CASE LAW

IMPOSING THE RIGHT AMOUNT OF SANCTIONS UNDER ARTICLE 260(2) TFEU: FAIRNESS V. PREDICTABILITY, OR HOW TO “BRIDGE THE GAPS”

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I. INTRODUCTION

If the European Commission determines that a Member State has failed to fulfill its obligations under EU law, it can bring an infringement action against that Member State before the Court of Justice of the EU (hereinafter “Court”) pursuant to Article 258 TFEU (ex 226 EC). If the Court agrees with the Commission, it will render a declaratory judgment, stating that the Member State in question has infringed EU law. Should the Member State fail to comply with this judgment, Article 260(2) TFEU (ex 228(2) EC) empowers the European Commission to bring a subsequent action against the recalcitrant Member State in Court for the imposition of financial sanctions. There are two types of sanctions: lump sums and periodic penalty payments. The former are one-off payments aimed at punishing the Member State for its misbehavior, while the latter are payments to be made periodically until the infringement has ceased. Both sanctions can be imposed simultaneously if the infringement continues by the time the Court delivers its judgment.\(^1\)

Determining the amount of the sanctions to impose, however, has proven to be something of a conundrum. Article 260(2) TFEU bestows on the Court jurisdiction to impose financial sanctions on Member States and to define their kind and degree. Unhelpfully, though, the Treaties have been silent not only as to the proper amount of these fines, but also as to how they ought to be calculated, suggesting only implicitly that they should be “appropriate in the circumstances.” In the absence of Treaty guidance, the European Commission has taken the initiative to fill in the gap by issuing soft-law communications in which it sets out in detail how it is going to calculate the level of the fines which it would then propose to the Court. The Commission has thus put forward two formulas based on fixed or variable coefficients, the latter backed up by a number of criteria and scales.

The Court’s reaction to the Commission’s arithmetical endeavor has been welcoming and critical at the same time. On the one hand, the Court has praised the initiative for its attempt to ensure transparency, predictability and legal certainty, calling it a “useful point of reference.” A closer look into the case law shows that the Court has, as a matter of fact, approved both the criteria and the formulas set out in the Commission’s communications. In the instances where it has done so, it has made clear that it will not shy away from verifying the appropriateness and eventually rectifying the various coefficient levels proposed by the Commission in a given case, modifying, where necessary, the final amount of the fine.

On the other hand, the case law harbors a separate set of examples where the Court has refused to apply the Commission’s formulas. This approach is probably based on the wide margin of discretion that the Court regards itself as having in the context of Article 260 proceedings. When the Court takes this more critical tack, it simply states that it is “appropriate” to fix the fine at a certain level, without shedding light on its methodology.

\(^1\) Case C-304/02, Commission v. France (Fisheries), EU:C:2005:444, ¶¶ 80–86.
The coexistence of these two competing lines of case law has so far received no logical explanation. The latest judgments delivered by the Court in 2013 in *Commission v. Sweden*, *Commission v. Czech Republic*, *Commission v. Belgium* and *Commission v. Luxembourg*, do not shed much light on the matter either. All four cases concerned a failure to comply with a directive. Whereas Sweden and the Czech Republic were ordered to pay only a lump sum because they had in the meantime ceased the infringing behavior, both a lump sum and a periodic penalty payment were imposed on Belgium and Luxembourg because their infringements were continuing. In none of these judgments, however, did the Court explain how precisely it obtained the final penalty amount. Nonetheless, in *Commission v. Belgium*, the amount of the penalty payment imposed by the Court coincided exactly with the amount claimed by the Commission. This suggests that in this case the Court in fact followed the Commission’s methodology, which in turn provides a detailed explanation as to how the penalty amount was obtained. By contrast, in its judgments against Sweden, the Czech Republic, and Luxembourg, as well as Belgium with regard to the lump sum portion of its penalty, the Court’s verdict differed, sometimes significantly, from the amounts claimed by the Commission. Providing no explanation as to how it calculated the imposed fine, the Court limited itself to stating, without further specification, that the fine was “just” or “fair” in the circumstances of the case. These judgments would thus seem to confirm the parallel use of both methodologies for determining the amount of the fine. However, they do not provide any guidance as to when and why one of the two methodologies has been preferred over the other.

The situation is thus somewhat confusing. The present article sets out to examine the present status quo in an effort to explain the rationale behind each of the two approaches taken by the Court. After briefly explaining, as a backdrop to the subsequent analysis, the Commission’s methodology for calculating the amount of the fine (II.), the article takes a closer look at the existing case law under Article 260(2) TFEU in order to assess how the Court presently determines the amount of the financial sanctions to be imposed on recalcitrant Member States (III.). The so-called formula-based method adopted in parts of the case law is examined first (III.A.), followed by an overview of the cases where the Court has determined the amount of the fine on grounds of fairness (III.B.). The article then tries to compare the lines of case law in order to assess whether one of these two methods appears to be predominant from a historical and quantitative perspective, or whether,

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conversely, both are of equal importance and can coexist one with the other (III.C.). The next part of the article attempts to identify the rationale behind each one of these two approaches, their raison d’être, underlying principles and possible justifications, with particular emphasis on their respective strengths and weaknesses (IV.A. and B.). Finally, the question of the scope of the Court’s jurisdiction under Article 260(2) TFEU is addressed (V.A. and B.), with an outlook on possible future developments and solutions (V.C.).

II. THE EUROPEAN COMMISSION’S METHODOLOGY

The primary focus of this article is not the European Commission’s proposed methodology for calculating the amount of lump sum and periodic penalty payments assessed upon recalcitrant Member States. It is, however, necessary to provide a brief overview of the European Commission guidelines that serve as a benchmark, or rather, as a backdrop, against which the Court has dealt with the question.

The Commission proposes that penalty calculations should be based on three fundamental criteria: the seriousness of the infringement; its duration; and the need to ensure that the sanction is itself a deterrent against further infringements. These three criteria form the foundation of the Commission’s methodology, both as to the calculation of the lump sum and the periodic penalty payments. A Commission communication published in 2005\(^6\) and updated most recently in August 2012\(^7\) sets out two formulas, one for the purpose of calculating the periodic penalty payment, and the other, for the purpose of calculating the amount of the lump sum.

A. Periodic Penalty Payment

As far as the periodic penalty payment is concerned, the Commission applies the following formula:

\[
D_p = (B_{frap} \times C_s \times C_d) \times n,
\]

where

- "\(D_p\)" is the daily penalty payment.
- "\(B_{frap}\)" is the so-called basic flat-rate amount set at a fixed rate applicable to all Member States. This flat-rate amount is currently fixed at EUR 640 per day\(^8\).
- "\(C_s\)" stands for "coefficient for seriousness." This coefficient is applied on a scale between a minimum of 1 and a maximum of 20, depending on the presumed seriousness of the infringement. For the needs of defining the exact level of the coefficient the Commission takes account of two parameters, namely the importance of the EU rules breached and the impact of the infringement on general and particular interests.\(^9\)

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\(^7\) Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings, C(2012) 6106 final.

\(^8\) Id. at part III, ¶ 1.

