

ENFORCEMENT OF THE EUROPEAN UNION LAW IN THE MEMBER STATES

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ABSTRACT

The efficient enforcement of decisions is indispensable element of any system. Accordingly it is necessary to provide an implementation of decisions and by doing this to guarantee an affective and stable existence of a system. This paper is devoted to the enforcement procedure of the European Union, in particular we will analyze the elements of the enforcement procedure such as the stages, the subjects, and their competence within the procedure. Besides, we will outline some last improvements which were taken and describe some issues which take place. Also the short comparison of the infringement procedure of the USA and of the EU will be depicted.

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INTRODUCTION

Any mechanism and organization needs to have an efficient system of implementation of its decisions, which should be executed timely and correctly, otherwise such an organization cannot work and pursue an implementation of these goals. In this way it is interesting to analyze the enforcement/infringement procedure in accordance with the European Union (EU) law. This is especially interesting because of some reasons such as taking into account the institutional structure of the EU which is not clear yet and among scholars there is no certain opinion about that question. Some of them argue that the EU is a supranational organization¹, others maintain an opinion that the EU is an intergovernmental organisation². However, a task of this paper is not to determine an institution structure of the EU, it is just necessary to highlight in order to show that the enforcement procedure is very important aspect of the EU which depends significantly on the institutional system of the EU.

In this paper there will be an attempt to analyze the procedure of the enforcement in accordance with the articles 256 and the article 258 of the TFEU³. So, the chapter 1 is devoted to such aspects of the procedure as interpretation of the article 258 with focusing on the competence of the Commission, the stages of the procedure and the competence of the European Court of Justice (ECJ).

¹ Jarle Trondal, "How Supranational are Intergovernmental Institutions? Assessing the Socializing Power of Council Working Parties", Agder University College, 2003, P. 4

² Ibid.

³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal, c 83, volume 53, 30 march 2010, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF> (accessed on 29.03.2012)

The chapter 2 will be focused on sanctions which can be imposed by the ECJ on the Member States for the non-compliance with the EU legal order and obligations, especially kinds of sanctions which can be imposed and by whom can be imposed, criteria which are used to impose sanctions, the role of the Commission in imposing of the sanctions under article 258 TFEU.

The chapter 3 will contain a short comparative analyze of the enforcement procedure in the United States Of America (USA) and in the EU. The USA, which consists of states with wide enough competence, is a federal state. However, the enforcement procedure of the USA is less strict than in the EU, which as an institutionalized system is much weaker and significantly less stable.

Besides, in this paper some issues will be highlighted such as the selection by the Commission of a Member States against whom to start the procedure and a question of transparency of the enforcement procedure. For instance “the southern Member States as well as France and Belgium appear to perform significantly worse than their Scandinavian counterparts”⁴. There are different explanations to this problem from the belief that some states are actually differently comply with the EU obligations to the point of view that this is a result of a policy of the Commission which can be not equal to all Member States.

Apart from this there are other some issues which will be depicted in the paper such as a problem of transparency of decisions and investigations which are taken by the Commission; accountability of the Commission; a question of sanctions in particular whether a penalty payment and lump sum can be imposed simultaneously or not, as well as whether sanctions

⁴ Falkner G., Treib O., Hartlapp M., Leiber S., “Complying with Europe: EU Harmonization and soft law in the Member States”, Cambridge University Press, 2005, p.203.

have punitive character as “many states argue that such sanctions pursue the aim not to punish but to persuade a Member State to comply with its obligations as established by judgment”⁵.

As a result in the paper some summarizes will be made and some explanations as well as advisers will be highlighted.

This paper is going to be written on the basis cases, which significant role in development of this institute, especially concerning sanctions for a failure to comply with EU responsibilities, and in particular here will be used different articles concerning the enforcement procedure.

⁵ Annette Schrauwen, “Fishery, waste management and persistent and general failure to fulfil control obligations: the role of lump sums and penalty payments in enforcement actions under Community law”, *Journal of Environmental Law*, Oxford University Press, 2006, p 6.

CHAPTER 1 – THE ENFORCEMENT PROCEDURE UNDER ARTICLE 258 TFEU

Firstly, it is necessary to say that there are two kinds of enforcement procedure which are analyzed by scholars such as centralized and decentralized. Centralized⁶ is the procedure which is initiated, as a rule, by the Commission against Member States for non-compliance with its EU obligations and accordingly decentralized enforcement procedure which is initiated by individuals against Member States which do not provide for these individuals their rights which were granted to them by, as a rule, Directives. In this paper we will pay attention mainly to the centralized enforcement procedure.

At the beginning it is reasonable to mention that the enforcement procedure was developed and firstly there was article 169 then 226 of the EC and now we have article 258 of the TFEU.

Before we start analyzing main issues of the infringement procedure it is necessary to clarify purposes of that procedure and what is a breach of the EU law which causes an initiating of that procedure.

Firstly let's clarify purposes of the enforcement 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 enforcement procedure: "firstly, it is necessary to ensure compliance by member state with their community obligations; secondly,

⁶ Melanie Smith, "Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process", European Law Review, 2008.

it provides a procedure for the resolution of disputes between the commission and member states over matters of community law (one-third of all procedures are settled at the preliminary informal stage); 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”⁷.

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”⁸ as the Court stated in a case *Commission v. France*. Such declaration can assist to comply with the EU law by other Member States.

Another important aspect of the enforcement procedure is a question what constitutes a breach of the EU law.

“Breaches may arise from the treaties, secondary legislation, international legislation, decisions of the court of justice and general principles”⁹. It means that “a state’s failure may be in respect of any binding obligations arising from Community law”¹⁰. Besides, the Commission can also initiate the procedure in a case of administrative violations, however the violations should be consistent and together constitute ‘a general administrative practice’¹¹. Thus, the ECJ held that “an administrative practice can be the subject-matter of an

⁷ Josephine Steiner and Lorna Woods, “EU law”, tenth edition, Oxford University Press, 2009, p 257.

⁸ *Commission v. France*, C-333/99, 1 February 2001, para 23, *available at* <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47103&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=32216> (accessed on 29.03.2012);

⁹ Nigel Foster, “EU law directions”, 2nd edition, Oxford University Press, 2010;

¹⁰ Josephine Steiner and Lorna Woods, “EU law”, tenth edition, Oxford University Press, 2009, p 258-259.

¹¹ *Ibid.*

action for failure to fulfil obligations when it is, to some degree, of a consistent and general nature”¹².

