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FINANCIAL SANCTIONS AGAINST MEMBER STATES FOR INFRINGEMENT OF EU LAW

ABSTRACT

The founding treaties set out two procedures where the Court of Justice may impose financial sanctions on EU Member States which fail to comply with their obligations under EU law. The first procedure is laid down in Article 260(2) TFEU, concerning cases when a Member State has failed to comply with an earlier judgment of the Court. The second option is a new legal solution introduced by the Lisbon Treaty in Article 260(3), under which the Court may impose sanctions on a Member State that has failed to notify the Commission about the national measures for transposing a directive adopted under a legislative procedure. If the Court finds that the Commission's allegations are true, it may impose penalty payment or a lump sum. Pursuant to Article 260(2), the Court is free to determine the sanction amounts, whereas the penalty payment or lump sum imposed pursuant to Article 260(3) must not exceed the amount specified by the Commission.

Keywords: *Article 260 TFEU, Court of Justice, penalty payment, lump sum, judgment, measures transposing a directive.*

1. INTRODUCTION

The Maastricht Treaty introduced an important novelty in Article 171 by envisaging the possibility of imposing financial sanctions upon Member States which do not comply with the judgments of the Court of Justice (hereinafter: Court). The Amsterdam Treaty and the Treaty of Nice simply renumbered Article 171 of the EC Treaty into Article 228 without introducing any changes. In the Lisbon Treaty, i.e. the Treaty on the Functioning of the EU (hereinafter: TFEU), Article 228 of the EC Treaty became Article 260 of the TFEU and its content was modified in some respects.

The TFEU amended the procedure set out in the second paragraph of Article 260 (ex 228) and added a completely new paragraph 3, concerning failure to notify measures transposing a directive adopted under a legislative procedure. The TFEU kept the essence of paragraph 2 and only removed the pre-litigation stage of issuing a reasoned opinion. Thus, the rules on types of sanction for non-compliance with the judgment and the method of calculating their amounts were not amended, but the sanctioning procedure was simplified and accelerated. The new paragraph 3 provides that where a Member State has failed to fulfill its obligation to notify measures transposing a directive, the Commission may suggest to the Court, even in an action launched under Article 258 TFEU, to impose the lump sum or penalty payment on the breaching Member States. If the Court finds that the alleged infringement exists, it may impose requested sanctions, which shall not exceed the amount specified by the Commission.

The first part of this paper describes the procedure under Article 260(2), followed by examination of the scope and procedure under Article 260(3). Further on, we analyze the sanctions under paragraph 2 of Article 260 and explore the types of envisaged sanctions as well as the criteria and methods of their calculation. The last part of the paper discusses the specificity of sanctions under paragraph 3 of Article 260, as compared with the sanctions set out in paragraph 2 of that article.

2. THE PROCEDURE UNDER ARTICLE 260(2) TFEU

Similarly to Article 258 TFEU, the procedure regulated by Article 260(2) TFEU consists of the pre-litigation and a judicial phase. The pre-litigation phase involves only the Commission and the Member State which allegedly failed to enforce the judgment. If the Commission considers that the State did not take the necessary measures to enforce the judgment, it should send a letter of formal notice to the non-compliant State.¹ In that notice, the Commission must provide specific reasons for non-compliance and give the State the opportunity to submit observations and present its arguments. Generally speaking, the purpose of the pre-litigation procedure is to give the State concerned the opportunity to comply with its obligations under EU law and enable it to use the right to defend itself against the Commission's complaints.²

¹ In practice, prior to this formal step, the Commission and the Member State have informal negotiations, aimed at adjusting their views on the alleged failure to enforce judgments and on measures to rectify such a situation; Radivojević, Z.; Knežević-Predić, V., *Institucionalni mehanizam Evropske unije posle Lisabonskog ugovora*, Punta, Niš, 2016, p.162.

² Case C-456/03 *Commission v. Italy* [2005] ECLI:EU:C:2005:388, par. 36.

In the letter of formal notice, the Commission has to determine reasonable period for enforcement of the judgment.³ It should be noted that the Commission must leave sufficient time for the Member State to enforce the judgment. Otherwise, the Commission runs the risk that the Court rejects its subsequent action.⁴

The TFEU simplified the administrative phase by abolishing the Commission's obligation to send a reasoned opinion to the defaulting State, and thus introduced the "fast-track administrative procedure".⁵ This amendment notably shortened and accelerated the procedure, without significantly reducing the Member State's rights of defense.⁶

If the administrative stage is unsuccessful, Article 260(2) empowers the Commission to refer the case to the Court.⁷ In the new complaint, the Commission may request the Court to declare that the Member State did not comply with the original judgment and concurrently request a lump sum or penalty to be imposed on the non-compliant State.

It should be stressed that under Article 260(2) the Commission is not obliged to bring the case to the Court. As in Article 258, the Commission enjoys full discretion in deciding whether to launch action against State which failed to obey the judgment.⁸ But, if the Commission lodges an action, it must specify the amount of sanctions. Given the mandatory nature of the modal verb "must" in Article 260(2), the Commission has no discretion on this point.⁹ So, the Commission shall ask for at least one type of sanction in every case.

The Court considers the procedure laid down in Article 260(2) as a "special judicial procedure for the enforcement of judgments, in other words, as a method of enforcement"¹⁰; consequently, all the general principles developed by the Court

³ Wenneras, P., *Sanctions against Member States Under Article 260 TFEU: Alive, But Not Kicking?*, Common Market Law Review, Vol.49, No.1, 2012, p.148.

