Op-Ed

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“*Commission v Romania* and *Commission v Ireland*: a step forward in clarifying the accelerated infringement procedure under Article 260(3) TFEU”

Chiara Amalfitano

1. One year after its first judgment (of 8 July 2019) implementing the new expedited infringement procedure referred to in Article 260(3) TFEU (*Commission v Belgium*, C-543/17), the Court of Justice, once again in Grand Chamber formation, took the opportunity to develop its case law on the application of this provision. As we all know, that Article – introduced by the Lisbon Treaty – allows the Commission to ask for a sanction (lump sum or penalty payment) to be imposed on a defaulting Member State when an action for failure to notify measures transposing a legislative directive is first lodged with the Court of Justice. Its purpose is to increase the deterrent effect of the infringement procedure, giving a stronger incentive to Member States to transpose directives within the deadlines laid down by the EU legislator, and to ensure the uniform and effective application of EU law, creating a level playing field in all Member States.

On 16 July 2020, the Court of Justice delivered two substantial twin judgments against Romania (C-549/18) and Ireland (C-550/18). The two Member States have been brought before the Court for failure to adopt, on the expiry of the period laid down in the reasoned opinion of the Commission, all the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and, therefore, for failure to notify those provisions to the Commission.

Both Member States fully complied with the obligation under Article 67 of that Directive (by notifying the transposition measures) in the course of the court proceedings and for that reason the Commission partially withdrew its actions and its requests to impose a penalty payment, confirming the requests to impose the lump sum, in line with its new approach, outlined in its 2016 Communication EU Law: Better Results through Better Application (p. 10). The two sanctions (as indicated by the Court of Justice in *Commission v France*, C-302/04) are complementary and have different purposes, respectively coercive and deterrent: while the imposition of a penalty payment is suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations. This means that if the infringement has come to an end pending proceedings before the Court of Justice a penalty payment can no longer be imposed, having lost its purpose; but this rule does not apply for the lump sum, aimed at sanctioning the breach that persisted after the expiry of the period prescribed in the reasoned opinion.

2. The Court – as we will see more in detail shortly hereafter – substantially endorses the approach and the reasoning of the Commission and, declaring the failure to transpose/notify of both Member States on the expiry of the period laid down in the reasoned opinion, imposed on Romania a lump sum of 3 million euros and on Ireland of 2 million euros (in both cases reducing the amount requested by the Commission).

It is worthwhile noting that, declaring such a double breach, the Court confirms the rule set out in the July 2019 judgment according to which: (i) Article 260(3) covers not only procedural failures (such as not communicating the transposition measures to the Commission) but also substantive failures (not transposing a directive), or, better, that the procedural violation implies the (underlying) substantive one; and (ii) the provision also covers both the absence of any communication/ transposition (that means total inactivity), and the incomplete communication/ transposition, such as a partial communication/transposition considering the material and/or geographic scope of the relevant directive. The Court of Justice also confirms the obligation of Member States to provide sufficiently clear and precise information on *themeasures* transposing a directive, and thus to state, for *each provision* of the directive, the national provision or provisions ensuring its transposition, using, where relevant, correlation tables or other equivalent explanatory documents and also including, where requested, a specific reference to the directive transposed.

3. The new key issues (with respect to case C-543/17) addressed by the Court of Justice concern: (1) the duty of the Commission to give reasons for its decision to have recourse to Article 260(3) TFEU, (2) the ability of the measures notified in the course of the proceedings to fulfil the obligations under Articles 258 and 260(3) TFEU, depriving the financial penalties of their purposes, and (3) the assessment of lump sum payments under the latter provision.

First, the Court of Justice – endorsing the Commission's view and AG Tanchev's Opinions (in case C-549/18, paras 43-49, and in case C-550/18, paras 45-50) and rejecting the view of Romania, Ireland and other Member States intervened in the proceedings – considers that the guardian of the Treaties is not required to state reasons for having recourse to Article 260(3) TFEU on a case-by-case basis, in light of factual and legal circumstances: it has a wide discretionary power analogous to the discretion it enjoys as to whether to initiate proceedings under Article 258 TFEU; the absence of a duty to justify the application of the expedited infringement procedure and the request for financial penalties does not imply the absence of the obligation to state reasons for the nature and the amount of the penalties; and, in any case, that absence does not affect procedural guarantees of the Member States, since, in any case, the Court of Justice alone has the power to impose a pecuniary sanction and to state reasons for its choice (case C-549/18, paras 44-56; case C-550/18, paras 54-66).

