Execution of Supervision Function by the Court of Justice of the EU

Financial Sanctions for EU Member States

Financial sanctions against Member States for infringement of European Union law can amount to millions of euros. They are imposed by the Court of Justice of the European Union, either as a periodic penalty payment or a lump sum. The paper presents the procedure for enforcing the Court's judgements and discusses the interpretation of Article 260 of the Treaty on the Functioning of the European Union in the case-law of this institution: from a precedent allowing the joint imposition of a periodic penalty payment and a lump sum, by changing the method of calculating both penalties as a result of the entry into force of the Lisbon Treaty, to the interpretation of the expression failure to fulfil its obligation to notify transposing measures referred to in Article 260 (3) TFEU.

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Introduction

European Union law is a specific legal system combining within itself the qualities belonging to the international law with the mechanisms ensuring its effectiveness pertaining to national legal orders. In accordance with settled case-law of the Court of Justice of the EU („CJEU" or „Court")[1], the special status of EU law results from its constitutional nature which is based on the assumption that all Member States are obliged to ensure that this legal order is respected and effective within their territories[2].

[1] In order to simplify the analysis, the author has omitted references to the changes names of the CJEU in historical background referring to the Court of Justice (CJ), the (EU) General Court previously the Court of First Instance (CFI).

[2] Cf. judgment of the CJ of 6 March 2018 in case C-284/16, *Slovakia v. Achmea BV*, EU:C:2018:158, paras. 33-34.

At the EU forum, one of the basic procedures enabling this aim to be achieved at a supranational level, is to vest in the European Commission as a so-called „Guardian of the Treaties", a wide range of powers to examine the fulfillment of obligations under EU law. One of the basic tools to achieve this goal is the competence to institute the so-called infringement proceedings, as a result of which the CJEU may issue a declaratory judgment confirming this type of violation.

However, it should be remembered that obtaining a judgment of the Court confirming a breach of EU law by a Member State constitutes only one of the elements aimed at ensuring the effectiveness of this legal order. The second, much more important stage of these proceedings are actions aimed at prompting a Member State to comply with a judgment confirming an infringement under pain of appropriate sanctions.

The above considerations take on particular significance for issues of compliance within the framework of a specific international organization which is the EU. The States that created it joined it voluntarily, accepting the specific obligations set out in the *acquis*. However, the legal order of an organization always tends to evolve depending on the needs of institutional practice within its internal structures. A fundamental problem arises when Member States are not willing to comply with the rules, they have themselves established in accordance with the applicable procedures. Such a problem has also become relatively quickly visible within the European Economic Community. It should be noted that Article 171 of the Treaty establishing the European Economic Community („EEC") contained only a stipulation for the Court to issue a judgment finding an infringement and an obligation for a Member State to comply with that judgment. This regulation proved quickly to be insufficient because in cases of repeated violations and relatively frequent non-execution of judgments there was no possibility for any enforcement actions. The only solution to this problem was to bring the case back to the Court for declaration that the previous judgment had not been implemented. While the Court recognized the legitimacy of such an interpretation of the Treaties[3], it did carry the risk of violating the *res iudicata* principle and it did not sit well with the effectiveness of EU law[4].

Various proposals to guarantee the compliance with these judgments by way of sanctioning policy have not found any response from the Member States for long time[5]. This state of affairs changed only in the course of negotiations of the Maastricht Treaty in which a provision was included

[3] Judgment of the Court of Justice of 7 March 1996 in case C-334/94, *Commission v. France*, [1996] ECR I-01307, para 2 of the operative part. See also the order of the Court of 28 March 1980 in Joined Cases 24 and 97/80 R, *Commission v. France*, [1980] ECR 01319, paras. 10-12.

[4] Ibid., para 19. See also a description of the regulations in this respect in A. Sikora, *Financial sanctions in the event of failure to comply with CJEU judgments*, Warsaw 2011, Wolters Kluwer, pp. 68-74.

[5] Cf. S. Andersen, "Procedural Overview and Substantive Comments on Articles 226 and 228 EC", *Yearbook of European Law 2008*, p. 139.

enabling the imposition of financial sanctions in the form of a financial penalty or a lump sum in the event of failure to comply with the Court's judgment[6]. It took a rather enigmatic wording which is now expressed in Article 260 (2) first and second sentence of the Treaty on the Functioning of the European Union („TFEU"):

If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall 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. These provisions, being clearly a provision of a blank nature, remained, however, a long dead letter of the law, due to their general nature and, consequently, doubts as to how to apply them correctly.

In this paper the author focused solely on examining the scope and mode of application of Article 260 TFEU leaving outside the scope of analysis other regulations aiming at disciplining EU Member States. The article does not describe separate sanction procedures specified in the treaties, i.e. procedures determining responsibility in the sphere of Economic and Monetary Union (Article 126 TFEU), in relation to State aid pursuant to Article 107 TFEU or the procedure specified in Article 7 of the Treaty on European Union, the so-called rule of law procedure[7]. Also outside the scope of the work lies the issue of Member States' sanctioning within the framework of interim measures prescribed by the CJEU on the basis of Article 279 TFEU[8], as well as regulations enabling the suspension of payments financed from the EU budget in certain cases, such as an existing infringement of EU law[9], as well as procedure for financial corrections under EU funds, including European agricultural funds (*clearance of accounts procedure*).

The purpose of the article is to describe the scope of judicial review exercised by the CJEU in relation to compliance with EU law by the Member States, in particular as regards the possibility of forcing them to fulfill certain obligations[10]. It should be emphasized that this is also

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[6] A description of this process is provided by A. Sikora, op. cit., pp. 74-80, and it is also analysed by I. Kilbey, "Financial Penalties Under Article 228 (2) EC: Excessive Complexity?" 44 *Common Market Law Review* 2007, pp. 744 and 745.

[7] For the sake of brevity, the implications resulting from the application of Article 260 TFEU to the Euratom Treaty under its Article 106a were omitted.

[8] See. order of the CJ of 20 November 2018 in case C-441/17 R, *Commission v. Poland*, EU: C: 2017: 877, para 118.

[9] The role of this remedy is particularly stressed as a part of legislative work aimed at drafting regulations for the new EU financial perspective. Cf. J. Łacny, "Zawieszenie wypłat funduszy UE przekazywanych państwom członkowskim naruszającym zasadę praworządności – nowy mechanizm warunkowości w prawie UE", *Europejski Przegląd Sądowy 2018*, nr 12; R. Poździk, "Wpływ naruszenia praworządności w państwach członkowskich na politykę spójności w latach 2021–2027", *Europejski Przegląd Sądowy 2018*, nr 12.

[10] It should be underlined that proceedings beyond the application of Article 258 and Article 260 TFEU are treated by the EC as going beyond its competence as "Guardian of the Treaties" – see the European Court of Auditors, Putting EU law into practice: The European Commission's oversight responsibilities under Article 17 (1) of the Treaty on European Union 2018, para 4.

related to the supervision over the activities of the European Commission ("EC" or "Commission") which is on the one hand the „Guardian of the Treaties" and, on the other hand, a party to the dispute in infringement proceedings.

Therefore, the author will first analyze the approach presented by the European Commission concerning the application of Article 260 TFEU as formulated in communications issued by that institution. The case-law of the CJEU will then be presented in an attempt to reconstruct the judicial review function exercised by the Court towards the Member States and the Commission's proposals. The whole analysis will be concluded by indicating emerging case-law lines in this area.

Supervision of the execution of the CJEU judgments

The main disadvantage of the sanctioning rule which was formulated in the Maastricht Treaty, was its generality which *prima facie* prevented its correct application in accordance with the principle of legal certainty. In the Article 171 of the EC Treaty there was only an indication that the effect of noncompliance with the Court's judgment may be the imposition of a periodic penalty payment or a lump sum. The amount of these sanctions was to be proposed by the Commission, but this provision did not specify in any way either the method of their calculation or the conditions for imposing them on the Member States. From the very beginning it has been raising doubts as to whether it was in fact consistent with the principles of law that were fundamental to all coercive rules such as the principle of legal certainty, non-retroactivity, the principle of equality and the protection of legitimate expectations. However, since the EC was assigned the obligation to achieve a specific goal, the measures which it should apply for its implementation should be effective enough to fulfill these tasks in the most possible effective manner and in accordance with the standards set for such activities.

