COMMUNICATION FROM THE COMMISSION

Application of Article 228 of the EC Treaty

I. Introduction

1. The possibility of imposing financial sanctions on a Member State that has failed to implement a judgment establishing an infringement was introduced by the Maastricht Treaty, amending former Article 171, now Article 228 of the EC Treaty and Article 143 of the Euratom Treaty[1].

2. In 1996 the Commission published a communication on the application of this provision[2]. In 1997 it published a second communication dealing more particularly with the method of calculating penalty payments[3]. And in 2001 it adopted an internal decision on the definition of the "duration coefficient" applied in this calculation[4]. The Court of Justice of the European Communities has in the meantime delivered three judgments applying Article 228[5]. The criteria set out in the 1996 and 1997 communications have been confirmed by the Court[6].

3. This communication replaces the communications of 1996 and 1997. It takes over the main content but also reflects recent case law, particularly concerning the lump sum payment and the principle of proportionality. It also updates the method of calculating sanctions and adapts it to enlargement of the Union.

4. The final decision on the imposition of the sanctions laid down in Article 228 lies with the Court of Justice, which has full jurisdiction in this area. Nevertheless the Commission, as guardian of the Treaties, plays a determining role in so far as it is responsible for initiating the Article 228 procedure and, if necessary, bringing the case before the Court of Justice with a proposal for the application of a lump sum and/or penalty payment of a specific amount.

   In the interests of transparency, the Commission states below the criteria it intends to apply to indicate to the Court the amount of the financial sanctions it considers appropriate in the context. The Commission wishes to point out that both the choice of criteria and the way in which they are applied will be governed by the need to ensure the effective application of Community law.

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1 All references to Article 228 of the EC Treaty apply also to Article 143 of the Euratom Treaty, as the wording is identical.

2 OJ C 242, 21.8.1996, p. 6.

3 OJ C 63, 28.2.1997, p. 2.

4 See PV(2001) 1517/2 of 2 April 2001. See point 17 of this communication.

5 Judgments in Case C-387/97 *Commission v Greece* [2000] ECR I-5047 of 4 July 2000, Case C-278/01 *Commission v Spain* [2003] ECR I-14141 of 23 November 2003 and in Case C-304/02 *Commission v France* of 12 July 2005 (not yet published).

6 Judgment in Case C-387/97 *Commission v Greece*, paragraphs 84 to 92.

5. The case-by-case application of the rules and general criteria explained below and developments in the case law of the Court of Justice will enable the Commission further to develop its policy after the adoption of this communication. As each financial sanction must always be tailored to the specific case, the Commission reserves the right to use its discretion and to depart from these rules and general criteria, giving detailed reasons, where appropriate in particular cases, including recourse to use of the instrument of the lump sum.

II. General principles

6. The fixing of the sanction must be based on the objective of the measure itself, that is to ensure effective application of Community law. The Commission considers the calculation should be based on three fundamental criteria:

   – *the seriousness of the infringement,*

   – *its duration,*

   – *the need to ensure that the penalty itself is a deterrent to further infringements*.

7. The sanctions proposed to the Court of Justice by the Commission must be foreseeable for the Member States and fixed using a method that respects both the principle of proportionality and the principle of equal treatment among the Member States. It is also important to have a clear and uniform method, because the Commission must justify its calculation of the amount to the Court.

8. From the point of view of the effectiveness of the sanction, it is important to fix *amounts* that are appropriate in order to ensure their *deterrent effect*. The imposition of purely symbolic sanctions would deprive this instrument, which is complementary to the infringement procedure, of its useful effect and detract from the ultimate objective of this procedure, which is to ensure full application of Community law.

9. From the budgetary point of view, the penalty and lump sum payments constitute "other revenue" of the Community, within the meaning of Article 269 of the EC Treaty and Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources[7].

A. THE LUMP SUM PAYMENT

10. In the 1996 communication, the Commission states that as "the basic object of the whole infringement procedure is to secure compliance as rapidly as possible … a penalty payment is the most appropriate instrument for achieving it".

    The Commission adds that "this does not … mean that it will never ask for a lump sum to be imposed". Nevertheless, since then its practice in Article 228 cases has been systematically to ask the Court to impose penalties, which the Court has applied, thus confirming that the penalty instrument is appropriate.

[7] OJ L 253, 7.10.2000, p. 42.

