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Discretionary Power of the Court of Justice in Article 260 (2) TFEU – Margin of Appreciation or Arbitrariness?

I. Introduction

Discretion is an inevitable intellectual tool in the application of Law. Legal terms are often uncertain and rules give the judge room for more than one choice. The complexity of competing values and competing interests in different fields precludes the formulation of specific rules. The legislator confers a discretionary jurisdiction on some official or authority. Courts expressly use discretion when sentencing in criminal cases.[1] The outer limit of this freedom of decision is arbitrariness. The sanctioning regime of Article 260 (2) of the Treaty on the functioning of the European Union describes one of these "discretion-situations": "If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it."

The wording of this paragraph does not contain any indication of the principles and practical considerations (for example upper and/or lower limits) concerning the imposition of the two financial sanctions. On the contrary, expressions like "It [the Commission] shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned *which it considers appropriate* in the circumstances", and "the Court...*may impose* a lump sum or penalty payment on it" suggest that these Institutions have a considerable power of discretion in the matter. This contribution is intended to shed light on the use of discretion in the framework of the Article 260 (2)

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[1] HART, HERBERT A.: Discretion. Harvard Law Review 2013, vol. 127, pp. 652–665.

procedure, with special attention to the jurisprudence of the Court of Justice concerning the imposition of a lump sum.

II. The Commission's first attempt to "auto-regulate" its own discretionary power – the communications of 1996/97

In 1996 the Commission published a memorandum on the application of Article 171 EC. It took the view that ".the Commission, in a spirit of openness, believes that it must publicly state the criteria it means to apply in asking the Court to impose monetary penalties."[2] The Commission considered that the penalty payment is the most appropriate instrument for achieving the basic objective of the new mechanism, i.e. compliance as rapidly as possible with the obligations stemming from EC law. That is why it decided to ask, as a rule, only a penalty payment and not a lump sum. The fundamental criteria which the Commission is intended to use when calculating the amount of the penalty payment are a) the seriousness of the infringement, b) its duration, c) the need to ensure that the penalty itself is a deterrent to further infringement.

As regards seriousness, the importance of the Community rules which have been infringed and the effects of the infringement on general and particular interests will be taken in account. The duration must be considerable. In order to secure the deterrent effect, the Commission will not propose to the Court a purely symbolic penalty. A more exact method of calculation by the Commission of the penalty payment was published in 1997.[3] In this communication the Commission declared that "Member States must be aware of how the financial penalties proposed by the Commission to the Court of Justice of the European Communities are to be calculated, and the method used must comply with the principles of proportionality and equal treatment for all Member States. It is also important to have a clear and consistent method, since the Commission must explain to the Court how it determined the penalty proposed."[4]

The penalty to be paid is the sum of the amounts due in respect of each day's delay in implementing a judgement of the Court, beginning from the day on which the Court's second judgement was brought to the attention of the Member State concerned and ending when the latter complies with the judgement. The amount of the daily penalty is calculated as follows: a uniform flat-rate amount (ECU 500) is multiplied by two coefficients, one reflecting the seriousness of the infringement (at least 1 and no more than 20) and the other the duration (at least 1 and no more than 3); the result is multiplied by a special factor (n) reflecting the ability to pay of the Member State concerned (based on the GDP of the Member States) and the number of votes it has in the Council.[5]

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[2] Memorandum on applying Article 171 of the EC treaty (96/C 242/07) OJ 1996 C 242. 6. p., point 2.

[3] Method of calculating the penalty payment provided for pursuant to Article 171 of the EC Treaty (OJ 1997 C 63, 2. p.).

[4] 1997 Communication, point 1.

[5] The "n" factor varies from 1 (Luxembourg) to 26,4 (Germany).

In the first case under Article 260 (2) which reached the Court,[6] the Commission – sticking to its Communication - applied for a daily penalty payment of 24.600 écu per day. On this point the question of discretionary power of the Court of Justice arose quite naturally. The Court had to decide on its attitude vis-à-vis the Commission's proposal concerning the financial penalty. Is it bound by it? If yes, to what extent? If no, how would it determine on the imposition of this type of sanction?

