STATE VERSUS STATE: WHO APPLIES BETTER EU LAW?

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Abstract

Each Member State is responsible for the implementation of EU Law within its own legal system. Non-compliance means failure by a Member State to fulfil its obligations under EU Law. An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. In the history of European integration only six times one Member State has directly brought infringement proceedings against another State. Of the six cases, only four proceeded to judgment. The European Institutions and the Member States should continue to develop their work to ensure that EU law is correctly applied and implemented.

Keywords: *infringement procedure, member states, european commision, article 259 TFEU.*

1. Introduction

To ensure the application of EU law by Member States there were created mechanisms to enforce obligations of States under the Treaties. As stated in the Treaty on European Union, one of these mechanisms is the so-called infringement procedure.

Although the procedure is implemented mainly through art. 258 TFEU with the European Commission having an essential role, also the Member States may bring an action before the Court of Justice for a declaration that another Member State has failed to fulfil its obligations under EU law.

However, in the history of the European Union there were only 6 cases when a Member State has brought an action before the Court of Justice against another Member State. The aim, in both types of proceedings, is the correct application of EU law in order to ensure the functioning and sustainability of the European Union.

As we shall see in the following analysis, the procedure has some specific features, but also some important limitations. Both the Commission and ultimately the Court of Justice will decide wherever one state has failed to fulfil its obligations - *the defendant State* either one state had misinterpreted EU law - *the applicant State*.

2. The principle of sincere cooperation

European Union and the Member States have *mutual obligations*. 'In the EU the Council was established as an institution representing the interests of Member States in this international organization. Mutually, in the Member States, a duty of loyalty and good faith to fulfil the obligations arising from treaties was also established'.[1]

'The principle of sincere cooperation', as it is regulated in the article 4 (3) TEU, was considered by some authors *the international law principle of good faith in the execution of treaties*, established in article 26 of the Vienna Convention.[2]

Correlative to international law, in the European Union law Member States culpable behaviour may constitute in the following: *an action* (when European rules instituted obligation not to do) or *inaction or omission* (when European rules have instituted obligation to do).[3]

As it is appreciated in the literature 'the principle (*of sincere cooperation*) cannot be invoked autonomously, but only if the provisions of primary or secondary EU law had already established clearly defined obligations for Member States'.[4]

In an attempt to define what 'obligations' means, let it suffice to say that the breach must be in respect of a 'pre-existence, specific and precise' obligation and that, in essence it will refer to a breach of a Treaty provision, or a breach of binding secondary legislation or of a general principle of Union law.[5]

In these circumstances *the obligation of sincere cooperation* becomes a general obligation, incidental to others. The term *duty of loyalty* does not appear in the text of the treaty, but it is a creation of literature. Court of Justice is speaking of 'duty of solidarity', 'principle of loyal cooperation', 'duty of loyal cooperation and support'.[6]

This principle has a correspondent between the principles of international law, namely the 'duty of

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[1] Ioana E. Rusu, Gilbert Gornig, *Dreptul Uniunii Europene*, 3rd ed., Ed. C.H. Beck, București, 2009, p. 54.

[2] Claude Blumann, Louis Dubouis, *Droit institutionnel de l'Union européenne*, p. 65 apud Raluca Bercea, *Drept comunitar. Principii*, Ed. C.H. Beck, București, 2007, p. 84. According to article 26 (*Pacta sunt servanda*) of Vienna Convention on the Law of Treaties: '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*'.

[3] Nicoleta Diaconu, *Acțiunea în neîndeplinirea obligațiilor comunitare de către statele membre*, Revista Română de Drept Comunitar no. 2/2008, p. 55.

[4] Raluca Bercea, *Drept comunitar. Principii*, Ed. C.H. Beck, București, 2007, p. 86.

[5] On this matter see also Alina Kaczorowska, *European Union Law*, 2nd edition, 2010, Abingdon: Routledge, p. 390.

[6] Ioana E. Rusu, Gilbert Gornig, *Dreptul Uniunii Europene*, 3rd ed., Ed. C.H. Beck, București, 2009, p. 55 and case-law cited there.

states to cooperate' or 'principle of international cooperation'. In this respect, UNO Charter provided in article 1 paragraph 3, for a purpose 'achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

By contrast with the general rule under international law, EU law provides for an effective enforcement regime against Member State in breach of its Treaty obligations. The principal enforcement actions brought before the European Court are actions brought by either the Commission on behalf of EU, or by another Member State against a Member State that has failed to fulfil its Treaty obligations.