10.1. Experience shows, however, that Member States often comply only at a late stage, sometimes only at the very end of the Article 228 procedure.

In these circumstances, the Commission feels that it needs to re-examine the question of the financial sanctions envisaged in Article 228. In effect, the Commission's practice only to apply to the Court for payment of a penalty for non-compliance after the Article 228 ruling means that late compliance before the ruling does not result in any sanction and so is not effectively discouraged.

Sticking with the penalty payment and not requesting a lump sum payment could mean accepting that, after the Court has found that a Member State has failed to fulfil its obligations, the same State could allow the situation to continue unchecked. But the Commission considers that every instance of prolonged failure to comply with a ruling of the Court of Justice in itself seriously undermines the principle of legality and legal certainty in a Community based on the rule of law.

10.2. The judgment of the Court of Justice in Case C-304/02 *Commission v France* confirmed that the two kinds of financial sanction (penalty and lump sum) can apply cumulatively for the same infringement, and applied this principle for the first time.

10.3. In the light of this reasoning, the Commission will from now on include in its applications to the Court under Article 228 a specification of:

– a penalty by day of delay after the delivery of the judgment under Article 228, and

– a lump sum penalising the continuation of the infringement between the first judgment on non-compliance and the judgment delivered under Article 228.

10.4. Equal treatment of Member States is best guaranteed by proposing a lump sum and a penalty payment, based on a predetermined and objective method for the calculation of the sanctions proposed. This systematic and objective approach has, since 1996, governed the practice of the Commission and the Court when proposing and fixing penalties under Article 228, and has proved to be effective and fair. Use of the lump sum payment should logically follow a similar approach.

10.5 In addition, the Commission does not exclude the possibility, in very specific cases, of recourse to the lump sum alone[8].

11. The logical consequence of the new approach concerning the lump sum payment is that in cases where a Member State rectifies the infringement after the referral to the Court and before the judgment is delivered under Article 228, the Commission will no longer withdraw its action for that reason alone. The Court, which cannot take a decision to impose a penalty payment because such decision has lost its purpose, can nevertheless impose a lump sum payment penalising the duration of the infringement up to the time the situation was rectified, because this aspect of the case has not lost its purpose. The Commission will endeavour to inform the Court without delay

[8] This approach could, for example, be appropriate in exceptional cases of repeated confirmed infringements or when it is clear that a Member State has completed all of the necessary measures to conform with the judgment but some time needs to elapse before the required result is achieved.

whenever a Member State terminates an infringement, at whatever stage in the judicial process. It will do the same when, following a judgment delivered under Article 228, a Member State rectifies the situation and the obligation to pay a penalty thus comes to an end.

12. The result that the Commission hopes to achieve from this change in the system of sanctions is that Member States will correct infringements more quickly and that there will be a reduction in the number of referrals to the Court under Article 228.

B. THE PRINCIPLE OF PROPORTIONALITY

13. Specific consequences have been drawn in recent case law from the principle of proportionality. Thus, in Cases C-387/97 *Commission v Greece* and C-278/01 *Commission v Spain,* the Court of Justice affirmed that a penalty payment should be appropriate to the circumstances and proportionate both to the breach found and to the ability to pay of the Member State concerned[9]. The Commission examines carefully in each case how best to take account of these principles when devising the sanction scheme it proposes to the Court. In particular, Case C-278/01 *Commission v Spain* shows that the sanction scheme should, to the extent appropriate, accommodate in advance the possibility of a change in circumstances.

From this perspective, four consequences can be drawn from the principle of proportionality and, more specifically, the principle of sanctions appropriate to the circumstances:

13.1. First, in cases involving several heads of infringement where the Commission considers that there are readily available, clear and objective grounds on which these heads of infringement can be evaluated separately without undermining the purpose of the procedure under Article 228, it will propose a distinct sanction for each head of infringement, while ensuring that this separation does not produce an increase in the overall volume of sanctions proposed compared with previous practice. This approach means rather that the overall volume of sanctions will be reduced as and when the Member State complies with part of the judgment, that is progressively for the various heads of infringement.

13.2. Second, there may be infringement situations, such as the one characterising Case C-278/01 *Commission v Spain* concerning quality standards for bathing water set by Directive 76/160/EEC, where, as the Court noted, "it is particularly difficult for the Member States to achieve complete implementation", and where "it is conceivable that the defendant Member State might manage significantly to increase the extent of its implementation of the Directive but not to implement it fully in the short term". In those circumstances, as the Court ruled, "a penalty which does not take account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found"[10].

