The CJEU's Infringement Procedure and Its Enforcement Mechanism

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Abstract

The enforcement of EU law takes place at two levels: at the level of the Union in a centralized manner, through direct proceedings before the CJEU, and at the level of the Member States – in a decentralized manner, through the national courts. In the first case, infringement proceedings initiated by the Commission play a central role, whereby the CJEU's responsibility is essentially judicial review: it examines whether a piece of national legislation complies with the requirements of EU law. Therefore, the present study focuses on the infringement procedure, describing its prominent types, features, and rules. In addition, it presents the relevant jurisprudence of the CJEU, with particular reference to the financial sanctions that the CJEU may apply together with a few novelties concerning Hungary.

Keywords: infringement procedure, CJEU, penalty payments, financial penalties, Hungary

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1. Introduction

According to the 1973 *Les Verts* case, judicial review must be available for all acts having legal effects in the EU.[1] As the decision reads, "the European Economic Community is a community of law in so far as neither the Member States nor the institutions are exempt from reviewing the conformity of their acts with the fundamental constitutional charter, namely the

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1 The *ERTA* case can be seen as a precedent for this finding: Judgment of 31 March 1971, *Case C-22/70, Commission v Council,* ECLI:EU:C:1971:32, para. 42.

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Treaty."[2] As the quote indicates, the rule of law requires that both EU legal acts and acts of the Member States comply with the founding Treaties.

To ensure such compliance, "[the] Treaty […] has established a complete system of legal remedies and procedures."[3] The comprehensive system that providing for the examination and enforcement of EU law takes place at two levels: at the level of the Union in a centralized manner, through direct proceedings before the CJEU, and at the level of the Member States in a decentralized manner, through the national courts. This symbiosis is reflected in Article 19(1) TEU, which determines the constitutional role of the CJEU, according to which the CJEU "shall ensure that the law is respected in the interpretation and application of the Treaties", and since the Lisbon Treaty, dedicates a specific paragraph to national courts. According to the latter, "the Member States shall provide for such means of redress as are necessary to ensure effective judicial protection in the areas governed by Union law."

In line with this dual approach, the founding treaties ensure the legal conformity of national acts with EU law at two levels. In a fully centralized approach, the infringement procedure is the direct mechanism before the CJEU. To reinforce this trajectory, Member States have even institutionalized the possibility of imposing fines in the Maastricht Treaty for the enforcement of judgments. This feature can be considered a 'revolutionary' innovation among the powers of international judicial organizations.[4] In addition, there is also an indirect mechanism, the preliminary ruling procedure initiated for the interpretation of EU law, which provides an opportunity to review national rules, as de Witte has noted.[5] The latter procedure has a strongly decentralized character as it requires the cooperation of national courts. This mechanism, which ensures both the enforcement of EU law and at the same time, the implicit normative control of national rules, has substantial advantages over the infringement procedure. On the one hand, its use is not dependent on the Commission's resources[6] or the out-

2 Judgment of 23 April 1986, *Case C-294/83, Les Verts,* ECLI:EU:C:1986:166, para. 23.

3 Id.

4 Vassilios Skouris, 'The Position of the European Court of Justice in the EU Legal Order and Its Relationship with National Constitutional Courts', *Zeitschrift für öffentliches Recht,* 2005/3, p. 324.

5 Bruno de Witte, 'The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts', *in* Bruno de Witte *et al.* (eds.), *National Courts and EU Law: New Issues, Theories and Methods,* Edward Elgar, Cheltenham, 2016, pp. 16–17.

6 The number of preliminary ruling procedures overtook the number of infringement procedures in the early 1970s and has been the Court's standard procedure ever since. Renaud

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come of the political negotiations between the Commission and the Member State. On the other hand, the enforcement of EU law is more likely to be achieved through the preliminary ruling procedure, as national judges themselves must make the final decision on the instant case. Thus, the CJEU does not have to confront the Member State, and if the Member State government does not wish to comply with the Court's ruling, it will ultimately find itself in a situation where it is condemned by the national court.[7]

Nevertheless, whether the CJEU acts directly in the context of infringement proceedings initiated by the Commission or indirectly through questions referred by national courts, the CJEU's task is essentially judicial review: it examines whether a piece of national legislation complies with the requirements of EU law. Because of this function, the CJEU is considered by many authors to be a quasi-constitutional court,[8] which pursues an Abstract judicial review in infringement procedures and a concrete judicial review in the preliminary ruling procedure. Furthermore, the *quasi* constitutional court position is reinforced by other essential powers: not only can the CJEU review national acts but it also safeguards the legality of the exercise of power in the EU, as well as ensuring the conformity of EU sources of law with the Treaty.[9] The latter is the purpose of the annulment procedure, the preliminary ruling procedure aims at examining the validity of EU legal acts, and the plea of illegality provided for in Article 277 TFEU.[10]

Against this backdrop, the present study will focus on the infringement procedure: it describes the procedure's main types, features, and rules. It presents the relevant jurisprudence of the CJEU, with particular reference

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Dehousse, *The European Court of Justice: The Politics of Judicial Integration,* Palgrave Macmillan, 1998, pp. 51–52.