The solution to these doubts was the issuance of a *Memorandum on applying Article 171 of the EC Treaty* which presented the Commission's approach to calculating financial sanctions in a public and accessible manner[11]. This general reference framework has been made more specific in the Communication on the methods of calculating financial penalties set forth in the Treaty[12]. In this way the institution met the implementation of the general principles of law against the deficiencies in the treaty provision and at the same time limited its powers. It should be borne in mind that such formally non-binding Commission acts (communications, recommendations or guidelines) when they produce effects in respect of third parties are in fact a measure of general application which illegality may be questioned. The Court seems to treat such documents *as rules of practice from which the administration may*

[11] Memorandum on applying Article 171 of the EC Treaty, O.J, C 242 of 21.08.1996, p. 7.
[12] Method of calculating the penalty payment provided for pursuant to article 171 of the EC Treaty, O.J. C 63 of 28.02.1997, p. 2.

not depart in an individual case without giving reasons that are compatible with the principle of equal treatment[13]. At the same time, it emphasized that:

[i]n adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects[14].

Incidentally such approach to the legal effects of „soft law" of the EC somehow poses a forced-choice question of its compliance with the framework set out by the Lisbon Treaty which distinguishes between delegated (Article 290 TFEU) and implementing (Article 291 TFEU) acts. Therefore, there have been voices in the legal writings indicating that this way of categorizing these documents may not be in line with the Treaty regulations[15].

The European Commission is therefore bound by the communications it has issued as long as they do not conflict with EU law[16]. In addition, at least in theory, if it makes a mistake in calculating financial penalties, this may constitute a violation of the principles of legal certainty and legitimate expectations[17]. The departure from the principles set out in the communications also requires detailed reasoning. These reflections have been made by the Court in the area of EU competition law, but pronouncements on general principles of law should also be extended to other areas of EU law as well as infringement proceedings themselves. Although the CJEU has not yet had the opportunity to take into consideration this type of problems within the process of imposing financial sanctions on the Member States, there is no doubt that these principles should apply to all coercive proceedings[18].

There is settled case-law established within the framework of proceedings instituted pursuant to Article 260 TFEU that the Commission communications are only a useful reference point, contributing to the guarantee of transparency, predictability and legal certainty[19].

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[13] Judgment of the CJ of 28 June 2005 in Joined Cases C-189, 202, 206, 207, 208 and 213/02 P *Dansk Rørindustri A / S and Others v Commission*, EU: C: 2005: 408, para 209.

[14] Ibidem, para 211.

[15] As to the argumentation in the area of competition law see W. Weiß, "After Lisbon, can the European Commission Continue to Rely on ‚Soft Legislation' in its Enforcement Practice? *Journal of European Competition Law & Practice* 2011, vol. 2, No. 5, p. 450.

[16] For example see the judgment of the CJ of 13.12.2002 in Case C-226/11, *Expedia by Autorité de la concurrence and Others*, EU: C: 2012: 795, para 28.

[17] Such a conclusion can be drawn by analogy from the judgment of the CJ of 18 May 2006 in case C-397/03 P *Archer Daniels Midland Co., Archer Daniels Midland Ingredients Ltd v. Commission*, EU: C: 2006: 328, para 93 and 94.

[18] See in this regard in a wider perspective the opinion of Advocate General Jääskinen of 21 March 2013 in case C-241/11, *Commission v. the Czech Republic*, EU: C: 2013: 181, paras. 40–43.

[19] Judgment of the CJ of 4 July 2018 in Case C-626/16, *Commission v. Slovakia*, EU: C: 2018: 525, para 83.

The remaining issue is the question how these principles will be ensured in practice in favor of the Member States since they are only aware of the initial potential amount of financial sanctions, the imposition of which is the sole discretion of the judges. Moreover, there are no thresholds limiting the level of sanctions contained in the provisions of the Treaty[20] which could at least approximately provide information on the consequences of the infringement of EU law.

This is, however, a broader problem because there is a difficulty in referring the sanction provided for in Article 260 TFEU, due to its vague nature, to the modern standards of the rule of law, according to which coercive rules should be known in advance, sufficiently specified and should clearly indicate the consequences of their violation. The European Commission has tried to remedy these shortcomings by means of soft law – communications addressed to the Member States which are unilaterally initiated by this institution. On the other hand, the Court itself has broadly defined the scope of its discretion in sanctioning on the basis of Article 260 TFEU assuming that its powers in this regard are not conditional upon prior issuing of communications in this area by the Commission and accordingly that these acts are not binding on Luxembourg judges[21].

Therefore, since the European Commission communications play an essential role in the procedure for enforcing compliance with the CJEU judgments, the sanctioning framework by which this institution has been bound should be briefly presented. For a long time, the Commission based its methodology for calculating and imposing financial penalties on the position developed in the document of 13 December 2005 entitled ‚Application of Article 228 of the EC Treaty „[SEC (2005) 1658]. The essential elements of the conditions for imposing financial sanctions were formulated in an internal Commission document prepared only in the EU working languages. It seems that information about the document adopted in Polish together with a reference to the Eur-Lex system did not appear in the Official Journal of the EU until 2007[22]. However, any changes to this communication has been properly published in Part C of the Official Journal of the EU.

What is typical, the Commission made a reservation at the outset of its Communication (and in many subsequent communications) that it may depart from the principles contained therein if the specificity of the case so requires, by giving detailed reasoning in particular when calculating the lump sum[23]. The document itself emphasized that its primary goal was to ensure foresability of sanctions applied

[20] It is difficult to consider for such a limitation the wording of Article 260 (3) TFEU according to which the Court is bound by the EC submission.
[21] Judgment of the CJ of 12 July 2005 in Case C-304/02, *Commission v. France*, EU: C: 2005: 444, para 85.
[22] See O.J. C 126 of 7.06.2007, p. 15. Previously these criteria were modified by an internal document – PV (2001) 1517/2 of 2 April 2001.
[23] Application of Article 228 of the EC Treaty [SEC (2005) 1658], para 5.

by the European Commission while maintaining proportionality and sticking to the requirement of treating all the Member States in equal manner. Pursuant to these principles in the process of calculating individual financial sanctions the gravity of the infringement, its duration and deterrent effect have always been taken into account.

This communication for a long time constituted the basic framework for setting the rules and procedure for the application of sanctions policy by the EC, therefore it has only been updated in relation to the individual coefficients applicable to the Member States. This was mainly caused by the changes in the population and in the GDP values[24].

Furthermore, an essential tool to understand the EC sanctioning policy constitutes also communications having a general, somewhat sectoral nature, i.e. *A Europe of Results – applying Community Law*[25], as well as *EU law: Better results through better application*[26].

Both communications are based on the assumption of fundamental importance of compliance with the law for the functioning of the EU. In order to ensure the effectiveness of EU law it is therefore necessary to conduct effective monitoring of the compliance and enforcement of Union law. As part of this function, the Commission through a legislative initiative form appropriately this law and ensures its quality allowing its better application. Moreover, this institution permanently cooperates with Member States in this area through informal contacts and regular meetings of national experts. Finally, the Commission's most far-reaching power to intervene in the legal systems of the Member States is to monitor compliance and enforcement of EU law by initiating infringement proceedings.

In this respect, the 2007 Communication set out the Commission's priorities in the area of monitoring compliance pointing out at the need to pay particular attention to compliance with CJEU judgments declaring the existence of an infringement. It also determines the time frames for monitoring progress for proceedings concerning non-notification of transposition measures (12 months), as well as proceedings for ensuring the application of the Court's judgment (12 to 24 months, save in special circumstances in exceptional cases)[27].

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[24] Cf. Communication from the Commission on Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings: SEC (2010) 923/3, of 1 September 2011 SEC (2011) 1024 final, of 31 August 2012 C (2012) 6106 final, of 21 November 2013 C (2013) 8101 final, of 17 September 2014 C (2014) 6767 final, of 5 August 2015 C (2015) 5511 final, of 9 August 2016 C (2016) 5091 final, of 15 December 2017 C (2017) 431 final, of 19 September 2018 C (2018) 5851 final, of 13 September 2019 C(2019) 6434. It is worth mentioning that the requirement to update the coefficients for calculating financial sanctions results from the case-law of the CJEU – cf. the judgment of the Court of 10 January 2008 in case C-70/06, *Commission v. Portugal*, EU: C: 2008: 3, paras. 49 and 50.

[25] Communication from the Commission of 5 September 2007, C (2007) 502 final.

[26] Communication from the Commission of 19 January 2017, C (2017) 18.

