



EUROPEAN
COURT
OF AUDITORS

EN

Opinion 02/2022

(pursuant to Article 322(1), TFEU)

**concerning the Commission's
proposal for a Regulation of
the European Parliament and
of the Council amending
Regulation (EU, Euratom)
2018/1046 on the financial
rules applicable to the general
budget of the Union
[2022/0125(COD)]**

Contents

	Paragraph
Introduction	01-14
Fines, other penalties and sanctions	01-02
Management of fines and penalties according to the current provisions of the Financial Regulation	03-07
Recent case-law	08-10
The Proposal	11-14
General observations	15-18
Specific comments	19-27
Compensation	19-21
Negative revenue	22-25
Default interest	26
Entering the definitive fines and penalties in the budget	27
Proposed amendments to the Proposal	28
Annex	
Annex I – Our suggested changes to and comments on the Proposal	

THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular Article 322(1) thereof;

Having regard to the Commission's proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the general budget of the Union, adopted on 22 April 2022¹;

Having regard to the Council's request for an opinion, received on 6 May 2022;

Having regard to the European Parliament's request for an opinion, received on 16 May 2022; and

Having regard to Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU, and repealing Regulation (EU, Euratom) No 966/2012² (the 'Financial Regulation').

Whereas:

(1) The Financial Regulation stipulates the principles and general financial rules for managing the EU budget, including both revenue and expenditure;

(2) Following recent case-law regarding competition fines, the Commission proposed this amendment to the Financial Regulation in order to alleviate excessive strain on the expenditure of the EU budget as soon as possible. This is separate from the proposal to recast the financial rules applicable to the EU budget³;

HAS ADOPTED THE FOLLOWING OPINION:

¹ COM(2022) 184 final, 2022/0125(COD).

² OJ L 193, 30.7.2018, p. 1.

³ COM(2022) 223 final, 2022/0162(COD).

Introduction

Fines, other penalties and sanctions

01 The Commission imposes fines, other penalties and sanctions on undertakings that contravene EU law or on Member States that fail to apply EU law, as described below:

- The Commission imposes **fines** on undertakings that have infringed competition rules under Articles 101 or 102 TFEU. According to the relevant EU competition rules⁴, the Commission determines the amount of the fine to impose so that it reflects the gravity and duration of the undertaking's participation in the competition infringement. However, the amount in question should not exceed 10 % of the undertaking's global turnover generated in the financial year preceding the decision;
- The Commission may also impose **other penalties and sanctions** under the TFEU or the Euratom Treaty. Financial penalties are the kind most frequently imposed, usually where the Commission takes legal action against Member States that do not (properly) implement EU legislation. It then refers the matter to the Court of Justice of the European Union (CJEU) under Article 260 TFEU. Financial penalties can take the form of a flat rate and/or a daily payment. They are calculated by taking into account the importance of the rules breached and the impact of the infringement, the period during which EU law has not been applied, and the country's ability to pay.

02 Fines, other penalties and sanctions collected by the Commission go into the EU budget, and are categorised as other revenue. The amounts concerned vary from year to year, depending on the definitive amounts established and paid by undertakings and Member States. In 2021, they amounted to €1.6 billion (0.7 % of the EU budget).

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

Management of fines and penalties according to the current provisions of the Financial Regulation

03 When a fine or penalty imposed by the Commission is contested before the CJEU, the party subject to the fine or penalty may either provisionally pay the amount of the fine or penalty, or provide a bank guarantee covering the amount in question⁵. In the case of provisional payments, the debtor concerned transfers the amount of the fine or penalty to a Commission bank account. Since 2009, these fines and penalties have been deposited in a dedicated 'BUFI' (Budgetary Fines) fund to be invested in secure bonds with the aim of preserving the principal amount by earning accrued interest while ensuring the liquidity of the monies if the fine is to be returned to the undertaking concerned.