III. Advocate General Colomer on the discretionary power of the Court vis-à-vis the Commission's proposal

The Advocate General (AG) of the case, *Ruiz-Jarabo Colomer* took the view that the Court cannot depart at will from the general direction and amount set by the Commission. He elaborated four arguments:

> "88. ... if the Court of Justice had complete freedom to decide, on its own initiative, whether or not to impose a financial penalty and to set the amount of any penalty it did impose, the Commission's function, once it had brought the action, would be reduced to that of an amicus curiae ...In view of the special reference which the Treaty makes to it, the Commission's proposal must have greater legal significance than the pleadings or observations of the parties.
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> 89. ... it would be contrary to the scheme of Article 171 for the Commission to be the orchestrator of the proceedings – since it alone has authority to decide to initiate them and the power to terminate them by withdrawing its action – but for its proposals regarding actions to be no more than mere suggestions which have not the slightest bearing on the decision ultimately to be taken by the Court.
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> 90. ... If the Court of Justice had unfettered discretion as regards the imposition and setting of the coercive sanction, it would also take over the task of assessing considerations of political expediency, which would seriously upset the existing division of powers between the institutions of the Union.
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> 91. ... If the Court of Justice were to have complete freedom to impose and set the penalty it considered appropriate, without taking into account the Commission's proposal – with which, logically, the exchange of arguments between the parties will be concerned – what would become of the rights of defence?"

The AG went on to ask the question "What, then, are the limits of the Court's power?" His answer – based on the analogy of the judicial review of the acts of Community institutions – was that "95 ... the Court must ensure that it does not substitute its own assessment for that carried out by the Commission so as not to distort the most important aspect of the judicial function it performs....The judicial review of a proposal for a sanction of this kind must seek rather to ensure observance of the principles of proportionality and equal treatment."

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[6] C-387/97, Commission v Greece, [2000] ECR I-5047.

IV. The Court's appreciation of its own discretion

In its judgement the Court started with the legal nature of the Commission's communications.

> "84. In the absence of provisions in the Treaty, the Commission may adopt guidelines for determining how the lump sums or penalty payments which it intends to propose to the Court are calculated, so as, in particular, to ensure equal treatment between the Member States....
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> 87. Those guidelines, setting out the approach which the Commission proposes to follow, help to ensure that it acts in a manner which is transparent, foreseeable and consistent with legal certainty and are designed to achieve proportionality in the amounts of the penalty payments to be proposed by it.
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> 88. The Commission's suggestion that account should be taken both of the gross domestic product of the Member State concerned and of the number of its votes in the Council appears appropriate in that it enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range."

In this way the Court seems to be quite permissive concerning the principles and methods applied to the financial penalties elaborated by the Commission. But the Court did not stop here and continued as follows: "89 It should be stressed that these suggestions of the Commission cannot bind the Court. It is expressly stated in the third subparagraph of Article 171(2) of the Treaty that the Court, if it finds that the Member State concerned has not complied with its judgment ... may impose a lump sum or a penalty payment on it. However, the suggestions are a useful point of reference." In the case at hand, the Court – having made its own appreciation of the seriousness and duration of the violation (not the ability to pay) and without making use of the method of calculation offered by the Commission – ordered Greece to pay a penalty payment of 20 000 ECU per day. The paragraph 89 cited above turned out to be decisive as far as the Court's basic perception of its own discretionary power is concerned. It declared that the suggestions of the Commission cannot bind it, and these suggestions will serve only as "a useful point of reference". The formula has been repeated several times in the relevant case-law.[7]

In the subsequent case-law, the Advocates-General and the Court itself seemed to accept the principles and the methods of decision regarding the penalty payment. They only maintained the discretionary power to give different weights to the factors which allow the possibility to evaluate the circumstances of the case, i.e. its seriousness and duration.[8] In some cases the Court decided on its own consideration to depart from the

[7] See, for example, cases C-304/02, Commission v France, [2005]ECR I-6262, par. 85.; C-70/06 Commission v Portugal, [2008] ECR I-1, par. 34.; C-369/07 Commission v Greece, [2009] ECR I-5703, par. 112.; C-610/10, Commission v Spain, (not yet reported) par. 116.