[27] Communication from the Commission of 5 September 2007, C (2007) 502 final, p. 10, para 3.

The Commission presented another modification of its approach to EU law enforcement procedures in 2017 Communication. First of all, it announced its withdrawal from the EU-Pilot informal cooperation system, except in specific cases[28]. Moreover, it clearly stated that in proceedings related to failure to notify transposition measures (pursuant to Article 260 (3) TFEU) it would henceforth always apply to the Court for a lump sum which would have the consequence of Commission non-withdrawal the applications, even if the Member State remedies its infringements[29].

It should also be noted that a serious review of the EC position followed the judgment of the Court of Justice of 14 November 2018 in case C-93/17, *Commission v. Greece*[30]. The Court in this decision referred to the entry into force of the new voting rules set out in the Lisbon Treaty changed the method of determining the payment capacity of Member States. Until now, the coefficient included GDP and the number of votes held by the Member State in the Council. Regarding the Greece, however, there were special circumstances because the economic crisis caused significant fluctuations (decrease) in the country's GDP – as a consequence the CJEU was inclined to take into account its actual value on the day the facts of the case were examined when calculating the penalty[31]. At the same time, however, the CJEU noted that from 1 April 2017 the weighting system was replaced by a double qualified majority system (requiring 55% of the Council members or 72% if the application does not come from the EC or the High Representative of the Union for Foreign Affairs and Security Policy, and the population of these States must constitute 65% of the EU population)[32]. Consequently, this system could not be applied according to the methodology proposed by the Commission[33] and therefore in the Court's opinion the main coefficient for calculating the Member State's payment capacity should only be the GDP[34].

This judgment provided an impetus for the EC to change the method of calculating the special „n" factor (reflecting the payment capacity of the Member State and its institutional significance) which developed a new communication changing the current rules for its calculation[35]. In this Communication the EC did not agree with the CJEU's approach to refer only to the GDP of a Member State for the purposes

[28] Communication from the Commission of 19 January 2017, C (2017) 18, p. 12.
[29] Ibidem, pp. 15-16.
[30] EU:C:2018:903.
[31] C-93/17, paras. 132-135.
[32] C-93/17, para 138.
[33] See the elaborations in the Opinion of Advocate General Wathelet of 16 May 2018 in Case C-93/17, ECLI: EU: C: 2018: 315, paras. 137-140.
[34] C-93/17, para 142.
[35] Communication from the Commission of 25 February 2019 Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringements proceedings before the Court of Justice of the European Union, C(2019) 1396.

of calculating the factor n, because, in its view, this coefficient reflects only the economic dimension of the State (the n factor would then show significant differences between individual States). Furthermore, such an approach would significantly increase the amount of sanctions for more than a third of the Member States[36]. The Commission was in favor of maintaining the factor of institutional importance of the Member States in the form of taking into account the number of representatives elected to the European Parliament in the individual Member States[37].

It is hard to resist the impression that the basic goal that guided the Commission services in constructing new rules for calculating the n factor was to strive for the new system to be as close as possible to the current practice in this area. This is clearly seen when the reference point for calculating this factor has changed. The reference point was the n factor of Luxembourg so far – at present it is the average GDP and the number of seats in the European Parliament[38]. Such a change, however, resulted in a significant reduction in the amount of penalties so the EC decided to multiply the amounts calculated by an adjustment factor of 4.5. After this revision the special n factor for Poland is 1.27 and the minimum lump sum is EUR 3 275 000. Although it does not follow directly from the content of the 2019 Communication it seems that the Commission still refers to the already outdated Communication ‚Application of Article 228 of the EC Treaty" [SEC (2005) 1658. It would be therefore desirable to issue a communication unifying and updating the current approach of the EC in this area to ensure legal certainty, predictability and transparency.

Before proceeding to the review of the methodology used by the EC to calculate financial sanctions it is worth mentioning a separate communication on the specific case provided for in Article 260 (3) TFEU when within one proceedings the Tribunal declares a breach by a Member State of the obligation to notify transposition measures of a directive adopted in accordance with the legislative procedure and financial penalties for this infringement. In the Commission communication – Implementation of Article 260(3) of the Treaty[39] it was noted that despite considerable discretion in this respect ("when it deems appropriate") the Commission is always going to apply for a penalty in such circumstances, except in certain specific cases. Unfortunately, this Communication does not seem to solve the main dilemma – what is the lack of notification of transposition measures, in particular whether it is enough to notify some measures or

[36] Ibidem, p. 2.
[37] It should be noted that this coefficient may change due to the Brexit – cf. Article 3 of the European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament (O.J. L 165 of 2.7.2018, p. 1).
[38] A detailed formula for calculation of this average has been presented in the footnote 1 of the Communication from the Commission of 25 February 2019.
[39] C(2011) 12.

whether it must be the information about the complete transposition of the directive[40]. The CJEU's approach to this issue will be discussed in the following part of the study devoted to the analysis of its case-law.

It is therefore worth analyzing the methodology for calculating financial sanctions developed by the European Commission – in accordance with Article 260 (2) TFEU may be a periodic penalty payment and a lump sum. It is necessary to signal a dispute that has already appeared at the very beginning of the application of this provision. Namely, the question arose whether the two sanctions can be applied cumulatively or whether the application of one rather precludes the imposing of the other. This issue was definitely resolved by the CJEU in judgment C-304/02 *Commission v. France*. In this case, the Commission applied for a periodic penalty to be imposed on France for infringements in the area of fisheries, but the Court of its own motion decided to consider the possibility of imposing also lump sum[41]. It underlined that both sanctions are aimed at prompting the Member State to comply with a judgment declaring a violation of EU law. At the same time, the periodic penalty payment is intended to prompt the remedying the infringement in the shortest possible time and the lump sum is to sanction the negative effects of non-compliance on private and public interests, in particular if the non-compliance persisted for a long time[42]. Therefore, there is a possibility of imposing both sanctions and this is not precluded by the wording of the provision, in particular the use of the conjunction *"or"* (*ou* in French, *oder* in German) which may be treated as exclusive disjunction[43].

The argument that taking into account the duration of the infringement during calculation of both sanctions would also be in breach of prohibition of double jeopardy rule (*ne bis in idem*) was also rejected[44]. The Court has a wide discretion in the imposition of financial sanctions and the fact that in some cases only one of the penalties have been imposed and in others both together, does not in itself constitute an infringement of the principle of equality since the type of sanctions and their amount depend on the circumstances of the specific case[45]. The CJEU also stressed that the proceedings aimed at compelling the Member State to comply with a judgment declaring a breach of EU law is a special procedure (enforcement procedure) the purpose of which is to put an economic pressure on the implementation of this judgment and therefore it cannot be compared to domestic proceedings[46]. Consequently, the Court

[40] C(2011) 12, para 19.
[41] C-304/02, para 75.
[42] C-304/02, para 81.
[43] C-304/02, para 83.
[44] C-304/02, para 84.
[45] C-304/02, paras. 85-86.
[46] C-304/02, para 91.

referring to a functional interpretation allowed the imposition of both a periodic penalty and a lump sum in one single procedure and, accordingly, the Commission has consistently adopted similar practice. The methodology adopted by this institution for calculating financial sanctions is as follows.

Periodic penalty payment[47]

The first of the financial sanctions is ascertained in principle in the days of delay calculated in days from the delivery to the Member State of the judgment issued pursuant to Article 260 TFEU until the date on which that Member State remedied the infringement[48]. In accordance with the EC guidelines it is calculated according to the following formula:

Daily penalty payment:

SR x WPN x WOT x n, where:

SR – basic flat rate amount for daily penalty payment: EUR 3116

WPN – coefficient for seriousness (it ranges from 1 to 20)

WOT – coefficient for duration of the infringement (it ranges from 1 to 3, calculated by the EC in the amount of 0.1 per month from the date of delivery of the CJEU judgment declaring a breach[49], in the failure of notification of transposition measures it is calculated from the day following the date of the transposition deadline)[50]

n – factor taking into account the payment capacity of the Member State concerned encompassing the GDP and the number of places attributable to its representatives in the European Parliament (currently for Poland it is 1.27)

The periodic penalty payment potentially imposed on Poland may range from EUR 3957.32 (minimum value) to EUR 237 439.2 (maximum value) for each day of delay.

