Brussels, 20.2.2019
C(2019) 1396 final

# 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 of the European Union**

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## 1.    Introduction

Under the Treaty on the Functioning of the European Union (TFEU), when the Commission refers a Member State to the Court of Justice of the European Union for having infringed EU law, the Court may impose financial sanctions in two situations:

- When the Court has ruled that a Member State infringing EU law has not yet complied with an earlier judgment finding that infringement (Article 260(2) TFEU);
- When a Member State has failed to fulfil its obligation to notify measures transposing a Directive adopted under a legislative procedure (Article 260(3) TFEU).

In both cases, the sanction is made up of a *lump sum payment*, to penalise the existence of the infringement itself[1], and a *daily penalty payment*, to penalise the continuation of the infringement after the Court's judgment.[2] The Commission proposes an amount for the financial sanctions to the Court, which takes the final decision.

The general approach of the Commission to calculating its proposed sanction is well-established. Since 1997[3] and as set out in successive Communications[4], it has applied an approach which reflects both the capacity to pay of the Member State concerned, and its institutional weight. This is applied through what is known as the *"n-factor"*.[5] This combines with other factors – the seriousness of the infringement, and its duration – in the Commission's calculation of a proposed sanction. Until now, the n-factor has been calculated with reference to the gross domestic product (GDP) of a Member State, and the number of votes allocated to it in the Council.[6]

However, the Court of Justice has recently established that the Council voting rules can no longer be used for this purpose.[7] Consequently, it would rely on the Member States' GDP as predominant factor.

The Commission has always considered that sanctions need both to act as a deterrent, and to be proportionate, and the proposals it makes to the Court for its final decision should already reflect this need. The combination of a Member State's capacity to pay and its institutional weight provided this balance. Use of GDP alone would upset this equilibrium, as it would exclusively reflect the economic dimension of Member States. It would have very different impacts for different Member States and in particular suggest a substantial increase in the amounts of the proposed sanctions for more than a third of the Member States. The Commission therefore considers that the n-factor should continue to reflect both GDP and institutional weight. This Communication sets out the details of how to retain this balance whilst adjusting the Commission's method of calculation for its proposed financial sanctions.

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[1]    SEC(2005) 1658, point 10.3.
[2]    SEC(2005) 1658, point 14.
[3]    Method of calculating the penalty payments provided for pursuant to Article 171 of the Treaty establishing the European Community (EC Treaty), OJ C 63 of 28.2.1997, p. 2.
[4]    See in particular the re-cast communication SEC(2005)1658, the Communication "Implementation of Article 260(3) of the Treaty, OJ C 12 of 15.1.2011 and the Communication "EU law: Better results through better application", OJ C 18 of 19.1.2017, p. 10.
[5]    SEC(2005) 1658, point 14.
[6]    As it was laid down in the EC Treaty.
[7]    Judgment of 14 November 2018 in case C-93/17, Commission v Greece.

## 2.      Revision of the n-factor

The Court of Justice ruled on numerous occasions that the method of calculation for the sanction proposal of the Commission was an appropriate means of reflecting the capacity to pay of the Member State concerned, while keeping the variation between Member States within a reasonable range.[8]

However, in its judgment of 14 November 2018[9], the Court of Justice noted that since 1 April 2017, the voting system in the Council laid down in the Treaty establishing the European Community (EC Treaty) had changed.[10] It concluded that as a result, the n-factor could no longer take account of the votes of a Member State in the Council, and that it had to rely on the Member States' gross domestic product (GDP) as predominant factor.

*Composition of the n-factor*

The Commission considers that, in addition to Member States' capacity to pay, the n-factor should also take account of the Member States' institutional weight. This means that the method of calculating the n-factor should not be based on demographic or economic weight alone, but also on the consideration that each Member State has intrinsic value in the institutional set-up of the European Union.

Given the Court's judgment, a new reflection of institutional weight to be used in the calculation of financial sanctions is needed. In order to maintain the balance between the capacity to pay and the institutional weight of a Member State, the Commission will calculate the n-factor on the basis of two elements: GDP, and the number of seats for representatives in the European Parliament allocated to each Member State.[11] The Commission considers that this is the most appropriate reflection of institutional weight of Member States available today in the EU Treaties.

*Range in the n-factor between Member States*

Another reason for maintaining the institutional weight of Member States in the calculation of the n-factor is that the exclusive use of GDP would considerably increase the range in the n-factor between Member States. The difference between the lowest and the highest n-factor today is 55 – this would increase to 312 with the exclusive use of GDP.

Taking into account the number of seats of a Member State in the European Parliament in the calculation of the n-factor would ensure that the variation between Member States could continue to be within a reasonable range.

The Commission further considers that the new method for calculating the n-factor should lead to amounts that do not create unjustified differences between the Member States and

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[8]   Case C-93/17, Commission v Greece, EU:C:2018:903, point 132.

[9]   Case C-93/17, Commission v Greece, EU:C:2018:903, points 138 and 142.

[10]  Replaced by the system of double majority as laid down in Article 16(4) TEU. Prior to the phasing out of the voting system in the Council laid down in the EC Treaty, each Member State had a fixed number of votes in the Council. Under the Lisbon Treaty, each Member State in the Council has one vote, with the qualified majority reached when 55% of Member States vote in favour and those Member States represent 65% of the EU population. This cannot be translated into a straightforward weighting and used in the same way as the previous system.

