Failure to notify national measures - The 'one-stage infringement procedure' (Article 260(3) TFEU) is gaining momentum

(first published at https://eulawlive.com/weekend-edition/weekend-edition-no29/)

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In July 2019 and July 2020, the CJEU (Court of Justice of the EU) activated and refined the 'one-stage infringement procedure' (Article 260(3) TFEU). This is the *accelerated* infringement procedure introduced by the Lisbon Treaty, which empowers the Commission to apply for monetary sanctions already during the first court procedure commenced against the Member State that failed to notify transposition measures in due time.[2] In this article, I will briefly describe how the one-stage infringement procedure works (Part 1). Then I will outline the key messages of three relevant Grand Chamber judgments as well as their practical implications (Part 2). This will be followed by some recommendations to avoid sanctions in the one-stage infringement procedure (Part 3).

Part 1 – How does the 'one-stage infringement procedure' (Article 260 (3) TFEU) work?

First, it is worth looking at Article 260(3) TFEU (not underlined in the original):

> 'When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
>
> If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.'

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[2] Gáspár-Szilágyi, 19 (2013) EPL 281; also cf. Wennerås, 49 (2012) CMLR 145, Peers, 18 (2002) EPL 22; Várnay, 23 (2017) EPL 301; Pingel 2019 RTDE 663.

What are the special features of the one-stage infringement procedure? How does it differ from the conventional 'two-stage infringement procedure' (Articles 258, 260(1) and (2) TFEU)?

- Obviously, the main advantage of the one-stage infringement procedure is the narrowing of the procedure to only *one* pre-litigation procedure and *one* court procedure(instead of two in each instance).
- Another main difference is that in one-stage infringement procedures, the Member State can be sanctioned for the period *before* the CJEU judgment has been delivered. By contrast, in the two-stage infringement procedure no sanctions are possible concerning the period before the CJEU's first decision, which is declaratory, only (Article 260(1) TFEU).

The differences between one-stage and two-stage infringement procedures are illustrated in **Figures 1 and 2**. They build on a hypothetical directive that is to be implemented by 31 December 2020. The deadlines correspond to the Commission's current practice and objectives: in one-stage infringement procedures, it aims to conclude the pre-litigation phase within 12 months. In two-stage infringement procedures, it aims for at least 16 months. At present, the average length of court proceedings at the CJEU is 14.4 months. Comparing the dates for the judgment imposing sanctions, the *accelerating effect* of the one-stage infringement procedure is clearly visible. The same is true for the time spans in which Member States can be sanctioned, highlighted by the dark background.

In the *one*-stage infringement procedure, the judgment imposing sanctions would be delivered on 15 February 2023. The sanctions reach back to 1 January 2021 (**Figure 1**). In the *two*-stage procedure, the judgment would be delivered on 1 April 2026, namely more than three years later. The sanctions only reach back to 15 July 2023. Hence, in contrast to the one-stage procedure, there is a 'sanction-free infringement period' between 1 January 2021 and 15 July 2023 (**Figure 2**).

