

# WHAT IS THE PRICE FOR BREAKING EU LAW?

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## Abstract

*Financial sanctions, as lump sum and penalty payments, can be imposed to Member States that failed to implement a judgement establishing an infringement. This mechanism was introduced by the Maastricht Treaty and further developed by the Lisbon Treaty. This paper is an analysis of Article 260 TFEU and examines the evolution of the mechanism, the principles for applying sanctions, the method of calculating sanctions, but also the limits of this procedure.*

**Keywords:** *infringement, financial sanctions, lump sum, penalty payments, EU law*

## 1. Introduction

Implementation of European Union law is not by far perfect, a standard that is neither realistic, nor reasonable. Although one of the fundamental values of the European Union is the rule of law, it becomes difficult, if not impossible to establish the degree of conformity<sup>1</sup>. Over time a system was developed that could track the degree of conformity, especially through coercive measures initiated by the European Commission and through decisions of the European Court of Justice<sup>2</sup>.

Thus, assuring the implementation of European Union Law requires passing through 3 distinct stages: the collection of data by the Commission, the initiation of an infringement action under article 258 TFEU and application of financial sanctions. *The first stage* of the process<sup>3</sup> is also the most effective, since over 90% of procedures initiated by the Commission ends at this stage. *The second stage* consists of an infringement action initiated by the Commission before the ECJ asking the Court to declare that a Member State failed to fulfil its obligations. Should the Court agree with the Commission, it will issue a declaratory judgement stating the breach. *In the third stage*, and only if the Member State does not comply with the Court's judgement, the Commission can initiate a follow-up action against the Member State demanding, on the basis of art. 260 (2) TFEU, that financial sanctions be imposed<sup>4</sup>.

Of crucial importance for the functioning of the European Union is for Member States to fully comply with the ECJ decisions. Otherwise, legal security,

citizens' rights, equal treatment between member states, as well as the balance between rights and obligations of member states become questionable.

## 2. Regulatory developments in the Treaties

The **Rome Treaties** provided in article 171 that member states failing to fulfil their obligations should take the necessary measures to comply with the Court decision. If the state failed to implement a judgment establishing an infringement there were no sanctions provided. There was, though, in this situation, the possibility to introduce a new infringement action, the pressure on the state being quite limited in this scenario<sup>5</sup>. The small number of infringement actions and the lack of a sanction made this procedure inapplicable and inefficient<sup>6</sup>.

The **Maastricht Treaty** amended article 171, thus including a sanctioning mechanism for Member States that did not comply with a previous decision of the Court of Justice which declared, on the basis of article 169, the existence of an infringement. The possibility of imposing a financial sanction, as lump sum or penalty payment, on a Member State that did not comply with a decision was thus introduced. The purpose of such sanctions was not to compensate for damages caused by a Member State, but to put economic pressure to bring the infringement to an end, to bestow the infringement procedure with coercive force and to offer member states a strong incentive to enforce decisions of the European Court of Justice<sup>7</sup>. Unfortunately, the instrument of imposing financial

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<sup>1</sup> Phedon Nicolaides, Anne-Marie Suren, The rule of law in the EU: what the numbers say, EIPASCOPE 2007/1, p. 33.

<sup>2</sup> See article 17 TFEU.

<sup>3</sup> The main purpose of the procedure is to force a Member States who breached a provision of EU law to comply. This pre-litigation stage is dedicated to the dialogue between the Commission and the Member State concerned on the possible infringement. A significant aspect of these mechanisms is to prevent excessive recourse to the judicial system.

<sup>4</sup> Financial sanctions can be imposed even from the second stage of the procedure, based on article 260 (3) TFEU, in cases concerning failure to notify measures to transpose directives.

<sup>5</sup> See Case 169/87, Commission v France. The duration of the infringement between the first judgement of the Court and the second one being 5 years.

<sup>6</sup> See Case C-334/94, Commission v France. The duration of the infringement between the first judgement of the Court and the second one being more than 20 years.

<sup>7</sup> Paul Craig, Grainne de Burca, Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină, ed. IV, Editura Hamangiu, București, 2009, p. 567.

sanctions was very rarely used because there were still very few cases brought before the Court,<sup>8</sup> as the Commission only asked for penalty payments, making publicly available just the method for calculating these penalties, but not those of lump sums<sup>9</sup>.

Through the **Amsterdam Treaty** amendments were brought to TEU and TEC, as well as a renumbering of articles, article 171 became article 228, with no modification to the content of the article<sup>10</sup>.

An important amendment to the new article 260 of the Treaty on the Functioning of the European Union (former article 228 of TEC) was brought by the **Lisbon Treaty**, which consolidated two aspects of the mechanism: (i) it eliminates the reasoned opinion (the Commission has to carry out only one pre-litigation procedural stage, namely the sending of a letter of formal notice requesting the Member State to submit its observations), the procedure thus being accelerated in practice<sup>11</sup>; (ii) a new paragraph (3) was added to article 260 which creates a new instrument for non-compliance with the obligation to notify measures transposing a directive adopted under a legislative procedure (when it deems appropriate, the Commission makes a proposal to the Court to impose a sanction, a lump sum or a penalty payment, in the same judgement that declares the infringement).