04 Where the fine or penalty is not paid by the deadline, the Commission should claim default interest at the rate applied by the European Central Bank (ECB) to its principal refinancing operations as in force on the first calendar day of the month in which the deadline falls, increased by three and a half percentage points until payment is made (ECB REFI, plus 3.5 percentage points)⁶. If the party subject to the fine or penalty chooses to provide a bank guarantee instead of the provisional payment, the guarantee must secure the payment not only of the fine or penalty but also of interest at the ECB REFI rate, plus 1.5 percentage points.

05 After all possible legal remedies have been exhausted, and **where the fine or penalty has been confirmed** by the CJEU, the provisionally collected amounts and the related interest yielded (the 'return') are entered in the EU budget. Where a financial guarantee has been lodged, it is duly enforced and the corresponding amounts (including the fine or penalty, plus interest) are entered in the EU budget⁷.

06 If the fine or penalty is increased by the CJEU judgment, the Commission should claim the additional amount due and set a deadline for payment. If the increased fine or penalty is not paid by the deadline, the Commission should claim default interest for late payment from the date of the CJEU judgment until the date of payment (see paragraph **04**).

⁵ Article 108(1) and (2) of the Financial Regulation (FR).

⁶ Article 99(4) FR.

⁷ Article 108(3) FR.

07 Where the fine or penalty has been cancelled or reduced as a result of the litigation process, the provisionally collected amounts or, in the event of a reduction, the relevant part (including the related return) are repaid to the party concerned. In the case of a negative return, the loss is deducted from the amounts to be reimbursed. Where a financial guarantee has been lodged, it is released in full or, as appropriate, in proportion to the reduction decided by the CJEU⁸.

Recent case-law

08 In its ruling of 20 January 2021 concerning an appeal about an action for damages, the CJEU ruled that following the reduction or annulment of the fine provisionally paid, the Commission had to pay interest for late reimbursement of the annulled or reduced fine from the date on which the undertaking provisionally paid the fine until the date of repayment⁹. This CJEU judgment goes beyond Article 108(4) of the Financial Regulation (FR), as that Article requires the Commission to reimburse the amount of the fine, plus (or minus) the related return only.

09 The CJEU ordered the Commission to pay this interest for deferred reimbursement as **compensation** for the loss of enjoyment of monies calculated by applying the ECB REFI rate, plus 2 percentage points for the period from the date of the provisional payment of the fine until the date due for repayment of the fine annulled by the judgment. This was the rate that the party concerned had sought as compensation. In addition, it recognised **default interest on compensation** from the date on which the fined undertaking lodged the action for damages with the CJEU until the actual date of the Commission's repayment, at the ECB REFI rate, plus 3.5 percentage points. This is the rate applied by analogy with Article 99(4) FR.

10 Following the above CJEU ruling, the 'compensation' paid to parties concerned by way of interest on deferred repayments would need to be paid where the return is lower than the compensation, or where there is no interest yielded on the amounts of the fines provisionally paid to the Commission, as set out in the current provisions of the FR. As part of an appeal relating to a similar case¹⁰, the Commission asked the CJEU to review its position on the recognition of compensation consisting of interest for

⁸ Article 108(4) FR.

⁹ Case C-301/19 P, appeal against the judgment in case T-201/17.

¹⁰ Case C-221/22 P, lodged on 28 March 2022, appeal against the judgment in case T-610/19.

deferred repayment of reduced or cancelled fines covered by provisional payments. There are several cases currently before the CJEU which have not yet been judged in the first instance or are subject to appeal¹¹.

The Proposal

11 Irrespective of the outcome of the above judicial appeal and of other cases, the Commission believes that it is urgent to propose legislative measures to avoid excessive strain on the EU budget resulting from recent case-law.

12 On 22 April 2022, the Commission submitted a proposal ('the Proposal') to the European Parliament and the Council to amend the Financial Regulation. On 6 and 16 May 2022 respectively, the Council and the European Parliament asked the ECA for an opinion on the Proposal.

13 According to the Commission's explanatory memorandum, the Proposal aims to ensure appropriate compensation representing the time value of the loss of enjoyment of monies in the event of reimbursement of provisionally paid fines, other penalties or sanctions that are cancelled or reduced. The Proposal also provides for this compensation to be recorded in the EU budget as negative revenue, thus avoiding any undue effect on the expenditure side and enabling the Union to meet the resulting financial obligations more effectively.