Figure 1: one-stage infringement procedure

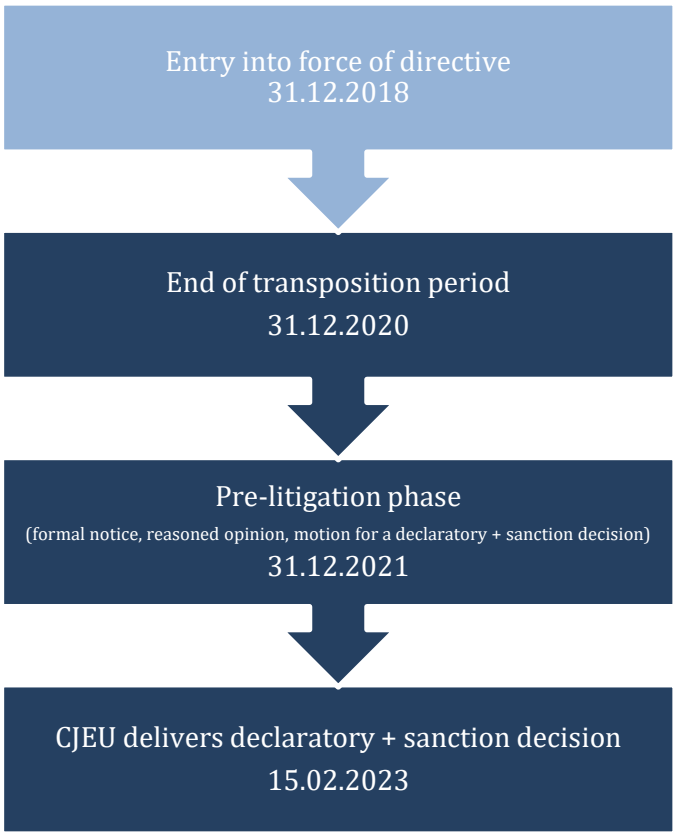
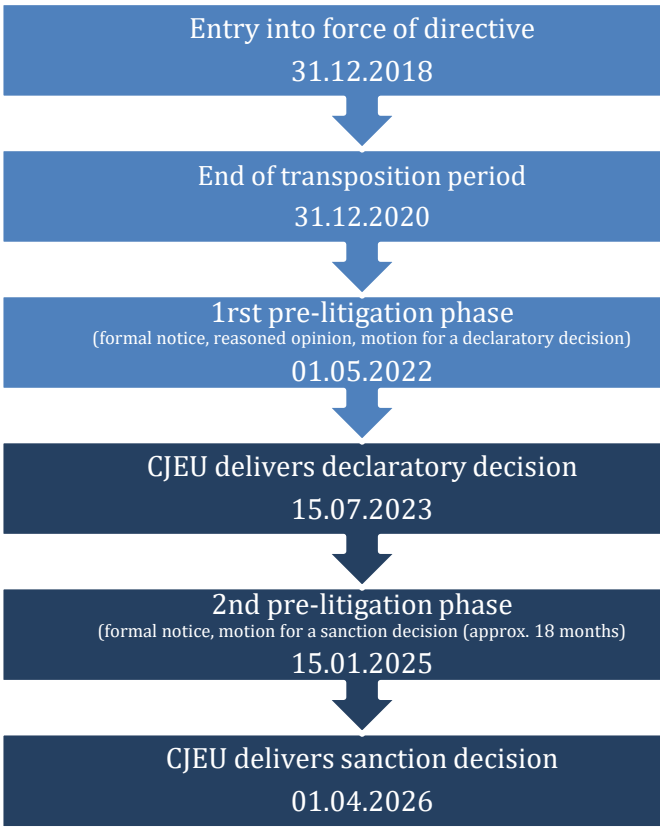


Figure 2: two-stage infringement procedure



The Commission has quickly recognised the potential of the new procedure: Shortly after the entry into force of the Lisbon Treaty, it announced in 2010 that the 'instrument should be used as a matter of principle in all cases of failure to fulfil an obligation covered by this provision'.

This was followed in 2016 by the further announcement that from then on lump sums and penalty payments would both be applied for in principle. In case the Commission has applied for a lump sum payment before the CJEU and the directive is transposed during the court proceedings, the Commission proclaimed that it 'will no longer withdraw its action for that reason alone'. Late transposition of the directive during the court proceedings will therefore no longer prevent the imposition of a lump sum payment by the CJEU. This further increases the probability of a sanction being imposed on the Member States.

(Background note: Penalty payments concern the period *following* the delivery of the judgment and impose daily sanctions for each day of delay after the delivery of the judgment. Lump sums, however, retroactively penalise the infringement *prior* to the judgment.)

Part 2: Core findings of the Grand Chamber

The first and leading judgment on the one-stage infringement procedure was delivered in July 2019: *Commission v Belgium – High-speed networks* (C-543/17). Two largely identical rulings followed in July 2020: *Commission v Romania* (C-549/18) and *Commission v Ireland* (C-550/18). These three judgments illustrate the risks of late transposition of directives:

***Commission v Belgium – High-speed networks* (C-543/17)**

What was the issue? Belgium had failed to transpose Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks on time. At the end of the transposition period, Belgium had not yet notified any transposition. At the end of the court proceedings, only implementation in the 'Brussels Capital' was still incomplete. The CJEU imposed a penalty payment of 5,000 euros per day starting from the day of delivery of that judgment until Belgium complied with its obligations. (The Commission had not filed an application for the imposition of a lump sum.)

Failure to notify measures transposing a directive

The most important statement of this judgment concerned the transposition notification of the Member States. Essentially, this boils down to the following question: When have the Member States done enough to evade a one-stage infringement procedure that immediately casts any disagreement with the Commission under the sword of Damocles for sanctions?