- "Cd" deciphers as "coefficient for duration." This coefficient varies between a minimum of 1 and a maximum of 3, calculated at a rate of 0.1 per month from the date the Article 258 TFEU judgment was delivered up to the date the Commission decides to refer the matter to the Court.\[^{10}\] The dies a quo under Article 260(3) TFEU is the expiry of the deadline for transposition of the directive in question.\[^{11}\]

- Lastly, the "n" factor is a fixed invariable coefficient calculated in advance for each Member State as being the square root of the product of the offending Member State's GDP divided by that of Luxembourg, and the number of votes that Member State exercises in a qualified majority vote in the Council divided by the number of votes granted to Luxembourg. The Commission revises periodically the levels of the "n" factor in order to take account of the changes in the GDP. According to the last update, the "n" factor results in a divergence of 0.34 (for Malta) to 21.12 (for Germany).\[^{12}\]

\[B. \text{ Lump Sum}\]

A similar formula is applied for purposes of calculating the lump sum penalties:

\[L_s = B_{\text{fals}} \times C_s \times n \times dy,\]

where

"Ls" stands for the lump sum payment; "Bfals" is the basic flat-rate amount, currently fixed at EUR 210 per day;\[^{13}\] "Cs" is the coefficient for seriousness, the same used for calculating the periodic penalty payment; so too, the same "n" factor. Finally, "dy" stands for the number of days the infringement persisted as of the day the Article 258 TFEU judgment was delivered, or, under Article 260(3) TFEU, as of the day of the expiry of the deadline for transposition of the directive in question.\[^{14}\]

Unlike the formula for calculating the periodic penalty payment, there is no coefficient for duration, since, presumably, the duration is already taken into account under the "dy" entry. Another peculiarity in the way the Commission defines the lump sum amount is the so-called minimum lump sum, set in advance for each Member State, which ranges, according to the last update as of August 2012, between EUR 179,000 (for Malta) and EUR 11,192,000 (for Germany). Thus, if the application of the aforementioned formula results in a higher amount than the minimum lump sum, the Commission will propose that amount. Conversely, if it results in a lower amount than the minimum lump sum, the Commission will propose the latter.

\[^{10}\] Id. at part C, ¶ 17.
\[^{12}\] C(2012) 6106 final, supra note 7, at part III, ¶ 3.
\[^{13}\] Id. at part III, ¶ 2.
III. HOW DOES THE COURT CALCULATE THE AMOUNT OF THE FINANCIAL SANCTIONS?

Much has been said about the methodology used by the Commission to determine the level of the financial sanctions that it proposes to the Court. However, the question of how precisely the Court calculates the amount of the sanctions it ultimately imposes on the recalcitrant Member State has remained on the sidelines of academic thinking and practitioners' concerns. This is terrain of shifting sands, where props are either treacherous or non-existent and where solid ground is a sought-after but unavailable commodity. There are at least three reasons for this state of affairs. First, the relevant Treaty provision—Article 260(2)—is exceptionally meager in content. In fact, it does not say anything about the magnitude of fines, or how they should be calculated. It only mentions that the Commission should indicate to the Court the amount that it considers to be "appropriate in the circumstances." Obviously, this standard does not solve the problem. On the contrary, its vagueness and malleability exacerbate it. Second, there is no Treaty provision that allows for the enactment of secondary legislation containing rules for calculating fines and/or the range within which they may vary. Third, while it is true that the Commission has taken the praiseworthy initiative of elaborating specific soft law rules and formulas for the calculation of fines, these rules and formulas cannot—by their very nature—produce effects besides binding the Commission itself. After all, the Commission is a party to the sanction proceedings, and it would be awkward to suggest that the Court should mechanically subscribe to the methodology put forward by the claimant, or the prosecutor.

Confronted with this vide juridique, it is no surprise that the Court has struggled to find ways to avoid the unavoidable. The desired result has been simple but unattainable. On the one hand, the Court has wished to distance itself from the Commission and its rules for calculating financial sanctions. It has continually repeated—and rightly so—the Commission's rules constitute merely a "useful point of reference" and do not bind the Court. This affirmation has served a twofold purpose. First, it has been intended as a declaration of the Court's independence vis-à-vis the parties to the dispute, and, second, it has been aimed at attaining the unlimited scope of the Court's own jurisdiction on the matter. Having distanced itself from the Commission's rules and rejected their binding effect, the Court, however, has had to face a blunt reality. Besides the Commission's rules, there are no others. How is the Court supposed to calculate the fine and explain to the parties, as well as to the rest of the world, how it has arrived at the final bill? The Court has thus found itself, unavoidably, in the midst of a gap, with no available tools for filling it. Given such circumstances, the Court has had two possible solutions available to it. The first

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15 See e.g., Ian Kilbey, Financial Penalties under Article 228(2) EC: Excessive Complexity?, 44 CML Rev. 743 (2007); Pål Wennerås, Sanctions against Member States under Article 260 TFEU: Alive but Not Kicking?, 49 CML Rev. 145 (2012).

16 The Court has constantly held that, in adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission "imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations." See e.g., Joined cases C-189/02 P, C-202/02 P, C-205/02 P – C-208/02 P, and C-213/02 P, Dansk Rørindustri e.a. v. Commission, EU:C:2005:408, ¶ 211.
one has been to retreat behind the Commission's rules and then fiddle with them, adjust them, rectify them. The second one has been to ignore the Commission completely and use its own judgment instead. The Court has ventured to explore both solutions—one after the other, or even in parallel. This is how the formula-based method and the 'fairness' method have come into being.

A. The Formula-Based Method

The formula-based method is in essence arithmetical. It relies on a constellation of coefficients, scales and multipliers that are meant to give a numerical expression of the infringement. This method can be summarized as follows: Even though the formulas, coefficients and rules exposed in the Commission's communications are no more than a "useful point of reference," the Court uses them as a stepping stone or as a benchmark. The case law contains a number of examples where the Court has, as a matter of fact, approved and applied most if not all of the criteria, coefficients and formulas set out in the Commission's communications. The Court has also typically verified—sometimes meticulously—whether the level of the various coefficients of the formulas suggested by the Commission is appropriate in light of the specific circumstances of the infringement under review. At such point, should the Court's assessment diverge from that of the Commission, the Court has adjusted upwards or downwards the respective coefficient levels, this way modifying the final penalty amount suggested by the Commission. Thus, the formula-based method boils down, in substance, to reviewing whether the Commission correctly applied its own rules as set out in its communications.

The Court’s 2013 judgment in Commission v. Belgium provides the most recent example of a case where the Court appeared to accept the Commission’s scales, coefficients and formulas without modification. In its judgment, the Court arrived at precisely the same amount of penalty payments as that suggested by the Commission, EUR 4,722 per day. Even though the Court abstained from divulging each of the numerical values that it retained in order to arrive at this sum, it is fairly obvious that it did this by accepting the Commission’s formula and coefficients without further ado. Indeed, there can be no other logical explanation for such a perfect match.

