



The Deterrent Effect of Financial Sanctions Pursuant to Article 260(2) TFEU in the Context of Violations of Environmental Obligations

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Abstract

The paper aims at understanding whether financial sanctions pursuant to Article 260(2) TFEU have a deterrent effect in relation to specific types of State breaches, namely environmental ones. Spanning three parts, the paper examines how the different type of infringement affects the effectiveness of the payment of financial sanctions, and how these are not equally effective in relation to all types of breaches. Subsequently, it studies the features and issues of the Italian cases. On the bases on this empirical analysis, the article will try to answer the research question. Finally, proposals for amendments will be drawn up, assessing the feasibility of other forms of sanctions.

Keywords

infringement procedure – environment – financial sanctions

1 Introduction: Financial Sanctions Under Article 260(2) TFEU

European environmental law, like many other fields of law, remains a mere set of principle if it is not correctly enforced. As it is well known, Member States

often fail to meet the obligation to give full effect to European law and this is particularly true when it comes to Environment law.¹ In this context, the paper aims at understanding whether financial sanctions pursuant to Article 260(2) TFEU² have a deterrent effect in relation to specific types of State breaches, namely environmental ones.

The reason behind this choice is linked to two specific preliminary considerations. First of all, because of the importance of this specific instrument – the infringement procedure – among those provided by the treaties. While there are additional instruments that ensure the compliance with the *acquis communautaire* – both of public and private enforcement, such as the preliminary ruling – the infringement procedure remains the main one.³ Undoubtedly, the financial sanction, within this procedure, represents (potentially) the most deterrent “moment”. Secondly, although there are studies on the effectiveness of environmental sanctions,⁴ it does not seem that they have carried out an analytical examination of penalty payments and its execution through the case-law.

This probably stems from the absence of public data on the execution of judgments pursuant to Article 260(2) TFEU (or, if available, they are often incomplete). Precisely for this reason, the paper will exclusively focus on Italy, given the easier access to data concerning this specific Member State.

The conclusions reached will therefore be limited to Italy, but this does not mean that they cannot potentially be extended to all Member States, since the mechanisms that characterize the infringement procedure are always substantially the same.

1 On this issue see, for instance, HEDEMAN-ROBINSON, *Enforcement of European Union Environmental Law. Legal Issues and Challenge*, London, 2015.

2 On the procedure under Article 260(2) TFEU see *ex multis* AMALFITANO, *La procedura di “condanna” degli Stati membri dell’Unione europea*, Milano, 2012; ANDERSEN, *The Enforcement of EU Law: The Role of the European Commission*, Oxford, 2012; BRIAN, “Article 260(2) TFEU: An effective judicial procedure for the enforcement of judgements?”, *European law journal*, 2013, p. 404 ff.; PRETE, *Infringement Proceedings in EU Law*, Alphen aan den Rijn, 2017.

3 It has rightly been highlighted that the infringement procedure “is the only legal means available to the Communities to obtain respect for Community Law by a Member State and to ensure the reestablishment of a situation which conforms to the Treaty”, see BARAV, “Failure of Member States to Fulfil their Obligations Under Community Law”, *Common Market Law Review*, 1975, p. 369 ff., p. 370.

4 See, for instance, KOPHE3OB, “Imposing the right amount of sanctions under Article 260(2) TFEU: Fairness v. predictability, or, how to ‘bridge the gaps’”, *The Columbia journal of European law*, 2014, p. 307 ff.; see also the authors *cit. supra* note 2, as well as *cit. supra* note 7.

Ratione temporis, the analysis will start from the first judgment pursuant to Article 260(2) TFEU on environmental matters that regards Italy⁵ until the last available data (end of 2022) and it will be structured in three parts.

A first, general, part will try to understand how the different type of infringement affects the effectiveness of the payment of financial sanctions, and how these are not equally effective in relation to all types of breaches. A second part will therefore discuss the features and issues of Italian cases. A third part, based on this empirical analysis, will try to answer the fundamental research question at the basis of the paper. Finally, proposals for amendments will be drawn up, assessing the feasibility of other forms of sanctions.

To this end, it is worth recalling from the very beginning that Article 260(2) TFEU⁶ establishes two types of financial sanctions that can be imposed on a Member State that has failed to comply with a judgment of the Court of Justice (“ECJ”) handed down on the basis of Article 258 TFEU: the penalty and the lump sum.

Both have a dissuasive purpose and aim at ensuring the effective and correct application of EU law by placing economic pressure on Member States.

The penalty, which consists in the periodic payment of a sum of money for as long as the infringement persists, is used to induce the defaulting State to comply with its obligations as soon as possible and is, thus, a coercive and persuasive measure.⁷ The lump sum, on the other hand, which consists in a one-time payment, aims at making continued infringement inconvenient and is used to prevent such breaches. The measure has, therefore, a dissuasive nature and a general preventive effect.⁸

The penalty is set taking into consideration several factors. The penalty is due for each day of delay running from the date when the court delivers its judgment until the date on which the Member State brings the infringement to an end. The amount of the daily penalty payment is calculated by multiplying a flat-rate amount by a coefficient for seriousness and a coefficient for duration. The result obtained is then multiplied by an amount fixed by the Member State (the “n” factor), which reflects the relevant Member State’s capacity to

5 Case C-196/13, *Commission v. Italy*, 2014.

6 In OJ C 202, 7 June 2016, p. 1 ff.

7 See, *ex plurimis*, WENNERÅS, “Sanctions against Member States under Article 260 TFEU: Alive, but not kicking?”, *Common Market Law Review*, 2012, p. 145 ff., p. 160.

8 See the Opinion of Advocate General Geelhoed, Case C-304/02, *Commission v. France*, 2004, para 71.

pay as well as the number of seats assigned to it in the European Parliament⁹ (although the latter element has been recently replaced with the population criterion).¹⁰

The coefficient for seriousness – which is fixed by the Commission on a scale between a minimum of one and a maximum of twenty – is applied taking into consideration the importance of the provisions breached¹¹ and the breach's consequences on general and particular interests, and must be assessed on a case-by-case basis (e.g., serious damage to human health or the environment).¹² The coefficient for duration, on the other hand, takes into account the period starting from the date of the first court judgment and ending on the date the Commission decides to refer the matter to the court pursuant to Article 260(2) TFEU. It is expressed as a multiplier of between one and three.

The penalty may take one of two forms: fixed or degressive. The fixed form means that the payment amount cannot be changed as fulfillment of the state's obligations progresses. The degressive form, on the contrary, entails the possibility that the Commission may recognize the progress of the State in implementing the judgment of the court. The imposition of one or the other method of payment of the penalty matters, as we will see below.

When it comes to lump sum type of financial sanction, a fixed minimum lump sum is set for each Member State (currently set, for Italy, at 9,548,000).¹³ In addition, a daily amount is multiplied by the number of days the infringement persists. This method is applied when the result of the calculation exceeds the fixed minimum lump sum.