This question is highly relevant in practice. Disagreements between Member States and the Commission on the *correct* implementation of directives are inherent in the nature of directives. They explicitly leave Member States 'the choice of form and methods' to achieve a given result (Article 288(3) TFEU). Is the Commission allowed to launch a one-stage infringement procedure merely if it disagrees as to the correct implementation of a directive? Or is it to be referred to the two-stage procedure, which initially only leads to a declaratory judgment of the CJEU, but not to the imposition of sanctions? Conversely, the question arises as to whether any *partial transposition* is sufficient to ensure that Member States are on the safe side of a two-stage infringement procedure for the time being.

It came as no surprise that many Member States considered that the notification of a partial transposition was already sufficient (*Commission v Belgium – High-speed networks* (C-543/17)

paragraphs 44-45). Setting the counterpoint, 'hardliners', including AG Wathelet and AG Tanchev, have argued (in other cases which have been withdrawn thereafter) that Member States must not only notify the transposition of all the requirements of the directive, but that the transposition must also be *correct in substance*.

> The CJEU struck a balance between these positions (*Commission v Belgium – High-speed networks* (C-543/17) paragraph 59), not underlined in the original):
>
> 'In the light of all the foregoing, the expression "obligation to notify measures transposing a directive" in Article 260(3) TFEU must be interpreted as referring to the obligation of the Member States to provide sufficiently clear and precise information on the measures transposing a directive. In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout its territory, the Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition. Once notified, where relevant in addition to a correlation table, it is for the Commission to establish, for the purposes of seeking the financial penalty to be imposed on the Member State in question laid down in that provision, whether certain transposing measures are clearly lacking or do not cover all of the territory of the Member State in question, bearing in mind that it is not for the Court, in court proceedings brought under Article 260(3) TFEU, to examine whether the national measures notified to the Commission ensure a correct transposition of the provisions of the directive in question.'

What are the consequences?

- Only 'article-by-article' notifications of the transposition of the directive, covering the entire territory of the Member State, can prevent the launch of a one-stage infringement procedure by the Commission.
- Partial notifications are not sufficient to avoid a one-stage infringement procedure.
- If the notification is complete, questions on the *correct* implementation of the directive will be dealt with in the two-stage infringement procedure.
- Once Member States have notified full transposition, the burden of proof for an incomplete notification passes to the Commission.

The CJEU thus establishes a 'dynamic system': the more detailed the notification made by Member States of the transposition, the higher the requirements for a one-stage infringement procedure.[3]

Sanction: penalty payments

The CJEU also ruled that penalty payments may be imposed starting from the date of delivery of the judgment. This issue was previously a matter of controversy as well. AG Szpunar, for example, took the view that the CJEU must always give the Member States a 'final deadline'.

The low level of the penalty payment of 5,000 euros per day imposed by the CJEU can only be explained by the small part of the Belgian territory, the 'Brussels Capital' Region, still being affected at the end of the court proceedings. Indeed, the CJEU found Belgium's infringement 'undoubtedly serious' and noted a 'significant' length of delay in transposing the Directive, which at the time was two and a half years (*Commission v Belgium – High-speed networks* (C-543/17) paragraphs 85 and 88). The Commission, for its part, had initially applied a so-called 'coefficient for seriousness' of 9, which it later reduced to 1 (scale 1-20), following partial transpositions by Belgium.

Sample calculations

These determinations would have allowed for significantly higher (daily) penalty payments. According to the Commission's calculation method in force today and based on a 'coefficient for seriousness' of 9 (complete non-implementation by the end of the court proceedings), the penalty payments for Belgium would range from 22,154.76 euros to 66,464.28 euros per day.

[3] Wendenburg (2019) Europarecht 637 (653).

Figure 3: Possible penalty payments for Belgium based on the Commission's calculation method – coefficient for seriousness of 9, one-stage infringement procedure

	standard flat-rate amount	coefficient for seriousness *(1 - 20)*	*coefficient for duration (1-3)*	*MS-factor „n" for Belgium*	daily penalty payment
best case	***3.116 EUR***	***9***	***1***	***0,79***	22.154,76 EUR
worst case			***3***		66.464,28 EUR

(Side note: This forecast of penalty payments, which is based on a 'coefficient for seriousness' of 9 (scale 1 - 20), can easily be transferred to other Member States. This is done by adjusting the Member-State-factor 'n' accordingly (DE = 4,62, FR = 3,39, IT = 2,92, ES = 2,07, PL = 1,27, NL = 1,14, etc.). For example, for Germany, this results in penalty payments of between 129,563.28 and 388,689.84 euros per day).