7 Joseph H.H. Weiler, 'The Transformation of Europe', *The Yale Journal,* Vol. 100, Issue 8, 1991, pp. 2420–2421.

8 Monica Claes, The National Courts' Mandate in the European Constitution, Hart, Portland, 2006, p. 391.

9 The constitutional nature of the Treaties was also recognized by the case law of the CJEU in *Les Verts,* which referred to the founding Treaties as a 'basic constitutional charter': *Case C-294/83, Les Verts,* para. 23. The concept has also been used in other cases: Opinion of 14 December 1991, *Opinion no 1/91,* ECLI:EU:C:1991:490, para. 21; Judgment of 3 September 2008, *Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat,* ECLI:EU:C:2008:461, para. 281; Opinion of 18 December 2014, *Opinion no 2/13,* ECLI:EU:C:2014:2454, para. 163.

10 Article 277 TFEU provides an exceptional legal remedy in the EU legal system. Under this Article, a party can challenge the application of a Union act of general application in a specific case on the grounds that it is unlawful. If the court finds an infringement, the act in question is not applied in the case, but EU law is not repealed either.

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to the financial sanctions that the Court may apply in case of infringement together with some new developments concerning Hungary.

2. Two Types of Infringement Proceedings

According to Article 258 TFEU, if the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. This is the *first type* of infringement proceedings that is essential for enforcing EU law: the European Commission, as 'the guardian of the Treaties', may launch such a procedure under Article 258 TFEU. Whether the European Commission launches such a procedure is at the discretion of the European Commission. It involves a consultation with the Member State concerned and possibly an agreement between them. However, it is clear that the Commission has no legal obligation to initiate or conduct proceedings.[11] In this respect, the Commission's procedure has had a 'black box' character from the outset: it is not accessible to external parties what criteria the Commission considers when it initiates proceedings in some cases and not in others. In any case, it may be an important consideration that the Commission's capacity is also finite, so it certainly cannot investigate all infringements of EU law.

However, as the Commission is the 'guardian of the Treaties', the recent proliferation of litigation regarding the values of the EU as enshrined in Article 2 TEU[12] has led to a growing number of critical voices in the literature stressing that the Commission should play a more significant role in defending EU values and be more active in bringing substantive infringement proceedings.[13]

The *second type* of infringement procedure, which is relatively rarely used, is litigation between the contracting parties, *i.e.,* the Member States themselves. If a Member State considers that another Member State has failed to fulfil an obligation under the Treaty, it may bring the matter before the CJEU. Before doing so, the Member State must refer the matter to the

11 Judgment of 14 February 1989, *Case C-247/87, Star Fruit,* ECLI:EU:C:1989:58, para. 11.

12 Luke Dimitrios Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks,* Oxford Studies in European Law, Oxford, 2023, pp. 87–106.

13 Petra Bárd *et al.,* 'Treaty changes for a better protection of EU values in the Member States', *European Law Journal,* Vol. 30, Issue 4, 2024, pp. 1–16. András Jakab: 'Three misconceptions about the EU rule of law crisis', *Verfassungsblog,* 17 October 2022.

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Commission and provide the possibility for the Commission, as the 'guardian of the Treaties', to initiate infringement proceedings in the same matter. If the Commission does not do so within three months, the Member State may bring the action before the CJEU. The legal basis of this procedure is Article 259 TFEU, and its rationale can be traced back to Article 344 TFEU, under which the Member States have undertaken to settle disputes concerning the interpretation or application of the Treaties exclusively by way of the procedures provided for in the Treaties. In light of this, the second type of infringement procedure reflects the *par excellence* characteristics of an international court. The Treaty 'softens' this international judicial character by entrusting the resolution of disputes between Member States primarily to the Commission, by requiring a Member State to communicate the legal issue to the 'guardian of the Treaties' first and ask it to represent its position in the first type of infringement procedure.[14] If the Commission does not agree with the existence of an infringement, the Member State is given the option to refer the dispute between the two Member States to the CJEU as an international court to resolve it.

3. Two Types of Infringements

Infringements can be divided into two broad categories. The first category is the so-called *substantive infringement procedure,* which occurs when a Member State fails to fulfil an obligation under EU law. This may be through national legislation that infringes EU law or through the application or failure to apply EU law in practice.[15] In addition, the second broad category of infringement proceedings relates to the obligation to implement directives. This is the so-called *non-notification infringement procedure* that is more technical. Its additional rules are laid down in Article 260(3) TFEU. The Commission can launch this procedure when a Member State fails to fulfil

14 According to Lenaerts, the infringement procedure that can be initiated by the Commission is an important feature distinguishing EU law from international law: in this procedure, contrary to Article 60 of the Treaty on the Law of Treaties, signed in Vienna on 23 May 1969, Member States cannot rely on the argument of non-reciprocity, *i.e.* the fact that another Member State has also infringed a particular provision of EU law, as a defence on the basis of EU law. *See* Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *Common Market Law Review,* Vol. 44, Issue 6, 2007, p. 1639.

15 Judgment of 9 December 1997, *Case C-265/95, Commission v France,* ECLI:EU:C:1997:595.

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its so-called 'notification obligation', *i.e.,* when it does not notify the Commission of the measures adopted to transpose a directive.

