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HAS THE ACTION FOR FAILURE TO ACT IN THE EUROPEAN UNION LOST ITS PURPOSE?

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ABSTRACT

This article analyzes the purpose of the action for failure to act under article 265 of the Treaty on the Functioning of the European Union (TFEU). The statements are derived from the analysis of scientific literature, relevant legislation, practice of the European Union Court of Justice (CJEU) and the European Union General Court (EUGC). Useful information has also been obtained from the opinions of general advocates of the CJEU. The article of TFEU 265, which governs the action for failure to act, is very abstract. For this reason, a whole

procedure under the article 265 TFEU was developed by the EU courts. The original purpose of the action for failure to act was to constitute whether European Union (EU) institution properly fulfilled its obligations under the EU legislation. However, in the course of case-law, a mere EU institution's express refusal to fulfill its duties became sufficient to constitute that the EU institution acted and therefore action for failure to act became devoid of purpose. This article analyzes whether the action for failure to act has lost its purpose and become an ineffective legal remedy in the system of judicial review in the EU. Additionally, the action for failure to act is compared to similar national actions.

KEYWORDS

Action for failure to act, European Union, article 265 TFEU, judicial protection

INTRODUCTION

The action for failure to act is governed by article 265 of the TFEU[1]. This article states that:

> Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act. The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months. Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

As is clear from the above-quoted text, the goal of the action for failure to act is to constitute the illegal inaction of an EU institution.[2] An illegal inaction can be declared when an EU institution does not act, but is obliged to act by an imperative of EU law.[3] Also, illegal inaction is constituted when an EU institution abuses its discretion.[4] Before going into further examination of the topic, it is necessary to disclose the meaning of the EU institutions' concepts of "action" and "inaction". Under EU law, the term "action" means adoption of a legal act.[5] Thus the "inaction" means non-adoption of a legal act.[6] The aforementioned concepts mean that if an EU institution adopts any act, it ends its inaction and therefore an applicant cannot bring the action for failure to act.[7] However, applicants usually perceive the "inaction" as any refusal to act, notwithstanding whether the EU institution refuses to act via silence (traditional inaction, which can be challenged by the action for failure to act) or refuses to act via negative act.[8] The express refusal to act via negative act cannot be challenged under the article 265 TFEU.[9] Negative acts

[1] *Consolidated Version of the Treaty on the Functioning of the European Union*, Official Gazette (2008, no. C 115/47).
[2] *Yusef v. European Commission*, European Union General Court (2014, no. T-306/10), para 108.
[3] *European Commission v. European Parliament and European Council*, European Union Court of Justice (2014, no. C-427/12), para 76.
[4] *Port v. Bundesanstalt*, European Union Court of Justice (1996, no. C-68/95), paras 38-40.
[5] *European Comission v. Ryanair*, European Union Court of Justice (2013, no. C-615/11P), para 39.
[6] *GEMA v. European Commission*, General advocate Capotorti of CJEU (1979, no. 125/78), para 5.
[7] *CEVA v. European Commission*, European Union General Court (2003, no. T-344/00), paras 82-84.
[8] Trevor Hartley, *The Foundations of European Union law*, 8th edition (New York: Oxford University Press, 2014), p. 350.
[9] *NDSHT v. European Commission*, European Union Court of Justice (2010, no. C-322/09), paras 53–54.

refusing to act can be challenged under the article 263 TFEU.[10] Article 263 of the TFEU governs the action for annulment of legal acts:

> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Therefore, negative acts are being quashed under the article 263 TFEU.[11]

Only when an EU institution refuses to act by silence, i.e. does not adopt any legal act and such inaction violates the imperative duties under EU law, is the applicant entitled to bring the action for failure to act under article 265 of the TFEU.[12] It may appear that the purpose of the action for failure to act is to find out whether an EU institution did not properly perform its duties by not adopting appropriate legal act.[13] However, case-law somewhat altered the purpose of this action and problems originate from the preliminary stage of article 265 of the TFEU.[14] Using case-law and legal doctrine, this article analyzes what is currently being constituted under article 265 of the TFEU and what the outcomes of these proceedings are.

The article is divided into three sections. The first section analyzes the problematic preliminary procedure under article 265 of the TFEU. The second section presents criticism of the procedure under article 265 of the TFEU and shows how the EU courts altered the purpose of the action for failure to act. The third section provides justification of the EU court's approach and compares the action for failure to act to similar national actions. Finally, conclusions and relevant solutions to applicability of article 265 of the TFEU are offered.