⁴ Case C-278/01 *Commission v. Spain* [2003] ECLI:EU:C:2003:635, pars. 27-31.

⁵ Wenneras, P. *op.cit.* note 3, p.47.

⁶ Arnulf, A., *The European Court of Justice after Lisbon*, in: Trybus, M. Rabini, L. (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar Publishing, Cheltenham/Northampton, 2012, p.39.

⁷ The Court of Justice has exclusive jurisdiction to conduct proceedings under Article 260 TFEU.

⁸ Unfortunately, the exercise of that discretion is not always based on the merits of the case but also on political considerations; Jack, B., *Enforcing Member States Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties*, Journal of Environmental Law, Vol. XXIII, No.1, 2011, p.79.

⁹ Theodossiou, A. M., *An analysis of the recent response of the Community to non-compliance with Court of Justice Judgements: Article 228 E.C.*, European Law Review, Vol. XXVII, No.1, 2002, p.29.

¹⁰ Case C-304/02 *Commission v France* [2005] ECLI:EU:C:2005:444, par. 92.

with regard to Article 258 should apply fully to Article 260(2).¹¹ First, the subject matter of dispute in the pre-litigation phase and judicial phase must be identical, meaning that “the Commission, in its application, cannot extend the subject-matter of the dispute by putting forward new complaints which were not included in the reasoned opinion¹² in which the Commission specified the points on which the Member State concerned had not complied with the judgment”.¹³ Second, in the action under Article 260(2), the Commission may charge the State only for failure to fulfill the obligations which the Court has declared in judgment issued on the basis of Article 258.¹⁴ However, it should be noted that under Article 258 the Commission does not have to bring an action for each and every infringement of EU legal act, but it may join them together into a single action and ask the Court to declare that the State has breached relevant EU rules in a general and persistent manner.¹⁵ Third, the Commission has the burden of proof and it must prove each aspect of its claim in the proceedings under Article 260(2).¹⁶

Acting upon the complaint, the Court has to decide whether the Member State enforced the previous judgment or failed to do so. After the Lisbon Treaty abolished the reasoned opinion, “the reference date for assessing whether there has been an infringement for the purpose of Article 260 is the date of expiry of the period prescribed in the letter of formal notice”.¹⁷ If the Courts finds that there was an infringement, it may impose financial sanctions.

3. THE SCOPE AND PROCEDURE UNDER ARTICLE 260(3) TFEU

Article 260(3) TFEU is a completely new instrument introduced by the Lisbon Treaty. It allows the Commission to seek financial sanctions earlier, at the first stage of the infringement proceedings under Article 258 TFEU, in cases involving a failure to “notify measures transposing a directive adopted under a legislative procedure”.

¹¹ Prete, L.; Smulders, B., *The Coming of Age of Infringement Proceedings*, Common Market Law Review, Vol.47, No.1, 2010, p.49.

¹² The claims are now included in the letter of formal notice (noted by Z. R., N. R.).

¹³ Case C-457/07 *Commission v. Portugal* [2009] ECLI:EU:C:2009:531, par.56.

¹⁴ Case C-457/07, *op.cit.* note 13, par.47; Case C-95/12 *Commission v. Germany* [2013] ECLI:EU:C:2013:676, par.23.

¹⁵ For example: Case C-494/01 *Commission v. Ireland* [2005] ECLI:EU:C:2005:250; Case C-135/05 *Commission v. Italy* [2007] ECLI:EU:C:2007:250; Case C-196/13 *Commission v. Italy* [2014] ECLI:EU:C:2014:2407, par. 33.

¹⁶ Case C-197/98 *Commission v. Greece* [1999] Opinion, ECLI:EU:C:1999:597, pars. 23-24.

¹⁷ Case C-241/11 *Commission v. Czech Republic* [2013] ECLI:EU:C:2013:423, par.23.

Current Article 260(3) is an exact replica of Article III-362(3) of the failed Treaty establishing a Constitution for Europe.¹⁸ The background for this novelty is the persistent and widespread problem of untimely transposition of directives, which not only threatens the uniform application of EU law but has also taken a disproportionately high toll on the Commission's enforcement recourses.¹⁹ The treat of sanction at the early stage of the infringement procedure should have a considerable preventive effect, inducing the Member States to rapidly end non-compliance with the obligation to transpose directives.²⁰ According to the Commission, the purpose of this new paragraph is to give a stronger incentive to Member States to transpose directives within the prescribed deadlines and thus ensure that EU legislation is genuinely effective, considering that "prompt transposition of directives is essential in safeguarding the general interests pursued by Union legislation... and protecting European citizens who enjoy individual rights under this law".²¹

However, there are several open questions concerning the function and place of the newly-created paragraph 3 of Article 260 TFEU. The first issue which should be clarified is "whether the new mechanism is meant to penalize directly the failure to transposition directive or, contrary, the non-implementation of judgments handed down by Court declaring Member States to be in breach of their obligation to notify transposition measures".²² The wording of the new provision suggests that it only introduces the sanction mechanism which, in standard infringement proceedings, allows the Commission to seek an additional order, asking the Court to impose financial sanctions upon the defaulting Member State. The Commission seems to have accepted that interpretation,²³ a also proposed by some authors.²⁴ If that is so, "the new paragraph would seem a odd place to locate a mechanism to penalize failures to notify transposition measures...Such a provision essentially constitutes derogation (or variant) from Article 258 TFEU. As such, it would have been more logically placed in a new paragraph added to Article 258 TFEU".²⁵

¹⁸ Lisbon Treaty – Comments and preparatory works for the Reform Treaty November 2009, available at URL=<http://www.lexnet.dk/law/download/treaties/Ref-2007.pdf>. Accessed January 2017.