9 Before the communication from the Commission "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", in OJ C 70, 25 February 2019, p. 1 ff., the "n" factor was calculated taking into consideration the number of votes available within the Council.

10 See the communication from the Commission "Financial sanctions in infringement proceedings", Brussels, 22 December 2022, C(2022) 9973 final.

11 See the communication from the Commission on the application of Article 228 of the EC Treaty, Brussels, 9 December 2005, SEC(2005) 1658, para 16.1.

12 *Ibid.*, paras 16 ff.

13 See the communication from the Commission "Financial sanctions in infringement proceedings" (*cit. supra* note 10), p. 15.

2 “Structural” Infringements and “Normative” Infringements: Deterrent Effect of Financial Sanctions in Relation to the Type of Infringement

Scholars have already extensively addressed the issue of the deterrent effect of financial sanctions pursuant to Article 260(2) TFEU.¹⁴

As anticipated, this paper aims not merely at understanding whether pecuniary sanctions have a deterrent effect in absolute or general terms, but particularly if they have it in relation to specific types of State breaches, namely environmental ones.

In order to provide an answer, it bears noting that the scope of the infringement procedure is extremely broad. Any violation may potentially be the subject of an infringement procedure. The mechanism is defined by the treaties in general terms and falls under the (exclusive) jurisdiction of the Court of Justice.

Where treaties are silent, scientific literature has traditionally divided State breaches into “active” and “omissive” behaviors.¹⁵ The former consist of positive actions, while the latter, as the term suggests, involve the failure to perform an obligatory action.

This broad distinction encompasses the largest possible number of infringements: from a failure to transpose directives, for example, to a national judge who neglects to make a preliminary reference pursuant to Article 267 TFEU; or, again: from violations deriving from an administrative practice¹⁶ to the failure to secure public works.¹⁷

Given the many ways in which the Member State can infringe EU law, one may very well ask whether pecuniary sanctions are always effective. In other words, given the heterogeneity that characterizes State infringements, it is

14 See, *inter alia*, GRECO, “Il modello comunitario della procedura di infrazione e il deficit di sindacato di legittimità dell'azione amministrativa in Italia”, *Rivista Italiana di Diritto Pubblico Comunitario*, 2010, p. 705 ff.; AMALFITANO, *cit. supra* note 2, p. 272 ff.; ANDERSEN, *cit. supra* note 2, p. 119 ff.; DIDIER, “Ombres et lumières portées sur la procédure du recours ‘en manquement sur manquement’: la Commission entre le Tribunal et Cour de justice”, *Revue trimestrielle de droit européen*, 2015, p. 285 ff.; WENNERÅS, “Making effective use of Article 260 TFEU”, in JAKAB, KOCHENOV (eds.), *The Enforcement of EU Law and Values*, Oxford, 2017, p. 79 ff., p. 97.

15 See, for instance, MORI, “Art. 258 TFEU”, in TIZZANO (ed.), *Trattati dell'Unione europea*, Milano, 2014, p. 2013 ff., p. 2016.

16 On the definition of “administrative practices” see the Opinion of Advocate General Jacobs, Case C-58/89, *Commission v. Germany*, 1991, para. 27.

17 See, for example, the infringement procedure No. 2019/2279 opened against Italy “Failure to adapt the safety levels of Italian tunnels”.

legitimate to ask whether the homogeneity of the EU response is sufficient to guarantee a deflationary effect.

To better understand the issue, it could be useful to distinguish the infringements into “structural” violations and “normative” violations.

“Normative” violations occur in the existence or absence of a regulatory provision or, more generally, of a regulatory act. As such, they can usually be dealt with by means of the legislative process.

With “structural” violations, on the other hand, not only are national regulations subject to censure, but also structural issues characterized by shortcomings and organizational difficulties or by administrative practices of a general and systematic nature. This means that, differently from “normative” violations, to remove a “structural” violation it is not simply necessary to intervene on the regulatory side, but it is also necessary, on the part of the Member State, to implement a complex and articulated activity which it affects precisely some “structural” elements of the State.

This definition partially matches the definition of “general and persistent” violations provided by the ECJ.¹⁸ These are infringements committed in a general and persistent way. For this reason, the Commission, with the (reasonable) aim of rationalizing the infringement procedure, tends to “[...] gather together cases relating to the same sector, launching ‘horizontal’ proceedings in order to target systemic problems of implementation”.¹⁹ In this way, the Commission aims at eliminating not only a specific breach, but a generalized practice. Over time, the Commission is able to “insert” the largest number of cases within a single *dossier*. Therefore, it will not be enough for a State to eliminate a single violation in order to end an infringement, but it will have to eliminate all the violations relating to a given sector and, above all, to prevent any new ones,

18 The ECJ identified this category of infringements for the first time in Case C-494/01, *Commission v. Ireland*, 2005, para 139, on waste management and disposal. It was applied to Italy in the Case C-135/05, *Commission v. Italy*, 2007, on illegal dumping. According to HADROUŠEK, “Speeding up Infringement Procedures: Recent Developments Designed to Make Infringement Procedures More Effective”, *Journal for European Environmental Law*, 2009, p. 251 ff., p. 277, the practice of censuring general and persistent violations would have the advantage of reinvigorating the effectiveness of the infringement procedure, used in this way in a more rational way. More recently, see also PRETE, “The Systemic Criterion in the Use of Infringement Proceedings”, *German Law Journal*, 2022, forthcoming, who notes that “the concept of ‘general and persistent’ breach remains somewhat elusive. Indeed, the Court did not need to expand much on that concept in order to address the parties’ arguments and adjudicate the disputes brought before it”.

19 GUAZZAROTTI, “Il contenzioso”, in DI COSIMO (ed.), *L'Italia inadempiente. La difficile attuazione del diritto europeo in materia ambientale*, Padova, 2012, p. 191 ff., p. 204.

because these, in turn, would be “inserted” into the dossier and could be used to demonstrate the persistence of the structural problem.²⁰

It follows that, unlike “normative” violations, a legislative amendment alone is not always sufficient to end “structural” breaches, and a more complex intervention is necessary, often involving the intersection and overlap of several competences (national, regional and local) and interests (political, economic and social).

Against this backdrop, it is appropriate to ask whether pecuniary sanctions are suitable for reacting to both types of infringements, bearing in mind that “the logical basis underlying the penalty payment [is] to encourage the Member State to remedy the situation in the shortest possible timescale”.²¹

It would seem, at least *prima facie*, that the sanctions effectively fulfill their dissuasive purpose with reference only to “normative” violations, which are, as such, easily identifiable and easily “eradicable” through targeted legislative intervention.