Lump sum

The interesting thing is the fact that this sanction is determined in the form of a minimum fixed rate or in the form of an amount specified in daily rates which in principle resembles the calculation of a periodic penalty payment although in relation to another period. The Commission adopts a calculation method that results in a larger amount. The purpose of this penalty is in principle to sanction the Member State's failure to comply with its obligations under a judgment rendered pursuant to Article 258 TFEU until the date of remedying the infringement or the judgment is delivered pursuant to Article 260 TFEU. Only in the event of a breach of the obligations arising from the failure to notify transposition measures the initial day is the day after the date of the transposition deadline[51]. The EC

[47] Apparently, the EC uses the term "penalty payment" (French: *montant de l'astreinte*; German: *Zwangsgelde)*, and the EC itself defines it as a daily penalty payment but the development of the CJEU's case-law has resulted in a change of the wording.

[48] SEC(2005) 1658, para 14.

[49] SEC(2005) 1658, para 17.

[50] C(2011) 12, para 27.

[51] C(2011) 12, para 27.

ascertains a lump sum according to the following formula:

Daily rate of the lump sum payment:

SR x WPN x n x D, where:

SR – basic flat-rate amount for lump sum payment: 1 039 EUR

WPN – coefficient for seriousness (it ranges from 1 to 20)

n – factor taking into account the payment capacity of the Member State concerned, encompassing the GDP and the number of places attributable to its representatives in the European Parliament (currently for Poland it is 1.27)

D – number of days of infringement.

At present, the minimum lump sum for Poland is EUR 3 275 000, calculated in daily from EUR 1319.53 (minimum value) to EUR 26 390.6 (maximum value).

According to the European Commission it attaches great significance to the importance of general principles of law in ongoing proceedings. The basic values include: the predictability of possible penalties for Member States as well as their compliance with the principles of proportionality and equal treatment, in particular taking into account the uniformity of their calculation[52]. The EC only underlines that financial sanctions determined by the CJEU are deterrent in nature[53]. This view can actually be pleaded as regards a penalty payment, but it is highly disputable with respect to a lump sum whose primary purpose is to punish a Member State for failure to remedy the infringement as declared by the CJEU judgment (or in a specific case of failure to notify transposition measures). This argument finds some support in the practice of the Commission which has been described in its communications and according to which it would not withdraw its application from the CJEU whenever it had requested for a lump sum even when the Member State concerned had remedied the infringement. In my view, this leans for a clear repressive function of this financial sanction, the more so as the CJEU also takes into account the recurrence of infringement by the Member State[54].

The Commission also attributes the paramount value for the principle of proportionality in the sanctioning process. According to the Court's view it is necessary that the sanctions are appropriate to the circumstances of the case, proportional to the infringement and to the payment capacity of a Member State[55]. In this respect, the communication on the methodology of sanctioning underlines the following aspects of this principle. First, if it is possible to objectively and transparently raise several allegations against a Member State, the EC applies for the imposition of penalties for each of them, provided that this will not increase the

[52] SEC(2005) 1598, para 7.

[53] SEC(2005) 1598, para 8.

[54] Judgment of the CJ of 9 December 2008 in Case C-121/07, *Commission v. France*, EU: C: 2008: 695, para 69; judgment of the CJ of 19 December 2012 in Case C-279/11, *Commission v. Ireland*, EU: C: 2012: 834, para 70; judgment of the CJ of 17 September 2015 in Case C-367/14, *Commission v. Italy*, EU: C: 2015: 611, para 120.

[55] This rule was formulated in regard to the periodic penalty payment, but it also seems to apply to lump sum – cf. judgment of the CJ of 25 November 2003 in case *Commission v. Spain*, EU: C: 2003: 635, para 41.

overall amounts of the penalties. Secondly, the amount of penalties should always be appropriate to the circumstances of the case, including the progress made by the Member State concerned in fulfilling of the obligations imposed on them by a judgment of the Court or under EU law. In particular, the Commission declared that as regards obligations of means it would indicate appropriate formulas taking into account progress of this kind[56]. Moreover, while as a rule a periodic penalty payment is calculated at daily rates, it cannot be excluded that in the circumstances of a particular case this period should be adjusted individually (e.g. as a half-year penalty). Finally, for certain types of infringements that require specific measures to be taken to verify that the infringement has been remedied (e.g. in relation to disturbances in hydrological conditions in a specific area), it may be necessary to suspend the periodic penalty payment[57].

The significant innovation introduced by the Lisbon Treaty should also be mentioned, namely the abandonment of an important stage in the administrative procedure (reasoned opinion) before submitting an application to the Court under Article 260 (2) TFEU. Currently, the only formal requirement preceding this stage of proceedings before the CJEU is to allow the Member State to express its observations in response to the letter of formal notice usually within two months of its service. In practice, however, the Commission submits to the Member State an informal letter requesting information about the manner of implementation of the judgment within two months of its delivery. Member States may apply for these deadlines to be extended but for no longer than two months in respect of letter of formal notice and subject to certain conditions being met[58]. It should also be borne in mind that according to the Commission's position the proceedings aiming at the implementation of a CJEU judgment should not as a rule last longer than 24 months[59]. In practice, however, such proceedings may take much longer, chiefly in the cases of particularly complex and difficult to implement obligations requiring significant financial expenditures on the part of the Member State.

After bringing the procedure and methodology for calculating financial sanctions closer as adopted by the Commission, it is worth reviewing the Court's case-law in order to verify in practice the adopted theoretical assumptions for sanctioning the Member States.

Controlling the implementation of obligations under EU law

At the outset, it should be underlined that the Court recognizes itself as the only institution with competence to decide on

[56] SEC(2005) 1658, para 13.2.
[57] SEC(2005) 1658, para 13.4.
[58] Regarding the EC guidelines on extending deadlines in infringement proceedings cf. Extension of deadlines in enforcement procedures, EU Law Network, <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=8985>, [access: 14.08.2019 r.].
[59] Communication from the Commission of 5 September 2007, C (2007) 502 final, p. 10.

the imposition of financial sanctions on Member States. Not only does it consider the communications elaborated by the EC merely as a useful reference point but also grants itself complete freedom to set an amount of the financial sanctions. They may be imposed in an amount and in a form which it considers appropriate to encourage the Member State to bring an end to non-compliance of its obligations under the Court's first judgment[60].

Such reasoning obviously finds support in the wording of Article 260 TFEU which makes the reference to the judicial control exercised by the CJEU in this respect. It should be noted that this provision is applicable in the event of the need to sanction the failure by the Member State of a number of obligations arising in the course of the implementation of various procedural powers of the EC, however, for the sake of brevity the present study investigates the effects of non-performance of obligations arising from the delivery of the judgment pursuant to Article 258 TFEU and the special case provided for in Article 260 (3) TFEU[61]. In theory as noted by the Court in these proceedings only breaches of the obligations arising from the treaty which it had found as having grounds in cases instituted pursuant to Article 258 TFEU[62]. In practice, however, the Court analyzes relatively broadly all the Member State's obligations in the context of the subject matter of the dispute set out under Article 258 TFEU which obviously puts into question the relationship between Article 258 and Article 260 TFEU.

Taking into account the big picture it should be underlined that such an approach raises a number of doubts in light of the general principles developed by the Court itself with regard to the interpretation of coercive rules addressing individuals. Particularly doubtful is the question of how to preserve legal certainty[63], predictability and its equal application in relation to the Member States, if it has not been determined in sufficiently clear and precise manner what sanctions such infringements would entail. Taking matters ridiculously it may be pinpointed that the Commission might have not issued any communication on financial sanctions as well, but only lodge an application to render them to the Court which could adjudicate on them in a completely arbitrary manner[64]. Anyway, such an interpretation means that, paradoxically, the Member States do not enjoy the protection they are

[60] See judgment of the CJ of 22 June 2016 in case C-557/14, *Commission v. Portugal*, EU: C: 2016: 471, para 69.

[61] As regards the application of Article 260 TFEU, cf. A. Sikora, "Financial penalties for non-execution of judgments of the Court of Justice", [in:] A. Łazowski, S. Blockmans (ed.), *Research Handbook on EU Institutional Law*, Cheltenham / Northampton 2016, pp. 326-328.

[62] Judgment of the CJ of 10 September 2009 in case C-457/07, *Commission v. Portugal*, EU: C: 2009: 531, para 47.

[63] It follows from the Court's case-law that the change in procedural regulations is without prejudice to the principle of legal certainty – see judgment of the Court of 11 December 2012 in case C-610/10, *Commission v. Czech Republic*, EU: C: 2012: 781, para 50.

