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Financial Penalties for Member States who fail to comply with Judgments of the European Court of Justice: European Commission clarifies rules

The European Commission has adopted a Communication which clarifies and develops the policy of the Commission in asking the European Court of Justice (ECJ) to impose a periodic penalty payment and a lump sum on a Member State which fails to comply with a judgment of the ECJ. This clarification was required after the ruling of the ECJ on 12 July 2005 in Case C-304/02, Commission v French Republic.

What does the EC Treaty provide in case Member States fail to comply with judgments of the ECJ?

Many times a year, the ECJ rules, on an application by the Commission, that a Member State failed to comply with Community law, either by infringing the provisions of the Treaties themselves (such as one of the four fundamental freedoms of the single market) or by not implementing or applying fully or correctly the Regulations, Directives or Decisions adopted by the European Parliament, the Council of Ministers and the Commission to implement EU policies such as single market or environmental legislation. In 2004, the ECJ declared in 144 cases that a Member State had failed to fulfil its obligations under Community law. 193 new infringement proceedings were brought by the Commission against Member States, increasing the total amount of infringement procedures against Member States to 2.497 since 1952 (see the ECJ's Annual Report 2004).

In a Community governed by the rule of law, it is of utmost importance that judgments of the ECJ are fully complied with by the Member States. Otherwise, legal certainty, individual rights, the conditions under which market participants operate in various parts of the Community, equal treatment of the 25 Member States as well as the balance of rights and obligations of Member States under the Treaties could be seriously called into question. Non-compliance with a judgment of the ECJ thus strikes at the heart of the legal order of the Community.

This is why the EU Member States added, with the Treaty of Maastricht, a new provision to the EC Treaty which seeks to secure respect for ECJ judgments. The new procedure according to Article 228 of the EC Treaty¹ is a special judicial procedure for the enforcement of judgments that provides for the imposition of penalty payments or lump sums by the ECJ on a Member State which fails to comply with an earlier judgment of the ECJ that a Member State is in breach of its obligations under Community law. It is for the ECJ to take the final decisions on the penalties to be imposed, while the Commission, as guardian of the Treaties, has a decisive part to play in initiating the Article 228-procedure, to bring a case before the ECJ and to give its view on the actual amount to be paid by the Member State concerned.

¹ See also Article 143 of the Euratom Treaty.

Article 228 of the EC Treaty reads as follows:

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing 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.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a **lump sum** or **penalty payment** on it. [...]

What was Case C-304/02, Commission v French Republic about?

In this judgment of 12 July 2005, the ECJ for the first time ordered a Member State to pay **both** a periodic penalty payment **and** a lump sum fine for a serious and persistent failure to comply with Community law.

The case concerned compliance by France with Community measures for fisheries conservation. Already in 1991, the ECJ had held, on an application by the Commission, that between 1984 and 1987, France had infringed Community law by letting undersized fish be offered for sale (Judgment of 11 June 1991 in Case C-64/88, *Commission v France*). Following inspection at certain French ports in the course of the subsequent 11 years, the Commission took the view that France was still not yet complying fully with its obligations. Undersized fish were still offered for sale, and the French authorities maintained a lax attitude in enforcing EC rules.

After France had not complied with two reasoned opinions addressed to it by the Commission, the Commission finally brought on 27 August 2002 a further action against France before the ECJ. The Commission asked the ECJ, in accordance with Article 228 of the EC Treaty, for a declaration that France had failed to fulfil its obligation to comply with the 1991 judgment. The Commission also asked the ECJ to impose on France a daily penalty payment of EUR 316 500 from the delivery of the new judgment of the ECJ until the day of full compliance.

In its judgment of 12 July 2005, the ECJ first of all stressed that the persistence of a practice in France of offering undersized fish for sale and the absence of effective action by the French authorities were such as to prejudice seriously the Community objective of conserving and managing fish resources. The similarity and recurrence of the situations recorded were the result of structural inadequacy of the measures implemented by the French authorities which neglected to carry out controls which were effective, proportionate and dissuasive, as required by Community law. However, the obligation to make sure that penalties which are effective, proportionate and dissuasive are imposed for infringements of Community rules is of fundamental importance in the field of fisheries.

The ECJ furthermore explained in its judgment of 12 July 2005 that both a periodic penalty payment and a lump sum, as provided for by Article 228 of the EC Treaty, have the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and of ensuring that Community law is effectively applied.

- The imposition of a **periodic penalty payment** serves to induce a Member State to put an end as soon as possible to a breach of obligations which would tend to persist.
- The imposition of a **lump sum** is based more on assessment of the effects on public and private interests of the Member State's failure to date to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.