The rationale behind the latter procedure is the requirement of legal certainty; the doctrinal starting point is that the provisions of a directive must be implemented with indisputable binding force and with the necessary degree of specificity, precision, and clarity. According to settled case law, it is essential that national law effectively ensure the complete application of the directive. It is also necessary that the resulting legal situation under national law be sufficiently precise and clear, so that individuals know the full extent of their rights to be able to rely on them before the national courts.[16]

Nevertheless, the jurisprudence of the CJEU on the incorrect transposition of directives by the Member States has made it clear that directives don't need to be implemented by legislation. Accordingly, the CJEU has held that "the existence of general principles of constitutional law or administrative law"[17] or "an existing legal framework"[18] may be sufficient to implement the directive without further legislative measures by Member States, provided that they comply with these minimum requirements. However, the CJEU has also held that the simple existence of administrative practice[19] that complies with a directive, or the possibility for courts to interpret national law in conformity with a directive,[20] does not relieve a Member State of the obligation to adopt appropriate binding implementing measures. The CJEU has also established that any Member State implementation that may even in theory jeopardize the implementation of a directive, is prohibited, notwithstanding the fact that the actual implementation itself had not resulted in any detrimental effects.[21] A simple administrative practice that the administration can change at will and which is not sufficiently known cannot be regarded as a valid implementation of the obligations incumbent on

16 Judgment of 9 September 2004, *Case C-70/03, Commission v Spain,* ECLI:EU:C:2004:505, para. 15, and the case law cited.

17 Judgment of 23 May 1985, *Case C-29/84, Commission v Germany,* ECLI:EU:C:1985:229, para. 23.

18 Judgment of 20 May 1992, *Case C-190/90, Commission v Netherlands,* ECLI:EU:C:1992:225, para. 17.

19 Judgment of 15 March 1990, *Case C-339/87, Commission v Netherlands,* ECLI:EU:C:1990:119, para. 36.

20 Judgment of 27 October 1993, *Case C-338/91, Steenhorst-Neerings,* ECLI:EU:C:1993:857, paras. 32–34.

21 Judgment of 9 April 1987, *Case C-363/85, Commission v Italy,* ECLI:EU:C:1987:196, paras. 10 and 12.

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Member States in the context of transposing a directive because of the lack of compliance with the minimum requirements.[22]

Furthermore, not only the failure to implement a directive but also other reasons can lead to an action for infringement. The CJEU has ruled on several occasions that the Commission may seek a declaration of failure to fulfil an obligation because the given directive's objective has not been achieved.[23] For instance, the CJEU has held that an action may be justified even if the applicable national legislation is in itself compatible with EU law when the administrative practice violates EU law and constitutes a breach of legal obligations.[24]

Both categories of infringements are channeled into the same procedure at the end of the day. However, two crucial differences between the two types of infringement should be highlighted. On the one hand, substantive infringement proceedings are more sensitive, as they represent a more significant challenge to the EU legal order and are, therefore, the ones that are usually reported in the news.[25]

On the other hand, in non-notification infringement proceedings, since the entry into force of the Lisbon Treaty that introduced Article 260(3) TFEU, the Commission may also seek to impose a financial penalty on the Member State already in its petition under Article 258 TFEU procedure for failure to notify measures transposing a directive. Unlike in substantive infringement proceedings, if the CJEU finds that an infringement has indeed taken place, it may order the Member State to pay a lump sum or penalty payment not exceeding an amount determined by the Commission. Importantly, this financial sanction can also be imposed if the Member State complies with its transposition obligations at the time of the court proceedings, because the existence of an infringement must be assessed in any event based on the situation in which the Member State in question was when the time-limit set in the reasoned opinion expired, and the CJEU may not take

22 Judgment of 12 July 2007, *Case C-507/04, Commission v Austria,* ECLI:EU:C:2007:427, para. 162, and the case law cited; Judgment of 19 December 2013, *Case C-281/11, Commission v Poland,* ECLIEU:C:2013:855, para. 105.

23 Judgment of 10 April 2003, *Joined Cases C-20/01 and C-28/01, Commission v Germany,* ECLI:EU:C:2003:220, para. 30; Judgment of 14 April 2005, *Case C-157/03, Commission v Spain,* ECLI:EU:C:2005:225, para. 44.

24 Judgment of 12 May 2005, *Case C-278/03, Commission v Italy,* ECLI:EU:C:2005:281, para. 13.

25 Statistics on infringement proceedings are available on the following website: https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en.

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into consideration any changes that have occurred since then.[26] Here, the aim is to ensure that the Member States transpose and notify their legislation in time and avoid court proceedings altogether.

4. Steps of the Infringement Procedure

To initiate proceedings, the EU infringement alleged by the Commission must be committed by a Member State, *i.e.,* the infringement must be attributable to the Member State's action in a broad sense. Thus, a Member State may be brought before the CJEU if the infringement in question is committed by the Member State's legislature, government, or judiciary[27] or if the acts of certain persons are closely connected with the functioning of the State and are therefore attributable to it.[28]

If the Commission considers that a Member State did not comply with its obligations under EU law, it may first open a non-public consultation with the Member State's government; this is the so-called pilot procedure.[29] If the consultation with the government does not dispel the doubts raised, the procedure enters the formal phase by the Commission's letter of formal notice. If the Member State's response to the letter of formal notice (or the measures adopted by the Member State in the meantime) do not resolve the infringement, the European Commission will issue a reasoned opinion, setting a deadline for the Member State to correct the infringement.