14 So far, the Commission has confirmed that it has paid a total of €2 million in compensation following the CJEU judgments on action for damages in two cases¹². Based on its assessment of April 2022 regarding the outcome of closed cases and of actions currently before the CJEU, the Commission estimated that possible compensation claims from parties subject to cancelled or reduced fines and penalties covered by provisional payments could amount to as much as €1.2 billion.

¹¹ Cases T-236/22, T-480/21, T-420/21, T-414/21, T-413/21, T-411/21, T-410/21, T-321/21, T-313/21, T-310/21, T-292/21, T-291/21, T-80/21 and T-94/20.

¹² Cases T-201/17 and T-610/19.

General observations

15 Overall, we welcome the proposed amendments to the FR, as they aim to ensure reasonable compensation for undertakings and Member States in the event of reimbursement of a provisionally paid fine or penalty that has been cancelled or reduced. However, we have certain reservations about the Proposal as regards the rules for budgeting for the financial costs of compensation.

16 Although it gives the Commission more flexibility in managing the budget, the proposal to record these costs as negative revenue means that the Commission would not be required to follow the ordinary budgetary procedures applicable to expenditure.

17 We also have specific comments on the following issues:

- (a) calculating compensation (see paragraphs [19-21](#));
- (b) the impact of recording negative revenue (see paragraphs [22-25](#));
- (c) clarification about default interest (see paragraph [26](#));
- (d) entering the definitive fines and penalties in the budget (see paragraph [27](#)).

18 We note that the Proposal has been made at the same time as the CJEU is examining an appeal about a similar case. There are also other ongoing cases relating to compensation for fines and penalties (see paragraph [10](#)). We suggest that the Commission should actively monitor the outcome of these cases and assess their impact on the FR.

Specific comments

Compensation

19 The Commission proposed that the amount of interest for compensation should be calculated at the ECB REFI rate, plus 1.5 percentage points¹³. We note that the proposed rate is lower than the rate the CJEU stipulated in its recent judgment of appeal relating to the action for damages (the ECB REFI rate, plus 2 percentage points), thereby reflecting the request by the undertaking concerned.

20 We acknowledge that the ECB REFI rate, plus 1.5 percentage points, is proposed to apply by analogy with the interest rate to be paid when a debtor lodges a financial guarantee (instead of making a provisional payment) for the period of litigation (see paragraph **26**). However, the difference between the rate proposed in Article 108(4) FR and the rate resulting from the above case-law creates a risk that undertakings or Member States may bring actions before the CJEU for damages in order to obtain higher compensation, rather than by applying the proposed rate.

21 We also note that the Commission did not propose adding a provision about default interest (calculated on the basis of the ECB REFI rate, plus 3.5 percentage points) in the event that compensation is not repaid by the stipulated deadlines (see paragraph **09**). In order to improve the clarity of the legal text, we suggest that the Commission should add this in its proposed change to Article 108(4) FR (see *Annex I*) by applying the conditions for interest on late payments as set out in Article 116(5) FR.

Negative revenue

22 From a budgetary viewpoint, a fine or penalty is recorded as revenue when the definitive amount is set and paid. During the litigation process at the CJEU, the amounts of fines or penalties are not budgeted for. The financial costs of compensation for cancelled or reduced fines or penalties are currently charged to the EU budget as expenditure, under Heading 7: 'European public administration'.

23 The Commission's proposed changes to Article 48(1) FR intend to record the financial costs of compensation as negative revenue, deducting them from the budgeted amounts of definitive fines and penalties. In our view, charging

¹³ Proposed Article 108(4) FR.

compensation as negative revenue instead of expenditure would have a neutral financial impact on the EU budget as a whole. While this could reduce excessive strain on the budget, the Commission would not be required to follow the ordinary budgetary procedures applicable to expenditure, i.e. either to apply the procedures for budgetary transfers and/or amending budgets¹⁴ to ensure that the necessary appropriations are available; or to include the above costs as part of total authorised spending in line with the own resources¹⁵ and Multiannual Financial Framework (MFF)¹⁶ ceilings.

