

THE SANCTIONS PROCEDURE UNDER ARTICLE 260(2) TFEU

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Abstract: *This paper aims to describe the procedure under Article 260(2) TFEU. It examines the circumstances in which a Member State of the European Union may be held liable for non-compliance with EU law and the consequences it provides for in such a situation, in particular when that State fails to comply with a judgment establishing such liability. It also looks at the nature and extent of the sanctions applied, including the criteria applied by the CJEU and the Commission in determining those sanctions, and the effects of that judgment. In particular, the role of the European Commission and the role of the Court of Justice are considered, as well as the missing role of individuals in this procedure.*

Keywords: *sanctions procedure; Article 260(2) TFEU; infringement procedure; financial penalties; non-compliance with EU law; non-compliance with CJEU judgments*

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1. Introduction. The sanction procedure

According to Article 258 of the Treaty on the Functioning of the European Union (TFEU), an infringement procedure may take place when a Member State fails to comply with EU law. In this case, the Commission may refer the matter to the Court of Justice of the European Union, after an initial phase of informal dialogue with the Member State concerned and a pre-litigation phase.

If the Court finds in its judgment that the Member State in question has failed to fulfil an obligation under EU law, it is required to take the necessary measures to comply with the judgment. The Member State must comply with this judgment and, if it fails to do so within a reasonable time, the Commission may initiate a second infringement procedure ("the sanction procedure"), setting a time limit for compliance and giving the Member State the opportunity to submit its observations. If the State continues not to comply, the Commission may refer the matter to the Court again. This time, the Court can impose financial penalties if it finds that the Member State concerned has not complied with its initial ruling.

The sanctioning procedure is mainly based on two principles of EU law: firstly, Member States are responsible for fulfilling their obligations under EU law and are therefore liable when this does not happen. At the same time, judgments of the CJEU are binding and must be implemented by Member States.

2. Liability of the Member States following an infringement of Union law

An established principle of European law is that "Member States have the primary responsibility for the correct implementation, application and enforcement of EU law". Therefore, by failing to comply with an obligation under EU law, a Member State can be held liable.

A Member State may not invoke particular provisions or aspects of its internal system to avoid this obligation. As was held in *Commission v Italy*, "the exercise of rights and powers by the Member States in accordance with the provisions of the Treaty implies a definitive limitation of their sovereign rights and no provision of national law may be invoked to nullify that limitation". On another occasion, the Court of Justice has stated that "a Member State may not rely on internal circumstances, such as implementation difficulties arising at the stage of implementation of a Community measure, in order to justify failure to comply with obligations and time-limits laid down by Community law".

However, the EEC Treaty did not contain a provision providing for an injunction against Member States following an infringement of EU law, and the Court of Justice could not initially impose sanctions for non-compliance with its rulings. As the European Parliament noted in an early resolution, only the ECSC Treaty allowed for supportive measures in favour of Member States that had complied with the Treaty or sanctioning measures against Member States that had acted in breach of the Treaty.

Thus, the consequences for a Member State against which liability is incurred have remained unfulfilled and, in view of this gap, the European Parliament has called on the Member States to amend

the EEC Treaty, as the Court of Justice has also suggested, to "provide for effective sanctions against a Member State which fails to comply with a judgment". The Court of Justice suggested, in fact, to close the existing loophole which prevented it from imposing an effective sanction in case of non-compliance.

The Maastricht Treaty therefore included an amendment and, and the Court of Justice now has the right under Article 260 TFEU to impose financial penalties if a Member State does not comply with a judgment given in infringement proceedings.

3. The obligation to comply with EU Court of Justice rulings

A breach of EU law may therefore lead, through an infringement procedure, to a judgment of the CJEU declaring that the Member State concerned has failed to fulfil its obligations under EU law. In this respect, Article 260(1) TFEU states: "If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, it shall be required to take the necessary measures to comply with the judgment of the Court".

The only defence available for a Member State to justify non-execution of a judgment is that it was absolutely impossible for it to implement the decision properly. Consequently, even the fear of internal difficulties cannot justify the failure of the Member State concerned to comply with its obligations under European Union law.

However, it should be noted that sanctions may be imposed under Article 260(3) TFEU already in the first cycle of the procedure in case of failure to comply with the obligation to notify measures transposing a directive.