¹⁹ Commission Communication, Application of Article 228 of the EC Treaty, SEC (2005) 1658, (hereinafter: 2005 Communication), par.20.

²⁰ Wenneras, P. *op.cit.* note, p.166.

²¹ Commission Communication, Implementation of Article 260(3) TFEU, SEC (2010), 1371 final (hereinafter: 2010 Communication), par.7.

²² Wahl, N.; Prete, L., *Between Certainty, Severity and Proportionality: Some Reflections on the Nature and Functioning of Article 260 (3) TFEU*, European Law Reporter, No.6, 2014, p.171.

²³ 2005 Communication, par.6.

²⁴ Kilbey, I.C., *The Interpretation of Article 260 TFEU (ex 228 EC)*, European Law Review, Vol.35, No.3, 2010, pp. 383-384.

²⁵ Wahl, Prete, *op.cit.* note 22, p.172. Some authors consider that paragraph 3 of the Article 260 essentially constitutes a revision of Article 258 TFEU; see: Raičević, N.; Đorđević, S., *The Controle of Com-*

On the other hand, there are legal scholars suggesting a different interpretation of the new Treaty provision.²⁶ According to their opinion, the fact that the new mechanism is found in Article 260(3) shows that it constitutes an option of the procedure under Article 260(2). In the judgment rendered pursuant to Article 258, the Court anticipates the effects of the ruling under Article 260(2) concerning the specific type of infringement covered by the new provision. This leads these authors to conclusion “that Article 260(3) TFEU lays down a mechanism for enforcing judgments, just like Article 260(2) TFEU, rather than a mechanism for immediately imposing sanctions for failure to notify transposition measures”.²⁷

The application of Article 260(3) depends on two conditions: first, the Member State must have failed to notify measures for transposing a directive (first condition); the directive in question must have been adopted under a legislative procedure (second, conditions).

In the first place, the new mechanism can be used by the Commission when it brings a case against a State for failure to fulfill its obligation to notify transposition measures. Yet, the precise meaning of this condition is not easy to understand. “The EU Treaties do not place Member States under any obligation to notify measures transposing directives. Such an obligation has regularly included within the final provision of each directive”.²⁸ Most directives contain a general clause stating that the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the directive within a certain time limit and immediately inform the Commission thereof. “This includes the normative and organizational aspect of transposition, i.e. absorbing the substantive content of directive into national law and creating the legal and administrative framework necessary for its application and enforcement. Failure to notify such measures clearly falls within the scope of Article 260(3) TFEU”.²⁹

The next question relates to the notion of failure to notify measures transposing a directive. Does it imply “the Member States’ substantive failure (that of not transposing a directive)” or “a procedural failure (that of not communicating the transposition measures to the Commission)”. In any case, the latter obligation must

pliance with the Judgments of the EU Court of Justice, in: M.Lazić, S.Knežević (ed.), *Legal, Social and Political Control in National, International and EU Law*, Collection of papers from the International Scientific Conference, Niš, 2016, p. 276, note 7.

²⁶ Garcia, R.A., *Lisbon and the Court of Justice of the European Union*, Working Papers on European Law and Regional Integration, WP IDEIR, No.1, 2010, p.18.

²⁷ Wahl, Prete, *op.cit.* note 22, pp.171-174.

²⁸ *Ibid.*, p.174.

²⁹ Wenneras, P., *op.cit.* note 3, pp.166-167.

be “ancillary to the former, serving only to facilitate a proper verification of the fulfilment of substantive obligation”.³⁰ On the contrary, it be possible that “financial sanction might be imposed on a Member State which actually implemented a directive, but has simply failed to notify the Commission of the implementation measures. It seems unlikely that Court would impose a sanction³¹ in case of such procedural failure without analyzing the substantial obligation. In such a case, the “Court should probably consider to merely declare the failure without however imposing any sanction upon the defaulting Member State”.³²

The Commission’s Communication suggests that it implies not only a total failure to notify any measures to transpose a directive but also cases of partial notification of transposition measures. The complete failure to communicate national measures is usually regarded as an indication that the State has not adopted any transposition measure at all. The instance of partial notification “might occur either where the transposition measures do not cover the whole territory of the Member State or where the notification is incomplete with respect to the transposition measures corresponding to a part of the directive”.³³ The Commission contends that both such cases fall within the scope of Article 260(3).

Concurrently, it appears that Article 260(3) is not intended to apply to cases in which the Member State has *prima facie* fulfilled its obligation to notify measures for transposing a directive, but where the transposition turns out to be substantively incorrect. The Commission considers that such instances must be dealt with in ordinary infringement proceedings under Article 258 TFEU.³⁴

However, “drawing a line between partial or incomplete transposition measures and the notification of incorrect transposition measures does not appear straightforward”.³⁵ This is reflected in the Commission’s Communication, which reveals the complexity awaiting “where the Member State has provided all necessary explanations on how it believes it has transposed the entire directive, the Commission may consider that the Member State has not failed to meet its obligation to notify of transposing measures, and therefore Article 260(3) does not apply”.³⁶ Hence, it seems “that the Commission will apply some form of *bona fides* test when determining whether the infringement should be characterized as a

³⁰ Wahl, Prete, *op.cit.* note 22, p.174.