The question arises here about the moment when the Member States better respect the obligation of sincere cooperation: when they bring an action to the Court of Justice against another Member State in order to respect the EU Law or when they settle the dispute amicably? Regarding this question, we can argue that the principle of sincere cooperation under EU law may apply on three levels:

- 'sincere cooperation with European Union' (as an organization) in order to respect the EU law;
- 'sincere cooperation with the State that failed to fulfil its obligations'.
- 'sincere cooperation with the other Member States beside the State in breach'.

3. The evolution of the proceedings under articles 258 and 259 TFEU

Since the onset of the first European community (European Coal and Steel Community) the Member States wanted to create a supranational institution – the High Authority – to watch and to highlight the interests of the Community. To carry out its tasks, the authors of the original Treaties have established that the institutions created under the Treaties have own authority, thus guaranteeing their independence from Member States.[7]

Article 88 of the ECSC Treaty gave exclusive jurisdiction to the High Authority to initiate the action. High Authority was empowered to declare a failure by a State's obligations incumbent without prior recourse to the Court. Subsequently the state could bring the matter to the attention of the Court, that according to the wording of the treaty, 'shall have unlimited jurisdiction in such cases'.[8]

Later, The Rome Treaties introduced the possibility for the Member States, that in addition to the Commission, to initiate an action for failure to fulfil the obligations.[9] Adjustments to the Treaties till the present time did not affect the procedure itself as regulated for the first time in the ECSC Treaty. Small differences, as can be seen in the table below, are purely terminological and do not affect the procedure itself, especially as these occur only after the Lisbon Treaty.[10]

[7] See in this respect articles 8-19 of ESCS Treaty (Paris, 1951), articles 124-135 of EAEC Treaty and articles 155-163 of ECC Treaty (Rome, 1957).

[8] See also Nicoleta Diaconu, *Dreptul Uniunii Europene. Partea Generală*, Ed. Lumina Lex, Bucureşti, 2007, p. 300.

[9] Referral right was recognized also to the individuals that can lodge complaints to the Court. The Maastricht Treaty has introduced the possibility of initiating an action also for the European Central Bank against national central banks.

[10] **Article 170 of the EEC Treaty**: A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, 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.

Article 227 of the EC Treaty (former article 170 EEC): A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, 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.

Article 259 TFEU (former article 227 EC): 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.

4. State versus state: article 259 TFEU

A Member State may bring an action against another Member State if considers that the latter has not fulfilled obligations assumed under this Treaty.

The procedure provided by article 259 TFEU is complementary to that of article 258 TFEU, proving certain particularities but also similarities. If the procedure based on article 258 TFEU provides exclusive competence to initiate action to the European Commission, the provision of article 259 reserve this competence only to Member States (any of the 28 EU Member States).

Member States cannot directly address the Court, but must first notify the Commission. The Commission then delivers a reasoned opinion after having heard the arguments of the Member States concerned, thus ensuring *the adversarial principle*.[11]

Delivering the reasoned opinion is not mandatory but requires the applicant Member State to wait three months before applying to the Court of Justice.[12] This period of three months has the nature of a *dilatory term*, within the Treaty stops the State to address to the Court.[13]

In terms of initiating the action, some authors[14] consider the infringement procedure from two perspectives: *bilateral* and *multilateral*.

- Article 258 TFEU: bilateral perspective
  Commission is exclusively competent to initiate
- Article 259 TFEU: bilateral perspective
  The initiative is solely up to the Member State
- Article 259 TFEU: multilateral perspective
  Member States must first bring the matter before the Commission

Sometimes, the Commission decides to take over the action and bring it before the Court of Justice of the European Communities.[15]

There are cases when the Commission encouraged the two States to resolve the dispute amicably and declined to issue a reasoned opinion 'given the sensibility of the underlying bilateral issue', but the Court ultimately upheld the conduct of the UK and found against Spain.[16]

In these circumstances it can be assumed that the multilateral perspective implies either closing the procedure laid down in article 259 TFEU by the Commission taking over the action,[17] either to hinder or even inhibit the initiation of the Member States.

The conditions required for an action to be admissible are:

1. must be based on an alleged breach of obligations deriving from the treaties;

2. conduct (action or inaction) be attributed to a Member State;

3. be brought to the Court over 3 months from the notification of the Commission.

As the Member States have *locus standi* in the procedure laid down in article 259 TFEU, they should not demonstrate an interest in initiating an action. However, Member States that have initiated an action so far have shown particular interest in each case.

