



ISSN: 2036-5438

Article 260 TFEU Sanctions in Multi-Tiered Member States

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Perspectives on Federalism, Vol. 7, issue 2, 2015





Abstract

The question at hand is located at the intersection of EU law and national constitutional law, and aims to answer the following problem: namely, how to mitigate federal concerns in the context of infringement procedures and financial sanctions under art. 260 TFEU. This article approaches this question both from the perspective of the Commission and the Court of Justice, as well as from the vantage point of the central and regional governments involved. After analysing the composition of the financial sanctions, we cover the involvement of subnational entities in the infringements proceedings in six tiered Member States (Austria, Belgium, Germany, Italy, Spain, and the UK) and the relevant national provisions for the partition of financial sanctions. The conclusions pertain to both the central and regional level and the EU institutions concerned, adhering to the multi-level relationship subjacent to this article.

Key-words

Federalism, regions, EU law, infringement procedures 260 TFEU, financial sanctions



1. Introduction

The dynamic process of constitutionalism in the European legal space features the increased recognition of several actors at the constitutional plane, including civil society, and autonomous regions. The position of regions *vis-à-vis* EU law is a well-known topic of scholarly debate, has been a subject of Treaty Reforms, and has challenged the Court of Justice on more than one occasion. The regional tax cases^I are but one example where the need for effective and uniform implementation of EU law no longer buttresses a strategy of ‘regional blindness’ (Ipsen 1966: 256; Weatherill 2005: 1; Lenaerts & Van Nuffel 2005: 532-37; Panara & De Becker 2011: 297-344). This article initiates an inquiry in that same vein, more precisely with respect to the position of regions under art. 260 TFEU sanctions: how should and can EU and national constitutional law coordinate in order to recognize each actor, Member State or region, and its autonomy, but still maintain their principal objectives such as the uniform implementation and the effectiveness of EU law? Two recent cases, both infringement proceedings imposing financial sanctions on a Member State for regional failures, illustrate this vexing and complex problem.^{II}

Financial sanctions, i.e. the lump sum and periodic penalty, aim at ensuring compliance with EU obligations. The infringement procedure has been rendered more effective (Kotzur 2015: 870; Hadroušek 2012: 235) subsequent to the Lisbon Reform, a necessary development in view of an ever-expanding *acquis*, 28 Member States and the intricate complexities of present-day governance. The application of article 260 (2) and (3) TFEU in tiered Member States raises important questions. From their perspective, subnational entities with legislative powers – generic ‘regions’ henceforth – need to defend and maintain their autonomy; on the one hand in a supranational context without an adult voice for those regions,^{III} and, on the other hand, versus a central government that is charged with primary – one is tempted to say ‘sole’ – responsibility under EU law.^{IV} The latter may lack the domestic instruments and legitimacy to perform a supervisory role, triggering further problems. Thus in case C-358/03, the federal government of Austria did not dispute the infringement as such, but argued that a judgment from the ECJ is needed in order to enable a substitution to implement the directive in the obstructive region of



Carinthia.^V In Belgium, a similar requirement of prior judgement is required to allow the federal government to temporarily intervene.^{VI}

This article starts from article 260 (2) TFEU and the Court's application of it (section 2). To this point, federal issues have only played a minimal role.^{VII} We can nonetheless reasonably expect this problem to reoccur, and gain significant traction, in the future. How to align article 260 TFEU financial sanctions with a federal or regional system is a problem best dealt with by the Member State concerned. At least, this is the common wisdom and the traditional opinion of the Court. The next section (section 3) will cover selected Member States and the arrangements in place to allocate or divide the responsibility for article 260 financial sanctions in Austria, Belgium, Germany, Spain, Italy and the United Kingdom.^{VIII} These Member States, categorized as federal or regional systems, have a tiered dimension, where regions with legislative powers are responsible for the transposition and implementation of EU law. Depending on the overall *telos* of the multi-layered system in the Member State under scrutiny, different strategies with respect to this problem can be distilled. Germany, for instance, recognizes the central, gate-keeping role of the federal government, constitutionally enshrined in article 104a (6) GG, while the UK and Spain rely on intergovernmental negotiations. This section, containing a functional comparison, will end with a summary.

The final section (4) draws up a synthesis of the inquiry, and offers guidelines for the relevant parties to the problem of article 260 TFEU financial sanctions in multi-tiered Member States: what can the Commission and the Court of Justice do to mitigate the existing problems and concerns? And what arrangements can Member States put in place to comply both with the EU's interest in implementation and the national, vertical institutional balance? The diversity of (quasi-)federal arrangements buttresses the Court's default position of rejecting federal arguments^{IX}, but only to a certain extent. This article will defend the proposition that both the Commission and the ECJ should take federal concerns into account to a certain extent, chiefly by offering more transparency in the composition of the sanctions and thus allowing for an internal allocation of responsibility.



2. Article 260 TFEU

“*Panta rhei*” and the same goes for constitutional law. In an age of globalization and localism, the unitary nation state with a static conception of legal power no longer thrives. Instead, competences migrate along a bi-dimensional axis: towards the EU level, and to regions, yielding a complex picture that illustrates the high coordination costs associated with multilevel governance (Piattoni 2010: 26). The EU directive has long been one of the prime examples of the coordination and cooperation between different levels of government, primarily between the EU and the national Member-States. Institutionally, the EU was not conceived to incorporate regional and local concerns. However, this “regional blindness” is gradually declining, allowing for a direct role of regional actors on the EU stage. Moreover, due to the increased competences regions enjoy at the national level, their role in the implementation of EU law increases.^x This important role brings about questions with regards to the legal mechanisms ensuring implementation and compliance.^{xi} The EU directive is an important legislative instrument, but its transposition is no sinecure. The following figures substantiate this, from which we infer a significant correlation between the extent of regionalization of a Member State and problems with the implementation of EU law.



Table 1. Infringement proceedings per selected MS

Member State	Pending inquiries ex art. 258 TFEU per 31.12.2013 ^{XII}	Cumulative court cases 1952-2014 failure to fulfil obligations ^{XIII}	Declared infringements 2010-2014 ^{XIV}	Degree of regionalization ^{XV}
Austria	49	136	14	18
Belgium	75	382	26	28.1
Germany	63	278	13	29.3
Spain	90	241	32	13.5
Italy	104	641	34	22.7
United Kingdom	53	137	9	9.5
<i>Average EU-27^{XVI}</i>	<i>48^{XVII}</i>	<i>no data^{XVIII}</i>	<i>10</i>	<i>9.4^{XIX}</i>

Despite a certain correlation between the extent of regionalization and the implementation record as witnessed by these infringement numbers, some divergences do exist. Spain and Belgium show roughly similar infringement data, but are of a very different tiered system. Before we can address this issue, we will set out the practice of art. 260 TFEU.

2.1. General application

The infringement proceedings under article 258 and 260 TFEU offer the Commission a powerful weapon to ensure full compliance with EU law. Originally devised as a weapon of last instance, only exceptionally to have recourse to, the infringement procedure has evolved into a normal, reasonably transparent and technical procedure (Prete & Smulders 2010: 60).