To corroborate this thesis, it would be interesting to identify which judgments pursuant to Article 260(2) TFEU, among the 42 pronounced by the ECJ, have been enforced and which, on the contrary, have not yet been enforced. This would be useful to verify whether the enforced judgments have tended to involve “normative” violations. Unfortunately, an investigation of this kind is not possible due to the unavailability of comprehensive data on compliance with the court’s 260(2) TFEU judgments. The reverse operation is possible, however, and reveals that only fifteen cases seem to fall into the category of “normative” violations.²² The remaining 27 on the contrary, which

20 See WENNERÅS, *The enforcement of EC environmental law*, Oxford, 2007, p. 266 ff.

21 See the Opinion of Advocate General Mischo, Case C-278/01, *Commission v. Spain*, 2003, para 98.

22 Specifically, these are Cases C-177/04, *Commission v. France*, 2006, on the incorrect transposition of directive 85/374/EEC, on liability for damage from defective products; Case C-119/04, *Commission v. Italy*, 2006, on the non-recognition of the acquired rights of former language assistants (in this case, however, no sanctions were imposed); Case C-70/06, *Commission v. Portugal*, 2008, on the failure to repeal the decree-law which made the award of damages to persons injured by an infringement of EU public procurement law conditional on proof of fault or fraud; Case C-121/07, *Commission v. France*, 2008, relating to the legislation on the control of the placing on the market for civil purposes of products composed of GMOs; Case C-568/07, *Commission v. Greece*, 2009, on the law which did not allow a certified optician, as a natural person, to manage more than one optical shop; Case C-109/08, *Commission v. Greece*, 2009, on the prohibition of installing and operating any electric and electronic game in any public or private place other than casinos; Case C-457/07, *Commission v. Portugal*, 2009, on the regulatory provision which did not take into account the approval certificates for polyethylene pipes issued by other

also include eight judgments in the area of State aid,²³ involve infringements which, if not “general and persistent”, are, in any case, difficult to eliminate with a mere ad hoc regulatory intervention. If, therefore, most of the cases that lead to sanctions concern “structural” violations, then we might deduce that these are the ones that Member States, in general, find more difficult to correct. Moreover, remedying such infringements is often extremely costly – think of waste management or the reclamation of illegal dumps – and requires a suitable infrastructural system, correct land management, and the ability to manage institutional relationships.

If this is true, one might legitimately question how effective financial sanctions (often protracted for years) really are in encouraging the Member State to quickly remedy situations of non-compliance, particularly where “compliance” is inherently slow and complex, as typically are the environmental ones.²⁴

Member States; Case C-270/11, *Commission v. Sweden*, 2013, on the failure to transpose directive 2006/24/EC concerning the retention of data generated or processed in the context of the supply of electronic communications services; Case C-241/11, *Commission v. Czech Republic*, 2013, on the failure to take the necessary measures to comply with Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision; Case C-388/16, *Commission v. Spain*, 2013, on the higher charges imposed on foreign port logistics companies compared to Spanish ones; Case C-95/12, *Commission v. Germany*, 2013, on certain provisions relating to the transfer of shares in limited liability companies to the private sector; Case C-76/13, *Commission v. Portugal*, 2014, on the failure to transpose the provisions governing the designation of the universal supplier or service providers; Case C-261/18, *Commission v. Ireland*, 2019, on the failure to adopt the necessary provisions to ensure that public and private projects covered by Directive 85/337 were previously checked from an environmental impact point of view, as well as the failure provision of a preliminary EIA for the release of authorizations for the construction of a wind farm; Case C-842/19, *Commission v. Belgium*, 2020, on the provisions according to which the tax base for taxing rented properties was different depending on whether these were located in the national territory or abroad.

23 State aid violations are “structural” violations as they too can be eliminated through an active conduct, i.e. the recovery of incompatible aid. The judgments *de quibus* are: Case C-369/07, *Commission v. Greece*, 2009; Case C-496/09, *Commission v. Italy*, 2011; Case C-610/10, *Commission v. Spain*, 2012; Case C-184/11, *Commission v. Spain*, 2014; Case C-367/14, *Commission v. Italy*, 2015; Case C-93/17, *Commission v. Greece*, 2018; Case C-576/18, *Commission v. Italy*, 2020; Case C-51/20, *Commission v. Greece*, 2022.

24 PERONI, “Il Trattato di Lisbona e la crisi dell'Euro: considerazioni critiche”, *Il Diritto dell'Unione europea*, 2011, p. 971 ff., p. 982, makes similar considerations, at least with reference to the euro crisis that occurred between 2008 and 2012. More recently, see also ADAM, “L'Italia e le procedure d'infrazione: ragioni e rimedi”, *Il Diritto dell'Unione europea*, 2021, p. 371 ff., p. 376.

As we will see in greater detail below, the Italian practice demonstrates that the absence of irreversible legal consequences typical of the monetization of infringement could lead Member States to remain inactive and to “set aside” the infringement, as if the cost of correctly implementing the obligations imposed by the Union were, in fact, more burdensome than the regular payment of the penalty. In these cases, the penalty simply becomes a part of the “DNA” of the State.

3 Payment of Financial Sanctions in the Context of Violations of Environmental Obligations: the Italian Cases

On the basis of the considerations made in the previous paragraphs, it is now necessary to understand if environmental breaches for which Italy has been ordered to pay sanctions are merely “normative” or, on the contrary, “structural” and, therefore, if financial sanctions, in this specific context, are effective.

Please note that, in Italy, proceedings pursuant to Articles 258 and 260 TFEU are often related to the environment, with 15 proceedings pending as of October 2022 (out of a total of 83). Three of them are at the judgment pursuant to Article 258 TFEU stage,²⁵ two at the formal notice stage pursuant to Article 260 TFEU²⁶ and three at the judgment stage, pursuant to Article 260(2) TFEU.²⁷ This – in addition to demonstrating that “[...] Italy is seriously in breach of obligations in the environmental field”²⁸ – is in line with the general attitude

25 They are the infringement procedures No. 2014/2147 “Incorrect application of directive 2008/50/EC relating to ambient air quality – PM₁₀”; 2014/2059 “Implementation of directive 1991/271/EEC relating to the treatment of urban wastewater”; and 2015/2043 “Application of directive 2008/50/EC – nitrogen dioxide NO₂”.

26 They are the infringement procedures No. 2009/2034 “Incorrect application of the Directive 1991/271/EC relating to the treatment of urban waste water”; 2011/2215 “Violation of article 14 of directive 1999/31/EC relating to landfills of waste in Italy”.

27 They are the infringement procedure No. 2003/2077 “Incorrect application of directives 75/442/EC on waste, 91/689/EEC on hazardous waste and 1999/31/EC on landfills”; 2004/2034 “Incorrect application of articles 3 and 4 of directive 91/271/EEC on the treatment of urban waste water”; 2007/2195 “Waste emergency in Campania”. The data can all be found in the EUR-infra database, available online at <http://eurinfra.politichecomunitarie.it/ElencoAreaLibera.aspx>.