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[9] See paragraph 90 of the judgment in Case C-387/97 *Commission v Greece* and paragraph 41 of the judgment in Case C-278/01 *Commission v Spain*.

[10] See paragraphs 47 to 52 of the judgment in Case C-278/01 *Commission v Spain.*

Therefore, in particular infringement situations comparable to that of Directive 76/160/EEC - characterised by a purely "result-based" obligation - where there is a readily available formula for mathematical adjustment of the sanctions in accordance with ongoing progress towards compliance, the Commission will suggest such a formula to the Court. Furthermore, the Commission will examine, on a case-by-case basis, whether and, if so, to what extent it may be appropriate to propose a similar, easily applicable variation mechanism in other infringement situations.

13.3. Third, Cases C-278/01 *Commission v Spain* and C-304/02 *Commission v France* illustrate that the reference time-frame for assessing continuing non-compliance after the second judgment and for determining when payment of the penalty becomes due may have to be adapted to the particular circumstances[11]. Where the degree of implementation can be assessed only at periodic intervals, care must be taken to avoid the situation where a penalty payment continues to accrue over periods in which the infringement has in fact ended, but this has not yet been ascertained. While the Commission will normally continue to propose penalties accruing on a daily basis, it will therefore, in appropriate cases, suggest applying a different reference time-frame, such as six months or one year. The appropriate reference time-frame will depend on the method of assessing compliance as provided for in the relevant legislation.

13.4. Fourth, in special circumstances, it may also be justified to provide for the suspension of a penalty. For example, in certain cases of incorrect application, the Member State might affirm at some point that all the necessary measures have been taken. Some time will then be necessary for verification, in cooperation between the Member State and the Commission, of the effectiveness of these measures[12]. In addition, in exceptional cases, a Member State may already have taken all necessary measures to comply with the judgment but some time is required to elapse before the required result is achieved. In such situations it may be appropriate for the Court to lay down, in its judgment rendered on the basis of Article 228, the conditions and terms for a suspension, including the possibility for the Commission to conduct the necessary verification to determine whether the conditions for the start and the end of the suspension are met. The Commission may, as appropriate, submit proposals to the Court in this regard.

III. Fixing the amount of the penalty payment

14. The penalty to be paid by the Member State is the amount, calculated in principle by day of delay – without prejudice to any different reference period in specific cases (see point 13.3) – penalising non-compliance with a judgment of the Court, the penalty running from the day when the second judgment of the Court was served on the Member State concerned up to that on which the Member State brings the infringement to an end.

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[11] See paragraphs 43 to 46 of the judgment in Case C-278/01 *Commission v Spain*, and paragraphs 111 and 112 of the judgment in Case C-304/02 *Commission v France*.

[12] For instance, a Member State found against for having allowed an important nature site to deteriorate as a result of land drainage may carry out infrastructure works aimed at restoring the hydrological conditions that are ecologically necessary. A period of monitoring may be needed to determine whether the works have succeeded in remedying the harm done.

The amount of the daily penalty payment is calculated as follows:

– multiplication of a standard flat-rate amount by a coefficient for seriousness and a coefficient for duration,

– multiplication of the result obtained by an amount fixed by country (the "n" factor) taking into account the capacity of the Member State to pay and the number of votes it has in the Council.

A. FIXING THE STANDARD FLAT-RATE AMOUNT

15. The standard flat-rate amount is defined as the fixed basic amount to which the multiplier coefficients are applied. It penalises the violation of the principle of legality and the failure to comply with the judgments of the Court, which applies in all cases under Article 228. It has been calculated so that:

– the Commission retains a broad margin of discretion when applying the coefficient for seriousness,

– the amount is reasonable and viable for all Member States,

– the amount, multiplied by the coefficient for seriousness, should be high enough to maintain sufficient pressure on whichever Member State is concerned.

It is fixed at EUR **600** per day[13].