The correct conduct of the pre-litigation procedure is significant in the infringement procedure. The pre-litigation procedures determine the subject matter of an action for infringement.[30] Therefore, the action cannot be examined on its merits if any of the guarantees of the pre-litigation procedure are missing. Accordingly, the CJEU will examine the pleas in law raised

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26 Judgment of 5 February 2015, *Case C-317/14, Commission v Belgium,* ECLI:EU:C:2015:63, para. 34; Judgment of 18 December 2014, *Case C-640/13, Commission v United Kingdom,* ECLI:EU:C:2014:2457, para. 42, and the case law cited.

27 Judgment of 4 October 2018, *Case C-416/17, Commission v France,* ECLI:EU:C:2018:811.

28 Judgment of 24 November 1982, *Case C-249/81, Commission v Ireland,* ECLI:EU:C:1982:402.

29 Ernő Várnay, 'Discretion in the Articles 258 and 260(2) TFEU Procedures', *Maastricht Journal of European and Comparative Law,* Vol. 22, Issue 6, 2015, p. 856; EU law: Better results through better application. Communication from the Commission, 2017/C 18/02.

30 Judgment of 10 May 2001, *Case C-152/98, Commission v Netherlands,* ECLI:EU:C:2001:255, para. 23; Judgment of 15 January 2002, *Case C-439/99, Commission v Italy,* ECLI:EU:C:2002:14, para. 11; Judgment of 16 June 2005, *Case C-456/03, Commission v Italy,* ECLI:EU:C:2005:388, para. 35.

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by the Member States in the context of admissibility. If such a procedural plea is successful, the CJEU will dismiss the action without examining the substantive merits of the case.[31]

Therefore, the *letter of formal notice and reasoned opinion* sent by the Commission play a key role. The letter of formal notice summarizes the alleged infringement, but it can also help understand the reasoned opinion. However, the most relevant legal effects are linked to the reasoned opinion, where the Commission must clearly identify the conduct it considers to be in breach of EU legal obligations. In other words, the reasoned opinion must contain a coherent and detailed statement of those reasons that have led the Commission to believe that the Member State concerned has failed to fulfil its obligation under the Treaty.[32] This ensures that the Member State concerned knows precisely which obligation the Commission considers to have been infringed by the Member State before it takes legal action before the CJEU, so that the Member State concerned can eliminate the infringement or present its defence.[33]

As a corollary, the Member States are expected to provide clear and precise replies to the formal notice. For example, in the case of an obligation to implement a directive, the Member State concerned must clearly indicate the legislative, regulatory, and administrative measures by which it considers that it has complied with its obligations under the directive. In the absence of this information, the Commission will not be in a position to verify whether the Member State has actually and fully implemented the obligation to implement the directive. Failure by a Member State to fulfil this obligation, either by failing to provide all necessary information or by failing to provide sufficiently clear and precise information, may in itself justify the opening of infringement proceedings.[34]

If the Member State fails to remedy the situation satisfactorily within the deadline set in the reasoned opinion, the European Commission may start the judicial phase of the infringement procedure by bringing an action before the CJEU. A critical procedural aspect is that the Commission, as the applicant, may only raise those grounds against the Member State in its action before the CJEU that it has already put forward in its reasoned opin-

31 Judgment of 16 March 2023, *Case C-174/21, Commission v Bulgaria,* ECLI:EU:C:2023:210, para. 22.

32 Judgment of 24 June 2004, *Case C-350/02, Commission v the Netherlands,* ECLI:EU:C:2004:389, para. 20.

33 Id. para. 21.

34 *Case C-456/03, Commission v Italy,* para. 27.

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ion.[35] This has a guarantee function since the purpose of the pre-litigation procedure is to enable the Member State concerned to comply with its obligations under Community law and to ensure its right of defence against Commission's legal objections.[36] As the reasoned opinion and the application must be based on the same grounds and pleas, the CJEU cannot examine an objection not raised in the reasoned opinion.[37] Consequently, if an objection has not been formulated in the reasoned opinion, it will be inadmissible at the stage of the proceedings before the CJEU.[38]

Nevertheless, according to the practice of the CJEU, this requirement is not applied n a mechanical way. The requirement that the subject matter of the action must be defined in the pre-action procedure cannot mean that the wording of the objection must be absolutely identical in the letter of formal notice, the operative part of the reasoned opinion, and the application. Following the principle of *a maiore ad minus* deduction,[39] it is possible to reduce the subject matter of the dispute. However, the doctrine of *a minore ad maius* is a strict limitation that does not allow the subject matter of the dispute to be extended, modified, or enlarged.[40]

If the CJEU does not declare the action inadmissible on formal grounds, the case will proceed to the substance of the action. Member States may rely on several pleas in law in the proceedings to defend themselves against the action. Typical Member State arguments that the CJEU has not accepted are references to provisions of national law, the length of legislative procedures, or other difficulties encountered by Member States. Indeed, the CJEU does not accept assertions that the legislative work to bring national legislation

35 Judgment of 17 February 1970, *Case C-31/69, Commission v Italy,* ECLI:EU:C:1970:10; Judgment of 9 February 2006, *Case C-305/03, Commission v the United Kingdom,* ECLI:EU:C:2006:90, paras. 22–23; Judgment of 20 March 1997, *Case C-96/95, Commission v Germany,* ECLI:EU:C:1997:165, para. 23; *Case C-439/99, Commission v Italy,* para. 11; Judgment of 20 June 2002, *Case C-287/00, Commission v Germany,* ECLI:EU:C:2002:388, para. 18.

