

## **A 5 billion Euro penalty to save the rule of law**

### **How infringement penalties are set**

#### **ESI Background paper**



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When member states violate EU law or refuse to implement judgements by the European Court of Justice (ECJ) EU institutions are not powerless: the European Commission can propose, and the ECJ impose, financial sanctions.

On 20 July 2021, European Commission Vice-President Vera Jourova, determined to see the ECJ judgement on the Polish judicial system from 15 July implemented, announced just this:

“We will ask for financial sanctions if Poland does not remedy the situation by 16 August. The rights of EU citizens and businesses must be protected in the same way across all Member States. There can be no compromise on this.”<sup>1</sup>

In a recent essay ESI recommended the Commission request a sanction of € 5 billion unless Poland fully implements the ECJ judgement. But how would this work? If European institutions can impose sanctions, why are they doing this so rarely? Why are most sanctions relatively low? Do they change behaviour? Here is a quick guide to financial penalties for breaking EU law.

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<sup>1</sup> European Commission, „[Remarks by Vice-President Vera Jourova at the press conference on Rule of Law Report 2021](#)”, 20 July 2021.

### Who can impose financial sanctions?

It is the ECJ, if requested to do so by the European Commission. This is spelt out in Article 260 of the Treaty on the Functioning of the European Union:

“If ... the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, [the Commission] may bring the case before the Court ... . *It shall specify the amount of the lump sum or penalty payment to be paid ... which it considers appropriate in the circumstances.*”

Article 260 (2), *Treaty on the Functioning of the European Union*.

This is how it works. An infringement process will usually be started by the European Commission, which has the responsibility to make sure EU law is followed.

And at the end of it, if the problem – the alleged breach of EU law - is not resolved, the Commission may take the member state to the EU’s highest court in Luxembourg. The statistics of infringement procedures are interesting and may surprise some. In 2019 the European Commission:

... sent out 797 *letters of formal notice* - the first step of the infringement procedure.

... sent out 316 *reasoned opinions* - the second step.

.... referred 31 *cases to the ECJ* - the third step.

... the ECJ issued 24 judgments and found violations in 22.

... the Commission referred only 2 (!) cases back to the Court with a request for financial penalties.

... the ECJ imposed only 1 (!) penalty payment.

This payment was a fine of € 5 million imposed on Ireland. More than *twenty* years ago the responsible Irish authorities had failed to assess the environmental impact of building a 70-turbine wind farm.<sup>2</sup> The ECJ also ordered an additional penalty of € 15.000 for every further day the turbines turned without an environmental impact assessment.<sup>3</sup>

<sup>2</sup> The Irish Times, “[State fined €5m over Co Galway wind farm](#)”, 12 November 2019.

<sup>3</sup> ECJ, „[PRESS RELEASE No 142/19](#)“, 12 November 2019.

## Why are sanctions so rare?



### *98 Marshmallows representing unimplemented judgements*

At the end of 2019 there were 98 unimplemented ECJ judgements following the infringement procedure. And yet, during the whole of 2019 the Commission decided to take just two cases to the ECJ to request a fine. two!

Why is this? Gerda Falkner has spent a lot of time looking at enforcement policy in the EU. The answer that emerges from her research is that all Commissions have approached this tool with care: “it seems a well-pondered policy of prudence to refrain from over-using and hence devaluing the instrument of court proceedings ... the Commission will distinguish between cases according to the added value which can be achieved by an infringement procedure and will close cases when it considers this to be appropriate from a policy point of view.”<sup>4</sup>

In other words: it is a political decision. There is no obligation for the Commission to go to the ECJ. As Falkner wrote in another essay in 2016, looking at specific fines:

“politics takes place in the selection and management of the cases under Article 260. Not only are the Commission and the government involved, but to some extent seemingly even the ECJ ... Overall, the Commission could hardly launch mass proceedings without risking

<sup>4</sup> Gerda Falkner, [“A causal loop? The Commission’s new enforcement approach in the context of non-compliance with EU law even after CJEU judgments”](#), Journal of European Integration, Vol. 40/6, 2018, pp.769-784.

a devaluation of its penalization powers in the face of continued non-compliance. This may explain its very cautious strategy in using the penalization potentials.”<sup>5</sup>

2019 was in fact a typical year for infringement and enforcement activities. The reality is that sanctions have always been imposed rarely. While the option of imposing financial sanctions has existed since 1993, the ECJ has imposed such sanctions only 37 times (See: Annex).

