

Sanctioning Under Article 260 (3) TFEU: Much Ado About Nothing?

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Article 260(3) TFEU, which was introduced into the Lisbon Treaty with the aim of compelling the Member States to implement directives in time, created the possibility for the Commission to apply before the Court of Justice for imposing financial sanctions on the Member State concerned in addition to producing a declaration of failure to fulfil the obligations stemming from EU law under the framework of Article 258 TFEU. This article analyses how the Commission has interpreted the scope of this procedural option and how it has made use of it in policing Member State infringements. So far the Court of Justice has not issued a ruling under Article 260(3) TFEU, mainly because its practice has been to wait until the Commission withdrew its application, which means that very little information is available regarding the Court's sanctioning policy under this instrument. The silence of the Court may indicate that the aim of the new provision was merely to raise the stakes for non-compliant Member States by threatening them with a new financial sanction.

Keywords: infringement procedure, Article 260(3), financial sanctions, inactivity of the ECJ, Commission's policy, effectiveness, partial transposition

1 INTRODUCTION

The argumentation of the Court of Justice points out that failure to transpose the directive in due time by one or several Member State(s) would result in discrimination, or that the very essence of the directives (i.e. the legal harmonization) would be put in danger,¹ or, as König and Luetgert put it, 'transposition delays not only damage reputations at the supranational level, this free-riding also creates a loss of efficiency for all member states; the optimal policy goal cannot be realized, and the policy burden is not equally shared'.² Although the Court 'invented' remedies against the harmful effects of late transposition of directives (the direct effect of the directives, action for damages against the Member State) most of the possible negative consequences remain unsolved.

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¹ Sacha Prechal, *Directives in EC Law* 23 (2d ed., Oxford: Oxford University Press 2005).

² Thomas König & Brooke Luetgert, *Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives*, Brit. J. Pol. Sci. 163, 165, 39 (2008).

Against this background it is understandable that one of the main concerns of the Commission as guardian of the Treaties is the late and/or incorrect transposition of directives.³ The Commission's latest report on monitoring the application of EU law emphasizes that the late transposition of directives, 'remains a persistent problem hindering delivery of tangible benefits for citizens'. In 2014 no less than 585 new late transposition infringements cases were launched.⁴

This led to the introduction into the TFEU by the Maastricht Treaty of Article 260 (2), which allows the imposition of financial penalties on Member States who fail to comply with a judgment of the Court of Justice declaring infringement of the article has occurred, was the need to enhance the effectiveness of the enforcement of the obligation to achieve the correct transposition of the directives.⁵

The problem, however, remains, since the two procedures – the first under Article 258 and the second under Article 260 (2) – can take a very long time, which means that the infringement can last for many years. In order to resolve this phenomenon, and especially the non-communication of the transposition measures, the Discussion Circle on the Court of Justice of the European Convent preparing the European Constitution proposed modification to the Treaty. According to its suggestion, the Commission should be allowed to propose in the first infringement proceedings that the Court impose financial penalties.⁶ The Presidium of the Convent took on the suggestions – although with a somewhat

³ The Commission included as serious those infringements which consist in the failure to transpose or the incorrect transposal of directives which can in reality deprive large segments of the public of access to Community law and which are a common source of infringement. Commission Communication, *Better Monitoring of the Application of Community law*, COM (2002) 725 final (11 Dec. 2002) at 12. This prioritization was repeated in 2007. 'Priority should be attached to those infringements which present the greatest risks, widespread impact for citizens and businesses and the most persistent infringements confirmed by the Court. These categories cover: non-communication of national measures transposing directives or other notification obligations.' Communication from the Commission, *A Europe of Results – Applying Community Law*, COM (2007) 502 final (5 Sept. 2007.) at 9.

⁴ Report from the Commission – 31st annual report on monitoring the application of EU law (2014) COM (2015) ('The 2014 Report') 329 final (9 July 2015) at 17. The relevant figures in 478 in 2013, 447 in 2012, 1185 in 2011, 855 in 2010.

⁵ Jonas Tallberg, *European Governance and Supranational Institutions. Making States Comply* (London, New York: Routledge 2003). The Declaration on the implementation of Community law adopted by the 1996 Intergovernmental Conference says: 'The Conference stresses that it is central to the coherence and unity of the process of European construction that each Member State should fully and accurately transpose into national law the Community Directives addressed to it within the deadlines laid down therein.' [1992] OJ C 191/102.

