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INFRINGEMENT PROCEDURE – THE CASE OF ROMANIA

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Abstract: *In this article, we propose to present the stages of application of the Infringement Procedure against the member states of the Union that fail to fulfil the obligations arising from the legislation of the European Union. Under the provisions of the Treaty of Lisbon, the European Commission has the power to initiate this procedure ex officio or following a referral and decide to refer the case to the Court of Justice of the European Union, if the Member State concerned does not take the necessary measures to comply with Union law. Failure to comply with a judgment of the Court of Justice by the Member State concerned, shall enable the Commission to refer the case back to the Court of Justice and to propose that the Court impose financial penalties. Also, if the Member State does not communicate in time the measures taken to transpose the provisions of a European Directive, the Commission may request the Court to apply financial penalties to that State. The case of Romania regarding the application of this procedure, known as "Infringement", is presented in detail in the monitoring documents published by the European Commission, such as the 2019 Annual Report on monitoring the implementation of EU law, which provides official data and information on the evaluation and ranking of the Member States of the Union in this matter, from which we will capture some comparative aspects that we consider to be significant and relevant. Last but not least, we will present some recent exemplary situations of application of the Infringement Procedure, in the case of Romania.*

Keywords: *Infringement Procedure, European Commission, Court of Justice of the European Union, Annual monitoring report, case of Romania*

Introduction

The term "*Infringement*", derived from English, translated into Romanian "*încălcare*", has its origin in the verb "*to infringe*", which means "*to violate*" (Amariei, 2018).

In other words, this term means a breach of European law by the Member States of the European Union (EU), signatories to the Union's Treaties.

Through this procedure, the European Commission fulfils its role of ensuring that Member States comply with/apply and transpose European legislation, in order to harmonize their national law with the primary and secondary law of the European Union.

The use of the term "*Infringement Procedure*" is not unitary, being used either to designate the *pre-litigation/non-jurisdictional* stage initiated by the European Commission, or for the *litigation/jurisdictional* stage, held before the Court of Justice of the European Union, at the both stages.

The sources that trigger the *Infringement Procedure* by the European Commission are: complaints, own investigations and failure to notify the transposition of European directives.

Based on these considerations, this article is structured in three Sections: *Application of the provisions of the Lisbon Treaty on infringement of the obligations arising from membership of the European Union, Compliance of Member States with European Union law in 2019, Recent European Commission decisions on infringement by Romania and Conclusions.*

The choice of the analysed topic takes into account the need to raise awareness among students/stakeholders/European citizens, of the importance of protecting the *public interest*, a desideratum of the European Commission enshrined in the Treaties, based on the principle of *loyal cooperation* within the *rule of law*.

The Commission ensures the monitoring of the implementation of European Union law by the Member States of the Union and has the power to initiate the *Infringement Procedure* as to failure to fulfil the obligations arising from the European law, including where the Member State fails to communicate in due time measures transposing the provisions of the European directives, following the steps set out in the Treaties. If the State concerned does not take the necessary measures within the prescribed period, the Commission may apply to the Court of Justice of the European Union for financial penalties.

Data and information on cases of *Infringement Procedure* are contained in documents published by the European Commission on *monitoring the application of European Union law*, such as the *2019 Annual Report, Romania*

being in the second half of the ranking of Member States (presented in ascending order of procedure number), as regards the number of new procedures opened in 2019 and the total number of procedures opened until 31 December 2019.

At the same time, in the case of Romania, we intend to present some examples from the content of the *2019 Annual Report*, as well as some recent cases, which we consider to be of special interest to our country, both for the targeted areas and for civil society, as a whole.

The scientific approach aims to bring to the attention of the academic and scientific environment especially, and not only, the incidental regulations in such cases, well known in fact, any interested natural or legal person having the possibility to notify the Commission, in any field governed by Union law, in order to protect the *general public and private interest*, the protection of the *democratic rule of law*, traditional European values enshrined in the Treaty of Lisbon.

1. Application of the provisions of the Lisbon Treaty on infringement of the obligations arising from membership of the European Union¹

The legal basis of the *Infringement Procedure* is represented by the provisions of Art. 4 and 17 of the Treaty on European Union (TEU) and Art. 258 and 260 of the Treaty on the Functioning of the European Union (TFEU).

