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**COMMISSION COMMUNICATION**

**Implementation of Article 260(3) TFEU**

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#### I. INTRODUCTION

1. The possibility of imposing financial sanctions on a Member State that has failed to implement a judgment establishing an infringement was introduced by the Maastricht Treaty, which, for this purpose, amended Article 171 TEEC, now Article 228 TEC, and Article 143 of the Euratom Treaty<sup>1</sup>. On 13 December 2005 the Commission adopted a Communication on the application of Article 228 TEC<sup>2</sup>, which replaced two previous Communications in 1996<sup>3</sup> and 1997<sup>4</sup>.
2. The Lisbon Treaty amended Article 228 TEC, now Article 260 TFEU, to strengthen two aspects of the mechanism.
3. First, as regards the procedure set out in Article 260(2) (ex Article 228(2) TEC), the Lisbon Treaty removes the pre-litigation stage of issuing a reasoned opinion. Since the entry into force of the Lisbon Treaty, if the Commission considers that a Member State has not complied properly with a judgment of the Court of Justice, it has to carry out only one pre-litigation procedural step, namely the sending of a letter of formal notice requesting the Member State to submit its observations<sup>5</sup>. Then, if the Commission is not satisfied with the Member State's observations or if the latter does not reply, it can refer the matter directly to the Court of Justice by virtue of Article 260(2). This will in practice speed up the procedure set out in Article 260(2), automatically reducing the average duration of the procedure proposed in the 2005 Communication to between eight and 18 months<sup>6</sup>. This indicative duration does not exclude the possibility that a procedure might, exceptionally, take longer when warranted by specific circumstances. Nor does it stand in the way of the Commission's desire to seek the swiftest possible compliance by Member States.
4. Otherwise, the mechanism in Article 260(2) TFEU corresponds fully to that in ex Article 228 TEC. The Commission Communication of 13 December 2005 therefore

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<sup>1</sup> This Communication also applies to the Euratom Treaty insofar as its new Article 106a makes Article 260 TFEU applicable to that Treaty.

<sup>2</sup> SEC(2005) 1658.

<sup>3</sup> OJ C 242, 21.8.1996, p. 6.

<sup>4</sup> OJ C 63, 28. 2.1997, p. 2.

<sup>5</sup> In the interim, in cases where a letter of formal notice was sent before the TFEU entered into force, a supplementary letter of formal notice is sent to the Member State concerned notifying it that the next step will be an action before the Court and no longer a reasoned opinion.

<sup>6</sup> Cf. point 3 of Communication COM(2007) 502 final ("A Europe of Results - Applying Community Law"), in which the Commission states in relation to the procedure under ex Article 228 TEC, that "subject to the specific circumstances of exceptional cases, the equivalent period in proceedings to ensure respect for an earlier judgment of the Court should be on average between 12 and 24 months." Specific circumstances may include cases in which the enforcement of an earlier judgment involves measures to develop or reinforce infrastructure on the ground or meet obligations as to results.

remains fully applicable to the procedures governed by Article 260(2), since the removal of the reasoned opinion did not require any amendment to be made to it.

5. The second, more substantial innovation introduced by the Lisbon Treaty concerns the new paragraph 3, which reads as follows:
  - "When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
  - 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. The payment obligation shall take effect on the date set by the Court in its judgment."
6. This paragraph creates a completely new instrument: the Commission can propose to the Court, even at the stage of the infringement proceedings pursuant to Article 258 (ex Article 226 TEC), that it 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 a directive adopted under a legislative procedure.
7. The purpose of this innovation in the Treaty is to give a stronger incentive to Member States to transpose directives within the deadlines laid down by the legislator and hence to ensure that EU legislation is genuinely effective. The Lisbon Treaty thereby takes account of the crucial importance of prompt transposition of directives by Member States: this is not only a matter of safeguarding the general interests pursued by EU legislation, where delays are unacceptable, but also and above all of protecting European citizens who enjoy individual rights under this law. Ultimately, it is the credibility of EU law as a whole which is undermined when acts take full legal effect in the Member States years later than they should
8. In this Communication, the Commission explains how it will make use of this new provision introduced by the Lisbon Treaty.
9. In relation to the new Article 260(3), the Commission, as the guardian of the Treaties, plays a decisive role upstream: it has the power to initiate the procedure laid down in Article 258, combining it with a request pursuant to Article 260(3), by proposing the imposition of a lump sum or penalty payment for a specific amount. In this case, unlike the procedure set out in Article 260(2), the penalty to be imposed will be set by the Court within the limit stated by the Commission.
10. The case-by-case application of the rules and general criteria explained below and developments in the case law of the Court of Justice will enable the Commission to develop its policy further after the adoption of this Communication. As each financial sanction must always be tailored to the specific case, the Commission reserves the right to use its discretion and to depart from these general criteria, giving detailed reasons, where appropriate in particular cases.