Thus, a breach of the EU law can cause a failure to fulfil EU obligations within Treaties, secondary legislation, international agreements, or even constitute minor breaches if they are can lead to “consistent and general nature”¹³.

There are depicted three possible reasons of non-compliance: “member states have become more reluctant to comply with EU legislation; a significant share of non-compliance is the result of the administrative inefficiencies; or the Commission treats member states differently in order to avoid conflicts with those countries that make the most significant contributions to the EU budget and/or have considerable voting power in the Council, or where the population is very ‘Euro-sceptic’”¹⁴. For example “the southern Member States as well as France and Belgium appear to perform significantly worse than their Scandinavian counterparts”¹⁵. It is explained by the fact that the procedure is “not open and there is no legal certainty and accordingly the procedure is not transparent”¹⁶.

In order to eliminate any possible accusations against the Commission there are some steps which were initiated by the Commission in the Communication 2002 and in the Communication 2007 to provide transparency and legitimacy of the enforcement procedure. These steps and proposals of the Commission will be described below.

¹² Commission v. Germany Case C-387/99, 29 April 2004, Para 42, *available at* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=49136&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=35268> (accessed on 29.03.2012);

¹³ *Ibid.*

¹⁴ Falkner G., Treib O., Hartlapp M., Leiber S., “Complying with Europe: EU Harmonization and soft law in the Member States”, Cambridge University Press, 2005, p.204.

¹⁵ *Ibid.* p.203.

¹⁶ The Commission v. France, Case C-304/02, Para89, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0304:EN:HTML> (accessed on 29.03.2012).

1.1 STAGES OF THE ENFORCEMENT PROCEDURE

The enforcement procedure has two stages: administrative stage¹⁷, which starts the procedure and the judicial stage¹⁸, which finishes the procedure. Let's analyze these phases.

To begin with the administrative stage we need to look at the article 258 TFEU (ex163 and ex 226), in accordance with that article the Commission issued a "formal letter"¹⁹ in order to notify a Member State and accordingly to give an opportunity to prepare an answer. Further, if the Commission has not received any respond it issues a "reasoned opinion"²⁰, which contains "the legal and factual grounds for the alleged infringement and the actions necessary to remedy the infringement"²¹.

Thus, administrative stage contains some internal phases which should take place. Firstly, the Commission, "having formed a view during the pre-procedural investigation and discussions with member states officials that a state has breached its obligations"²², informs a member state by the formal letter where clarifies claims, after that the state has a time to answer by explanations its position or to fix a violation²³. As the answer was not received or if a Member State does not agree with the claims, the Commission issues a reasoned opinion, where the Commission clarifies aspects which are constitutes a breach of the EU law.

¹⁷ Melanie Smith, "Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process", *European Law Review*, 2008, p2.

¹⁸ *Ibid.*

¹⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal, c 83, volume 53, 30 March 2010, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF> (accessed on 29.03.2012).

²⁰ *Ibid.*

²¹ Lisa Borgfeld White, "The enforcement of European Union law: the role of the European Court of Justice and the Court's latest challenge", *Houston Journal of International Law*, 1996, p 7.

²² Nigel Foster, "EU law directions", 2nd edition, Oxford University Press, 2010.

²³ *Ibid.*

“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”²⁴. 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 that had to be made to the relevant rules in order to bring them into line with Community law”²⁵. “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 obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission”²⁶.

Thus, the procedure starts with the diplomatic phase of negotiations, which is often a last phase for many actions which are initiated within the enforcement procedure. “The Commission resorts to a reasoned opinion only if no agreement can be reached.”²⁷ In this way the enforcement procedure and the administrative part of that procedure is described sometimes as “secretive and diplomatic process”²⁸, which is called also as “negotiated enforcement”²⁹. After that it continues through formal stage of the “formal letter” and “reasoned opinion” and finally finished with judicial stage.

²⁴ Josephine Steiner and Lorna Woods, “EU law”, tenth edition, Oxford University Press, 2009, p. 262.

²⁵ *Commission v. Belgium*, C-293/85, 2 February 1988, Para10, *available at* <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=94126&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=41397> (accessed on 29.03.2012).

²⁶ *Ibid.* para13.

²⁷ Carol Harlow, “Accountability and law enforcement: the centralised EU infringement procedure”, *European Law Review*, 2006, p.6.

²⁸ Melanie Smith, “Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process”, *European Law Review*, 2008, p2.

²⁹ *Ibid.*

1.2 A QUESTION OF TRANSPARENCY OF THE ENFORCEMENT PROCEDURE

An initial phase of negotiations starts without public access to that and as T. Hartley states in the “The Foundations of European Community Law”: “the Commission will try to avoid press publicity and the embarrassment that might result for the defendant Member State”³⁰. Accordingly, access to such information in particular to a “formal letter” and “reasoned opinion” cannot be allowed to “third parties” or other informants. Besides, as it was mentioned above that question causes lack of trust to the procedure as the Member States argue that the Commission initiated the procedure based on not equal foundation³¹. However, despite this “both Commission and Court have stood firmly on the exception from disclosure in the relevant texts applicable to “inspections, investigations and audits”, immunity consonant”³².

In this way it is interesting to illustrate a case *Bavarian Lager Company v. Commission*³³. In that case the Commission wrote the reasoned opinion and on the request of the company to allow the access to that reasoned opinion refused with explanation that “the Code of Conduct of the Commission, provides for two categories of exceptions to the general principle that citizens are to have access to Commission documents. The Commission is obliged to refuse access to documents falling within one of the mandatory exceptions, which include the public interest exception”³⁴, accordingly as the Commission stated that was such a case. The ECJ held that “however, two categories of exceptions to the general principle that citizens are to

³⁰ T. Hartley, “The Foundations of European Community Law”, 5th. Ed., Oxford, Oxford University Press, 2003, p.320.

³¹ Falkner G., Treib O., Hartlapp M., Leiber S., “Complying with Europe: EU Harmonization and soft law in the Member States”, Cambridge University Press, 2005, p.203.

³² Carol Harlow, “Accountability and law enforcement: the centralised EU infringement procedure”, *European Law Review*, 2006, p.7.

³³ *Bavarian Lager Company v Commission*, Case T-309/97, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997A0309:EN:HTML> (accessed on 29.03.2012).

³⁴ *Ibid.*

have access to Commission documents are set out in the Code of Conduct. The first category, which includes the exception relied on by the Commission provides that “the institutions will refuse access to any document where disclosure could undermine [inter alia] the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)”³⁵. Accordingly in that case the ECJ states that taking into account that the Commission was in investigation process “the disclosure of documents during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure inasmuch as its purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position could be jeopardized”³⁶. In this situation the ECJ takes the position of the Commission and refused the disclosure of the documents.