³¹ Arnall, *op. cit.* note 6, pp. 39-40.

³² Wahl, Prete, *op. cit.* note 22, p.187, note 36.

³³ 2010 Communication, par.19.

³⁴ *Ibid.*

³⁵ Wenneras, *op.cit.* note 3, p.167.

³⁶ 2010 Communication, par. 19.

instance of incomplete (or partial) notification falling within the scope of Article 260(3), or as incorrect transposition to be pursued in regular infringement proceedings under Article 258 TFEU”.³⁷

This approach of bringing separate infringement proceedings for ipartial and incorrect transposition measures was challenged in the legal doctrine. Some authors believe that “the first condition in Article 260(3) is only satisfied in cases which concern total failure to notify any national measures transposing a directive. Where a Member State has fulfilled its duty to communicate to the Commission the transposition measures adopted, the question whether those measures constitute a complete and correct transposition is a matter to be resolved under Article 258 TFEU”.³⁸ Thus, when a dispute arises between the Commission and a Member State “due to the sufficiency of the transposition measures” adopted, a financial sanction can be imposed only following the regular procedure.³⁹

As for the second condition, the Article 260(3) is applicable with regard to failure concerning directives adopted under a legislative procedure. There is no doubt as to the types of legislatives instrument covered by this provision.

Transposition of directives which are not adopted under a legislative procedure thus falls outside the scope of Article 260(3). This Article excludes directives adopted under the Commission’s delegated powers and directives implementing legislative acts without modifying the scope of their basic obligations. Such directives normally do not require any notification of transposition measures. On the other hand, “their exclusion from Article 260(3) owe to the fact that, in comparison with legislative directives, they generally have more limited impact on private or public interests”.⁴⁰

In practice, the Commission has brought twenty four claims for penalty payments in accordance with Article 260(3). Most of these claims were withdrawn after the Member States notified the relevant transposition measures prior to the Court’s hearing. In fact, only one case dealing with the proposal for penalty payment has so far remained open before the Court.⁴¹ It should be noted that these complete transpositions of directives were achieved at the very late stage of judicial procedure. Thus far, the Commission has not made proposals to the Court to impose

³⁷ Wenneras, *op.cit.* note 3, pp.167-168.

³⁸ Wahl, Prete, *op. cit.* note 22, p.177.

³⁹ Gáspár-Szilágyi, G., *What Constitutes “Failure to Notify” National Measures?*, European Public Law, Vol. Vol.19, No.2, 2013, p.287.

⁴⁰ Jack, B., *Article 260 (2) TFEU: An Effective Judicial procedure for the Enforcement of Judgements?*, European Law Journal, Vol. XIX , No.3, 2013, p.407.

⁴¹ Case C-683/15, *Commission v. Poland*.

a lump sum payment, nor has the Court of Justice had the opportunity, as yet, to pronounce its judgment under Article 260(3) TFEU.⁴²

4. THE SANCTIONS UNDER ARTICLE 260(2) TFEU

Article 260(2) empowers the Commission to require from the Court to impose a “lump sum or penalty payment” upon the Member State that failed to enforce a judgment. A lump sum is determined in a fixed amount of money which implies a single one-time payment. On the other hand, penalty payment is the sum of money which must be paid periodically, starting from the moment of imposing the penalty to the moment of enforcing the judgment.

Initially, the Commission required from the Court to impose penalty payment only, considering that the daily increase of sanctions would exert more pressure on the State to enforce the judgment. Consequently, in the Memorandum (1996)⁴³ and the Communication (1997)⁴⁴, the Commission adopted rules only for calculating the penalty payment. Until 2005, the Court had accepted the Commission’s requests and imposed only penalty payment. Yet, in the case C-304/02, the Court departed from its previous practice and imposed both penalty payment and a lump sum concurrently.⁴⁵

France and 12 intervening Member States opposed the imposition of both sanctions. They asserted that the conjunction “or” in Article 228(2) had a disjunctive meaning, and that the Court may not cumulate two sanctions. Further, they considered that the imposition of both sanctions was contrary to the principle *ne bis in idem*, which prohibits being punished twice for the same conduct. These States also argued that, in the absence of the Commission guidelines for calculation of the lump sum, imposition of such sanctions by the Court would be contrary to the principles of legal certainty and transparency.⁴⁶ The respondent Government and a number of interveners argued that the Court could not impose a sanction

⁴² Wenneras, P., *Making Effective Use of Article 260 TFEU*, 2016. Forthcoming in A. Jakab and D. Kochenov, *The Enforcement of EU law and Values*; available at SSRN: <https://ssrn.com/abstract=2821032>, p.19.

⁴³ Commission Memorandum on applying Article 171 of the EC treaty, OJ EC, No. C 242/6 (hereinafter: 1996 Memorandum).

⁴⁴ Commission Communication, Method of Calculating the Penalty Payments Provided For Pursuant to Article 171 of the EC Treaty, OJ EC, No. C 63/2 (hereinafter: 1997 Communications).

⁴⁵ The Court ordered France to pay €57,761,250 for each six-month period of delay and a lump sum of €20 million.