Following the Lisbon reform, the Commission can now petition the Court, after a shortened administrative phase^{XX}, for a financial penalty in case of non-compliance with a previous infringement declaration by the ECJ, or, in case of the non-communication of measures of transposition of directives - as respectively stated in article 260, para 2 and 3 TFEU. The general approach of the Commission to these financial sanctions has been set



out in a Communication from 2005,^{XXI} together with an extra communication in 2011 on the use of article 260 (3) TFEU.^{XXII} Statistical data used for calculation, such as the GDP per country, is updated annually.^{XXIII}

The introduction of the new paragraph three is important for the question at hand, since the Commission indicated that she reads the ‘obligation to notify measures transposing a directive adopted under a legislative procedure’ as a comprehensive duty to transpose and communicate all measures under the directive concerned. I.e. the partial transposition, albeit materially or territorially, does not suffice to meet this obligation, and may thus trigger an article 260(3) procedure.^{XXIV} Thus far, no 260(3) procedure has ultimately led to financial sanctions.^{XXV}

The rule of thumb is to compute the financial penalty as petitioned by three main factors, namely, the duration and the seriousness of the infringement, and the necessity to deter future infringement.^{XXVI} The penalty payment is the product of four variables: the basic flat-rate amount (€ 640), a coefficient for seriousness of infringement (ranging from 1 to 20), a coefficient based on the number of days an infringement persisted (ranging from 1 to 3)^{XXVII}, and the capability to pay, expressed in the “n” factor.^{XXVIII} The lump sum is calculated in the same manner, by multiplying the same coefficient for seriousness and the “n” factor, a basic flat-rate amount (one third of aforementioned flat-rate amount), and the number of days of the infringement.^{XXIX}

Since the basic flat-rate amount and the “n” factor are predetermined, the case-law focuses mainly on the coefficients of duration and seriousness. In the interest of legal certainty, the Commission indicated that the two most important parameters to assess the seriousness of the infringement are the importance of the Union rules at stake, and the consequences of the infringement on general and particular interests.^{XXX} In the first category reside obviously the four fundamental freedoms and human rights. Additionally, the Commission considers the behaviour of the Member State as important. Such behaviour may thus constitute aggravated circumstances; specifically, if any honest attempt at national implementation is missing, or if loyal cooperation is rather absent. On the other hand, if there are real problems of interpretation or intrinsic difficulties to comply^{XXXI} with the declaratory judgment at short notice, these considerations may mitigate to a certain extent the severity of the infraction. On the criterion of the consequences for general and



particular interests, the Commission cites, for instance, the impact of the infringement on the functioning of the Union, or the magnitude of the population affected.

The case law diverges to some extent from these guidelines.^{xxxii} The next section will aggregate the recent decisions.

2.2. Case law

The ECJ never fails to affirm the non-binding nature of the Commission's proposal for the computation of financial sanctions. Though essentially non-binding, they provide a useful point of reference.^{xxxiii} A joint analysis of both the case law and the Commission's communications reveals a significant amount of mutual accommodation and cross-fertilization.

1. Penalty payment

When the Court imposes a penalty payment, the three criteria of duration, seriousness and ability to pay form a recurring pattern. In older cases, the Court explained in detail how it treated the Commission's proposal: when it raised the proposed coefficient of duration or seriousness,^{xxxiv} when it lowered them,^{xxxv} or when it maintained them.^{xxxvi} In more recent cases, however, the Court no longer argues on the basis of the Commission's proposal, but develops an autonomous assessment on the three criteria. This tendency is deplorable from our vantage point, since transparency in the computation of the sanctions is precisely what enables national mechanisms to adequately divide the responsibility among the governmental levels concerned.^{xxxvii} The quasi-mathematical formula from the Communication becomes reduced to a complex balancing act. The Court takes up several arguments it deems relevant and 'weighs' them.

When assessing the coefficient of duration, the ECJ turns first to an abstract opinion.^{xxxviii} Next to this general finding, the Court also considers the character of the infraction, the difficulty to complete the implementation, and the measures already taken by the Member State.^{xxxix} For an assessment of the seriousness, the Court seems to operate along the same lines by first seeking out the "importance" of the infringed obligation. For instance, breaches in the fields of human health, the environment or state aid, are considered quite serious.^{xl} This abstract form of scrutiny is combined with or exchanged for an *in concreto* assessment: the Court will inquire into the extent of the



infraction and what measures the Member State has adopted meanwhile to alleviate the infringement.^{XLI}

Finally, when the Court turns to the third criterion, the Member State's ability to pay, it invariably follows the Commission's calculation of the "n"-factor. The only digression found in the case law concerns the application of a recent update due to inflation and changes in the GDP of the Member State,^{XLII} or the application of mitigating circumstances because of the financial crisis.^{XLIII}

2. *The lump sum*

The Court draws upon the following determinants: the duration since the first judgment declaring the infringement, the seriousness of the breach and the attitude of the Member State. On the duration, the ECJ does not limit itself to a mechanical multiplication based on the number of days, but often it seeks out mitigating or aggravating circumstances that explain the Member States' posture in that period. The same considerations explained above, when assessing the duration with respect to the penalty payment, resurface: the character of the breach, the difficulty to achieve full compliance, and the interim measures adopted.^{XLIV} The Court does not subscribe to the Commission's proposition that duration should only be taken into account when computing the penalty payment.^{XLV} This is regrettable, since it would partially alleviate some of the concerns following the cumulative imposition of the sanctions.^{XLVI}

The Court's treatment of the criterion of seriousness runs likewise largely parallel. Thus, the ECJ indicates which subject matter it deems to be of high importance,^{XLVII} and it reviews the behavior of the Member State in the past.^{XLVIII} Contrary to the practice in computing the penalty payment, the question to what extent public or private interests are affected by the infraction gains more attention.^{XLIX}

On the attitude of the Member State, the Court regularly inquires if the cooperation with the Commission was sufficiently loyal, i.e. if the exchange of relevant information occurred in a timely manner. The question of whether the Member State has committed (similar) violations in the past – often treated when the criterion of seriousness is discussed – sometimes arises when assessing the attitude of the Member State.^L



The considerations employed by the Court to compute the two types of sanctions are significantly intertwined, as exemplified by the multiple internal citations in a decision.^{LI} This finding detracts from the transparency and coherence of the computation of both types of sanctions. In particular, with respect to multi-tiered Member States, the following problems cannot be answered by recourse to the ECJ's decision. A question that springs to mind concerns the responsibility of regions that do not - or no longer - partake in the breach at the stage of the second judgment under article 260 (2) TFEU but nevertheless have an influence on the computation of the sanctions, for instance because of a past implementation record. The next section will address in more depth the two leading cases where 'regional infringements' gave rise to a financial penalty.

2.3. Composition of sanctions in case of regional involvement

Cases C-610/10 and C-533/11 are of specific importance to the research question proposed. In both cases, the national government was not directly involved in the conduct under scrutiny. In the Spanish case, the Commission filed suit under article 260(2) TFEU because Spain had failed to recover illegal state aid from a company, even after a declaration of infringement.^{LII} Though the original case cast a wider net,^{LIII} the petition seeking financial sanctions under article 260(2) TFEU only envisaged the illegal state aid that was granted by the Autonomous Community of the Basque Country.^{LIV} Thus a number of remarkable passages appear in the judgment, such as Spain communicating the actions of the Basque government,^{LIV} or pleading a reduction of the "n"-factor since the Basque country only accounts for 6,24 % of the Spanish GDP.^{LVI} Unsurprisingly, the latter argument did not find a receptive ear in Luxembourg.^{LVII} Additionally, two other regions were involved in the initial case of illegal state aid. When the Court computed the penalty payment and the lump sum, considering the long duration of the infringement, this behaviour of other regions indirectly contributed to the weight of the penalty.^{LVIII}

Case C-533/11 displays similar traits. The failure of Belgium to correctly transpose directive 91/271/EC of May 21st, 1991 concerning urban waste management^{LIX} led to the declaration of infringement in 2004.^{LX} According to Belgian federal division of competences, urban waste is a matter exclusively assigned to the regions.^{LXI} Again, while in the initial infringement proceedings all three regions were to a certain extent at fault, the



amended petition of the Commission only envisaged 13 local communities under the responsibility of the Brussels and Walloon Region.^{LXII} Moreover, at the hearing, the Commission confirmed only five local communities, in the Walloon Region, were not in conformity with the obligations of the directive. Similar to *Commission v Spain*, the financial sanctions, while seemingly addressing only the single region at fault in the ultimate phase, were composed based on the past behaviour of other regions with respect to the transposition.^{LXIII}

Both cases illustrate a misalignment of the behaviour of the regional entities and the computation of the financial sanctions. This is especially apparent in the calculation of the factor of duration, since some of the regions might comply before the date of the deadline set in the Commission's Reasoned Opinion; and in the factor of seriousness, because there the past behaviour of other components of the Member State,^{LXIV} or the number of citizens affected can be drawn into the equation.^{LXV} From the vantage point of the subnational levels of government, a qualitative difference exists between non-differentiable and differentiable criteria that compose the computation of the lump sum and the penalty payment. Of course, it is up to national law to implement this difference.