In view of these different functions of periodic penalty payments (persuasive function to incite compliance with Community law in the future) and lump sums (dissuasive function to respond to illegal conduct in the past), the ECJ held on 12 July 2005 that **it is possible to impose both a penalty payment and a lump sum simultaneously, in particular where the breach of Community law obligations has both continued for a long period and is inclined to persist.** Whether cumulating both sanctions is appropriate, must be decided by having regard to the nature, seriousness and persistence of the breach of obligations established.

Against this background, the ECJ, in its judgment of 12 July 2005, ordered France to pay

- a penalty payment of EUR 57 761 250 for each period of six months, from the 12 July 2005 onwards, the 1991 judgment has still not been fully implemented. With this amount, the ECJ took into account the duration and the seriousness of France's infringement and its ability to pay:
- and a lump sum of EUR 20 000 000. With this amount, the ECJ took into account the persistence of the breach of obligations since the 1991 judgment and the public and private interests at issue.

Do Member States often not comply with judgments of the European Court of Justice?

Non-compliance with judgments of the ECJ so far has been fortunately limited to relatively few cases. Since the entry into force of the Maastricht, the Article 228-procedure led to judgments by the ECJ only in three cases:

- **Judgment in Case C-387/97 *Commission v Greece* of 4 July 2000:** The ECJ imposed on Greece a periodic penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with a 1992 judgment because Greece had failed to take the measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste; and had failed to draw up for that area plans for the disposal of waste, pursuant to Article 6 of Directive 75/442, and of toxic and dangerous waste, pursuant to Article 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste.
- **Judgment in Case C-278/01 *Commission v Spain* of 25 November 2003:** The ECJ imposed a penalty payment of EUR 624 150 per year and per 1% of bathing areas in Spanish inshore waters which had been found not to conform to the limit values laid down under Directive 76/160 for the year in question, as from the time when the quality of bathing water achieved in the first bathing season following delivery of the judgment was ascertained until the year in which the judgment in *Commission v Spain* was fully complied with. Spain had not taken all the measures necessary to comply with a 1998 judgment.

- **Judgment in Case C-304/02 *Commission v France* of 12 July 2005:** For non-compliance with a 1991 judgment, the ECJ ordered France to pay both a penalty payment of EUR 57 761 250 for each period of six months, from the 12 July 2005 onwards and a lump sum of EUR 20 000 000 (see above).

What is the Commission's objective in clarifying and developing the rules in its new Communication?

With its Communication of 13 December 2005, the Commission intends, first of all, to enhance legal certainty and the effective application of Community law, thereby fulfilling its task as guardian of the Treaties.

In its judgment of 12 July 2005, the ECJ stressed that guidelines by the Commission on the application of Article 228 of the EC Treaty, even though not required under the EC Treaty, could help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty. Article 228 of the EC Treaty itself says that the Commission "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", and thus requires the Commission to follow suitable criteria to ensure an efficient application of Community law, as well as proportionality and equal treatment for all the Member States.

So far, the Commission had asked the ECJ in Article 228-procedures only to impose either periodic penalty payments or lump sums, but never both of them at the same time. The Commission also so far considered that a penalty payment is the most appropriate instrument for achieving compliance as soon as possible, and reserved lump sums for exceptional cases. The criteria for imposing and calculating periodic penalty payments had been set out in the Commission Memorandum of 5 June 1996 "Information from the Commission - Memorandum on applying Article 171 [today: Article 228] of the EC Treaty" (Official Journal 1996 No C 242, p. 6) and in the Commission Communication of 28 February 1997 "Information from the Commission - Method of calculating the penalty payments provided for pursuant to Article 171 [today: Article 228] of the EC Treaty" (Official Journal 1997 No C 63, p. 2).

The new Commission Communication takes into account the judgment of the ECJ of 12 July 2005 and in particular the possibility, opened by the ECJ, to impose simultaneously penalty payments and lump sums. **The new Commission Communication, which replaces the 1996 and the 1997 Communications, therefore lays down criteria under which the Commission will in the future propose periodic penalty payments, lump sums or both types of sanctions simultaneously for Member States who failed to comply with judgments of the ECJ.**

The Commission expects that the Communication of 13 December 2005 will clarify that Member States which do not respect Community law, as established by the ECJ, could face serious financial sanctions. This should encourage compliance with ECJ judgments by the Member States and therefore reduce, from the beginning, the need to have recourse to the Article 228-procedure. This should also ensure that private and public interests which Community law intends to promote and protect will be better respected. Finally, the dissuasive effect of the possibility of cumulating periodic penalty payments and lump sum fines should help avoiding distortions of competition in the single market which otherwise could result if Community law is observed in some Member States, but not in others.

The new Communication explains the practice the Commission intends to take in the future, but does of course not bind the other Community institutions. Whether periodic penalty payments, lump sum fines, or both, will be imposed on a Member State, and which amounts will be fixed in the end, is exclusively for the ECJ, in the performance of its judicial function, to decide.