[8] C-278/01 Commission v Spain, [2003] ECR I-14141; C-304/02, Commission v France, [2005] ECR I-6263; C-177/04, Commission v France, [2006] ECR I-2461; C-70/06, Commission v Portugal, [2008] ECR

daily penalty payment system and ordered the payment on a half yearly basis.[9] Only in a relatively recent case did it impose a daily penalty payment which departed considerably from the proposal of the Commission and the Advocate General as well.[10]

V. Advocate General Geelhoed's revolutionary proposal: two financial penalties in the same case

In 2004, in a case *Commission v France*[11] AG *Geelhoed* – despite the fact that the Commission had only applied for a daily penalty payment – suggested imposing both of the financial sanctions. The Court decided to ask the Member States' observations on this issue closely related to the discretionary power: a) Whether the Court can impose both a lump sum and penalty payment? b) Whether the Court may, where appropriate, depart from the Commission's suggestions and impose a lump sum on a Member State even though the Commission had not proposed this? Thirteen (!) Member States answered the first question in the negative. They relied on the wording of the Article which actually says "penalty payment *or* lump sum", on the breach of the principles of legal certainty and transparency (the Commission did not publish guidelines on the criteria of the imposition of a lump sum), the *ne bis in idem* principle (both of the financial penalties take into account the length of the violation). The Court did not accept these objections and declared:

> "81.... While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.
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> 82. That being so, recourse to both types of penalty provided for in Article 228(2) EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist."

The second question was answered in the affirmative only by the Czech, Hungarian and Finnish governments. They submitted that the Court has a discretion which extends to determining the penalty considered to be the most appropriate, irrespective of the

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I-1; C-109/08 Commission v Greece, [2009] ECR I-4657; C-369/07 Commission v Greece, [2009] ECR I-5703.

[9] C-278/01, Commission v Spain, [2003] ECR I-14141; C-533/11, Commission v Belgium (not yet reported).

[10] C-610/10, Commission v Spain, (not yet reported). In this case the Commission asked for 131,136 € per day; the Advocate General proposed 104,909 € per day. The Court (taking into account GDP and inflation in Spain at the time) imposed 50,000 €, without making use of the Commission's calculation scheme.

[11] C-304/02, Commission v France, [2005] ECR I-6262.

Commission's suggestions in this regard.[12] Twelve governments took the opposite view, asserting that such a wide discretion would infringe the principles of legal certainty, predictability, transparency and equal treatment. The German government raised the argument that the Court lacks the political legitimacy necessary to exercise such a power in a field where assessments of political expediency play a considerable role. At the procedural level it stressed that so extensive a power is incompatible with the general principle of civil procedure - common to all the Member States - that courts cannot go beyond the parties' claims, and dwelt upon the need for an *inter partes* procedure enabling the Member State concerned to exercise its rights of defence.[13] The French, Belgian, Netherlands, Austrian and Finnish governments dwelt upon the rights of defence. It is remarkable that most of these arguments are very close to those of AG Colomer which we have seen above.

The Court rejected all of these considerations. The breach of the principles of legal certainty, predictability, transparency and equal treatment was rejected by reference to the arguments used to ascertain that the Court is not bound by the suggestions of the Commission. The procedure is not a civil procedure but a special judicial procedure for the enforcement of judgments.[14] Concerning the lack of political legitimacy, the Court asserted that once the Commission has exercised its discretion as to the initiation of infringement proceedings the question of whether or not the Member State concerned has complied with a previous judgment of the Court is subjected to a judicial procedure in which political considerations are irrelevant. In the case at hand the Court imposed both of the two sanctions.

VI. The Commission gives up a considerable part if its discretion – Communication 2005

After the judgment in *Commission v France*, there was the possibility that the Commission might not maintain its previous position according to which it would suggest only a penalty payment. In 2005 it published a new communication on the application of the Article 228 EC (2) (now Article 260 (2) TFEU); ("Communication 2005").[15] The new communication reflects the new perception of the Court – that the two sanctions may be imposed in the same case – and the position of the Court concerning the specific objective of the lump sum: sanctioning the violation of the Treaty and the necessity of taking account of the damage the infringement has caused to public and private interests. To some extent the Commission went even further. It fixed as a new rule that it will propose the imposition of both the financial sanctions. (Of course, if the violation has been brought to an end before the Court's judgment, it will withdraw the application for penalty payment.)