24 Charging financial costs as negative revenue is not standard budgetary practice. However, we take note that, with a view to enhancing financial reporting, the Commission intends to introduce a separate budget line in order to identify the negative amounts of compensation deducted from the revenue from fines and penalties. It also intends to provide more information on this compensation (e.g. the amounts paid or due for the current year, and the estimated amounts for the following year) as part of the supporting documents for the adoption of the budget and its amendments.

25 According to the Proposal, the financial costs would be covered by the revenue resulting from the amounts of fines and penalties that have become definitive. The Commission considers this to be generally sufficient. We note, however, that there is a risk that the level of definitive fines or penalties may not cover compensation due in the same year. This means that, if this risk materialises, compensation would have to be financed from other revenue or, as a last resort, additional national contributions based on the Member States' Gross National Income (GNI) (see paragraph 27).

Default interest

26 We welcome the proposed modification to Article 99(4) FR, which removes the reference to the interest to be paid where a guarantee is provided to cover fines or penalties (at the ECB REFI rate, plus 1.5 percentage points) and places it under the proposed Article 108(1) FR. The Proposal clarifies that default interest (at the ECB REFI

¹⁴ Articles 30 and 44 FR.

¹⁵ Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (OJ L 424, 15.12.2020, p. 1).

¹⁶ Council Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027 (OJ L 433I, 22.12.2020, p. 11).

rate, plus 3.5 percentage points) applies only to cases where amounts of fines and penalties imposed by Commission decisions have neither been paid nor covered by a guarantee.

Entering the definitive fines and penalties in the budget

27 Entering definitive fines and penalties in the budget (as proposed in Article 107(2) FR) by the end of the year following the one where the fines became definitive would give the EU budget greater flexibility in responding to its financial needs. This is because the Proposal would allow revenue from fines and penalties to be budgeted for until the end of the year after the related amounts are definitive, if needed to cover compensation due without using other sources of revenue (see paragraph [25](#)).

Proposed amendments to the Proposal

28 In the *Annex I*, we set out suggested changes to and comments on the Proposal.

This Opinion was adopted by Chamber V headed by Mr Tony Murphy, Member of the Court of Auditors, in Luxembourg on 28 June 2022.

For the Court of Auditors

A handwritten signature in black ink, appearing to read 'K-H Lehne', written in a cursive style.

Klaus-Heiner Lehne

President

Annex

Annex I – Our suggested changes to and comments on the Proposal

Text of the proposal	Suggested change	Comments
<p><i>Article 1 of the Proposal</i></p> <p>(...)</p> <p>(4)</p> <p>Article 108 is amended as follows:</p> <p>(a) (...)</p> <p>(b) paragraph 4 is amended as follows:</p> <p>(i) (...)</p> <p>The amount or the relevant part thereof referred to in point (a) of the first subparagraph shall be increased by interest at the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the <i>Official Journal of the European Union</i> in force on the first calendar day of the month in which the decision imposing a fine, other penalty or sanction was adopted, increased by one and a half percentage points.</p> <p>(ii) (...).</p>	<p><i>Article 1 of the Proposal</i></p> <p>(...)</p> <p>(4)</p> <p>Article 108 is amended as follows:</p> <p>(a) (...)</p> <p>(b) paragraph 4 is amended as follows:</p> <p>(i) (...)</p> <p>The amount or the relevant part thereof referred to in point (a) of the first subparagraph shall be increased by interest at the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the <i>Official Journal of the European Union</i> in force on the first calendar day of the month in which the decision imposing a fine, other penalty or sanction was adopted, increased by one and a half percentage points. If the interest under point (i) is not paid by the deadline set by the judgment of the Court of Justice of the European Union, or, in the absence of such deadline, within 30 days of that</p>	<p>We suggest it be clarified that the Commission may pay default interest in the event of late reimbursement of the amount of compensation, by applying the conditions for interest on late payments as set out in Article 116(5) FR (see paragraph 21).</p>

	<p>judgment, default interest shall be applied in accordance with Article 116(5).</p> <p>(ii) (...).</p>	
--	--	--