1. PRELIMINARY PROCEDURE UNDER ARTICLE 265 OF THE TFEU

Before an applicant can present the action for failure to act to the EU courts, the applicant is obliged to complete a special procedure.[15] In article 265 of the TFEU it is stated that: "the action shall be admissible only if the institution, body,

[10] *European Commission v. European Council*, General advocate Yves Bot of CJEU (2013, no. C-63/12), paras 70–122.
[11] *European Commission v. European Council*, European Union Court of Justice (2014, no. C-377/12), para 61.
[12] *Bayer CropScience v. European Commission*, European Union General Court (2005, no. T-34/05R), para 37.
[13] *National Carbonizing Company v. European Commission*, General advocate Mayras in EUGC (1976, no. 114/75), p. 389.
[14] *Cantine v. European Parliament*, European Union General Court (2000, no. T-103/99), para 27.
[15] *Magnus Killinger v. European Commission and European Parliament*, European Union Court of Justice (2005, no. C-396/03).

office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months". The EU courts in their case law call this procedure "preliminary procedure". In preliminary procedure the applicant requests EU institution to perform its duties. When the EU institution still does not act, the applicant can then bring an action for failure to act before EU courts.[16] General advocate Roemer expressed his opinion that preliminary procedure is necessary because it gives the EU institution a second chance to remedy its failure to act.[17] However, there is also a negative side to preliminary procedure. The EU institution can simply delay to perform its duties, knowing that the action for failure to act shall not be brought before the court unless the EU institution receives an invitation to act. Accordingly, all the terms for performing obligations are extended due to the fact that after the receipt of invitation to act, the EU institution has another two months to correct its failure to act.[18] Clearly, two elements are especially relevant in preliminary procedure of actions for failure to act: invitation to act and response to it, the so-called definition of position.[19] Accordingly, these two elements and their interactions are analyzed below. This analysis shows how the action for failure to act has lost its purpose.

1.1. INVITING AN EU INSTITUTION TO ACT

According to the EU courts case law, an applicant is entitled to invite an EU institution to act only when it becomes clear that the EU institution shall not perform its obligations under EU law.[20] It is easy enough to determine that the EU institution did not perform its obligations when specific terms are set in EU law. However, when there are no such specific terms, the applicant can invite the institution to act after a reasonable time has passed from non-performance of particular duty.[21] It is not clear when such reasonable time passed, so this is determined separately in each case.[22]

There are no specific requirements regarding the form of invitation to act.[23] Usually the invitation to act is presented in written form and is sent by registered mail to the EU institution.[24] However, it is also possible to present an invitation to

[16] *Jogamar v. European Commission*, European Union Court of Justice (1999, no. C-249/99 P), para 10.
[17] *Elz v. High Authority*, European Union Court of Justice (1961, no. 22/60), p. 192.
[18] *Branco v. European Commission*, European Union General Court (2000, no. T-194/97) para 55.
[19] *San Carlo v. European Commission*, European Union Court of Justice (1987, no. 95/86), para 4.
[20] *Netherlands v. European Commission*, European Union Court of Justice (1971, no. C-59/70), para 19.
[21] *Ibid*., paras 10-24.
[22] *Goldstein v. European Commission*, European Union General Court (1998, no. T-286/97), para 29.
[23] *Usinor v. European Commission*, European Union Court of Justice (1986, no. C-81/85), para 15.
[24] *Ryanair v. European Commission*, European Union General Court (2011, no. T-442/07), para 22.

act orally;[25] but this method is not used, since there are difficulties proving that the invitation to act was dully presented to the EU institution.[26]

EU courts in their practice were more specific[27] about the content of invitation to act.[28] Firstly, the applicant is obliged to indicate precisely what legal measure was not adopted as a result of failure to fulfill obligations on the part of EU institution.[29] Secondly, the applicant shall indicate on what legal basis he requests the EU institution to act and how the EU law is breached due to inaction of the EU institution.[30] Thirdly, the applicant shall designate that an invitation to act is being presented under article 265 of the TFEU and in case the EU institution does not comply with it, the applicant shall bring the action for failure to act before the EU courts.[31] Fourthly, the applicant in the invitation to act must specify all the requirements which he requests the EU institution to perform, because in case he requests the fulfillment of more obligations via the action for failure to act, such action shall be dismissed as inadmissible.[32] Fifthly, the applicant in the invitation to act must indicate his requests in such a manner that those requests could be identically presented in the action for failure to act itself.[33] When there are discrepancies of requirements between an invitation to act and the action for failure to act, such an action is inadmissible.[34]

As mentioned above, according to article 265 of the TFEU, the applicant, before going to court, must present a dully prepared invitation to act for an EU institution. Under article 265 of the TFEU, the EU institution has to reply to the invitation to act. The EU institution's reply is analyzed below.