[12] *Ibid.* par. 87.
[13] *Ibid.* par. 88.
[14] *Ibid.* paras. 91-92.
[15] Communication SEC (2005) 1658 of 12 December 2005 entitled 'Application of Article 228 of the EC Treaty' (OJ 2007 C 126, 12. p.)

In taking this action the Commission gave up a considerable part of its discretionary power, *i.e.* whether it would propose the imposition of a lump sum or not. This position is based on the argument that any case of persistent non-compliance with a Court judgment by a Member State, irrespective of any aggravating circumstances, in itself represents an attack on the principle of legality in a Community governed by the rule of law, which calls for a genuine sanction.[16] If the Member State concerned complies with its EU law obligations just before the appreciation of the facts by the Court, it can maintain the unlawful situation for a considerable period of time without any negative consequence.

The Commission limited its margin of discretion to the determination of the amount of money it considers appropriate in the particular case. The fundamental considerations are the principles of proportionality and equal treatment. The actual amount of money also reflects the necessary deterrent effect on the Member State concerned (and may have a general preventive effect). The factors according to which the Commission will determine the amount of money it will apply for are the same as in the case of the penalty payment (seriousness, duration, deterrent effect). The calculation of the amount will be made following practically the same arithmetical formula as in the case of the penalty payment (see section II).

This scheme introduces a highly automatised system for calculating of the amount of lump sum suggested by the Commission. The only multiplier which leaves a real margin of appreciation is the coefficient of seriousness. A specific characteristic of the determination of the amount of the lump sum payment is that there is a minimum amount for each Member State.[17] The Commission presented the criteria which it intends to take into consideration when deciding on the actual value of the coefficient of seriousness: a) The importance of the rules breached. Infringements affecting fundamental rights or the four fundamental freedoms protected by the Treaty should be considered serious breaches. b) The judgment which the Member State has not complied with forms part of established case-law. c) The clarity of the of the rule breached can be a determining factor. d) If the Member State adopted measures it thought sufficient, but which the Commission considers insufficient, this is a different situation from one in which the Member State omits to take any action at all. e) A lack of full cooperation with the Commission during the procedure constitutes an aggravating factor.[18] f) The effects of infringements on general or particular interests.

Concerning the latter criterion, the Commission gives examples of facts which may influence the evaluation of the seriousness of the breach: any loss of the Community's own resources; the impact of the infringement on the way the Community functions; serious or irreparable damage to human health or the environment; economic or other harm suffered by individuals and economic operators, including intangible consequences, such as personal development; the financial sums involved in the infringement; any possible financial advantage that the Member State gains from not

[16] Communication (2005), point 10.2

[17] The lowest minimum amount is 180,000 euros (Malta), the highest is 12,700,000 euros (Germany).

[18] On this point the Commission refers to par. 92 of the conclusions of Advocate-General Geelhoed in Case C-304/02 (Commission v France).

complying with the judgment of the Court; the relative importance of the infringement, taking into account the turnover or added value of the economic sector concerned in the Member State in question; the size of the population affected by the infringement (the degree of seriousness could be considered less if the infringement does not concern the whole of the Member State in question); the Community's responsibility with respect to non-member countries; whether the infringement is a one-off or a repeat of an earlier infringement (for example, repeated delay in transposing directives in a certain sector).

VII. The Court of Justice's perception of the lump sum as a financial sanction – non-acceptance of the Commission's method

As we have seen earlier, the Court widely accepted the principles and the method of calculation of the penalty payment proposed by the Commission in the communications 1996/1997 (and maintained in Communication 2005). Examining the jurisprudence of the Court concerning appreciation of the lump sum it seems to be clear that this is not the case with the lump sum.[19] The data in the Table show that there are important differences in the levels of payment set, relative to the amounts suggested. It also seems to be obvious that the Court refused to apply the method of calculation set out in its communications and put into practice by the Commission. Instead, the Court relied on its own appreciation and determined the amount payable in round sums, without any precise indication of the criteria applied.