*Non-compliance after ECJ ruling<sup>6</sup>*

	<b>Cases still open after 1<sup>st</sup> judgement</b>	<b>Request for fine</b>
2017	93	3
2018	99	2
2019	98	2

It may well be counterproductive to call on the Commission too often to launch infringement procedures against states. The Commission will not do so: as a political actor, it weighs political choices and should focus its limited political capital on the matters of greatest importance.

At the same time, when there is such a matter of great importance, the Commission and the ECJ must not hesitate to use their powers to protect the legal system for which they are responsible.

### **How are fines determined?**

The treaty leaves this completely open. It specifies that it must be *appropriate in the circumstances*.

What this means is that, in principle, the Commission can suggest *any* amount to the Court. However, there is a need for some objective guidelines and criteria. Fines should be fair, objective and transparently calculated. Not least because the Commission is always one of the parties to the dispute, it must prove its neutrality in the punishments it proposes to the Court.

There are three criteria the Commission considers. First, how serious the violation is; second, how wealthy a member is; and third, how long an infringement violation went on for. It then applies these factors: seriousness, wealth, and time.

8 of the 37 fines the EU’s Court has imposed have been over a directive on how wastewater in cities is to be treated. The EU’s highest Court had ordered members to stop polluting. They had ignored its judgments. On average, the water-polluters had to pay € 8 million for breaking the law. This is referred to as a **lump sum**. The ECJ also threatened an additional few million for each 6 months that they continued polluting. This is referred to as the **penalty payment**.

The **lump sum** is normally calculated as follows:

There is a standard rate (today) of € 1,052 ...  
... multiplied by a coefficient for seriousness, ranging from 1 to 20.

<sup>5</sup> Gerda Falkner, “[Fines Against member states: An effective new tool in EU infringement proceedings?](#)”, *Comparative European Politics*, Vol. 14, 2016, pp.36-52.

<sup>6</sup> European Commission, [Annual reports on monitoring the application of EU law](#).

So, in the maximum case this is: € 1,052 Euros times 20 = € 21,040.

This is multiplied by a factor “n” reflecting the GDP of member states, ranging from 0.1 for Estonia to 4.59 for Germany. In the case of Poland n is 1.29:

So, the maximum for Poland would be: €21,040 times 1.29 = € 27,141.6 per day.

This is multiplied by the number of days between the first infringement ruling finding the breach and the second ruling imposing the fine. If it takes 100 days, the maximum lump sum fine that the Commission might ordinarily request for Poland is € 2.7 million. If it takes 300 days, it would be € 8.1 million.

The **penalty payment** is normally calculated as follows:

There is a standard rate (today) at € 3,154 per day ...  
... multiplied by a coefficient for seriousness, ranging from 1 to 20.

So, in the maximum case: € 3,154 times 20 = € 63,080 per day.

This is multiplied by “n”, which for Poland is 1.29.

So, in the maximum case for Poland: € 63,080 times 1.29 = € 81,373 per day.

This is multiplied by a coefficient for the time between the original judgment and the date of the imposition of the fine from 1 to 3.

In this case the highest daily penalty the Commission would ordinarily request for Poland would be 3 times € 81,373 = about quarter of a million a day.

The total annual fine would then be around 90 million Euros.

Would such a sanction impress Poland’s strong-willed minister of Justice Ziobro? It is very unlikely. Given that Poland receives billions in EU assistance every year it would be largely a symbolic sanction.

### **How does the ECJ look at fines?**

EU law gives the Commission the right to propose any financial sanction. It then gives the ECJ the right to decide the appropriate fine, at *whatever level it sees fit*.