The sanctioning procedure can be initiated if a judgment given in an infringement procedure (the original judgment) is not respected. Non-compliance with this judgment is a mandatory condition. The procedure is therefore concerned with the enforcement of the original judgment and, as the infringement of EU law was *res judicata* in the first judgment, it cannot be the subject of further debate at this stage. While the first infringement procedure concerns the declaration of non-compliance with EU law, the sanction procedure concerns the non-enforcement of the judgment which "declared" this non-compliance/infringement of EU law.

When the CJEU delivers its first infringement judgment, it may declare that the Member State concerned has failed to fulfil its obligations under EU law. Article 260(2) TFEU does not set out how Member States are obliged to comply with this ruling, but it does set out when a Member State can be considered not to have complied, and therefore the Commission can refer a case to the Court when the Member State has not taken the necessary measures to comply with the Court's ruling. The Court does not have the power to order specific and necessary measures to be taken by the Member State in order to comply with the judgment, as this is strictly a matter for the sovereignty of the Member State concerned.

Article 260(2) TFEU does not define what kind of infringements are concerned. In principle, any failure to comply with a judgment given in proceedings under Article 258 TFEU could be prosecuted. However, the Commission has established that, since "the obligation to take the necessary measures to comply with a judgment of the Court of Justice has the widest effect when the action requested relates to systemic deficiencies in the legal system of a Member State", it will "give high priority to systemic infringements which undermine the functioning of the EU institutional framework".

In deciding whether to proceed with a case, the Commission will objectively assess whether, in accordance with the infringement judgment, the national law or practice declared incompatible with EU law has been reformed or eliminated, bringing it into line with the judgment, irrespective of the authority involved in its enforcement.

The Treaties do not set a specific time limit within which the original judgment must be executed. However, in accordance with Article 91 of the Rules of Procedure of the Court of Justice, judgments shall be binding from the date of their delivery. In this regard, the Court has held that, although the Treaty does not lay down a time-limit within which a judgment must be enforced, it is well known that the enforcement of a judgment must begin immediately and must be completed as soon as possible. The absence of a fixed time-limit for compliance and the fact that Article 260(2) TFEU does not set any time-limit for the Commission to initiate a sanction procedure leaves the Commission with a significant margin of discretion.

In this regard, the Court has established that the reference date to be used to assess whether there has been a failure to comply with a judgment is the expiry of the time-limit laid down in the letter of formal notice issued under Article 260(2) TFEU. It should be noted that, if the State which has not complied with the judgment within that time-limit subsequently enforces the judgment, the Commission may nevertheless refer the matter to the Court, as it may propose the imposition of a lump sum for the period during which the Member State has not complied.

In *Commission v. France*, where the Member State concerned implemented the judgment after the time limit but before the second judgment, the Commission was in fact of the opinion that the proposal to pay a lump sum in this case was "justified in order to ensure that the authority of judgments of the Court, the principles of legality and legal certainty and the effectiveness of Community law are not undermined".

It is for the Court of Justice of the European Union to decide whether or not the Member State concerned has complied with the judgment given in the first infringement procedure and, consequently, to impose penalties. The Commission can only decide to continue a case and therefore bring it before the Court if the Member State fails to put forward defences or if these are not satisfactory, and it is for the Court to decide whether or not a Member State has complied with the judgment.

4. Evolution of the legal framework

Originally, Article 171 of the EEC Treaty did not allow the Court of Justice to impose penalties for failure to comply with a judgment. The Maastricht Treaty introduced an additional paragraph (Article 171(2) of the EC Treaty: Article 228 after the Amsterdam renumbering) allowing the Court to impose penalties for failure to comply with a judgment.

The steps in the procedure were similar to those in the first infringement procedure: the Commission had the power to send, at its discretion, a letter of formal notice to the Member State which it considered had failed to comply with Community law. The Member State was given the opportunity to submit observations and, if these were not satisfactory, the Commission could, at its discretion, issue a reasoned opinion setting a deadline for compliance. In the event of non-compliance, the Commission could (again at its discretion) refer the matter to the Court, suggesting the imposition of financial penalties, and the Court would decide.

The Lisbon Treaty accelerated this procedure, which is now described in Article 260(2) TFEU, by abolishing the reasoned opinion stage. Under the new procedure, the Commission no longer issues a reasoned opinion and now sets a deadline in its official letter of formal notice. It can then refer the matter to the Court if the State fails to comply with the judgment within this deadline.

On the other hand, Article 260(3) of the Lisbon Treaty has also introduced the possibility of imposing financial penalties (a penalty payment and/or a lump sum) as soon as the first infringement decision is taken, for failure to comply with the obligation to notify measures transposing a directive adopted under a legislative procedure.