As stated by the Treaty, where the Court of Justice finds that there is an infringement, it may impose a lump sum or penalty payment not exceeding the amount specified by the Commission. In this regard, what the Court states at paragraph 52 of case C-549/18 and paragraph 62 of case C-550/18 cannot go unnoticed, pointing out that 'the Commission's proposals *are binding on it as to the nature of the financial penalty* which the Court may impose *and the maximum amount* of the penalty which it may set' (emphasis added). This statement is very interesting, because the Court seems, albeit not too explicitly, to deviate from the reasoning of AG Tanchev in his Opinions in case C-549/18 (paragraphs 50-59) and in case C-550/18 (paragraphs 51-57), where he considers – as early as in his Opinion in case C-569/17, *Commission v Spain*, paragraphs 75-78 –

that Article 260(3) refers *only to the amount* of the sanctions and not to the type of sanction. In other words, he argues that while bound by the maximum amount specified by the Commission the Court of Justice can impose a sanction different from the one requested by the Commission, or even both the penalty payment and the lump sum regardless of the fact that the Commission has only asked for one of them.

I fully endorse the Court of Justice's approach which on that point follows the solution pointed out by AG Szpunar in case C-543/17 (paragraphs 97-100) and AG Wathelet in case C-320/13 (paragraphs 153-155), according to whom *the prohibition for the ECJ to exceed the amount proposed by the Commission applies substantially for both sanctions taken individually*, since it is not possible to increase the lump sum and lower the penalty payment (or vice versa) without knowing when the infringement will come to an end. And for this very reason the solution suggested by AG Tanchev is not understandable nor acceptable: it is not clear (nor clarified by AG Tanchev) how his solution would be possible in practice, being difficult (*rectius*, impossible) to make realistic (*rectius*, certain) predictions on the moment when the infringement (still ongoing at the moment of the evaluation of the facts by the Court) may end and, on the basis of those predictions, recalibrate the *quantum* of the sanction, not exceeding the maximum specified by the Commission. Thus, having regard to the different purposes of the two sanctions, it goes without saying that if the infringement has come to an end in the course of the court proceedings only a lump sum can be imposed (as anticipated and as we will see immediately hereafter).

Second, concerning the consequences of the fact that the infringement has come to an end during the proceedings, the Court of Justice states that the elimination of the breach does not impede the substantially automatic request of the lump sum: this sanction, as mentioned above, does not lose its purpose, it remains viable in order to address the impact of that infringement on public and private interests and deter that infringement from recurring. Especially in light of the objective pursued by Article 260(3) – that is to simplify and speed up the procedure to impose financial penalties for failures to comply with the obligation to notify the national measures transposing a legislative directive – the application of that sanction is neither disproportionate, nor inconsistent with the duty of sincere cooperation under Article 4(3) TEU, as argued in particular by Ireland, according to which as the transposition is complete, the imposition of a lump sum is not likely to achieve a deterrent effect and may motivate the Member States to compromise the quality of transposition measures in favour of timeliness of transposition.

In light of the case law on Article 260(2), inaugurated in *Commission v France*, C-121/07 (following the new approach in the above-mentioned *Commission v France*, C-302/04, developed by the Commission in its 2005 Communication, para 11), the ECJ's solution could be taken for granted.

That being said, one may wonder whether it is correct and proportionate to apply the same approach with respect to infringements pursued under Article 260(2) and Article 260(3) TFEU: but once the Treaty provides that the specific breach consisting in the failure to comply with the obligation to notify the national measures transposing a legislative directive can be sanctioned by the same financial penalties set out in Article 260(2), it is reasonable to expect the Court to recognise the same purpose they have under the latter procedure and to follow the same solution for the two mechanisms laid down in those two Articles.

Third, with regard to the assessment of the lump sum, the reasoning of the Court of Justice concerning its calculation under the duration criterion is particularly worthy of attention. As suggested by the AG Tanchev (case C-549/18, paragraph 74; case C-550/18, paragraph 73), the beginning of the period which must be taken into account is the transposition date laid down in the relevant directive and not the date of the expiry of the period prescribed in the reasoned opinion, even if this latter deadline is used by the Court, in case C-543/17, to calculate the daily penalty payment to be imposed on Belgium (see paragraph 88).