Besides, the Commission in the Report 2004 indicates that refusal to disclose information applies when two conditions are met:

- there is a public interest in disclosing the information contained in the document
- this interest must be overriding compared with the interest to be protected.

The public interest is a quite vague legal concept. It is difficult to lay down criteria to identify the existence of a public or general interest to disclose information. It is clear, however, that the interest of applicants, insofar as the latter have justified their applications at their own initiative, is not in itself a public interest. On the other hand, it is possible to maintain that there is always a public interest in disclosing information held by the

³⁵ Ibid.

³⁶ Ibid. para 46.

authorities”³⁷. As we see ‘public interest’ is a difficult definition which can be interpreted differently. That fact was affirmed by the Commission, however in a case of dispute it is obvious, in my point of view, that a question will be decided in favour of the Commission.

Another issue is an issue of the accountability of the Commission. The first aspect of that question is that “no measure taken by the Commission during this stage could be attacked because it had no binding force”³⁸. For example in a case *Société nationale interprofessionnelle de la tomate (Sonito) v. the Commission*, where the farmers of the France complained that their farmers from the Italy and Greek were acting not in accordance with the competitions rules³⁹. However, the Commission argued that “it had made its own investigations, could find no evidence of fraud and declined to proceed under Art.226 (ex Art.169)”⁴⁰.

It is important to take into account here that the applicants could not check anyhow the information of the Commission. However, the ECJ stated that “the Commission possessed only isolated and unconfirmed information which had been communicated to it by the national authorities. The checks which the Commission itself carried out did not bring to light the existence of frauds of the type alleged by the applicants”⁴¹. Accordingly, in that case we see that the limitation to the information to third parties can lead to acceptance by the Commission wrong decisions and third parties cannot check also facts on the basis of which the Commission takes such decisions.

³⁷ Report from the Commission on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, COM/2004/0045 final, Para 3.4.5., *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0045:EN:HTML> (accessed on 29.03.2012).

³⁸ Carol Harlow, “Accountability and law enforcement: the centralised EU infringement procedure”, *European Law Review*, 2006, p.10.

³⁹ *Sonito v. the Commission*, Case C-87/89, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989CJ0087:EN:HTML> (accessed on 29.03.2012).

⁴⁰ *Ibid.* para 3.

⁴¹ *Ibid.*

Another aspect of the issue concerning the accountability is the opportunity for the defence. In accordance with that right of the defence a Member State should have an opportunity to “submit observations, a reasonable time to prepare a “defence”, a date by which to comply, and so on”⁴². However these requirements do not actually have any influence on the Commission’s accountability. “They formalize and, if neglected, may seriously delay the proceedings but this does not essentially change their nature”⁴³. Accordingly, if a Member State does not recognize a decision of the Commission and accept it as inadmissible, a judicial phase of the enforcement procedure takes place. Besides, as it states above the right of the defence is connected with the right to access of the information which is restricted.

The article which regulates the second part of the enforcement procedure has been developed and changed more than the article which regulates the administrative stage. Let’s see what kind of changes has been established.

To begin with a second (judicial) stage of the infringement procedure was regulated by the article 171 of the EEC, which stated that “if the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice”⁴⁴. However there was a problem concerning the implementation of these judgments, because the ECJ could not enforce them as there were no any sanctions, which the ECJ could impose. In spite of that, the enforcement was successful, because of the pressure of other Member States.

⁴² Carol Harlow, “Accountability and law enforcement: the centralised EU infringement procedure”, *European Law Review*, 2006, p.10

⁴³ Ibid.

⁴⁴ Treaty Establishing the European Community, ROME, 25 March 1957, *available at* <http://www.hri.org/docs/Rome57/Part5Title1.html#Art171> (accessed on 29.03.2012).

It is interesting to notice that even under the article 171 the ECJ did not always agree with the Commission as it was in a case *Commission v. Kingdom of Belgium*, where the Commission stated that the Belgium created the conditions which were in conflict with the Directive”⁴⁵. The European Court of Justice indicated that if Belgium proves that such a policy reaches an aim of the social policy, the fact that the system favours to more male workers cannot be considered as a violation of the Directive⁴⁶.

Thus we can say that the Commission in spite of its main role in the enforcement procedure does not have a right to take a final decision and, accordingly, the Member States can use their right of defence within a judicial stage of the enforcement procedure which finishes the procedure.

However, in accordance with new amendments, made by the Maastricht Treaty (TEU), the article 228(2) (ex 171) states that: “if the Court of Justice finds that the member state concerned has not complied with its judgment it may impose a lump sum or penalty payment on it”⁴⁷. However, it is important to notice that, in accordance with the article, sanctions can be imposed only in the case if a Member State failed to comply with a previous judgment of the ECJ.

These changes which were established “show a shift from a diplomatic approach in the preliminary stages in the article 226 procedure, to a legal framework. It also suggests a shift

⁴⁵ *Commission v. Kingdom of Belgium*, Case C-229/89, 7 May 1991, para 24, *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61989J0229&lg=en (accessed on 29.03.2012).

⁴⁶ *Ibid.* para 10.

⁴⁷ Treaty of Amsterdam amending the Treaty on European Union, Official Journal C 340, 10 November 1997, *available at* <http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078> (accessed on 29.03.2012).

from the intergovernmental approach, where breach of obligations could be negotiated, to a supernatural one, in which the need to enforce Union law takes priority”⁴⁸.

1.3 THE ENFORCEMENT PROCEDURE WHICH IS INITIATED BY ONE MEMBER STATE AGAINST ANOTHER MEMBER STATE

In accordance with provisions of the Treaty the enforcement procedure can be initiated not just by the Commission but also by one of the Member States. There is a special article in the Treaty which regulates that question, that article is the article 259 TFEU⁴⁹. 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.”⁵⁰

Thus, accordingly to the article 259 TFEU (ex 170 EEC, ex 227 TEC), a Member State should firstly to take a case before the Commission which should consider the observations of

⁴⁸ Josephine Steiner and Lorna Woods, “EU law”, tenth edition, Oxford University Press, 2009, p 272.

⁴⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal, c 83, volume 53, 30 march 2010, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF> (accessed on 29.03.2012).