B. APPLICATION OF THE COEFFICIENT FOR SERIOUSNESS

16. An infringement concerning non-compliance with a judgment is always serious. But, for the specific needs of fixing the amount of the financial penalty, the Commission will also take account of two parameters closely linked to the basic infringement which gave rise to the judgment for non-compliance, that is *the importance of the Community rules breached and the impact of the infringement on general and particular interests.*

16.1. To evaluate *the importance of the Community provisions breached*, the Commission will take into consideration their nature and extent rather than their standing in the hierarchy of norms. Thus, for example, an infringement of the principle of non-discrimination should always be regarded as very serious, whether the infringement results from a violation of the principle established by the Treaty itself or a violation of the principle as set out in a regulation or directive. Generally speaking, infringements affecting fundamental rights or the four fundamental freedoms protected by the Treaty should be considered as serious and should result in an appropriate financial penalty.

16.2. In addition, where appropriate, account should be taken of the fact that the judgment which the Member State has not complied with forms part of established case-law

[13] The uniform flat-rate amount of EUR 500, published in 1997, has been index-linked to the GDP deflator and rounded off. The Commission will revise the amount every three years in line with inflation.

(for example when the judgment on non-compliance follows a similar judgment delivered on a reference for a preliminary ruling). The clarity (or the ambiguous or obscure nature) of the rule breached can be a determining factor[14].

16.3. Finally, where appropriate, account needs to be taken of a situation where, in order to comply with the judgment, the Member State has adopted measures it thought sufficient but the Commission considers insufficient, which is different from the situation where the Member State omits to take any action at all. Clearly, in the latter case, there can be no doubt that the Member State is in breach of Article 228(1). Likewise, a lack of full cooperation with the Commission during the procedure provided for in the first subparagraph of Article 228(2) constitutes an aggravating factor[15]. In contrast, account must be taken, as appropriate, of such mitigating factors as the fact that the judgment to be implemented gives rise to real questions of interpretation or particular intrinsic difficulties of compliance in the short term.

16.4. The *effects of infringements on general or particular interests* should be measured on a case-by-case basis, taking into account, for example:

– the loss of Community own resources,

– the impact of the infringement on the way the Community functions,

– serious or irreparable damage to human health or the environment,

– economic or other harm suffered by individuals and economic operators, including intangible consequences, such as personal development,

– the financial sums involved in the infringement,

– any possible financial advantage that the Member State gains from not complying with the judgment of the Court,

– the relative importance of the infringement taking into account the turnover or added value of the economic sector concerned in the Member State in question,

– the size of the population affected by the infringement (the degree of seriousness could be considered less if the infringement does not concern the whole of the Member State in question),

– the Community's responsibility with respect to non-member countries,

– whether the infringement is a one-off or a repeat of an earlier infringement (for example, repeated delay in transposing directives in a certain sector).

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[14] A Member State that goes against a clear rule or case law well established by the Court of Justice is committing a worse infringement than a Member State that applies an imprecise and complex Community rule that has never been submitted to the Court for interpretation or for a ruling on validity. See in this regard the case law of the Court on Member States' responsibility for infringements of Community law and in particular the judgment in Case C-392/93 *British Telecommunications* [1996] ECR I-1631 of 26 March 1996.

[15] See paragraph 92 of the conclusions of Advocate-General Geelhoed in Case C-304/02 *Commission v France*.

16.5. Moreover, when taking the *interests of individuals* into account for the purpose of calculating the amount of a penalty, the Commission does not set out to obtain redress for the damage and loss suffered as a result of an infringement, since such redress may be obtained by means of proceedings before the national courts. The Commission's purpose is rather to take into consideration the *effects of an infringement from the point of view of the individuals or economic operators concerned*; thus, for example, the effects are not the same if an infringement concerns a specific case of incorrect application (failure to recognise a qualification), or a failure to transpose a directive on the recognition of qualifications, which would undermine the interests of an entire profession.

16.6. The seriousness of the infringement affects the basic lump sum by a coefficient of between a minimum of 1 and a maximum of 20.

C. APPLICATION OF THE COEFFICIENT FOR DURATION

17. For the purpose of calculating the amount of the penalty payment, the period taken into account is the duration of the infringement from the date of the first Court judgment up to the date the Commission decides to refer the matter to the Court. This period will be taken into account by applying a multiplier to the standard lump sum.

The duration of the infringement increases the basic lump sum by a multiplier of between 1 and 3, calculated at a rate of 0.10 per month from the date the Article 226 judgment was delivered[16].

The Court has confirmed that the duration of the infringement must be taken into account both for the penalty payment and for the lump sum payment, given the specific purpose of each kind of sanction[17].