5. The nature and extent of sanctions

It is important to establish the nature and scope of the sanctions that the Court may impose. The criteria determining whether the court will impose sanctions and the extent of the sanctions (amount and frequency of the sanction) depend mainly on factors arising from this nature.

When deciding whether to impose a sanction, and also when calculating the amounts, the Court takes into account the fact that these sanctions are not intended to punish States, but to induce them to comply with the judgment and therefore to implement EU law correctly, as required by the rule of law.

According to Article 260(2) and (3) TFEU, two types of penalties can be imposed on non-compliant states: a penalty payment and/or a lump sum. The Court of Justice revealed the nature of these penalties in the *Commission v. France* case, in which it stated that this procedure "has the objective of inducing the defaulting Member State to comply with a judgment finding an infringement and thus to ensure the effective application of Community law" and that "the measures provided for in that provision, namely a lump sum and a penalty payment, are both designed to achieve that objective".

6. Criteria used to determine sanctions

It is for the Court to decide on the amount of the penalty payment and the lump sum. However, the Commission may propose amounts which are not binding on the Court. In this regard, the Court

has recognised that, in the absence of provisions in the Treaties, the Commission may adopt guidelines to determine how to calculate the lump sums or periodic penalty payments which it intends to propose to the Court. However, it should be made clear that, in the case of a judgment under Article 260(3) TFEU, the Court may not exceed the amount indicated by the Commission in its action.

The criteria used by the Commission to calculate the quantum of sanctions it will propose to the Court have been set out in a series of guidelines. The Commission has stated that both the choice of criteria and the way in which they are applied "will be governed by the need to ensure the effective application of Community law".

The Commission applies three basic criteria to calculate the amount of the penalty: the seriousness of the breach, the duration of the breach and the need to ensure that the penalty itself is a deterrent to further breaches.

Therefore, the amount of the daily penalty, as suggested by the Commission, is calculated according to the following formula: $Pzpc = (V-Fpc \times Cg \times Cd) \times n$ where: $Pzpc$ = daily penalty payments; $V-Fpc$ = lump sum for "periodic penalty payments"; Cg = coefficient for severity; Cd = coefficient for duration; n = factor "n", reflecting the ability to pay of the Member State concerned.

When referring the matter to the Court, the Commission may also suggest the imposition of a lump sum. In this case, the Commission will suggest a fixed minimum lump sum determined for each Member State on the basis of the „N" factor. To calculate the amount of the lump sum the formula is used: $SF = V-Fpsf \times Cg \times n \times zl$ where: SF = lump sum; $V-Fpsf$ = lump sum related to the "lump sum payment"; Cg = coefficient for gravity; n = factor reflecting the ability to pay of the Member State concerned; zl = number of days the infringement persists.

In the last Commission Notice on financial penalties in infringement proceedings, it was established that the lump sum for the periodic penalty payment is set at EUR 3 000 per day and the lump sum for the lump sum payment is set at EUR 1 000 per day, i.e. one third of the lump sum for periodic penalty payments.

As regards the "n" factor, according to the communication its value in the case of Romania is 0.61, and the minimum lump sum has been set at €1,708,000.

The basic principle for the Court is that "the payment of penalties must be decided on the basis of the degree of coercion necessary to ensure that the Member State which has failed to comply with a judgment finding an infringement of obligations changes its conduct and puts an end to the infringement found". In *Commission v Greece*, the Court emphasised that, since the primary purpose of periodic penalty payments is to ensure that the Member State remedies the breach as soon as possible, a periodic penalty payment must be determined which is appropriate to the circumstances and proportionate both to the breach found and to the ability of the Member State concerned to pay. The degree of urgency with which the Member State concerned should fulfil its obligations may vary depending on the breach.

The Court also stated in another case that the appropriateness of imposing a financial penalty and the choice of the most appropriate penalty for the circumstances of the case can only be assessed in the light of the findings made by the Court in the judgment and therefore does not fall within the policy sphere. When examining the circumstances of the case, a relevant factor that the Court takes into account is the progress that the Member State concerned would have made in complying with its obligations.

Timing is also an important issue when considering a suspension of the penalties imposed or a different frequency for the execution of the payments set. The Court of Justice has clarified in its case law how periods of time are to be calculated for determining penalties.

The period of infringement to be taken into account for the calculation of the amounts due depends on the type of penalty imposed. For the payment of penalties, it starts on the day of the second judgment and ends on the day the original judgment is complied with. For the lump sum, on the other hand, the period is calculated from the date of the original judgment until the date of the second judgment (or the date of compliance, if earlier).

