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COMMUNICATION FROM THE COMMISSION

Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom

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I. INTRODUCTION

Under the Treaty on the Functioning of the European Union (TFEU), where the Commission refers a Member State to the Court of Justice of the European Union for failing to fulfil an obligation under the Treaties, the Court may impose financial sanctions in two situations:

    (a) where the Member State has not taken the necessary measures to comply with an earlier judgment of the Court finding an infringement of EU law (Article 260(2) TFEU);

    (b) where the 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 imposed by the Court of Justice may be composed of a *lump sum payment*, to penalise the continuation of the infringement[1], and a *daily penalty payment*, to motivate the Member State concerned to bring the infringement to an end as soon as possible after the delivery of the judgment[2]. The Commission proposes amounts for the financial sanctions to the Court, which takes the final decision.

The general approach of the Commission when calculating the proposed sanctions 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] The 'n' factor is combined with other factors – the seriousness of the infringement, and its duration – in the Commission's calculation of the proposed sanctions.

Since 2019[6], the Commission has calculated the 'n' factor on the basis of two elements: Gross Domestic Product (GDP), and the number of seats for representatives in the European Parliament allocated to each Member State[7]. The Commission determines the reference 'n'

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[1]   Communication from the President: Re-cast Communication on the application of Article 228 of the EC Treaty (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 EC Treaty (OJ C 63, 28.2.1997, p. 2).

[4]   See in particular Communication from the Commission - Implementation of Article 260(3) of the Treaty (OJ C 12, 15.1.2011, p.1) and Communication from the Commission - EU law: Better results through better application (OJ C 18, 19.1.2017, p. 10).

[5]   SEC(2005) 1658, point 14.

[6]   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 C(2019) 1396 final (OJ C 70, 25.2.2019, p. 1).

[7]   See Article 3(1) of European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament (OJ L 165 I, 2.7.2018, p. 1).

factor by using the average of each of the two elements used, GDP and the number of representatives in the European Parliament.[8]

The basic figures used in the calculation are updated yearly to reflect economic developments in the Member States.

The latest update[9] still took account of the GDP of the United Kingdom and the number of seats in the European Parliament allocated to the United Kingdom prior to its withdrawal from the Union. This is because, under the Withdrawal Agreement, the Commission could still refer the United Kingdom to the Court of Justice under Article 260 TFEU during the transition period.

However, now that the transition period has ended, the data used to calculate financial sanctions need to be adjusted. The GDP of the United Kingdom and the number of seats in the European Parliament previously allocated to the United Kingdom are no longer relevant and should not be used for calculating the financial sanctions that the Commission proposes in respect of the 27 Member States.

This adjustment was already announced in the Commission Communications of February 2019[10] and September 2020[11].

II. ADJUSTED 'N' FACTORS FOR 2021

The adjusted 'n' factors for the Member States following the removal of the data relating to the United Kingdom from the calculations are as follows:

Table 1: Adjusted 'n' factors for 2021

	2021 n factors
Belgium	0,86
Bulgaria	0,28
Czechia	0,59
Denmark	0,57
Germany	4,95
Estonia	0,12
Ireland	0,59
Greece	0,54
Spain	2,33

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[8] 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 all Member States; 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.

[9] Communication from the Commission - Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, C(2020)6043 final (OJ C 301, 11.9.2020, p. 1).

[10] C(2019)1396 final.

[11] C(2020)6043 final.

France	3,77
Croatia	0,22
Italy	3,17
Cyprus	0,10
Latvia	0,13
Lithuania	0,20
Luxembourg	0,17
Hungary	0,47
Malta	0,08
Netherlands	1,32
Austria	0,75
Poland	1,43
Portugal	0,57
Romania	0,74
Slovenia	0,17
Slovakia	0,31
Finland	0,50
Sweden	0,86

III. ADJUSTMENT FACTOR

1. ADJUSTED MINIMUM LUMP SUMS

The minimum lump sums for each Member State are calculated by multiplying a reference lump sum by the 'n' factor and the average inflation in the 27 Member States ('EU27') in the reference year. The increase of the 'n' factors resulting from the United Kingdom's withdrawal from the Union (see section II) would therefore result in higher financial sanctions being proposed by the Commission to the Court[12].

To avoid an increase in the financial sanctions proposed in respect of any of the Member States as a direct result of the withdrawal of the United Kingdom from the Union, an **adjustment factor of 0.836** will be applied to the formula used to calculate the minimum lump sums. This adjustment factor corresponds to a situation whereby the Member State with the highest increase in its 'n' factor (Ireland) would not see its minimum lump sum increase by more than would otherwise be the case (that is to say, an increase corresponding solely to inflation and evolution of GDP, calculated at 4.5 %).

The formula used for determining the national minimum lump sums is therefore as follows:

Minimum lump sum = reference minimum lump sum x EU27 inflation 2019 x 'n' factor **x 0.836**

The current **reference minimum lump sum** is EUR 2 610 384; adjusted for inflation (+1.7%), the reference lump sum used in 2021 will be **EUR 2 656 000**.