⁶ 'The following suggestions were made here (means should be found to bring about greater effectiveness and simplicity in the machinery for sanctions for failure to comply with a judgement of the Court): ... b) to grant the Commission the possibility of initiating before the Court *both* (in the same procedure) proceedings for failure to fulfil an obligation pursuant to Article 226 TEC and an application to impose a sanction. If, at the Commission request, the Court imposes sanction in the same judgment, the sanction would apply after a certain period had elapsed from the date the judgment was delivered, if the defending State did not comply with the Court ruling. A majority of members were in favour of this proposal. This would enable the procedure in particular for sanctions in cases of "non-communication" of a national transposition measure to be simplified and speeded up.'

modified content – which became the predecessor⁷ of the new 260 (3) TFEU paragraph:

When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

The new procedure is applicable only in the case of directives adopted under a legislative procedure. This means that directives adopted as non-legislative acts⁸ do not lie within the scope of the new paragraph. Another interesting novelty is that contrary to the proceedings under Article 260 (2), the discretion of the Court of Justice concerning the determination of the amount of money to be paid by the recalcitrant Member State is limited, and may not exceed the amount proposed by the Commission. In order to avoid uncertainties the Court will set the date of the effectiveness of the payment obligation⁹

According to a ‘historical’ interpretation, the text leaves open the question of how to deal with the situation in which the Member State notifies ‘some’ but not all the measures for a correct transposition of a directive (incomplete transposition).¹⁰

This article argues that six years after the entry into force of the Treaty of Lisbon there is still a lot of uncertainty. The Court has not given any judgment under this new procedure. This short comment suggests that the glass is not full, but neither is it

The Discussion circle added to this in a footnote: ‘A distinction is made in practice between cases of “non-communication” – i.e. the Member State has not taken any transposition measure, and cases of incorrect transposition – i.e. the transposition measures taken by the Member State do not, in the Commission’s view, comply with the directive (or framework law). The proposed arrangements would not apply in the second case.’ Final report of the discussion circle on the Court of Justice. Brussels, 25 mar. 2003, CONV 636/03, 10–11.

⁷ ‘When the Commission brings a case before the Court of Justice pursuant to Article 226 on the grounds that the State concerned has failed to fulfil its obligations to notify measures transposing a framework law, it may, when it deems appropriate, request that, in the course of the same proceedings, the Court of Justice impose the payment of a lump sum or penalty if the Court finds that there has been such a failure. If the Court of Justice complies with the Commission’s request, the payment in question shall take effect within the time limit laid down by the Court of Justice in its judgment.’ Preasidium of the Convention, Articles on the Court of Justice and the High Court. Brussels, 12 May 2003, CONV 734/03.

⁸ Arts 290 and 291 TFEU on ‘delegating’ and ‘implementing’ acts as non-legislative acts.

⁹ On the legal debate concerning compulsory fines issued in the framework of 260 (2) TFEU, see: Case T-139/06, *France v. Commission*, 2011 E.C.R. II-7315, Case C-292/11. P (Appeal Case before the General Court T-33/09) Published in the electronic Reports of Cases.

¹⁰ See the interpretation of the Discussion Circle cited *supra* n. 6. This kind of problem was already raised by Munoz in 2006. Rodophe Munoz, *The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate*, Jean Monnet Working Paper, 34–35 (2006).

empty. The continuous decline in number of infringement cases reaching the Court and the relatively short time for full transposition after the case was brought to the Court suggest that the threat of financial sanction may contribute to a more disciplined transposition behaviour of the Member States.

The Commission – as it did concerning the Article 260(2) infringement procedure – published a communication on how it intends to use the large discretionary power what the Treaty allowed to it. From 2012 it started to bring actions before the Court based on this policy statement; the failure to notify covers not only the complete lack of notification, but also the partial notification, the only financial sanction proposed to the Court is penalty payment. Part 2 of the article summarizes the main points of the communication. Part 3 follows the main characteristics of the process and Part 4 tries to analyse the actual use of the procedure. It is submitted that the Commission's strategy is not clear as far as the choice of the time, the common policy concerned and the seriousness of the infringement is concerned. The self-restraint of the Court of Justice – i.e. it waits until the withdrawal of the action – leaves some questions unanswered (in what exactly the failure to notify lies, is it acceptable for it limiting the financial penalties to the penalty payment).