36 *Case C-456/03, Commission v Italy,* paras. 35–37; Judgment of 21 September 1999, *Case C-392/96, Commission v Ireland,* ECLI:EU:C:1999:431, para. 51, Judgment of 29 April 2004, *Case C-117/02, Commission v Portugal,* ECLI:EU:C:2004:266, para. 53.

37 Judgment of 27 April 2006, *Case C-441/02, Commission v Germany,* ECLI:EU:C:2006:253, para. 60; Judgment of 11 May 1989, *Case C-76/86, Commission v Germany,* ECLI:EU:C:1989:184, para. 8.

38 *Case C-439/99, Commission v Italy,* para. 11.

39 *Case C-305/03, Commission v the United Kingdom,* paras. 22–23; Judgment of 1 February 2005, *Case C-203/03, Commission v Austria,* ECLI:EU:C:2005:76, para. 29.

40 *Case C-456/03, Commission v Italy,* para. 39; Judgment of 16 September 1997, *Case C-279/94, Commission v Italy,* ECLI:EU:C:1997:396, para. 25; and Judgment of 11 July 2002, *Case C-139/00, Commission v Spain,* ECLI:EU:C:2002:438, para. 19.

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into conformity with EU legal requirements has already been started but has not yet been completed because of the lengthy and complex procedures that must be followed. According to the settled case law of the CJEU, a Member State may not justify non-compliance with obligations under EU law based on provisions of its national legal system, including constitutional provisions.[41] Similarly, a Member State cannot rely on the direct effect of directives as a defence against a claim that it has failed to wholly and correctly implement a directive.[42]

However, a borderline case of inadmissibility and dismissal on the merits is when the CJEU accepts the Member State's argument that the legal effects have ceased, *i.e.,* that the impact of the infringement has essentially been eliminated. In such a case, the CJEU dismisses the action for infringement as inadmissible, considering that the Member State's plea that the alleged violation could no longer produce legal effects following the expiry of the time limit set in the reasoned opinion was well-founded.[43]

5. Enforcing the CJEU's Judgments

The CJEU's rulings are declaratory: they determine whether the Member State concerned has infringed EU law. Should the CJEU find an infringement, the Member State must enforce the judgment, *i.e.,* to end the situation that infringes EU law. This voluntary enforcement is based on the loyalty clause set out abstractly in Article 4(3) TEU and fleshed out more concretely in Article 260(1) TFEU.

Whether the Member State is sued by the Commission or by another Member State, the Member State will appear as a single entity in the proceedings, and the Court's rulings will be declaratory in its direction: the Court will not have direct access to the national legal system, but the Member State will have to remedy the breach of law. In other words, the CJEU only establishes the infringement but does not (may not) determine the measures necessary to comply with its judgment. This means that the

41 Judgment of 8 April 2014, *Case C-288/12, Commission v Hungary,* ECLI:EU:C:2014:237, para. 35, and the case law cited.

42 Judgment of 6 May 1980, *Case C-102/79, Commission v Belgium,* ECLI:EU:C:1980:120, para. 12; Judgment of 25 July 1992, *Case C-208/90, Emmott,* ECLI:EU:C:1991:333, para. 20; *Case C-96/95, Commission v Germany,* para. 37.

43 Judgment of 18 May 2006, *Case C-221/04, Commission v Spain,* ECLI:EU:C:2006:329, paras. 25–26; Judgment of 7 April 2011, *Case C-20/09, Commission v Portugal,* ECLI:EU:C:2011:214, para. 33.

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measures needed to comply with the judgment finding an infringement are not the subject of the judgment;[44] the choice of the form and nature of the measures remain a matter for the Member State to choose. The enforcement of decisions of the CJEU is not optional but obligatory for the Member State under the principle of *pacta sunt servanda* and the loyalty clause derived from the Treaties. In this regard, Article 4(3) TEU lays down a positive and a negative obligation. On the one hand, Member States must take appropriate measures, whether general or particular, to ensure fulfilment of obligations arising from the Treaties or resulting from action taken by the institutions of the Union, and must assist the Union in the performance of its tasks. On the other hand, Member States must refrain from any measure which could jeopardize the attainment of the Union's objectives. The principle of loyalty is concretized in Article 260(1) TFEU,[45] according to which if the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. While Article 260(1) TFEU does not specify the time limit by which the judgment must be executed, the CJEU has consistently held that the interest of the immediate and uniform application of EU law requires compliance to begin immediately and to be completed as soon as possible.[46]

6. Financial Penalties

As a safeguard for the enforcement of CJEU judgments, Member States introduced pecuniary sanctions in the Maastricht Treaty. In case of non-notification infringements, such sanctions may be requested already in the procedure under Article 258 TFEU. However, in case of substantive infringement procedures, the Commission is empowered to initiate a second procedure under Article 260(2) TFEU for enforcing CJEU judgments with the prospect of a financial penalty.

Under the latter provision, if the European Commission considers that the Member State concerned has not complied with the CJEU's judgment,

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44 *Case C-288/12, Commission v Hungary,* para. 33.