The Commission’s request is only a proposal. It is up to the ECJ to determine the actual fine, and it is completely free to do so. The ECJ is not bound by the Commission’s request and has both reduced and increased it in the past. The ECJ is not bound by any upper or lower limit. It can therefore go far higher than practice until now.

Note that the highest lump sum which the ECJ has ever imposed has been € 40 million against Italy 2014 for failing “generally and persistently, to fulfil its waste management obligations.” The highest annual payment has been € 115.5 million, imposed on France in 2005 for allowing fisherman to catch fish that were too small.

## Are high fines imaginable? Learn from Vestager

Yes, they are. The Commission regularly imposes them in another field: competition policy.

The maximum level of fines against companies are up to 10 percent of a company's earnings in the preceding business year.<sup>7</sup> Neelie Kroes, the Commissioner who came up with this, wanted this amount to “send three clear signals to companies. Don't break the anti-trust rules; if you do, stop it as quickly as possible, and once you've stopped, don't do it again.”<sup>8</sup>

In July 2018, Margrethe Vestager, the Commissioner in charge of competition, explained why the Commission imposed a fine on Google:

“What we want is for Google to change its behaviour, this is an illegal behaviour, we want this to stop in an effective manner. And this is what we are asking, because this is not a moral endeavour, this is a market, there are rules in this market, and just as well as anyone else, Google should play by these rules.”<sup>9</sup>

That fine was € 4.3 billion Euros.<sup>10</sup> In 2017 the Commission had already fined Google 2.3 billion Euros.<sup>11</sup> In March 2019 it fined Google another 1.49 billion Euros.<sup>12</sup>

Just last month, the Commission fined Volkswagen 500 million and BMW 375 million, for collusion in the failure to install emission reducing technology on their vehicles.<sup>13</sup> At the time Commissioner Vestager warned companies:

*“We do not tolerate it when companies collude. It is illegal under EU Antitrust rules. Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. This decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal.”*<sup>14</sup>

When it wants to be, the European Commission can be intolerant of violations of EU legislation.

<sup>7</sup> European Commission, [“Competition: revised Commission Guidelines for setting fines in antitrust cases – frequently asked questions”](#), 28 June 2006.

<sup>8</sup> European Commission, [“Competition: Commission revises Guidelines for setting fines in antitrust cases”](#), 28 June 2006.

<sup>9</sup> Youtube, [“European Commission fines Google €4.34 bn for illegal practices regarding Android mobile devices”](#).

<sup>10</sup> European Commission, Press Release, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018.

<sup>11</sup> European Commission, [“Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service”](#), 27 June 2017.

<sup>12</sup> European Commission, [“Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising”](#), 20 March 2019.

<sup>13</sup> European Commission, [“Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars”](#), 8 July 2021.

<sup>14</sup> European Commission, [“Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars”](#), 8 July 2021.

## Justifying a € 5 billion fine: Poland is unique

While the fines against member states have usually been relatively modest, the formula they have been based on is not binding. The EU treaty does not set an upper limit.

The Commission's guidelines themselves underline that the aim of sanctions must be to "ensure that the penalty itself is a deterrent to further infringement." They also provide for exceptional fines "where appropriate in particular cases."

The Commission explicitly states that as "each financial sanction must always be tailored to the specific case, the Commission reserves the right to use its discretion and to depart from these rules and general criteria, giving detailed reasons, where appropriate in particular cases, including recourse to use of the instrument of the lump sum."<sup>15</sup>

The Commission also notes that the "fixing of the sanction must be based on the objective of the measure itself, that is to ensure effective application of Community law." One of the most fundamental criteria is "the need to ensure that the penalty itself is a deterrent to further infringements."

In 2017 the Commission announced that it would prioritize all cases that undermine the rule of law:

"The obligation to take the necessary measures to comply with a judgment of the Court of Justice has the widest effect where the action required concerns systemic weaknesses in a Member State's legal system ... The Commission will therefore pursue rigorously all cases of national rules or general practices which impede the procedure for preliminary rulings by the Court of Justice, or where national law prevents the national courts from acknowledging the primacy of EU law."<sup>16</sup>

This would apply directly to the ECJ 15 July 2021 judgement against Poland. Arguably, there has never been an infringement case of similar importance for the EU legal system and for the survival of the rule of law. This would justify a sanction unlike any in the history of the EU.