The Court clarified its position regarding Communication 2005 in Commission v France.[20] It declared as it did concerning the penalty payment – that while guidelines may help to ensure that the Commission acts in a manner that is transparent, foreseeable and consistent with legal certainty, such rules cannot bind the Court in the exercise of the power conferred on it by Article 228 (2) EC.[21] As far as the extent of this power is concerned, it specified that an order for the payment of a lump sum should not be made automatically as argued in the communication, since Article 228 *"confers a wide discretion upon the Court whether it is necessary to impose such sanctions."*[22] It is striking that the Court does not consider the Commission's suggestions as a "useful point of reference" as it did in case of the penalty payment. (In subsequent judgments it went on to qualify these suggestions as "merely guidance".[23]) This clearly indicates that the Court wishes to retain wider discretionary power than in case of the penalty payment. The Court also states how will it decide when it has the opportunity to impose a lump sum: "62 The

[19] This was clearly stated in the opinion of Advocate General Mazák in Case C-407/09, Commission v Greece, (delivered on 16 December 2010): "46. It can be seen from the judgments in which the Court has ordered Member States to pay a lump sum that, in contrast to the fixing of a penalty payment, the Court has not adopted the method of calculation proposed by the Commission in its 2005 communication."

[20] C-121/07, Commission v France (GMO), [2008] ECR I-09159.

[21] *Ibid.* par. 61.

[22] *Ibid.* par 63.

[23] C-241/11, Commission v Czech Republic (not yet reported), par. 43.; C-576/11, Commission v Luxembourg (not yet reported) par. 60.

decision whether to impose a lump sum payment must, in each individual case, depend on all the relevant factors pertaining to both the particular nature of the infringement established and the individual conduct of the Member State involved in the procedure instigated pursuant to Article 228 EC."

What seems to be of particular interest is the important weight accorded to the individual conduct of the Member State. We have seen in Communication 2005 that this is one of the factors affecting the seriousness of the infringement. Once the Court has decided to impose a lump sum payment it has to determine the amount the Member State has to pay. The relevant factors to be taken into account include the ability to pay of the Member State concerned, how long the breach of obligations has persisted since the judgment which initially established the breach was delivered (the duration) and the public and private interests involved.[24] Here, we may see once again factors which were also included amongst the factors of seriousness in Communication 2005 (general and/or private interests) and the ability to pay of the Member State (the "n" factor) as a factor producing a kind of deterrent effect. The general statement became part of the established case-law of the Court, and was frequently repeated.[25]

VIII. How does the Court proceed with the imposition of a lump sum?

1. General approach

In cases under Article 260 (2) TFEU the Court first decides whether it would be justified in ordering the Member State concerned to pay a lump sum. In the second step it decides on the amount to be paid. This exercise depends on the necessity of the imposition of a penalty payment. Often, if the Court imposes a penalty payment (starting from the suggestions of the Commission) it refers broadly to the same circumstances (emphasising some of them, especially the duration) as it would in the case of a lump sum, and then turns to the determination of the amount of money to be paid, without adopting any method of calculation.[26] If the penalty payment is not appropriate (i.e. the Member State has complied with its obligation(s) after the action had been brought), it considers only the appropriateness and the amount of the lump sum payable.

The Court starts its argumentation on the necessity of the imposition of a lump sum. It takes into account different criteria concerning the special circumstances of the breach and the conduct of the Member State concerned. (We have looked at these criteria under

[24] *Ibid.* par. 64.

[25] See Cases C-369/07, Commission v Greece, par. 144.; C-407/09, Commission v Greece, par. 30.; C-279/11, Commission v Ireland (not yet reported) paras. 65-67.; C-241/11, Commission v Czech Republic, paras. 40-50.; C-533/11, Commission v Belgium (not yet reported) paras. 49-53.

