EU law.

The Commission proposed in 2014 a new rule of law framework which aims to enable the Commission to identify a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law which is likely to become a 'clear risk of serious misconduct' which could trigger the application of Article 7 TEU. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission may launch a 'pre-Article 7 procedure', initiating a dialogue with that Member State.

Of course, any suggestion is welcomed but this procedure also calls for some limits: prolonged dialogue may give rise to a new crisis situation that has the potential to block not only respect for the principles of the rule of law but also the functioning of the Union, and the absence of financial penalties from this framework is ineffective.

As far as *the obligation to respect fundamental rights* is concerned, this has been imposed as a result of the strengthening of human rights at EU level after Lisbon, by giving binding legal force to the Charter of Fundamental Rights of the European Union.

Involvement of the Commission to ensure compliance with the Charter of Fundamental Rights both by the Union institutions and, in particular, by the Member States, has become increasingly strong since 2010, when it started to produce an annual report on the assessment of progress made in this area. For the first time in 2012, the Commission had to bring before the Court of Justice cases of failure to comply with the obligations of non-compliance with key provisions of the Charter by a Member State. It follows that a breach of the obligation to comply with the Charter of Fundamental Rights may lead to infringement proceedings against the Member State concerned. However, the Commission tends to give a reduced priority to cases that do not suggest a violation of a specific provision of EU primary or secondary legislation, in addition to - and independently of - a violation of the Charter itself.

An issue of novelty and which is increasingly emerging in the literature is related to the 'systemic infringement action' that emerged in response to the question: What can the European Union do about the Member States that move away systematically from the fundamental principles underpinning the European Union? Although the Commission has not launched any such action so far, if the Commission has the possibility to initiate several infringement actions against the same Member State by grouping complaints on the same subject in one action, this could demonstrate that all the integrally collected and analysed infringements would constitute a more serious infringement than the sum of the individual infringements - so that the systemic breach could be demonstrated where appropriate. Clearly, however, following the current evolution of the behaviour of some Member States, the Commission needs to adapt the tools provided by EU law to play its role as 'Guardian of the Treaties' and thus respond to the new breaches of EU law.

An extremely important issue, having relevance both in relation to international law and due to the actuality and involvement of the Romanian state, is related to the incompatibility with European Union law of the treaties concluded by the Member States, with particular reference to the bilateral investment treaties. The peculiarity of this subject is related to the investor-state-trio-European Commission, in which the position of the state is at least ingrained, being attacked on the basis of two signed and assumed legal instruments, because the priority application of any of them automatically attracts the violation of assumed obligations through the other, and because investors are trying to protect their investment within the limits of bilateral treaties signed and governed by international law, the European Commission wants to protect the internal market and eliminate inconsistencies with EU law.

As regards the obligation to implement European Union law, this is one of the most frequent causes leading to the opening of the infringement procedure, the way Member States comply with the EU's legal rules, both in terms of transposition and in terms of apply.

On the one hand, although the breach of the Regulation is one of the causes of the infringement procedure, because of the binding and directly applicable nature of the Regulation and thus the lack of implementation and transposition in the internal legal order of the Member States, the incidence of failures to implement is relatively low.

Furthermore, since the directives require transposition in the national law of the Member States, this is not left to the discretion of the Member States, which is why the directives include a fixed date until Member States have to transpose the provisions, and any exceeding of that period constitutes a breach of obligations by the Member State concerned. Thus, the transposition of European Union law into national law can be flawed in several ways, such as: late transposition; incomplete or incorrect transposition; the lack of transposition, plus the non-communication of transposition measures and inadequate implementation. The analysis of these types of infringements is relevant to the area under consideration, especially as the Commission reports on the monitoring of the application of EU law show that the directives have an important role to play in infringement proceedings. The conclusion that emerges from the analysis is that non-compliance with EU directives is the most visible and easy to detect of infringements of EU law, firstly because directives need to be transposed into national law within a certain timeframe that can be verified by the Commission, secondly, because Member States are obliged to communicate transposition measures to the Commission, and thirdly, because anyone can check the conformity of national legislation with the directive.

As regards decisions, breaches by Member States and triggering the infringement procedure concern either non-compliance with the provisions of the decision on the measures to be taken to comply or the deadlines imposed by the decision.