### 3. From the Commission proposal to the decision of the Court

Both the Commission and the Court acts in the common interest of the European Union, trying to determine the most appropriate sanction and its amount, taking into consideration the circumstances of the case.

The procedure provided by article 260 has a specificity – a hybrid between adversarial and investigation nature<sup>12</sup>. *Firstly*, the Commission has a discretionary competence to notify the Court<sup>13</sup>, but also proposing a sanction,<sup>14</sup> the Commission takes part in the procedure before the Court, the arguments in the letter of formal notice (reasoned opinion provided by

article 258) provide the circumstances of the purpose of the procedure, and also the burden of proof is attributed to the Commission. All these elements provide a adversarial nature to the procedure. *Secondly*, the Commission has an important role in evaluating data in the pre-litigation stage, its role not being limited to submit the infringement, but also having to argue the necessity of imposing financial sanctions based on the information collected.

The Commission's proposals on financial sanctions are not mandatory for the Court, but are a useful point of reference<sup>15</sup>. Neither the guidelines such as those contained in the Commission's communications cannot bind the Court, but contribute to ensuring that the action taken by that institution is transparent, foreseeable and consistent with legal certainty<sup>16</sup>, when submit its proposal to the Court<sup>17</sup>.

In the contentious stage, the Court has the main role, although more limited than that of the Commission, since it does not have the possibility to collect information. The Court also has the possibility of imposing a penalty or not, this being an exclusive prerogative<sup>18</sup>, and the obligation to fix the appropriate financial sanction and its amount (appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the Member State concerned), on the basis of its discretionary competence<sup>19</sup>.

Analysing the provisions of article 260 (3) "If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission", compared with article 260 (2), this limitation refers not only to the amount of the sanction chosen by the Commission, but also to the type of sanction. In other words, if the Commission were to request the Court to oblige a Member State to pay a penalty payment, the Court can't impose a bigger amount nor to apply a lump sum<sup>20</sup>.

The Commission also has the possibility to reduce the amount of the initial penalty, or to limit the extent of its application, or even withdraw the action, taking into consideration the progress made by the

<sup>8</sup> Since the entry into force of the Treaty of Maastricht only 3 cases were brought before the Court on the basis of article 171: Case C-387/97, *Commission v Greece*; C-278/01, *Commission v Spain*; C-304/02, *Commission v France*.

<sup>9</sup> See European Communications from 1996 (OL C 242, 21.8.1996) and 1997 (OJ C 63, 28.2.1997).

<sup>10</sup> Between 1997-2006 there were 22 cases ruled under article 228 TEC, of which more than 50% against France (7), Germany (4) and Luxembourg (3).

<sup>11</sup> The mechanism provided by article 260 (2) TFEU is structurally similar to the non-litigation procedure in two steps from article 258 (letter of formal notice and reasoned opinion).

<sup>12</sup> Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *The Law of the European Union*. Article 260, LexisNexis, 2011, p. 260-8.

<sup>13</sup> See Paul Craig, Grainne de Burca, op. cit., p. 545; A. Evans, *The enforcement procedure of article 169 EEC: Commission Discretion*, 4 ELRev. 442, 1979, p. 445.

<sup>14</sup> For example, the Commission may invoke certain circumstances that justify the lack of a financial sanction (minor infringements or when there is risk that such infringement can be repeated).

<sup>15</sup> Case C-387/97, *Commission v Greece*, para. 89.

<sup>16</sup> Opinion of Advocate General Juliane Kokott delivered on 25 February 2016 in Case C-557/14, *Commission v Portugal*, para. 22 and the cited case-law.

<sup>17</sup> See C-177/04, *Commission v France*, para. 70; Case C-557/14, *Commission v Portugal*, para. 69.

<sup>18</sup> Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: Cases and Materials*, second edition, Cambridge University Press, 2010, p. 348.

<sup>19</sup> Case C-278/01, *Commission v Spain*, para. 41; C-177/04, *Commission v France*, paras. 58, 63.

<sup>20</sup> See, in this regard, the Opinion of Advocate General Melchior Wathelet delivered on 11 December 2014 in case C-320/13, *Commission v Poland*, paras. 154-155.

Member State towards conforming with the initial decision (the case of partial compliance)<sup>21</sup>.

#### 4. The effects of Court's decisions

Should the Court find a violation in the context of a procedure based on article 258, the Court simply declares that the Member State failed to fulfil its obligations, and its decision does not have any effect over the contested national provision<sup>22</sup>. Also, the Court held that it has no jurisdiction to impose to a Member State to comply with its decision in a specified period of time. Although article 260 TFEU does not provide a timeframe for complying with the Court's decisions, according to the case law<sup>23</sup> the process of complying with an infringement ruling must be initiated at once and completed as soon as possible<sup>24</sup>.