2 THE COMMISSION'S COMMUNICATION ON THE IMPLEMENTATION OF ARTICLE 260(3) OF THE TREATY¹¹

One year after the entry into force of the Treaty of Lisbon the Commission adopted its communication on how it wishes to use its new power.

Perhaps the most important issue is the interpretation of the notion of 'failing to notify':

the failure covered by Article 260(3) concerns both the total failure to notify any measures to transpose a directive and cases in which there is only partial notification of transposition measures. Such cases might occur where the transposition measures notified do not cover the whole territory of the Member State or where the notification is incomplete with respect to the transposition measures corresponding to a part of the directive.¹²

This definition clearly gives a broad meaning to the term 'failing to notify' and seems to be contrary to the narrow interpretation of the text of Article 260(3). This is an answer to the problem mentioned above – i.e. sending 'something' in order to avoid the threat of financial sanctions.

As far as the application of the two types of financial sanction (the lump sum and the penalty payment) is concerned, the Commission specifies – as it did in its 1996

¹¹ Communication from the Commission, *Implementation of Article 260(3) of the Treaty*, SEC(2010)1371 final OJ C12/1 (15 Jan. 2011) ('The 2011 Communication').

¹² Point 19 of the 2011 Communication.

memorandum concerning the Article 260 (2) TFEU procedure¹³, that it ‘*hopes that the penalty payment will prove sufficient to achieve the innovation’s objective, namely to give member States a stronger incentive to transpose directives in good time*’. At the same time the Commission declares that it does not exclude the proposal for both types of sanction, and that it is prepared to modify its policy if it seems to be necessary.¹⁴

If one considers that the special objective of the penalty payment is:

to induc[e] 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, and that the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations¹⁵

then this policy decision can hardly be criticized. If the proceeding is initiated shortly after the expiry date of the transposition, the damage caused by non-implementation might not be serious.

The criteria taken into account and the method of calculation of the amount of financial sanctions are the same as they are in the Commission’s 2005 Communication¹⁶ concerning the application of the Article 260(2) TFEU procedure:

The three fundamental criteria which should be taken into consideration are:

- the seriousness of the infringement,
- its duration,
- the need to ensure that the sanction itself is a deterrent to further infringements.¹⁷

The method of calculation follows the same pattern: the amount of daily penalty is calculated by multiplying the standard flat-rate amount,¹⁸ first by coefficients for seriousness¹⁹ and duration,²⁰ and then by the ‘n’ factor for the country.²¹

¹³ European Commission, *Memorandum on Applying Article 171 of the EC Treaty*, O J C 242/6 (21 Aug. 1996), point 4.

¹⁴ Points 21 and 22 of the 2011 Communication.

¹⁵ Case C-304/02, *Commission v. France*, 2005 E.C.R. I-6263 at [81].

¹⁶ Communication from the Commission, *Application of Article 228 of the EC Treaty*, SEC (2005) 1658 (20 Sept. 2006) (‘the 2005 Communication’).

¹⁷ Point 13. of the 2011 Communication.

¹⁸ According to the latest update, the standard flat-rate amount for the penalty payment is fixed at EUR 670 per day. Communication from the Commission, *Updating of Data Used to Calculate Lump Sum and Penalty Payment to Be Proposed by the Commission to the Court of Justice in Infringement Proceeding*, C(2015) 6767 final (5 Aug. 2015).

¹⁹ This coefficient can be between a minimum of 1 and a maximum of 20.

²⁰ This coefficient can be between 1 and 3, calculated at a rate of 0.10 per month from the date of the deadline for implementing the directive until the date when the Commission referred the case to the Court of Justice.

²¹ This coefficient reflects the Member States ability to pay (the GDP of the Member State is taken into account) and its voting rights in the Council. According to the latest update this ‘n’ factor is set between 0.35 (for Malta) and 21.21 (for Germany).

The factors taken into account in the method of calculation of the penalty payment have been endorsed by the Court of Justice case law.²²

The Commission also considers that the imposition of purely symbolic penalties renders this instrument useless and that this runs counter to the objective of ensuring that directives are transposed within the time limits laid down.²³ In line with this, the Commission also set a minimum lump sum (to be proposed if the result of the calculation would not exceed this sum).²⁴

The Commission declares that in cases before the Court where it has proposed only a penalty payment, it will withdraw its action if the Member State notifies the transposition measures required to put an end to the infringement.