Commission v Romania **(C-549/18) and** ***Commission v Ireland*** **(C-550/18)**

The two parallel cases against Romania and Ireland concerned the transposition of the 4th Money Laundering Directive (EU) 2015/849.

Romania had failed to transpose the Directive within the transposition deadline, and Ireland had notified only partial transposition. The action was brought 13 months after the expiry of that deadline, only just after the targeted 12-month period. (The Commission had previously rejected a request from Romania to extend the two-month deadline set in the Commission's 'reasoned opinion'.) During the court proceedings, Romania and Ireland both fully transposed the Directive and notified its transposition. Unlike in the case against Belgium (see above), the Commission therefore did not apply for penalty payments but for a lump sum. The CJEU largely granted these requests in its judgments of 16 JulyQ 2020, rounding off the respective requested penalty payments. Consequently, the CJEU ordered Romania and Ireland to pay a lump sum of three million euros and two million euros respectively.

No withdrawal of the action during the court proceedings

Most importantly, the CJEU confirmed the Commission's practice, announced in 2016, of applying for a lump sum even if the directive has been transposed in the meantime. Ireland claimed that this was in breach of the principles of proportionality (Article 5(4) TEU) and loyal cooperation (Article 4(3) TEU). It also complained that 'the Commission's objective is to make an example of Ireland and to prompt the other Member States, in future, to comply with the transposition periods prescribed in directives' (*Commission v Ireland* (C-550/18) paragraph 51).

The CJEU did not accept this reasoning (*Commission v Romania* (C-549/18), paragraph 66 and *Commission v Ireland* (C-550/18), paragraph 67) – rightly so, as Article 260(3) TFEU expressly provides for lump sums as sanctions. Lump sums penalise the duration of the infringement *prior* to the judgment up to the time the situation is rectified. This aspect does not lose its purpose subsequent to a late transposition of a directive during the court proceedings.

Affirmation of the Commission's rigorous procedural approach

The CJEU also confirmed the Commission's rigorous handling of the case (*Commission v Romania* (C-549/18) paragraphs 70 - 71). This confirms the Commission's objective of bringing an action within only 12 months of the transposition deadline. Implicitly, the CJEU also endorses the refusal to grant extensions of time limits, as in the present case with Romania. Member States can therefore expect infringement proceedings to be launched within a few weeks of the transposition deadline. (In the cases against Romania and Ireland, it was over three weeks, only.) Previously, with regard to the 'the alleged short duration of the pre-litigation phase', AG Tanchev had pointed out that 'over one year elapsed after the transposition deadline set in Directive 2015/849 (26 June 2017) before the Commission brought this action (27 August 2018)'. This indicates the direction in which things are heading.

Finally, the CJEU ruled that the Commission was not required to give specific reasons for initiating a one-stage infringement procedure (*Commission v Romania* (C-549/18) paragraph 48 et seq. and *Commission v Ireland* (C-550/18) paragraph 58 et seq.). The one-stage infringement procedure was 'only an ancillary mechanism of the infringement proceedings', to be launched at the discretion of the Commission, only. The CJEU could indeed rely on the wording of Article 260(3) TFEU ('the Commission … may … when it deems appropriate').

Refinement of the requirements for the transposition notification

Nor could Romania or Ireland claim that their national law 'anyway' complied with the Directive, which therefore did not need to be transposed. Due the requirement of a reference set in Article 67 Directive (EU) 2015/849 'it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question', at least in a notice on its official publication (*Commission v Romania* (C-549/18) paragraph 20 and *Commission v Ireland* (C-550/18) paragraph 31). As such a reference requirement is the standard in directives today, this statement can be generalised.

Sanction: lump sum

For the first time, the CJEU had to rule on an application for the imposition of a *lump sum* in a one-stage infringement procedure.

No methodological distinction from the two-stage infringement procedure

First of all, the CJEU approves the parameters established by the Commission to determine the lump sum (*Commission v Romania* (C-549/18) paragraph 72 and *Commission v Ireland* (C-550/18) paragraph 82. These are the seriousness of the infringement, the duration of the infringement and the ability to pay of the Member State concerned. At first glance, there are few objections to this.