The decision issued on the basis of article 260 TFEU has two different functions: *firstly*, establishes a positive obligation to take the necessary measures to comply with the judgment of the Court and, *secondly*, enables a different mechanism of coercion, namely imposing financial sanctions.

The decisions of the European Court of Justice have *res judicata status* and in case of difficulty of interpreting the meaning and scope of a judgment, the Court has the jurisdiction to interpret its decision, upon request of one of the parties or of a EU institution which can justify interest<sup>25</sup>.

#### 5. Determining the sanction

##### 5.1. Two types of sanctions

The two types of financial sanctions that can be imposed upon a Member State that has not complied with its obligations are **payment penalty** and **lump sum**.

If payment penalties have a persuasive role, having the potential to determine the Member State to end as soon as possible the violation, the lump sum sanction has a deterrent role, having the potential to affect the public and private interests by not abiding with the initial decision, for the effective prevention of

future violations of EU law, similar to the one in question<sup>26</sup>.

Determining the sanction in the case of state who do not enforce decisions of the European Court of Justice need to rely on the purpose of applying the measure, specifically ensuring the application of EU law. Thus, if the lump sum reflects the Member State's failure to comply with previous decisions (especially if there was a prolonged delay), penalty payments sanctions act as an incentive for the Member State to end the violation as soon as possible<sup>27</sup>.

Determining the sanction is important for two reasons: on one hand, which of the sanctions will be applied or if they will be applied cumulatively and, on the other hand, the amount of the sanction.

##### 5.2. The criteria for determining the sanctions

The three fundamental criteria, such as developed by the Commission since 1996, are: *the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to further infringements*. Commission subsequently added further criteria which have emerged from the development of jurisprudence: the necessity of a "clear and uniform method" (Commission must justify its calculation of the amount to the Court) and that respects both the principle of proportionality<sup>28</sup> and the principle of equal treatment among the Member States.

In applying those criteria, the Court must take into account the impact of the infringement on general and particular interests, and the urgency of getting the Member State to comply with its obligations<sup>29</sup>. Although the Court does not quantify individual coefficients when determining financial sanctions, it does admit that the method of calculation proposed by the Commission is helpful in rendering the calculation of penalties comprehensible<sup>30</sup>.

**The seriousness of the infringement.** The premise is that an infringement concerning non-compliance with a judgment *is always serious*. When determining the coefficient of seriousness the Commission will also take account of two parameters closely linked to the basic infringement which gave rise to the judgment for non-compliance, namely: the importance of the EU rules breached<sup>31</sup> and the impact of the infringement on general and particular

<sup>21</sup> Case C-177/04, *Commission v France*, paras. 15-17.

<sup>22</sup> Paul Craig, Grainne de Burca, op. cit., ed. IV, p. 573.

<sup>23</sup> See Case C-131/84, *Commission v Italy*, para. 7; Case C-169/87, *Commission v France*, para. 14; Case C-334/94, *Commission v France*, para. 31, Case C-387/97, *Commission v Greece*, para. 82.

<sup>24</sup> The Commission must leave sufficient time, a longer or shorter period according to the case, for the Member State to complete the process of compliance (2005 European Commission Communication, para. 22). See also Case C-387/97, *Commission v Greece*, paras. 82 and 92.

<sup>25</sup> See article 43 of the Statute of ECJ and article 158 (1) of the Rules of Procedure. Such a request for interpretation was made by Italy in Case C-496/09 INT.

<sup>26</sup> See Case C-378/13, *Commission v Greece*, para. 37.

<sup>27</sup> Lorna Woods, Philippa Watson, Steiner and Woods EU Law, ed. 12, Oxford University Press, 2014, p. 258.

<sup>28</sup> A sanction should be appropriate to the circumstances and proportionate both to the breach found and to the ability to pay of the Member State concerned (see Case C-387/97, *Commission v Greece*, para. 90 and Case C-278/01, *Commission v Spain*, para. 41).

<sup>29</sup> Case C-610/10, *Commission v Spain*, para. 5.

<sup>30</sup> Opinion of Advocate General Juliane Kokott delivered on 25 February 2016 in Case C-557/14, *Commission v Portugal*, para. 41.

<sup>31</sup> It will take into consideration the nature and extent of the EU provisions, the existence of established case law, the clarity and precision of the rule breached (see Case C-392/93, *British Telecommunications*, para. 42), the behaviour of the State onto the measures to comply with the judgment, non-cooperation with the Commission (see Opinion of Advocate General Geelhoed delivered on 18 November 2004 in Case C-304/02, *Commission v France*, para. 92).

interests<sup>32</sup>. The coefficient of seriousness is listed on a scale between a minimum of 1 and a maximum of 20<sup>33</sup>.