This recent example follows in the footsteps of earlier precedents. In its landmark judgment in Commission v. France (Fisheries), the Court similarly endorsed, without modification, the Commission’s calculations. First, the Court agreed that the seriousness of the infringement should be measured on a scale of 1 to 20, as laid down in the Commission's communication, and confirmed, after noting that the breach in question could jeopardize the pursuit of the fundamental objective of the common fisheries policy, that a coefficient of 10, as proposed by the Commission, adequately reflected the seriousness of the breach. Second, the Court also accepted that the duration of the infringement should be measured on a scale of 1 to 3, as suggested by the Commission in its communication, and found that the

\[18\] Commission v. France (Fisheries), EU:C:2005:444.
\[19\] Id. at ¶¶ 105–107.
coefficient of 3 proposed by the Commission was appropriate.\textsuperscript{20} Third, the Court approved both the appropriateness and the quantification of the "n" factor put forward by the Commission, stating that it is an "appropriate way of reflecting [the given Member State's] ability to pay, while keeping the variation between Member States within a reasonable range."\textsuperscript{21} Fourth, it rubber-stamped the basic flat-rate amount (EUR 500 per day at the time).\textsuperscript{22} Having thus arrived at specific numerical values that were meant to express the basic criteria mentioned above, the Court then endorsed the formula suggested by the Commission in order to spell out the mathematical interaction between these coefficients.\textsuperscript{23}

There are also examples in the case law of upward or downward adjustments by the Court of some of coefficients in the Commission’s formula. For instance, in \textit{Commission v. Spain (Quality of bathing water)}, the Court found that the coefficient of 2 proposed by the Commission was too harsh and replaced it by a coefficient of 1.5, which seemed to the Court more appropriate under the circumstances, given that compliance with the Court's previous judgment was found to be difficult to achieve in a short time.\textsuperscript{24} The Court took a similar course in \textit{Commission v. Portugal (Public contracts)}, where the coefficient for seriousness was brought down from 11 to 4,\textsuperscript{25} and in \textit{Commission v. Greece (Computer games)}, where the same coefficient was reduced from 11 to 8.\textsuperscript{26} But the Court has also increased the level of a coefficient from that proposed by the Commission. Such instances can be found in \textit{Commission v. France (Defective products)}, where the coefficient for duration was brought up to 3 from the Commission’s initial proposal of 1.3;\textsuperscript{27} in \textit{Commission v. Portugal (Public contracts)}, where the same coefficient was increased from 1 to 2; and in \textit{Commission v. Greece (Computer games)}, where it was increased from 1.1 to 1.5.

With regard to the "n" factor, however, the Court seems to have endorsed it precisely as it stands in the Commission’s communications, adding that should the factor be updated in a subsequent communication, its updated version should be taken into account instead.\textsuperscript{28} The same holds true for the basic flat-rate amount.\textsuperscript{29}

These examples show that the Court has, in substance, accepted the Commission's formulas as they are. Nonetheless, some sporadic examples of the Court's dissatisfaction with the formulas can be found in the case law. Thus, in

\textsuperscript{20} Id. at ¶ 108.
\textsuperscript{21} Id. at ¶ 109.
\textsuperscript{22} Id. at ¶ 110.
\textsuperscript{23} Id. at ¶ 110.
\textsuperscript{24} Case C-278/01, Commission v. Spain (Quality of bathing water), EU:C:2003:635, ¶¶ 53–54.
\textsuperscript{25} Case C-70/06, Commission v. Portugal (Public contracts), EU:C:2008:3, ¶ 43.
\textsuperscript{26} Case C-109/08, Commission v. Greece (Computer games), EU:C:2009:346, ¶ 38.
\textsuperscript{27} Case C-177/04, Commission v. France (Defective products), EU:C:2006:173, ¶¶ 69–74.
\textsuperscript{28} Commission v. Portugal (Public contracts), EU:C:2008:3, ¶ 49.
\textsuperscript{29} The Court explicitly stated this in Commission v. Greece (Computer games), EU:C:2009:346, ¶ 44. \textit{See also} Commission v. Portugal (Public contracts), EU:C:2008:3, in which the basic flat-rate amount was updated.
Commission v. France (Defective products) the Court pointed out that the scale of 1 to 3 proposed by the Commission for the coefficient for duration did not bind the Court. Nevertheless, the Court did not depart from the Commission’s formula—and retained, in the end, a coefficient equal to 3 (i.e. still within the Commission’s range of 1 to 3). Arguably, it could have done otherwise, given that nearly four years had elapsed since the first judgment was delivered. If this coefficient was to be calculated as suggested by the Commission in its soft law communication (i.e. by multiplying the number of months during which the infringement persisted by 0.1), this would produce a coefficient of 4.8 above the ceiling allowed by the Commission. The Court’s threat to depart from the above-mentioned formula did not therefore materialize in practice.

Nevertheless, the Court may have implicitly rejected the Commission's suggestion that the criterion for duration should be quantified by multiplying a coefficient of 0.1 by the number of months during which the infringement has persisted (within a scale of 1 to 3). In Commission v. Greece (Computer games), the Court noted that Greece's failure to comply with the Court’s judgment had lasted for more than two years. This finding would have produced, applying the Commission's formula, a coefficient of at least 2.4. However, the Court decided that in the circumstances of the case, a coefficient of 1.5 was appropriate. The fact, however, that the Court did not explicitly reject the Commission's method of calculating the coefficient for duration makes it difficult to assess whether one should read this judgment as a departure from the Commission's method of calculation, or rather as a low-profile demonstration of the Court’s discretion.

With regard to the frequency of the periodic penalty payment, the Court has shown itself ready to deviate from the Commission's proposal on a number of occasions. In Commission v. France (Fisheries), for example, the Court noted that any finding that the infringement had come to an end could be made only after a period allowing an overall assessment of the results obtained. It then concluded that the penalty payment should be imposed not on a daily basis, as suggested by the Commission, but on a half-yearly basis. The Court has also adapted the Commission’s formula to provide for the diminution of penalty payments over time in accordance with the Member State’s future gradual compliance. Thus, in Commission v. Spain (Quality of bathing water) the Court ordered Spain to pay EUR 624,150 per year for every 1% of inshore Spanish bathing waters that continue to fail to meet the quality standards set in EU legislation. This would allow the total amount of the penalty to decrease with the decrease in the total percentage of bathing areas that did not comply with the requirements of EU law.

30 Commission v. France (Defective products), EU:C:2006:173, ¶¶ 70–71. The Court’s remark may be explained by its frustration with the fact that the Commission had applied a new method of calculation introduced in the meantime, but not published nor formalized in a new communication, according to which the coefficient relating to the duration of the infringement should be calculated counting from the seventh month after the delivery of the Article 258 TFEU judgment. Such a suggestion obviously ran counter to the Court’s constant case law, which states that the action required to give effect to a judgment must be set in motion “immediately” and be completed “as soon as possible.” See e.g., Case 131/84, Commission v. Italy, EU:C:1985:447, ¶ 7.

31 Commission v. France (Fisheries), EU:C:2005:444.

32 Commission v. Spain (Quality of bathing water), EU:C:2003:635.
What conclusion may be drawn from this case law? All things considered, the Court seems to have adopted, as if it were its own, the Commission's methodology as set out in its soft law communications. This should come as no surprise given that, in the absence of a normative framework, the Commission's communications provide ready-to-use and reasonably structured arithmetical equations. The Court has nonetheless made it a matter of principle to verify whether, in a given case, the Commission has correctly applied the aforementioned methodology. It has also issued a few indications that it may depart from certain elements of the Commission's rules, although such warnings have so far remained without consequence. In a separate development, the Court has shown itself prepared to adapt this methodology in order to take account of certain factors, such as the eventuality of a Member State's gradual compliance with its obligations.