But what could be the new guideline or reference point? The Commission and the ECJ could argue for exceptionally large fines based on an *Article 19 principle*:

**Whenever the ECJ finds that the right to "effective legal protection" through national courts, which Article 19 of the EU treaty guarantees, is violated by member states, and these do not remedy the situation, a financial sanction shall be imposed that is at least 1 percent of the GDP of the country annually.**

In the case of Poland, which has a GDP of about € 520 billion, this would amount to a fine of some € 5.2 billion annually. The Commission should therefore propose, and the ECJ impose a fine of € 880 million every two months until the Polish government implements the 15 July 2021 ruling.

And if the Polish government commits to fully implementing this judgement before 16 August 2021, and to abandon its quest to control its judges, there would be no financial sanction.

<sup>15</sup> European Commission, "[Application of Article 228 of the EC Treaty](#)" [now Art. 260 TFEU], 2005.

<sup>16</sup> Communication from the Commission, [EU law : Better results through better application, \(2017/C 18/02\)](#), 19 January 2017, page 5.

### **What is the point of sanctions? Change behaviour**

The purpose of high sanctions against Google is to change its behaviour, as well as that of other large companies. The best sanction is one that does not need to be used, because the credible threat of its use influences behaviours.

The most important questions for any rule of law protection system are: where is the line? And what happens when it is crossed?

It must be clear what kind of behaviour will be fined, so that states know what to avoid. Ideally there should be an objective triggering event that anyone can pinpoint and understand why it is serious, such as a (rare) judgement about a violation of Article 19.

And it must be clear what will happen: a financially and politically painful fine.



## Annex – all infringement fines in EU history

*All Infringement Fines 2000-2020 ECJ<sup>17</sup>*

		<b>Topic</b>	<b>Lump sum million €</b>	<b>Penalty million € per year</b>
2000	Greece	Illegal Dump		7.3
2003	Spain	Quality of water		0.6 <sup>18</sup>
2005	France	Fisheries	20	115.5
2006	France	Product liability		11.5
2008	France	GMOs	10	
	Portugal	Public contracts		7
2009	Greece	Ban of gaming machines	3	11.5
	Greece	Opticians' shops	1	
2011	Italy	Unlawful aid	30	60
	Greece	Compensation to crime victims	2	
2012	Ireland	Waste water disposal	2	4.4
	Ireland	Environmental impact assessment	1.5	
	Spain	State aid	20	18.2
2013	Belgium	Urban waste-water	10	1.7
	Czechia	Retirement providers	0.25	
	Luxembourg	Urban waste-water	2	1
	Sweden	Data retention	3	
2014	Italy	Waste management	40	85.6
	Greece	Waste management	10	29
	Portugal	Electronic communications	3	3.65
	Spain	State aid	30	
	Sweden	Industrial Pollution	2	1.46
2015	Greece	Waste management	10	7.28
	Italy	Waste management	20	0.24
	Italy	State aid	30	24
2016	Greece	Waste management	10	10.9
	Portugal	Urban waste-water	3	2.92
2017	Spain	Unfair competition	3	
2018	Greece	Unlawful aid	10	14.6
	Greece	Urban waste-water	5	6.55
	Spain	Urban waste-water	12	21.9
	Italy	Failure to collect levy	25	60.2
	Slovakia	Illegal Dump	1	1.8
2019	Ireland	Environmental impact assessment	5	5.5
2020	Greece	Water pollution	3.5	
	Belgium	Tax regulations	2	2.7
	Italy	State aid	7.5	29.2
<b>Total</b>	<b>37 cases</b>		<b>336.75</b>	

<sup>17</sup> Source: European Commission, [Annual reports on monitoring the application of EU law](#).

<sup>18</sup> Per 1% of low-quality bathing areas.