⁵⁰ Ibid.

both sides and then to issue a reason opinion within three months, otherwise, if the Commission does not issue any opinions, this Member State can bring an action before the ECJ. “It has been suggested that since article 227(1) gives member state a general right to bring proceedings, the issuing of a reasoned opinion cannot preclude the complainant state from bringing proceedings before the Court”⁵¹.

Main difference between the article 259 and the 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 seem to prefer to have the Commission enforce EU law and thus rarely utilize Article 170”⁵². The Member States prefer to solve issues through the Commission which is presented as some kind of a representative of the Member States in such questions. Accordingly, there are no many cases when one Member State initiated the infringement procedure against another Member State. In this way let’s see some of such cases.

One of them is a case French Republic v. the United Kingdom⁵³, where the France takes action, in accordance with the article 170 EC, against the United Kingdom. The action was based on a violation of the Regulation’s obligations, which required a Member State to notify another Member State about any changes concerning fishing zones. Such notification should be done before entry into force of new rules. Accordingly, France alleged that the United Kingdom arrested a French trawler, before notifying the France about new rules. In that situation, the ECJ stated that “it follows from the foregoing that, by not previously notifying

⁵¹ Josephine Steiner and Lorna Woods, “EU law”, tenth edition, Oxford University Press, 2009, p 272.

⁵² Lisa Borgfeld White, “The enforcement of European Union law: the role of the European Court of Justice and the Court’s latest challenge”, Houston Journal of International Law, 1996.

⁵³ French Republic v. United Kingdom, Case C-141/78, 1979 E.C.R. 2923, *available at* <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130d56c899b1f47f044748eafad5b83afc024.e34KaxiLc3eQc40LaxqMbN4Oa38Oe0?text=&docid=90056&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=64627> (accessed on 29.03.2012).

the other Member States and the Commission of the measure adopted and seeking the approval of the Commission, the United Kingdom has failed to fulfil its obligations under Article 5 of the EEC Treaty, Annex VI to The Hague Resolution and Articles 2 and 3 of Regulation No 101/76”⁵⁴. Thus, the ECJ held that the UK was in a failure to comply with EU obligations. There is also another case *Spain v. UK* about the voting rights of citizens of Gibraltar⁵⁵, where one Member State initiated the enforcement procedure against another Member State.

1.4 PROPOSALS OF THE COMMISSION

In order to solve some of the issues such as an issue of accountability and transparency the Commission has started to issue Communications, where the Commission has proposed suggestions concerning improvements of the infringement procedure. For example, the Commission has outlined that the procedure should be correspond to the criteria of “the ‘good governance’ such as openness, participation, effectiveness, coherence and accountability”⁵⁶.

So the Commission has suggested the proposals through the Communications. In 2002 the Commission issued the Communication, where it clarifies which questions are in any case starts the enforcement procedure. It is supposed to make the enforcement procedure more efficient and more transparent. The Commission stated that “it would bring proceedings against infringements effectively and fairly by applying priority criteria reflecting the

⁵⁴ Ibid. para 12.

⁵⁵ *Kingdom of Spain v. United Kingdom*, Case C-145/04, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0145:EN:HTML> (accessed on 29.03.2012).

⁵⁶ Melanie Smith, “Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process”, *European Law Review*, 2008, p4.

seriousness of the potential or known failure to comply with the legislation”⁵⁷. In accordance with that there are three areas such as “undermining the foundations of EU law, undermine the smooth functioning of the Community legal system, and the failure to transpose or the incorrect transposal of directives”⁵⁸. The Communication explains that “when an infringement meets one of these three priority categories, Art.226 EC proceedings will be, commenced immediately, unless the situation can be remedied more rapidly by other means”⁵⁹.

A new Communication was issued in the 2007, where the Commission stated that the enforcement procedure should be improved so that it will “resolve identified infringements more quickly, while enhancing transparency”⁶⁰. In this way the Commission proposed “four main areas in which the Commission sees scope for improvement:

- (1) prevention: increased attention to implementation throughout the policy cycle
- (2) efficient and effective response: improved information exchange and problem-solving;
- (3) improving working methods: prioritisation and acceleration in infringements management;
- (4) enhancing dialogue and transparency: between the European institutions and improving information for the public”⁶¹.

⁵⁷ Commission Communication, “Better monitoring of the application of Community law”, 16.5.2003, COM(2002)725 final/4 P.11, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0725:FIN:en:PDF> (accessed on 29.03.2012).

⁵⁸ Ibid.

⁵⁹ Melanie Smith, “Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process”, *European Law Review*, 2008, p4.

⁶⁰ Communication from the Commission “a Europe of results – applying Community law”, Brussels, 5.9.2007, COM(2007) 502 final, page 2, *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2007:0502\(01\):FIN:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2007:0502(01):FIN:EN:PDF) (accessed on 29.03.2012).

⁶¹ Ibid. page 5.

Within these areas of improvements in 2008 the Commission launched a project “a pilot scheme”, where 15 Member States participated at the first year and after this year all Member States could participate. The aims of that “pilot scheme” were “to provide more rapid answers to citizens and businesses and solutions to problems, including correction of infringements. All Member States need to make a maximum effort, first, to search for solutions to complaints in compliance with Community law and, second, to respect short deadlines in dealing with all issues arising. This will require strong political support and the dedication of sufficient resources by Commission and Member States”⁶².

Another Commission’s suggestion is the ‘prioritization’ and ‘acceleration’. The aim of the prioritization is decreasing loading of the Commission and as a result to manage a case faster and more efficiently. Prioritization means that “some cases will be dealt with by the Commission more immediately and more intensively than others. Priority should be attached to those infringements which present the greatest risks, widespread impact for citizens and businesses and the most persistent infringements confirmed by the Court”⁶³.

Acceleration of the enforcement procedure assumes that an administrative stage as well as a judicial stage should take less time than it takes now⁶⁴.

Despite these suggestions, which are aimed to improve the enforcement procedure there is an opinion that the new ‘pilot scheme’ can make a ‘normal’ article 226 EC procedure even longer than it was before any changes, “because if the Member State does not resolve the complaint to the Commission's satisfaction, the regular article 226 EC process may be

⁶² Ibid. page 8.

⁶³ Ibid. page 9.

⁶⁴ Ibid.

initiated (i.e. investigation, negotiation, formal letter, etc)”⁶⁵. And accordingly it takes in addition to that the same period of time which is planning to decrease.

Taking everything into consideration we see that the Commission undertakes action to pursue improvements of the procedure in order to make it in accordance with the principles of “accountability, proportionality, transparency and legal certainty”⁶⁶.

⁶⁵ Melanie Smith, “Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process”, *European Law Review*, 2008, p11.