3 THE ARTICLE 260(3) PROCEEDING IN PRACTICE

Looking at the whole procedure of the implementation of directives from the Commission's viewpoint it becomes clear that a number of 'preventive methods' are used in order to help Member States in timely and precise transposition.²⁵ On the other hand it is well known that the compliance strategies of Member States vary significantly,²⁶ to such an extent that in some cases measures may even include the deliberate omission of the deadline for transposition.

From the date of the transposition deadline, concerning the management of the notification of the national transposition measures, the Commission proceeds as follows:

If the date for transposition has expired without any notification, the Commission automatically sends a letter of formal notice asking – generally within a two month period – the Member State to make its observations. If the deadline elapses without a satisfactory response, the Commission sends a reasoned opinion to the Member State. The reasoned opinion contains a deadline – generally two months – for notification. If no notification, or other acceptable answer, is received in time, the Commission (as the college of commissioners, on the proposal of the relevant Directorate General) may decide to initiate the non-communication procedure under Articles 258 and 260 (3). It is very important to note at this point that the Commission has broad discretionary power concerning the

²² Case C-387/97, *Commission v. Greece*, 2000 E.C.R. I-5047 paras 87–88 and 92.

²³ Point 15 of the 2011 Communication.

²⁴ The minimum lump sum ranges from 193 (EUR thousand) for Malta to 11,703 (EUR thousand) for Germany.

²⁵ 'These can be limited if the new measure is technical, in a well-established framework. But in other cases, the Commission could suggest, e.g. developing guidelines, organising expert group meetings on transposition, launching administrative co-operation and so on to prepare the good application of the law.' Commission Communication, *supra* n. 3, at 5.

²⁶ For a detailed analysis of Member States notifications and delayed transposition between 1986 and 2002, see König & Luetgert, *supra* n. 2.

infringement against which it starts proceedings, the Member State against which it initiates the procedure and also the time it chooses for continuing or abandoning the process. It is also worth to recall that the Commission's services and the Member States authorities usually remain in contact in order to achieve an amiable solution, even after bringing the case to the Court.

If the Commission receives notification on the full transposition of the directive, the official of the Commission performs the so called *prima facie* control. If this control establishes that there is a lack in terms of the geographical or material scope of the national measures, he or she may propose to the college that they make a decision on initiating the non-communication proceedings.

Gáspár-Szilágyi notes that after the positive *prima facie* control the conformity check may reveal insufficient transposition and the Commission in this case also may decide on the launching of the non-communication proceedings. This may result in some uncertainty, because it may happen that the problem with the notified pieces of legislation is qualified as a problem of 'sufficiency' by the official carrying out the *prima facie* control whereas the (other) official qualifies the same problem as a 'failure to notify'. According to Gáspár–Szilágyi the notion of 'failure to notify' given by the Commission is not clear enough, one cannot be sure which provisions of the directive have to be transposed in order to avoid the 'non-communication' proceeding and which – non-transposed – provisions lie within the scope of the 'normal', (Article 258 TFEU) proceeding.²⁷

In 2012, the Commission referred a number of late transposition infringements to the Court with a request for financial sanctions under Article 260(3) TFEU. Twelve Member States were involved in thirty-five such decisions in 2012: Poland (ten cases), Slovenia (five), the Netherlands, Finland (four each), Belgium, Cyprus (three each), Germany, Bulgaria, Slovakia, Luxembourg, Portugal and Hungary (one each). The proposed daily penalty ranged from EUR 5,909.40 to EUR 315,036.54²⁸

In 2013, the Commission continued to refer a number of late transposition infringements to the Court of Justice with a request for daily penalties under Article 260(3) TFEU. Nine Member States were involved in fourteen such decisions in 2013: Belgium, Bulgaria, Estonia, Romania, the United Kingdom (two cases each) and Austria, Cyprus, Poland and Portugal (one each). The proposed daily penalty ranges from EUR 4,224 to EUR 148,177.92.²⁹

²⁷ Szilárd Gáspár-Szilágyi, *What Constitutes 'Failure to Notify' National Measures?*, 19(2) Eur. Pub. L. 281–294 (2013).