[26] C-109/08, Commission v Greece, [2009] ECR I-4657. paras. 53-54.; C-576/11, Commission v Luxembourg, paras. 61-65.; C-369/07, Commission v Greece, par. 145.; C-496/09, Commission v Italy (not yet reported) paras. 84-91.; C-610/10 Commission v Spain (not yet reported) par. 145.

point VI.) After "proving" the appropriateness of the imposition of this sanction,[27] the Court decides on the amount of money and the method of payment (on a daily or half yearly basis, payment in instalments etc.). In most of the cases it simply refers only to the circumstances analysed in the previous part of the judgment.[28] However, it can happen that it produces a detailed analysis of the seriousness and duration of the violation and the conduct of the Member State in question only in the "amount of a lump sum payment" section.[29]

2. Factors taken into account in the Court's appreciation

There are several factors taken into consideration by the Court concerning the seriousness of the breach; the duration of the violation; the Member State's conduct; the Member State's ability to pay.

2.1 Seriousness of the breach

(1) *The importance of the rules breached.* As the lump sum is concerned with sanctioning the impact of the violation of EU law on public and private interests, its amount has to reflect the importance of the rule(s) breached. The jurisprudence of the Court consequently mirrors this approach. In its argumentation regarding the appropriateness of a lump sum, or when it turns to the business of setting the amount, one always finds a presentation dealing with the importance of the rule breached. In *Commission v France* (GMO) the Court emphasised that "... where failure to comply with a judgment of the Court is likely to harm the environment and endanger human health, the protection of which is, indeed, one of the Community's environmental policy objectives, as is apparent from Article 174 EC, such a breach is of a particularly serious nature" [30]

The Court consequently held that the Treaty rules on State aid (the common market) are of a vital nature, so the repayment of any unlawfully paid State aid is important.[31] In *Commission v Greece* (opticians) the breach of the fundamental freedom of establishment was assessed very narrowly by the Court. It is interesting to note that in this case the Courtas was suggested by the Commission's communication – looked at the impact of the violation on the companies or firms established in other Member

[27] Only in one case did the Court decide not to impose a lump sum in spite of the fact that it declared there had been non-compliance with its earlier judgment. C-503/04, Commission v Germany, [2007] ECR I-6153.

[28] C-121/07, Commission v France; C-568/07, Commission v Greece, [2009] ECR I-4505; C-407/09, Commission v Greece, [2011] ECR I-2467; C-184/11, Commission v Spain (not yet reported); C-279/11, Commission v Ireland.

[29] C-241/11, Commission v Czech Republic; C-270/11, Commission v Sweden (not yet reported).

[30] C-121/07, Commission v France, [2008] ECR I-9159, par. 77. The importance of the EU rules on environment and human health was already emphasised in the "pre-lump sum" Art. 260 jurisprudence. See to this effect C-387/97, Commission v Greece, par. 94.; C-278/01, Commission v Spain, par. 37.

[31] C-369/07, Commission v Greece, paras. 118-120.; C-610/10, Commission v Spain, paras. 125-127.; C-184/11, Commission v Spain, paras. 69-71.

States.[32] In a similar reasoning the Court found that the national legislation infringed the principles of the free movement of goods, the freedom to provide services and freedom of establishment and led to a reduction in the volume of imports from other Member States, caused those imports to stop when the prohibition of national law came into force and prevented traders from other Member States from providing their services, or even establishing themselves in Greece for that purpose.[33]

(2) *Efforts made by the Member State in order to comply.* In several judgments the Court appreciated the efforts made to comply by the Member State which had violated its obligations under EU law. This is particularly the case when the compliance requires considerable investment.[34] If, however, the obligation requires the adoption of a legislative act by the Member State, the Court tends to qualify the failure to do so as an aggravating factor.[35]

In *Commission v Spain* the Court appreciated that its earlier judgment had been complied with as regards three of the four recipients of the unlawful aid.[36]

2.2. Duration of the breach

In its seminal judgment, the Court attributed a great importance to the period of time over which the infringement persisted.[37] The time factor plays a decisive role in "proving" the appropriateness of the imposition of a lump sum, and also in determining its amount. Unlike the Commission, which gives a predetermined weight to the duration, the Court uses general phrases, such as "[the]considerable delay that occurred, after that judgment had been delivered";[38] "that failure must be regarded as having persisted for more than four years, which is a considerable period of time";[39] "the breach of obligations has persisted for a long period";[40] (almost 27 months) a "significant period of time";[41] "approximately 9 years, which is excessive";[42] "[the infringement] has persisted for approximately seven years, which is excessive".[43]