**The duration of the infringement.** Given the specific purpose of each kind of sanction, the Court of Justice has confirmed that the duration of the infringement must be taken into account both for the penalty payment and for the lump sum payment<sup>34</sup>.

Regarding the *duration*, for the purpose of determining the sanction but also for calculating the amount we should take into consideration several parameters: the coefficient of duration, the number of days the infringement persists, date of entry into force of the payment obligation and the date the obligation to pay comes to an end.

- The coefficient for duration used in calculating the amount of the penalty payment

For *article 260 (2)* the period taken into account is the duration of the infringement from the date of the first Court judgment up to the date the Commission decides to refer the matter to the Court<sup>35</sup>.

For *article 260 (3)* the period taken into account is the duration starting from the day following the expiry of the deadline for transposition in the directive in question up to the date the Commission decides to refer the matter to the Court<sup>36</sup>.

This period will be taken into account by applying a multiplier (minimum 1 and maximum 3) to the basic lump sum<sup>37</sup>. However, the Court held in its case-law that the duration of the infringement must be assessed taking into account when it considers the facts and not the date the Commission decides to refer the matter to the Court,<sup>38</sup> its discretion not being limited by the scale of 1 to 3.

- The number of days the infringement persists used in calculating the lump sum

For *article 260 (2)* is calculated between the date of delivery of the judgment under article 258 and the date the infringement comes to an end, or, failing compliance, the date of delivery of the judgment under article 260 (2) TFEU.

For *article 260 (3)* is calculated between the day after the time limit for transposition set out in the directive expires and the date the infringement comes to an end, or, failing compliance, the date of delivery of

the judgment under article 258 and article 260 (3) TFEU.

**The deterrent effect.** The sanction must be sufficiently high to ensure that: (i) the Member State decides to rectify its position and bring the infringement to an end (it must therefore be higher than the benefit that the Member State gains from the infringement); (ii) the Member State does not repeat the same offence<sup>39</sup>.

**The member state's ability to pay.** In determining the amount of the sanction a "n" factor is taken into account defined as the geometric mean based, in part, on the gross domestic product (GDP) of the Member State in question and, in part, on the weighing of voting rights in the Council. In conclusion, since the country is bigger and economically stable, the "n" factor will be higher, so the ability to pay of each Member State<sup>40</sup>.

### 5.3. Method of calculation

The method of calculation is the same for financial sanctions requested on the basis of article 260 (2), as well as for those requested on the basis of article 260 (3), taking into consideration that financial instruments are identical.

Moreover, the purpose of both types of sanctions is the same: to encourage a Member State to comply with an infringement judgment and, thus, to ensure the effective application of EU law – para. (2), and to strongly encourage Member States to transpose directives in the time period established by the legislative, thus ensuring the efficiency of the EU legislation – para (3). Also, the use by the Commission of an identical methodology is part of a coherent administration of the means that the Treaty put at its disposal, thus leading to more predictability for Member States.

The Commission will start calculating with a lower basic rate for the lump sum than for penalty payments.<sup>41</sup> In fact, it seems only fair that the daily amount of the penalty payment should be higher than the lump sum payment, since the behaviour of the Member State concerned is more reprehensible once the article 260 ruling has been delivered, since that involves a persistence of the infringement despite two consecutive judgments by the Court<sup>42</sup>.

<sup>32</sup> The purpose of using this parameter is not to gain reparation for damages suffered by the victims of the infringement, but to consider the effects of an infringement from the point of view of the individuals or economic operators concerned (for example, the effects are not the same if infringement concerns a specific case or interests of an entire profession).

<sup>33</sup> 2005 European Commission Communication, para. 16. The value of the coefficient of seriousness is the same for calculation of both sanctions.

<sup>34</sup> See 2005 European Commission Communication, para. 17 and Case C-304/02, *Commission v France*, para. 84.

<sup>35</sup> 2005 European Commission Communication, para. 17.

<sup>36</sup> See the Opinion of Advocate General Melchior Wathelet delivered on 11 December 2014 in case C-320/13, *Commission v Poland*, para. 176.

<sup>37</sup> On April 4, 2001 the European Commission adopted a new method to calculate the coefficient of duration at a rate of 0.10 per month from the date the article 258 judgment was delivered (<http://ec.europa.eu/transparency/regdoc/rep/10061/2001/FR/10061-2001-1517-FR-F-0.Pdf>). See also, Case C-177/04, *Commission v France*, para. 69.

<sup>38</sup> See Case C-177/04, *Commission v France*, para. 71, Case C-70/06, *Commission v Portugal*, para. 45, Case C-610/10, *Commission v Spain*, para. 120, Case C-378/13, *Commission v Greece*, para. 57, Case C-196/13, *Commission v Italy*, para. 102, Case C-557/14, *Commission v Portugal*, para. 43.

<sup>39</sup> See 2005 European Commission Communication, paras. 18-19.

<sup>40</sup> The value of "n" factor is the same for calculating both sanctions.