Under the *loyal cooperation principle*, *the Union and the Member States shall respect and assist one another* in carrying out tasks under the provisions of the Treaties, and *Member States shall take any general or special measures* to ensure fulfilment of their obligations under the Treaties or acts of the Union institutions [Art. 4 par. (3) TEU].

The **European Commission** *promotes the general interest of the Union*, takes the necessary initiatives to this end, *ensures the application of the Treaties* as well as the measures adopted by the institutions under them and *supervises the application of Union law under the control of the Court of Justice of the European Union* [Art. 17 par. (1) TFEU].

Recognized as a “*guardian of the Treaties*”, the **European Commission** may issue a *reasoned opinion* if it considers that **a Member State has breached any of its obligations under the Treaties**, with the State concerned having the opportunity to submit its observations, and **may refer the matter to the Court of Justice of the European Union**, if the State concerned does not comply with the opinion delivered within the time limit set by the Commission [Art. 258, TFEU].

¹ *Treaty on European Union and Treaty on the Functioning of the European Union*, Consolidated Version, Official Journal C 115 of the European Union, Romanian Edition, 9 May 2008. (our translation/processing).

If the Court of Justice of the European Union finds that a Member State has infringed any of its obligations under the Treaties, that State shall be required to take the necessary measures to comply with the judgment of the Court [Art. 260, par. (1), TFEU]. If it considers that the *Member State concerned has not taken the necessary measures to comply with the judgment of the Court*, **the Commission may refer the matter to the Court again**, giving that State the opportunity to submit its observations and indicating the amount of the *lump sum* or *periodic penalty payment* it considers that the Member State concerned must pay according to the situation.² If it is found that the State concerned has not complied with its judgment, the Court may impose on it the payment of a *lump sum* or a *periodic penalty payment* [Art. 260, par. (2), TFEU].

If the Commission notifies the Court, pursuant to Art. 258, considering that *the Member State concerned has not complied with its obligation to communicate the measures transposing a European directive*, the Commission may indicate, if it considers it necessary, the amount of the *lump sum* or *periodic penalty payment* to be paid by that State, according to the situation. If the obligation is found not to be fulfilled, the Court may impose on the State concerned the payment of a *lump sum* or a *periodic penalty payment*, up to the amount indicated by the Commission, the obligation to pay coming into force on the date set by the Court in its judgment [Art. 260, par. (3), TFEU].

1.1. Informal Procedure - Expedite settlement³

If it identifies a possible breach of European Union law, the Commission shall take steps for the *expedite settlement* of the matter through a structured dialogue (*EU Pilot*) with the Member State concerned.

Member States have the possibility to provide the Commission with additional information on possible breaches of EU law, on the basis of which an *expedite solution* can be identified, according to Union law, thus avoiding the initiation of a *formal Infringement Procedure*.

1.2. Formal Procedure⁴

If the Member State concerned does not take the necessary measures to remove the grounds for infringement of European Union law, or if it does

² European Commission, Communication from the Commission - *Application of Article 260 of the Treaty on the Functioning of the European Union, Updating of data used to calculate lump sums and periodic penalty payments to be proposed by the Commission to the Court of Justice in infringement procedures*, available at website: https://ec.europa.eu/info/sites/info/files/file_import/sec_2010_923_ro.pdf.

³ European Commission, *European Commission at Work, Applying EU Law, Infringements*, available at: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index_ro.htm. (our trans).

⁴ European Commission, *Infringement Procedure*, available at: https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_ro. (our trans./ processing).

not communicate the measures transposing the provisions of the European directives, the Commission may initiate a **formal Infringement Procedure** following the steps set out in the EU Treaties, each of which ends with an official decision:

- The Commission sends a *letter of formal notice* requesting additional information from the Member State concerned, which must send a detailed reply within the time limit usually set at 2 months.
- If it concludes that the Member State has failed to fulfil its obligations under EU law, the Commission may send it a *reasoned opinion*, formally requesting it to comply with EU law, stating the reasons why the Commission considers that state is in breach of EU law, as well as a request for that state to inform the Commission of the measures taken, usually within 2 months.
- If the Member State does not take the necessary measures to comply with EU law, **the Commission may decide to refer the case to the Court of Justice.**
- In the specific case, where the Member State does not communicate in time the measures necessary for the transposition of the provisions of the European Directive, within the prescribed period **the Commission may request the Court to apply financial penalties to that State.**

If the **Court's judgment** finds that the State has infringed EU law, the national authorities must take action to comply with the Court's judgment.