28 See GRATANI, “L’ambiente: il settore prescelto dall’ordinamento italiano per violare la normativa comunitaria”, *Rivista giuridica dell’ambiente*, 2007, p. 289 ff., p. 290.

of the Commission, which, especially in recent years, has shown little tolerance for environmental violations.²⁹

The infringement proceedings in environmental matters in relation to which Italy pays (substantial) financial penalties are: (i) No. 2003/2077 “Incorrect application of directives 75/442/EC on waste, 91/689/EEC on hazardous waste and 1999/31/EC on landfills”; (ii) No. 2004/2034 “Incorrect application of Articles 3 and 4 of directive 91/271/EEC on the treatment of urban waste water”; (iii) and No. 2007/2195 “Waste emergency in Campania”.

In the first one – opened on 11 July 2003, with the first judgment on 26 April 2007³⁰ and the second on 2 December 2014³¹ – Italy was ordered to pay a six-monthly penalty in degressive form with an initial amount set at almost EUR 43 million.

In the case, the Commission alleged three types of violations: (a) use of illegal landfills; (b) failure to clean up closed illegal landfills; (c) failure to issue new authorizations pursuant to the so-called “landfill directive”³² for those that remain active.

At the expiration of the term established in the reasoned opinion, between 368 and 422 illegal dumping sites were found to be present in 19 Italian regions.³³

29 According to data reported in the last five annual reports on monitoring the application of EU law, the environmental field is always among the top three-four sectors most affected by infringement procedures. The evident relevance of the topic justifies the great interest of the doctrine: on environmental infringements (excluding the case notes) see, *ex multis*, LAUDER, PRELLE, “Environmental assessment and judicial approaches to procedural errors: a European and comparative law analysis”, *Journal of Environmental Law*, 2001, p. 133 ff.; DE SMEDT, “Is Harmonization always Effective? The implementation of the Environmental Liability Directive”, *European Energy and Environmental Law Review*, 2004, p. 2 ff.; GROHS, “Commission infringement procedure in environmental cases”, in ONIDA, KRÄMER (eds.), *Europe and the environment: legal essays in honour of Ludwig Krämer*, Groningen, 2004, p. 23 ff.; BEIJEN, “The implementation of European environmental directives: are problems caused by the quality of directives?”, *European Energy and Environmental Law Review*, 2011, p. 150 ff.; EDWARDS, “Significant EU Environmental Cases: 2010”, *Journal of Environmental Law*, 2011, p. 143 ff.; GROHS, “Article 258/260 TFEU infringement procedures: the Commission perspective in environmental cases”, in CREMONA (ed.), *Compliance and the enforcement of EU law*, Oxford, 2012, p. 57 ff.; HEDEMANN-ROBINSON, *Enforcement of European Union environmental law: legal issues and challenges*, London, 2015.

30 Case C-135/05, *Commission v. Italy*, 2007, with a case note by HUTEAU-MOUGLASIS, “Une condamnation opportune pour l’effectivité du droit des déchets en Italie et en Europe”, *Revue européenne de droit de l’environnement*, 2007, p. 431 ff.; SANTOCCHI, “L’Italia e le sue seimila discariche abusive”, *Rassegna dell’avvocatura dello Stato*, 2007, p. 267 ff.

31 Case C-196/13, *Commission v. Italy*, 2014.

32 Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, in OJ L 182, 16.7.1999, p. 1 ff.

33 Case C-196/13, *Commission v. Italy*, cit., p.to 39.

At the time of the presentation of the appeal there were 218. Compared to the 4866 existing at the time of the opening of the first procedure, the scenario had incontrovertibly improved. Given the constant evolution of the Italian illegal dumping situation, the Commission proposed, net of the lump sum, the payment of a daily penalty of EUR 256,819.20 to be paid on a six-monthly basis, in degressive form. The amount of the penalty would, thus, be reduced on the basis of each site brought into conformity.

The Commission proposed a coefficient for seriousness of eight out of twenty due to the importance of the infringed provisions, which are a fundamental tool for the protection of human health and the environment, as well as due to the general and persistent dimension of the breach. The Commission also highlighted the negative effects of the infringement on public and private interests, “such as the noxious smells and noise that accompany the discharge of waste, the pollution of the surrounding area, the risk that the pollution will have repercussions on human health, and the alteration of natural landscapes”.³⁴ Finally, while acknowledging that the situation had improved, the institution referred to Italian recidivism in the matter of waste. The court set the six-monthly penalty at EUR 42.8 million (slightly lower than the one proposed by the Commission) from which an amount proportional to the number of landfills brought into conformity at the end of the six-month period would be deducted.³⁵

In April 2021, Italy paid EUR 8.6 million and, in the last semester of 2022, Italy paid EUR 5 million.

Although the penalty amount is still high, the procedure is not “static”, and the enforcement proceeds, albeit slowly. According to scholars, the appointment of an extraordinary commissioner was decisive, the work of which like caused, “in a relatively short period of time, a significant contraction of the amount to be paid every six months”.³⁶

In any case, compliance with EU law is hampered (among other things) by the complexity of the situation, which is characterized not only by a high level of technical complexity, but also by the difficulty of coordinating action across regions.³⁷ For each landfill site, Italy is required not only to remove the waste and no longer use the sites as landfills (which means identifying how and where to dispose of waste), but also to carry out an assessment of whether

34 Case C-196/13, *Commission v. Italy*, 2014, para 75.

35 *Ibid.*, para 112.

36 See CONDINANZI and AMALFITANO, “La procedura di infrazione dieci anni dopo Lisbona”, *Federalismi*, 2020, p. 217 ff., p. 296, note 238.

37 See Case C-196/13, *Commission v. Italy*, *cit. supra* note 5, para 24. Legal scholarship highlights these issues, see GUAZZAROTTI, “Il contenzioso”, *cit. supra* note 19, pp. 193–194.

it is necessary to implement a remediation. These are, as the Commission itself has said, “structural measures of a general and lasting nature”.³⁸ Since this is a “structural” infringement, not only would issuing the targeted provisions not be enough, but, on the contrary, multiple adaptation activities are necessary. These activities require lengthy administrative procedures, which touch on the complicated distribution of powers between the Italian State and the regions.

In the urban wastewater procedure, Italy was ordered to pay a six-monthly penalty in degressive form, with an initial amount set at more than EUR 30 million. This procedure, opened due to Italy’s delays in adapting its sewage-purification sector, is going on parallel to three other proceedings – already at an advanced stage. Overall, they concern over 900 non-compliant agglomerations.³⁹ The existence of four infringement proceedings on this subject shows a clear and widespread state of non-compliance with the aforementioned directive in various Italian regions. For this reason, one might have expected a formal declaration of generality and persistence of the infringement, but no such declaration was issued in this case.