Contentious procedure is similar for both situations, the proceedings before ECJ scrolling down in 2 phases: written (written pleadings) and oral (oral pleadings).

1. Written stage

a. *Application initiating proceedings* – procedural document initiating proceedings;

b. *Defence* – reply of defendant state to the application;

c. *Reply* – reply of applicant state to the defence;

d. *Rejoinder* – reply of defendant state to the reply;

e. *Application for leave to intervene* – if the case.

2. Oral stage

ECJ may decide to hold an oral stage to hear the parties about the pleadings lodged in the written stage. The main purpose of the hearing is to allow the parties and other interested persons to reply to the arguments put forward by other participants in their written pleadings. The oral phase can be held also by request of any interested party.

5. Limitations of the procedure provided by art. 259 TFEU

As regulated in the international law, Member States are entitled to invoke the responsibility of

[11] Given the sensitivity of the subject, the Commission may refrain from delivering a reasoned opinion within the meaning of article 259 TFEU, and may invite the parties to find an amicable solution (see, in this regard, case Gibraltar, C-145/04, *Spain v. United Kingdom*). Sometimes Commission decides to take over the action, as it did in case C-232/78, *Commission v. France* (action brought by Ireland against France) and C-1/00, *Commission v. France* (action brought by the United Kingdon against France).

[12] See case C-388/95, *Belgium v. Spain*, where Commission didn't delivered a reasoned opinion in time.

[13] Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities (http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf).

[14] Hans Smit, Peter Hherzog, Christian Campbell, Gudrun Zagel, Smit & Herzog on The Law of the European Union, Lexis Nexis, 2011, 259-2.

[15] See for example Case C-1/00, *Commission v. France*, judgement of 1 December 2001.

[16] Case C-145/04, *Spain v United Kingdom*, paragraph 32: 'The Commission considers, following an in-depth analysis of the Spanish complaint and an oral hearing held on 1 October, that the UK has organised the extension of voting rights to residents in Gibraltar within the margin of discretion presently given to Member States by EU law. However, given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 227 [EC] and invites the parties to find an amicable solution'.

[17] In this regard we mention the action brought by the Commission in response to France's complaint against the Netherlands, case 169-84, *Cofaz c. Comisia*. See also case C-1/00, *Commission v. France*, judgement of 1 December 2001.

another Member State pursuant to article 259.[18] Even if the mechanism provided by article 258 TFEU is considered more advanced than the existing system in international law because of two specific elements: **1.** existence of a particular institution - European Commission - designated to protect and promote the interests of the European Union; and **2.** recognition by Member States of the compulsory jurisdiction of the Court of Justice of the European Union, as provided in the EU accession process (there is no need for an explicit recognition[19]), the action for failure to fulfil an obligation is much limited in case of the procedure provided by article 259 TFEU. This limitation is obvious taking into consideration the infringement procedure purpose, namely to compel the State who breached its obligation to comply and to stop the infringement. If a Member State may, in addition, claim for damages or compensation remains an open question.[20] The literature argued that the lack of such interstate repair mechanism constitute a gap in the European legal order, which could be covered by other methods of enforcing state liability as provided for by the Treaty or by recourse to State responsibility in international law.[21]

Proceedings for failure to fulfil an obligation initiated under article 259 have been very rarely used because of the preference of the Member States, for political reasons, to ask the Commission to act under article 258, and only after to intervene before the Court by the side of the Commission, than to assume the role of applicant.[22] This draws our attention to other limitation caused by the discretionary power of the Commission to initiate proceedings, issue long discussed for the application of article 258 TFEU.[23]

There is no text in the treaties that prevent Member States to resolve disputes through political negotiations or 'political deals' outside the legal framework of the European Union. However, if a judicial determination of the inconsistency of a Member State's conduct with the EU law is sought, the procedure under article 259 constitutes the only solution available to Member States. This conclusion follows from the interpretation of article 344 TFEU, which forbids Member States to submit 'any dispute concerning the interpretation or application of the Treaties to any method of dispute settlement not provided for in the Treaty'.[24]

Yet, even if the procedure laid down in article 259 remains the only mechanism available for the Member States to enforce EU law, it doesn't mean that the European legal order is completely separated from the international law of state responsibility.[25]

6. Case-law under art. 259 TFEU

In the history of European integration only six times a Member State has directly brought an action for failure to fulfil the obligations before the ECJ against another State. Of the sixth cases, only four proceeded to judgment, the other two were settled amicably.