Although they are not binding, the recommendations and opinions cannot be regarded as having no legal effect, but require the national courts to take them into account in order to resolve the disputes which are submitted to them, in particular when they explain the interpretation of national provisions adopted in order to ensure their implementation or where they are intended to supplement binding provisions.

CHAPTER III focuses on the infringement procedure for breaching the obligations under EU law. The European Commission have the authority and responsibility to ensure compliance with European Union law and to assure compliance of Member States with the obligations laid down in the Treaties and with EU secondary legislation.

The legal instrument that the Commission has at its disposal is the action for failure to fulfil obligations under the European Treaties by the Member States, also called the infringement procedure governed by Articles 258-260 TFEU.

This procedure has evolved both in terms of regulation under the Treaties, but especially in terms of the circumstances of the case and the procedure before the Court of Justice, which over the years has developed a case-law which has supported and has made its application more and more natural and ultimately effective. The purpose of this procedure is primarily a preventive one, namely to prevent Member States from failing to fulfil their obligations under the Treaty and only secondly a correction, which can be achieved either by the Court's decision under Articles 258 -259 TFEU, or under Article 260 TFEU.

Since the Commission has the primary role in implementing this procedure, it enjoys a discretionary power which has raised many controversies, taking into account either the lenient or selective manner that the Commission may have towards some Member States, or the unfair or oppressive use of procedures to ensure EU law. However, the Court has consistently upheld and maintained that the action for failure to fulfil obligations is objective and only the Commission has the power to assess whether it is appropriate to bring such an action before the Court of Justice. The power of appreciation is based on the Commission's principal function of acting in the general interest of the European Union.

The analysis will focus on the two main categories of initiators of the proceedings, namely the Commission - Article 258 and other Member States - Article 259. In this context, we highlighted the steps and particularities of each type of action, the conclusion being clear that the Commission is the primal initiator, having all the means necessary (automatic referral, own investigations - reports, parliamentary questions, petitions, complaints of individuals), while state-to-state proceedings constitute the exception. In the history of the EU having only 6 cases where a Member State has brought an action before the Court of Justice against another Member State and only 4 of these cases have been resolved by a judgment, the other two being settled amicably.

CHAPTER IV focuses on the consequences of initiating proceedings for failure to fulfil obligations by the Member States of the European Union, subject to the defences of the Member States' defences in the proceedings, the application of financial penalties for failure to comply with the Court of Justice's judgment and failure to communicate transposition measures, European Union law and, last but not least, the derogating procedures for the application of Articles 258 and 259 TFEU:

Firstly, we have analysed the equality of procedural instruments between the Commission and a Member State in the proceedings before the Court of Justice in order to resolve the action for failure to fulfil obligations undertaken by the Member States, a report which has a specific non-symmetrical configuration designed to protect not only the rights of the Member State concerned, but also to ensure that the contentious procedure has a clearly defined object. In that regard, I have stated that the Commission is required to set out, in the course of the non-contentious procedure, all the grounds on which its application is based before the Court, contrary to the Member State's right to invoke all the grounds of its defences, including new defence matters, although they were not raised during the non-contentious procedure.

In this context, I have argued that there are judgments of the Court of Justice in favour of the Member States which have found that they correctly interpret certain provisions in opposition to the European Commission. I also pointed out that although the Member States have often demonstrated that they lack ingenuity in justifying the failure to fulfil obligations under the Treaties, the Court has adopted a very strict approach to the way Member States respect their obligations under EU law, rejecting most of their defences.

From the analysis of the case law of the Court of Justice, we identified 17 defences invoked by the Member States and rejected by the Court with the appropriate arguments, as well as some defences which either were accepted by the Court in defence of the Member States or were recognized as possible defences in the context of fulfilling certain conditions. Last but not least, the Commission's failure to prove a Member State’s non-compliance with obligations is a reason why the Court will decide in favour of that Member State.

Effective liability for non-compliance lies in the analysis of the sanctions applicable to the Member States both on the basis of the finding of a failure to fulfil obligations [Articles 260 (1) and 258 TFEU in conjunction with Article 260 (3) TFEU], and on the basis of failure to comply with the judgment of the Court [Article 260 (2) TFEU].