1.2. RESPONDING TO AN INVITATION TO ACT

The EU institution's reply to an applicant's invitation to act in EU court case-law is called a definition of position.[35] Under article 265 of the TFEU, the EU institution has a two-month term to define its position after receipt of invitation to act from an applicant.[36] However, in EU court practice this term of defining position is in fact indefinite, because the EU courts always accept the delayed definition of

[25] *Campsider v. European Commission*, European Union Court of Justice (1985, no. 25/85R), para 32.
[26] *Tecnoprocess v. European Commission*, European Union General Court (2011, no. T-264/09).
[27] *Sánchez v. European Commission and European Parliament*, European Union General Court (2010, no. T-61/10).
[28] *Ainsworth v. European Commission and European Council*, European Union Court of Justice (1987, no. 271/83), para 41.
[29] *Jogamar v. European Commission*, *supra* note 16, para 35.
[30] *Sateba* v. European Commission, European Union General Court (1997, no. T-83/97), para 39.
[31] *Ainsworth v. European Commission and European Council*, *supra* note 28, para 8.
[32] *Steenkolemijnen v. High authority*, European Union Court of Justice (1959, no. C-17/57), p. 8.
[33] *Bergbau v. High authority*, European Union Court of Justice (1960, no. 41/59), p. 505.
[34] *Germany v. European Commission*, European Union Court of Justice (1984, no. 84/82), para 23.
[35] *CEVA v. European Commission*, *supra* note 7, para 80.
[36] *Pioneer Hi-Bred v. European Commission*, European Union General Court (2013, no. T-164/10), para 53.

position, even if the definition of position is presented after two months but before a judgment.[37] It is worth noting that the EU institution can define its position even after the action for failure to act is already presented to the court.[38] Because of this, a strict term for definition of position is almost meaningless and its expiration just marks a starting point for the applicant to bring action for failure to act.

Via definition of position, the EU institution indicates whether it agrees with the arguments set forth by the applicant and whether the EU institution shall fulfill the alleged duties under EU law.[39] However, there is always the possibility that the EU institution via definition of position simply rejects the request made by the applicant and continues its inactivity.[40] In practice the EU institution in fact usually rejects requests and refuses to recognize any alleged failure to act.[41] Therefore, definition of position means either the EU institution's compliance with invitation to act or refusing to act.

Article 265 of the TFEU does not set a form for definition of position. Usually, EU institutions define their positions in written form.[42] In EU court case law it is established that the EU institution can define its position by adopting a positive or negative legal act. The EU institution can also issue a letter which states that no action shall be taken or vice versa.[43] The EU institution can also define its position orally.[44] In the case *Air France*, the EUGC stated that an orally presented definition of position is appropriate when it is made publicly available and from the wording it is clear whether the EU institution plans to act or not.[45]

Not every reply to invitation to act constitutes a definition of position under article 265 of the TFEU. EU institution does not define its position when it does not express its final opinion on applicant's request to act.[46] For example, in the case *Pioneer Hi-Bred* the EUGC stated that the European Commission did not define its position because from the European Commission's letter it was not clear, whether it shall adopt the requested act or not.[47] There is also another occasion when the EU institution does not define its position. When the EU institution is silent after receipt of invitation to act, under EU court practice this fact also means that the EU