The next section will look in more depth at the national mechanisms that ensure compliance with EU law and how the regional point of view is incorporated into the infringement proceedings. Lastly, we will analyse the different mechanisms that divide financial sanctions under article 260 TFEU between the responsible governmental layers.

3. National mechanisms in Austria, Belgium, Germany, Spain, Italy and the UK

Austria, Germany, Belgium, the United Kingdom, Italy, and Spain are being selected for study since regional bodies with legislative powers feature – to varying degree – in their constitutional system. 'Tiered' MS is our connotation comprising both federal and regional states.

The particular mechanisms surrounding the implementation of EU law in the selected multi-tiered Member States show different traits, inspired by the overall logic of the balance between the governmental layers. We will review these mechanisms with the following questions in mind: firstly, is there a supervisory role for the national government



(section 3.1)? Secondly, how and when are competent regions involved in the infringement proceedings under articles 258 and 260 TFEU (section 3.2)? Finally, in the case of financial penalties based on article 260 TFEU, how are they allocated to the responsible governmental layer (section 3.3)?

These questions connect the enforcement mechanisms with the responsibility to implement EU law. Referring to the figures above in [table 1], the discrepancies between countries with a higher degree of regionalization, but a relatively low amount of infringement cases, can be explained due to a better functioning monitoring system or better intergovernmental cooperation. This is an important finding, considering the obligation of Member States to put optimal mechanisms in place in order to optimize the implementation and enforcement of EU law.^{LXVI} We will revisit this point *infra* when discussing the national substitution mechanisms.

3.1. The national Member State as guarantor of EU obligations?

The six selected Member States, where differing degrees of regionalization play, seem to have a common trait with respect to compliance with EU law. From a cooperative system, like Germany, to a dual system, like Belgium, a provision allowing the national government to intervene or take control to ensure compliance following a (predetermined) breach of EU law, is installed.

In Belgium, this right to intervene is an anomaly given the dualistic set-up and the exclusive division of competences. The adage holds that for each individual case, a single entity, federal or regional, can be deemed competent on the matter, to the exclusion of others.^{LXVII} One of the exceptions^{LXVIII} is article 16 § 3 SAIR that allows the federal government to substitute itself for the regional government, responding to an international judgment and under the requirement of previous consultation with the subnational government concerned. When the article was devised in 1992, the *travaux préparatoires* explicitly referred to the infringement proceedings of article 258 and 260 TFEU.^{LXIX} Though it was never applied in practice, this did not dissuade the constituent power to enhance the scope of this article in the recent round of state reform. Article 16 SAIR will now also be applicable with respect to the UN Climate convention, and will even eliminate the requirement of a declaration of infringement, similar to article 260(3) TFEU, but only in matters concerning the reduction of greenhouse gasses.^{LXX}



In the UK, the central and supervisory role of the Westminster government is hardly surprising. Not only does the division of competences rest on an intergovernmental agreement that is not susceptible to judicial review,^{LXXI} in the annex to the Memorandum of Understanding on devolution is a section on the EU, where several consultation requirements betray a strong cooperative emphasis.^{LXXII} Moreover, the European Union Act addresses the implementation of EU law as a concurrent competence.^{LXXIII} Point 21 of the Memorandum thus conveys the agreement to sustain regional autonomy in these matters, with the legal proviso of intervention if warranted.^{LXXIV} While in federal countries such intervention is of a mere academic nature, in the UK this is no moot point.^{LXXV} Additionally, the devolved acts explicitly reserve the law-making powers of Westminster on the devolved territory.^{LXXVI} In the specific case of EU law, this and other provisions install a joint compliance mechanism.^{LXXVII} Thus, when the implementation of EU law is deemed to require uniformity, this may be done through an act of the Westminster Parliament for the whole of the UK.^{LXXVIII}

Germany organizes the participation of the Länder through the Bundesrat, which is composed of members of the regional executive bodies. Article 23 of the Basic Law describes at length the various rights and duties of the Bundesrat concerning EU policy. Next to these participation rights, article 37 of the Basic Law constitutionally enshrines the right of the federation to intervene.^{LXXIX} Following the duty of *Bundestreue*, implementation of EU law is a constitutional duty (Putler 2008: 1050), safeguarded by a federal right to intervene. Similar to the Belgian mechanism, no use has been made of this mechanism.^{LXXX}

The Austrian constitution contains a similar clause enabling a federal right to intervene.^{LXXXI} In *Commission v. Austria* for instance, the federal government admitted in the proceedings that in order to intervene *en lieu* of a recalcitrant Land, a prior judgment declaring the infringement is constitutionally required.^{LXXXII} Until now, the substitution clause is applied only once (Kiefer 2011:168). Following a declaration of infringement by the ECJ because of a failure to transpose in full Directive 97/65/EC on the protection of workers,^{LXXXIII} the federal government issued a regulation for the Land of Carinthia.^{LXXXIV}

In Spain, no similar substitution mechanism exists in the Constitution.^{LXXXV} However, the constitutional court derives a particular and partial substitution mechanism to ensure compliance from article 149(3).^{LXXXVI} It envisages the case where a matter is regulated by EU law, and is asymmetrically devolved within Spain. For those regions that are not



competent to regulate this matter, the national level will obviously legislate. On the territory of other regions that do enjoy competence in that matter, but have not yet acted, the central norm may be temporarily applicable (Vuillermoz 2003: 684-685). Thus, when a directive expires and is not implemented by one or more Autonomous Communities under its shared powers, the central state may expand its competence so as to remedy – temporarily – the lacuna. A posterior measure of these regions subsequently takes precedence (Chicharro Lázaro 2011: 203-204; Ross & Salvador Crespo 2003: 220). This mechanism does not apply to those powers that are exclusively attributed to an Autonomous Region.^{LXXXVII}

In Italy, the Italian Constitutional Court has ruled that the implementation of EU law should follow the division of competences as set out in the Constitution.^{LXXXVIII} The 2001 constitutional reform recognized, however, the national responsibility for the implementation vis-à-vis EU institutions. Therefore, the national State can intervene to correct for a regional legislative act or omission, as stipulated in articles 117, paragraph 5 and article 120, paragraph 2 of the Constitution.^{LXXXIX} The procedure of this substitution requires a notice from the Prime Minister or the Minister for Community Policy, and if the region fails to comply within a time limit, the national government can enact a measure in order to end the infringement.^{XC}

3.2. Regional involvement in infringement proceedings

Every Member State under analysis has developed methods for cooperating in supranational litigation, thus giving regions an indirect voice at the EU level. The UK has a specific consultation mechanism on infringement proceedings, which allows a devolved region to take the lead when it concerns devolved matters.^{XCI} In Spain, the right to intervene in infringement proceedings where an Autonomous Community is involved, is guaranteed through an intergovernmental agreement^{XCII} signed in 1990.^{XCIII} The mechanism is quite cooperative, requiring exchange of information in the administrative phase, and allowing for the regional government to submit observations to the Court through the national government (Chicharro Lázaro 2011: 205). In Italy, a similar cooperation agreement between the State and the Regions has been adopted in 2008, with an emphasis on coordination and information exchange.^{XCIV} Moreover, since 2012, the national government is required to send quarterly reports on pending inquiries and infringement



proceedings to the House, and to the Regions.^{XCv} In Belgium, the involvement of regions in infringement proceedings can take two routes: either through article 16 § 3 SAIR, which requires the federal government to consult with the region that has breached EU law. In practice, cooperation is achieved through the Interministerial Conference on Foreign Policy, and no recourse was ever made to the rights on consultation in article 16 SAIR. When Germany is the subject of an infringement proceeding with a regional dimension, coordination of an agreement ('Einvernehmen') between the federal and the regional level is achieved through the Bundesrat.^{XCvi} Note that, as opposed to Belgium, Spain and the UK, this is a collective mechanism (Panara & De Becker 2011: 340-341).