⁴⁶ Case C-304/02 02 [2004] *Commission v. France*, Opinion, ECLI:EU:C:2004:274, par.78-79.

that had not been proposed by the Commission because it would go beyond the parties' claim (*extra petita*).⁴⁷

The Court rejected all of these arguments. It pointed out that the conjunction "or" could, linguistically, equally be understood in the cumulative and the alternative sense, and that the context and objective of Article 228(2) require that it should be understood in a cumulative sense. In the Court's opinion, simultaneous application of both penalties is not contrary to the principle *ne bis in idem* since each penalty has its own function. The Court clearly stressed that the absence of Commission guidelines for calculating a lump sum is not an obstacle for imposing this sanction, given that "the exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which, in any event, cannot bind the Court".⁴⁸ Finally, the Court dismissed the argument on acting *extra petita*, stating that "the procedure provided for in Article 228(2) EC is a special judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure", and that the imposition of sanctions "is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established".⁴⁹

As a result of the Court's approach, the Commission supplemented its guidelines, establishing the method for calculating the lump sum.⁵⁰ Thereafter, the Commission changed its practice and now it generally requests a penalty payment and lump sum concurrently.

The Court has frequently imposed both sanctions, justifying it by their different objectives. As the Court points out, the imposition of penalty payment is intended to compel the Member State to stop breaching EU law as soon as possible, i.e. to comply with the previous judgment;⁵¹ it is the so-called persuasive effect.⁵² The aim of that penalty is to force the State to comply with the judgment by exerting economic pressures on it. In contrast, the lump sum is imposed on a State because of harmful effects of non-compliance with original judgment to public and private interests.⁵³ A lump sum is a dissuasive measure designed to prevent repetition of future similar infringements of EU law.⁵⁴

⁴⁷ *Ibid.*, par.88.

⁴⁸ *Ibid.*, pars.84-85, 94-97.

⁴⁹ *Ibid.*, par. 91.

⁵⁰ 2005 Communication.

⁵¹ *Ibid.*, par. 81.

⁵² Case C-304/02 [2004] *Commission v. France*, Opinion, ECLI:EU:C:2004:274, par.41.

⁵³ *Ibid.*, par. 81.

⁵⁴ Case C-121/07, *Commission v. France* [2008] ECLI:EU:C:2008:695, par.69.

The Court is not bound by the Commission's suggestions concerning sanctions. Thus, the Court may decide not to impose any sanction at all even though the Commission has requested them. This discretion arises directly from Article 260(2) which provides that the Court "may" impose a lump sum or a penalty payment, which clearly demonstrates that the Court has a discretion to finally decide whether sanctions should be imposed or not. If the Commission at any stage of the judicial proceedings considers that the imposition of the proposed sanction is not necessary, it is not the reason for cessation of the proceedings.⁵⁵ In such a case, the Court may continue the proceedings and impose sanctions.⁵⁶

As regards the amounts of these sanctions, Article 260(2) TFEU and its predecessors only required the Commission to "specify the amount of penalty payment or a lump sum to be paid by the Member State", without any concrete criteria for determining the amounts. In the absence of Treaty guidance, the Commission filled in the gap by issuing soft-law communications in which it set out in detail how it would calculate the amount of fines which would be proposed to the Court.⁵⁷ The first guidelines were made in 1996⁵⁸ and 1997.⁵⁹ The current version was adopted in 2005,⁶⁰ which was first updated in 2010⁶¹ and, from then onwards, it has been updated annually.⁶²

In the aforementioned documents, the Commission pointed out that the calculation of the financial sanctions should be based on three fundamental criteria: a) the seriousness of the infringement; b) duration of the infringement; and c) the need to ensure that the penalty itself is a deterrent to further infringements. Besides, in the 2005 Communication, the Commission stressed that sanctions must be foreseeable and calculated respecting the principle of proportionality and principle of equal treatment of Member States.⁶³ If there is any risk of a repetition of the failure to comply with the judgments, financial sanctions must be set at a higher level.⁶⁴

⁵⁵ Case C-503/04, *Commission v. Germany* [2007] ECLI:EU:C:2007:432, par.22.

⁵⁶ Lenaerts, K.; Maselis, M.; Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, p. 213.

⁵⁷ Kornezov, A., *Imposing the Right Amount of Sanctions under Article 260(2) TFEU: Fairness v. Predictability, or How to "Bridge the Gaps"*, Columbia Journal of European Law, Vol.20, No.3, 2014, p.284.

⁵⁸ 1996 Memorandum.

⁵⁹ 1997 Communication.

⁶⁰ 2005 Communication.

⁶¹ Commission Communication - Application of Article 260 of the Treaty on the Functioning of the European Union, SEC(2010) 923/3.

⁶² The last version was adopted in August 2016 (OJ EU, No. C 290/3).

⁶³ Pars.6-7.

⁶⁴ 1996 Memorandum, par.8.

The Commission has specified the above general criteria and principles in order to establish methods for calculating the amounts of individual sanctions. In the 2005 Communication, the Commission identified specific formulas for calculating the penalty payment and the lump sum, which are similar.

The formula for calculating penalty payment payable per day is:

$$Dp = (Bfrap \times Cs \times Cd) \times n$$

where: “*Dp*” is the daily penalty payment; “*Bfrap*” is the basic flat-rate amount for “penalty payment”; “*Cs*” is the coefficient of seriousness; “*Cd*” is the coefficient of duration; and “*n*” is the factor indicating a Member State’s capacity to pay.⁶⁵

The basic flat rate is an amount set annually by the Commission at the fixed rate applicable to all Member States. The latest flat-rate determined in 2016 is €680.