2.3. Individual conduct of the Member State

The individual conduct of the Member State concerned was perceived as "a lack of full cooperation with the Commission during the procedure" and incorporated into Communication 2005 as an aggravating factor which influences the coefficient of

[32] C-568/07, Commission v Greece, paras. 54-56.
[33] C-109/08, Commission v Greece, paras. 33-34.
[34] C-533/11, Commission v Belgium, par. 59.; C-576/11, Commission v Luxembourg, par. 62.
[35] C-369/07, Commission v Greece, par. 70.; C-568/07, Commission v Greece, par. 53., C-121/07, Commission v France, par. 70.
[36] C-610/10, Commission v Spain, par. 128.
[37] C-304/02, Commission v France, par. 81.
[38] C-121/07, Commission v France, par.70.
[39] C-369/07, Commission v Greece, par.117.
[40] C-109/08, Commission v Greece, par. 53.
[41] C-270/11, Commission v Sweden, paras. 57-58.
[42] C- 533/11, Commission v. Kingdom of Belgium, par. 54.
[43] C-576/11, Commission v. Luxembourg, par. 64.

seriousness. While the case-law of the Court reflects this perception,[44] it developed an alleviating factor related to the propensity to cooperate with the Commission during the procedure, under Article 260 (2). In *Commission v Belgium* the Court emphasised that "the Kingdom of Belgium has fully cooperated with the Commission during the proceedings;[45] in *Commission v Czech Republic* it was stated that "(the Czech Republic) cooperated in good faith with the Commission."[46] In this case the Court set a lump sum even lower than the minimum established for that Member State by the Commission.

In *Commission v Spain* the Court widened the scope of the Member State's behaviour which it took into consideration, going beyond the scope allowed for the procedure under Article 260 (2): it took into consideration the fact that the defendant State for many years did make the required effort and had taken steps to comply only a short time before the Commission brought the action.[47] We suggest that in *Commission v Sweden* the Court went far beyond even these considerations when it "invented" a new mitigating circumstance: "... the fact that the Kingdom of Sweden has never failed to comply with any judgment previously given by the Court under Article 258 TFEU should be taken into account as a mitigating circumstance."[48] It is an open question whether this circumstance – which is reminiscent of a similar approach in the criminal law to the personality of the criminal – will be maintained in the future. (It would hardly be acceptable if all Member States which have never failed to comply with a judgment given under Article 258 – the majority of the Member States – were to be "released".) Maybe the Court wished to honour the overall behaviour of Sweden as a long-standing champion of compliance with the law of the EU.[49]

Communication 2005 indicated that the seriousness (the impact on public or private interests) will be qualified as an aggravating factor if the infringement in the case follows several breaches in a certain sector. Obviously the Court accepted this factor, and uses it when it decides on the necessity of the imposition of a lump sum.[50] It is remarkable that this criterion goes beyond the case under scrutiny, and tends to take into consideration the recidivious nature of the Member State in question, and brings the lump sum closer to a penal sanction.

2.4 Ability to pay

In order to ensure the effectiveness of the principle of proportionality concerning the deterrent effect of the financial sanctions, the Commission uses in its application the coefficient "n" which mainly reflects the GDP of the Member States. The Court also

[44] In Case C-407/09, Commission v Greece, the Court stated: "33. Thus with regard, first, to the conduct of that Member State, it should be pointed out that the Greek authorities responded with substantial delays both to the formal notice and to the reasoned opinion." See also C-184/11, Commission v Spain (State aid), par. 67.

[45] C-533/11, Commission v Belgium, par. 60.

[46] C-241/11, Commission v Czech Republic, par. 51.

[47] C-610/10, Commission v Spain, par. 130.

[48] C-270/11, Commission v Sweden, par. 55.

[49] For figures, see Annual Reports of the Court of Justice 2009 and 2013 (Actions for failure of a Member State to fulfil its obligations.)