3.3. Partition of financial sanctions

The points of departure are the various national mechanisms for redress – for it is the national Member State that needs to pay the fine in the Commission's account.^{XCvii} More often than not, the national partition of the financial sanctions will thus take the form of a right to redress. The general thrust of the mechanisms is to allocate the burden to whichever level that bears the responsibility for the infraction. We distinguish three strands. The first variant mitigates this burden by taking the budgetary capacity of the region into account, while the second allocates the amount in full to the region responsible. The third strain tries to divide the sanctions with respect to the share in the infraction, and the size of the financial sanction.

Germany is a case in point to illustrate the first variant. In a rather rigid set-up, a mechanism for division of sanctions was set up, that allocates the burden to the party responsible, and minimizes ad hoc any disagreement. As well as being a rigid system, it is the most detailed of all mechanisms covered. Prior to the arrangement by the law of 2006 – the *Lastentragungsgesetz* – several issues were unclear: should the federal government bear the brunt of the penalty, and what criteria should determine the internal allocation?^{XCviii} The 2006 constitutional reform included a new provision: article 104aVI,^{XCix} elaborated in the *Lastentragungsgesetz*.^C This article concerns the financial sanctions following a violation of inter- or supranational obligations of Germany, amongst which are the moderate indemnities imposed by the ECtHR.^{ci} To allocate the financial burden, one should follow



the internal division of competences. Hence, the competent authority, Land, *Länder* or *Bund*, is responsible for the financial consequences.^{CII} When the ECJ fines Germany under article 260 TFEU, three hypotheses are to be discerned. Firstly, if the infringement of EU law is a joint responsibility of both the federal government and the *Länder*, each bears the financial burden proportionate to their share in the infringement.^{CIII} Secondly, if the infringement can be ascribed to two or more *Länder*, but not the federal government, the division between the *Länder* concerned is based on the *Königsteiner*-calculus.^{CIV} This calculus determines the share of each Land on a fixed basis, for two-thirds dependent on tax revenue, and for one-third on the size of population.^{CV} This method is generally accepted in Germany to determine the share of the regions in joint financing.^{CVI} Through the fixed criteria, ad hoc political disagreement is severely reduced. Thirdly, in the specific case of *länderübergreifender Finanzkorrekturen* a rule of solidarity is installed.^{CVII} When the Commission opines that a misuse of structural or cohesion funds has occurred in one or more *Länder*, it can assume the same happened in other *Länder*. In this specific case, the sanctions are divided with a fixed share of 15 % for the federal government, and the other 85% for the *Länder*. Out of this 85%, the *Länder* that in fact gave rise to the sanctions carry 50%, and the remaining 35% is divided amongst all *Länder*, according to the *Königsteiner*-calculus.^{CVIII}

A second strand builds on the example of the United Kingdom. There exists no legally binding rule to allocate financial sanctions, but according to the *Concordat on Co-Ordination of European Policy Issues*, financial sanctions imposed on the UK because of an act of a devolved body, will be allocated to that body.^{CIX} Disputes will primarily be settled through bilateral negotiation; failing that, the matter will be put before the 'Joint Ministerial Committee' (Ross & Salvador Crespo 2003: 225) composed of members of the national and regional government.

Spain has set up a system in the third category. Each governmental level should take up its responsibility in case of a fine. This responsibility will be determined by the national government, after consultation with the regional executives.^{CX} Important to note is that the federal government is obliged to take all the relevant criteria as deployed by the ECJ into consideration when deciding on the responsibility.^{CXI} Supra, in section 2.3 we highlighted the discrepancy between the composition of the fine and the responsibility of the region in the final judgment, for example as displayed in the computation of the capability to bear



(n-factor). Other examples of that finding are the persecution for general and persistent infringements^{CXII}, or the subcriterion of past violations. The Spanish mechanism allows the government to decide upon these issues when allocating the financial burden. A prerequisite for this mechanism to function is a sufficiently transparent reasoning by the ECJ on the determining factors.

The outliers, Italy, Belgium and Austria, both have a minimalistic mechanism, essentially assigning the financial sanction to the region responsible. Belgium has no comprehensive rule outside of the redress mechanism in article 16 § 3 SAIR. The recent imposition of fines in judgment C-533/11 gave rise to some political bickering. The secretary indicated in a plenary hearing of the House that should the regional governments not find any accommodating solution, this right to redress would be put into practice for the first time.^{CXIII} Upon submitting this article, no subsequent action could be traced. In Austria, article 3(2) of the 2008 *Finanzausgleichsgesetz* obliges the responsible Länder to shoulder the costs for breaches of EU law following a judgement of the ECJ.^{CXIV} The same principle is confirmed in an intergovernmental agreement on the cooperation of regions and local communities vis-à-vis European affairs.^{CXV}

Italy has a similar system, where the State has a right of financial redress to the Regions that are responsible under national constitutional law for the infringement of EU law.^{CXVI} This right, expanded in article 43 of the Law no 234/2012, envisages three kinds of penalties: a penalty under article 260 (2) and (3) TFEU, a penalty for violation of the European Convention of Human Rights, and the financial charges arising out of the misuse of EU agricultural or structural funds.^{CXVII} The damages that can be reclaimed from the Regions are limited to the total amount of the penalty paid, and will be imposed through Ministerial Decree within three months of the notification of the judgement to the Italian State.^{CXVIII} Thus far, this redress has only been exercised with respect to violation of the European Convention of Human Rights by municipalities.^{CXIX}

The majority of these national provisions have not – yet – been put to the test. Apart from the detailed German arrangement, it is unclear how these mechanisms can successfully address the theoretical complexity of the sanctions in light of regional autonomy. In absence of a structural settlement, we can expect the Belgian clause to be used to redress the fine in the case *Commission v Belgium*. Additionally, Spain is again



involved in infringement proceedings possibly leading to a severe financial penalty for illegal state aid resulting from regional measures.^{CXX}

4. Synthesis in propositions

The previous sections have dealt with the problem of regional liability under article 260 TFEU from both the national (C) and the European vantage point (B). It results that both are not perfectly aligned. We offer three propositions to improve this misfit.

Proposition 1: A more facilitative posture of the Commission and the European Court

The finding above that the method of computation of the financial sanctions under article 260 TFEU is rather opaque, renders the application of a system of internal partition in multi-tiered Member States even more problematic. The responsibility of each actor has to derive unambiguously from the reasoning of the Court, with respect to both the penalty payment and the lump sum. Indeed, the national Member State is solely responsible before the Court for the compliance with EU law.^{CXXI} In other words, the allocation of internal responsibility for the financial sanctions is, from the perspective of the EU, “your problem, not mine” to put it in vulgar terms. This explains the summary rejection of Spain’s argument on the ability to pay of the Basque region.^{CXXII} In another – more recent - case, the ECJ even explicitly rejected the question from Spain to be more precise in order to allow for an internal allocation mechanism to function.

“The Kingdom of Spain claims that the Court is required to state, for each of the contested decisions, the sums which have not yet been recovered, since that Member State is obliged, by virtue of its domestic law, to pass on the penalties imposed by the Court to the infra-State entities responsible for the infringement of EU law.