In any case, as regards the procedure started in 2004, the judgment pursuant to Article 258 TFEU, pronounced on 19 July 2012,⁴⁰ ascertained that many municipalities in eight regions did not have sewer systems for urban waste water and that 109 agglomerations were not compliant with the provisions of Articles 3 and 4 of the directive. Upon expiry of the deadline set in the letter of formal notice pursuant to Article 260(2) TFEU, i.e. on 11 February 2016, 80 agglomerations were still not compliant. On 22 June 2017, therefore, the Commission filed an appeal seeking an order to pay financial penalties. While the judgment was pending, the situation of Italian non-compliance improved slightly, lowering the number of non-compliant agglomerations to 74. The Commission, first, proposed a daily penalty, to be paid on a half-yearly basis, of EUR 346,992.40, reduced at the hearing to EUR 318,952.29 in consideration of Italy’s progress since the time of filing. Second, it considered the decreasing form to be appropriate. As regards the coefficient for seriousness, the Commission (which enjoys full discretion in its definition) recalled the importance of the infringed directive from an environmental and human health point of view.⁴¹ The Commission identified as aggravating circumstances, *inter alia*, the uncertainty regarding the effective date of full implementation, the clarity of the infringed provisions, the large number of non-compliant agglomerations

38 See Case C-196/13, *Commission v. Italy*, *cit. supra* note 5, para. 40.

39 They are the infringement procedures No. 2009/2034; 2014/2059 e 2017/2181. The four procedures are not superimposable, referring to different types of agglomerations.

40 Case C-565/10, *Commission v. Italy*, 2012.

41 Case C-251/17, *Commission v. Italy*, 2018, para 43.

and, finally, Italy's many violations in the urban wastewater sector. Conversely, the Commission recognized that the efforts of the Italian authorities, as well as considerable financial investment in the sector, constituted mitigating circumstances.⁴²

For these reasons, the Commission proposed a coefficient for seriousness of 11 out of 20. The court agreed and proposed a decreasing penalty of EUR 165,000 per day, to be paid on a six-monthly basis. The actual amount was to be calculated at the end of each semester, reducing the total amount according to the progress made.

In February 2021 the Italian Government paid around EUR 23 million, while in the last semester of 2022, Italy paid EUR 22 million. If the trend continues, it is difficult to imagine that Italy will fully comply within a few years. One may note that his procedure has, at its core, a significant infrastructural *deficit*. This is a particularly complex situation that cannot be solved by mere legislative acts, but which requires a strong commitment in terms of administrative action, as well as the use of substantial financial resources and procedures to be implemented in compliance with the legislation on public procurement.

Therefore, it was necessary to appoint an extraordinary commissioner in this case as well – the *Commissario Straordinario Unico per la Depurazione*⁴³ – to oversee the entire procedural phase: from the design to the testing of the new structures once completed. The commissioner also oversees the management of the plants until the agglomeration is compliant, subsequently transferring the role to the competent public authority.

Finally, with regard to the latest environment-related infringement procedure which reached the financial penalties, No. 2007/2195 on waste in Campania, Italy was ordered to pay a six-monthly fixed penalty of EUR 22 million.

The infringement, a textbook case of “mismanagement of resources”⁴⁴ due to the “confused growth of structures, administrative models, [and] overlapping of competences between central administrations and local authorities”,⁴⁵ is particularly complex and has been the subject of extensive scholarly

42 *Ibid.*, para 46.

43 Introduced by Article 2 of the Law Decree No. 243 of 29.12.2016, the so-called “Decreto Mezzogiorno”, in *GURI* 30 December 2016, and appointed by DPCM of 27 April 2017.

44 See the report by the President of the Court of Auditors Tullio Lazzaro on the occasion of the inauguration of the 2008 judicial year, p. 24 ff.

45 See COLELLA, “La governance dei rifiuti in Campania tra tutela dell'ambiente e pianificazione del territorio. Dalla ‘crisi dell'emergenza rifiuti’ alla ‘società del riciclaggio’”, *Rivista giuridica dell'ambiente*, 2010, p. 493 ff., p. 498.

analysis.⁴⁶ It concerns the systematic uncontrolled and abusive disposal of waste throughout the Campania region, which has given rise to a true “waste crisis”⁴⁷ with serious repercussions on the environment and human health.

Judgment under Article 260 TFEU of 16 July 2015⁴⁸ ordered Italy to pay a fixed penalty equal to EUR 120,000 for each day of delay in implementing the necessary measures to comply with the judgment pursuant to Article 258 TFEU of 4 March 2010,⁴⁹ plus a EUR 20 million lump sum. The Commission proposed a degressive penalty, which was not accepted by the court.

As regards the coefficient for seriousness, the Commission had proposed 8 out of 20. In this case, too, the elements supporting the choice were: the importance of the rules aimed at protecting human health and the environment; the existence of consolidated case-law on waste disposal; and the clarity and unambiguity of the infringed provisions.

The court agreed with the Commission's arguments and noted that the situation had slightly improved since the first judgment, when 55,000 tons of waste were found to be strewn in the streets.⁵⁰ At the time of filing of the second appeal, in fact, the phenomenon had decreased to the level of sporadic and isolated episodes.⁵¹ Despite this, the Kirchberg judges did not consider it appropriate to grant the degressive form of payment, as if to further underline the seriousness of the violation.

The latter procedure has been the subject of reflections both by the doctrine⁵² and within the institutions themselves. For example, the European Parliament has also said, “[...] compliance with EU legislation on waste in Campania requires a very energetic commitment to reduce the volume of waste and shift the balance towards prevention, reduction, reuse and recycling

46 For a reconstruction of the previous events, see KRÄMER, *European Environmental Law Casebook*, London, 1993, p. 387 ff. For more information on the Commission's complaints against Italy, see BARONI, “Lo sguardo vigile dell'Europa sulla ‘emergenza’ rifiuti in Campania”, *Rivista Italiana di Diritto Pubblico Comunitario*, 2011, p. 1093 ff. For a complete reconstruction of the judicial events relating to waste management in Campania, MASSAI, “EU case-law and waste management in Campania”, in PANOUSSIS and POST (eds.), *Waste management in European law*, London, 2014, p. 45 ff.; as well as BARONI, “Le principali sentenze di condanna dell'Italia per la mala gestio dell'emergenza rifiuti in Campania e la perdurante violazione della normativa europea”, *Rivista Italiana di Diritto Pubblico Comunitario*, 2015, p. 615 ff.

47 See Case C-297/08, Commission v. Italy, 2010, para 12.

48 Case C-653/13, Commission v. Italy, 2015.

49 Case C-297/08, Commission v. Italy, *cit. supra* note 47.

50 *Ibid.*, para 103.