Failure to comply with a judgment given by the Court of Justice by the Member State concerned shall enable the Commission **to refer the case back to the Court of Justice** after sending a *written warning* to that State.

If the case is referred back to the Court of Justice, the Commission may propose that the Court impose **financial penalties** on the Member State in the form of a *lump sum* (based on the time elapsed from the first judgment) and/or a daily fine/*periodic penalty payment* (until the Member State ceases to infringe).

Regarding the method of calculating the penalties, according to the quoted source, the following criteria are considered:

- *the importance of the rules infringed and the impact of the infringement on the general and private interests,*
- *the period during which EU law was not applied,*
- *the Member State's ability to pay.*
- *The amount proposed by the Commission may be amended by the Court in its judgment.*

2. Compliance of Member States with European Union law in 2019⁵

The European Commission publishes an *Annual Report on monitoring the application of European Union law* for the previous year, following a request made by the European Parliament since 1984.

The European Parliament shall subsequently adopt a resolution on the report. Thus, the Commission monitors whether Member States apply European Union law in the national legal order, and otherwise takes the measures provided for in the Treaties, respecting the *rule of law*.

The Commission's action on *ensuring compliance with and enforcement of European law* focuses on issues that can have a real impact on the legitimate interests of citizens and businesses. The effective application of EU law ensures that the rights and benefits conferred on citizens by Union law and the conditions of fair competition in the internal market for businesses are guaranteed.

As, according to the Treaties, the implementation of EU law is based on the *principle of cooperation*, the European Commission actively supports Member States in implementing Union law, through *guidance* and *dialogue*.

At the same time, in order for citizens and businesses to be able to capitalize on the benefits of EU law, it is necessary for Member States to transpose *European directives* into their own national legal order within the deadlines set.

In order to facilitate the correct and timely transposition of European legislation, *the Commission continued to assist Member States by preparing implementation plans, specific websites and guidance documents*, as well as *by exchanging best practices at expert group meetings*, it is also shown in the quoted document.

At the same time, the Commission continued to refer cases of infringement by Member States to the Court of Justice, requiring the imposition of daily penalties.

2.1. Monitoring the application of European Union law, 2019 Annual Report⁶

⁵ European Commission, Representation in Romania, News, *Compliance of Member States with EU law in 2019: 38 infringement procedures opened against Romania*, 31.07.2020, available at: [https://ec.europa.eu/romania/news/20200731_raport_monitorizare_aplicare_dreptul_ue_ro\(...\)](https://ec.europa.eu/romania/news/20200731_raport_monitorizare_aplicare_dreptul_ue_ro(...)). (our trans./ processing).

⁶ European Commission, *28 Member States of the European Union - Monitoring the application of European Union law, 2019 Annual Report*, Romanian version, available at: https://ec.europa.eu/info/sites/info/files/file_import/report-commission-2019-eu-28-countries-factsheet_ro.pdf. (our trans./ processing).

Monitoring the Application of EUROPEAN UNION LAW 2019 Annual Report,⁷ published by the European Commission, presents how it has ensured and monitored the application of EU law in 2019, as well as the performance of Member States in various policy areas.

According to data published by the Commission, at the end of 2019, 1,564 *Infringement Procedures* were still open, which is a slight *decrease* compared to the 1,571 procedures that were still open at the end of 2018, in total. In 2019, Luxembourg, Estonia and Lithuania registered the fewest new cases of incorrect transposition or application of EU law, while Spain, Italy and Greece registered the most cases.

According to data published by the Commission, at the end of 2019, 599 *Infringement Procedures as to timely transposition obligations* were still open, which is a *decrease* of 21% compared to the 758 procedures that were still open at the end of 2018, in total.

In 2019, Denmark, Italy and Lithuania registered the fewest new cases of late transposition of EU directives, while Bulgaria, Belgium, Greece and Cyprus recorded the highest number of cases.

We note that Romania is not one of the examples of European Union member states that have registered the *most new cases* of incorrect transposition or application and/or late transposition of EU legislation in 2019, but neither among the examples with the *fewest new cases*, being in the second part of the statistical situation, in which Member States are presented in ascending order of the number of cases recorded.