The coefficient of seriousness is determined on the basis of the gravity of infringement and it is applied on a scale between a minimum of 1 and a maximum of 20. When determining the seriousness of the infringement, the Commission takes into account two criteria: the importance of the breached rule and the consequences of the infringement to general and particular interests.⁶⁶

The second criterion, coefficient of duration of the infringement, depends on the time elapsed between the delivery of the previous judgment (rendered under Article 258) and the date of the Court’s oral hearing in the second proceeding.⁶⁷ The coefficient varies between 1 and 3, calculated at a rate of 0.1 per elapsed month. This method has a significant disadvantage because all the breaches that exceeded 29 months have a coefficient of 3, regardless of whether they lasted for 30 or 50 months.

The “*n*” factor is a fixed coefficient determined by the Commission in advance for each Member State. It is calculated on the basis of the Member State’s gross domestic product⁶⁸ as well as the number of votes they have in the Council.⁶⁹ Hence,

⁶⁵ 2005 Communication, par. 18.2.

⁶⁶ 2005 Communication, par.16.

⁶⁷ Case C-177/04 [2006] *Commission v. France*, ECLI:EU:C:2006:173, par.71.

⁶⁸ There is an opinion that the Commission should have used gross national product *per capita* as a more accurate reflection of a country’s wealth rather than gross domestic product; Theodossiou, *op. cit.* note 9, p. 34.

⁶⁹ Some scholars criticize this solution, pointing out that taking into account the number of votes in the Council when determining factor “*n*” brings a political element into calculating the amount of financial sanctions for non-compliance; Jack, B., *op. cit.* note 8, p. 90. As a result of political arrangements, some Member States are either over- or under-represented in the Council in comparison to their actual population and/or economic strength. Linking the number of votes in the Council with the Member State’s wealth is questionable; (Kornezov, *op. cit.* note 57, p. 305).

taking into account the State's ability to pay, the amount of sanctions to be paid for the identical breach may be significantly different, depending on the wealth of the defaulting State. Currently, the “n” factor is the smallest for Malta (0.35) and the highest for Germany (20.79).⁷⁰

Finally, the total amount of penalty payment is calculated by multiplying the amount of daily penalty payment with the number of days that elapsed from the date of delivering the second judgment until the date when the Member State brings the infringement to an end.

The method of calculating the lump sum is similar to the method of calculating the penalty payment. The Commission uses the following formula:

$$Ls = Bfals \times Cs \times n \times dy$$

where: “*Ls*” is the total amount of the lump sum payment; “*Bfals*” is the basic flat-rate amount for “lump sum payment”; “*Cs*” is the coefficient of seriousness; “*n*” is the factor indicating a Member State's capacity to pay; “*dy*” is the number of days the infringement persists.

The total amount of the lump sum which the defaulting State has to pay is the result of multiplying the daily amount by the number of days of infringement. The daily amount for determining the lump sum is obtained by multiplying the pre-determined basic flat-rate by the coefficient of seriousness (from 1 to 20), and then by the “n” factor.

The basic flat-rate for lump sum is also predetermined annually. It is significantly lesser than the basic flat-rate for penalty payment, and it currently stands at €230. By contrast, the coefficient of seriousness of infringement and the factor “n” are the same for calculating lump sum and the penalty payment.

The coefficient of duration is not applied in the calculation of the lump sum because duration is already taken into account under the “dy” factor. Lump sum should be calculated by reference to the number of days, starting from the date of delivery of the judgment in proceedings under Article 258 until either the date of its enforcement or the date of oral hearing before Court in proceedings under Article 260(2).⁷¹

The Commission set out the so-called minimum lump sum for each Member State, which implies that states cannot pay below that amount, regardless of the

⁷⁰ Communication from the Commission [2016] OJ No. C 290/3.

⁷¹ Kilbey, *op. cit.* note 24, p.372.

seriousness of the infringement.⁷² The purpose of fixed minimum lump sum is to prevent “purely symbolic amounts which would have no deterrent effect and could undermine, rather than strengthen, the authority of Court judgments”.⁷³

The Court has full discretion to decide on the type and amount of sanction. Therefore, it is not bound either by the Commission proposal on the type of sanction or by the suggested amounts. Wishing to retain full autonomy in determining the amount of penalties, the Court pointed out in the early cases that it is not bound by the Commission’s proposals given in the complaint, nor by its guidelines,⁷⁴ stressing that “...the Commission’s suggestions cannot bind the Court and merely constitute a useful point of reference”. In a recent judgment, the Court stated that the Commission’s suggestions “are merely guidance” and are not binding for the Court.⁷⁵ Thus, the Court may impose higher or lower lump sums and penalty payments other than those suggested by the Commission. The Court noted that, when determining the penalty payment and the lump sum, it takes into consideration all the circumstances of the individual case,⁷⁶ fixing the amount so as to induce the Member State to comply with the judgment as swiftly as possible and preventing similar infringements of EU law in the future.⁷⁷

When fixing the penalty payment, the Court considers three criteria identified by the Commission.⁷⁸ In calculating the penalty payment, in some cases the Court applied the Commission’s formula but in others the Court calculated the penalty payment without reference to this formula.⁷⁹ When applying the three criteria, the Court takes into particular account the effects of the infringement on public and private interests, and the urgency of exerting pressure on the Member State to fulfill its obligations.⁸⁰

The Court has applied the general principle of proportionality in determining the penalty payment proportionate to the specific infringement. The Court ascertained that imposition of fixed penalty payment “is neither appropriate to the cir-

⁷² According to the 2016 Communication, Malta may not pay less than €197.000, Croatia €699.000, and Germany €11.721.000.