[11]  See, for the current parliamentary term, Article 3 of European Council Decision (EU) 2013/312 of 28 June 2013 establishing the composition of the European Parliament, (OJ L 181 of 29.6.2013, p. 57), and Article 3 of European Council Decision (EU) 2018/937 of 28 June 2018 for the next parliamentary term, starting on 2 July 2019.

stay as close as possible to the amounts resulting from the current calculation method, which are both proportionate and sufficiently deterring. While the resulting amounts may be lower compared to the current situation, they come closer to the practice of the Court, which generally sets lower fines than those proposed by the Commission.

*Reference value for the n-factor*

Until now, the Commission has used the n-factor of Luxembourg as reference value. This dates back to a time when Luxembourg was the country with the lowest total GDP amongst the Member States. The Commission considers it appropriate to opt for a reference that better reflects today's economic and political reality. The Commission will therefore determine the reference n-factor by using the average of each of the two factors being used, GDP and the number of representatives in the European Parliament.[12] Using averages also increases the stability of this reference value over time.

However, using these factors without adjustment leads to a reference value for the n-factor that is considerably lower than the current value. An adjustment is therefore needed to ensure that the amounts proposed by the Commission remain proportionate and sufficiently deterring. An adjustment factor of 4.5 would come close to current levels whilst ensuring that no Member State will see an increase. The respective standard flat-rate amounts used for calculating the daily penalty payments and the lump sum payments are consequently adjusted as follows:

- Standard flat-rate amount for daily penalty payments: EUR 690 x 4.5 = EUR 3,105;
- Standard flat-rate amount for lump sum payments: EUR 230 x 4.5 = EUR 1,035.

Following the same logic, the current reference minimum lump sum amount of 571,000 EUR will also be multiplied by the new n-factor to calculate the minimum lump sum amount for each Member State. In order to ensure that the amounts proposed are proportionate and sufficiently deterring, that amount will also be multiplied by the adjustment factor: EUR 571,000 x 4.5 = EUR 2,569,500. These amounts will be revised annually, in line with inflation.

The resulting n-factor per Member State is set out in Annex I, and the resulting minimum lump sum in Annex II.


**3. Application**

The Commission will apply the calculation method as outlined in this Communication to financial sanctions proposed to the Court of Justice from the date of its publication in the Official Journal. The Commission will review the calculation method as outlined in this Communication at the latest five years after the date of its adoption.

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[12] The mean is calculated as follows: the n-factor is a geometric mean calculated by taking the square root of the product of the factors based on Member States' GDP and the number of seats in the European Parliament. It is obtained via the following formula: $\sqrt{\frac{GDP_n}{GDP_{avg}} \times \frac{Seat_n}{Seat_{avg}}}$

Where: GDP n = GDP of Member State concerned, in millions of euros; GDP avg = average GDP of EU28; Seat n = number of seats of the Member State concerned in the European Parliament; Seat avg = average number of seats in European Parliament of all Member States.

Once the withdrawal of the United Kingdom from the European Union becomes legally effective, and irrespective whether the Withdrawal Agreement[13] enters into force or not, the Commission will recalculate the relevant averages and will adjust the figures set out in Annex I and II accordingly.

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[13] The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as annexed to the proposal for a Council Decision on the signing on behalf of the European Union and of the European Atomic Energy Community of that Agreement, COM(2018) 833 final.

# ANNEXES

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# ANNEX I

## Special "n"-factor

| | |
|---|---|
| **Belgium** | **0,79** |
| **Bulgaria** | **0,24** |
| **Czech Republic** | **0,51** |
| **Denmark** | **0,50** |
| **Germany** | **4,60** |
| **Estonia** | **0,09** |
| **Ireland** | **0,46** |
| **Greece** | **0,51** |
| **Spain** | **2,06** |
| **France** | **3,40** |
| **Croatia** | **0,19** |
| **Italy** | **2,93** |
| **Cyprus** | **0,09** |
| **Latvia** | **0,12** |
| **Lithuania** | **0,17** |
| **Luxembourg** | **0,15** |
| **Hungary** | **0,41** |
| **Malta** | **0,07** |
| **Netherlands** | **1,13** |
| **Austria** | **0,67** |
| **Poland** | **1,23** |
| **Portugal** | **0,52** |
| **Romania** | **0,62** |
| **Slovenia** | **0,15** |
| **Slovakia** | **0,27** |
| **Finland** | **0,44** |
| **Sweden** | **0,81** |
| **United Kingdom** | **3,50** |

# ANNEX II

## Minimum lump sum (€ thousand)

| | |
|---|---|
| **Belgium** | **2029** |
| **Bulgaria** | **616** |
| **Czech Republic** | **1310** |
| **Denmark** | **1284** |
| **Germany** | **11812** |
| **Estonia** | **231** |
| **Ireland** | **1181** |
| **Greece** | **1310** |
| **Spain** | **5290** |
| **France** | **8731** |
| **Croatia** | **488** |
| **Italy** | **7524** |
| **Cyprus** | **231** |
| **Latvia** | **308** |
| **Lithuania** | **437** |
| **Luxembourg** | **385** |
| **Hungary** | **1053** |
| **Malta** | **180** |
| **Netherlands** | **2902** |
| **Austria** | **1720** |
| **Poland** | **3158** |
| **Portugal** | **1335** |
| **Romania** | **1592** |
| **Slovenia** | **385** |
| **Slovakia** | **693** |
| **Finland** | **1130** |
| **Sweden** | **2080** |
| **United Kingdom** | **8987** |