2.2. The case of Romania regarding the application of the Infringement Procedure, in 2019⁸

In 2019, 38 new Infringement Procedures were opened against Romania, the European Commission informs. The areas covered by the new Infringement Procedures were:

- financial stability, financial services and the union of capital markets (3),
- justice and consumers (3),
- migration and internal affairs (3),
- energy (3),

⁷ European Commission, *Monitoring the Application of EUROPEAN UNION LAW 2019 Annual Report*, available in English on the site: https://ec.europa.eu/info/sites/info/files/file_import/report-2019-annual-report-monitoring-application-eu-law_en.pdf. (processing).

⁸ European Commission, *Romania Monitoring the Application of EUROPEAN UNION LAW 2019 Annual Report*, EN, available at: https://ec.europa.eu/info/sites/info/files/file_import/report-commission-2019-national-factsheet-romania_en.pdf. (processing).

- mobility and transport (4),
- internal market, industry, entrepreneurship and SMEs (5),
- environment (5),
- taxation and customs union (6).
- other areas (6).

In total, on December 31, 2019, 64 Infringement Procedures were opened against Romania, *increasing* compared to 2018 (59).

At the same time, in 2019, 17 Infringement Procedures were opened against Romania regarding the non-transposition of European legislation in time. The areas covered by the new procedures for finding non-compliance with the timely transposition obligations opened in 2019 were:

- environment (3),
- mobility and transport (3),
- financial stability, financial services and the union of capital markets (2),
- internal market, industry, entrepreneurship and SMEs (2),
- justice and consumers (2),
- other areas (5).

In total, on 31 December 2019, 24 Infringement Procedures were opened for non-timely transposition of EU legislation, *decreasing* compared to 2018 (34).

We exemplify, in the excerpt, aspects from the content of the *2019 Annual Report*, aimed at the infringement of EU law by Romania and other Member States of the Union:⁹

- Regarding *Guaranteeing cybersecurity and trust in online transactions*, the Commission launched in 2019 Infringement Procedures as to the *Directive on the Security of Network and Information Systems (NIS Directive)* against 6 Member States, including Romania, for not having identified key service operators under the Directive to improve the Union's overall level of cybersecurity.
- The Commission continued the Infringement Procedure as to the *Motor Insurance Directive (Solvency II Directive)* against Romania, because it did not align the domestic legislation on motor third party liability insurance with EU rules, as Romania's national rules impose strict conditions on insurers in setting premiums, contrary to the principle of

⁹ European Commission, *Monitoring the Application of EUROPEAN UNION LAW 2019 Annual Report*, quoted doc., pp. 7-8, 15, 25. (processing).

freedom of tariffs and obliges insurers to issue a policy valid only in Romania, contrary to the directive imposing policies to cover the entire territory of the Union and a single insurance premium.

- Infringement Procedures have been launched against 4 Member States, including Romania, for signing a multilateral international agreement on the exchange of DNA, fingerprints and vehicle registration data, which contain provisions that violate the exclusive external competence of the EU under *Prüm Decisions*, which provide for mandatory automatic exchange and comparison of DNA data between national databases, to combat terrorism and cross-border crime.

3. Recent European Commission decisions on infringement by Romania - Environmental Infringement Procedures concerning illegal logging, air quality and protection of Natura 2000 networks¹⁰

The European Commission issues decisions on a monthly basis in the event of infringement, with the legal jurisdiction to sue Member States that have not fulfilled their obligations under EU law.

These decisions cover various sectors and policy areas of the European Union and aim to ensure the proper application of EU law, for the benefit of citizens and businesses.

3.1. Nature - European Commission calls on Romania to combat illegal logging and better protect forests on Natura 2000 sites on its territory (reasoned opinion)

The European Commission “urges” **Romania** to properly implement the EU Timber Regulation ((EU) Regulation No. 995/2010), which prohibits the production and placing on the EU market of products obtained from illegally harvested logs.

The Commission found that *inconsistencies* in national legislation do not allow the Romanian authorities to verify large quantities of illegally harvested timber and that national authorities authorize logging without first assessing the impact on protected habitats, as provided for in the *Habitats Directive* (Directive 92/43/EEC of the Council) and the *Strategic Environmental Assessment Directive*.

¹⁰ European Commission - Representation in Romania, News, *Romania: Environmental Infringement Procedures concerning illegal logging, air quality and protection of Natura 2000 networks*, 02.07.2020, available at: https://ec.europa.eu/romania/news/20200702_infringement_mediu_ro. (our trans./processing).