[37] *Echebastar v. European Commission*, European Union Court of Justice (1993, no. C-25/91), paras 6-9.
[38] *Sodima v. European Commission*, European Union Court of Justice (2000, no. C-44/00P), para 83.
[39] *Borromeo v. European Commission*, General advocate Gand of CJEU (1970, no. 6/70), p. 821.
[40] *European Parliament v. European Council*, European Union Court of Justice (1985, no. 13/83), para 25.
[41] *NDSHT v. European Commission*, *supra* note 9, paras 53–54.
[42] *Irish Cement v. European Commission*, European Union Court of Justice (1998, no. C-166/86), para 11.
[43] *Nordgetreide v. European Commission*, European Union Court of Justice (1972, no. 42/71), para 4.
[44] *Kohler v. European Court of Auditors*, European Union Court of Justice (1984, no. 316/82), para 13.
[45] *Air France v. European Commission*, European Union General Court (1994, no. T-3/93), para 55.
[46] *Pioneer Hi-Bred v. European Commission*, *supra* note 36, para 80.
[47] *Ibid*.

institution does not define its position.[48] Consequently, the EU institution properly adopts a position when it acts immediately after receiving the invitation to act, i. e. agrees with the request and starts to act, or unequivocally refuses to act while raising no doubts about its refusal.[49]

Definition of position is a key element in preliminary procedure under article 265 of the TFEU. Article 265 of the TFEU states that "if, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months". As can be seen in the article's wording, the action for failure to act before the EU courts can be brought only in the case when an EU institution does not define its position. Precisely, definition of position and its application by the EU courts altered the purpose of the actions for failure to act. This problem is discussed below.

2. CONSEQUENCES OF DEFINITION OF POSITION

This section analyses the consequences of definition of position and the position's impact on the procedure itself. As can be seen in EU case law, the consideration of whether an EU institution illegally failed to fulfill its duty was somehow replaced by a consideration whether the EU institution defined its position. Such EU court practice is criticized here and questions are raised about the purpose of the action for failure to act.

2.1. FAILURE TO ACT ONLY AS A FAILURE TO DEFINE A POSITION

The consequences of definition of position are important. Under EU court practice, any definition of position terminates further proceedings under article 265 of the TFEU.[50] The applicant is entitled to bring the action for failure to act only in the case when an EU institution does not adopt a position at all, i.e. the EU institution remains silent or just provides feedback on the current situation without answering about its plans to act or not.[51]

It is worth noting that under EU case law, even when the EU institution at first failed to adopt position and the action was brought before the court and the case was started, the EU institution nonetheless can define its position later. Definition of position in an ongoing case but before the judgment precludes the applicant from obtaining a final decision in a case for failure to act.[52] For example, in the case

[48] *European Parliament v. European Council*, European Union Court of Justice (2013, no. C-196/12), para 22.
[49] *Meroni v. High authority*, European Union Court of Justice (1962, no. 21/61), p. 76.
[50] *Hake v. European Commission,* European Union Court of Justice (1970, no. 75/69), para 11.
[51] *Echebastar v. European Commission,* General advocate Gulmann (1992, no. C-25/91), para 13.
[52] *Cantine v. European Parliament*, *supra* note 14, para 27.

Oficemen, the applicant invited the European Commission under article 265 of the TFEU to set anti-dumping regulation for cement which was supplied to the EU from third world countries. The European Commission failed to respond about whether it would satisfy the request, and the position of the European Commission was unknown.[53] After the definition of position had expired by two months, the applicant lodged action for failure to act before the EUGC. The action for failure to act was admitted because the European Commission did not define its position. However, during judicial procedure the European Commission defined its position by stating that it rejects the applicant's request regarding anti-dumping. The EUGC stated that at the time action was lodged it was admissible. However when the European Commission defined its position, further proceedings were terminated and no judgment was given.[54]

In legal doctrine it is observed that EU institutions tend to define their positions at the very last possible moment.[55] This approach is harshly criticized in legal doctrine mainly for two reasons. First, it further delays applicants from availing themselves of rights provided to them under the EU law, especially article 265 of the TFEU.[56] In legal doctrine it is indicated that this approach simply undermines legal protection, legal certainty, and sound administration, which are the central principles of EU law.[57] Second, definition of position at the last moment is considered as undignified effort to avoid judgment and to prevent the EU courts from clarifying the obligations of EU institutions.[58] By granting the right for the EU institution to define its position at any time before judgment, preconditions are created for EU institutions to abuse the right of defining position. For this reason it is advisable not to allow EU institutions to define position in cases in which judicial procedure has already been started.