<sup>41</sup> Basic flat-rate amount "lump sum payment" is corresponding to one third of the of basic flat-rate amount "penalty payment".

<sup>42</sup> The action brought by the Commission on December 4, 2014 against Portugal (OJ C 46, 9.2.2015).

Although in the majority of cases the Commission details and justifies the method of calculating the sanctions proposed, the Court is not required to submit details of its calculation. If for determining penalty payments there are several decisions where the Court nevertheless details its method of calculation, for establishing lump sums the Court seems to refuse to justify its decision in report to the method proposed by the Commission.

## 6. Periodic penalty payments

**Definition.** Periodic penalty payments are "the amount, calculated in principle by day of delay – without prejudice to any different reference period in specific cases – penalising non-compliance with a judgment of the Court, the penalty running from the day when the second judgment of the Court was served on the Member State concerned up to that on which the Member State brings the infringement to an end"<sup>43</sup>.

**Application.** The imposition of a penalty payment is particularly suited to induce a Member State to put an end to an infringement which, in the absence of such a measure, tends to persist<sup>44</sup>. In other words, the imposition of a penalty payment is justified only if the Member State fails to comply with an earlier judgment of the Court at the date of the second ruling, given that full implementation is possible even on the day that the Courts delivers the article 260 judgement<sup>45</sup>.

Penalty payments can be imposed on a daily<sup>46</sup>, semester<sup>47</sup> or annual<sup>48</sup> basis. The amount of the penalty can be progressively reduced, depending on the evolution in the execution of the first judgment of the Court establishing the breach of obligations. Thus the periodic penalty payment has a degressive nature<sup>49</sup>.

**The first decision to impose the penalty payment.** In 2000, the Court ruled for the first time that a Member State was required to pay periodic penalty

payments. In the judgment of 4 July 2000, the Commission v Greece<sup>50</sup>, Greece was called before the Court for failure to fulfil its obligations in the matter of waste collection centre in Crete and to ensure compliance with directives that regulate in this field.<sup>51</sup> Since it did not implement all the measures necessary to comply with the judgment of the Court of 7 April 1992, Greece was ordered to pay a penalty payment of EUR 20.000 per day of delay.

**The method of calculating the daily penalty payment**<sup>52</sup>. According to the Commission, fines should always be deterrent and never symbolic. The calculation of the amount of the daily penalty payment has two stages: 1. multiplication of a standard flat-rate amount<sup>53</sup> by a coefficient for seriousness and a coefficient for duration; 2. multiplication of the result obtained by an amount fixed by country (the "n" factor) taking into account the capacity of the Member State to pay and the number of votes it has in the Council.

**Values.** Daily penalty payments so far range from EUR 2.800 per day<sup>54</sup> to EUR 57.761.250 per semester<sup>55</sup>.

## 7. Lump sum

**Definition.** The lump sum is a sanction "penalising the continuation of the infringement between the first judgment on non-compliance and the judgment delivered under article 260"<sup>56</sup>.

**Application.** All the legal and factual elements surrounding the failure to fulfil obligations established constitute an indication that the effective prevention of future similar repeat infringements of EU law requires the adoption of a deterrent such as an order for payment of a lump sum<sup>57</sup>.

The purpose of imposing a lump sum is to penalize the infringement for the period prior to the Court of Justice's decision under article 260 and thus to

<sup>43</sup> 2005 European Commission Communication, para. 14.

<sup>44</sup> Case C-304/02, Commission v France, para. 81.

<sup>45</sup> Case C-378/13, Commission v Greece, para. 47 read together with para. 51.

<sup>46</sup> The Court imposed in most cases penalty payments on a daily basis. For example, in case C-177/04, Commission v France, the Court opted for a periodic penalty imposed on a daily basis, given that enforcement involved the adoption of a legislative amendment.

<sup>47</sup> For example, in case C-378/13, Commission v Greece, the penalty payment was set on a semi-annual basis and was considered appropriate to enable the Commission to assess the Member State progress in enforcing the measures imposed.

<sup>48</sup> For example, in case C-278/01, Commission v Spain, paras. 45-46, the penalty payment was imposed annually following the Member States submission of the annual report on the implementation of the directive, and thus to avoid the situation when Member State could be forced to pay the fine for periods in which the infringement would actually have ceased.

<sup>49</sup> C-378/13, Commission v Greece, paras. 40, 60 and 61. In this case, the Court considered that reducing the penalty payment could only take place if Greece communicates to the Commission evidence which, beyond any doubt, proved to be in conformity.

<sup>50</sup> Case C-387/97, Commission v Greece.

<sup>51</sup> Directive 75/442/EEC on waste (JO L 194, 25.7.1975, p. 39) and Directive 78/319/EEC on toxic and dangerous waste (JO L 84, 31.3.1978, p. 43).