D. TAKING INTO ACCOUNT THE MEMBER STATE'S ABILITY TO PAY

18. The amount of the penalty payment should ensure that the sanction is both proportionate and dissuasive.

The deterrent effect of the penalty has two aspects. The sanction must be sufficiently high to ensure that:

– the Member State decides to rectify its position and bring the infringement to an end (it must therefore be higher than the benefit that the Member State gains from the infringement),

– the Member State does not repeat the same offence.

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16 See paragraphs 81, 102 and 108 of the judgment in Case C-304/02 *Commission v France*.

17 See paragraph 84 of the judgment in Case C-304/02 *Commission v France*.

18.1. The deterrent effect is taken into account by an "n" factor, defined as the geometric mean based, in part, on the gross domestic product (GDP) of the Member State in question and, in part, on the weighting of voting rights in the Council[18]. As a result, the "n" factor in effect combines the capacity to pay of each Member State – represented by its GDP – with the number of votes it has in the Council. The resulting formula produces reasonable divergence of 0.36 to 25.40 between the various Member States.

The "n" factor is:

Member State	**Special factor N**
Belgium	5.81
Czech Republic	3.17
Denmark	3.70
Germany	25.40
Estonia	0.58
Greece	4.38
Spain	14.77
France	21.83
Ireland	3.14
Italy	19.84
Cyprus	0.70
Latvia	0.64

[18] This 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 weighting of votes in the Council. It is obtained via the following formula:

$$\sqrt{\frac{GDP_{n}}{GDP_{Lux}} \times \frac{Votes_{n}}{Votes_{Lux}}}$$

where:
GDP n = GDP of the Member State concerned, in millions of euros
GDP Lux = GDP of Luxembourg
Votes n = number of votes each Member State has in the Council under the weighting laid down in Article 205 of the Treaty
Votes Lux = number of votes of Luxembourg.
The choice of Luxembourg as a basis for the calculation has no influence on the relative level of the coefficients for any two given Member States.

Lithuania	1.09
Luxembourg	1.00
Hungary	3.01
Malta	0.36
Netherlands	7.85
Austria	4.84
Poland	7.22
Portugal	4.04
Slovenia	1.01
Slovakia	1.45
Finland	3.24
Sweden	5.28
United Kingdom	21.99

18.2. In order to calculate the amount of the daily penalty payment to be applied to a Member State, the result obtained by applying the coefficients for seriousness and duration to the standard flat-rate amount is multiplied by the "n" factor (invariable) of the Member State in question. At the same time, the Commission reserves the right to revise this factor if there is any significant divergence from the real situation or if the weighting of votes in the Council is changed. In any case, the proportionately higher growth in GDP expected for the new Member States will lead the Commission to revise the "n" factor in three years' time.

The resulting method of calculation can therefore be summed up by the following general formula:

Dp = (Bfrap x Cs x Cd) x n

where: Dp = daily penalty payment; Bfrap = basic flat-rate amount "penalty payment"; Cs = coefficient for seriousness; Cd = coefficient for duration; n = factor taking into account the capacity to pay of the Member State concerned.

IV. Fixing the amount of the lump sum payment

19. In order to take full account of the deterrent effect of the lump sum payment and the principles of proportionality and equal treatment, the Commission will suggest to the Court a method which comprises:

– the setting of a minimum fixed lump sum, and

– a method of calculation based on a daily amount multiplied by the number of days the infringement persists, and so broadly similar to the method for calculating the penalty payment; this method will apply when the result exceeds the minimum lump sum.

20. Every time it refers a case to the Court of Justice under Article 228 the Commission will propose *at least* a fixed lump sum payment, determined for each Member State according to the "n" factor, irrespective of the result of the calculation described in points 21 to 24.

This fixed minimum base reflects the principle that any case of persistent non-compliance with a Court judgment by a Member State, irrespective of any aggravating circumstances, in itself represents an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction. The fixed minimum base also avoids the proposal of purely symbolic amounts which would have no deterrent effect and could undermine, rather than strengthen, the authority of Court judgments.