⁷³ 2005 Communication, par.20.

⁷⁴ Case C-387/97 *Commission v. Greece* [2000] ECLI:EU:C:2000:356, par.89.

⁷⁵ Case C-533/11 *Commission v. Belgium* [2013] EU:C:2013:659, par.52.

⁷⁶ *Ibid.*, pars.49, 68.

⁷⁷ Case C-407/09 *Commission v. Greece* [2011] ECLI:EU:C:2011:196, par.29; Case C-496/09 *Commission v. Italy* [2011] ECLI:EU:C:2011:740, par.36.

⁷⁸ Case C-533/11, par.69; Case C-610/10 *Commission v. Spain* [2012] ECLI:EU:C:2012:781, par.119.

⁷⁹ Jack, B., *op.cit* note 40, p.409.

⁸⁰ Case C-304/02, par.104; Case C-177/04, par.62; Case C-70/06 *Commission v. Portugal* [2008] ECLI:EU:C:2008:3, par.39.

cumstances nor proportionate to the breach which has been found”, and acknowledged that “in order for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the breach, the amount must take account of progress made by the defendant Member State in complying with the judgment”.⁸¹ Thus, the Court held that the amount of penalty payment can be reduced by taking into account the gradual compliance with the judgment.⁸²

When fixing the lump sum, the Court considers the effects of the infringement on public and private interests, duration of infringement,⁸³ and conduct of the Member State in the procedure initiated pursuant to Article 260(2) TFEU.⁸⁴ However, in many cases, the Court refused to apply the Commission’s formula and numerical coefficients; instead, by using its broad discretionary rights, it autonomously determined the amount of the lump sum.⁸⁵ In these situations, the Court simply stated that the determined amount of sanction is appropriate to circumstances of the case, without any further explanation. The Court usually states that the sanctions are “just” or “fair” in the circumstances of the case.⁸⁶ Round figures of the lump sums in some cases show that they are not a result of mathematical operations, but rather a result of the Court’s *ex aequo et bono* assessment.⁸⁷ In some cases, the Court even imposed lump sums below the minimum predetermined by the Commission.⁸⁸

Although Article 260(2) does not explicitly recognize the Court’s right to delay the application of sanctions, the Court has inherent right to act in this manner.⁸⁹ For example, using this possibility, the Court deferred the penalty payment imposed on Greece until one month after delivery of the judgment,⁹⁰ thus granting

⁸¹ Case C-278/01, pars.49-50.

⁸² See Case C-496/09 *Commission v. Italy* [2011] ECLI:EU:C:2011:740.

⁸³ Case 304/02, par.81.

⁸⁴ Case C-610/10, par.141.

⁸⁵ This is the correct approach of the Court because, under Article 260(2), the Commission is one of the parties in the proceedings, just like the defendant State. If the Court always accepts the Commission’s methodology, it would violate the principle of equality of arms; Kornezov, *op. cit.* note 57, p.299.

⁸⁶ Case C-270/11 *Commission v. Sweden* [2013] ECLI:EU:C:2013:339, par. 59; Case C-241/11, par.55; Case C-533/11, par.62; Case C-576/11 *Commission v. Luxembourg* [2013] ECLI:EU:C:2013:773, para.66.

⁸⁷ Kornezov, *op. cit.* note 57, p. 294.

⁸⁸ Case C-567/08 *Commission v. Greece* [2009] ECLI:EU:C:2009:342; Case C-241/11.

⁸⁹ Peers, S., *Sanctions for Infringement of EU Law after the Treaty of Lisbon*, European Public Law, Vol. XVIII, No.1, 2012, p.47.

⁹⁰ Case C-369/07 *Commission v. Greece* [2009] ECLI:EU:C:2009:428.

to the defaulting State a grace period to rectify the infringement and thereby avoid any penalty payment.⁹¹

5. SPECIFICITY OF SANCTIONS UNDER ARTICLE 260(3) TFEU

The rules on imposing sanctions contained in Article 260(2) generally apply to Article 260(3). But, the sanction envisaged in Article 260(3) differs in some aspects from the general rules contained in Article 260(2).⁹²

First, unlike paragraph 2, under paragraph 3 the Commission is not obliged to propose financial sanctions. The used phrase “it may, when it deems appropriate” means that the Commission can bring a case to the Court without proposing any sanctions. The Commission has full discretion to decide whether to ask the Court to impose financial sanctions on the State which has failed to notify the measures for transposing a directive, or to use “the regular procedure” pursuant Article 258 TFEU. The Commission took the view that it would, in principle, use the procedure set out in Article 260(3) in all cases involving States’ failure to notify about the taken transposition measures, but it recognised that there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3).⁹³

Second, Article 260(3) provides that Court may not impose financial sanctions exceeding the amount specified by the Commission in its complaint. In other words, penalties imposed by the Court must be within the limits proposed by the Commission. Like procedure set out in Article 260(2), the Court enjoys full discretion to decide whether or not to impose a sanction, and it can refuse to levy proposed sanction(s). But, if it decides to impose sanctions, its discretion concerning their amount is limited. The Court may impose only the same or a lower amount of sanctions than the amount proposed by the Commission.