[64] It is clear from the Court's case-law that it may impose a financial sanction that has not been proposed by the EC – cf. the judgment of the CJ of 18 July 2007 in case C-503/04, *Commission v. Germany*, EU: C: 2007: 432, para 22.

required to provide in their legal systems when applying such rules in relation to the imposition of sanctions on private parties. According to the view of the Court itself:

The order imposing a penalty payment and/or a lump sum 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[65].

Some more critiques of the provisions of the TFEU regarding the imposition of financial sanctions has been formulated by the Member States within the framework of proceedings aimed at imposing financial penalties on Spain. These proceedings were unique in so far as they had been initiated prior to the amendments introduced by the Lisbon Treaty, and the Court already adjudicated after the Treaty entered into force introducing procedural changes in Article 260 (2) TFEU. In that regard, Spain argued that adjudication pursuant the new rules would infringe the principle of legal certainty, non-retroactivity and violate its rights of defense.

Referring to these pleas and allegations the Court noted that the principle of legal certainty does not preclude the application of new procedural regulations with immediate effect. Admittedly, it has not been expressed explicitly in the reasoning of the Luxembourg judges but it can be presumed that since the substantive provisions specifying the impending sanctions have not changed and the Member States have been fully aware of their wording, neither the principle of legal certainty nor the prohibition of retroactivity are not applicable in such circumstances[66]. Furthermore, the Member State was able to make full use of its right of defense because it made statements in response to letter of formal notice, additional letter of formal notice and another letter informing that the case had been brought before the Court[67].

The deceptiveness of such reasoning has only recently been noticed in the scholarly writings which moreover underlined that despite the CJEU's allegations of free discretion in imposing financial sanctions it refers as a rule to the proposals formulated by the Commission. The Court only slightly modifies in the framework of the generally accepted convention of the sanctioning, the claims submitted by this institution in its applications[68]. On the other hand, however, it is difficult to assume that from the vague wording of Article 260 TFEU, it can be construed that the instruments contained therein cannot be used, as this would undermine the *effet utile* of EU primary law. The present jurisprudence of the CJEU in this respect can therefore be considered as an expression of a reasonable compromise in this area with this caveat that Article 260 TFEU belongs to the coercive rules (in terms of the ECtHR rules of a criminal

[65] C-304/02, para 91. It follows from the next paragraph of this judgment that the CJEU recognizes proceedings based on Article 228 (2) of the Treaty establishing the European Community as a kind of enforcement procedure.
[66] Judgment of the CJ of 11 December 2012 in case C-610/10, *Commission v. Spain*, EU: C: 2012: 781, paras. 50–51.
[67] C-610/10, *Commission v. Spain*, para 52.
[68] A. Kornezow, "Imposing the Right Amount of Sanctions under Article 260 (2) TFEU: Fairness v. Predictability, or How to 'Bridge the Gaps'", 2014 *Columbia Journal of European Law*, vol. 20, No 3, p. 300.

nature), and thus it is acceptable to rely only on the restrictive interpretation of this provision. Unfortunately, this postulate is not entirely applicable in the Court's case-law which will be further highlighted in the course of further argumentation. At this point, one can only evoke the most vivid example of a broad interpretation of Article 260 TFEU, i.e. allowing by the Court the possibility of adjudicating cumulatively the penalty payment and a lump sum which does not reflect directly the wording of this provision.

Enforcement of a judgment declaring violation of EU law

One of the basic objectives constituting a necessary condition for imposing financial sanctions on a Member State is to examine whether it has fulfilled its obligations imposed by the CJEU judgment declaring an infringement[69]. The proceedings pending before the Court on the basis of Article 260 TFEU are objective in nature – they are based on the verification of the implementation of the Member State's obligations[70] and the Court's function is to determine the level of persuasion and deterrence it considers necessary for their effective implementation[71].

The burden of proof in principle rests with the EC services, in particular as regards demonstrating to what extent at least part of the obligations has been carried out by the Member State[72]. However, if the Commission has provided sufficient evidence showing the continuation of the infringement, the burden of proof is shifted to the other party and in such circumstances the Member State is to contest the data submitted and the conclusions which it draws in a substantial and detailed manner[73]. Although, if the Member State has made legislative changes in the course of the pre-litigation procedure, the enforcement procedure may concern national provisions that are not identical to the provisions identified in the reasoned opinion and thus when the subject matter of the dispute has not been changed[74].

In such cases, the Commission does not need to inform the Member State of defects in transposition as the lack of such a reference does not prevent the infringement being remedied, it does not also encroach upon the right of the defense and does not affect the setting of the limits of the dispute[75]. Moreover, as regards the recovery of State aid declared incompatible with the internal market, the EC is not obliged to specify the exact amount to be recovered. It is sufficient if its decision contains instructions allowing the recipient to determine itself, without

[69] The issue of a ruling issued pursuant to Article 260 (3) TFEU will be omitted for the sake of simplicity and it will be presented hereafter.
[70] C-304/02, *Commission v. France*, para 44.
[71] Judgment of the CJ of 4 June 2009 in case C-568/07, *Commission v. Greece*, EU: C: 2009: 342, para 46.
[72] Judgment of the CJ of 4 July 2000 in Case C-387/97, *Commission v. Greece*, EU: C: 2000: 356, para 73.
[73] Judgment of the CJ of 18 July 2006 in Case C-119/04, *Commission v. Italy*, EU: C: 2006: 489, para 41.
[74] Judgment of the CJ of 14 March 2006 in case C-177/04, *Commission v. France*, EU: C: 2006: 173, para 37.
[75] C-177/04, *Commission v. France*, para 42.

overmuch difficulty, indispensable amount to be recovered[76]. Furthermore, if a Member State intends to recover this aid by means other than by cash payment, it must provide the Commission with all information allowing it to verify that the measures chosen constitute an appropriate implementation of the decision and the measures adopted must be sufficiently transparent, i.e. allowing to establish that they enable the elimination of distortions of competition and produce effects identical to the return of funds[77].

It must be underlined that the process of implementing the Court's judgment must be commenced immediately and completed as soon as possible without any delay[78]. In contrast, the reference date for the declaration of non-execution of the judgment delivered pursuant to Article 258 TFEU is the date when the deadline for replying to the letter of formal notice addressed by the European Commission in the process of enforcing this judgment has expired[79].

When considering the circumstances of a particular case, the Court takes into account the effects of non-compliance with the judgment of the Court on private and public interests (such as endangering human health and the creation of harm to the environment)[80] and urgency in forcing a Member State to comply with EU law[81]. It should be remembered that the EC guidelines are not binding on the Court and this also applies in particular to the duration of the infringement (the Court is not bound by the scope proposed by the Commission)[82].

According to the settled case-law internal circumstances (for example, difficulties in implementation of the directives), regulations or practices cannot justify a failure to comply (French: *pour justifier le non-respect*) with the obligations and deadlines stemming from EU law[83]. Similarly, the internal division of powers of central and regional authorities does not affect the sole responsibility of a Member State towards the EU for the implementation of its obligations under this law[84]. If a Member State in meeting its obligations under EU law encounters unforeseen difficulties or finds out about the unforeseen effects of its actions, it should put those problems under the assessment of

[76] Judgment of the CJ of 12 October 2000 in case C-480/98, *Spain v. Commission*, EU: C: 2000: 559, para 25 and the case-law cited therein.
[77] Judgment of the CJ of 7 July 2009 in Case C-369/07, *Commission v. Greece*, EU: C: 2009: 428, paras. 79–81.
[78] This rule apparently has been formulated quite a long time ago – see the judgment of the CJ of 6 November 1985 in case 131/84, *Commission v. Italy*, EU: C: 1985: 447, para 7.
[79] C-610/10, *Commission v. Spain*, para 67.
[80] According to the Court's case-law, the violation of EU environmental standards and the free movement of goods is treated as particularly serious. C-121/07, *Commission v. France*, paras. 77–78.
[81] C-387/97, *Commission v. Greece*, para 92.
[82] C-177/04, *Commission v. France*, paras. 70-71. On that note the Court has underlined that it is not bound by the range proposed by the Commission but in the present case it did not go beyond that range.
[83] C-387/97, *Commission v. Greece*, para 70. See also the judgment in case C-70/06, *Commission v. Portugal*, para 22.
[84] Judgment of the CJ of 13 May 2014 in case C-184/11, *Commission v. Spain*, EU: C: 2014: 316, para 43.

that institution together with a proposal to make appropriate changes[85], and the State concerned and the EC should co-operate in good faith in order to overcome such difficulties[86].