45 Claes 2006, p. 400.

46 Judgment of 14 December 2023, *Case C-109/22, Commission v Romania,* ECLI:EU:C:2023:991, para. 67, and the case law cited; Judgment of 6 November 1985, *Case C-131/84, Commission v Italy,* ECLI:EU:C:1985:447, para. 7; Judgment of 12 November 2019, *Case C-261/18, Commission v Ireland,* ECLI:EU:C:2019:955, para. 123, and the case law cited.

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i.e., has not fulfilled its obligations under the CJEU's judgment, the Commission may refer the Member State back to the CJEU after allowing the Member State to submit its observations.[47] This means that – unlike in the non-notification infringement proceedings – in case of substantive infringement proceedings, there is a second procedure before the CJEU where financial penalties might be applied.[48] In this regard, it seems to be appropriate to use the terminology of first and second judgments on failure to fulfil obligations: failure to comply with the first CJEU judgment's finding may result in the Member State being ordered to pay a penalty or a lump sum in the second infringement procedure.[49]

Several similarities can be established between the first proceedings concerning the breach of EU legal obligations and the second, subsequent proceedings for failure to enforce a CJEU judgment. First, the date of the violation of obligations is of primary importance in the case law of the CJEU which is defined as the date of reference. The reference date for assessing the existence of a failure to fulfil an obligation within the meaning of Article 260(2) TFEU (*i.e.,* the breach of the obligation to take the necessary measures to comply with the judgment of the CJEU) is the expiry of the period laid down in the letter of formal notice issued under Article 260(2) TFEU.[50] This date is of similar importance and effect to the time limit set in the reasoned opinion sent out in the first, pre-litigation procedure.[51] Second, the requirement of legal certainty applies equally as under Article 258 TFEU; accordingly, the issuance of a letter of formal notice under Article 260(2) TFEU has significant legal consequences. In the course of the pre-litigation procedure, the Commission must examine whether the first judgment finding an infringement has been enforced. As a first step, the Commission requests information from the Member State, with an information letter on the measures taken to comply with the first judgment. If the Commission is not satisfied with the Member State's reply, it sends a formal notice setting out the deadline for compliance. Here, the Commission must clearly state that the first infringement judgment has not yet been complied

47 *Case C-174/21, Commission v Bulgaria,* para. 22.

48 Judgment of 12 July 2005, *Case C-304/02, Commission v France,* ECLI:EU:C:2005:444, para. 80; *Case C-174/21, Commission v Bulgaria,* para. 22.

49 Judgment of 4 July 2000, *Case C-387/97, Commission v Greece,* ECLI:EU:C:2000:356, para. 42.

50 *Case C-174/21, Commission v Bulgaria,* para. 24; Judgment of 11 December 2012, *Case C-610/10, Commission v Spain,* ECLI:EU:C:2012:781, para. 67.

51 Judgment of 14 March 2006, *Case C-177/04, Commission v France,* ECLI:EU:C:2006:173, para. 20; *Case C-304/02, Commission v France,* para. 30.

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with. Accordingly, in the event of a legal action, the CJEU will examine whether the Commission has established *prima facie* that the judgment's requirements have not yet been fulfilled by the reference date.[52]

If the CJEU finds in the second infringement procedure that the first infringement judgment has not been enforced, it will impose a financial penalty to the infringing Member State. However, the two types of infringements are essentially different when it comes to financial penalties. Whereas in the case of non-notification infringement proceedings, the CJEU is bound by the amounts requested by the Commission in its application, no such limit applies in the case of substantive infringement proceedings, and the Commission's proposal for the level of the financial penalty is merely a helpful reference point. This means that the CJEU has discretion to determine the amount of the fine in a way it deems appropriate under the circumstances. In determining the financial sanction, the following criteria must be taken into account: the seriousness of the infringement, its duration and the deterrent effect of the financial sanction, the need to avoid a repetition of the infringement,[53] and its proportionality both to the infringement established and to the ability of the Member State concerned to pay.[54]

To ensure transparency and equal treatment, the Commission has published several communications[55] since 1996, setting out its policy and methodology for calculating financial penalties. The most recent amendment of the current 2023 Communication of the Commission took place in 2025.[56]

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52 *Case C-174/21, Commission v Bulgaria,* para. 27; Judgment of 5 December 2019, *Case C-642/18, Commission v Spain,* ECLI:EU:C:2019:1051, paras. 17, 18, 26, and the case law cited.

53 *Case C-387/97, Commission v Greece,* para. 92; Judgment of 25 February 2021, *Case C-658/19, Commission v Spain,* ECLI:EU:C:2021:138, paras. 63 and 73; Judgment of 16 July 2020, *Case C-550/18, Commission v Ireland,* ECLI:EU:C:2020:564, para. 81.

54 Judgment of 25 November 2003, *Case C-278/01, Commission v Spain,* ECLI:EU:C:2003:635.

55 In 1996, the Commission published a memorandum on applying Article 171 of the EC treaty, followed in 1997 by its first communication on the method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty. In 2001, the Commission adopted an internal Commission Decision on the method of the calculation of fines, followed in 2005 by a Communication on the implementation of Article 228 of the EC Treaty. In 2010, the Commission adopted a Communication on the implementation of Article 260(3) TFEU, following the amendments introduced by the Lisbon Treaty. The current Communication was issued in 2023, updated in 2024 and amended in 2025.

56 Modification of the method of calculation of financial penalties proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, C/2025/1481.