⁶⁶ Communication from the Commission, “European Governance: Better lawmaking”, Brussels, 5.6.2002 COM(2002) 275 final, p. 6, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0275:FIN:EN:PDF> (accessed on 29.03.2012).

CHAPTER 2 – THE ENFORCEMENT PROCEDURE UNDER ARTICLE 260 TFEU

The European Court of Justice did not have such possibilities in enforcement procedure in accordance with the article 171 of the EEC as it has now due to amendments to the Treaties and a practice of the ECJ. For example, accordingly to the article 171 EEC the competence of the ECJ extended only to require a “Member State that was in breach of its Community obligations to take the ‘necessary measures’ to comply with the Court's original Article 169 EEC judgment”⁶⁷.

As it was mentioned, a significant role of improvement of the judicial stage was played by the ECJ through its decisions. One of such ECJ's decisions is a decision of the Commission v. Hellenic Republic case about a period of time within which a member state should comply with a judgment. The ECJ stated that: “although Article 228 EC does not specify the period within which a judgment of the Court establishing that a Member State has failed to fulfil its obligations must be complied with, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible”⁶⁸. Accordingly, it did not establish certain limits, however it limited that time.

The next step was amendments to the article 228 (ex 171 EEC) of the Treaty on European Union, which created some changes. They establish additional power for the ECJ such as an opportunity to impose sanctions for non-compliance with the EU obligations. So, in

⁶⁷Treaty Establishing the European Community, ROME, 25 March 1957, *available at* <http://www.hri.org/docs/Rome57/Part5Title1.html#Art171> (accessed on 29.03.2012).

⁶⁸ Commission of the European Communities v. Hellenic Republic, Case C-109/08, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0109:EN:HTML> (accessed on 29.03.2012).

accordance with the amendment, the article 228 (ex 171 EEC) states: “if the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it”⁶⁹.

New amendments to the enforcement procedure have established more efficient judicial stage and increased the ECJ’s role. That is affirmed by the Commission in the Memorandum 1996, where it stated that “the basic object of the whole infringement procedure is to secure compliance as rapidly as possible, and the Commission considers that a penalty payment is the most appropriate instrument for achieving it”⁷⁰.

Later when the Lisbon Treaty entered into force the article 228 of the TEU was changed to the article 260 of the TFEU, and some interesting changes have been made. Thus, the article 260 of the TFEU⁷¹ was added with section 3, which stated: “When the Commission brings a case before the Court 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”⁷².

⁶⁹ Treaty of Amsterdam amending the Treaty on European Union, Official Journal C 340, 10 November 1997, available at <http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078> (accessed on 29.03.2012).

⁷⁰ Memorandum on Applying Article 171 of the EC Treaty, Official Journal C 242, 21/08/1996 P. 0006 – 0008, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0821\(03\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0821(03):EN:HTML) (accessed on 29.03.2012).

⁷¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union”, Official Journal, c 83, volume 53, 30 march 2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF> (accessed on 29.03.2012).

⁷² Ibid.

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 a right of the Member States for the defence.

2.1 LUMP SUM OR PENALTY PAYMENT

The article 260 of the TFEU (ex 171 EEC, 228(2) TEU) states that the ECJ “may impose a lump sum or penalty payment”⁷³. Such a definition causes some disputes whether the Court can impose a penalty payment and lump sum simultaneously or it can impose just one of them? Besides, there is a question concerning a role of the Commission in the process of imposing sanctions, as the article states that the Commission “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”⁷⁴ to the ECJ. The question is whether this specification is mandatory for the Court or not?

There is no certain answer to a question about the role of the Commission in imposing sanctions. One of opinions states that, taking into account that the Commission “shall specify the amount of the lump sum or the penalty payment to be paid”⁷⁵, “the word ‘shall’ is mandatory in nature”⁷⁶. In this way, the Court must follow the specification of the Commission and impose the same kind and an amount of sanctions as the Commission specified.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Maria A. Theodossiou, “An analysis of the recent response of the Community to non compliance with Court of Justice judgments: Article 228(2) E.C”, *European Law Review*, 2002, p. 4.

However, the Advocate General Fennelly does not agree that the Court is bound by the Commission opinion. He states that “there is nothing in Article 228(2) to restrict the discretion of the Court or limit it. The Commission's proposal is a procedural requirement under Article 228”⁷⁷. Accordingly, a specification of the Commission should be considered as a recommendation and not as something mandatory for the ECJ.

Let's see some cases where the ECJ indicates its position about that. Thus, in case *Commission v. Greece*⁷⁸ and *Commission v. Spain*⁷⁹ the Court held that “it should be stressed that these suggestions of the Commission cannot bind the Court”⁸⁰. The same position of the Court we can find in another case the *Commission v. France*, where the ECJ agreed with the Commission that France failed to comply with the earlier judgment. The Commission in its specification indicated to impose only the penalty. However, the ECJ established in the decision that the Court “is not bound by the commission's suggestions in respect if fines”⁸¹.

Thus, we can say that the ECJ affirmed that the Court's discretionary concerning the imposing sanctions within the enforcement procedure does not bound by the Commission's specification in accordance with provisions of the Treaty.

⁷⁷ Opinion of Mr Advocate General Fennelly delivered on 9 December 1999. - *Commission of the European Communities v Hellenic Republic*. Case C-197/98, Para 28, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998C0197:EN:HTML> (accessed on 29.03.2012).

⁷⁸ *Commission v. Greece*, case C-387/97, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0387:EN:HTML> (accessed on 29.03.2012).

⁷⁹ *Commission v. Spain*, case C-278/01, para. 41, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0278:EN:HTML>, (accessed on 29.03.2012).

⁸⁰ *Commission v. Greece* case C-387/97, para. 89, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0387:EN:HTML>

⁸¹ *The Commission v. France* case C-304/02, para. 86, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0304:EN:HTML> (accessed on 29.03.2012).

Next issue is a question about the imposing of sanctions, because the article, which states that the Court “may impose a lump sum or penalty payment”⁸², leads scholars to dispute whether the Court can impose a lump sum and a penalty payment or just one of them?

In order to answer to that question some researchers look at a linguistic perspective and indicate that “the use of the word ‘or’ can either mean alternatively or cumulatively depending on the context in which it is used”⁸³. Accordingly, the imposing both a penalty and lump sum are allowed in some circumstances. In certain cases, a combination of a lump sum and a penalty payment is indeed the best means to achieve the objective”⁸⁴.