As can be seen in the current practice of EU courts, any valid definition of position precludes finding whether the EU institution acted lawfully or not. In other words, when an EU institution defines its position, the EU courts are prevented from finding out whether that institution unlawfully executed competence under EU law. Under EU court case law, definition of position somehow became equivalent to the fulfillment of duty, and, therefore, illegal inaction cannot be constituted under article 265 of the TFEU.[59] In fact, in article 265 of the TFEU it is checked as to

[53] *Oficemen v. European Commission*, European Union General Court (1997, no. T-212/95), paras 28-33.
[54] *Ibid.*, paras 65-68.
[55] John T. Lang and Colin Raftery, "Remedies for the Commission's Failure to Act in 'Comitology' Cases," *European Law Review* No. 36 (2011): 272.
[56] *Ibid*.
[57] *Ibid*.
[58] *Ibid*.
[59] *ENU v. European Commission*, European Union Court of Justice (1993, no. C-107/91), para 10.

whether the EU institution adopted a position.[60] The aim of the action for failure to act was to gain the EU institution's decision, which can be either favorable to the applicant or unfavorable, but not to find out whether the EU institution performed its original duty.[61]

As an example of this problem: an applicant has evidence that an EU member state illegally provides state aid for the applicant's competitor. The European Council regulation no. 659/1999 sets the duty for the European Commission to examine alleged unlawful aid in the member states.[62] The applicant presents a claim before the European Commission to examine the case. The European Commission does not respond to the claim. Then the applicant, pursuant to article 265 of the TFEU, presents the European Commission with an invitation to act. The European Commission at the time does not define position, i.e. it has neither said that it shall examine the case nor said otherwise. Under such circumstances, the applicant lodges the action for failure to act for the purpose to oblige the European Commission to examine the aid and establish infringement. Additionally, the applicant presents evidence about illegal state aid. Imagine the situation that the European Commission during proceedings defines position and adopts decision, under which it rejects the applicant's claim. As mentioned above, definition of position terminates proceedings under article 265 of the TFEU. So, in this case, the fictional judicial proceedings would also be terminated, because the European Commission defined its position by saying that it will not examine the matter. The applicant can question what the purpose of the initiated proceedings was, if simple rejection to examine alleged illegal state aid is enough to terminate proceedings under article 265 of the TFEU?[63]

However, in some cases the EU courts showed initiative to change the goals of article 265 and examine the original performance of duties, not just checking whether the EU institution had defined its position. That case-law was supported by some scholars as well; thus the next section analyzes what should originally be constituted under article 265 of the TFEU.

2.2. FAILURE TO ACT AS A FAILURE TO FULFILL OBLIGATIONS

In legal doctrine it is stated that the "failure to act" should be considered only the original failure to perform obligation, i.e. checking whether the EU institution

[60] *Sánchez v. European Commission and European Parliament*, *supra* note 27, para 38.
[61] *Asia Motor France* v. *European Commission*, European Union General Court (1992, no. T-28/90), paras 39-44.
[62] *Regulation Laying down Detailed Rules for the Application of Article 108 of the Treaty on the Functioning of the European Union*, Official Gazette (1999, no. 659/1999), Art. 10.
[63] *Asklepios v. European Commission*, European Union General Court (2007, no. T-167/04), paras 74-78.

complied with its duties under EU law.[64] The failure to act cannot simply end with definition of position, which can be just a bare rejection to fulfill obligations under EU law.[65] It is assumed that definition of position could preclude further proceedings under article 265 only in a case when the EU institution agrees with the requirements set forth in the invitation to act and performs its alleged duties.[66] This would be logical, because the applicant could then further bring action for failure to act regarding only those requirements which the EU institution refused to perform. Under this view, the impartial EU court could decide whether illegal inaction still exists and therefore the EU institution should perform its duties. Under current case-law, the EU institution itself decides whether its inaction is legal or not, by defining a position.

Although the EU court's favorite "failure to act" is a "failure to define a position", some case-law shows a different approach. This alternative approach hints that "failure to act" can also be treated as a "failure to fulfill obligations". For instance, in the case *Netherlands v. European Commission*, the CJEU stated that the applicant waited too long to request the European Commission to act from the moment it became clear that the European Commission shall not perform its duties under EU law.[67] This problem of delayed invitation to act would certainly have not existed if "failure to act" in this case should have been treated as "failure to define position", and not as a "failure to fulfill obligations". This is due to the fact that invitation to act is being presented prior to definition of position, and the term to present invitation can only be counted from the original failure to act. It is not possible to count this term from the defined position.[68] General advocate Gand also noted that negative definition of position[69] should not deny the right to lodge the action for failure to act.[70]