6.1. Cases that proceeded to judgement

A. Case 141/78, France v United Kingdom

This is the first case of interstate infringement proceedings and the action was brought on 14 June 1978 by France against the United Kingdom with respect to sea fisheries.

The applicant claims for a declaration that by adopting on 9 March 1977 and by bringing into force on 1 April 1977, 'Sea Fisheries, Boats and Methods of Fishing, the Fishing Nets (North-East Atlantic) Order 1977', the United Kingdom has failed, in the sea fisheries sector, to fulfil its obligations under the EEC Treaty.

In 1977, Britain unilaterally adopted an order (Order no. 440) pursuant to which all trawlers were required to use a particular type of fishing net so as to reduce the proportion of by-catches and preserve the fish stock. In the same year, the master of a French fishing vessel was arrested and convicted of infringing order or having used nets of a mesh smaller than the minimum authorised by the order. France challenged the consistency of the UK order with Community law on the grounds that the area of sea fisheries was an exclusive Community competence.

Commission refrained from initiating parallel infringement proceedings. Instead, it intervened on the side of France. The Court sided with France and decided that United Kingdom has failed to fulfil its obligation under the Treaty (judgement of the Court from 4 October 1979). The provision of the Treaty relating to agriculture covered all questions relating to the protection of maritime biological resources.

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[18] An interesting study on the corresponding procedure before the ECJ and EFTA Court can be found in Thorbjorn Bjornsson, Report 2/12 on the Effectiveness of the EFTA Court: Usage Rate, p. 40 (http://www.effective-intl-adjudication.org/admin/Reports/4f46f789be89ecee489aed37ae262f50EFTA-second%20report-toby-final.pdf).

[19] Alan Dashwood, Robin White, Enforcement Actions under Articles 169 and 170 EEC, European Law Review, vol. 14/1989, no. 6, p. 389.

[20] Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *cited supra*, 259-2.

[21] Simma Pulkowski, Of Planets and the Universe: Self-Contained Regimes in International Law, 17 EJIL (2006) 483.

[22] See, for egz., case C-195/90, *Commission v. Germany*, where Belgium, Denmark, France, Luxemburg and Netherlands had intervened sided the Commission.

[23] Also see Paul Craig, Grainne de Burca, Dreptul Uniunii Europene, 4th ed., Ed. Hamangiu, București, 2009, p. 545-549.

[24] For a more detailed commentary on article 344 TFEU, see Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *cited supra*, 259-3. The authors cited case Iron Rhine, *Belgium v. Netherlands*, where it was suggested that not every reference to Community law triggers an obligation on the Member States to refer a case to the Court of Justice. We mention also case C-459/03, *Commission v. Ireland*, where ECJ decided that Ireland failed to fulfil its obligation to respect exclusive jurisdiction in this matter.

[25] Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *cited supra*, 259-3.

Therefore, a Member State could not adopt any unilateral measures in the area. Thus, 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.

B. Case C-388/95, *Belgium v Spain*

This second case was brought on 13 December 1995 by Belgium against Spain concerned a Spanish law that made the use of the name of the production region conditional upon bottling in that region.

The applicant claims for a declaration that, by maintaining in Royal Decree no. 157/88 laying down the rules governing designations of origin and controlled designations of origin for wines and regulations implementing it and in particular Article 19(1)(b) thereof, the Kingdom of Spain has failed to fulfil its obligations under Article 34 of the EC Treaty (now, after amendment, Article 29 EC), as interpreted by the Court of Justice of the European Communities in its judgment of 9 June 1992 in Case C-47/90 *Delhaize v Promalvin* [1992] and Article 5 of the EC Treaty (now Article 10 EC).

Belgium was supported by other four Member States that intervened (Denmark, the Netherlands, Finland and the United Kingdom). This coalition of non-wine producing countries led by Belgium challenged the consistency of the law with Community law. On the other side, Italy, Portugal and the Commission intervened in support of Spain.

Spanish rules govern the bottling of wines bearing the designation of origin 'Rioja'. Belgium considered that those rules which, in particular, require the wine to be bottled in cellars in the region of production in order to qualify for the 'controlled designation of origin' (*denominación de origen calificada*) were detrimental to the free movement of goods.[26] Spain contended that its rules conformed with Community law. The Court sided the defendant, reasoning that while the law constituted a measure having an effect equivalent to quantitative restrictions on exports, it was justified since it constituted a necessary and proportionate means of protecting a designation of origin (judgement of the Court from 16 May 2000).