Besides, if we check the decisions of the ECJ we will notice that the Court also thinks that ‘or’ does not mean alternative and imposes both sanctions together. In accordance with a case *Commission v. France*, the ECJ held that “As the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments have submitted, that conjunction may, linguistically, have an alternative or a cumulative sense and must therefore be read in the context in which it is used the conjunction ‘or’ in Article 228(2) EC. In light of the objective pursued by Article 228 EC, the conjunction ‘or’ in Article 228(2) EC must be understood as being used in a cumulative sense”⁸⁵ and accordingly both kinds of sanctions the ECJ considers as applicable simultaneously. In this way, the ECJ indicated when these kinds of sanctions can be used by specifying aims which pursues these kinds of sanctions.

⁸² Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal, c 83, volume 53, 30 march 2010, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF> (accessed on 29.03.2012).

⁸³ Annette Schrauwen, “Fishery, waste management and persistent and general failure to fulfil control obligations: the role of lump sums and penalty payments in enforcement actions under Community law”, *Journal of Environmental Law*, Oxford University Press, 2006, p 9.

⁸⁴ *Ibid.* page 7.

⁸⁵ *Commission v. France*, Case C-304/02, para.83, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0304:EN:HTML> (accessed on 29.03.2012).

Accordingly as the ECJ established “the lump sum would reflect the failure of the member state to comply with the earlier judgment (particularly where there has been a long delay), including assessment of the effects on public and private interests which were undermined by a failure of a Member State, whereas the penalty payment would act as an incentive to the member state to bring the infringement to an end as soon as possible”⁸⁶. Lump sum is used “to make sure that the Member State complies with a former judgment, and a means to make sure that similar breaches won't happen anymore”⁸⁷.

However, not all Member States agreed with the position of the ECJ and some other Member States and stated that “exercise by the Court of such a discretion would infringe the principles of legal certainty, predictability, transparency and equal treatment. At the procedural level, the aforementioned governments stress that so extensive a power is incompatible with the general principle of civil procedure common to all the Member States that courts cannot go beyond the parties’ claims”⁸⁸.

As we see there is no certain opinion, however the ECJ and the Commission has decided that ‘or’ should be interpreted in dependence on a context as cumulative or alternative.

At the end of a section about sanctions it seems reasonable to describe shortly criterions which were proposed by the Commission to the ECJ concerning the imposition of sanctions. The Commission indicated criterions two times in the Memorandum 1996 where it stated that “the amount must be calculated on the basis of three fundamental criteria:

⁸⁶ Ibid. para 81.

⁸⁷ Annette Schrauwen, “Fishery, waste management and persistent and general failure to fulfil control obligations: the role of lump sums and penalty payments in enforcement actions under Community law”, *Journal of Environmental Law*, Oxford University Press, 2006, p 7.

⁸⁸ *Commission v. France Case C-304/02*, Para88, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0304:EN:HTML> (accessed on 29.03.2012).

- the seriousness of the infringement,
- its duration,
- the need to ensure that the penalty itself is a deterrent to further infringements”⁸⁹.

In 1997 the Commission issued another guideline concerning sanctions. In accordance with Method of calculating the penalty payments the Commission indicated that sanctions should be imposed on the basis of the duration of the infringement, the level of seriousness and on the ability of the Member State to pay⁹⁰. This change that a ability of a Member State to pay should be taken into account says that the Commission tries to improve the procedure in the light of the principles of legitimacy, justice and transparency.

2.2 RIGHT OF THE MEMBER STATES FOR DEFENCE

There is a problem that some Member States consider that their right for defence can be undermined in a case if the court can impose sanctions, which are different in a comparison with the sanctions specified by the Commission. Besides, it can undermine such principles as the principle of equal treatment and legal certainty⁹¹. Accordingly in that case it would be more difficult for the Member States to protect themselves due to lack of transparency and legal certainty. In this way, the Member States argue that “although the Court is not formally bound by a proposal of the Commission, in exercising its discretion under Article 228(2) EC

⁸⁹ Memorandum on applying Article 171 of the EC treaty, *Official Journal* C 242 , 21/08/1996 P. 0006 - 0008, Para 5, *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0821\(03\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0821(03):EN:HTML) (accessed on 29.03.2012).

⁹⁰ Method of calculating the penalty payments provided for pursuant to article 171 of the EC Treaty, *Official Journal* C 063 , 28/02/1997 P. 0002 – 0004, *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y0228\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y0228(01):EN:HTML) (accessed on 29.03.2012).

⁹¹ Opinion of Advocate General Geelhoed 18 November 2004 Para18, case C-304/02, *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CC0304\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CC0304(01):EN:HTML) (accessed on 29.03.2012).

it must respect the rights of the defence as well as the principles of proportionality, foreseeability and legal certainty”⁹².

However there are also opinions concerning an opportunity of the ECJ to impose sanctions. Thus, the Advocate General Fennelly stated that “if the law gives the Commission all power to determine an amount and a kind of sanctions it eventually eliminate a right of the defence, because in this case the Member States could not be able to use their right of the defence in order to change the sanctions”⁹³. Accordingly in this way it is more reasonable to leave a right for the Court to impose a sanction independently and by doing that to guarantee the right of the defence.

At the end it is important to mention shortly case Commission v. Hellenic Republic, where the Greece blocked the Macedonia and by doing that caused a humanitarian issue in Macedonia. In that case the ECJ indicates that the enforcement procedure for a failure to comply with EU obligations concerns the internal affairs and common market, and accordingly cannot be extended to the international relations⁹⁴. Besides, the Advocate General indicated that Greece's actions are considered as political actions and accordingly there are no judicial tools that allow the court to analyze that problem⁹⁵.

Thus, the political questions and issues which are not related to internal affairs in particular to common market of the EU are not within the competence of the enforcement procedure.

⁹² Ibid. para 20.

⁹³ Opinion of Advocate General Fennelly, Case C-197/98 Commission v. Greece, Para 32, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998C0197:EN:HTML> (accessed on 29.03.2012).

⁹⁴ Opinion of Advocate General Jacobs 6 April 1995, case C-120/94, Para 72, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CC0120:EN:PDF> (accessed on 29.03.2012).

⁹⁵ Ibid. para 65.

CHAPTER 3 – COMPARISON OF THE ENFORCEMENT PROCEDURE IN THE USA AND IN THE EU

The chapter is devoted to analyzing of the enforcement procedure in the EU and in the USA. From the first view it sounds strange “comparison of the enforcement procedure” in the federal state and in the union which is not a federal state, not an international organization and which status is arguable. However, for the purposes of this chapter in a wide sense we can consider the EU as a federal state, as it has the same major elements, which we need for comparison, such as the supremacy of the main EU organs, the supremacy of the European Court of Justice, the unique competence of the EU in relation to the Member States.