As regards the frequency of late payment penalties, the Court of Justice may determine the time limits within which they must be enforced. The Court will not necessarily set daily payments, but they could possibly be enforced on a different basis (over a period of three months or six months, for example) if it so decides.

The frequency of payments will be determined according to the nature of the obligation and the behaviour of the Member State concerned. The *Commission v Spain* case, which concerned an infringement of an EU directive on the quality of bathing water, was the first case to impose a long-term basis for the payment of penalties, rather than a daily payment. In this case, the Court held that "in order for the periodic penalty payments to be appropriate to the particular circumstances of the case and proportionate to the infringement found, the amount must take account of the progress made by the defendant Member State in complying with the judgment" and required the Member State concerned to pay annually an amount "calculated on the basis of the percentage of bathing areas in Spanish inland waters which still do not comply with the mandatory values laid down in the Directive".

Another case in which payment of the penalty was based on a lengthy period was *Commission v. Belgium*, where the Court of Justice, while noting the incomplete implementation of the judgment, also took into account the time needed to provide evidence of compliance. The Court held here that "in view of the fact that the provision of evidence of compliance with the Directive in question might take some time and in order to take account of any progress made by the defendant Member State", it was appropriate for the periodic penalty payment to be calculated on the basis of six-month periods.

However, the Court may refuse to grant such an extended basis for payment of the penalty. For example, in another case of recovery of undue aid, the Court refused to impose quarterly instead of daily payments, having regard, first, to the extremely long duration of the breach of obligations found and, second, to the urgent need to put an immediate end to that breach.

It is the responsibility of the Member State concerned to demonstrate, at the end of each period, the progress made in reducing the periodic penalty payments. In the case of illegal landfills, for example, the Court ruled that the Member State concerned would have to prove, before the end of each six-month period from the date of the judgment, that the specific waste landfills in breach of obligations were no longer in operation and/or had been cleaned up in order to obtain a reduction of the periodic penalty payment.

The Commission considered that in special circumstances, suspension of a sanction may be justified, such as in cases of incorrect application of EU law, where all necessary steps have been taken but time was needed for verification; or in cases where all necessary steps have been taken to comply with the court ruling, but a certain period of time must elapse before the required result is achieved.

The Court did not reject this idea in principle. In *Commission v. Portugal*, the latter applied for a suspension of the periodic penalty payments, but the Court held that the necessary measures had not been taken to comply with the original judgment and therefore did not accede to its application. Subsequently, in *Commission v Luxembourg*, the Court similarly held that the payment of penalties could not be suspended before the Member State concerned had taken all necessary measures to comply with the judgment.

7. The (missing) role of individuals

The role of individuals is not determined by Articles 258-260 TFEU. Although in practice the role of the individual is limited to the possibility of lodging a complaint with the Commission at the initial stage of the infringement procedure, it is not clear whether this is also possible in the case of non-compliance with a court judgment.

The Commission's definition of "complaint" does not seem to allow for such an interpretation, as its scope is limited to measures or the absence of a measure or practice in a Member State which is contrary to EU law and, according to a recent communication, "infringement proceedings" appear to be limited, in the Commission's view, to the "pre-litigation phase of infringement proceedings brought by the Commission under Article 258 of the Treaty on the Functioning of the European Union (TFEU) or Article 106a of the Treaty establishing the European Atomic Energy Community (Euratom Treaty)", thus excluding the phases covered by Article 260(2) TFEU.

In addition, the sanction procedure is usually considered a special procedure aimed at enforcing a judgment which is binding *inter partes*. Since natural persons are not parties and have no procedural rights in the first infringement procedure, it must be assumed that they are neither entitled nor entitled to seek enforcement of a judgment given in a procedure to which they are not parties.

This state of the law could, however, be subject to criticism because, as is commonly understood, individuals are the beneficiaries of EU law and many of their rights derive from its correct application and therefore from the correct implementation of the judgment. It should also be recalled

that, as has been pointed out, if the Commission does not proceed with a case this could not justify either an action for annulment, an action for failure to act or an action for damages, and in exceptional circumstances an individual may bring an action for damages.