<sup>52</sup> An example of calculation proposed by the Commission under article 260 (2) TFEU and the Court's reasoning can be found in Case C-109/08, Commission v Greece. Similarly, in case C-320/13 Commission v Poland, such a calculation was done under article 260 (3) TFEU, although the case was removed from the register of the Court because the Commission withdrew its action following the adoption by Poland of the necessary measures to comply with the first decision of the Court. So far, there is no case where the Court has used or interpreted the possibility of imposing financial sanctions from the first ruling of the Court. See, however, the Opinion of Advocate General Melchior Wathelet delivered on 11 December 2014 in case C-320/13, Commission v Poland.

<sup>53</sup> The standard flat-rate amount penalises the violation of principle of legality and the failure to comply with the judgments of the Court. On the method of determining this amount, see point 15 of the 2005 European Commission Communication.

<sup>54</sup> Case C-576/11, Commission v Luxemburg.

<sup>55</sup> Case C-304/02, Commission v France.

<sup>56</sup> 2005 European Commission Communication, para. 10.3.

<sup>57</sup> Case C-184/11, Commission v Spain, para. 47.

strengthen the authority of the Court's judgments. The imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it<sup>58</sup>.

According to its initial view on this matter, the Commission's practice was systematically to ask for daily penalty payments and never for a lump sum to be imposed. The consequence was that Member States were often comply with the first ruling of the Court only at a late stage of the procedure, and sometimes only at the very end of the article 260 procedure, and so this late compliance not being sanctioned in any way. However, the Commission did not rule out the possibility of asking only for a lump sum to be imposed in certain situations<sup>59</sup>, although there are no cases till today where the Commission only claimed for a lump sum payment pursuant to article 260 (2) or (3) TFEU.

There are cases where only a lump sum payment was imposed when the Member State's compliance with the first judgment was recorded in the course of the proceedings before the Court, even though the Commission asked for both a lump sum and a daily penalty payment. In assessing this progress, the Commission may consider that it is no longer necessary to impose a daily penalty payment and therefore withdraw that claim<sup>60</sup>.

**The first decision to impose this sanction.** In 2005, the Court imposed this sanction in its judgment of 12 July 2005, *Commission v France*<sup>61</sup>, where the cumulative penalty payment and lump sum payment was also imposed for the first time. According to the Court's decision, by fixing the amount of the lump sum, a fair assessment was made of the particular circumstances of the case. The French Republic was ordered to pay a lump sum of EUR 20.000.000.

**The method of calculating the lump sum takes into account two values:**<sup>62</sup> **1.** minimum fixed lump sum;<sup>63</sup> **2.** a daily amount multiplied by the number of days the infringement persists. This amount will apply when the result exceeds the minimum fixed lump sum. The condition for calculating such an amount is that at the time of its imposition (date of the judgment) this calculation is possible and the Court can decide on a fixed amount.

The method of calculating the *daily amount* that composes the lump sum is similar to setting the daily amount applicable for the daily penalty payment:

multiplying a standard flat-rate amount by a coefficient for seriousness and then by the "n" factor, taking into account both the capacity of the Member State to pay and the number of votes it has in the Council.

A daily amount is determined first. Secondly, this daily amount is multiplied by the number of days the infringement persists in order to obtain the total amount of the lump sum. Therefore, it becomes necessary to compare, on the one hand, the cumulative total of the daily amount for determining the lump sum calculated until the Commission's decision (referral to the Court under article 260 TFEU) and, on the other hand, the minimum fixed lump sum established for the Member State concerned. Daily amount will be proposed by the Commission when the calculation result exceeds the minimum fixed lump sum.

**Values.** The largest lump sum imposed on a Member State as a result of the failure to comply with a judgment of the Court is EUR 40 million for Italy in Case C-196/13. In this case the Court ruled in over 20 waste cases where the Member State has failed to fulfil its obligations under European Union law. The infringement in question was characterized as of a general and persistent nature, the coefficient of gravity proposed by the Commission being 8 and, in terms of the duration of the infringement; it lasted for more than seven years, which is a considerable period.

The lowest lump sum is EUR 250.000 and it was imposed on the Czech Republic in case C-241/11, as a result of the non-enforcement of the judgment finding a breach of obligations following the partial transposition of Directive 2003/41/EC. The circumstances that led the Court to the imposition of a reduced amount were: (i) the Member State cooperated in good faith with the Commission; (ii) 19 months elapsed between the date of delivery of the first judgment and the date when the Czech Republic fully transposed Directive 2003/41 into domestic law and, consequently, brought its national legislation into conformity with that judgment; (iii) late compliance, by that Member State, with the first judgment had a limited effect on the internal market for occupational retirement provision and, therefore, on private and public interests.

## 8. The possibility to cumulate sanctions

**The first decision to impose this sanction.** The Court of Justice confirmed for the first time in its judgment of 12 July 2005, in *Commission v France*<sup>64</sup>,

<sup>58</sup> Case C-304/02, *Commission v France*, para. 81.

<sup>59</sup> 2005 European Commission Communication, para. 10.5.