Why will the Commission in future ask the ECJ to impose both penalty payments and lump sums against non-compliant Member States?

Experience shows that Member States often comply only at a late stage, sometimes only at the very end of the Article 228-procedure. The Commission's practice so far only to apply to the Court for payment of a penalty for non-compliance after the Article 228 ruling means that late compliance before the ruling does not result in any sanction and so was not effectively discouraged. The Commission will therefore from now on include in applications to the Court under Article 228 of the EC Treaty a specification of:

- a penalty by day of delay after the delivery of the judgment under Article 228, and
- a lump sum penalising the continuation of the infringement between the judgment on non-compliance and the judgment delivered under Article 228.

The logical consequence of the new approach concerning the lump sum payment is that in cases where a Member State rectifies the infringement after the decision to seize the ECJ is taken, but before the judgment is delivered under Article 228, the Commission will no longer withdraw its action as a result for that reason alone. In such cases, even though the ECJ cannot take a decision to impose a penalty payment because such decision has lost its purpose, it can nevertheless impose a lump sum payment penalising the duration of the infringement up to the time the situation was rectified, because this aspect of the case has not lost its purpose.

The Commission also does not exclude the possibility, in very particular cases, of recourse to the lump sum alone. This approach could, for example, be appropriate in exceptional cases of repeated confirmed infringements or when it is clear that a Member State has completed all of the necessary measures to conform with the judgment but some time needs to elapse before the required result is achieved

How will the Commission calculate periodic penalty payments?

The amount of the daily penalty payment is calculated as follows:

- multiplication of a standard flat-rate amount of EUR 600 by a coefficient (from 1 to 20) for seriousness and a coefficient (from 1 to 3) for duration;
- multiplication of the result obtained by an amount fixed by country (the "n" factor) taking into account the capacity of the Member State to pay and the number of votes it has in the Council (reaching from 0.36 for Malta to 25,40 for Germany).

The resulting method of calculation can therefore be summed up by the following general formula: $Dp = (Bfrap \times Cs \times Cd) \times n$, where: Dp = daily penalty payment; Bfrap = basic flat-rate amount "penalty payment"; Cs = coefficient for seriousness; Cd = coefficient for duration; n = factor taking into account the capacity to pay of the Member State concerned.

The new Commission Communication also introduces the 'n' factor amounts (based on GDP and voting rights in the Council, necessary for the calculation of lump sum and penalty payments) for the ten Member States which acceded to the EU in 2004. It also updates the GDP data for the existing fifteen Member States and updates the relevant flat rate amounts, upon which the calculation of all payments is based, to take account of inflation since these amounts were last fixed.

How will the Commission calculate lump sum fines for non-compliant Member States?

In order to take full account of the deterrent effect of the lump sum payment and the principles of proportionality and equal treatment, the Commission will set lump sum fines in a two-stage-method:

- by the setting of a minimum fixed lump sum, and
- a method of calculation based on a daily amount multiplied by the number of days the infringement persists; this method will apply when the result exceeds the minimum lump sum.

Every time it refers a case to the ECJ under Article 228 of the EC Treaty, the Commission will propose *at least* a fixed lump sum payment, determined for each Member State according to the "n" factor (reaching from 0.36 for Malta to 25,40 for Germany).

This fixed minimum base reflects the principle that any case of persistent non-compliance with a Court judgment by a Member State, irrespective of any aggravating circumstances, in itself represents an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction. The fixed minimum base also avoids the proposal of purely symbolic amounts which would have no deterrent effect and could undermine, rather than strengthen, the authority of ECJ judgments.

The Commission
lump sum every
inflation.

The minimum lump sum is set at:

(n factor) (minimum lu
sum)¹⁸

will revise the minimum
three years in line with

For further

	(n factor)	(minimum lu sum) ¹⁸
Belgium	5.81	2 905.000
Czech Republic	3.17	1 585.000
Denmark	3.70	1 850.000
Germany	25.40	12 700.000
Estonia	0.58	290.000
Greece	4.38	2 190.000
Spain	14.77	7 385.000
France	21.83	10 915.000
Ireland	3.14	1 570.000
Italy	19.84	9 920.000
Cyprus	0.70	350.000
Latvia	0.64	320.000
Lithuania	1.09	545.000
Luxembourg	1.00	500.000
Hungary	3.01	1 505.000
Malta	0.36	180.000
Netherlands	7.85	3 925.000
Austria	4.84	2 420.000
Poland	7.22	3 610.000
Portugal	4.04	2 020.000
Slovenia	1.01	505.000
Slovakia	1.45	725.000
Finland	3.24	1 620.000
Sweden	5.28	2 640.000
United Kingdom	21.99	10 995.000

information :

http://www.cc.cec/home/dgserv/sg/ldroit_comm/index.cfm?lang=fr&page=controle

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