As for the amount of sanction, the Commission will use the same formula and criteria that are applicable under Article 260(2),⁹⁴ in accordance with 2005 Communication. The only difference is the starting date for calculating the duration of infringement. Under Article 260(2), the reference date is the delivery of the previous judgment, while pursuant to Article 260(3) the duration of infringement

⁹¹ Kilbey, *op. cit.* note 24, p. 374.

⁹² Wenneras, P., *op. cit.* note 42, p.18.

⁹³ 2010 Communication, para.17.

⁹⁴ Peers, *op. cit.* note 89, p.44.

starts from the day following the expiry of the deadline for transposition provided in the concerned directive.⁹⁵

With regard to the aforementioned limitation, it is questionable whether the Court may impose sanction which was not proposed by the Commission. Some scholars argue that the Court “cannot impose a type of sanction that has not been requested by the Commission”.⁹⁶ But, others consider that the wording of Article 260(3) does not prevent the Court from “assessing the appropriateness of imposing sanctions which the Commission has not specified”.⁹⁷ Yet, it seems that the text of Article 260(3) does not allow the Court to impose a sanction that the Commission has not proposed. If the Court is not allowed to impose a higher amount of sanction than that requested by the Commission, it is even less entitled to impose the sanction that is not proposed at all.

It is indisputable that the Commission may propose both sanctions (penalty payment and a lump sum) cumulatively.⁹⁸ The Commission explicitly promulgated this approach in its 2010 Communication, stating that the wording of Article 260(3) “does not preclude the possibility of combining both types of penalties in the same judgment.”⁹⁹ It came to this conclusion by using analogy with the case law on Article 260(2).¹⁰⁰ But, at the same time, the Commission indicated that it would normally propose only a penalty payment, hoping that this sanction will prove sufficient to achieve full notification on the transposition measures. However, the Commission reserves the possibility to seek the lump sum for instances in which this sanction is warranted by the circumstances of the case.¹⁰¹ Such policy enables States to procrastinate the notification of transposition measures until imminently prior to the Court’s hearing and thus escape any sanctions.¹⁰² The practice has shown that States widely used this possibility. In 23 out of 24 proceedings under Article 260(3), Member States completed notification at the last stage of judicial proceedings and thus avoided penalties despite their delay in notification. Therefore, the Commission should amend its policy and regularly start requesting a lump sum, as it has done under Article 260(2).¹⁰³

⁹⁵ 2010 Communication, para.27.

⁹⁶ Wahl, Prete, *op. cit.* note 22., p.185.

⁹⁷ Wenneras, *op.cit.* note 42, p.19.

⁹⁸ Wenneras, *op.cit.* note 3, p.168.

⁹⁹ 2010 Communication, par.20.

¹⁰⁰ Peers, *op. cit.* note 89, p.38.

¹⁰¹ 2010 Communication, par.21.

¹⁰² Wenneras, *op.cit.* note 3, p.168.

¹⁰³ Wenneras, *op.cit.* note 42, p.19.

Third, Article 260(3) gives explicit authority to the Court to determine the day when the payment obligation imposed by the judgment shall take effect. Thus, the Court has opportunity to delay the effect of its judgment. As the Commission noted, Article 260(3) “allows the Court to set the date of effect as either the day on which the judgment was handed down or a subsequent date”.¹⁰⁴ Notably, such an option is not totally new “since the Court has inherent jurisdiction to delay the application of its Article 260(2) judgments as well”.¹⁰⁵

6. CONCLUDING REMARKS

The mechanism of sanctions provided in Article 260 TFEU certainly contributes to better implementation of EU law. Besides the direct pressure on the countries on which sanctions are imposed, it acts preventively to all other Member States. Improvements made by the Lisbon Treaty further contribute to achieving these effects. Removing the reasoned opinion in Article 260(2) contributes to a faster imposition of sanctions for non-compliance with judgments, whereas the new paragraph 3 speeds up and simplifies the procedure for imposing sanctions in cases of the Member States’ failure to notify the Commission about the national transposition measures within the prescribed time-limits.

As for Article 260(2), the case law has mainly clarified dilemmas regarding its application. However, the method of calculating the amount of sanctions remains ambiguous. The lack of binding rules in this area leads to frequent disagreement between the Commission and the Court on this matter, which is detrimental to the legal certainty and transparency.

There is much more uncertainty concerning Article 260(3) because of the lack of case law on this matter. Yet, we may still anticipate some developments regarding its application. It is almost certain that the Commission will soon start proposing penalty payment and lump sum cumulatively under Article 260(3), just as it has done under Article 260(2), in order to preclude the Member States’ delayed notification of implementation measures, which is often given in the last stage of judicial proceedings, thus enabling the States to avoid any sanctions despite being in default. It can be expected with considerable certainty that the Court will not often use the possibility of postponing the enforcement of the imposed sanctions. Finally, having regard to the linguistic interpretation of paragraph 3, the Court should not be expected to impose a sanction that has not been proposed by the Commission.

¹⁰⁴ 2010 Communication, par.29.

¹⁰⁵ Peers, *op. cit.* note 89, p.47

It should be noted that, thus far, the Commission has acted in both proceedings under Article 260, primarily taking into account the political circumstances which have been used as guidelines in deciding whether to initiate proceedings, when to lodge a complaint, and what kind of sanctions to propose. By contrast, as an independent judicial authority, the Court has managed to keep the political circumstances aside and acted solely on the basis of legal criteria.

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