In that regard, it must be pointed out that the allocation of internal central and regional powers cannot have any bearing on the application of Article 260 TFEU, since the Member State concerned is responsible towards the European Union for compliance with obligations arising under EU law.

It follows that a finding of a failure to fulfil obligations made by the Court in the procedure provided for in Article 260(2) TFEU cannot depend on the particular



features of the internal organisation of the Member State concerned.

Furthermore, it follows from the considerations in paragraph 22 of this judgment that it is for the Kingdom of Spain to verify the individual situation of each undertaking concerned and to determine the exact amounts of the aid which should have been recovered under the contested decisions, taking into account the indications given in those decisions.”^{CXXIII}

Nonetheless, the Court of Justice does note the respective role of the subnational governments, as for instance in *Commission v Belgium*, where the Court out of its own motion asked the Belgian government and the Commission to indicate “the exact stage of compliance with the judgment in *Commission v Belgium* as of 1 April 2013, listing the agglomerations [...]”.^{CXXIV} The Belgian government added that those five agglomerations in point all reside in the Walloon region.^{CXXV} The Court did not directly respond to this, obviously for lack of necessity, but did take into account the severe reduction in the number of agglomerations breaching the *Urban Waste* Directive relative to the first judgment.^{CXXVI} In another infringement case, under article 258 TFEU,^{CXXVII} the Court clearly did indicate in its dictum where the infractions of each competent region reside.^{CXXVIII} This detailed declaration followed the decision of the Commission to discontinue the procedure against the national government. The paragraph – only available in French or Dutch – is worth quoting in full:^{CXXIX}

« Après avoir examiné la réponse du Royaume de Belgique au regard des compétences qu’il exerce en tant qu’autorité fédérale, la Commission a décidé de ne pas poursuivre la procédure en ce qui concerne cette dernière. La Commission a néanmoins maintenu sa position en ce qui concerne la Région flamande, la Région wallonne ainsi que la Région de Bruxelles-Capitale et émis, par lettre du 17 octobre 2008, un avis motivé dans lequel elle reprochait aux autorités de ces trois Régions de ne pas avoir pris toutes les mesures nécessaires pour transposer complètement les dispositions de la directive 85/337. En conséquence, le Royaume de Belgique a été invité à se conformer à cet avis dans un délai de deux mois à compter de la notification de celui-ci. »



We acknowledge the difference between the binary declaration of an infringement versus the computation of financial sanctions under article 260 (2) or (3) TFEU, but with more rigor and transparency in the reasoning, the national mechanisms to allocate responsibility would be served.^{CXXX} The Commission could play a pivotal role in this respect, as it has announced in its communication. In case of several heads of infringement, the Commission could propose separate sanctions if clear and objective data are available.^{CXXXI}

Proposition 2: Regions should be able to submit observations in infringement proceedings where they are responsible

Regions are no privileged applicants in the sense of art. 267 TFEU and cannot challenge EU legislative acts. A pendant of the privileged status is the ability to intervene in other proceedings. In this respect too, regions are treated on the same footing as private applicants and need to demonstrate an interest. However, infringement proceedings are invariably between the Commission and a Member State and regions are thus under article 40(2) of the Statute of the CJEU precluded to intervene (Materne 2012: 289-290; Wägenbaur 2013: 115). For instance, in *Commission v. Italy*,^{CXXXII} the application by the region of Liguria to intervene was rejected.^{CXXXIII} The substance of the infringement nonetheless concerned a measure of that very same region. Moreover, the Italian government indicated that it limited itself in transmitting the arguments of Liguria without sharing them with regards to the content. It did not dispute the Commission's point of view; in fact, the Italian government was of the same opinion.^{CXXXIV} Without any opinion on the content of the breach, one could question the reconcilability with the rights of defense.

Infringement proceedings are thus conducted by the national government with the freedom to appoint agents and legal counsel. The current state of the law thus heavily relies upon loyal cooperation at the national level. This assumption may be untenable in view of the composition of the sanctions and the national partition. If the federal government for instance, can be exonerated following the national mechanism, it might bring the Court to address the national division of competences. Per hypothesis, in a setting with shared powers or framework competence – it might be hard to precisely allocate the breach. In this case of dissonance between the national and the regional interests, much depends



upon the strength of the national channels of communication and the rights of the regions in the proceedings.

Next to this national perspective, one could question what is exactly lost should art. 40(2) of the Statute be amended as to allow the regions concerned to submit observations directly. On the plus side, it would help the Court in striking a balance between the recognition of constitutional regional autonomy and the necessity of precluding a strategic use of the argument of division of competences.^{CXXXV} It would also strengthen the objective of the infringement proceedings, i.e. to ensure full compliance,^{CXXXVI} by furthering dialogue and participation, *a fortiori* when the matter at hand is an exclusive regional competence.

Proposition 3: National implementation

Section 3.3 above contains a comparative analysis of the national mechanisms allocating the responsibility to bear the financial burden imposed by the ECJ on the Member State. We already evinced the issue that the obligation of article 260(1) TFEU extends to all institutions and levels of the Member State concerned.^{CXXXVII} A well-functioning substitution mechanism that ensures compliance at an earlier stage than the invocation of article 260 TFEU may lead to a shared responsibility under EU law.^{CXXXVIII} When, for instance, an ex post substitution mechanism is triggered after a declaration of infringement by the ECJ, this optional avenue to ensure compliance may draw the federal government into the material infringement under article 260(1) TFEU. It may even lead the Court to downgrade the findings on the loyal cooperation of the Member State and in turn negatively affect the financial sanctions.

A second problem is of a more practical nature and relates to the necessary expertise and administrative capacity to implement directives in a given field. In the Belgian case, due to the exclusive division of competences, this necessary administrative expertise may be lacking to properly intervene, albeit temporarily. This may be solved by having recourse to the measures enacted by the other regional bodies, and extending them.

To sum up, the characteristics of a well-designed national mechanism are threefold: a) there exists a possibility for a concurrent exercise of powers by allowing a temporal intervention by the national government; b) the division of the financial sanctions is as lucidly set out as possible; c) the national mechanism takes due account of the



requirements of EU law.

5. Conclusions

We set out to inquire how federal concerns and interests can be mitigated in the context of infringement procedures and financial sanctions under art. 260 TFEU. This article has analysed this question both from the perspective and practice of the Commission and the Court of Justice, as well as from the vantage point of the central and regional governments involved.

A careful analysis of the composition of financial sanctions has shown that regional responsibility and autonomy fits uneasily into current practice. From the perspective of EU law, the principle of equality, and responsibility, of the Member States precludes any direct imposition of sanctions. Even in the calculation, as we have seen in section B.III, the regional dimension is hardly taken into account.

We have turned to the various national mechanisms of redress to assign the internal responsibility for the financial sanctions under article 260 TFEU. In the six cases we have selected (Austria, Germany, Belgium, UK, Spain and Italy), different national mechanisms have been set up. It appears that these mechanisms are to a large extent untested, and leave large scope for political negotiation. Additionally, in these MS, regions often cannot access the infringement proceedings.

In conclusion, the Lisbon-fuelled enhancements of the article 260 TFEU procedures call for due attention to the structural dimension of several Member States. Timely implementation and compliance are the primordial objective. Failing that, a well-designed national mechanism to divide the sanctions at the national plane^{CXXXIX}, and more transparent and coherent reasoning from the Court and the Commission are warranted.

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^I Case C-88/03, *Portugal v. Commission*, [2006] ECR I-7115; Joined Cases C-428/06 to C-434/06, *UGT La Rioja*, [2008] ECR I-6747; Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, [2009] ECR I-10821; Greaves 2009.

^{II} Case C-610/10, *Commission v. Spain*, judgement of 11 Dec. 2012, nyr; Case C-533/11, *Commission v. Belgium*, judgement of 17 Oct. 2013, nyr.