When the original meaning of "failure to act" is analyzed, one CJEU case stands out. In the case *European Parliament v. European Council*, the CJEU stated that: "a refusal to act, however explicit it may be, can be brought before the Court under Article 265 since it does not put an end to the failure to act". This statement by the CJEU, taking into account all of the prevailing practice, provoked serious discussion. Professor Trevor Hartley contends that negative decision under which an EU institution rejects to act shall be treated not as a definition of position.[71] But if this was accepted as a general proposition, according to the professor, two

[64] Hans Smit and Peter Herzog, *The Law of the European Communities: A Commentary on the EC Treaty* (New York: Matthew and Bender, 1998), p. 415-416.
[65] *Eurocoton v. European Council,* European Union General Court (2000, no. T-213/97), paras 1-19.
[66] Hans Smit and Peter Herzog, *supra* note 64, p. 415-416.
[67] *Netherlands v. European Commission*, *supra* note 20, paras 10-24.
[68] *TF1 v. European Commission*, European Union General Court (1999, no. T-17/96), para 6.
[69] I. e. position which rejects applicant's requirements.
[70] *Alfons Lütticke v. European Commission*, General advocate Gand of CJEU (1966, no. 48/65), p. 31-32.
[71] Trevor Hartley, *supra* note 8, p. 395-396.

problems would arise. First, it would be hard to assess what could constitute a definition of position if a clear and explicit refusal does not do so.[72] Second, there would be legal uncertainty about what definition of position is. There have been several cases in which the statement by the EU institution that it would not meet the request has been held by the CJEU to constitute a definition of position.[73]

The CJEU was not consistent on the meaning of "failure to act". Because of the abstract nature of article 265 of the TFEU, the EU courts can set the "failure to act" term's content in their practice. Although the EU courts "failure to act" can be treated as a "failure to fulfill obligations" or "failure to define a position", the EU courts chose the latter conception and abandoned "failure to act as a failure to fulfill obligations".[74] Currently, in all the cases for failure to act, the EU courts terminate the proceedings when the EU institution defines its position. In current legal practice definition of position is equal to the termination of failure to act.[75]

General advocates Mayras[76] and Warner[77] criticized this approach of the EU courts, stating that when the EU institution defines position, the applicant should have the ability to further proceed under article 265. In case the applicant wants to annul the defined position, he can end the procedure under article 265 and start a new procedure under the article 263 of the TFEU of the position's annulment. This view seems logical, because currently the applicant can only try to annul the position under article 263, but he cannot proceed with article 265 if the position is defined. As can be clearly seen, the EU courts in their practice narrowed the "failure to act" conception to just "definition of position". In the newest practice the CJEU expressly states that: "A failure to act, for the purposes of Article 265 TFEU, means a failure to take a decision or to define a position, and not the adoption of a measure different from that sought or considered necessary by the applicant".[78]

Due to the abovementioned "failure to act" conception treatment, action for failure to act under article 265 of the TFEU became an ineffective legal remedy. Its current purpose is totally unclear, because under article 265 of the TFEU the lawfulness of inaction is not checked. Under article 265 of the TFEU only whether the EU institution replied to the applicant's invitation to act is checked. One can think that a favorable decision is a matter of success, because the applicant can win the case only when the EU institution does not define its position.

[72] *Ibid*.
[73] *Ibid*.
[74] *Buckl v. European Commission*, European Union Court of Justice (1992, no. C 15/91), para 17.
[75] *Alfastar Benelux SA v. European Council II*, European Union General Court (2013, no. T-274/12), paras 16–18.
[76] *National Carbonizing Company v. European Commission*, *supra* note 13, p. 389.
[77] *Camera Care v. European Commission*, General advocate Warner of CJEU (1980, no. 792/79 R), p. 134.
[78] *European Parliament v. European Council*, *supra* note 48, para 22.

