

COMMISSION COMMUNICATION

**Application of Article 260 of the Treaty on the Functioning of the European Union.
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**

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I. INTRODUCTION

The Commission re-cast Communication on the application of Article 228 of the EC Treaty¹ established the basis on which the Commission calculates the amount of the financial sanctions, in the form of lump sum and penalty payments, that it requests the Court of Justice to apply when the Commission seizes the Court under the former Article 228 TEC (now Article 260 TFEU) in the context of infringement proceedings against a Member State.

Paragraph 25 of the Communication provided that the rules and criteria set out applied as from 1 January 2006. The Communication also decided that these parameters would be subject to revision every three years to reflect inflation and changes in GDP².

When adopting the Communication the Commission empowered its President, acting in agreement with the Member responsible for economic and monetary affairs, to adopt the above-mentioned measures on the basis that this exercise will not involve any evaluation or exercise of discretion by the Commission.³

Under normal circumstances a first update of the relevant components of the calculation methods would have taken place in 2009. However, in view of the exceptionally uncertain economic circumstances no up-date was made.

The Commission now considers it appropriate to carry out the necessary update in line with the general rules established by the communication of 2005.

As the update has not been done in 2009 for the reasons explained above, once the Commission has revised the factor 'n' of the calculation, it will adapt its calculation to the new factor 'n' in pending cases before the Court decided in 2009 according to Article 260 TFEU, if the new factor 'n' is lower than the factor initially applied in the referral.

The method for carrying out this update is laid down in the recast Communication of 2005⁴ (paragraph 18.2 and footnotes 12, 18, and 22). Accordingly, the update is to be based on the evolution of inflation and the GDP of each Member State. The relevant rate of inflation and GDP statistics to be used are those established two year prior the year of the update ("n-2 rule"). (For details see heading II).

The present Commission Communication is therefore based on economic data for nominal GDP and GDP deflator for 2008 and the current weighting of Member State voting rights in the Council.

There is no reason to change the n-2 rule. The use of the data for 2008 is appropriate as two years is the minimum needed to dispose of relatively stable macroeconomic data. Using data

¹ Sec(2005)1658; OJ C126 of 7 June 2007

² Paragraph 18.2 and footnotes 12, 18 and 22 of SEC(2005)1658

³ Empowerment of 13 December 2005 for the adoption of decisions up-dating certain data used to calculate lump sum and penalty payments under the Commission's policy regarding the application of Article 228 of the EC Treaty, SEC(2005)1616/2

⁴ Sec(2005)1658; OJ C126 of 7 June 2007

from n-1 (2009) could render the data still subject to revision. Moreover, using 2008 allows for an intermediate year of GDP growth and inflation to be taken into consideration, which appears to produce results broadly in line with forecast data for the coming years.

However, in order to ensure a more regular update of the data used in the calculation method, the Commission takes the view that in the future the relevant parameters should be revised on an annual basis⁵.

The other elements used for carrying out the update are also in line with those approved by the Commission.⁶

II. COMPONENTS OF THE UPDATE

The list of economic criteria to be revised or introduced is as follows:

- The standard flat-rate amount for the penalty payment⁷, currently fixed at € 600 per day, to be revised in line with inflation;
- The standard flat-rate amount for the lump sum payment⁸, currently fixed at € 200 per day, to be revised in line with inflation;
- The special "n" factor⁹, to be revised in line with the GDP of the Member State in question taking into account the number of voting rights in the Council. The "n" factor is identical for the calculation of lump sum and daily penalty payments;
- Minimum lump sum payments¹⁰ to be revised in line with inflation;
- In addition to the update of the above-mentioned parameters, new "n" factors and lump sum minima are to be introduced for Bulgaria and Romania.

III. UPDATE

In accordance with the Commission re-cast Communication on the application of Article 228 of the EC Treaty (now Article 260 TFEU) [SEC (2005) 1658], the Commission will apply the following updated figures to indicate to the Court of Justice, when seizing it under Article 260

⁵ The present Commission Communication amends the related parts of the Communication of 2005 as well as of the Empowerment Decision.

⁶ The price deflator of GDP is used as a measure of inflation. The uniform flat rate amounts for lump sum and penalty payments are rounded to the nearest multiple of ten. The minimum lump sums are rounded to the nearest thousand. The "n" factor is rounded to two decimal places.

⁷ The standard or uniform flat-rate amount for daily penalty payments is defined as the fixed basic amount to which certain multiplier weightings are applied. The weightings are the coefficients for the seriousness and the duration of the infringement and the special factor "n" corresponding to the Member State concerned that are to be applied for the calculation of a daily penalty payment.

⁸ The flat-rate amount is to be applied when calculating the lump sum. The lump sum will result from multiplying a daily (lump sum) amount (resulting from multiplying the flat-rate for lump sum payments by the coefficient for seriousness and the result of this calculation being multiplied by the special factor "n") by the number of days the infringement persists between the date of the first judgment and the date that the infringement comes to an end or the date of delivery of the judgment under the Article 228. The (daily) lump sum will be proposed by the Commission when the result of the above mentioned calculation exceeds the minimum fixed lump.

⁹ The special factor "n" takes into account the capacity of the Member States to pay (gross domestic product (GDP)) and the number of votes it has in the Council.

¹⁰ The minimum fixed lump sum payment is determined for each Member State according to the special "n" factor. The minimum fixed lump sum will be proposed to the Court when the summed up daily lump sum payments do not exceed the minimum fixed lump sum.

TFEU, the amount of the financial sanctions in the form of lump sum and penalty payments the Commission considers appropriate in the circumstances.

- (1) The standard flat-rate amount for calculating the penalty payment is fixed at € **640** per day.
- (2) The standard flat rate for the lump sum payment is fixed at € **210** per day.
- (3) The special “n” factor for the 27 EU Member States is:

	Special factor 'n'
Belgium	5,13
Bulgaria	1,47
Czech Republic	3,36
Denmark	3,22
Germany	21,44
Estonia	0,64
Ireland	2,84
Greece	4,27
Spain	13,66
France	18,96
Italy	17,00
Cyprus	0,66
Latvia	0,77
Lithuania	1,20
Luxembourg	1,00
Hungary	2,84
Malta	0,33
Netherlands	7,02
Austria	4,23
Poland	7,88
Portugal	3,56
Romania	3,53
Slovenia	0,97
Slovakia	1,70
Finland	2,86
Sweden	4,57
United Kingdom	18,31

(4) The minimum lump sum (in €) is set at:

	Special factor 'n'	Minimum lump sum (thousands €)
Belgium	5,13	2707
Bulgaria	1,47	777
Czech Republic	3,36	1773
Denmark	3,22	1700
Germany	21,44	11323
Estonia	0,64	337
Ireland	2,84	1501
Greece	4,27	2255
Spain	13,66	7215
France	18,96	10008
Italy	17,00	8974
Cyprus	0,66	350
Latvia	0,77	405
Lithuania	1,20	632
Luxembourg	1,00	528
Hungary	2,84	1498
Malta	0,33	174
Netherlands	7,02	3704
Austria	4,23	2234
Poland	7,88	4163
Portugal	3,56	1881
Romania	3,53	1862
Slovenia	0,97	513
Slovakia	1,70	896
Finland	2,86	1511
Sweden	4,57	2411
United Kingdom	18,31	9666

(5) The Commission will apply the updated figures to decisions it takes to seize the Court of Justice under Article 260 TFEU from ten working days after the date of adoption of this Communication.

(6) As from 2010, an update of the parameters contained in this Commission communication will be carried out on a yearly basis.