^{III} On the subject of a regional voice in a multilevel setting, three central questions have been addressed in recent scholarship: the possibility to let regions partake in the deliberation of the Council based on art. 16(2) TEU (for an overview see Skoutaris 2012: 216-222; and the *locus standi* of regional entities before the Court of



Justice (see for instance Gamper 2013); Lenaerts & Cambien 2010. Thirdly, on the regional dimension of the subsidiarity principle, see Popelier & Vandenbruwaene 2011.

^{IV} Cf. Cygan 2013.

^V Case C-358/03, *Commission v. Austria*, [2004] ECR I-12055, para 11.

^{VI} The right of substitution in article 16 § 3 of the Special Act of Institutional Reform of August 8th, 1980 (SAIR).

^{VII} See *Commission v. Spain* and *Commission v. Belgium*, cited supra n. II.

^{VIII} The first mentioned three States proclaim their federal nature in the respective constitutions (art. 1 Belgian Const., art. 20(1) GG and art. 2 B-VG). On Spain, see Chicharro Lázaro 2011; on Italy, see Grottanelli de' Santi 2006; on the UK, see Leyland 2011.

^{IX} “The fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. The Court has consistently held that a Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law”; see, for instance, Case C-87/02, *Commission v. Italy*, [2004] ECR I-5975, para 38; *Commission v. Spain* (note II) para 132. This often repeated mantra stems from international law: see article 27 of the Vienna Convention on the Law of Treaties.

^X Committee of the Regions, White Paper on Multi-Level Governance (2009) 3-4; Christiansen & Lintner 2005.

^{XI} A point which travels beyond ‘federal’ Member States, see the recent discussion in France on territorial reform, and the issue of compliance with EU law: Boulet 2015.

^{XII} Based on the latest Report of the Commission on the Application of EU Law, COM(2014)612, 11.

^{XIII} Based on the Annual Report of the Court of Justice 2014, 120.

^{XIV} Based on the Annual Report of the Court of Justice 2014, 106.

^{XV} Based on Hooghe, Marks & Schakel 2010: 170-176, compiling an aggregate regional authority index for 42 countries in the period 1950-2006. In the sample of 42 countries are all 28 members of the EU. The aggregate regional authority index is based on 8 indicators composing self-rule (score on 15) and shared-rule (score on 9), compiled per region in the selected country and weighted for population. To interpret the index as reproduced here, the regional authority index varies between 0,0 (e.g. Malta) and 30.6 (Bosnia). Other federal countries (USA: 23.2; Switzerland: 19.5) provide a point of reference too.

^{XVI} Obviously, Croatia would reduce the average and is hence omitted.

^{XVII} COM (2014)612, 11, the Report of the Commission on the Application of EU Law, counts 1300 open infringing cases. The result, 48, is the quotient, rounded off.

^{XVIII} Due to the discrepancy in length of Membership of the EU, an average of the absolute sum of cases yields a partial picture. The next column (infringements declared 2010-14) is a more adequate basis for comparison.

^{XIX} Hooghe, Marks and Schakel 2010, incorporate different periods per state, depending on constitutional reforms implemented. We have used the most recent figures per country.

^{XX} No requirement of a reasoned opinion: see the Communication from the Commission “Implementation of Article 260(3) of the Treaty” 2011/C 12/01; Materne 2012: 38-47; Prete & Smulders 2010: 31; Kilbey 2010: 383-384.

^{XXI} SEC(2005)1658, as amended by SEC(2010)923. See the analysis by Kilbey 2007.

^{XXII} 2011/C 12/01.

^{XXIII} The last update dates from September 2014: C(2014) 6767.

^{XXIV} SEC(2010)1371, point 19; Gáspár-Szilágyi 2013: 283-284. Contra, based on a literal interpretation of article 260(3) TFEU: Träbert 2009: 395.

^{XXV} All cases have been withdrawn, see for instance the Order in Case C-329/14.

^{XXVI} SEC(2005)1658, point 6.

^{XXVII} 0.10 per month of duration, starting from the first judgement (procedure under paragraph 2) or from the date of expiration set in the directive (procedure under paragraph 3).

^{XXVIII} See SEC(2005)1658, points 14-18.

^{XXIX} See SEC(2005)1658, points 19-24.

^{XXX} SEC (2005) 1658, point 16.



XXXI This point relates to the finding of Materne, who concludes from the case-law that only *force majeure* can be successfully relied upon as a defense. See Materne 2012: 263.

XXXII In the words of AG Sharpston: “it is clear from the case-law that the Court’s practice has never been to follow the Commission’s detailed calculations when determining the amount of a lump sum but to determine a suitable amount, having regard to all the circumstances, in round figures. In doing so, it has not generally provided any precise detail of its reasoning but has merely pointed out the various aggravating and mitigating factors taken into account”: Opinion of the Advocate-General in Case C-184/11, *Commission v. Spain* of January 23, 2014, para 126.

XXXIII E.g. Case C-387/97 *Commission v. Greece*, [2000] ECR I-5047, para 89; Case C-70/06, *Commission v. Portugal*, [2008] ECR I-1, para 34; Case C-241/11 *Commission v. Czech Republic*, judgement of 25 June 2013, nyr, para 43; and the Opinions of the Advocate-General in cases C-109/08, [2009] ECR I-4657, para. 72; and in Case C-407/09, [2011] ECR I-11483, para. 46.

XXXIV E.g. Case C-278/01 *Commission v. Spain*, [2003] ECR I-14141, para 47-48 and 53-54; Case C-177/04 *Commission v. France*, [2006] ECR I-2461, para 65-66 (ECJ raises the coefficient of duration from 1,3 to 3); *Commission v. Portugal* (note XXXIII) para 44-47 (ECJ raises the coefficient of duration from 1 to 2); Case C-109/08, *Commission v. Greece*, [2009] ECR I-4657, para 39-41 (ECJ raises the coefficient of duration from 1,1 to 1,5).

XXXV E.g. *Commission v. Spain* (note XXXIV, para 47-48 and 53-54 (ECJ lowers the coefficient of duration from 2 to 1,5); *Commission v. Portugal* (note XXXIII) para 40-43 (ECJ substantially reduces the coefficient of seriousness from 11 to 4).

XXXVI E.g. *Commission v. Spain* (note XXXIV) para 55 (ECJ maintains the coefficient of seriousness of 4); Case C-304/02 *Commission v. France*, [2005] ECR I-6263, para 108 (ECJ maintains the coefficient of seriousness of 10); *Commission v. France* (note XXXIV) para 65-66 (ECJ maintains the coefficient of seriousness of 1).

XXXVII For a critique on the low degree of transparency and consistency, see Craig & de Búrca 2010: 438; Kilbey 2010: 370.

XXXVIII Case C-369/07 *Commission v. Greece*, [2009] ECR I-5703, para 116-117 (ECJ considers 4 years “a considerable period of time”); Case C-496/09 *Commission v. Italy*, [2011] ECR I-11483, para 58-59 (ECJ finds 7 years “a very considerable period of time”); *Commission v. Spain* (note II) para 121 (“an exceptionally long period”); Case C-374/11 *Commission v. Ireland*, judgment of 19 December 2012, nyr, para 40 (ECJ deplores the “particular lengthy character of the infringement”, *in casu* over 19 years). 378/13, Case C-378/13, *Commission v. Greece*, [2014] nyr, para 72.

XXXIX E.g. *Commission v. Spain* (note XXXIV) para 47-48 and 53-54; *Commission v. France* (note XXXIV) para 65-66; *Commission v. Italy* (note XXXVIII) para 48-49; *Commission v. Ireland* (note XXXVIII) para 40.

XL E.g. *Commission v. Spain* (note XXXIV) para 57; *Commission v. Greece*, (note XXXVIII) para 118-122; *Commission v. Italy* (note XXXVIII) para 60-64; *Commission v. Ireland* (note XXXVIII) para 38.