The CJEU treats as mitigating circumstances a financial crisis (as decreasing the Member State's financial resources), partial fulfillment of the Member State's obligations[87], good cooperation with the Commission[88], significant investment expenditures aimed at ensuring compliance with the judgment[89] or the fact that this is the first infringement of this Member State[90]. To a similar extent, the Court has also recognized the absence of a second pillar in a Member State in the absence of transposition deficiencies of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 n the activities and supervision of institutions for occupational retirement provision.

The basic aggravating circumstance for the Court is always the significant passage of time during which an obligation under EU law has not been implemented[91].

Periodic penalty payment

The imposition of a periodic penalty payment on a Member State is only possible if the infringement continued until the date on which the Court examined the facts of the case[92], otherwise, even if the infringement lasted at the time of the reply to the reasoned opinion, there would be no grounds for imposing a periodic penalty payment[93]. When determining the amount of the periodic penalty payment, the Court generally examines the frequency of the proposed penalty, its nature (fixed or decreasing) and then calculates its exact amount[94]. Suffice it to mention the famous case of infringement of the Bathing Directive by Spain[95] in which the CJEU imposed on the Member State a periodic penalty payment on an annual basis, taking into account the percentage of bathing areas that do not comply with this Directive. The Court also analyzes possible difficulties in the implementation of the directive resulting from EU law which is the basis for reducing coefficient for seriousness of the infringement[96]. Some differences in determining the amount

[85] C-184/11, *Commission v. Spain*, para 66.
[86] Judgment of the CJ of 5 May 2011 in case C-305/09, *Commission v. Italy*, EU: C: 2011: 274, para 34.
[87] C-270/11, *Commission v. Sweden*, para 55.
[88] Provided that reliable timetables are presented see C-328/16, *Commission v. Greece*, para 123. Contra judgment of the CJ of 4 July 2018 in case C-626/16, *Commission v. Slovakia*, EU: C: 2018: 525, para 104.
[89] Judgment of the CJ of 31 May 2018 in case C-251/17, *Commission v. Italy*, EU: C: 2018: 358, para 76.
[90] C-270/11, *Commission v. Sweden*, para 55.
[91] C-251/17, *Commission v. Italy*, para 77.
[92] C-304/02, *Commission v. France*, para 31. In practice, the Court seems to give the date of the hearing as the reference date – see judgment of the CJ of 22 February 2018 in case C-328/16, *Commission v. Greece*, EU: C: 2018: 98, para 86.
[93] C-119/04, *Commission v. Italy*, paras. 45-47.
[94] Judgment of the CJ of 25 November 2003 in Case C-278/03, *Commission v. Spain*, EU: C: 2003: 635, para 42.
[95] Council directive of 8 December 1975 concerning the quality of bathing water (76/160/EEC), OJ L 31, 5.2.1976, p. 1).
[96] C-278/01, *Commission v. Spain*, para 53.

of the periodic penalty payment are also provided for in State aid cases, especially if there are difficulties in determining the recipients of the aid or the amounts of aid granted[97]. The CJEU relatively frequently imposes a penalty payment on a semi-annual basis[98].

It is also worth noting that the CJEU has made significant modifications in the manner of imposing a periodic penalty payment against Member States in relation to the European Commission communications.

Firstly, the Court allowed the possibility of delaying the enforcement of a periodic penalty payment in order to enable a Member State to demonstrate that it had already ended an infringement which it could not have done earlier, usually due to the insufficient evidence in the proceedings[99]. In this context, the Luxembourg judges pointed out that a periodic penalty payment may only be imposed if the infringement has not been remedied on the day the CJEU judgment was delivered[100].

Secondly, there is a new practice of imposing a decreasing penalty payment which is increasingly adjudicated[101]. Although the Court underlined that as a rule a periodic penalty payment should be due in the aggregate until all measures necessary to remedy the infringement have been adopted, in certain circumstances the progress achieved by the Member State may be encompassed by the imposed penalty[102]. The Court is therefore obliged to determine how this penalty will be calculated and the period over which it should be imposed[103]. This happens most often when the infringement encompasses a significant number of individual pleas such as the obligation to close and recultivate individual landfills in the Member State concerned. The Court accentuates that the imposition of a periodic penalty payment of this kind must be enforceable and the condition that the penalty have an adequate degree of persuasion and deterrence must also be met[104]. However, it seems that such a pronouncing of this sanction means that calculating its correct amount may not be a simple task and it constitutes the basis for further disputes between the EC and the Member State[105]. Interestingly enough,

[97] C-496/09, *Commission v. Italy*, para 32, as regards the specificity of evidentiary issues in such cases see also paras. 70-78 of that ruling.

[98] C-304/02, *Committee v. France*, para 112; judgment of the CJ of 17 November 2011 in cse C-496/09, *Commission v. Italy*, EU: C: 2011: 740, para 54; judgment of 17 October 2013 in case C-533/11, *Commission v. Belgium*, EU: C: 2013: 659, para 73.

[99] C-369/07, *Commission v. Greece*, para 125. In this case, the CJ allowed the effectiveness of the periodic penalty payment to be delayed by one month which was caused by Greece having provided insufficient quality of evidence.

[100] Judgment of the CJ of 2 December 2014 in case C-378/13, *Commission v. Greece*, EU: C: 2014: 2405, para 51.

[101] Judgment of the CJ of 16 July 2016 in case C-653/13, *Commission v. Greece*, EU: C: 2015: 478, para 82.

[102] Judgment of the CJ of 2 December 2014 in case C-196/13, *Commission v. Italy*, EU: C: 2014: 2407, para 106; C-378/13, *Commission v. Greece*, para 60-63.

[103] C-196/13, *Commission v. Italy*, para 107.

[104] C-196/13, *Commission v. Italy*, para 109.

[105] See more on the method of calculating the periodic penalty payment consisting of three parts in the judgment of the CJ of 7 September 2016 in case C-584/14, *Commission v. Greece*, EU: C: 2016: 636, paras. 88-92.

such penalties are often requested by the Commission which, at least theoretically in line with its communications, should apply for a daily penalty.

Lump sum

The Court approaches in a general manner to the lump sum calculations made by the European Commission while underlining that this sanction is not to imposed automatically[106]. The CJEU tends to adjudge a predetermined amount not based on precise calculations, e.g. EUR 20 million, pointing out that this is a fair assessment of the specific circumstances of the case (French: *une juste appréciation des circonstances*)[107]. The lack of detailed calculations and their reasoning in the Court's case-law may suggest that it imposes a lump sum penalty based solely on the principle of equity. As a rule, the Court's reasoning as to whether or not a lump sum is to be adjudicated is extremely brief[108]. One may even get the impression (as mentioned above) that the CJEU in some way regards this sanction as a means of "punishing" the Member State for not cooperating with the Commission[109], particularly if the legal and factual context presupposes that effective prevention of similar infringements requires the use of deterrent means[110].

In several cases the CJEU ruled for the amounts of lump sums lower than the minimum lump sum proposed by the Commission[111].

Special proceedings pursuant to Article 260 (3) TFEU

The Lisbon Treaty introduced a significant modification to the procedure for

See also C-378/13, *Commission v. Greece*, para 65; C-328/16, *Commission v. Greece*, paras.104-108; judgment of the CJ of 25 July 2018 in case C-205/17, *Commission v. Spain*, EU: C: 2018: 606, paras. 66-68; C-251/17, *Commission v. Italy*, paras. 86-88.

[106] C-121/07, *Commission v. France*, para 63.