<sup>60</sup> See Case C-184/11, *Commission v Spain*; Case C-241/11, *Commission v Czech Republic*; C-270/11, *Commission v Sweden* (the Commission stated that it had partially withdraw its claim with regard to daily penalties in the light of the transposition of Directive 2006/24 and the communication of the transposition measures in the course of the procedure before the Court, but retains its claim for the lump sum payment and the amount thereof).

<sup>61</sup> Case C-304/02, *Commission v France*. This sanction was imposed even though the Commission only asked for a daily penalty payments.

<sup>62</sup> For an example of calculation proposed by the Commission under article 260 (2) TFEU see Case C-557/14, *Commission v Portugal*.

<sup>63</sup> This amount is set for each Member State according to the "n" factor. From 2010, these amounts are communicated annually by the Commission and are revised in line with inflation and GDP of each Member State.

<sup>64</sup> Case C-304/02, *Commission v France*.

the possibility of imposing cumulatively two kinds of financial sanction (penalty and lump sum) in cases where the infringement persisted for a considerable time and still tends to persist.

The judgment is of importance from two points of view: first, because it is the first decision where both types of sanctions were applied cumulatively and, second, because it demonstrates that the Commission's proposals are not binding the Court, the latter having full jurisdiction to impose the appropriate type of sanction and the amount thereof<sup>65</sup>.

The Commission, Denmark, the Netherlands, Finland and the UK<sup>66</sup> supported the Court's arguments in favour of cumulative sanctions because of their common objective, of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that EU law is in fact applied.<sup>67</sup> Both sanctions are complementary, in that each of them respectively seeks to achieve a deterrent effect.

Therewith, a combination of those measures should be regarded as one and the same means of achieving the objective laid down by article 260 TFEU, not only to induce the Member State concerned to comply with the initial judgment but also to reduce the possibility of similar infringements being committed again<sup>68</sup>.

**The active role of the Court in the application of sanctions.** Although the Commission did not proposed a lump sum, the Court of Justice rejected the argument that it would need "political legitimacy" to impose financial sanctions unsolicited by the Commission and stated that the financial penalties imposed "must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct"<sup>69</sup>.

From a procedural point of view, the principles of civil procedural law valid in all Member States, namely the principle of availability and the principle of the right to defence, have been invoked, according to which the courts cannot exceed the limits of the parties' claims. However, the Court has invoked the special nature of the article 260 TFEU procedure, the imposition of

sanctions not having the purpose to compensate the damages caused by the wrongful Member State but to exert sufficient economic pressure to put an end to the infringement<sup>70</sup>.

**Implementation of article 260 (2) TFEU.** In the last 5 years, the Court has ruled in 18 cases under article 260 (2), of which only one was rejected by the Court<sup>71</sup>.

**Implementation of article 260 (3) TFEU.** The provisions of article 260 (3) TFEU represent the innovation of the Lisbon Treaty, which aims to give a stronger incentive to Member States to transpose directives within the deadlines laid down and hence to ensure real effectiveness in European Union law<sup>72</sup>. This new instrument creates a derogatory situation from the application of article 258 TFEU, namely the possibility for the Commission to suggest to the Court to impose a lump sum or penalty payment in the same judgment which finds that a Member State has failed to fulfil its obligation to notify measures transposing<sup>73</sup> a directive adopted under a legislative procedure<sup>74</sup>.

The Commission announced in its 2011 Communication<sup>75</sup> that it will, in general, ask the Court to impose only a penalty payment, but depending on what the Member States do, the Commission will not hesitate to adjust its approach by seeking a lump sum in all cases. Subsequently, in its 2016 Communication<sup>76</sup>, in the light of experience<sup>77</sup>, the Commission stated that it tighten its practice and would systematically ask the Court to impose both a lump sum and a periodic penalty payment.

## 9. Conclusions

The European construction was founded on the basis of cooperation between Member States and the institutions of the European Union and on an automatic compliance with the rules of the new institutional construction. The accession of new Member States and the enlargement of attributions have triggered a lower and lower rate of conformity, making it necessary for

<sup>65</sup> The Court imposed a cumulative penalty, although the Commission only requested a penalty payment of EUR 316.500 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-64/88.

<sup>66</sup> Case C-304/02, *Commission v France*, para. 76.

<sup>67</sup> *Ibid.*, para. 80.

<sup>68</sup> *Ibid.*, para. 77.

<sup>69</sup> *Ibid.*, para. 91.

<sup>70</sup> *Ibid.*, para. 95.

<sup>71</sup> According to the Commission's reports on the monitoring of the application of EU law (2011-2015).

<sup>72</sup> See European Commission Communication on the implementation of article 260 (3) TFEU (OJ L 12, 15.1.2011). The introduction of this procedure was motivated by the widespread problem of late transposition of directives.