B. Determining the Amount of the Fine on Grounds of Fairness

The formula-based method described above is not the only method employed by the Court. The case law also harbors a considerable number of examples where the Court has taken a fundamentally different approach in determining the amount of financial sanctions to impose on a recalcitrant Member State. This alternative approach consists, in substance, in defining the sum of the fine on grounds of fairness. It is a non-arithmetical method that makes no use of numbers, coefficients, formulas or other numerical values. When it chooses to apply this method, the Court states that it is "appropriate" to fix the fine at a certain level without further explanation as to how it has arrived at precisely that amount.

When it decides to determine the amount of the fine on grounds of fairness, the Court usually starts by stating that, if it decides to impose a fine, it must, in "exercising its discretion," do so in a manner that, on the one hand, is appropriate to the circumstances of the case and the degree of persuasion and deterrence which are required in the Court's view, and, on the other, is proportionate both to the breach as established, and the capacity of the Member State concerned to pay. Consequently, according to the Court, account must be taken of all the circumstances of the case, and, in particular, of the conduct of the recalcitrant Member State and the duration and seriousness of the infringement.33 It is noteworthy that in its 2013 judgment in Commission v. Czech Republic, the Court examined the conduct of the defendant Member State as a separate issue before looking at the seriousness of the infringement.34 The conduct of the Member State was also examined as a separate criterion in Commission v. Greece (Opticians),35 Commission v. France (GMOs)36 and Commission v. Greece (Compensation to crime victims).37 This approach contrasts with the Court’s recent judgment in Commission v. Sweden, also delivered in 2013, where the Court examined Sweden’s conduct as part and parcel of the seriousness of the infringement.38 There are also examples in the case law where the

35 Id.
36 Case C-121/07, Commission v. France (GMOs), EU:C:2008:695.
37 Case C-407/09, Commission v. Greece (Compensation to crime victims), EU:C:2011:196.
Member State’s conduct was not mentioned at all. It is therefore not entirely clear whether the Court has added a new criterion (that of the conduct of the Member State) as part of its analysis whenever the fairness method is applied.

The second step of the Court’s analysis consists usually of an evaluation of each of the criteria set out above. At this juncture, the Court may qualify the duration of the infringement as "significant" (e.g., 29 or 37 months), "excessive" (e.g., approximately 9 years), "exceptionally long" (e.g., more than 10 years) or "particularly lengthy" (e.g., more than 19 years). As far as the seriousness of the infringement is concerned, the Court may note that the Member State has breached fundamental rules or principles of EU law; that the interests of companies or firms have been "substantially" affected; or that the breach was of a "particularly serious nature." With regard to the capacity of the Member State concerned to pay, the Court has held that the Commission’s method of calculation is an “appropriate means” of reflecting said capacity while keeping the variance between Member States within reasonable limits.

Recently, the Court has indicated that it is prepared to take into consideration a Member State’s reduced capacity to pay in the context of the economic crisis.

The analysis described above has, however, been omitted altogether if the Court has already reached the conclusion earlier in its judgment that a periodic penalty payment should be imposed. In such cases, the Court has simply referred, in broad terms, to the findings already made with regard to that payment, without carrying out a further criterion-by-criterion analysis.

Finally, the Court will reach the conclusion that "it is a fair assessment of the circumstances of the case" to set the amount of the fine at a given level. Unsurprisingly, the resulting sum is always a round figure. The most recent examples include EUR 10 million imposed on Belgium, 3 EUR million on Sweden and EUR 2 million on Luxembourg. Moreover, the Court seems to accept that the final amount of the lump sum may fall below the minimum level as defined in the Commission’s communication. This has been made clear in Commission v. Greece (Opticians) and, most recently, in Commission v. Czech

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40 Such a proposition could be valid, if the seriousness of the infringement were to be appraised exclusively in the light of the objective importance of the EU rule breached, whereas the conduct of the Member State concerned were to reflect its (lack of) cooperation, the intentional or excusable nature of the infringement, the eventual benefits sought for the national stakeholders, etc.
44 Case C-610/10, Commission v. Spain (Indosa), EU:C:2012:781, ¶ 121.
45 Case C-374/11, Commission v. Ireland (Waste), EU:C:2012:827, ¶ 38.
46 Id. at ¶¶ 125–127.
50 Commission v. Ireland (Waste), EU:C:2012:827, ¶ 44.
where the Court imposed, in the first case, a lump sum of EUR 1 million, even though the minimum lump sum for Greece, set out in the aforementioned communication, was, at that point in time EUR 2.19 million and, in the second case, a lump sum of EUR 250,000, whereas the minimum lump sum for the Czech Republic was fixed at EUR 1.773 million.

One can of course speculate that even though the Court did not spell out its arithmetic in its judgment, it had actually performed detailed calculations behind closed doors. One may even spend time trying to reconstruct the Court’s calculations by second-guessing what the actual coefficients might have been. This suggestion boils down to assuming that the Court has been actually using the formula-based method all along, while deciding to reveal the details of its calculations in one case but not in another. It is, however, difficult to see why the Court would choose to reveal to the public the way it calculates a penalty in one case but not in another. Moreover, there is no empirical evidence in the case law to support such speculation. To the contrary, the round amount of the fine imposed by the Court in the cases where no calculations have been disclosed clearly indicates that the Court made no mathematical exercises, but proceeded to a global appreciation ex aequo et bono.

The single outstanding feature of the cases where the “fairness” method has been applied is that the Court appears to disregard altogether the mathematical variables and formulas suggested by the Commission in its communications. The Court seems particularly intent on keeping away from numbers and coefficients, without explanation as to how it has arrived at a final penalty amount.

C. Drawing the Lines of Case Law Together

The preceding analysis of the case law shows that the Court determines the amount of the fine in the context of Article 260(2) TFEU along two competing lines: it either uses the Commission’s coefficients and formulas as a stepping stone and then applies them according to its interpretation of the circumstances of the case; or it fixes the fine on grounds of fairness. Understanding the interaction between these lines is therefore essential in order to assess each one’s relative place and importance. It is necessary, to this end, to look with greater detail into the question of whether one of these two competing lines is to be considered as dominant, or conversely, whether both are of equal importance. It should then be examined whether it is possible to discern any pattern in the case law that may be able to explain why the Court has opted for one of these methods in any given case. Finally, one should ask the inevitable question: is there unsustainable tension between these two competing lines of jurisprudence or can they peacefully coexist?

1. Is One of the Methods Dominant?

Apart from the recent amendment to the pre-litigation phase of the procedure introduced by the Lisbon Treaty (which is irrelevant for the present analysis), the provision governing the imposition of a lump sum or a periodic penalty payment has remained, in substance, unchanged since its introduction into primary EU law by the

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Treaty of Maastricht. The emergence of the two methods adopted so far by the Court cannot therefore be explained by Treaty changes.

The earliest example where the Court defined the amount of a fine on grounds of fairness dates back to 2000, while the most recent such examples can be found in 2012 and three of the four judgments rendered by the Court in 2013. In comparison, the Court first determined the amount of the fine by applying the Commission’s formulas in 2003 and again on a number of occasions, for instance in 2009, and most recently in its 2013 judgment in Commission v. Belgium, discussed above. It thus appears impossible to establish a chronological order that would allow us to conclude that one of the two methods is more recent than the other. Indeed, these two lines of jurisprudence sprang into being almost simultaneously and seem to have developed in parallel.