[50] C-121/07, Commission v France; C-184/11, Commission v Spain; C-279/11, Commission v Ireland.

relies on this in its judgments on penalty payments.[51] In the case of a lump sum the Court does not seem to follow this method, having never referred to this coefficient. However, in recent times of economic crisis the Court has been sensitive to the precarious situation of certain Member States, and ordered the payment of a relatively modest lump sum.[52]

IX. Conclusion

The Court of Justice rightly interpreted that the provisions of Article 260 (2) TFEU give it a wide discretionary power. Using this margin of appreciation it has chosen different methods in the imposition of the two types of financial sanctions. Concerning the penalty payment, it has decided to follow the principles and method of calculation suggested by the Commission, using the proposals of the Commission as "useful point of reference". As far as the imposition of a lump sum is concerned, the Court retained – or vindicated – a wide discretionary power. It maintained a considerable distance from the method of calculation adopted by the Commission. Although the guiding principles on which the judgments are based are common to those of the Commission, they are too general and require a set of criteria which should be taken into account systematically.

The criteria used in deciding on the necessity of the imposition of a lump sum and the amount to be paid are not far form those published and used by the Commission, but there is no list of criteria and the weight given to any particular criterion is uncertain or non-existent. The Court widened the scope available for considering the conduct of the Member State concerned too far. Counter-balancing the rigidity of the Commission, the Court introduced a new criterion – i.e. the Member State's reduced ability to pay in an economic crisis. In conclusion, we can share the position adopted by AG *Jääskinen* when defending the adoption of the imposition of a lump sum as a *"fair and coherent practice, [...] helping to make judicial decisions more foreseeable"*: *"The communications [of the Commission] contribute to the development of a methodical and rigorous approach by the Court to the imposition of pecuniary penalties. ...They therefore constitute both an indicative starting point for the Court for the overall assessment of the infringement complained of and a mechanism to ensure that the amount of the penalty does not become arbitrary or subjective, even though that amount will never be mathematically objective."*[53]

[51] C-387/97, Commission v Greece, [2000] ECR I-5047, par. 88.
[52] C-407/09, Commission v Greece, par. 26. Similar statement in C-279/11, Commission v Ireland, par. 79.
[53] Opinion in the case C-241/11, Commission v Czech Republic, delivered on 21 March 2013.

Table

Financial sanctions in the jurisprudence of the Court of Justice

Case	Penalty payment proposed by the Commission	Penalty payment imposed by the Court of Justice	Lump sum proposed by the Commission	Lump sum imposed by the Court of Justice
C-387/97, Commission v Greece	24 600 € per day	20 000 € per day	----------	----------
C-278/01, Commission v Greece	45 600 € per day	624 150 € per year	----------	----------
C-304/02, Commission v France	316 500 € per day	57 761 250 € per six months	None	20 000 000 €
C-177/04, Commission v France (product liability)	13 715 € per day	31 650 € per day	----------	----------
C-70/06, Commission v Portugal	21 450 € per day	19 392 € per day	----------	----------
C-121/07, Commission v France	366 744 € per day	----------	43 660 € per day	10 000 000 €
C-369/07, Commission v Greece	53 611 € per day	16 000 € per day	----------	2 000 000 €
C-568/07, Commission v Greece	----------	----------	98 988 000 €	1 000 000 €
C-109/08, Commission v Greece	9 636 € per day	31 536 € per day	3 420 780 €	3 000 000 €
C-407/09, Commission v Greece	----------	----------	8 700 000 €	3 000 000 €
C-496/09, Commission v Italy	244 800 €	30 000 000 € per six months	27 000 € per day	30 000 000 €
C-610/10, Commission v Spain	131 136 € per day	50 000 € per day	14 343 € per day	20 000 000 €
C-184/11, Commission v Spain	----------	----------	64 543 500 €	30 000 000 €
C-241/11, Commission v Czech Republic	----------	----------	3 364 395 €	250 000 €
C-270/11, Commission v Sweden	----------	----------	4 088 322	3 000 000 €
C-279/11, Commission v Ireland	----------	----------	4 387 714.80 €	1 500 000 €
C-533/11, Commission v Belgium	55 836 € per day	859 404 € per six months	6 168 € per day	10 000 000 €
C-576/11, Commission v Luxembourg	11 340 € per day	2 800 € per day	1 248 € per day	2 000 000 €