51 See Case C-653/13, Commission v. Italy, *cit. supra* note 48, para 75.

52 See authors *cit. supra* notes 45 and 46.

of waste, through the provision of adequate infrastructures [...].⁵³ Even a string of appointments of extraordinary commissioners and the designation of waste sites as areas of “strategic interest under the control of the army” were not considered suitable measures. On the contrary, they were even seen as “counterproductive”, for having “favored a greater presence of organized crime groups both in the official management of waste at the regional level and in the illegal disposal of industrial waste”.⁵⁴

Nevertheless, the historical and political framework existing at the time of the imposition of the sanction, as well as the seriousness of the situation in Campania, have changed today. The penalty imposed by the court was, in fact, related to the waste treatment capacity on the day of the ruling in 2015. Today the factual context has objectively changed, especially following the approval of the new Regional Waste Management Plan in 2016.⁵⁵

It is not possible to go into detail of the factual and legal interventions made to improve the situation, but proof of this is that the Commission has recently recognized the progress made by the Region, after numerous efforts on the part of the Italian authorities (*i.e.*, the increase in recyclable collection and the decrease in landfilling), granting a significant reduction amount of the penalty (around EUR 80 thousand).⁵⁶

Because of the changed factual scenario, it is undeniable that the sanction had lost its functionality, and was instead imposing on Italy an economic sacrifice that was disproportionate to the current seriousness of the situation and, therefore, perhaps even illegitimate.

4 The Deterrent Effect of Fines for Violations of Environmental Obligations

Regarding the effectiveness of financial sanctions in general, scholars are divided between proponents of sanctions as a “formidable instrument of coercion to comply with Community obligations”, and more moderate voices who, observing the practice, have pointed out that that, although the Member States continue to fail after the first judgment establishing the infringement, “they nevertheless align themselves more frequently with the ruling and

53 See the Resolution of the European Parliament on the waste emergency in Campania, in OJ C 182E, 22.06.2012, p. 12 ff., para 2.

54 *Ibid.*, para 3.

55 Resolution No. 685 of 6.12.2016, in BURC No. 85 of 12.12.2016.

56 On file with the author.

eliminate, more rapidly than in the past, the alleged breach".⁵⁷ Others expressed doubts about the effective deterrent capacity of financial sanctions, due to the lack of pre-established rules on the methods for guaranteeing the execution of the judgment (although, it should be noted, this was before the sanction system became fully operational).⁵⁸

Even the Commission was initially skeptical about the proposal to introduce the sanction mechanism.⁵⁹ Repeated violations of EU rules might, in fact, result from a substantial lack of resources, and, therefore, the imposition of financial sanctions could risk aggravating the very cause of the violation itself. The Commission also pointed out that the imposition of financial penalties on a specific Member State might not have the same deterrent effect on another.⁶⁰

With specific regard to environmental procedures, it bears acknowledging that the payment of penalties pushes the State at least to adopt measures aimed at accelerating the adjustment (for example the appointment of the extraordinary commissioner for the four procedures relating to waste water). In addition, the threat of financial sanctions can have the positive deterrent effect of discouraging national and local policies and practices in contrast with EU constraints *ex ante*.

Still, it should also be highlighted that, if a financial sanction does not lead to a fundamental rethinking of the national environmental legislation, then the application of heavy economic burdens can only worsen the Italian structural deficit, subtracting economic resources from the State budget which could instead be directed towards environmental policies.⁶¹

57 See, AMALFITANO, *cit. supra* note 2, p. 273.

58 See, *inter alia*, TESAURO, "La sanction des infractions au droit communautaire", *Rivista di diritto europeo* 1992, p. 477 ff., p. 488 (the paper is the "rapport général" presented at the xv Congrès FIDE, Lisbon, 1992); as well as ANDERSEN, "Procedural Overview and Substantive Comments on Articles 226 and 228 EC", *Yearbook of European Law*, 2008, p. 121 ff., p. 142 ff.; ID., *cit. supra* note 2, p. 231.

59 See "Intergovernmental Conferences: Contributions by the Commission", in *Bulletin of the European Communities*, Supplement 2/91, 1991, p. 151 ff., p. 152. In the literature it has been written that "[...] reading the Commission's contribution to the Conference in this respect one gets the impression that the Commission did not consider the introduction of a sanction mechanism a priority", TIMMERMAN, "Court of Justice of the European Communities", in KUIJER and BULTERMAN (eds.), *Compliance with Judgments of International Court*, The Hague-Boston-London, 1996, p. 115.

60 See *Intergovernmental Conferences: Contributions by the Commission*, *cit. supra* note 59, p. 152.

61 See, in this sense, COSSIRI, "Analisi Casistica dell'inadempimento", in DI COSIMO (ed.), *cit. supra* note 19, p. 291 ff. p. 311; as well as GUAZZAROTTI, "Il contenzioso", *cit. supra* note 19, p. 194. He believes that a profound review of environmental policies is also necessary to prevent infringements, FONDERICO, *La "codificazione" del diritto dell'ambiente in Italia, modelli e questioni*, in *Rivista trimestrale di diritto pubblico*, 2006, p. 613 ff.

Scholars have correctly noted that the Commission, especially DG ENV, seems to be aware of this problem, one indicator being the nearly two year period that was allowed to elapse between the judgment pursuant to Article 258 TFEU and the sending of the letter of formal notice pursuant to Article 260(2) TFEU in the context of the “Waste emergency in Campania” procedure.⁶² Also in the procedure No. 2003/2077 “Incorrect application of the directives on waste, hazardous waste and landfills”, although the first judgment was dated 26 April 2007 and the letter of formal notice pursuant to Article 260 TFEU was sent on 1st February 2008, the appeal pursuant to the same Article was notified only on 16 April 2013, a full six years later.

Because of the significant economic outlay that the payment of pecuniary sanctions entails, it cannot be excluded, especially in the environmental sector, that the Member States “make a calculated decision as to whether it is more costly (in terms of economics or political capital) to avoid compliance for as long as possible and pay the fine or comply with the court’s judgment”.⁶³ The infringement related to waste in Campania might perhaps be one example of this. Net of some progress recognized by the Commission, the situation appears dormant, without (further) possible concrete prospects for improvement.

Similar observations could also be made with reference to the procedures on illegal dumping and the treatment of wastewater.

First of all, while it is true that there has been some progress (given the reduction of the penalty), it is equally true that this progress has been characterized by an inexorable slowness. This again raises doubts as to whether the payment of financial penalties is actually suitable for inducing the Member State to quickly put an end to an infringement which, in itself, likely involves a slow process of elimination.