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Initially,[57] the Commission introduced a method for calculating the Member State's ability to pay based on the gross domestic product (GDP) of the Member State (weighted 2/3) and the population of the Member State concerned (weighted 1/3). However, in its judgment of 25 April 2024 in *Case C-147/23,*[58] the CJEU ruled that there is no absolute link between the population of a Member State and its capacity to pay. Therefore, the demographic criteria cannot be considered when determining the Member States' ability to pay. Thus, the Communication currently in use follows a different method for determining the Member State's ability to pay ('coefficient n'). The new method of calculation does not apply the demographic criteria. The so-called 'coefficient n' is defined as the ratio of the given Member State's GDP to the Member State's average GDP, which is the ability to pay of the Member State concerned in relation to other Member States. The Communication contains precise calculation methods for calculating the lump sum and penalty payment, including daily, minimum, and reference amounts. The new value of the 'coefficient n' for each Member State is also available in a table in the Annex to the revised Communication.

There are two types of financial penalties. If the CJEU finds that the Member State concerned has not complied with its judgment, it may order it to pay a lump sum or penalty payment. Nevertheless, the CJEU may simultaneously apply both types of penalties, particularly where the infringement has been committed over a long period and is likely to be persistent.[59]

6.1. The Lump Sum Penalty

The lump sum is proportional to the past infringement and ensures that it is remedied. According to the case law of the CJEU, the lump sum must be determined in each case based on all the relevant factors relating to the characteristics of the infringement established and the conduct of the Member State concerned in the proceedings initiated under Article 260 TFEU. This provision gives the CJEU broad discretion[60] to decide whether or not to impose such a sanction. The discretionary criteria include whether the effective prevention of a repetition of a similar breach of EU law in the future

57 Commission Notice 2023/C 2/01 – Financial penalties in infringement proceedings.
58 Judgment of 25 April 2024, *Case C-147/23, Commission v Poland,* ECLI:EU:C:2024:346, paras. 84–86.
59 *Case C-304/02, Commission v France,* para. 81.
60 *Case C-109/22, Commission v Romania,* para. 78, and the case law cited.

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justifies the application of a dissuasive measure.[61] The lump sum should be proportionate to the infringement committed.[62] Other criteria to be considered are the seriousness and duration of the infringements found, and the solvency of the Member State concerned.[63]

6.2. Periodic Penalty Payments

In contrast with the lump sum payment, the penalty payment is prospective. It is payable daily until the infringement is remedied, thus incentivizing the Member State to comply with the CJEU's judgment as soon as possible. Accordingly, the imposition of a periodic penalty payment is justified only if the infringement based on non-compliance with the previous judgment persists at the time of the evaluation by the CJEU.[64] The purpose of a periodic penalty payment is to end the infringement complained of, and the CJEU must set it in such a way as to be both appropriate under the circumstances and to the infringement found, including the Member State's ability to pay.[65]

In the case of a periodic penalty payment, the Commission's proposals on the fine amount cannot bind the CJEU, but only serve as a helpful reference point.[66] According to the CJEU, the essential criteria to be taken into account for determining the amount of a periodic penalty payment to ensure that it is coercive for the uniform and effective application of EU law are the following: the gravity of the infringement, the duration of the infringement and the ability of the Member State concerned to pay. In applying those criteria, the CJEU must take into account, in particular, the consequences for private and public interests of non-compliance with the judgment and the

61 Judgment of 13 June 2024, *Case C-123/22, Commission v Hungary,* ECLI:EU:C:2024:493, para. 99.

62 *Case C-109/22, Commission v Romania,* para. 80, and the case law cited.

63 *Case C-123/22, Commission v Hungary,* para. 101; *Case C-109/22, Commission v Romania,* para. 81, and the case law cited.

64 *Case C-123/22, Commission v Hungary,* para. 137; *Case C-109/22, Commission v Romania,* para. 52, and the case law cited.

65 Importantly, on 20 November 2017, the CJEU held that it has power under Article 279 TFEU procedure as well, empowering the CJEU to prescribe any necessary interim measures in any cases before it, to impose a periodic penalty payment on a Member State, if the Member State fails to comply with the interim measures ordered. Judgment of 17 April 2018, *Case C-441/17, Commission v Poland,* ECLI:EU:C:2017:877, para. 102.

66 *Case C-123/22, Commission v Hungary,* para. 140; *Case C-109/22, Commission v Romania,* para. 58, and the case law cited.

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urgency with which the Member State concerned must comply with its obligations.[67]

6.3. Hungary-related Developments

Recently, Hungary provided examples for both types of infringements that resulted in sanctions.

Concerning the *non-notification type of infringement,* Member States had to implement the whistleblowers directive until 17 December 2021.[68] The European Commission had to be informed by this deadline. Still, five Member States – Germany, Luxembourg, the Czech Republic, Estonia, and Hungary – have not taken the necessary measures and have not fulfilled their obligations under the directive. Therefore, the Commission launched infringement procedures under Article 260(3) TFEU and the CJEU in cases *C-149/23 Commission v Germany, C-150/23 Commission v Luxembourg, C-152/23 Commission v Czech Republic, C-154/23 Commission v Estonia and C-155/23 Commission v Hungary* ordered all five Member States to pay financial penalties. The CJEU fixed the lump sum from the date of the infringement until the date the infringement has been eliminated, or failing that, the date on which the CJEU's judgment is delivered, and a daily penalty thereafter to be paid until the necessary legal provisions are adopted. Accordingly, in the case of Hungary, a lump sum has been requested for the period starting from December 2021, together with a periodic penalty payment of €13,650 per day from the date of the judgment. However, in the meantime, Hungary eliminated the unlawful situation on 24 July 2023, with the entry into force of Law No XXV of 2023 and Government Decree No 225/2023; therefore, it was condemned only to pay a lump sum of EUR 1,750,000.[69]

Concerning the *substantive infringement procedure,* it must be recalled that the European Commission launched infringement proceedings against Hungary due to its asylum rules, including the transit zones established in the country. The matter has reached the court phase, where Hungary lost the case in December 2020. In its first judgment of 17 December

67 *Case C-123/22, Commission v Hungary,* para. 141.