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[12] Without any adjustment, the minimum lump sums for all Member States would increase by 13.7% on average. The range varies from +9.4% (Belgium and Portugal) to +25.1% (Ireland).

Table 2: 2021 minimum lump sums __with adjustment factor of 0.836__ (reference year: 2019)

	2020 Minimum lump sums (EUR thousand)	**2021** Minimum lump sums (EUR thousands)	Minimum lump sums evolution 2020 => 2021
Belgium	2 088	**1 909**	-8.6%
Bulgaria	653	**622**	-4.7%
Czechia	1 384	**1 310**	-5.3%
Denmark	1 331	**1 266**	-4.9%
Germany	11 982	**10 990**	-8.3%
Estonia	261	**266**	+1.9%
Ireland	1 253	**1 310**	+4.5%
Greece	1 305	**1 199**	-8.1%
Spain	5 377	**5 173**	-3.8%
France	8 849	**8 370**	-5.4%
Croatia	496	**488**	-1.6%
Italy	7 596	**7 038**	-7.3%
Cyprus	235	**222**	-5.5%
Latvia	313	**289**	-7.7%
Lithuania	470	**444**	-5.5%
Luxembourg	392	**377**	-3.8%
Hungary	1 122	**1 044**	-7.0%
Malta	183	**178**	-2.7%
Netherlands	3 002	**2 931**	-2.4%
Austria	1 749	**1 665**	-4.8%
Poland	3 367	**3 175**	-5.7%
Portugal	1 384	**1 266**	-8.5%
Romania	1 723	**1 643**	-4.6%
Slovenia	392	**377**	-3.8%
Slovakia	731	**688**	-5.9%
Finland	1 175	**1 110**	-5.5%
Sweden	2 062	**1 909**	-7.4%
EU average			-4.9%

2. ADJUSTED STANDARD FLAT-RATE AMOUNTS

The current **standard flat-rate amount for daily penalty payments**[13] is EUR 3 154[14]. For 2021, without any adjustment factor and taking into account only inflation, the standard flat-rate amount for daily penalty payments would be EUR 3 209.

After applying the adjustment factor of 0.836 to that figure, the adjusted standard flat-rate amount for daily penalty payments for 2021 is **EUR 2 683**.

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[13] The amount of the daily penalty payment is calculated by multiplying a *standard flat-rate amount*, first by *factors for seriousness* and *duration*, and then by the 'n' factor.

[14] C(2020)6043 final

The current **standard flat-rate amount for lump sum payments**[15] is EUR 1 052[16]. For 2021, without any adjustment factor and taking into account only inflation, the standard flat-rate amount for lump sum payments would be EUR 1 070.

After applying the adjustment factor of 0.836 to that figure, the adjusted standard flat-rate amount for the lump sum payment for 2021 is **EUR 895**.

IV. ADJUSTMENT OF FINANCIAL SANCTIONS PROPOSED FOR THE UNITED KINGDOM

The figures set out in Section II only apply to Member States.

Pursuant to Article 12(4) of the Protocol on Ireland/Northern Ireland and Article 12 of the Protocol relating to the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, the Commission and the Court of Justice retain the powers conferred upon them by the Treaties in connection with the application of Union law made applicable to the United Kingdom under those Protocols. In addition, under Article 160 of the Withdrawal Agreement, the Court of Justice retains jurisdiction under Articles 258, 260 and 267 TFEU in respect of the interpretation and application of certain provisions of Part Five of the Withdrawal Agreement.

It is therefore possible for the Commission to refer the United Kingdom to the Court of Justice with a request for financial sanctions, after 31 December 2020, pursuant to those provisions.

Should the Commission do so, it could no longer rely on the formula previously used to calculate the 'n' factor,[17] given that the United Kingdom no longer has any seats in the European Parliament. For that reason, in the 'n' factor formula to be used for calculating financial sanctions to be imposed on the United Kingdom, the number of seats in the European Parliament **is replaced by a fixed numerical factor of 2.8,** corresponding to the share of seats allocated to the United Kingdom in the European Parliament in 2018 in relation to the Union average[18].

This results in the following figures for 2021:

- United Kingdom 'n' factor: **3.70**
- United Kingdom minimum lump sum: **EUR 8 215 000**

V. APPLICATION

The Commission will apply the updated figures set out in this Communication in decisions it takes to bring cases before the Court of Justice as from the date of publication of this Communication in the *Official Journal of the European Union*.

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[15] The amount of the lump sum is calculated by multiplying a *standard flat-rate amount* (different from the one for daily penalty payments) by *a factor for seriousness*, the 'n' factor and *the number of days the infringement persists* (until compliance or until judgment).

[16] C(2020)6043 final

[17] See footnote 8.

[18] Specific United Kingdom 'n' factor formula: $\sqrt{\dfrac{GDP_{UK}}{GDP_{avg}}} \times 2.8$