A numerical analysis of the jurisprudence is not conclusive either. Although statistically the ‘fairness’ method comes up more often in the case law, no specific conclusion can be drawn from this fact. It is particularly revealing in this regard that sometimes the Court has had recourse to both methods in the same judgment: it has applied one of them for the purpose of calculating the amount of the lump sum, and the other for calculating the level of the periodic penalty payment. This has occurred in Commission v. France (Fisheries), Commission v. Greece (Computer games) and, most recently, in Commission v. Belgium. This clearly shows that, in the Court’s view, both methods may be applied under the law.

Thus, there is no express indication in the case law suggesting that one of the two methods has been abandoned or that the Court has altogether reconsidered its previous case law. It can therefore be concluded that neither of the two competing lines appears to have a clearly predominant position.

2. Patterns of Application

The conclusion that both methods are deeply embedded in the Court’s case law risks opening a true Pandora’s Box. Which method is applied when? And why? Are the methods mutually exclusive or alternative? One instinctively starts to look for some sort of pattern capable of explaining the application of each of the two methods. Given that the case law does not spell out the reasons underpinning the Court’s choices to give preference, in any given case, to one of the above-mentioned

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58 See Commission v. Belgium, EU:C:2013:659, in which, as mentioned above, the Court imposed precisely the same amount of daily penalty payment as the one suggested by the Commission. This strongly suggests that the Court used the Commission’s formula-based method.
59 The overview of the Court’s judgments where financial sanctions were imposed shows that the Court used the ‘fairness’ method on 17 occasions, whereas the formulas-based method appears on 6 occasions. The data have been compiled on the basis of the 18 judgments (as of 1st April 2014), in which the Court has imposed a fine in application of Art 260(2) TFEU. It should be noted that in some judgments the two methods were used, one for each type of fine.
methods over the other, it becomes necessary to examine whether hints may be found in the case law.

Upon undertaking such examination, one cannot help but note that there may be a recurrent pattern insofar as the determination of the amount of the lump sum is concerned. Indeed, in every single case so far where the Court has decided to impose a lump sum, it determined its amount on grounds of fairness, that is to say, without mention being made of any specific numbers, multipliers, coefficients, formulas, etc. This pattern was again confirmed in all four judgments handed down by the Court in 2013.\textsuperscript{60} This clearly indicates that, according to the Court, the fairness method is the only suitable method for determining the amount of the lump sum.

It is a pity that the Court never explained its choices in these cases. Nonetheless, a number of reasons may be advanced in support of its approach. First, unlike a periodic penalty payment, the imposition of a lump sum is based on an assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations.\textsuperscript{61} This is an assessment of the harm \textit{in abstracto}, and not compensation for damages. From this perspective, the infringement's past effects may seem more justly—and proportionately—assessable as a whole, as such matters cannot easily be pinned down to the cent. Second, applying the 'fairness' method to lump sums may be justified in light of the drawbacks of the formula put forward by the Commission. In essence, the Commission’s formula does not substantially differ from the formula proposed for calculating the periodic penalty payment. Critically, the comparison between the two formulas reveals that the coefficient for duration present in the penalty payment formula is replaced in the lump sum formula by the number of days during which the infringement has persisted. However, it remains unclear why the same criterion has been numerically expressed in two different ways in the Commission's formulas. Moreover, it has been argued that by reflecting the duration of the infringement both in the lump sum and the penalty payment formulas, the same factor is actually counted twice.\textsuperscript{62} This may pose particular problems in cases where the Court decides to impose both types of sanctions simultaneously.

Might a pattern be discerned with regard to penalty payments as well? At first glance, this seems unlikely. It can be argued that the Court feels perfectly comfortable applying either one of the two methods. Indeed, it has used the 'fairness' method for determining the amount of the penalty payment on six occasions, in 2000, 2009, 2011, twice in 2012 and once in 2013. The formula-based method has been the preferred method on six other occasions, in 2003, 2005, 2006, 2008, 2009 and 2013.

Nevertheless, a closer examination of the case law might allow the identification of a pattern with regard to penalty payments, too. Notably, so far, in all cases concerning the non-recovery of illegal state aid, the Court has used the fairness

\textsuperscript{61} Commission v. France (Fisheries), EU:C:2005:444, ¶ 81.
\textsuperscript{62} Kilbey, \textit{supra} note 15, at 753–757.
One reason for this may be found in the specificity of state aid cases in the context of Article 260 TFEU, since the resulting fine must be proportionate to the amount of the non-recovered state aid. Indeed, it would seem inequitable if the amount of the penalty payment is not commensurate to the sum that the Member State has failed to recover. It is true that the amount of the non-recovered aid might be a relevant consideration for determining the coefficient for seriousness, insofar as a larger amount would normally mean a higher coefficient for seriousness and vice-versa. But this does not in itself guarantee that the final amount would not be manifestly disproportionate as compared to the amount of the non-recovered aid, given that the other coefficients of the formula add up anyway. The Commission’s methodology may thus be seen as unsuitable in state aid cases.

With respect however to all other cases where penalty payments were imposed, no clear pattern can be identified. The formula-based method has been used in cases where the infringement consisted of a failure to comply with primary law, or with secondary legislation (non-compliance with a regulation or with a directive). Yet, the fairness method was also used in the context of non-compliance with a directive. The latest case law is particularly revealing. In 2013, the Court found that both Belgium and Luxembourg had failed to comply with their obligations stemming from Directive 91/271/EEC. Yet, when it imposed penalty payments, it used the formula-based method in its judgment against Belgium and the fairness method in its judgment against Luxembourg.

What conclusion can be drawn from the foregoing analysis? One plausible conclusion is that the Court considers the two available methods for determining the amount of the fine as interchangeable, and it uses its discretion to determine which method to apply in a given case. This would suggest that the case law is not uniform. The second plausible conclusion is that the Court considers that each of the two methods has its own scope of application. In particular, the case law may be interpreted as suggesting that the 'fairness' method is more appropriate for determining the amount of lump sum penalties and penalty payments in state aid cases. It would seem that in all other cases, the formula-based method should be preferred, although the case law is rather ambivalent in this regard.

Regardless, in the absence of clear guidance in the case law, it is difficult to say which of these two conclusions is valid.

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64 See e.g., Commission v. Greece (Computer games), EU:C:2009:346.
65 Commission v. France (Fisheries), EU:C:2005:444.
3. Are the Two Methods Compatible?

The conclusion, according to which both methods for determining the amount of the fine continue to be applicable law, raises the question of whether, notwithstanding their differences, these methods can coexist peacefully together. The answer, stemming from the case law, is a resounding “yes.” The mere fact that the Court has applied both methods in one and the same judgment shows that, in the Court’s view, the two methods are perfectly compatible with one another. The Court’s latest case law confirms this, insofar as in its judgments delivered in 2013 it had recourse, explicitly or implicitly, to both methods as demonstrated above. Crucially, however, this conclusion does not address a more fundamental question pertaining to the justification and the underlying principles of the two methods. Therein may lay the key to the Court’s decision to use the two methods in parallel.

IV. FAIRNESS V. PREDICTABILITY

The case law does not provide guidance on the genesis of the two available methods for determining penalty amount. The methods have so far been utilized as ready-to-use tools without much reflection as to their theoretical foundations, raisons d’être, or objectives. As demonstrated in the foregoing analysis, the two methods clearly differ with regard to a number of technical details. More importantly, however, they also differ in their underlying principles, justifications, and drawbacks. The subsequent analysis aims to address these differences.