The lack of financial sanctions has shown that it has a major influence on the compliance of Member States. Since 1996, the Commission has begun to

develop the principles for the application of financial sanctions, principles which have subsequently been complemented by more and more clear and easy-to-use technical methods. The Court of Justice has also played an important role in the development of this practice, as it is now almost a rule to impose sanctions for breach of EU law if compliance with the deadlines for cooperation with Member States is not achieved.

The two types of financial penalties which may be imposed on a Member State which has failed to fulfil its obligations are the periodic penalty payments and the lump sum, the cumulating of the two types of penalty being also requested by the Commission and imposed, even on its own initiative, by the Court of Justice.

Since there are clear conditions and criteria for imposing and calculating these penalties, any Member State may itself make an assessment of the sanction that may be imposed on it in the event of being found in breach of an obligation, the main purpose remaining the deterrent factor of those penalties, the amount of which must be large enough to determine the state to correct the situation and even if the cessation of the infringement (should therefore be greater than the benefit the Member State derives from the infringement), but in particular to determine the Member State not to repeat the same violation.

The justification for tightening the penalty enforcement system also results from the fact that the founding states (but also the richest in the Union) are the ones that most frequently violate EU law and are subject to the highest financial penalties, unlike the newer states European Union which demonstrates a higher degree of compliance.

Undertaking the liability of EU Member States for compensation for damage to individuals in breach of European Union law is another consequence of initiating the infringement procedure, given that once the conditions set out to give rise to a right to compensation in favour of individuals are met, the State must remedy the consequences of the damage caused by the application of internal judicial procedural mechanisms. In practice, the internal legal order of each Member State must establish the competent courts and regulate the procedural rules governing actions for the purpose of ensuring the full and effective protection of the rights which they have under European Union law. The Member State must also impose legal and procedural conditions in the matter of compensation for damages in case of breaches of EU rules which cannot be less favourable than those concerning similar domestic complaints.

Apart from the common procedure, there are exceptions meant to persuade Member States to change their behaviour if they have not fulfilled their obligations under the Treaty, as there are also specific obligations of the Member

States created by secondary legislation, whose supervision and administrative enforcement require new procedures. The derogating procedures have common points but also peculiarities to the common procedure, but they often come under competition, thus creating some difficulties with regards to the option to initiate a procedure to the detriment of the other.

CHAPTER V is devoted to informal mechanisms for solving problems related to the correct application of EU legislation, which is a particularly important aspect of the scientific approach, especially since it offers solutions to prevent the initiation of infringement proceedings by Member States. The role of these mechanisms can be summed up to prevent excessive recourse to the judicial system, all the more so as the procedures are often complex and the mechanisms for guaranteeing the protection of individuals is often an obstacle to access to justice.

In this context, SOLVIT, EU-Pilot and CHAP are the three main tools that interact and provide a quicker solution to problems related to the application of EU law, without the need to resort to infringement procedures.

The conclusion on the success of these instruments results from the Commission's recent reports on monitoring the application of EU law demonstrating that the interaction between infringement procedures and alternative systems is minimal in terms of reducing the number of infringement procedures, these instruments ultimately lead to an increase in compliance in the EU.

The European Ombudsman also has an important role to play in the mismanagement of EU law by the institutions of the European Union, which can be brought to its attention either by a complaint from any citizen of the Union and any natural or legal person residing or with a registered office in a Member State of the Union, or may also act on its own initiative. Relevant for our analysis are complaints about alleged delays in dealing with complaints about breach of EU law by the European Commission and / or lack of adequate information from the complainant in the EU-Pilot procedure. In this regard, the European Ombudsman may request additional information, may carry out inquiries and recommendations to enable the Commission to review certain procedures that will enable these types of problems to be dealt with as efficiently as possible, particularly since practice has shown that petitions frequently lead to the initiation of proceedings for failure to fulfil obligations.

CHAPTER VI illustrates, in a comparative analysis, the similarities and differences between the jurisdiction of the European Union and the jurisdictions

of ECHR and ICSID, since the states responsibility in European Union law cannot be regarded as a completely autonomous responsibility, indifferent to other categories of liability that can be triggered against states.

The comparative analyse revealed high levels of similarity between the three entities, given the allegiance to the international law system, a series of peculiarities and differences deriving from the specificity of each type of jurisdiction, but especially convergence points that determine a concurrent application or alternative, and which may give rise to difficulties in the application by EU Member States, while taking into account national systems of law.