²⁸ Report from the Commission, *30th Annual Report on Monitoring the Application of EU Law* (2012), COM (2013) 726 final (22 Oct. 2013) at 5.

²⁹ Report from the Commission, *31st Annual Report on the Monitoring the Application of EU law* (2013), COM (2014) 612 final (1 Oct. 2014) at 6.

In 2014 three Member States were referred to the Court: Belgium, Finland and Ireland (two cases).³⁰

4 ANALYSIS OF THE CASES BROUGHT TO THE COURT

Looking at the data collected in the Table 1 below, it seems to be evident that the Commission does not ‘over-use’ this procedure (twenty-six cases in four years against the hundreds of late transposition files). Before criticizing too severely this, we have to bear in mind that ‘the Commission has many different functions in the EU, such as policy initiator, legislator, and executive. Enforcement of Member State obligations therefore becomes a political choice for Commission, as it must decide which policy areas are more important than others, prioritizing its enforcement activities according to its own (executive) agenda.’³¹

It is far from obvious how the Commission selects from the huge number of late transposition cases which to bring to the Court. The policies most concerned were environment, energy, telecommunication services and most recently banking union. The seriousness of the infringement does not seem to be decisive (in the calculation of the daily penalty payment the coefficients of seriousness are between four and ten). The time which elapses between the deadline for transposition and the bringing of action varies also in a broad range (from one year one and half month to three years and five months³²)

In several cases the Member States adopted the transposition measures after the decision on referral was made but before the application was sent to the Court.

On the basis of the cases initiated under Article 260(3) included in the Table 1 below, it is clear that the Commission makes use of the new procedure in cases when the Member State did not notify any transposition measure on time,³³ and also in cases when – in the Commission’s opinion – there is only a partial transposition of the directive, i.e. some concrete provisions are clearly not transposed into national law.³⁴ This practice reflects its own broad perception of ‘failure to notify’ declared in the 2011 Communication.

³⁰ The 2014 Report, *supra* n. 4, at 20.

³¹ Melanie Smith, *Inter-Institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties Under Article 228 EC (Now Article 260 TFEU)*, Eur. Pub. L. 547–570, 549, 16 (2010).

³² Case C-330/12, *Commission v. Poland* (ECLI:EU:C:2013:213) and Case C-236/14, *Commission v. Ireland* (ECLI:EU:C:2015:41) respectively.

³³ E.g. Case C-245/12, *Commission v. Poland* (ECLI:EU:C:2013:584), Case C-310/12, *Commission v. Hungary* (ECLI:EU:C:2013:556), Case C-330/12, *Commission v. Poland* (ECLI:EU:C:2013:213), Case C-406/12, *Commission v. Slovenia* (ECLI:EU:C:2013:215).

³⁴ E.g. Case C-545/12, *Commission v. Cyprus* (ECLI:EU:C:2013:329), Case C-109/13, *Commission v. Finland* (ECLI:EU:C:2013:880), Case C-240/13, *Commission v. Estonia* (ECLI:EU:C:2014:136), Case C-405/13, *Commission v. Romania* (ECLI:EU:C:2014:2356), Case C-406/13, *Commission v. Romania* (ECLI:EU:C:2014:2396), Case C-663/13, *Commission v. Austria* (ECLI:EU:C:2015:323),

The period of time which elapses between the deadline given for notification in the directive and the referral to Court (from 1 year 1.5 months to 3 years 5 months). means that the administrative phase is relatively long (and the infringement lasts for a relatively long period of time). In the light of these facts the consequent practice of the Commission of not proposing the imposition of lump sum (only a daily penalty payment payable from the day the Court gave its judgment) may be criticized. It is easily conceivable that given the considerable period of time which elapses between the deadline for transposition and the full transposition, damage to public and private interests arises. The special objective of the lump sum as a financial sanction is specifically to penalize this kind of damage.³⁵

The Commission – as it indicated in the Communication – proposed only a daily penalty payment and withdrew each of the applications. This is because it considered later that the Member State fully transposed the directive in question.