A. Underlying Principles and Drawbacks of the Formula-Based Method

By putting forward universally applicable and precise formulas, coefficients, and scales, laid down in advance, the formula-based method aspires to ensure that penalty levels are determined in a predictable and transparent manner. The Court seems to recognize this. The Court has indeed pointed out, on numerous occasions, that the Commission's guidelines help to ensure that the Commission acts in a manner that is transparent, foreseeable and consistent with legal certainty.\footnote{See e.g., Commission v. Greece (Computer games), EU:C:2009:346, ¶ 27.} The result of the calculation, when using this method, is indeed easily verifiably—by applying the relevant formula, it becomes possible to work out, almost to the eurocent, how the Court arrived at a certain amount for a fine. This method is also in line with the principle of predictability, as its mathematical components allow Member States to foresee, within reasonable limits, what the consequences of their infringement may be. The predictability of this method is however, not such as to allow Member States to calculate the precise amount of the eventual fine and weigh it against the benefits that may be reaped from the infringement, given that some coefficients vary within a given scale. In addition, the formula-based method enhances legal certainty and provides a solid basis for guaranteeing equal treatment of Member States. Indeed, the fear of possible discrimination between Member States is easily addressed, since they are subject to the same rules. This method also facilitates their right of defense because relatively abstract notions, such as the seriousness of the infringement, are given concrete numerical expressions.
These considerations show that there is certainly genuine merit in the formula-based method. There are, however, a number of pertinent concerns as well. First, the formula-based method is, in substance, a copy-paste of the Commission's communications on determining the amount of the fine. It is true that the Court has never failed to state that the Commission's suggestions do not bind it. Yet, the Court has, as a matter of fact, reproduced the Commission's formulas into its case law. The problem is that the Commission is and remains a party to the proceedings under Article 260(2) TFEU, just like the defendant Member State. Why should then a given methodology put forward by one of the parties be endorsed at the expense of any other plausible methodology that might hypothetically be put forward by another interested party? The Court's adoption of the formula-based method inspired by the Commission may therefore run into objections pertaining to the principle of equality of arms. Indeed, this method may be seen as putting the defendant at a disadvantage vis-à-vis the applicant—it is the latter's self-made rules (which the applicant may unilaterally choose to modify) which enjoy a particularly favored status in the case law. One way to get around such objections is to argue—rather formalistically—that by incorporating the Commission’s method into the case law, this method has become the Court's own. Such a transformation would also affect the legal force of the methodology. Indeed, it would no longer be soft law binding only the Commission, but would be transformed into judge-made law, binding on all parties. This abracadabra, although feasible from a purely judicial perspective, is not entirely convincing, as it relies heavily on a sort of fiction rather than on a fully-fledged exercise of the Court's own jurisdiction.

Second, the formula-based method, as it is currently applied, puts unjustifiable constraints on the jurisdiction of the Court. As explained above, the Court appears to have accepted, first and foremost, all the basic elements of the Commission's formulas, including its fixed coefficients (such as the basic flat-rate amount and the 'n' factor), and the scales applicable to its variable coefficients. It has then gone on to review and correct, where necessary, the coefficients applied by the Commission in a given case, but always within the limits laid down in the latter's communication. This approach comes close to what may be seen as judicial review of the way in which the Commission had applied, in a given case, its own rules. The formula-based method is thus reminiscent of a situation where the Commission would have been empowered directly to impose sanctions on Member States by means of a decision, which could then be challenged by the Member State concerned under Article 263 TFEU. Such a resemblance is however problematic precisely because the Treaties have not empowered the Commission to impose sanctions on Member States in the context of Article 260 TFEU.

Third, the formula-based method is inherently prone to excessive rigidity. Indeed, the mechanical multiplication of preset coefficients may prove insufficiently flexible to accommodate all the specificities of the political, economic and legal context of the infringement. While it does allow certain elasticity, given that two of its coefficients can be varied according to the circumstances, the other coefficients are fixed. This method could therefore potentially yield results which are manifestly disproportionate or, at the very least, unfair in the circumstances.
B. Underlying Principles and Drawbacks of the Fairness Method

The Court's decision to ignore altogether, in a series of cases, the mathematical variables and formulas suggested by the Commission and determine the amount of the fine on grounds of fairness instead appears easier to justify in the light of the above-mentioned concerns surrounding the formula-based method. In doing so, the Court has probably sought to distance itself from the Commission in an effort to demonstrate its independence. Such an objective is legitimate and particularly welcome given that the Commission is no more than a party to the proceedings. The fairness method was thus designed to ensure, first of all, compliance with the principle of equality of arms. This method aspires, second, to fortify the Court's jurisdiction in proceedings under Article 260 TFEU. When it applies the fairness method, the Court takes full responsibility for determining the level of the penalty, without relying on the Commission's rules and formulas. Third, at the heart of this method is the idea of fairness. This idea is inherent in the process of judging. It is closely linked to the concept of the judge's conviction intime (inner conviction), which finds expression in the supposition that judges develop an inner, intimate feeling about what is right and wrong. The fact that the ideal of fairness has not been substantiated, or, in our case, quantified in a regulatory instrument, is therefore not particularly unsettling for a judge's ability to form his or her inner conviction.

Playing the fairness game without yardsticks, benchmarks, or points of reference may however prove hazardous. In the absence of rules set out in advance, what may seem fair to one, often seems unfair to another. The Court may thus be seen as walking a fine but perilous line between the arbitrary and the fair. The fairness method is particularly vulnerable in light of the principles of transparency, predictability and legal certainty. In terms of transparency, the lack of quantification of the relevant basic criteria makes it impossible to find out how and why a penalty amount has been fixed at a given level. This particular aspect has been subject to strong criticism. It also makes it very difficult, in terms of predictability and legal certainty, to foresee what the impending penalty might look like. The lack of transparency and predictability entails further problems, such as ensuring—and convincing the outer world—that Member States have been treated equally. These concerns should be addressed with particular care in an area where the economic burden of the fine is borne, at the end of the day, by the taxpayer.

It thus appears that the strengths of one method are the drawbacks of the other, and vice-versa. It would be naïve, however, to contend that the Court has been unaware of the shortcomings of each one of them. It could be argued that the Court has actually acted at its best, given the non-existent legal framework. Thus, rather than rejecting outright a given methodology for determining penalty amounts, the Court has sought to accommodate as best as it can the two available approaches.

70 Melanie Smith, Inter-institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties under Article 228 EC (now Article 260 TFEU), 16(4) EUR. PL 547, 562 (2010); Melchior Wathelet and Jonathan Wildemeersch, Double Manquement et Sanctions Financiers des États (Article 228, § 2 CE): Le Point Après Quinze Ans, 3 REVUE DE LA FACULTÉ DE DROIT DE L’UNIVERSITÉ DE LIÈGE 323, 329–330 (2008); Maria Theodossiou, An Analysis of the Recent Response of the Community to Non-Compliance with Court of Justice Judgments: Article 228 (2) EC, 27(1) EL REV. 25 (2002); Martin Hedemann-Robinson, supra note 24, at 330, 339.
both of which, as demonstrated above, are objectively justifiable. Their parallel coexistence in the case law may therefore be seen as an attempt to offset the drawbacks that are inherent to each one of them.

It is important, at this stage, to point out that the underlying principles of these two methods should not be seen as conflicting. Indeed, fairness is not an antonym for predictability. A sanction can and should be both fair and predictable. The problem however is that neither method, taken alone, provides a satisfactory solution, given the concerns to which each method gives rise.