[107] C-304/02, para 115; C-369/07, *Commission v. Greece*, para 149; C-121/07, para 87; judgment of the CJ of 4 June 2008 in case C-109/08, *Commission v. Greece*, EU: C: 2009: 346, para 54; judgment of the CJ of 31 March 2011 in case C-407/09, *Commission v. Greece*, EU:C:2011: 196, para 42; C-496/09, *Commission v. Italy*, para 96; C-610/10, *Commission v. Spain*, para 147; C-279/11, *Commission v. Ireland*, para 80; C-374/11, *Commission v. Ireland*, para 52; judgment of the CJ of 17 October 2013 in case C-533/11, *Commission v. Belgium*, EU: C: 2013: 659, para 62; C-576/11, *Commission v. Luxembourg*, para 66; C-270/11, *Commission v. Sweden*, para 59; C-196/13, para 120; C-378/13, *Commission v. Greece*, para 79; judgment of the CJ of 25 June 2014 in case C-76/13, *Commission v. Portugal*, EU: C: 2014: 2029, para 67; C-557/14, *Commission v. Portugal*, para 100; C-584/14, *Commission v. Greece*, para 104; judgment of the CJ of 15 October 2015 in case C-167/14, *Commission v. Greece*, EU: C: 2015: 684, para 79; C-653/13, *Commission v. Greece*, para 95; C-367/14, *Commission v. Italy*, para 126; judgment of the CJ of 4 December 2014 in case C-243/13, *Commission v. Sweden*, EU: C: 2014: 2413, para 66; C-328/16, *Commission v. Greece*, para 128; C-626/16, *Commission v. Slovakia*, para 105; C-205/17, *Commission v. Spain*, para 80; judgment of the CJ of 13 July 2017 in case C-388/16, *Commission v. Spain*, EU: C: 2017: 548, para 46; C-251/17, *Commission v. Italy*, para 102.

[108] See at least C-503/04, *Commission v. Germany*, para 41. It should be noted, however, that in more recent case-law the Court has devoted much more room to give reasons for the amount of lump sum, perhaps under the influence of the critique of its previous case-law.

[109] In this case, the subject of the analysis is mainly the attitude of the Member State concerned – cf. C-568/07, *Commission v. Greece*, paras. 44 and 45.

[110] C-496/09, *Commission v. Italy*, para 89.

[111] C-568/07, *Commission v. Greece*, para 61; C-205/17, *Commission v. Spain*, paras. 71-73 and 80.

sanctioning the Member States in terms of informing the Commission about transposition measures.

In accordance with Article 260 (3) TFEU, if the EC considers that a Member State has failed to notify about the measures taken to transpose a directive adopted in accordance with the legislative procedure it may, if it considers it appropriate, indicate the amount of the lump sum or periodic penalty payment to be paid by that State which it finds appropriate in the circumstances. If the Court finds that there is a violation of EU law, it may impose financial sanctions on the Member State not exceeding a specific amount determining the date on which the obligation to pay is due.

The purpose of this provision was to force the Member States to efficiently inform the Commission services about implementing measures which was to enable the institution to quickly verify the implementation of obligations under EU law. In practice, every time a Member State fails to provide information on full transposition in the national implementing measures database, the Commission IT system generates backlog tables within about two months after the transposition deadline. There are afterwards adopted by circulation by the College of Commissioners and delivered as a letter of formal notice. So far, however, this procedure has hardly ever led to the imposition of sanctions as the Commission withdrew its applications from the Court when it has received information from the Member State that it had fully implemented its obligation.

This picture has changed together with the development of policy in this respect by the EC which at present in each case lodges a request for adjudication of a lump sum. It should also be mentioned that this provision caused much controversy in relations between Member States and the Commission. The former held the view that only the lack of information on any transposition measures met the conditions provided for in this provision, whereas the Commission services considered that those conditions were satisfied only if all the provisions of the Directive had been correctly transposed[112].

The doubts arising with the interpretation of this provision were resolved only by the precedent judgment of the CJEU in case C-543/17, C*ommission v. Belgium*. The Court stressed at the outset that the obligation to notify the Commission clearly and precisely about the provisions transposing the directives derives from the duty of loyal cooperation (now codified in Article 4 (3) of the Treaty on European Union). This can therefore constitute an independent basis for breach of obligations arising from EU law pursued through the proceedings under Article 258 TFEU[113]. The Luxembourg judges referred to the historical interpretation of this provision and the arrangements made as part of the

[112] Cf. S. Gáspár-Szilágyi, "What Constitutes 'Failure to Notify' National Measures?" 19 *European Public Law* (2013), No 2, pp. 291-294.
[113] Judgment of the CJ of 8 July 2019 in case C-543/17, *Commission v. Belgium*, EU: C: 2017: 922, para 51.

discussion circle on the functioning of the Court of Justice (CONV 636/03, pp. 10 and 11).

The purpose of that provision was to encourage the Member States for prompt remedying of the infringements and to accelerate the imposition of financial sanctions by the Court. The CJEU referring to the historical interpretation rejected the reading that this provision is only applicable if the Member State has not notified all implementing provisions[114]. It would incur the risk that the Member State will provide information on provisions allowing for the implementation of a small number of provisions of directive or provisions that clearly do not aim to transpose it but only to deter the European Commission from applying Article 260 (3) TFEU[115]. However, the interpretation that the condition for notifying the EC about the provisions transposing the directive cannot be considered as legitimate only in relation to those Member States which have correctly transposed the directive and informed about this fact within the prescribed deadline[116]. The Court again referred in this point to the historical interpretation in this respect pointing out that members of the Convention on the Future of Europe clearly distinguished between cases of failure to notify on transposition measures and the lack of transposition. It follows from the contextual interpretation of this provision that the construction adopted by the EC would lead to circumventing the application of Article 260 (2) TFEU[117] while it is necessary in this case to reconcile the Commission's prerogatives with the Member States' right of defense, as well as enabling the Court to freely assess their implementation of their obligations under EU law.

Summing up the Article 260 (3) TFEU requires the Member States to provide sufficiently clear and precise information on the provisions transposing directives – they are obliged to pinpoint the national measures ensuring transposition for each EU provision. Thus, the Court has established a presumption of compliance with this obligation every time the Member State provides this information together with a correlation table of transposing laws and regulations. It can be rebutted by the Commission only if it indicates which provisions are missing or that they do not cover the entire territory of the Member State concerned. At the same time as part of the proceedings conducted pursuant to Article 260 (3) TFEU the Court is not obliged to examine the correctness of transposition[118]. Moreover, due to the fact that financial sanctions pursue the same purpose the case-law developed on the basis of Article 260 (2) TFEU should be applicable to the proceedings conducted pursuant to Article 260 (3) TFEU[119].

[114] C-543/17, *Commission v. Belgium*, para 53.
[115] C-543/17, *Commission v. Belgium*, para 54.
[116] C-543/17, *Commission v. Belgium*, para 55.
[117] C-543/17, *Commission v. Belgium*, paras 56-57.
[118] C-543/17, *Commission v. Belgium*, para 59.
[119] C-543/17, *Commission v. Belgium*, para 61.

It appears that in the landmark judgment in Case C-543/17, the Court attempted to provide an interpretation aimed at reconciling the opposing interests of the EC and the Member States while maintaining the *effet utile* of Article 260 (3) TFEU. However, the question remains whether this solution can be applied in practice.

Enforcement of a judgment pursuant to Article 260 (2) and (3) TFEU

In accordance with Article 280 TFEU the CJEU judgments are enforceable under the conditions set out in Article 299 TFEU which regulates the enforcement proceedings of acts of the Council, the Commission or the ECB imposing pecuniary obligations on entities other than States (these acts constitute an enforceable title). The enforcement proceedings are regulated by the civil procedure provisions of the Member State of enforcement. This raises the question of fundamental importance whether this regulation applies to the enforcement of obligations towards the Member States. Although opinions on the admissibility of such proceedings are divided in scholarly writings[120] at least two interpretations seem possible.

Firstly, if it is to be considered that the reference in Article 280 TFEU relates to the whole content of Article 299 it regulates than in this context the enforcement of pecuniary obligations only towards the non-state entities. This interpretation is supported by the settled case-law of the Court according to which Article 260 TFEU regulates the special enforcement procedure of judgments issued on the basis of Article 258 TFEU and therefore constitutes *lex specialis* in relation to Article 280 TFEU. In such a case, since the States parties to the Treaty did not expressly limit the reference in the above provision, all the conditions provided for in Article 299 TFEU are applicable to the judgments of the Court[121]. Therefore, only what should be done is to replace the wording acts *of the Council, the Commission or the ECB* with the expression *judgments of the CJEU*. Such an interpretation would prevent the execution of the Court's judgments against State entities in the proceedings before domestic courts.