Second, it could be argued that degressive payment represents, in this sense, a rather strong incentive (at least) in the “psychology” of the State. In fact, knowing that the amount of the penalty might decrease could be an important element in the dissuasive effect of the penalty itself. On this point, however, there is an opposite thesis which sees in the decreasing penalty the risk that it could be perceived by the State as symbolic, leading indirectly to

62 ADAM, “Quando l’Italia è inadempiente. Le procedure per infrazione in materia ambientale”, seminar intervention, University of Macerata, 14 June 2011.

63 See SMITH, “Interinstitutional dialogue and the establishment of enforcement norms: a decade of financial penalties under Article 228 EC (now 260 TFEU)”, *European Public Law*, 2010 p. 547 ff., p. 558.

the attenuation of the authority of the court's judgments (and therefore to the attenuation of the effectiveness of the sanction).⁶⁴

Therefore, one could argue that financial sanctions, which are supposed to exert economic pressure on the State to comply, are not always capable of inducing a State to change its behavior. This shortcoming is even more evident in the case of "structural" violations.

5 Feasibility of Other Forms of Sanctions of an Economic (and non-Economic) Nature

A first, important example of an alternative form of sanction lies in the so-called "environmental conditionality", i.e. the provision of a mechanism that prevents access to EU funds, or imposes their suspension, if the State infringes environmental obligations.

The idea of introducing a "sanctioning" system consisting in the non-access or suspension of EU funding has been proposed more than once, in legal literature, with specific regard to the violation of the values referred to in Article 2 TEU.⁶⁵

Even the Member States, "that [...] shielded themselves behind the subsidiarity principle to escape scrutiny and criticism on fundamental right coming from EU institutions",⁶⁶ since 2013, have begun to discuss, in the Council, the possibility of strengthening EU instruments to deal with violations of EU values.⁶⁷

64 See WENNERÅS, "Sanctions against Member States under Article 260 TFEU: Alive, but not kicking?", *cit. supra* note 7, pp. 162 and 165.

65 See, among the first and for all, SCHEPPELE, "What can the European Commission do when Member States infringe basic principles of the European Union? The case for systemic infringement actions", *Verfassungsblog*, 2013, p. 1 ff., p. 2. Authoritative doctrine, however, had envisaged such a solution also in relation to any infringement, precisely as a (more) effective solution to increase the deterrent effectiveness of the sanctioning mechanism governed by Article 260 TFEU, see TESAURO, "Remedies for Infringement of Community Law by Member States", in VON GERVEN and ZULLEG (eds.), *Sanktionen als Mittel zur Durchsetzung des Gemeinschaftsrechts*, Köln, 1996, p. 17 ff., p. 22.

66 See the working document of the European Parliament "On the situation of fundamental rights in the European Union in 2012", Committee on Civil Liberties, Justice and Home, Bruxelles, 21 June 2013.

67 The debate had started on the basis of a letter sent to the former Presidents of the Commission and the Council by the Foreign Ministers of Denmark, Finland, Germany and the Netherlands on 6 March 2013 (available at www.rijksoverheid.nl) where the need to develop a new and more effective mechanism to safeguard fundamental values in the Member States was acknowledged, including through, where appropriate, "as a last resort, the suspension of EU funding should be possible", p. 2.

The threat of withholding funds could not only act as a powerful incentive for Member States to align themselves with EU law, it would also help to avoid the paradoxical situation whereby, although a State persists in non-compliance, the European Union still provides it with funds, for various reasons. This intervention would not probably require a revision of the Treaties: the adoption of a secondary law act (for example, a regulation giving the Commission the power to suspend EU funds) would be enough.⁶⁸

This solution has actually been adopted in relation to the violation of the values referred to in Article 2 TEU, demonstrating the feasibility of the proposal.⁶⁹ The well-known rule of law “conditionality regulation” has indeed introduced a new mechanism to protect the EU budget from violations of the rule of law committed by public authorities. The mechanism shall allow the Union to suspend, reduce or restrict access to funding proportionally to the nature, gravity and extent of the infringements.

A weakness of this mechanism is that its activation is entrusted, pursuant to Article 6(1) of the regulation, with the Commission, which might hesitate to activate it.⁷⁰ Moreover, the fact that Article 260(2) TFEU expressly provides

68 Please note that this is the thesis of the ECJ in Case C-156/21, Hungary v. Parliament and Council, 2022, and Case C-157/21, Poland v. Parliament and Council, 2022. However, the arguments of Poland and Hungary on the absence of a legal basis do not appear, at least *prima facie*, to be totally groundless.

69 See the regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, in OJ L 433L, 22.12.2020, p. 1 ff. The regulation was introduced to protect the EU budget from breaches of the rule of law principles. See some comments by PECH, PLATON, SCHELPELE, “Compromising the Rule of Law while Compromising on the Rule of Law”, *Verfassungsblog*, 2020; GALLINARO, “Il nuovo regime generale di condizionalità per la protezione del bilancio dell’Unione: verso una più efficace tutela dello Stato di diritto?”, *Nuovi Autoritarismi e Democrazie*, 2021, p. 139 ff.

70 The European Parliament had proposed to act for failure against the Commission for failure to fully and promptly implement the regulation. The Commission, in accordance with the European Council conclusions of 10 and 11 December 2020, EUCO 22/20, p. 2 (c), had declared that, before proceeding to the activation of the mechanism, it would have elaborated and adopted some lines guides on the application of the regulation. It also made it clear that, if there had been an action for annulment against the regulation, it would have waited for the court’s decision. On 11 March 2021, a few days before the expiry of the time-limit for bringing an action, Hungary and Poland brought an action against the regulation, giving the commission the opportunity to wait. Former president David Sassoli had expressly requested the introduction of the action for failure to act to the Parliament’s Legal Service by letter of 20 October 2021. The letter is available online at http://images.dirittounioneuropea.eu/f/sentenze/documento_m7A9g_DUE.pdf. See also the European Parliament Resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(IN1)), P9_TA(2021)0348.

for the use of the “lump sum” and the “penalty payment” entails that, to use the “conditionality” system within an infringement procedure, it would be necessary to amend the treaties. This means that the suspension of funds would be an additional instrument to the sanctions provided for in the treaties and it would not replace them.

However, the Commission – in the context of the infringement procedure INFR(2021)2115 launched on 15 July 2021 against Poland – threatened the Regions that had created the (discriminatory) so-called “LGBT-ideology free zones” to suspend the disbursement of the Structural Funds from which they benefited.⁷¹ The fact that the Commission has suggested, in the past, the possibility of suspending the funds in an infringement procedure⁷² may lead to the conclusion that such corrective measures do not necessarily need a treaty amendment, since the legal basis can be found in different provisions than Article 260 TFEU.

On the environmental side, instruments such as the European Green Deal⁷³ and the Next Generation EU⁷⁴ must be mentioned. Indeed, to achieve

71 The Commission contested the Resolutions of several Polish municipalities and regions on the creation of so-called “LGBT-ideology free zones”. To deepen, see the commission press release “EU founding values: commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people”, Brussel, 15 July 2021.