The minimum lump sum is set at:

	(n factor)	(minimum lump sum)[19]
Belgium	5.81	2 905 000
Czech Republic	3.17	1 585 000
Denmark	3.70	1 850 000
Germany	25.40	12 700 000
Estonia	0.58	290 000
Greece	4.38	2 190 000
Spain	14.77	7 385 000
France	21.83	10 915 000
Ireland	3.14	1 570 000
Italy	19.84	9 920 000
Cyprus	0.70	350 000
Latvia	0.64	320 000
Lithuania	1.09	545 000
Luxembourg	1.00	500 000

[19] The Commission will revise the minimum lump sum every three years in line with inflation.

Hungary	3.01	1 505 000
Malta	0.36	180 000
Netherlands	7.85	3 925 000
Austria	4.84	2 420 000
Poland	7.22	3 610 000
Portugal	4.04	2 020 000
Slovenia	1.01	505 000
Slovakia	1.45	725 000
Finland	3.24	1 620 000
Sweden	5.28	2 640 000
United Kingdom	21.99	10 995 000

21. In addition, and only if the minimum lump sum is exceeded, the Commission will propose that the Court determine the lump sum by multiplying a *daily amount* by the *number of days the infringement persists* between the date of delivery of the judgment under Article 226 and the date the infringement comes to an end, or, failing compliance, the date of delivery of the judgment under Article 228.

This method of calculation appears compatible with the concept of the lump sum, provided that at the time it is imposed, that is the date of the judgment, this calculation is possible and the Court can thus decide on a set amount.

22. It is appropriate to define the *dies a quo* as the day of the first judgment. In effect, the ruling in Case C-304/02 *Commission v France* states that the duration of the infringement to be taken into account in fixing sanctions is the period starting from the date of the first judgment[20]. Moreover, according to the case law, the process of complying with an infringement ruling must be "*initiated at once and completed as soon as possible*"[21]. Of course, the Commission must leave sufficient time, a longer or shorter period according to the case, for the Member State to complete the process of compliance, before issuing the reasoned opinion under Article 228, or risk seeing the Court reject its subsequent action[22]. However, if a reasonable period has been given to the Member State and it appears, at the end of this period, that full compliance with the judgment has not been achieved, the Member State must be considered as having failed, since the first judgment, to fulfil its obligation immediately to initiate the process of compliance and to complete it as soon as possible.

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20 See paragraphs 81, 102 and 108 of the judgment in Case C-304/02 *Commission v France*.

21 See paragraph 82 of the judgment in Case C-387/97 *Commission v. Greece*, citing earlier jurisprudence.

22 See paragraphs 27 to 31 of the judgment in Case C-278/01 *Commission v. Spain*.

23. *The daily amount* for determining the lump sum will be calculated in a broadly similar way to the method for determining the penalty payment, that is the:

– multiplying of a standard flat-rate amount by a coefficient for seriousness,

– multiplying of the result by a factor fixed by country (the "n" factor) taking into account both the capacity of the Member State to pay and the number of votes it has in the Council.

23.1. For calculation of the lump sum, the Commission will apply the same coefficient for seriousness and the same fixed "n" factor as for penalty payments.

23.2. However, it will start with a lower basic rate for the lump sum than for penalty payments. It is fair that the daily amount of the penalty payment should be higher than the lump sum payment, because the behaviour of the Member State concerned is more reprehensible once the Article 228 ruling has been delivered, since that involves a persistence of the infringement despite two consecutive judgments by the Court.

The minimum rate for the lump sum payment is fixed at EUR 200[23] per day, that is one third of the basic rate for penalty payments.

23.3. In contrast with the calculation of the penalty payment, a coefficient for duration is not applied, given that the duration of the infringement has already been taken into account by multiplying the daily amount by the number of days the infringement persists.

24. In view of the above, the method of calculation of the lump sum so determined can be summed up by the following general formula:

Ls = Bfals x Cs x n x dy

where:

Ls = lump sum payment; Bfals = basic flat-rate amount "lump sum payment"; Cs = coefficient for seriousness; n = factor taking into account the capacity to pay of the Member State concerned; dy = number of days the infringement persists.

V. Transitional rule

25. The Commission will apply the rules and criteria set out in this communication to all decisions it takes to refer matters to the Court of Justice under Article 228 of the EC Treaty from 1 January 2006.

26. However, in cases of infringements terminated by Member States in the course of 2006, the Commission will continue its current practice of withdrawing its action before the Court under Article 228. This will allow Member States to have time to adapt their future behaviour to the Commission's new policy.

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[23] The Commission will revise the lump sum every three years in line with inflation.