At the same time the states of the USA have a unique right as a state sovereign immunity⁹⁶ which lets them not to implement some federal laws in some way it makes them similar to the Member States of the EU, where the unique competence of the EU covers only some areas when others are under sovereign power of the Member States.

The enforcement procedure of the USA is different from the enforcement procedure in the EU and it seems logical. However as you will see it is different in unusual way. That sounds strange and therefore it is interesting to analyze it. Moreover it can help to understand better the enforcement procedure of the EU which is the main aim of this paper.

In this chapter we will analyze firstly the enforcement procedure of the USA, then we will try to compare it with the procedure of the EU and after that we will try to make some

⁹⁶Daniel J. Meltzer, “Member state liability in Europe and the United States”, International Journal of Constitutional Law, 2006 P. 4.

conclusions. The chapter is based on the article of the Daniel J. Meltzer “Member state liability in Europe and the United States”⁹⁷.

3.1 THE USA APPROACH TO THE ENFORCEMENT PROCEDURE

At the beginning it is interesting to mention that the USA, which is a federal state with a strong centralized federal government, has less strict and punitive enforcement procedure than the EU has, when the EU as a system is much weaker and less centralized in comparison with the USA.

To begin with it is necessary to say that the American approach has developed since the end of the 18th century and was in dependence on the historical circumstances of a certain period of the history as well as the law schools of the USA often prefers to explain some things in the context of certain facts which take place at the certain period of time⁹⁸. Accordingly, we will see that the enforcement procedure of the USA has changed since the end of the 18th century. One of the main reasons why the USA has such an enforcement procedure is the existence of the principle of state sovereign immunity.

The principle of state sovereign immunity do not establish directly in the USA Constitution, however the eleventh amendment states that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”⁹⁹. However, the Supreme Court in a case *Chisholm v. Georgia* in 1793 stated that a

⁹⁷ Ibid.

⁹⁸ Daniel J. Meltzer, “Member state liability in Europe and the United States”, *International Journal of Constitutional Law*, 2006 p. 10.

⁹⁹ The Constitution of the USA, available at <http://constitutionus.com/#x11> (accessed on 29.03.2012).

citizen of South Carolina can take a suit against the State of Georgia¹⁰⁰. Such a decision was unexpected taking into account the eleventh amendment. However, another decision of the Supreme Court clarified a situation and stated in a case *Hans v. Louisiana* that “a federal court could not entertain a suit brought by a citizen against his own State”¹⁰¹. Accordingly, as we can see the establishment of the right of the state sovereign immunity was not easy and has been developed through case of the Supreme Court.

The Congress has limited power in relation to the States, however there are some areas where the Congress has a supremacy. As Daniel J. Meltzer indicates “the bulk of federal legislation regulating the states - for example, fair-labor-standards regulation, prohibitions on employment discrimination on the basis of age or disability, bans on infringing patents, copyrights, or trademarks - cannot be upheld as an exercise of congressional power under section five”¹⁰². At the same time the Congress can overcome the states sovereign immunity when legislates within the area of the interstate commerce. However there are some limitations to the right of the interstate commerce. The Congress cannot regulate intrastate commerce¹⁰³, however when “the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation”¹⁰⁴.

Another interesting thing of limitation of the state sovereign immunity is a special structure of a state with creating subdivisions such as cities and countries¹⁰⁵. Accordingly “the

¹⁰⁰ *Chisholm v. Georgia*, 2 Dall. 419 (1793).

¹⁰¹ *HAN v. LOUISIANA*, 134 U.S. 1 (1890) , No. 4. Supreme Court of United States.

¹⁰² Daniel J. Meltzer, “Member state liability in Europe and the United States”, *International Journal of Constitutional Law*, 2006.

¹⁰³ *United States v. Lopez* 115 S. Ct.1624 (1995) P.155, Geoffrey R. Stone, “Constitutional law”, third edition, Aspen law&Business.

¹⁰⁴ *Ibid.*

¹⁰⁵ Daniel J. Meltzer, “Member state liability in Europe and the United States”, *International Journal of Constitutional Law*, 2006 p. 4.

Congress can make the city of Chicago, but not the state of Illinois, liable in damages for copyright infringement or age discrimination”¹⁰⁶. In contrast to the EU where the Member States are responsible for all violations of the EU obligations independently by whom they are committed by local authorities, by centralized authorities or by independent institutions. As it was stated in case *Commission v. Belgium*, where the ECJ established that “the liability of a Member State under article 169 arises whatever the agency of the state whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution”¹⁰⁷. Accordingly a Member State is responsible for any actions, which are committed by any institutions which are operated within the Member State.

Besides, there is a difference between these two systems that the USA has a system of the low federal courts, which can hear cases concerning private suits against state officials for the violation of the federal law¹⁰⁸. Moreover, the judges of these courts are under control of the federal government and accordingly they are independent from the local state officials¹⁰⁹. Furthermore, the Supreme Court has a power to cancel decisions of the state’s courts. Such a system of controlling creates an understanding that the failure to comply with the federal rules can cause the reviewing of the judgment by the Supreme Court. Accordingly local judges are afraid to take decisions, which are in contradiction with federal laws and which accordingly can be overruled. In comparison with the EU where the role of the federal courts

¹⁰⁶ Ibid.

¹⁰⁷ *Commission v. the Kingdom of Belgium*, Case 77/69, 5 May 1970, para. 15, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0077&lg=en (accessed on 29.03.2012).

¹⁰⁸ Daniel J. Meltzer, “Member state liability in Europe and the United States”, *International Journal of Constitutional Law*, 2006 p. 13.

¹⁰⁹ Ibid.

is executed by the local courts of the Member States, which should interpret the national law as far as possible in the light of the directives in order to comply with the EU obligations¹¹⁰.

Apart from this, the state sovereign immunity is undermined due to a special program of federal spending which is a conditional and can depend on the efficient implementation of the federal law¹¹¹. It is possible due to big opportunities of the USA federal budget, which is “about 20 percent of US GDP, when the EU's budget is capped at 1.24 percent of the Gross Domestic Income of EU nations”¹¹². As a result the federal authorities of the USA can require from the local state authorities an adequate implementation and compliance with the federal law in order to be able to receive some investments and funds¹¹³.