3. REASONS FOR CERTAIN LIMITATIONS TO ACTION FOR FAILURE TO ACT, AND OTHER COUNTRIES' EXPERIENCES

The EUCJ and the EUGC in their case-law do not explain the reasons why the action for failure to act is interpreted in such an ineffective manner. However, general advocate Bot in the recent case *European Commission v. European Council* expressly stated that applicants are able to annul the definition of position via the action of annulment under article 263 of the TFEU, and, therefore, the aforementioned limitations of the action for failure to act are somewhat justifiable.[79]

However, in the legal doctrine the limitations of article 265 of the TFEU are harshly criticized and considered inappropriate.[80] In the legal doctrine it is argued that action for failure to act (due to the abovementioned reasons) became an almost meaningless legal remedy[81].

The limitations of the action for failure to act, based only on the fact that the applicant can start new proceedings and contest the position of EU institution, are inappropriate for several reasons. First of all, the whole process of defending from inaction of the EU institution is delayed when the applicant is forced to initiate two legal cases: (i) in first legal case under the action for failure to act, the applicant receives the position and (ii) in second legal case based under the action for annulment, the same applicant contests the position. While initiating several cases, the inaction, due to long process, can lose actuality and do harm to legal interests. Second, while initiating several cases, the applicant incurs unnecessary additional time and monetary costs. To solve this problem, it should be allowed for the applicant to proceed further under the action for failure to act also in the case when the EU institution defines its position.

Institute of action for failure to act also exists in other countries. The action for failure to act under article 265 of the TFEU originated in German law, but there it is quite different[82]. In German law, the applicant can use the action for failure to act and declare the illegal inaction also when the administrative institution adopts the position not to act[83]. Therefore, definition of position under the German law does not preclude declaring illegal inaction, contrary to article 265 of the TFEU. Similar actions for failure to act allow declaration of the illegal position of

[79] *European Commission v. European Council*, *supra* note 10, para 79.
[80] Josephine Steiner, Lorna Woods, and Philippa Watson, *EU Law*, 12th edition (Oxford: Oxford University Press, 2014), p. 303-304.
[81] Ole Due, "Legal Remedies for the Failure of European Community Institutions to Act in Conformity with EEC Treaty Provisions," *Fordham International Law Journal* No. 14 (1990).
[82] Jürgen Schwarze, *European Administrative Law*, revised 1st edition (London: Sweet&Maxwell, 2010), p. 123-127.
[83] Mathias Reimann and Joachim Zekoll, *Introduction to German Law* (Hague: Kluwer law international, 2005), p. 87-121.

administrative institutions also in Great Britain[84], Denmark[85], Lithuania[86], and other EU member states. In the United States of America action for failure to act also exists and definition of position does not preclude finding out whether the administrative authority properly conducts its obligations[87].

Consequently, the conception of article 265 of the TFEU is unique and differs from other national procedures.

CONCLUSIONS

The action for failure to act, which is entrenched in article 265 of the TFEU, consists of preliminary and judicial procedures. During preliminary procedure, the applicant requests the EU institution to remedy its failure to act. After receipt of invitation to act, the EU institution can adopt its position by meeting the request or rejecting it. Only in a case in which the EU institution does not adopt its position, an applicant is entitled to bring the action for failure to act before the EU courts. Even in a judicial stage but before a judgment, the EU institution can define its position and this position terminates the proceedings.

Due to the fact that article 265 of the TFEU is abstract in its nature and the term "failure to act" is not explained therein, the term's conception was developed in the legal practice of the EU courts. EU courts could have chosen to interpret "failure to act" as "failure to fulfill obligations"; but, instead, the term is interpreted as "failure to adopt position". In this case it is formally checked whether the EU institution replied to the invitation to act by defining its position. If the position is defined, the applicant cannot use article 265 of the TFEU to constitute illegal inaction of the EU institution and obtain favorable decision. Due to these reasons, action for failure to act is an ineffective legal remedy and has lost its purpose to determine whether EU institutions duly perform their duties. It is worth noting that similar actions in the member states and the United States of America do not have the aforementioned issues.

For the reasons given above, it is highly recommended to form the case-law of article 265 of the TFEU in a manner such that "failure to act" would mean "failure to fulfill obligations". It is also advised that only a positive definition of position could preclude judicial proceedings. Positive position is the EU institution's acceptance to meet the requirements set forth by the applicant in invitation to act.

[84] Jürgen Schwarze, *supra* note 82, p. 148.
[85] *Ibid*., p. 164.
[86] *Law on Administrative Proceedings*, Official Gazette (1999, No. 8-1029), Art. 90.
[87] Eric Biber, "Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction," *Virginia Environmental Law Journal* No. 26 (2008).

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