11. Article 260(3) is an innovative instrument offered by the Treaty with a view to providing an effective solution to the widespread problem of late transposition of directives, a problem that remains a source of concern. In its annual report on the application of European Union law, the Commission will use the statistics available to it to examine in depth the Member States' performance in transposing directives within the time limits. If the results show no significant improvement, the Commission will adjust its approach and review the policy set out in this Communication.

## **II. GENERAL PRINCIPLES**

12. First, the Commission would recall the three general principles which must guide the implementation of Article 260(3), just as they already guide implementation of paragraph 2 of this Article.
13. The sanction must be geared to the instrument's essential objective, which is to ensure that EU law is transposed in good time and to prevent a repetition of this type of infringement. The Commission considers that three fundamental criteria should be taken into account:
  - the seriousness of the infringement;
  - its duration;
  - the need to ensure that the sanction itself is a deterrent to further infringements.
14. The penalties proposed to the Court of Justice by the Commission must be foreseeable for the Member States and fixed using a method that respects both the principle of proportionality and the principle of equal treatment of Member States. It is also important to have a clear and uniform method, because the Commission will have to justify its calculation of the amount to the Court.
15. Last, from the point of view of the effectiveness of the penalty, it is important to fix amounts that are appropriate in order to ensure the deterrent effect of the sanction. The imposition of purely symbolic penalties would render this instrument useless and run counter to the objective of ensuring that directives are transposed within the time limits laid down.

## **III. USE OF THE NEW MEASURE**

16. In accordance with Article 260(3), the Commission can have recourse to the new possibility provided by this Article "*when it deems appropriate*". This formula must be understood as conferring wide discretionary powers on the Commission, along the lines of the power - held by the Commission under settled case law - to decide whether to bring infringement proceedings under Article 258.
17. In exercising this discretionary power the Commission considers that the Article 260(3) instrument should be used as a matter of principle in all cases of failure to fulfil an obligation covered by this provision, which concerns the transposition of

directives adopted under a legislative procedure. The importance of ensuring transposition by Member States within the deadlines laid down applies equally to all legislative directives, there being in principle no reason to distinguish between them. The Commission nevertheless recognises that there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3).

18. Article 260(3) 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).
19. It must be pointed out that the failure covered by Article 260(3) concerns both the total failure to notify any measures to transpose a directive and cases in which there is only partial notification of transposition measures. Such a case might occur either where the transposition measures notified 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. 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 obligations to notify transposing measures, and therefore Article 260(3) shall not apply. Any dispute regarding the sufficiency of the transposition measures notified or the rules of law existing in national law will be dealt with under the normal procedure on the correct transposition of the directive, under Article 258.

#### **IV. THE TWO TYPES OF SANCTION**

20. Article 260(3) allows the Court to impose, at the request of the Commission, a "lump sum or penalty payment". The Commission considers that, given its objective, this formula (and the similar one in paragraph 2 of the same Article) does not preclude the possibility of combining both types of penalties in the same judgment<sup>7</sup>.
21. Since this innovation of the Lisbon Treaty will make it possible to impose sanctions for failure to notify measures at a much earlier stage than in the past, the Commission hopes that the penalty payment will prove sufficient to achieve the innovation's objective, namely to give Member States a stronger incentive to transpose directives in good time. The Commission will, however, from now on also propose a lump sum payment, where warranted by the circumstances of a case. Furthermore, depending on what the Member States do, the Commission will not hesitate to adjust its approach by seeking a lump sum in all cases (see paragraph 11 above).
22. According to the logic underlying both types of sanction, in cases before the Court of Justice where it has proposed only a penalty, the Commission will withdraw its action if the Member State notifies the transposition measures required to put an end to the infringement. In contrast, in cases pending in which it has also proposed a

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<sup>7</sup> Case C-304/02 *Commission v France* [2005] ECR I-6263.

lump sum, it will not withdraw its action simply because the required notification has been made<sup>8</sup>.