CHAPTER VII contains the general conclusions, namely *lex ferenda* proposals. Our contribution includes a series of proposals designed to improve the national and European Union legislative framework in question.

This approach is based on the idea that the legal rules, in general and those of the European Union, in particular, are individualized by the fact that they are constantly adapting and evolving to the exigencies of society, which in turn are constantly changing.

Among these proposals we mention the following;

- *liability for systemic infringements*: it is necessary to amend Articles 258-260 Treaty on the Functioning of the European Union in order to regulate a new category of infringement – a systemic one – so that the Commission can sanction those infringements of Union law which are not only accidental but are generalized and persistent. By regulating this special procedure, it is necessary to impose severe sanctions, able to determine the Member State to comply as quickly as possible. Equally, a special procedure should be devised to allow interim measures to stop infringements which by their systemic nature threaten the unity and cohesion of the Union;

- *special procedural rules before the Romanian courts on actions to bring the Romanian State accountable for EU law infringement: it is necessary to introduce a procedure in the Civil Procedure Code, in the 6th Book "Special procedures" (Articles 915-1064) designed to establish special rules for this category of actions, which would allow the recovery of damages caused by non-compliance with European Union law.* An extremely important issue is the jurisdiction of the courts in this matter, so it is necessary that all disputes concerning the sanctioning of the Romanian state for breach of EU law (irrespective of the state institution that actually generates the violation) be resolved at first instance by the Court of Appeal and the appeal by the High Court of Cassation and Justice;

- *creating a new jurisdictional body at EU level to resolve disputes concerning intra-EU investments*: ("Arbitration Tribunal specialized in resolution of investment disputes") it is necessary to regulate a permanent arbitration court with the purpose to solve disputes between investors and Member States that may result from breaching intra-EU bilateral treaties, which guarantees the investments. In order to comply with the judgment of the Court of Justice in Achmea[9] case, these arbitral judgments will be appealed before the Court of Justice;

- *prioritizing the application of the European Convention on Human Rights and European Union law*: Article 6 (2) TEU should be amended and read as follows: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *If there are inconsistencies between the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaty on European Union and the Treaty on the Functioning of the European Union, the Convention shall prevail, unless the EU Treaties contain more favourable provisions*. The Union's competences, as defined in the Treaties, are not altered by this accession"; a similar change may also occur in the content of the EU Charter of Fundamental Rights by completing Title VII. General provisions governing the interpretation and application of the Charter;

- *penalizing Member States with the suspension of EU funds*: it is necessary to amend the secondary legislation of the European Union to confer the competence of the Commission and the Court of Justice to suspend EU funds for a Member State that refuses to comply. This sanction could be proposed in particular for those Member States which consistently refuse to respect the fundamental European values regulated in the Treaties and where systemic breaches of European Union law are found. Such a change can even be included in the Treaty on the Functioning of the European Union either as a complement to Article 260 TFEU or as a complement to the procedure set out in Article 7 TEU and 354 TFEU.

Article 260 (4): "Where the Court of Justice is invested with an action under Article 258 by considering that that State has failed to fulfil its obligation to observe the values on which the European Union is based under Article 2 TEU, the Commission may indicate the amount of the lump sum or periodic penalty to be paid by that State and which it considers appropriate to the situation and shall propose the suspension of EU funds to that State if it considers it necessary.

[9] Judgement of 6 March 2018, Achmea,C-284/16, EU:C:2018:158.

If the Court finds that the obligation has not been fulfilled, the Court may impose on the Member State concerned a lump sum or periodic penalty payment, up to the amount indicated by the Commission, and the suspension of the grant of EU funds to that State, even in the absence of a proposal from the Commission. The obligation to pay shall take effect on the date fixed by the Court in its decision".

- *changing the moment from when financial penalties are imposed*: it is necessary to impose sanctions from the very moment when it is found that there has been an infringement and not from the date of the judgment finding the violation, as set out in Commission Communication SEC (2005) 1658: Application of Article 228 of the EC Treaty. This provision should address situations of inappropriate application of EU secondary legislation (regulations, directives and decisions). In fact, what is relevant is that in the case of periodic penalty payments, the coefficient of duration should be calculated either from the moment of the infringement (for example, in the case of directives from the date of expiry of the deadline for transposition) or from the date of communication of the letter of formal notice to the State concerned.

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