I am not sure whether this new approach will be used also with regard to the calculation of the penalty payment in the next judgments under Article 260(3) TFEU and if so whether the Court is trying to smoothly modify its previous case law. In any case, I believe that this approach is more correct and better guarantees the equality of Member States before the Treaties and for this reason it should be followed for the calculation of both pecuniary sanctions: since the objective of Article 260(3) is to encourage Member States to transpose directives within the deadlines set by the EU legislature and to ensure the full effectiveness of EU legislation, any other approach – as pointed out by the Court – would be tantamount to jeopardising the effectiveness of the provisions of directives setting the date on which the measures transposing those directives must enter into force. If the relevant deadline were the expiry of the period prescribed in the reasoned opinion, Member States 'which had not transposed a directive as at the date laid down therein would […] enjoy […] an additional transposition period, whose duration would moreover vary according to the speed with which the Commission initiated the pre-litigation procedure' (case C-549/18, paragraphs 77-83; case C-550/18, paragraphs 90-95).

4. Having in mind that Article 260(3) expressly reads: '[T]he payment obligation shall take effect on the date set by the Court in its judgment', one final passage of the reasoning of the Court deserves further consideration: it is the one at paragraph 49 of *Commission v Romania* and paragraph 59 of *Commission v Ireland*, where the Court of Justice affirms that 'the application for a financial penalty under Article 260(3) TFEU is only an *ancillary mechanism* of the infringement proceedings' under Article 258 TFEU (emphasis added).

Can this statement be regarded as a confirmation of the nature of the expedited procedure under Article 260(3) resulting from *Commission v Belgium* of July 2019?

In this latter judgment the Court – applying the penalty payment starting from the date of delivery of its judgment – seems to endorse the most intuitive and (maybe) plain interpretation of the provision at stake, according to which the accelerated infringement procedure aims to sanction a substantive breach (the communication/lack of trasposition) and, in that perspective, to 'enhance' the Article 258 infringement procedure. But it is well-known that – pursuant to a literal, teleological and systematic (and maybe historical) interpretation, and also in light of the proportionality principle – the accelerated procedure could also be considered a mechanism to simplify and speed up the process for the imposition of pecuniary sanctions in cases where judgments handed down by the Court have not been respected; therefore, a mechanism aimed at pursuing a procedural violation, – as in the Article 260(2) procedure – the non-execution of the ECJ judgment. This is the reason why the financial penalties should only take effect from a date subsequent to the delivery of the judgment, if at that date the breach has not come to an end, and so the judgment on the basis of Article 258 is not complied with.

It is true that one could argue that the nature of the procedure must be the same regardless of the financial penalties requested and imposed. But it is also true that the two pecuniary sanctions have different purposes. For that reason, with regard to the decisions at stake, it seems more reasonable and less disappointing[1] that the Court does not say anything on the *rationale* of Article 260(3) TFEU. In these two cases the infringements have been eliminated in the course of the court proceedings and, insofar as they sanction a previous, ended, breach, the lump sums (the only fine imposed) are quite reasonably applied at the date of delivery of the judgment. By contrast, since no penalty payments are imposed, there is no need to tackle the question of the date of their collectability – that could also have been set at a date subsequent to the delivery of the judgment or on a semiannual or annual basis – and thus on the nature of the expedited infringement procedure.

Further clarifications on this and other (still) foggy aspects of the procedure under Article 260(3) TFEU, will hopefully be offered by the Court in the near future, to begin with the decisions related to pending cases (see *Commission v Spain*, C-164/18, *Commission v Spain*, C-165/18, Commission v Slovenia, C-628/18 and Commission v Spain, C-658/19). For the time being, Member States are warned: legislative directives must be transposed and the transposing measures must be notified at the latest before the expiry of the period laid down in the reasoned opinion, otherwise the lack of transposition/communication is likely to be sanctioned under Article 260(3) TFEU at least by imposition of a lump sum payment.

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[1] In this sense, with regard to *Commission v Belgium* judgment, see L. Prete, *Infringement Procedures and Sanctions under Article 260 TFEU: Evolution, Limits and Future Prospects*, in S. Montaldo, F. Costamagna, A. Miglio (eds), *European Union Law Enforcement: The Evolution of Sanctioning Powers*, forthcoming, Routledge, 2020, p. 6 of the typescript.

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