**V. DETERMINING THE AMOUNT OF THE PENALTY PAYMENT AND, WHERE APPROPRIATE, OF THE LUMP SUM**

23. The penalty payment which the Commission will propose pursuant to Article 260(3) will be calculated by means of the same method used for referrals to the Court in line with Article 260(2), as explained in paragraphs 14 to 18 of the Communication of 13 December 2005.
24. The amount of the daily penalty is calculated by multiplying the standard flat-rate amount (paragraph 15 of the 2005 Communication<sup>9</sup>), first by coefficients for seriousness and duration, and then by the "n" factor for the country, which takes account of the Member State's capacity to pay (paragraph 18 of the 2005 Communication<sup>10</sup>).
25. The coefficient for seriousness will be established in line with the rules and criteria set out in paragraphs 16 to 16.6 of the 2005 Communication. The Commission will continue to apply these rules and criteria in the same way as applied hitherto in cases brought under ex Article 228 EC concerning the non-notification of measures to transpose directives. When, in line with the principle of full cooperation and with current practice, a Member State indicates that it has partially failed to notify measures, this may constitute a mitigating circumstance leading to a lower coefficient for seriousness than in the case of complete failure to notify measures.
26. If the Commission reviews its policy (see paragraph 11 above), it will pay particular attention to the question of coefficients for seriousness, taking into account future developments in the case law of the Court.
27. As regards establishing the coefficient for duration, to be calculated in line with paragraph 17 of the 2005 Communication, the duration of the infringement to be taken into account is the period starting from the day following the expiry of the deadline for transposition in the directive in question (subject to paragraph 31 below).
28. In the cases in which the Commission decides also to propose a lump sum, the amount of the lump sum will be calculated using the method set out in paragraphs 19 to 24 of the 2005 Communication, the sole proviso being that the day on which the period begins<sup>11</sup> should be the day after the time limit for transposition set out in the directive expires.

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<sup>8</sup> See, similarly, paragraph 11 of the Communication of 13 December 2005.

<sup>9</sup> As updated by the Communication of 20 July 2010 (SEC(2010) 923).

<sup>10</sup> As updated by the Communication of 20 July 2010 (SEC(2010) 923).

<sup>11</sup> Day from which the period to be taken into account when calculating the lump sum starts running (see paragraph 22 of the 2005 Communication).

## **VI. DATE ON WHICH THE OBLIGATION TO PAY THE SANCTION TAKES EFFECT**

29. In accordance with Article 260(3), second subparagraph, when the Court imposes a sanction on a Member State, the payment obligation "*shall take effect on the date set by the Court in its judgment*". This allows the Court to set the date of effect as either the day on which the judgment was handed down or a subsequent date. It should be noted that the Court had the same discretionary power under Article 228 EC, although there was no explicit provision in that Article. The Court rarely made use of it to set a date subsequent to the date of its judgment<sup>12</sup>; in any case, it never did so in cases concerning failure to notify measures to transpose directives.
30. In the Commission's view, in the context of Article 260(3), the day on which the judgment is handed down should generally be set as the date on which the obligation to pay the penalty payments takes effect. This would mean, for instance, that the daily penalty payment would run from the day on which the judgment was handed down.

## **VII. TRANSITIONAL RULE**

31. The Commission will apply the new measure laid down in Article 260(3), and the principles and criteria for its implementation set out in this Communication, to proceedings initiated pursuant to Article 258 following the publication of this Communication and to proceedings initiated before its publication, except those which have already been referred to the Court. In proceedings where a reasoned opinion has already been issued, the Commission will issue a supplementary reasoned opinion warning the Member State concerned that it will lodge a request under Article 260(3) in the event that the matter is referred to the Court. When calculating the amount of the sanction and as regards the duration of the infringement, the Commission will not take into account the period before 1 December 2009, the date the Lisbon Treaty came into force.

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<sup>12</sup> Of the nine judgments handed down pursuant to Article 228 which imposed a sanction, in only three cases did the Court decide to set the first deadline for the penalty payment on a date following its judgment. See cases C-278/01 *Commission v Spain* [2003] ECR I-14141, C-304/02 *Commission v France* [2005] ECR I-6263 and C-369/07 *Commission v Hellenic Republic* ECR [2009] I-05703.