<sup>73</sup> Concerns both the total failure to notify any measures to transpose a directive and cases in which there is only partial notification of transposition measure (paras. 16 to 19 of the abovementioned Commission Communication). See <http://eur-lex.europa.eu/collection/n-law/mne.html?locale=en>.

<sup>74</sup> The Commission points out in the abovementioned Communication that article 260 (3) TFEU cannot be used when non-legislative directives are not transposed. The Commission will therefore have to continue referring matters to the Court first by virtue of a procedure under article 258 and, in the event of failure to comply with a judgment, then by a second referral to the Court pursuant to article 260(2).

<sup>75</sup> OJ C 12, 15.1.2011.

<sup>76</sup> OJ C 18, 19.1.2017.

<sup>77</sup> The Commission has registered an upward trend in 2015 with regard to failure to fulfil obligations due to late transposition, representing a 19% increase over 2014.

an intervention for ensuring the functionality of the Union<sup>78</sup>.

Considering the fact that the decisions of the European Court of Justice are declaratory, from a juridical point of view they are redundant, since the Court has no jurisdiction to intervene in the legal order of the Member State or to impose a specific conduct in order to force the Member State to comply with the European Union law<sup>79</sup>. The financial sanctions imposed do not seem to have the expected deterrent effect, taking into consideration that, in certain cases, Member States do not take measures to transpose a directive until is very late, more specifically during judicial procedures initiated against them by the Commission and even late compliance before the ruling does not result in any sanction and so is not effectively discouraged.

We can say that non-compliance with EU law is very cheap especially in light of the fact that Member States may obtain such additional time, substantially nearly 10 years, to fulfil their obligations<sup>80</sup>. Of course the real economic costs of such behaviour of Member States is actually much higher counting the cost of human resources invested in such a process, the risk of awarding damages before national courts, and the cost of failing to reap the benefits of integration and common EU policies<sup>81</sup>.

Practice has demonstrated that imposing financial sanctions has some limits that surpass its main purpose, that of ensuring the efficient application of EU law: (i) compliance only after the infringement procedures is in an advanced stage, often in the final stage; (ii) late execution, just before the Court deliver a judgement,

does not lead to any sanctions and, thus, is not efficiently discouraged; (iii) after the Court has declared that a Member State has not complied with its obligations, the same Member State could allow the situation to continue; (iv) there is no mechanism for collecting payment in case a Member State refuses to comply and there is no express possibility to solicit an imputed notice or to impose upon a Member State to take specific measures.

Of course that the quantity of European provisions is not negligible, the EU legislative corpus that Member States need to comply with, transpose<sup>82</sup> or implement, is considerable, each corresponding to at least one possibility of non-compliance and accordingly to one infringement action<sup>83</sup>.

We believe that the possible solutions that can be taken into consideration for consolidating the sanctioning system and thus ensuring the efficient implementation of EU law are:

1. Increasing the amount of the sanctions imposed, especially for Member States with a 'subscription' for non-compliance;
2. The possibility of imposing financial sanctions from the moment the Court finds that an infringement has occurred (this will enable the Commission to propose fines already in the article 258 procedures);
3. Reducing the timeframes in the infringement procedure;
4. Development of the Commission's support programs for Member States in transposing and implementing the legislation.

## References:

- Phedon Nicolaides, Anne-Marie Suren, *The rule of law in the EU: what the numbers say*, EIPASCOPE 2007/1;
- Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, ed. IV, Editura Hamangiu, București, 2009;
- European Communications from 1996 (OL C 242, 21.8.1996) and 1997 (OJ C 63, 28.2.1997);
- Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *The Law of the European Union. Article 260*, LexisNexis, 2011;
- A. Evans, *The enforcement procedure of article 169 EEC: Commission Discretion*, 4 ELRev. 442, 1979.
- Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: Cases and Materials*, second edition, Cambridge University Press, 2010;
- Lorna Woods, Philippa Watson, Steiner and Woods *EU Law*, ed. 12, Oxford University Press, 2014.

<sup>78</sup> Interestingly, no new member states are leading with the infringement actions. From 1952 to 2015, the six founding states (France, Germany, Italy, Belgium, Luxembourg, and Netherlands) comprise a 56% of all actions, placing Italy on the first place with 642 out of a total of 3859. See the Court of Justice 2016 Report, p. 112.

<sup>79</sup> Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *The Law of the European Union. Article 260*, LexisNexis, 2011, p. 260-3.

<sup>80</sup> Phedon Nicolaides, Anne-Marie Suren, *The rule of law in the EU: what the numbers say*, EIPASCOPE 2007/1, p. 37.

<sup>81</sup> *Ibid*, p. 38.

<sup>82</sup> For example, at the beginning of 2016 Romania registered a total of 90 directives that have a transposition deadline and notice for 2016-2018 (<http://www.cdep.ro/presa/Anexa%20Directive%20UE.pdf>).

<sup>83</sup> Phedon Nicolaides, Anne-Marie Suren, *The rule of law in the EU: what the numbers say*, EIPASCOPE 2007/1, p. 35.