The Table 1 also reveals that in some cases the Member States complied with their transposition obligations short after the Commission brought an action before the Court. In other cases the Member States ended their non-compliance only after considerable delay. Even in these latter cases (given that the Commission withdraws the application only in the case of full transposition) one can suppose that the procedures generally took less time than two subsequent procedures (i.e. one under 258 and another under 260 (2) TFEU). This means that the new procedure – if it is used – may contribute to a better application of EU law. It remains true what the Commission itself states, i.e. ‘it is to be noted that these complete transpositions are achieved at a very late stage in the judicial procedure, some Member States benefiting from an undue prolongation of the transposition deadline set by the legislator equally for all Member States’.³⁶

A further possible effect, which cannot be proved, is that the possibility of initiating the new procedure has itself induced the Member States to a more disciplined attitude. Perhaps this general preventative effect (with the Article 260 (2) proceeding) has contributed to a decline in the number of the Court’s judgments in infringement cases in the last couple of years.³⁷

Case C-217/14, *Commission v. Ireland* (ECLI:EU:C:2015:255), C-329/14, *Commission v. Finland* (ECLI:EU:C:2015:289).

³⁵ The Court’s statement in *Commission v. France* became established case law ‘While the imposition of a penalty payment seems particularly 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 more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations.’ Case C-304/02, *Commission v. France* (ECLI:EU:C:2005:444), para. 81.

³⁶ The 2014 Report, *supra* n. 4, at 20.

³⁷ The number of judgments concerning failure of a Member State to fulfil its obligations: 2007: 143, 2008: 103, 2009: 143, 2010: 95, 2011: 81, 2012: 52, 2013: 63, 2014: 44. Court of Justice of the European Union, Annual Reports 2011: 113, 2014: 107.

Table 1 Cases Initiated Under 260 (3) TFEU⁴³

Case Number, Name of the Parties	Time Limit for Transposition of the Directive	Referral to Court (Time Elapsed from the Time Limit)	Withdrawal from the Proceedings (Time Elapsed from the Referral to Court)	The Financial Sanction Proposed (Daily Penalty Payment in EUR)	The Policy Area Concerned
C-48/12 <i>Commission v. Poland</i>	11 June 2010	31 January 2012. (1 year 7 months)	22 November 2012 (10 months)	71,521.38	Environment
C-245/12 <i>Commission v. Poland</i>	15 July 2010	16 May 2012. (1 year 10 months)	20 August 2012 (3 months)	93,492	Environment
C-310/12 <i>Commission v. Hungary</i>	12 December 2010	27 June 2012. (1 year 6 months)	10 June 2013 (1 year)	27,316.80	Environment
C-330/12 <i>Commission v. Poland</i>	25 May 2011	9 July 2012. (1 year 1.5 month)	25 February 2013 (7 months)	56,095.20	Electronic commu- nications networks and services
C-331/12 <i>Commission v. Poland</i>	25 May 2011	9 July 2012. (1 year 1.5 month)	25 February 2013 (7 months)	56,095.20	Electronic commu- nications networks and services

⁴³ The data in the Table 1 have been collected by the author via the European Court of Justice's search form. The Table 1 contains data up to 25 June 2015

<i>Case Number, Name of the Parties</i>	<i>Time Limit for Transposition of the Directive</i>	<i>Referral to Court (Time Elapsed from the Time Limit)</i>	<i>Withdrawal from the Proceedings (Time Elapsed from the Referral to Court)</i>	<i>The Financial Sanction Proposed (Daily Penalty Payment in EUR)</i>	<i>The Policy Area Concerned</i>
C-406/12 <i>Commission v. Slovenia</i>	25 May 2011	4 September 2012. (1 year 3 months)	1 March 2013 (6 months)	6,531.84	Electronic communications networks and services, processing of personal data and the protection of privacy in the electronic communications sector
C-407/12. <i>Commission v. Slovenia</i>	25 May 2011	3 September 2012. (1 year 3 months)	1 March 2013 (6 months)	6531.84	Electronic communications networks
C-532/12 <i>Commission v. Luxembourg</i>	21 August 2011	23 November 2012 (1 year 3 months)	25 February 2013 (3 months)	8320	Public procurement in the fields of defence and security
C-545/12 <i>Commission v. Cyprus</i>	27 November 2012	19 January 2011 (1 year 10 months)	25 April 2013 (2 years 3 months)	6,504.96	Common transport policy
C-572/12 <i>Commission v. Netherlands</i>	21 August 2011	6. December 2012 (1 year 3 months)	26 Mars 2013 (4 months)	57,324,80	Public procurement in the fields of defence and security