At the same time, the Commission also said, there are shortcomings in terms of public access to environmental information in forest management plans. The Commission also found that some protected forest habitats have disappeared from Natura 2000 protected sites, which is a breach of the *Habitats Directive* and the *Birds Directive*.

After analysing the arguments presented by Romania, following a *letter of formal notice*, sent in February 2020, the Commission concluded that the issues had not been resolved, in which case the Commission issued a ***reasoned opinion***. In this case, if Romania does not take action within one month, the Commission may *refer* the matter to the Court of Justice of the European Union (Amariei, 2020).

3.2. Nature: European Commission calls on Romania to take necessary measures to protect and manage its Natura 2000 networks (notice of default letter)

The Commission calls on **Romania** to take measures to protect and manage its Natura 2000 networks, thus respecting its obligations under the *Habitats Directive*, according to which Member States have an obligation to propose EU Sites of Community Importance (SCI), to be included in the EU biogeographical lists, and within six years of the listing, Member States will set appropriate conservation objectives and measures, designating those SCI as Special Areas for Conservation (SAC), which are essential for the protection of biodiversity throughout the EU.

As Romania has so far not designated special areas of conservation and set detailed site-specific conservation objectives and measures, the Commission has decided to send a ***letter of formal notice*** to Romania, granting it a period of three months to remedy the situation. Otherwise, the Commission may decide to send a *reasoned opinion*.

3.3. Air quality: Commission calls on Romania to fully implement EU rules on permits for industrial plants (reasoned opinion)

The Commission calls on **Romania** to improve the implementation of EU rules on permits for industrial plants on its territory, as Romania allows these plants to operate without the necessary permits, in accordance with EU law, with industrial activities having a significant impact on the environment.

Directive 2010/75/EC on industrial emissions aims to prevent and reduce harmful industrial emissions across the EU, while promoting the use of energy-efficient techniques and the use of resources that reduce polluting emissions. Following the Commission's *letter of formal notice*, although some progress has been made, three plants continue to operate contrary to the

requirements of the directive and two large combustion plants do not comply with the emission limit values (for sulphur dioxide, nitrogen oxide and dust). The Commission therefore sends a *reasoned opinion*, with Romania having three months to adopt and communicate all necessary measures to ensure the full and correct application of the Directive. Otherwise, the Commission may *refer* the matter to the Court of Justice of the European Union.

Conclusions

As we have pointed out, the procedures initiated by the European Commission are based on the democratic principle of *cooperation*, under which the Commission takes preliminary steps for a *expedite solution* through a structured dialogue (*EU Pilot*) and *assists Member States in preparing implementation plans, specific websites and guidance documents*, as well as *by exchanging best practices in expert group meetings*, in order to facilitate the correct and timely transposition of European legislation.

Therefore, before addressing the European Court of Justice, the Commission operates with non-judicial procedural instruments, supporting Member States for the correct and timely application of European law, in the interests of citizens and businesses, acting on the basis of European democratic principles within the rule of law.

From the data communicated by the European Commission, selectively presented in the content of this article, it appears that Romania is not one of the examples of European Union member states that have recorded *the most new cases* of incorrect transposition or application and/or late transposition of EU legislation, in 2019 (Spain, Italy and Greece, respectively Bulgaria, Belgium, Greece and Cyprus), but neither among the examples with *the fewest new cases* recorded (Luxembourg, Estonia and Lithuania, respectively Denmark, Italy and Lithuania).¹¹

According to the quoted document, 64 procedures were opened against Romania for infringement, in total, on December 31, 2019, *increasing* compared to 2018 (59).

Regarding the Infringement Procedures for non-transposition of EU legislation in time, against Romania, in total, on December 31, 2019, 24 procedures were opened, *decreasing* compared to 2018 (34). In the current context, regarding the recent cases in which the Commission declared the

¹¹ European Commission, *28 Member States of the European Union - Monitoring the application of European Union law, 2019 Annual Report*, quoted doc. (our trans./ processing).

Infringement Procedure against Romania, (*in the field of environment regarding illegal logging, air quality and protection of Natura 2000 networks, etc.*), we note, among others, the following observation made in the documents on the agenda of the institutions of the European Union:

“Although the COVID-19 epidemic creates real difficulties for national administrations, it should not be used as an excuse to further delay the implementation of mutually agreed rules. (...)” (European Parliament, 2020).

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