However, another aspect is more problematic: while the Commission differentiates between lump sums and penalty payments, it does not distinguish between one-stage and two-stage infringement procedures when it comes to these sanctions. This ignores the generally lower seriousness of infringements in one-stage infringement procedures: the one-stage infringement procedure 'only' concerns the incorrect transposition *notification*, not the correct transposition of the directive in terms of content. Moreover, the two-stage infringement procedure always sanctions a *two-fold* infringement: failure 'to fulfil an obligation under the Treaties' and failure to comply with the first, declaratory judgment of the CJEU (Article 260(1) and (2) TFEU). Such a *two-fold* infringement is missing with one-stage infringement procedures.

The 'coefficient for seriousness' applied by the Commission could, in theory, address this difference. However, this is only possible if the so-called 'minimum fixed lump sum' laid down as a base for each Member State and irrespective of the difference between one-stage and two-stage infringement procedures, is exceeded. These 'minimum fixed lump sums' constitute the minimum threshold for lump sums. Depending on the Member State, the minimum fixed lump sums currently range from

232,000 euros (Cyprus) to 11,915 million euros (Germany). Indeed, the 'minimum fixed lump sums' might be disproportionately high when it comes to one-stage infringement procedures.

Moreover, in line with its practice concerning penalty payments (see above **Figure 3**), the Commission applies the rather high 'coefficient for seriousness' of 8 (scale 1-20) for non-transposition of a directive in one-stage infringement proceedings (*Commission v Romania* (C-549/18), paragraph 58). As will be shown below (**Figure 4**), this leads to lumps sums that are much higher than the respective minimum fixed lump sums. This makes it even less likely that the Commission will succeed in properly differentiating between the two infringement procedures when it comes to the level of sanctions.

Seriousness of the infringement

In the context of the 'seriousness of the infringement' criterion, the CJEU then questions the fiscal significance of the Directive in the Union legal system (not underlined in the original):

> 'Furthermore, Directive 2015/849 is an important instrument for ensuring that the European Union's financial system is effectively protected against the threats from money laundering and terrorist financing. The absence or inadequacy of such protection of the European Union's financial system must be considered particularly serious in the light of its effects on public and private interests within the European Union' (*Commission v Romania* (C-549/18) paragraph 73 and *Commission v Ireland* (C-550/18) paragraph 82).

These findings are likely to pose a risk to Member States with regard to future sanctions as soon as the EU budget is (indirectly) affected. Such indirect impact on the EU's 'power of the purse' is quickly established, for example in the field of VAT. In view of the increasing importance of the EU's own resources (Article 311 TFEU), more and more references to the EU budget will be possible in the future.

The seriousness of the infringement is, in the view of the CJEU, also reinforced by the fact that, at the end of the transposition period, 'Romania had still not adopted the slightest measure' (*Commission v Romania* (C-549/18) paragraph 75) and that Ireland 'had adopted measures … only in relation to a single provision of that directive' (*Commission v Ireland* (C-550/18) paragraph 84). These observations suggest that, conversely, substantial partial transpositions may not prevent the initiation of one-stage infringement procedure, but may at least reduce the level of sanctions.

Practices or circumstances existing in the Member States' legal order, including the 'complexity of the directive's provisions' (*Commission v Romania* (C-549/18) paragraph 76), continue to be irrelevant.

Duration of the infringement: Relevant deadlines

Finally, the CJEU confirms the Commission's view, already expressed in 2010, that the date of expiry of the transposition period must be considered when calculating the duration of the infringement (not underlined in the original):

> 'Any other approach would indeed be tantamount to calling into question the effectiveness of the provisions of directives setting the date on which the measures transposing those directives must enter into force. Since, … in order for a letter of formal notice to be issued, in accordance with the first paragraph of Article 258 TFEU, a prior failure by the Member State concerned to fulfil an obligation owed by it must be capable of being legitimately alleged by the Commission …, Member States which had not transposed a directive as at the date laid down therein would, in that scenario, enjoy at all events an additional transposition period, whose duration would moreover vary according to the speed with which the Commission initiated the pre-litigation procedure, without its nonetheless being possible to take into account the duration of that period when evaluating the duration of the failure to fulfil the obligations at issue. … Consequently, in order to ensure that EU law is fully effective, it is appropriate, when evaluating the duration of the infringement with a view to determining the amount of the lump sum to be imposed pursuant to Article 260(3) TFEU, to take into account the date of transposition provided for by the directive at issue itself' (*Commission v Romania* (C-549/18), paragraphs 81-83 and *Commission v Ireland* (C-550/18), paragraphs 92-95).'