Secondly, if it is to be considered that Article 280 TFEU refers only to Article 299 (2) – (4), it leaves open the possibility of enforcing all CJEU judgments also against the Member States. This must, however, raise the obvious question to what extent this solution can be reconciled with the customary principle of international law according to which the State enjoys execution immunity. In addition, judgments issued pursuant to Article 260 TFEU by their

[120] Most scholars seem to accept such a possibility – see K. Kowalik-Bańczyk, "Artykuł 280" [in:] A. Wróbel (ed.), *TFUE. Komentarz*. T. III, Warszawa 2012, Wolters Kluwer, p. 561. Cf. Ch. Gaitanides, "Artikel 280" [in:] H. von der Groeben, J. Schwarze, A. Hatje (eds.), *Europaisches Unionsrecht*. Band 4, Baden-Baden 2015, Nomos, p. 1037 and K.P.E. Lasok, *Lasok's European Court Practice and Procedure*, Bloomsbury 2017, pp. 1217–1219, paras. 16.170–16.171.

[121] Similarly, though ambiguously J. Schwarze, Artikel 244 [in:] J. Schwarze (ed.), *EU-Kommentar*, Nomos, Baden-Baden 2009, p. 1861, mn. 1.

very nature are not suitable for execution – the only amount expressly indicated in such a judgment is the lump sum amount. A periodic penalty payment is after all an ongoing penalty and as such is payable until the obligation is fulfilled. Apparently however, the sole entity having jurisdiction to determine whether the obligation arising from the judgment issued pursuant to Article 258 TFEU has been implemented is the Court. The CJEU ruled so on the basis of case C-292/11 P, C*ommission v. Portugal*, in which it annulled the EC decision determining the amount of the Member State's obligation arising from an earlier judgment. This may suggest the need to go through the proceedings under Article 260 (2) TFEU again so that the Court clearly determines the amount due in a judgment which in that case might be enforceable. It must be admitted, however, that it is difficult to predict the position of the Court as to this point, and the enforcement procedure itself stipulated in Article 299 TFEU has never been used in practice in the context of the execution of judgments based on Article 260 TFEU.

Admittedly as the Court stressed out it is for the Member States to remove the unlawful effects of a breach of EU law in accordance with the principle of sincere co-operation[122] but in practice but in practice not all Member States are willing to remedy them swiftly[123]. Several doubts have been raised by the possibility of executing financial sanctions from the Member State by set-off. This possibility seems to be allowed by the EC's internal regulations formulated in the decision of 2 May 2013 (COM (2013) 2488 final[124]. In such cases this institution usually sends an informal letter after the imposition of financial sanctions on the Member State requesting the information on the execution of judgment[125].

In the scholarly writings, however, there is a considerable controversy regarding the admissibility of offsetting possible financial sanctions imposed by the CJEU from the payment of the Member State towards the EU[126]. Obviously, the European Commission had a natural tendency to settle the disputes unilaterally as to the implementation of the Court's

[122] Judgment of the CJ of 21 June 2007 in joined cases C-231/06 to C-233/06, Office national des pensions and Others, EU: C: 2007: 373, para 37.

[123] Cf. on problems with recovering the payments from Greece in B. Jack, "Article 260 (2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?" 19 *European Law Journal* 2013, No. 3, pp. 411-414. See most recently judgment of the CJ of 12 November 2019 in case C-261/18, *Commission v. Ireland*, EU:C:2019:955, para 120.

[124] Commission Decision of 2 May 2013 on the internal procedure provisions for the recovery of amounts receivable arising from direct management and the recovery of fines, lump sums and penalty payments under the Treaties, replacing Decision C(2011) 4212 final of 17 June 2011.

[125] L. Prete, *Infringement Proceedings in EU Law*, Wolters Kluwer 2017, in C Execution of Penalties.

[126] Among others see M. Górka, „Kary finansowe nakładane na państwa członkowskie UE na podstawie art. 228 Traktatu WE", *Państwo i Prawo* 2005/6, p. 71; I.C. Kamiński, *Sankcje finansowe wymierzane państwom członkowskim na mocy art. 228 Traktatu ustanawiającego Wspólnotę Europejską* (TWE), PWPMEiP No 5, p. 138; P. Wennerals, "Making effective use of Article 260 TFEU" [in:] A. Jakab, D. Kochenov (ed.), *The Enforcement of EU Law and Values*, Oxford 2017, OUP, pp. 87 and 88.

judgment by way of issuing a decision, but the Court underlined expressly that such a way of settling the case infringes its exclusive jurisdiction and the procedural rights of the Member States[127]. Currently the doubts related to the act of the Commission relating to the manner of the implementation of the judgment imposing financial sanctions on the Member State is to be decided by the Court of Justice in accordance with the new wording of Article 51 (c) of the Statute of the Court of Justice[128]. Therefore, it should be accepted that only after such a judicial check the Commission act would be subject to enforcement pursuant to Article 299 TFEU.

While this approach by the Court seems to significantly hinder the Commission's efforts to execution of the financial penalties through deductions based on general principles[129] it should be remembered that there are a great number of separate regulations that may form the basis for such actions. This applies in particular to regulations related to the expenditure of funds available under Cohesion Policy from the EU budget[130].

Summary

The above analysis has clearly demonstrated that the CJEU has successfully assigned itself the role of the final arbiter in controlling the compliance with obligations under EU law. The evolution of case-law in this regard seems to enforce a narrower interpretation of the judgments imposing financial sanctions on the Member States since any dispute in this regard should in principle be brought before the Court. There are some interesting conclusions drawn from the review of the gradual expansion of case-law in this area in which the Court and the Commission seemed to be able to create a functioning mechanism for ensuring compliance with EU law from a "dead letter" provision.

This way of working out this enforcement mechanism, however, meant that it was burdened with certain legal deficiencies (such as the lack of certainty as to the final amount of the financial penalty) from the moment it was created. It must be said quite honestly that the Member States have not yet contested (in a way other than in the proceedings before the CJEU) such a development

[127] C-292/11 P, *Commission v. Portugal*, paras. 52-55. See also comment in L. Prete, "Enforcement Actions", [in:] R. Schütze, T. Tridimas (ed.), *The European Union Legal Order. Oxford Principles of EU Law*, Oxford 2018, OUP, p. 977.

[128] See recital 3 and Article 1(1) of the Regulation of the European Parliament and of the Council (EU, EURATOM) 2019/629 of 17 April 2019 amending Protocol No. 3 on the Statute of the Court of Justice of the EU (O.J. L 111 of 25.4.2019, p. 1).

[129] See the analysis regarding the scope of recognition of EC competence in this area in T. van Rijn, "Les sanctions pécuniares de l'article 260 TFEU: 5 ans après le Traite de Lisbonne", 51 *Cahiers de droit europeen* 2015, No. 2-3, p. 565. See also comments on practical difficulties related to this matter in L. Prete, *Infringement Proceedings in EU Law, in C Execution of Penalties*.

[130] For example Article 32 (3)(f) of the Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds – see judgment of the CFI of 19 April 2013 in joined cases T-99/09 and T-308/09, *Italy v. Commission*, EU: T: 2013: 200 confirmed by the judgment of the CJ of 6 November 2014 in case C-385/13 P, *Italy v. Commission*, EU: C: 2014: 2350.

of the legal circumstances and therefore it can be considered a settled practice of the functioning of the EU.

The system of financial sanctions adjudicated pursuant to Article 260 TFEU does not seem to be a particularly reliable and prompt method of ensuring effective compliance with EU law. Disputes arising from the ongoing proceedings are of a lengthy nature and involve significant resources, both on the part of the European Commission and the Member States. It is difficult to imagine how it would be possible to force a sovereign State to meet its pecuniary obligations in the process of the execution of the CJEU judgment. It should be clearly underlined that sanctions imposed pursuant to Article 260 TFEU are not of a compensatory nature, they are not intended to cover any damage caused to the EU or other Member States[131]. At present therefore, the burden of sanctioning is shifting rather towards reducing EU funding in cases of infringements of Union law[132]. The cost of non-compliance with EU law can be high – for example in the years 2014–2016 financial sanctions imposed by the CJEU on the Member States have contributed to the EU budget in the amount of EUR 339 million[133].

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[131] M. Górka, Kary finansowe…, p. 62.
[132] In this manner R. Bieber, F. Maiani, "Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?", 51 *Common Market Law Review* 2014, p. 1077.
[133] Putting EU law into practice: The European Commission's oversight responsibilities under Article 17(1) of the Treaty on European Union 2018, para 97.

The views expressed in this paper are personal and should not be attributed to the institutions the author is employed in.

Key words: financial sanctions, EU law, CJEU judgments, lump sum, periodic penalty payment, non-execution of CJEU judgment, Communication from the Commission