Besides, in a case if a state of the USA has failed to comply with the USA federal law the responsibility usually lies on the state officials who failed to implement these legal norms and not on the states themselves¹¹⁴. Accordingly the defenders at courts are not the states but the state's officials. It is common for the Anglo - American approach, where it has permitted that “private parties to sue government officials for specific relief and for damages (to be paid from the personal assets of the officials)”¹¹⁵. In contrast to the EU where for non-compliance with EU obligations a Member State takes a full responsibility and pays fines which are imposed by the European Court of Justice.

Taking everything into account we can say that the enforcement procedure of the USA is very different in comparison with the enforcement procedure of the EU. And as it was said

¹¹⁰ *Marleasing SA v. La Comercial Internacional SA*, Case C-106/89, Para 8, *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61989J0106&lg=en (accessed on 29.03.2012).

¹¹¹ Daniel J. Meltzer, “Member state liability in Europe and the United States”, *International Journal of Constitutional Law*, 2006 p. 14.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

above the enforcement procedure in the EU is much stricter and more punitive than in the USA in spite of the fact the USA is a federal state with a strong federal government. That explains by a special history through which the states of the USA have passed as well as by some particularities of the EU, which is not a state and which does not have a long history, but which should provide efficient functioning of its system through immediate and correct implementation of the EU obligations by all Member States on the basis of legitimacy, transparency and legal certainty¹¹⁶.

¹¹⁶ Communication from the Commission, "European Governance: Better lawmaking", Brussels, 5.6.2002 COM(2002) 275 final, p. 6, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0275:FIN:EN:PDF> (accessed on 29.03.2012).

CONCLUSION

The enforcement procedure is very important instrument of the EU, which provides efficiency and stability of the EU as a system. The importance of that institute is undoubtedly and not just for the EU but also for any system from a state and until local organization, otherwise any system will not be able to exist and pursue its aims. However, the importance of the enforcement increases significantly especially in a case of the EU due to a difficult institutional structure. It is clear for the Member States and for the Commission which develop that institute constantly by trying to take into account interests of all Member States.

A significant part of that paper was devoted to the Commission and it is logical if we analyze the discretion of the Commission and last proposals of it concerning the procedure. It has a significant competence within the enforcement procedure, which is so-called “standart enforcement procedure as opposed to the specific procedures such as competition or state aids”¹¹⁷. Besides, the Commission can decide not only to initiate the procedure, but also to initiate negotiations, if the Commission considers that it is enough in order to achieve its purposes.

That shows an indispensable role of the Commission, which can stop any enforcement procedures at the beginning at the stage of negotiations, however, as it was mentioned, sometimes for the Commission it is better to continue the procedure and declare a failure to comply with the EU obligations. Besides, the important role of the Commission confirms by

¹¹⁷Carol Harlow, “Accountability and law enforcement: the centralised EU infringement procedure”, *European Law Review*, 2006, p.2.

the quite rarely using of “the article 227”¹¹⁸. That explains an opinion that the conflict and “direct clashes”¹¹⁹ between states can cause negative consequences for the EU.

As it was mentioned in the introduction the aim of that paper is to identify positive changes in the enforcement procedure as well as to highlight some areas which need to be improved in accordance with the proposals of the Commission¹²⁰.

As a result of that paper we can identify such improvements as an opportunity to impose sanctions: a penalty or/and a lump sum. Besides, the ECJ has developed criteria for imposing sanctions, in order to exclude any accusations that sanctions were not fairly imposed and accordingly to make the enforcement procedure more transparent, as well as there are clarified the purposes which are pursued by a penalty payment or a lump sum. Moreover, the question of the discretion of the Commission and of the ECJ concerning of the imposition of sanctions is clarified due to the ECJ. Apart from this there is no anymore question about whether the ECJ can impose a penalty payment and lump sum simultaneously.

However, it is necessary to say that the enforcement procedure of the EU is not perfect, and there are many questions which should be decided. Of course, there are some disadvantages, which are stipulated by the institutionalized system of the EU, but that is normal taking into consideration that the EU and its enforcement procedure relatively very young.

¹¹⁸ Treaty of Amsterdam amending the Treaty on European Union, Official Journal C 340, 10 November 1997, available at <http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078> (accessed on 29.03.2012).

¹¹⁹ Carol Harlow, “Accountability and law enforcement: the centralised EU infringement procedure”, European Law Review, 2006, p.4.

¹²⁰ Communication from the Commission “a Europe of results – applying Community law”, Brussels, 5.9.2007, COM(2007) 502 final, page 5, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2007:0502\(01\):FIN:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2007:0502(01):FIN:EN:PDF) (accessed on 29.03.2012).

There are still some questions which remained open such as for example status of sanctions, which is not determine as there is a question whether sanctions have “punitive character or not”¹²¹. Besides, there is a question of collection of fines, as Maria A. Theodossiou notices “the most troublesome aspect of the article is the lack of any mechanism for the collection of any fines imposed. In these cases it is likely that the Community will have to resort, as it has done in the past, to the negotiating table”¹²². Moreover, on the basis of the comparison of the enforcement procedures of the USA and of the EU it is possible to suggest for the EU to use some of the USA tools due to which “violations of the form found in Francovich are simply not at issue”¹²³ at USA. Among such tools Daniel J. Meltzer names the special federal budget system¹²⁴, as well as an opportunity to sue state officials in the federal courts by individuals¹²⁵, which can assist to decrease the pressure at the ECJ. Of course each system is unique and you cannot just transfer from one system to another, however it seems possible to make something similar taking into account its own particularities.

Taking everything into account we can say that the enforcement procedure in the EU is an indispensable element, which is necessary in order to provide efficient functioning of the EU through the implementation of the EU law in all member states equally and correctly. Accordingly, the Commission together with the Member States and with the ECJ has improved the system significantly and continues to do it in accordance with such principles as “accountability, proportionality, transparency and legal certainty”¹²⁶.

¹²¹ Maria A. Theodossiou, “An analysis of the recent response of the Community to non compliance with Court of Justice judgments: Article 228(2) E.C”, *European Law Review*, 2002, p.6.

¹²² *Ibid.* p.17.

¹²³ Daniel J. Meltzer, “Member state liability in Europe and the United States”, *International Journal of Constitutional Law*, Oxford University Press, 2006, p.14.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* p. 4.

¹²⁶ Communication from the Commission, “European Governance: Better lawmaking”, Brussels, 5.6.2002 COM(2002) 275 final, p. 6, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0275:FIN:EN:PDF> (accessed on 29.03.2012).

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