This reasoning can easily be extended from lump sums *to penalty payments*. The amount of the penalty payment is also reduced if a later starting date is chosen (see above: coefficient for duration, **Figure 3**). However, such an extension would require a *change* in the CJEU's case law. In fact, the CJEU is currently referring to the later date of expiry of the deadline set by the Commission in the 'reasoned opinion' when it comes to penalty payments (*Commission v Belgium – High-speed networks* (C-543/17) paragraph 88.

Sample calculations

In the present cases, the CJEU only imposed relatively small lump sums (Romania: three million euros, Ireland: two million euros). Nevertheless, as with penalty payments (see above), the CJEU's findings in the field of lump sums would allow for significantly higher sanctions. Unlike penalty payments, there is no upper limit for the lump sum. In fact, according to the Commission's methodology, the amount is *inter alia* determined by the number of days (as a multiplier) between the expiry of the period for transposition of the directive and the entry into force of the transposition measure or the judgment imposing the penalty.

Based on the above illustrative example (**Figure 1**), in the one-stage infringement procedure there are 775 days between the expiry of the transposition deadline (1 January 2021) and the sanction decision (15 February 2023). For the period of complete non-transposition, the Commission assumes a 'coefficient of seriousness' of 8 (scale 1-20) (*Commission v Romania* (C-549/18) paragraph 58). On this basis, total non-implementation results in sanctions that are significantly higher than the respective minimum fixed lump sums (**Figure 4**).

Figure 4: Possible lump sums for non-transposition over 775 days for selected EU Member States, given a severity coefficient 8 (one-stage infringement procedure)

MS	*standard flat-rate amount*	coefficient for seriousness *(1 - 20)*	*Days of delay in transposition of directive*	*MS-factor „n" for MS*	*Lump sum (in brackets: respective minimum fixed lump sum)*
DE	*1.039 EUR*	*8*	*775 days*	*4,62*	*29.761.116 EUR (11.915.000 EUR)*
FR				*3,39*	*21.837.702 EUR (8.743.000 EUR)*
IT				*2,92*	*18.810.056 EUR (5.338.000 EUR)*
ES				*2,07*	*13.334.526 EUR (5.338.000 EUR)*
PL				*1,27*	*8.181.086 EUR (3.275.000 EUR)*
NL				*1,14*	*7.343.652 EUR (2.940.000 EUR)*

Part 3: Concluding remarks and recommendations

The Member States have created a new instrument in Article 260(3) TFEU, which now turns against them if they fail to meet the transposition deadlines they once adopted in the Council of the EU (together with the European Parliament, Articles 260(3), 289, 294 TFEU).

The analysis of the three leading Grand Chamber judgments (see above) leads to the following recommendations:

- As co-legislators in the Council of the EU, the Member States must not accept unrealistically short transposition deadlines. The two-year transposition period currently favoured is obviously too short in many cases.
- Once adopted, the Member States must respect the deadlines for transposing the directives and notify the Commission of their transposition in due time. This notification should be

'article specific' and cover the entire territory of the Member State. The use of a correlation table is recommended.

- If Member States are unlikely to succeed in transposing the directive timely, they should at least try to transpose the directive within 12 months of the transposition deadline, to avoid litigation before the CJEU.
- On an ongoing basis, Member States should try to reduce the risk of sanctions at least in respect of the total amount by transposing substantial parts of the directive.
- At the very least, the transposition of the directive should take place during litigation. This at least helps avoiding penalty payments. During litigation, however, lump sums will be unavoidable if the Commission requests them.

Outlook

Now that there have been decisions on both penalty payments and lump sums in the one-stage infringement procedure, it is only a matter of time until the CJEU has to rule on an application for the *cumulative* imposition of both sanctions. Although this contradicts the wording of Article 260(3) TFEU ('*or*'), it is likely to be approved by the CJEU (cf. concerning cumulating of sanctions in the *two*-stage infringement procedure: *COM/France* (C-304/02), paragraph 83). Corresponding one-stage infringement cases are already pending before the CJEU: *Commission v Slovenia* (C-628/18) and *Commission v Spain* (C-658/19).