<i>Case Number, Name of the Parties</i>	<i>Time Limit for Transposition of the Directive</i>	<i>Referral to Court (Time Elapsed from the Time Limit)</i>	<i>Withdrawal from the Proceedings (Time Elapsed from the Referral to Court)</i>	<i>The Financial Sanction Proposed (Daily Penalty Payment in EUR)</i>	<i>The Policy Area Concerned</i>
C-109/13 <i>Commission v. Finland</i>	3 March 2011	6 March 2013 (2 years)	18 November 2013 (8 months)	32,140.80	Energy
C-111/13 <i>Commission v. Finland</i>	3 March 2011	7 March 2013 (2 years)	18 November 2013 (8 months)	28,569.60	Energy
C-203/13 <i>Commission v. Bulgaria</i>	3 March 2011	17 April 2013 (2 year 1.5 month)	29 July 2013. (3 months)	8448	Energy
C-240/13 <i>Commission v. Estonia</i>	3 March 2011	29 April 2013 (2 years 1.5 month)	16 July 2014 (1 year 3 months)	5068.80	Energy
C-241/13 <i>Commission v. Estonia</i>	3 March 2011	29 April 2013 (2 years 1.5 month)	16 July 2014 (1 year 3 months)	4224	Energy
C-405/13 <i>Commission v. Romania</i>	3 March 2011	17 July 2013. (2 years 4.5 months)	2 October 2014 (1 year 2.5 months)	30,228.48	Energy

<i>Case Number, Name of the Parties</i>	<i>Time Limit for Transposition of the Directive</i>	<i>Referral to Court (Time Elapsed from the Time Limit)</i>	<i>Withdrawal from the Proceedings (Time Elapsed from the Referral to Court)</i>	<i>The Financial Sanction Proposed (Daily Penalty Payment in EUR)</i>	<i>The Policy Area Concerned</i>
C-406/13 <i>Commission v. Romania</i>	3 March 2011	17 July 2013 (2 years 4.5 months)	17 October 2014 (1 year 2.5 months)	30,228.48	Energy
C-663/13 <i>Commission v. Austria</i>	5 December 2010	13 December 2013 (3 years)	29 April 2015 (1 year 4 months)	40,512	Energy
C-217/14 <i>Commission v. Ireland</i>	3 March 2011	2 May 2014 (3 years 2 months)	23 April 2015 (11 months)	20,358	Energy
C-236/14 <i>Commission v. Ireland</i>	5 December 2010	12 May 2014 (3 years 5 months)	11 December 2014 (7 months)	25,447.50	Energy
C-302/14 <i>Commission v. Belgium</i>	9 July 2012	24 June 2014 (almost 2 years)	26 March 2015 (10 months)	42,178.50	Energy
C-329/14 <i>Commission v. Finland</i>	9 July 2012	7 July 2014 (2 years)	19 March 2015 (8 months)	19,178.25	Energy

<i>Case Number, Name of the Parties</i>	<i>Time Limit for Transposition of the Directive</i>	<i>Referral to Court (Time Elapsed from the Time Limit)</i>	<i>Withdrawal from the Proceedings (Time Elapsed from the Referral to Court)</i>	<i>The Financial Sanction Proposed (Daily Penalty Payment in EUR)</i>	<i>The Policy Area Concerned</i>
C-540/15 <i>Commission v. Greece</i>	5 June 2014	15 October 2015 (one year 4 months)	26 February 2016 (3 months)	29,145,60	Energy
C-545/15 <i>Commission v. Poland</i>	14 February 2014	16 October 2015 (one year 8 months)	26 February 2016 (4 months)	71,610	Banking union
C-546/15 <i>Commission v. Germany</i>	14 February 2014	16 October 2015 (one year 8 months)	15 January 2016 (3 months)	210,078	Environment
C-683/15 <i>Commission v. Poland</i>	31 December 2014	18 December 2015 (one year)		51,456	Environment
C-684/15 <i>Commission v. Luxembourg</i>	31 December 2014	18 December 2015 (one year)	30 March 2016 (3 months)	6,700	Banking union

Given that the Court has not yet given any judgment in Article 260(3) cases, some questions are awaiting answers:

The most obvious question is whether the Court accepts the Commission's broad interpretation of 'failure to notify' and imposes a financial sanction in a partial transposition situation.