72 See CHARLIS, “EU warns Polish regions they could lose funding over ‘LGBT-free’ zones”, Reuters, 6 September 2021, available at [https://www.reuters.com/world/europe/eu-warns-polish-regions-they-could-lose-funding-over-lgbt-free-zones-2021-09-06/#:~:text=Europe,-EU%20warns%20Polish%20regions%20they%20could,over%20'LGBT%2Dfree'%20zones&text=WARSAW%2C%20Sept%206%20\(Reuters\),councils%20affected%20confirmed%20on%20Monday](https://www.reuters.com/world/europe/eu-warns-polish-regions-they-could-lose-funding-over-lgbt-free-zones-2021-09-06/#:~:text=Europe,-EU%20warns%20Polish%20regions%20they%20could,over%20'LGBT%2Dfree'%20zones&text=WARSAW%2C%20Sept%206%20(Reuters),councils%20affected%20confirmed%20on%20Monday).

73 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final, 11 December 2019. On the European Green Deal see, without demanding completeness, VAN ZEBEN, “The European Green Deal: the future of a polycentric Europe?”, *European law journal*, 2020, p. 300 ff.; MONTINI, “The European Green Deal from an environmental protection perspective: the missing role of the environmental integration principle”, in DE GRAAF et. al. (eds.), *Grensoverstijgende rechtsbeoefening: liber amicorum Jan Jans*, Groningen, 2021, p. 97 ff.; CHITI, “Managing the ecological transition of the EU: The European Green Deal as a regulatory process”, *Common market law review*, 2022, p. 19 ff.

74 To deepen, see, without demanding completeness, DE SADELEER, “Le plan de relance Next Generation EU: du changement de cap budgétaire à l'ingénierie institutionnelle”, *Revue des affaires européennes*, 2020, p. 607 ff.; ILIOPOULOU-PENOT, “L'instrument pour la relance Next Generation EU: ‘where there is a political will, there is a legal way’?”, *Revue trimestrielle de droit européen*, 2021, p. 257 ff.; PORRAS RAMÍREZ, “EU next generation-Europe's recovery and resilience plan: a revolution in economic governance of EU”, *Diritto pubblico comparato ed europeo*, 2021, p. 821 ff.; LEINO-SANDBERG, RUFFERT, “Next generation EU and its constitutional ramifications: a critical assessment”, *Common market law review*, 2022, p. 433 ff.

the objectives set by the European Green Deal, about 30% of the EU's Next Generation, as well as the EU's seven-year budget, is devoted to combating climate change and supporting green projects.⁷⁵ Next Generation EU is funding EU countries in the transition to clean energy, largely based on safe and affordable renewable sources. The same financial pressures are designed to make (both private and public) buildings more energy efficient. Cycling infrastructure and public transport networks, such as high-speed rail lines, are also being developed by Next Generation EU and its funds. It is known that Member States have prepared their Recovery and Resilience Plans to access the resources of the Next Generation EU, which entitle them to receive funds under the Recovery and Resilience Instrument. EU countries must allocate at least 37% of the funding received under the Recovery and Resilience Provision to investments and reforms that support climate targets.

It is clear, therefore, that the threat of withholding such funds due to environmental breaches could not only act as a powerful incentive for Member States to align themselves with EU law, but would also have the advantage of avoiding the paradoxical situation whereby, despite the fact that a Member State keeps failing to comply with the environmental requirements, the European Union is in any case paying it various amounts of money.

The existence of a sanctioning mechanism of an economic nature does not preclude reflecting on "sanctionary" forms of a non-economic nature, which could be introduced from a first judgment pursuant to Article 258 TFEU.

During the intergovernmental conference which led to the adoption of the Maastricht Treaty, the Commission itself proposed what it defined as a more modest and less aggressive approach: to give the Court of Justice the power to declare, in the judgments establishing the infringement, what measures the respondent State should have adopted to restore legality. Both the Court of Justice⁷⁶ and the European Parliament⁷⁷ had previously suggested an identical solution.

75 See the European Green Deal communication, *cit. supra* note 73, p. 15.

76 See the reports on European Union, Suggestions of Court of Justice on European Union, Bulletin of the European Communities, Supplement 9/1975, p. 1 ff., p. 17.

77 See the Resolution of the European Parliament of 9 February 1983, in OJ C 68, 14.03.1983, p. 1 ff., p. 32.

This hypothesis of reform, which some scholars have shared in the past,⁷⁸ has been partially reformulated by other authors,⁷⁹ who instead envisage the more moderate possibility of attributing to the court the power to indicate the measures to be adopted, but without binding effect. It should be noted that some other Authors have (correctly) considered that such a solution would not be feasible, for complex reasons related to matters of competence and procedure (just think of the fact that judges should also deeply know domestic law).⁸⁰

One could, then, imagine the possibility of indicating, in the first judgment of the court, the deadline by which a State must remedy an infraction, after which the Commission would be required to initiate the procedure under Article 260 TFEU, at least in its pre-litigation phase.⁸¹

The proposed solutions have no claim to completeness, nor do they aim to outline a definitive answer to the issues illustrated. Some would clearly require the radical reconsideration of the paradigm of the infringement procedure and, therefore, of the entire set of principles, values and objectives which constitute the reference framework surrounding it. Others, on the other hand, would involve changes of a more moderate nature, and, as such, are more practicable.

In any case, in the immediate future, no changes of any kind are foreseen.

78 See, for example, CAHIER, "Les articles 169 et 171 du traité instituant la Communauté économique européenne", *Cahiers de Droit européen*, 1974, p. 3 ff., p. 29; JOLIET, *Le droit institutionnel des Communautés européennes: les institutions, les sources, les rapports entre ordres juridiques*, Liège, 1981, p. 44; MORI, "Il nuovo art. 171, par. 2, del Trattato CE e le sanzioni per gli Stati membri inadempienti", *Rivista di Diritto Internazionale*, p. 58 ff., p. 72; AMALFITANO, *cit. supra* note 2, p. 289.

79 See, in particular, AUDRETSCH, *Supervision in European Community Law*, Amsterdam, New York, Oxford, 1978, pp. 115–116.

80 See PRETE, *cit. supra* note 2, p. 363 ff.

81 See, for example, BONNIE, "Commission Discretion under Article 171(2) EC", *European Law Review*, 1998, p. 537 ff., p. 541 ff.; THEODOSSIOU, "An analysis of the recent response of the Community to non-compliance with Court of Justice judgments: Article 228(2) E.C.", *European Law Review*, 2002, p. 25 ff., p. 28; MASSON, "L'obscurité clarté de l'article 228(2) CE", *Revue trimestrielle de droit européen*, 2004, p. 639 ff., p. 649.