V. THE SCOPE OF THE COURT’S JURISDICTION: A KEY TO BRIDGING THE GAPS?

Before looking into the question of whether and how the deficiencies of each of the two methods can be overcome, another fundamental question needs to be addressed. What is the scope of the Court's jurisdiction under Article 260 TFEU? The answer to this question may hold the key to solving the present conundrum.

A. The Scope of the Court's Jurisdiction under Article 260 TFEU

It should be clear from the outset that while the Commission is empowered to initiate proceedings against a Member State that does not comply with an Article 258 TFEU judgment, and eventually, to bring the matter to the Court, it is not empowered to impose a financial sanction on the recalcitrant Member State. In addition, there is nothing in the wording of Article 260 TFEU that could suggest that the Commission's recommendations somehow circumscribe the Court's jurisdiction. In particular, the provision does not state that the Court’s decision on the pecuniary sanction should be based on Commission recommendations. As Advocate General Geelhoed rightly pointed out, the absence of such a statement, "together with the contrast in the description of the functions of the Commission and the Court in applying this provision, in which the Commission 'specifies' and the Court 'imposes,' clearly demonstrates that the Court has jurisdiction to determine whether a sanction ought to be imposed, what type of sanction that should be and the amount of that sanction."71

This interpretation finds further support in the new paragraph 3 of Article 260 TFEU. This provision, introduced by the Treaty of Lisbon, allows the imposition of a fine on a Member State for failure to notify the Commission of the measures transposing a legislative directive, without there having been a previous judgment of the Court with which the Member State has not complied. In this specific situation, the level of the fine cannot exceed the amount specified by the Commission. While this seems to limit somewhat the Court's jurisdiction under Article 260(3) TFEU, there is no such limitation under Article 260(2) TFEU. Per argumentum a contrario, the Commission's penalty recommendations do not therefore affect in any way the Court's jurisdiction under the latter provision.

71 Opinion of Advocate General Geelhoed in Commission v. France (Fisheries), EU:C:2005:444, ¶ 23.
The case law is very much in line with the foregoing. The Court has held, in particular, that the general principle of civil procedural law which prohibits courts from going beyond the parties’ claims is not relevant in Article 260 TFEU proceedings, as the latter is a special judicial procedure peculiar to EU law. The Court has also emphasized that it has jurisdiction to impose a financial penalty not suggested by the Commission. This means, for example, that the Court may decide to impose a lump sum instead of a periodic penalty payment, contrary to what the Commission might have claimed. Moreover, the Court may depart from the specific terms of the sanction suggested by the Commission, for example, by choosing a periodicity different from the one suggested by the Commission or by postponing the moment from which the payment is due. The Court has also ruled that Article 260 TFEU proceedings do not necessarily imply the automatic imposition of a financial sanction on the defendant Member State, even where the latter is found not to comply with the Court's judgment. The imposition of a sanction will instead depend on the particular circumstances of the case.

It can thus be inferred, both from the spirit and the wording of Article 260 TFEU, as well as from the case law, that the Court has unlimited jurisdiction to determine not only whether it is necessary to impose a fine on a Member State, and the sort of fine which should be imposed, but also to fix the appropriate amount. According to the Court, Article 260 TFEU confers upon it a “margin of discretion” or even “wide discretion.” Advocates General Geelhoed and Fennelly have qualified the Court's jurisdiction under Article 260(2) TFEU as “full,” “unlimited,” and “unrestricted.” The Commission seems to have finally acknowledged this, referring to the Court's jurisdiction as "full" in its 2005 communication. All of these terms translate into the French notion of pleine juridiction.

B. Unlimited Jurisdiction v. Review of Legality

It is essential, at this juncture, to put particular emphasis on the distinction between the notion of unlimited jurisdiction and that of judicial review. The Court has recently had the occasion, in the context of EU competition law, to note that whereas the review of legality of the Commission's decisions empowers the Court to carry out a "mere review of the lawfulness of the penalty," its unlimited jurisdiction under Article 261 TFEU (ex 229 EC) enables it, in addition, to "substitute [its] own

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72 Commission v. France (Fisheries), EU:C:2005:444, ¶ 91.
73 Id. at ¶ 90; Case C-503/04, Commission v. Germany, EU:C:2007:432, ¶ 22.
74 See e.g., Commission v. France (Fisheries), EU:C:2005:444; Commission v. Spain (Quality of bathing water), EU:C:2003:635.
76 Commission v. France (GMOs), EU:C:2008:695, ¶ 63.
appraisal for the Commission’s.\textsuperscript{81} The same logic should apply \textit{a fortiori} to Article 260(2) TFEU. Indeed, unlike in competition law, the Commission has no power to impose penalties, nor to adopt any legally binding acts, which would then be subject to judicial review. The letter of formal notice that the Commission issues in the pre-litigation procedure is devoid of legal force vis-à-vis the Member State to which it is addressed and cannot be equated with a decision or any other legally binding act. The fact that Article 260(2) TFEU does not explicitly mention the notion of "unlimited jurisdiction," as does Article 261 TFEU, does not mean that the Court’s jurisdiction in the first instance is narrower than in the latter. After all, Article 260 TFEU does not bestow competence in that regard on any other EU institution besides the Court. The latter should therefore have unfettered competence to adjudicate the matter.\textsuperscript{82} The Court’s unlimited jurisdiction in the context of Article 260(2) TFEU thus enables it to substitute its own appraisal for that of the Commission. It should for this reason be able to decide, according to its own set of rules and considerations, how to determine, in particular, the amount of a penalty. In other words, it is for the Court to set the rules of the game.

Since the formula-based method comes intimately close to a judicial review of the legality of a Commission’s decision, as explained above, it appears insufficient—in light of the Court’s unlimited jurisdiction—to scrutinize, be it meticulously, whether the Commission has correctly evaluated and applied the various coefficients that it has itself created. The fairness method also features a number of shortcomings, as discussed above. This leads us to our final query: can the deficiencies of each of these two methods be overcome?

\textbf{C. Possible Solutions}

One possible way to address the aforementioned concerns is by modifying Article 260(2) TFEU. Such an amendment could, for example, entrust the Council and the European Parliament with the task of adopting legislation relating to the calculation of the financial sanctions. Thus, instead of leaving the matter to the Commission and its soft law endeavors, enactment of legislation would give legitimacy to the applicable method for calculating penalties, while allowing the Member States to have a say within the Council. It would also bolster the transparency and accountability of the Union judicature by laying down binding rules and yardsticks for all. Such legislation could also set a ceiling above which no fine could be imposed. Such ceilings are not a novelty in EU affairs. A recent example can be found in the newly launched Treaty on Stability, Coordination and Convergence in the Economic and Monetary Union. According to Article 8(2) of this Treaty, if the Court of Justice finds that a Contracting Party has not complied with a previous judgment delivered in the context of the Treaty, it may impose on it a lump sum or a penalty payment that shall not exceed 0.1% of its gross domestic product. Analogous ceilings may also be found in other contexts in secondary EU legislation, e.g. in competition law, where the fine for infringing Articles 101 and 102 TFEU cannot exceed 10% of the undertaking’s total turnover in the preceding business.