C. Case C-145/04, Spain v United Kingdom

A third complaint, brought on 18 March 2004 by Spain against United Kingdom, was of symbolic rather than economic importance.

By its action Spain seeks a declaration that, by enacting the European Parliament (Representation) Act 2003 ('the EPRA 2003'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 189 EC, 190 EC, 17 EC and 19 EC, and under the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002.

Case C-145/04 is unusual because it is the sequel to a judgment of the European Court of Human Rights *Matthews v. United Kingdom* in which that Court found that the United Kingdom had failed to organize European Parliament elections in Gibraltar contrary to Article 3 of Protocol No. 1 to the European Convention on Human Rights. To comply with that judgment, the United Kingdom Parliament passed the European Parliament (Representation) Act 2003 which contains a Section 9 combing Gibraltar with an existing electoral region in England and Wales to form a new electoral region.

As a consequence, voters in Gibraltar were represented in the European Parliament as of 2004. Spain objected to the extension of a British voting district to include 'qualifying Commonwealth citizens' who are not UK citizens on two grounds: First because its Section 16 extends the right to vote in Euro elections in Gibraltar to 'qualifying Commonwealth citizens' who are not United Kingdom Citizens. Second, because the Act includes Gibraltar in an existing electoral district in England. The Advocate General sided (on this ground) with Spain[27] and suggested that the Court should find against the United Kingdom and uphold Spain's claim about the extension of the right to vote in Gibraltar to 'qualifying Commonwealth citizens' who are not United Kingdom citizens. But he suggests that the rest of Spain's claim should be dismissed.

The European Commission, by contrast, considered the UK act of Parliament to be consistent with Community law since it was 'within the margin of of discretion presently given to Member Stated by EU law'. In light of the 'sensibility' of the territorial conflict on Gibraltar, however, Commission deliberately refrained from adopting a reasoned opinion but intervened on the side of the defendant before the Court.

The Court of Justice agreed with Spanish position that Community law did not forbid the extension of voting rights to non-citizens (judgement of the Court from 12 September 2000). In particular, the term 'peoples of the Stated brought together in the Community' need not to be interpreted as synonymous of 'nationals of the Member States' (as Spain contended). Hence, 'in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections for the European Parliament falls within the competence of each Member State'.

[26] Belgium considered that the incompatibility of the Spanish rules had already been established by the Court in its judgment of 9 June 1992 in the Delhaize case (Case C-47/90). Spain considered that the Delhaize judgment did not affect it specifically and that other wine-producing Member States had adopted similar provisions.

[27] The Advocate General in case C-145/04 was A. Tizzano.

D. Case C-364/10, *Hungary v Slovakia*

This is the newest inter-state case brought on 8 July 2010 by Hungary against Slovakia for refusing the Hungarian President entry into Slovakian territory.

Hungary has argued that Slovakia infringed the free movement of EU-Citizens - Article 21(1) TFEU and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Taking the view that the entry of its President into Slovak territory could not be refused on the basis of that directive, Hungary asked the Commission to bring infringement proceedings before the Court of Justice against Slovakia. The Commission, however, expressed the view that EU law did not apply to visits made by the head of one Member State to the territory of another Member State and that, in those circumstances, the alleged infringement was unfounded.

Hungary subsequently decided to introduce, of its own motion, infringement proceedings before the Court against Slovakia. The Commission decided to intervene in the proceedings in support of Slovakia.

The Court finds that, as the Hungary head of state is of Hungarian nationality, he enjoys the status of EU citizen, which confers on him the right to move and reside freely within the territory of the Member States. However, the Court observes that EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the EU legal order and is thus binding on the European institutions.

The Court decides that EU law did not oblige Slovakia to guarantee access to its territory to the President of Hungary. Similarly, while Slovakia was wrong to rely on Directive 2004/38 as a legal basis for refusing the President of Hungary access to its territory, the fact that it did so does not constitute an abuse of rights within the meaning of the Court's case-law. In those circumstances, the Court dismisses Hungary's action in its entirety.

6.2. Cases that were settled amicably

A. Case 58/77, *Ireland v France*

The action was brought on 10 May 1977 by Ireland against the French Republic[28] and the applicant claims that the Court should declare that the prohibition imposed by the French Republic on imports of mutton and lamb coming from Ireland when the domestic price of mutton and lamb in France is lower than a given threshold price constitutes a quantitative restriction on imports or a measure having equivalent effect and amounts to a failure to fulfil its obligations under articles 30, 31 and 32 of the EEC Treaty and under the Act annexed to the Treaty concerning the accession to the EEC and the EAEC of the Kingdom of Denmark, Ireland and the United Kingdom concluded at Brussels on 22 January.

