



PRESS RELEASE No 149/23

Luxembourg, 28 September 2023

Judgment of the Court in Case C-692/20 | Commission v United Kingdom (Fiscal marking of gas oil)

The Court of Justice orders the United Kingdom to pay a lump sum penalty of € 32 million for having failed to prohibit the use of marked fuel in private pleasure boats within the time limit prescribed by the Commission

The United Kingdom did not comply with the judgment establishing the infringement until after the court proceedings were brought, after a period of almost three years

By the judgment of 17 October 2018¹, the Court of Justice held that, by allowing the use of fuel that was marked (by the addition of colouring) for the propulsion of private pleasure craft, even where the fuel in question was taxed at full rate, the United Kingdom had infringed EU law.

Under an EU directive², fiscal marking is intended to make it possible to identify gas oil that is not subject to the full rate of taxation, such as that used in commercial boats. That aim cannot be achieved if the marking may also be used for gas oil intended for uses subject to taxation at the full rate, such as that used for propulsion of private pleasure craft.

The Commission sent a letter of formal notice to the United Kingdom inviting it to submit its observations regarding compliance with the judgment establishing the original infringement and, to that end, granted it a time limit of four months starting from the date of receipt of that letter within which to respond, namely by 15 September 2020. By that date, that State had already withdrawn from the European Union. However, Union law and therefore the directive in question continued to apply to the United Kingdom as a whole during the transition period which did not end until 31 December 2020. Since 1 January 2021, EU law has no longer applied to that State, except in respect of Northern Ireland.

Taking the view that the United Kingdom had not taken all the necessary measures to comply in good time with the judgment establishing the original infringement, the Commission, on 21 December 2020, brought before the Court a second infringement action against that State seeking, first, a declaration that the United Kingdom had failed to fulfil its obligation to comply with that judgment and, second, an order for that State to pay a financial penalty, namely a daily penalty payment and a lump sum.

Given that, with effect from 1 October 2021, the use of marked fuel in private pleasure craft for propulsion was prohibited in Northern Ireland, the Commission withdrew its claim for the United Kingdom to be ordered to pay a daily penalty payment. Nevertheless, it maintained its claim for an order requiring that State to pay a lump sum.

By its judgment handed down today, the Court holds, first, that **the United Kingdom has failed to fulfil its**

¹ Judgment of 17 October 2018, *Commission v United Kingdom*, [C-503/17](#).

² Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene (OJ 1995 L 291, p. 46).

obligation to take all the necessary measures to comply with the judgment establishing the original infringement within the time limit prescribed by the Commission, namely by 15 September 2020, and, second, that **the infringement did not persist up until the examination of the facts of the case by the Court**.

According to the Court, **it is clear that the United Kingdom had not taken all the necessary measures to comply with that judgment within that time period**. In that respect, it rejects the United Kingdom's argument that the Commission's letter of formal notice and its action were brought prematurely. In addition, the Court considers that the failure to comply with that judgment cannot be justified by any difficulties related to the legislative procedure, the general election, public consultations, geographic features, the variety in port sizes, difficulties in supplying both marked fuel and unmarked fuel, or the COVID-19 pandemic.

As regards the claim for the United Kingdom to be ordered to pay a **lump sum**, the Court takes account of the seriousness of the infringement, its duration and that State's ability to pay.

As regards the **seriousness of the infringement**, the Court recalls the importance for the establishment of the internal market of the rule infringed. In addition, it observes that both United Kingdom citizens wishing to enter waters of neighbouring Member States, and citizens of those Member states wishing to enter United Kingdom waters and needing to refuel with marked fuel before returning, risked facing difficulties during checks by the authorities of those Member States and, in particular, having fines imposed on them by those authorities.

In that regard, the Court recalls that the practical difficulties referred to by the United Kingdom cannot be taken into account as a mitigating circumstance. The same is true as regards that State's cooperation with the Commission during the pre-litigation procedure; only cooperation with the Commission characterised by steps showing an intention to comply within the shortest time possible with the judgment establishing the infringement in question may be taken into account for that purpose.

By contrast, the Court takes into account as a mitigating circumstance, first of all, the fact that the United Kingdom took a certain number of measures both before the present action was lodged and while the proceedings were ongoing in order to comply with the judgment establishing the original infringement. Next, **the effect of the infringement is reduced since 1 January 2021 in so far as, since that date, the directive at issue has no longer applied in that State, except in respect of Northern Ireland**. Finally, the Court also takes into account, in that context, the fact that the United Kingdom had never previously failed to give effect to a judgment establishing an infringement delivered by the Court.

As to the **duration of the infringement**, almost three years elapsed between the delivery of the judgment establishing the original infringement and its implementation by the United Kingdom.

As regards the **United Kingdom's ability to pay**, it is true that, since 1 January 2021, the infringement at issue has concerned only Northern Ireland. However, it is the United Kingdom's authorities and not those of Northern Ireland, which are responsible for the proper application of EU law in Northern Ireland. Therefore, the fact that, since 1 February 2020, the United Kingdom is no longer a Member State is irrelevant for the assessment of its ability to pay, with the result that it is not appropriate to treat it differently from the Member States in that regard.

Moreover, a penalty imposed on the United Kingdom calculated taking into account only the gross domestic product (GDP) of Northern Ireland, as regards the continuation of the infringement after the end of the transition period, would not be sufficiently dissuasive and therefore would not make it possible to achieve the aim of effectively preventing the repetition of similar infringements of EU law in the future. Furthermore, given that, since the end of the transition period, EU law no longer applies in the United Kingdom except in respect of Northern Ireland is a mitigating circumstance which plays a role in the assessment of the seriousness of the infringement, there is no reason to take that factor into account once again as regards the United Kingdom's ability to pay.

According to the Court, **it is therefore appropriate to take into account the GDP of the United Kingdom as a**

whole for the entire period of the infringement for the purpose of determining its ability to pay, with account being taken of recent trends in that GDP.

Consequently, the Court orders the United Kingdom to pay to the Commission a lump sum of € 32 000 000.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under EU law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The full [text and, as the case may be, the abstract](#) are published on the CURIA website on the day of delivery.

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