It is also an open question whether the Court follows its Article 260(2) case law and imposes two financial sanctions (the penalty payment and lump sum) in the same case.³⁸ One can only speculate on the 'sanctioning policy' of the Court. (In Article 260 (2) procedures, as far as the penalty payment is concerned, the Court has accepted the criteria and method of calculation of the Commission while using them at its own discretion. As far as the imposition of a lump sum is concerned, the Court imposes 'round sums' without any precise method of calculation.)

Perhaps the most delicate question is: Why does the Court wait until the Commission withdraws the application? This kind of case is not- in principle – hard to decide on. The preparation of cases should be undemanding for the Judge-Rapporteur and, if one is appointed, the Advocate General.³⁹ The Court made it clear a very long time ago, that the failure to notify (correctly) in time in itself constitutes an infringement of EU law.⁴⁰ In this kind of case, proving the existence of the infringement may not cause serious difficulty for the Commission. We cannot attribute this to the virtue of patience but to the generous respect for the Commission's method of compliance management which includes the dialogue between the bureaucracies of the Member State in question and the Commission, which is intended to find an amicable solution. Given that the Commission is trapped by its own communication in which it declared its intention to withdraw the action if the Member State fully complies with its obligations laid down in the directive the remaining question is: Waiting until the Commission's withdrawal is it always in line with the reasonable time requirement? Or putting it differently: Is it reasonable to wait more than one year for the notification of full transposition after the action which itself has been brought more than two years after the deadline for notification?⁴¹

³⁸ See Case C-304/02, *Commission v. France*, 2005 E.C.R. I-6263, and the subsequent case law.

³⁹ Stine Andersen, *The Enforcement of EU Law. The Role of the Commission* 116 (Oxford: Oxford University Press 2012). Andersen cites Judge Koen Lenaerts, who points out that this kind of case may warrant a full hearing on the matter and a detailed assessment as regards the amount, and this would normally require a Chamber of five judges. We note that so far the procedure has not reached the oral phase of the judicial procedure.

⁴⁰ Case 96/81, *Commission v. Netherlands*, 1982 E.C.R. 1791. para. 8. See also Case C-69/90, *Commission v. Italy*, 1991 E.C.R. 6011.

⁴¹ C-241/13, *Commission v. Estonia* (ECLI:EU:C:2014:2137), C-405/13, *Commission v. Romania* (ECLI:EU:C:2014:2356), C-406/13, *Commission v. Romania* (ECLI:EU:C:2014:2396), C-663/13, (ECLI:EU:C:2015:323).

Another perhaps less powerful explanation for the Court's 'patience' may be that threatening with a sanction is more effective than the actual imposition of sanctions.⁴²

5 CONCLUSION

The aim of this article was to pursue how the new procedure under Article 260 (3) TFEU found its way to the real life, to what extent could it contribute to the timely and precise transposition of directives.

After more than five years of entry into force of the Treaty of Lisbon we can observe that the Commission started to profit from the procedure. One can note as surprise that the Court did not deliver a judgment in this kind of cases. Formally this is due the fact that the Commission withdrew all the actions because the defendant Member State fully transposed the directive after the action has been brought.

This inaction of the Court leaves a number of questions unanswered. First of all one can not know how the Court decides on the scope of the procedure in terms of what constitutes failure to notify. Does it cover only the 'not notifying anything' or does it cover also – as the Commission understands it – the partial transposition. Is the Court ready to accept the Commission's policy on the types of financial sanctions (i.e. restricting to the penalty payment) or wishes to use its own full discretion as it did in Article 260 (2) procedures and to impose both of the two types? An interesting but rather theoretical question also arises: What is the reason why the Court is waiting until the withdrawal? Is it because of the respect for the Commission's compliance management practices or is this due its own management of limited human resources?

As far as the effectiveness of the new procedure is concerned the general picture is rather positive. In most of the cases some months after the case has been brought to the Court the Member State concerned fully complied with the directive in question. It is conceivable that the sole threat of financial sanction put enough pressure to transpose correctly. On the other hand in several cases the whole period of time which elapsed between the deadline for transposition and the full compliance lasted several years which can be harmful for the public and private interests, the avoidance of which was the original aim of the new procedure.

⁴² Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered* (3d ed., Peterson Institute for International Economics 2007). The study on a sample of 204 economic sanctions cases found that only 34% were successful while 9 of the 11 threat cases were evaluated as successes (80%).