By order of 15 February 1978 the Court of Justice of the European Communities ordered the removal of the case from the register. In this case the Commission was intervening.[29]

B. Case C-349/92, Spain v United Kingdom

The action was brought on 4 September 1992 by Spain against the United Kingdom[30] and the applicant claims that the Court should declare that, by maintaining tax legislation in force which assesses Sherry and British Sherry in differentiated form, the United Kingdom has failed to fulfil its obligations under article 95 and 30 of the EEC Treaty and of the Spanish Act of Accession to the European Community.

By order of 27 November 1992 The President of the Court of Justice of the European Communities ordered the removal from Register of the case.[31]

The orders of the President of the Court of Justice are not public and cannot be consulted in order to see the motivation of the removal from the register of the two above mentioned cases.

7. Conclusion

Finally we conclude over some interesting issues concerning the procedure as provided for Member States by the Treaties.

Interpretation of the Member States action should be achieved in relation to art. 344 TFEU[32] under which Member States have pledged not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein, Court of Justice of the European Union being the only jurisdiction to settle any dispute which opposes two Member States concerning the interpretation of EU law.[33] However, there are situations that challenge the application of this article: (i) EU accession to the European Convention on Human Rights; (ii) bilateral agreements between Member States on the promotion and protection of investments.[34]

Case-law examination reveals that Commission's role is not limited in this procedure only to the status of intermediary institution between Member States and the Court, but it has various roles, ensuring compliance

[28] OJ No C 142, 16.06.1977.
[29] OJ No C 78, 30.03.1978.
[30] OJ No C 256, 3.10.1992.
[31] OJ No C 340, 23.12.1992.
[32] For an interesting analyses on article 344 TFEU (ex-article292 TCE), see Gerard Conway, Breaches of EC Law and the International Responsability fo Member States, EJIL (2002), Vol. 13 No. 3, 679-695.
[33] This was also argued by the Commission in C-364/10, *Hungary v. Slovakia*, pct. 23.
[34] Ion Gâlea, Tratatele Uniunii Europene. Comentarii și explicații, Ed. C.H. Beck, București, 2012, p. 520-521.

with treaties, whether it's under art. 258 or 259 TFEU. The Court of Justice has repeatedly stated that the goal of the infringement procedure is 'to give the member state an opportunity, on the one hand, of remedying the position before the matter is brought before the court and, on the other hand, of putting forward its defence to the Commission's complaints'.[35]

European Commission acts as a mediator. In the case of *Hungary v. Slovakia*, Commission Vice-President emphasised that 'everything possible had to be undertaken in order to avoid any repetition of such situations and stated that he was confident that a constructive bilateral dialogue between the two Member States could resolve the dispute.'

European Commission can intervene and support one of the states before the Court, as it did in all 4 cases settled by pronouncing a judgment. Although there are not sufficient cases, the conclusion is simple: *Commission has never lost by the side of one State.*

Recourse to the procedure lay down in Art. 259 TFEU is clearly a rarity in the European system; actions were brought at intervals of 17, 9 and 6 years. Member States, pursuant to the obligation imposed by art. 4 TEU on the principle of sincere cooperation, either decide to resolve any disputes between them (by negotiation) or turn to Commission to take complaints by virtue of its role as guardian of the Treaties.

Although proving an interest is not required by the Treaties, practice has proved that its existence is decisive. We can say that a dilemma arises in terms of establishing who better applies EU law. On the one hand, compliance with art. 4 TEU divert Member States from the procedure lay down in art. 259 TFEU, but promote one of the basic principles of European construction. On the other hand, refraining from art. 259 TFEU procedure and accordingly ignoring a breach of EU law by another Member State may lead to the interpretation that an indirect violation of the EU law may happen.

We conclude by emphasizing that recourse to the procedure established by art. 259 TFEU was concurrent to other types of disputes, usually political, and the purpose of the procedure was to gain a strategic advantage in international relations at the expense of a correct application of European law. In the present international context the struggle for an important economic position is at its high levels and on the verge of a conflict outbreak. Thus, Member States prefer to leave to the Commission the enforcement of EU law.

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[35] *Commission v. Ireland*, C-74/82; *Commission v. Belgium*, C-293/85; *Commission v. Netherlands*, C-152/98.