XLI E.g. *Commission v. France* (note XXXIV) para 65-66; *Commission v. Greece*, (note XXXVIII) para 122; *Commission v. Italy* (note XXXVIII) para 62-63.

XLII E.g. *Commission v. Italy* (note XXXVIII) para 65; *Commission v. Spain* (note II) para 131.

XLIII E.g. *Commission v. Ireland* (note XXXVIII) para 44.

XLIV E.g. Case C-568/07 *Commission v. Greece*, [2009] ECR I-4505, para 53; Case C-121/07, *Commission v. France*, [2008] ECR I-9159, para 70; *Commission v. Ireland* (note XXXVIII) para 40; *Commission v. Belgium* (note II) para 57.

XLV *Commission v. Belgium* (note II) para 42 (the Court states that “the criterion relating to the duration of the infringement, [is] according to the Commission’s claim, relevant only for the calculation of the penalty payment”) and para 54 (where the Court does take the duration into account when composing the lump sum payment).

XLVI On the double use of the criterion of duration by imposing both types of sanctions cumulatively, see Prete & Smulders 2010: 53; Kilbey 2007: 754.

XLVII E.g. *Commission v. France* (note XLIV) para 73-78 (importance of environmental protection); *Commission v. Greece* (note XLIV) para 54 (internal market/free movement); *Commission v. Greece*, n. XXXIII) para 38-39 (internal market/free movement); *Commission v. Belgium* (note II) para 55-56 (importance of environmental protection).

XLVIII E.g. Case C-270/11 *Commission v. Sweden*, judgment of 30 May 2013, nyr, para 55; *Commission v. Ireland* (note XXXVIII) para 49.



- XLIX Depending on the elaboration of this point by the Commission, see Case C-270/11 *Commission v. Sweden* (note XLVIII) para 50.
- L E.g. *Commission v. France* (note XLIV) para 66-69; *Commission v. Belgium* (note II) para 60.
- L^I E.g. *Commission v. Greece* (note XXXVIII) para 148; *Commission v. Spain* (note II) para 145; *Commission v. Ireland* (note XXXVIII) para 52; *Commission v. Belgium* (note II) para 72.
- L^{II} Case C-499/99, *Commission v. Spain*, [2002] ECR I-6031.
- L^{III} *Commission v. Spain* (note II) para (note 7, 10 and 45).
- L^{IV} *Commission v. Spain* (note II) para 4.
- L^V *Commission v. Spain* (note II) para 61, 85, 86.
- L^{VI} *Commission v. Spain* (note II) para 91.
- L^{VII} *Commission v. Spain* (note II) para 132.
- L^{VIII} See *Commission v. Spain* (note II) para 120-124, and 145.
- L^{IX} OJ L 135, 40.
- L^X Case C-27/03, *Commission v. Belgium*, judgment of July 8th, 2004, not reported.
- L^{XI} Since 1988, based on article 6, §1, II, 2° SAIR.
- L^{XII} *Commission v. Belgium* (note II) para 20.
- L^{XIII} *Commission v. Belgium* (note II) para 54, 71.
- L^{XIV} SEC(2005)1658, points 16.4, 10th indentation.
- L^{XV} SEC(2005)1658, points 16.4, 8th indentation (size of population affected). This criterion is quite relevant for spatially diverging regions, such as in Belgium – on the territory of Brussels Capital, four autonomous levels of government enjoy competences.
- L^{XVI} See, for instance, Joined Cases C-227-230/85, *Commission v. Belgium*, [1988] ECR 8, para 9: “[...] That division of powers does not however release it [Member State] from the obligation to ensure that the provisions of the directive are properly implemented in national law.”; Case C-8/88, *Commission v. Germany*, [1990] ECR I-2321, para 13: “[...] it is for all the authorities of the Member States, whether it be the central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence. However, it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on federal and Laender authorities respectively. It may only verify whether the supervisory and inspection procedures established according to the arrangements within the national legal system are in their entirety sufficiently effective to enable the Community requirements to be correctly applied.”
- L^{XVII} E.g. Const. Court nr. 146/01, judgement of November 20, 2001, para B.5.2.
- L^{XVIII} On the nuances to the principle of exclusivity with respect to matters pertaining to social policy, see Popelier & Cantillon 2013.
- L^{XIX} Parliamentary Documents, *Senate*, Special Session 1991-92, nr. 457/1, 2-3.
- L^{XX} See article 39 of the Proposal to Amend the SAIR, as adopted December 19th, 2013, Parl. Doc., *House*, 2012-13, nr. 3201/5.
- L^{XXI} See Leyland 2011; R. Hazell & R. Rawlings, *Devolution, Law Making and the Constitution* 6 (2005).
- L^{XXII} See B.4.17 to 26 of the Common Annex to the Concordat on Co-Ordination of EU Policy, [2010] consulted at <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>.
- L^{XXIII} Section 2(2) of the European Communities Act 1972, as amended.
- L^{XXIV} Point 21: “The devolved administrations are responsible for observing and implementing international, European Court of Human Rights and European Union obligations which concern devolved matters. In law, UK Ministers have powers to intervene in order to ensure the implementation of these obligations.”
- L^{XXV} Ross & Salvador Crespo 2003: 219.
- L^{XXVI} Art. 28(7) Scotland Act; art. 93(5) Government of Wales Act; art. 5(6) Northern Ireland Act.
- L^{XXVII} See for instance art. 57 & 58 Scotland Act. See for an application of this joint responsibility A. Ross, H. Nash, C. Reid, *The Implementation of EU Environmental Law in Scotland*, 13 *Edinburgh Law Review* 224-251 (2009).
- L^{XXVIII} Panara & De Becker 2011: 337; Vandamme 2005: 256-262.
- L^{XXIX} The first paragraph reads: “If a Land fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the Bundesrat, may take the necessary steps to compel the Land to comply with its duties.”



LXXX Erbguth 2011: 119.

LXXXI Article 23d(5): “The Laender are bound to take measures which within their autonomous sphere of competence become necessary for the implementation of juridical acts within the framework of European integration; should a Land fail to comply punctually with this obligation and this be established against Austria by a court within the framework of European Union, the competence for such measures, in particular the issuance of the necessary laws, passes to the Federation. A measure taken by the Federation pursuant to this provision, in particular the issue of such a law or the issue of such an ordinance, becomes invalid as soon as the Land has taken the requisite action.”

LXXXII Case C-358/03, *Commission v. Austria* [2004] ECR I-12055, para 11-12.

LXXXIII Case C-111/00, *Commission v. Austria*, [2001] ECR I-7559.

LXXXIV See Ordinance nr. 173/2002, *Bundesgesetzblatt* II April 26, 2002, p. 701.

LXXXV Under Article 149.1.3, the national government enjoys the exclusive competence with respect to international relations, but this cannot supersede the division of competences. See Chicharro Lázaro 2011: 185-186 and 201-203.

LXXXVI Spanish *Tribunal Constitucional*, decision 79/1992 of May 28, 1992 ; STC decision nr. 80/1993 of March 8, 1993, II.3: “[...] que la plena garantía del cumplimiento y ejecución de las obligaciones internacionales y, en particular ahora, del Derecho Comunitario que al Estado encomienda el art. 93 C.E., a pesar de que necesariamente ha de dotar al Gobierno de la Nación de los instrumentos necesarios para desempeñar esa función garantista, articulándose la cláusula de responsabilidad por medio de una serie de poderes que permitan al Estado llevar a la práctica los compromisos internacionales adoptados, tampoco puede tener una incidencia o proyección interna que venga a alterar la distribución de poderes entre el Estado y las Comunidades Autónomas operada por el bloque de la constitucionalidad. Y es que, aun cuando en el art. 93 C.E. se localiza una clara manifestación del monopolio competencial del Estado en orden a la garantía del cumplimiento de los compromisos adquiridos frente a otros sujetos de Derecho internacional, ya que esa garantía de la ejecución -no, desde luego, la ejecución misma- sí puede integrarse en el contenido del art. 149.1.3 C.E. [...]”