68 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

69 Judgment of 6 March 2025, *Case C-155/23, Commission v Hungary,* ECLI:EU:C:2025:151.

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2020,[70] the CJEU found that Hungary had failed to fulfil its obligations by not complying with EU law governing, in particular, the granting of international protection and the return of illegally staying third-country nationals. This infringement consists of restricting access to procedures for international protection, unlawfully detaining persons seeking such protection in transit zones, and violating the right of such individuals to remain in Hungary until a final decision has been taken on their appeal against the rejection of their application, and the removal of illegally staying third-country nationals. Following the decision, the Commission launched the second infringement procedure for non-compliance with the CJEU's judgment on 21 February 2022, requesting financial penalties, after finding that Hungary (apart from closing the transit zones, which it had already done before the judgment was delivered) had failed to comply with the 2020 judgment. In its second judgment,[71] the CJEU holds that Hungary has not taken the measures necessary to comply with the 2020 judgment as regards access to the international protection procedure, the right of applicants for international protection to remain in Hungary pending a final decision on their appeal against the rejection of their application and the removal of illegally staying third-country nationals. By doing so, Hungary has deliberately withdrawn from the entire common EU policy on international protection and from the application of the rules on the removal of illegally staying third-country nationals, in breach of the principle of loyal cooperation. This conduct significantly jeopardizes the unity of EU law, which has a very serious impact on both private interests, including the interests of asylum seekers, and the public interest. Hungary has failed to fulfil its obligations, which, among other things, has financial implications, shifting the responsibility for receiving applicants for international protection, assessing their applications, and returning illegally staying third-country nationals, which seriously undermines the principle of solidarity and fair sharing of responsibility among Member States.

In this procedure, the Commission requested the CJEU to order Hungary to pay a daily lump sum of EUR 5468.45, amounting in total to at least EUR 1,044,000, for the period from the date on which the judgment in the 2020 *Commission v Hungary* judgment was delivered until the date on which the defendant complies with that judgment or the date of delivery of

70 Judgment of 17 December 2020, *Case C-808/18, Commission v Hungary,* ECLI:EU:C:2020:1029.

71 Judgment of 13 June 2024, Case C-123/22, *Commission v Hungary,* ECLI:EU:C:2024:493.

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the second infringement procedure's judgment, together with a daily penalty payment of EUR 16,393.16 in case Hungary has not yet complied with the first judgment. Nevertheless, the CJEU – "in the light of […] the exceptional seriousness of the infringements at issue and Hungary's failure to cooperate in good faith in order to bring them to an end"[72] – increased the penalty payments and condemned Hungary to pay a lump sum of €200 million with an additional €1 million daily penalty payment until the government implements a migration law-related ruling of the CJEU.

7. Concluding Thoughts

Infringement proceedings are central to ensuring Member State compliance with EU law. Regarding both types of infringements, *i.e.,* non-notification and substantive infringements, the European Commission plays a vital role as the guardian of the Treaties. The Member States have recognized the proceedings' importance and sought to make the judicial review and the judicial enforcement of EU law as complete as possible in the founding treaties.[73] This is well illustrated by the legal bases empowering EU institutions to request and impose financial penalties in the Maastricht Treaty, serving as a guarantee for the horizontal relations of the 'High Contracting Parties'.

The two types of financial penalties are a lump sum and a penalty payment. Both the lump sum and the penalty payment have the same purpose: to encourage the Member State in breach to comply with the judgment establishing the infringement. In particular, the imposition of a penalty payment seems appropriate to incentivize the Member State to bring the infringement to an end as soon as possible. The imposition of a lump sum is based more on an assessment of the consequences of the infringement for the private and public interests of the Member State concerned, in particular where the infringement has persisted for an extended period since the judgment had established it. In addition, the CJEU has interpreted Article 260(2) TFEU as meaning that the application of a 'cumulative' sanction cannot be excluded because of the different objectives pursued, in particular where the breach of obligations has been of long duration and is of a persistent nature.[74] We may conclude that there is extensive case law on the application

72 *Case C-123/22, Commission v Hungary,* ECLI:EU:C:2024:493, para. 132.

73 Anthony Arnull, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley', *Law Quarterly Review,* Vol. 112, July 1996, p. 416.

74 *Case C-304/02, Commission v France,* paras. 80–83.

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of this system of sanctions and on the mechanism for enforcing judgments of the CJEU,[75] and recently, the cases involving Hungary have also contributed to the clarification of the penalties' mechanisms.

75 Id. para. 92; *Case C-174/21, Commission v Bulgaria,* para. 23.

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