However, the fact that individuals are not allowed to bring an action before the Court in the event of failure to comply with a judgment, and that they cannot seek a declaration of failure to act or the annulment of an act or damages if the Commission does not bring an action before the Court, does not exclude the possibility for individuals to bring an action in the national legal order of the Member State concerned, using the judgment given in the infringement procedure as a basis for their action. It has therefore been argued that a judgment finding a failure to fulfil an obligation under EU law can be relied upon by individuals to have national courts declare inapplicable national provisions that are contrary to EU law.

8. Failure to comply with a judgment under Article 260(2)

The European Commission has the power to control the implementation of a judgment under Article 260(2) TFEU. It will therefore be responsible for monitoring compliance, which includes, on the one hand, the recovery of the amounts due by the Member State concerned and, on the other hand, the implementation of the part of the judgment which involves the adoption of measures by the Member State concerned. Despite the usual compliance by Member States with judgments under Article 260(2) TFEU, it may happen that a State is unable or unwilling to comply with a judgment. What is the consequence in this case?

Failure to comply with a judgment constitutes a breach of the Treaty and may therefore also give rise to a finding of liability on the part of the Member State concerned. Another (more practical) point of view states that if a Member State refuses to pay, it would normally be considered that "the Community could withhold payments that Member States owe for various reasons". This was also the argument used by the Commission to make Greece pay the penalties imposed by the Court in the Waste Disposal case.

But, however, the question should also be asked what can be done if the Member State concerned does not adopt the measures implied by the judgment in its internal order. This question, which is directly linked to the way in which the international community is organised and the fact that the EU order can still be ignored, is difficult to resolve, since the adoption of administrative, judicial or legislative measures within their own internal orders is within the sovereignty of the Member States.

Thus, a State may still prefer to pay the penalties instead of taking the necessary measures and, in this case, neither the Commission nor the Court could legally oblige that State to take these measures. While it is difficult to imagine such a case of persistent non-compliance with the Court's ruling imposing sanctions, it could be added that it would constitute a serious breach of EU law.

Because the rule of law is mentioned in the preamble and in Article 2 of the TEU as a founding value of the European Union, judgments of the CJEU must be respected. It could therefore be assumed that, in extremis, a procedure under Article 7 TEU could be applied for violation of this value.

9. Conclusions

While the infringement procedure can be seen as a crucial procedure for ensuring the rule of law in the European Union, the penalty procedure can also be seen as a practical and effective procedure. The number of cases brought before the Court of Justice in 2022 (806 cases) was slightly down on the previous year, when 838 new cases were registered by the Registry. As regards infringement proceedings, they accounted for 4.3% of new cases registered before the Court during 2022, up from 2021 (2.7%) and 2020 (2.2%) but down from 2019 (4.3%) and 2018 (7%).

Among the actions for failure to fulfil obligations brought in 2022, particular mention should be made of the first action brought against a third State - the United Kingdom - under Article 87(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

This means that Member States frequently take the necessary measures to comply promptly with a Court ruling. From this point of view, therefore, the penalty procedure can be considered as a procedure worth maintaining, both as a deterrent procedure (as Member States try to avoid the serious financial consequences of applying such penalties) and as an enforcement procedure, if the Member State concerned has not complied with the first judgment.

On the other hand, a number of shortcomings are evident, mainly in two features of the procedure: a lack of legal certainty and transparency which, despite the Commission's efforts, still prevails at various stages of the procedure and, on the other hand, a procedure completely devoid of the intervention/control of individuals.

On the first point, although the Commission has demonstrated through its guidelines its willingness to make the process of determining the amount of sanctions more transparent and predictable, other aspects of the procedure, such as the timeframe for determining whether the Commission will open or close and withdraw a case, and the reasons for deciding to open or withdraw a case, remain largely uncertain and unpredictable.

This is particularly true in the case of Article 260(3) TFEU, according to which the Commission may initiate a procedure "when it considers it necessary". However, it is a general principle of law that the pursuit of legal subjects for the purpose of imposing a sanction must be clearly defined in time and scope, which means that the time within which the subject could be pursued and the grounds which will allow such pursuit must be clearly delimited. However, these elements are not yet clearly identified and remain within the total discretion of the European Commission, which is undoubtedly subject to criticism due to the lack of legal certainty vis-à-vis the Member States.

As for the role of natural persons, they remain completely excluded from the sanctioning procedure, and it is more debatable whether they should have a role in this procedure. While individuals may play a role in the initial phase of the first infringement procedure by lodging a complaint with the Commission, it is not clear whether the applicable provisions allow them to play such a role in the sanctioning procedure, and it is possible to understand that these provisions do not foresee any role for them in this procedure, even if they are beneficiaries of some provisions of EU law.

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