LXXXVII In case of exclusive powers of an Autonomous Region, this principle of supplementary state law cannot function. In that case, there is the ‘nuclear option’ of article 155 Constitution, that allows the Senate to authorise extraordinary measures, see Ross & Salvador Crespo 2003: 221; Vuillermoz 2003: 688-690.

LXXXVIII Case 126/1996.

LXXXIX On the relationship between both norms, see Martinico 2012: 370.

XC On the procedure of the Italian substitution mechanism, see article 8 of the Law no. 131/2003, *Gazzetta Ufficiale* n.132 of June 10, 2003; and article 41 of Law No 234 of 24 December 2012, *Gazzetta Ufficiale* no.3 of January 4, 2013.

XCI See points B.4.23 – B.4.24 of the Common Annex to the Concordat on the Co-ordination of European Union Policy.

XCII This agreement was adopted in the CARCE, Conferencia de Asuntos relacionados con las Comunidades Europeas. See Chicharro Lázaro 2011: 192-193.

XCIII *Acuerdo para regular la intervencion de las Comunidades Autonomas en las actuaciones del Estado en procedimientos precontenciosos de la Comision de las Counidades Europeas y en los asuntos relacionados con el TJCE que afecten a sus competencia*, d.d. November 29th, 1990.

XCIV Agreement between the Government, the Regions and the Autonomous Provinces, the Provinces, the Municipalities and the Mountain Communities “on the terms of application of obligations arising out of Italy’s membership of the European Union and on information guarantees from the Government” of January 24, 2008, in *Repertorio atti* of 24.01.2008. A detailed explanation of this agreement by Bertolino 2013: 164-165.

XCv Law No 234 of 24 December 2012 ‘General rules on Italy’s participation in drafting and implementing EU legislation and policies’, *Gazzetta Ufficiale* no.3 of January 4, 2013.

XCvi Art. 7(3) of the *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* – EUZBLG.

XCvii The “European Union Own Resources” account, administered by the Commission under article 317 TFEU. The recent judgment in *Commission v. Portugal* addresses the competence of the commission in seeking execution of the financial sanctions based on art. 260(2)TFEU. Nor the Commission, or the General Court, can rule on the conformity of a new (post 260judgement) national measure, which, in that case, lead Portugal to believe the daily sum should be reduced. See Case C-292/11P, *Commission v. Portugal*, judgment of January 15 2014, nyr.



- xcviii Puttler 2008: 1092. An overview of the (fruitless) arguments to base a right to redress on the constitution as it stood, see Böhm 2000.
- xcix Next to this, art. 109(5) covers the execution of the Stability- and Growth Pact with respect to the contributions by the several Länder in case of a joint deficit.
- c Gesetz zur Lastentragung im Bund-Länder-Verhältnis bei Verletzung von supranationalen oder völkerrechtlichen Verpflichtungen (Lastentragungsgesetz, LastG abbreviated), September 5th, 2006, *BGBI. I*, 2105.
- ci Explanatory introduction, Deutscher Bundestag, nr. 16/813, March 7th, 2006, 19.
- cii *Ibidem* and art. 1(1) LastG. This is the so-called ‚*Verursacherprinzip*‘, see Puttler 2008: 1096.
- ciii Art. 1(2) LastG.
- civ Art. 3 LastG.
- cv Puttler 2008: 1096; U. Karpenstein, „AEUV Art. 260“ in *Das Recht des Europäischen Union 25* (E. Grabitz, M. Hilf & M. Nettesheim eds., 2013).
- cvi Puttler 2008: 1096.
- cvi Explanatory introduction, Deutscher Bundestag, nr. 16/813, March 7th, 2006, 19. See for a critical opinion: Siekmann 2011: 2179.
- cvi Art. 2(2) LastG.
- cix Art. B 4.25 of the Concordat, *supra* note LXXII.
- cx See article 8 and the Second Additional Disposition of the Organic Law 2/2012.
- cxii From the second indentation of the article cited *supra* n. CX.
- cxii On this, see Wennerås 2006.
- cxiii *Parliamentary Dealings*, Senate, October 24th, 2013, question nr. 5-1141. There are other legal problems associated with this right to redress, including its unsure independence from the right to substitution, and its inapplicability *vis-à-vis* the Brussels Joint Community Commission.
- cxiv *Bundesgesetzblatt* December 28, 2007.
- cxv Art. 10 and 12 of the *Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration*, *Landesgesetzblatt* Nr. 93/1992.
- cxvi The general principle of reimbursement was laid for the first time down in article 1, para 1213-23 of the Law no. 296 of December 27, 2006.
- cxvii See, respectively, paragraphs 4, 3 and 10 of article 43. These provisions have abolished the relevant paragraphs of the Law of 2006 mentioned in the previous footnote.
- cxviii Bertolino 2013: 168.
- cxix Bertolino 2013: 172-173.
- cxx See Case C-184/11, *Commission v. Spain* (on fiscal measures by three provinces in the Basque Region).
- cxxi *Commission v. Italy* (note IX) para 38; *Commission v. Spain* (note II) para 132; see also note IX and accompanying text.
- cxxii *Commission v. Spain* (note II) para 132.
- cxxiii Case C-184/11, *Commission v. Spain* [2014], para 42-46.
- cxxiv *Commission v. Belgium* (note II) para 21-23.
- cxxv *Commission v. Belgium* (note II) para 28.
- cxxvi *Commission v. Belgium* (note II) para 57 (with respect to the lump sum) and 70 (with respect to the penalty payment).
- cxxvii Case C-435/09, *Commission v. Belgium*, [2011] ECR I-36.
- cxxviii From the dictum: (own trans.) by failing to take all the measures necessary to implement directive [...], with respect to the Flemish measures [...], with respect to the Walloon measures [...], with respect to the measures of the Region Brussels-Capital [...].
- cxxix *Commission v. Belgium* (note CXXVII) para 27.
- cxix See also the Opinion of AG Kokott in Case C-196/13, *Commission v. Italy* [2014] nyr, at para 72-73, where the absence of a precise list of the landfills to be cleaned up is discussed. The allocation of pecuniary responsibility adds to this problem.
- cxix See SEC(2005)1658, point 13.1.
- cxix Case C-503/06, *Commission v. Italy*, [2008] ECR I-74.
- cxix Per Order of the President of the Court of June 19, 2007.



CXXXIV *Commission v Italy* (note CXXXII) para 22: “La République italienne, dans le mémoire qu’elle a présenté à la Cour, se borne à lui transmettre les arguments de la région de Ligurie en les reproduisant textuellement, mais sans les reprendre à son compte. La République italienne ne présente en outre pas de conclusions tendant au rejet du recours de la Commission ni même à la condamnation de cette dernière aux dépens. De plus, la République italienne a fait savoir à la Cour, dans le cadre de la procédure de référé, qu’elle partageait l’analyse de la Commission et qu’elle a introduit, devant la Corte costituzionale (Cour constitutionnelle), un recours contestant la constitutionnalité de la loi régionale n° 34/2001 sur les mêmes fondements que le présent recours en manquement.”

CXXXV On this balance, see Lenaerts & Cambien 2010: 634.

CXXXVI *Commission v. France* (note XXXVI) para 80: “The procedure laid down in Article 228(2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective”.

CXXXVII See the references in note LXVI and accompanying text.

CXXXVIII In the Italian case, the combination of a substitution mechanism and a right to full redress has led Bertolino to criticize the amount of the redress, arguing that the national government bears some responsibility: see Bertolino 2013: 169.

CXXXIX See for the case of Belgium the recent recommendation of the Senate: *Report on the Implementation of EU Law, Parl Doc* Senate, 2014-15, No 6S131/2, 288-89, recommendations Nos 57 and 58, and the discussion at p. 178-184.

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