\textsuperscript{81} Case C-386/10 P, Chalkor v. Commission, EU:C:2011:815, ¶ 63.
\textsuperscript{82} Advocate General Fennelly reached, in substance, the same conclusion in his Opinion in \textit{Commission v. Greece}, EU:C:2000:553.
The advantage of such caps is that they set the limits of an otherwise potentially infinite magnitude of fines, and make such magnitude predictable. Such changes in Article 260(2) TFEU would therefore be particularly welcome.

In the meantime, it could be argued that the succinctness of Article 260(2) TFEU was intentionally sought. This would mean that Treaty-makers have willingly left the matter to the Court. This should not be taken, however, to mean that the Court has been given a free hand to fix penalties arbitrarily. After all, the principles of transparency, predictability, legal certainty, proportionality and equal treatment are general principles of EU law that must be respected in all cases brought before the Court. The Court has itself emphasized on many an occasion that the Commission’s guidelines on Article 260(2) TFEU contribute precisely to ensuring these principles. It would be anomalous to pretend that they do not apply to the Court. To the contrary, the lack of explicit rules on the matter makes the need for transparency, predictability and legal certainty all the more pressing.

How can then the Court preserve its unlimited jurisdiction while at the same time respecting the above-mentioned principles? Rather than having to choose, every time, between the fairness method and the formula-based method, might it not be possible to apply, instead, a combination of the two? Isn’t there a way that could allow the combination of the strengths of each of the two methods, while at the same time minimizing their shortcomings?

One possible solution might be the consolidation of the two methods into one unified two-step approach. The first step would consist of quantifying the various elements of the infringement with a view towards ensuring the transparency and predictability of the calculation. This first step of the analysis would thus resemble the formula-based method which should, however, be seriously reconsidered in order to reflect the Court’s full jurisdiction on the matter. There is nothing wrong in using the Commission’s coefficients as a point of reference, as long as they remain precisely that. It is therefore important to insist that the Court be free to depart from the scales and formulas put forward by the Commission. The Court’s unlimited jurisdiction means, in particular, that it can freely quantify in numerical terms the relevant criteria for assessing the infringement without limiting itself within the confines laid down by the Commission.

A number of examples can illustrate this point. First, with regard to the duration of the infringement, it should, according to the Commission, be quantified within a scale from 1 to 3, each month of infringement being equal to 0.1. Thus, in the Commission’s logic, an infringement which went on for 30 months should be assessed in the same way as an infringement which persisted, say, for 120 months. Such an outcome would obviously be unfair and the Court should, in such circumstances, be able to fix the appropriate level of this coefficient independently of the aforementioned scale.  

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83 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, art. 23(2), 2003 O.J. (L 1) 1 (EC).
84 Advocate General Mazák argued likewise in his Opinion in Commission v. France (GMOs), EU:C:2008:695, ¶ 57.
Second, the mere lapse of time may prove inconclusive for the purpose of assessing the duration of the infringement. For example, the long duration of the infringement may be partly the result of the Commission’s failure to act resolutely and expeditiously. Indeed, the Commission’s inaction might have led the Member State to believe that the Commission had no further objections. In any event, it must not be forgotten that a case lagging behind for years in the administrative phase of the procedure translates necessarily—because of the objective lapse of time—into bigger fines. The Court should be able to take account of such circumstances.

Third, in order to avoid taking twice into account the duration of the infringement—once in the formula for calculating the lump sum and a second time in the formula for determining the penalty payment—the Court should be free, for example, to disregard altogether this criterion when it comes to determining the amount of the penalty payment. Indeed, past behavior, and therefore the duration of the misconduct, is irrelevant in the context of imposing a penalty payment. The latter seeks to induce the Member State concerned to put an end to the infringement as rapidly as possible. The emphasis should therefore be on the urgency to comply and the Member State’s future conduct, not on its past behavior.

Fourth, as previously discussed, the capacity of each Member State to pay is currently measured with the “n” factor: a fixed invariable coefficient calculated in advance for each Member State on the basis of its GDP, the weighing of its voting rights in the Council, and Luxembourg’s GDP as well as number of votes in the Council. It should however be borne in mind that the Member State’s voting rights in the Council are the result of political arrangements and are so designed that certain Member States are over or under-represented by comparison to their actual population and/or economic strength. Its link with the Member State’s wealth is therefore questionable. Thus, the “n” factor, as calculated by the Commission, does not necessarily provide an accurate picture of a Member State’s ability to pay. Interestingly, it has been demonstrated that the “n” factor is unfair compared to the use of the actual GDP or GDP per capita, as it over or undervalues the ability of certain Member States to pay.

Last but not least, the Court should also be free to attune the applicable formula to the circumstances of the case. This seems particularly necessary where the fine should be varied over time in order to take account of the Member State’s future gradual compliance with its obligations. The problem is that the Commission’s formulas do not allow room for such variations, which makes them in turn unsuitable in such circumstances. The Court should therefore be able to introduce a separate

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86 The relevance of Luxembourg’s GDP and voting rights in the Council is obscure. Arguably, Luxembourg was chosen by the Commission for being, at the time, the smallest Member State.

87 The same view was expressed by Advocate General Fennelly in his Opinion in Commission v. Greece, EU:C:2000:553, ¶¶ 39–42. See also Bénédicte Masson, “L’obscure Clarté” de L’Article 228 § 2 CE, 4 RTDE 639, 666 (2004), Levente Borzsák, Punishing Member States or Influencing Their Behaviour or Iudex (non) Calculate?, 13 J. ECON. LIT. 235 (2001).

element to the formula, which should be designed with a view towards reducing the amount of the penalty payment as the Member State makes progress in complying with the Court's judgment. The case law already contains examples to this effect.89

The first step of the proposed approach would thus ensure a respectable degree of transparency, predictability and observance of the principle of equal treatment. After having accomplished this first stage of its reasoning however, the Court should be able to take a step away from its calculations in order to appreciate whether the result it has arrived at is fair. The second step of the proposed two-step approach should therefore enable the Court to appreciate globally the appropriateness and proportionality of the amount of the fine. This is necessary since, as mentioned above, the rigorous application of predetermined formulas and coefficients does not always yield results which are appropriate in the circumstances. Transparency and predictability do not, in themselves, ensure fairness. A concluding global appreciation ex aequo et bono would be yet another, final manifestation, of the Court's unlimited jurisdiction.

VI. CONCLUSIONS

Determining the amount of the sanctions to be imposed under Article 260(2) TFEU is not an easy task in the absence of a legally-binding framework. Under such circumstances, the Court has had to negotiate a treacherous terrain in its effort to assert its full jurisdiction. It has thus accommodated in its case law two competing methodologies for determining penalty levels, as demonstrated most recently in its judgments rendered over the course of 2013. One of the methodologies is essentially arithmetic and relies heavily on the formulas and coefficients put forward by the Commission. In Commission v. Belgium,90 the Court admittedly had recourse to this method. This approach has the advantage of ensuring a transparent and predictable calculation of the fine, equal treatment of Member States, and more generally, legal certainty. But it also raises a number of objections pertaining to the limitations it poses to the Court's jurisdiction, due process, proportionality and fairness.

The other method adopted in the case law ignores altogether the aforementioned formulas and coefficients and enables the Court to fix the fine ex aequo et bono, as illustrated most recently in Commission v. Sweden,91 Commission v. Czech Republic92 and Commission v. Luxembourg.93 This method aims at preserving the Court's jurisdiction under Article 260(2) TFEU, at ensuring equality of arms with respect to both parties in the proceedings, and at imposing a fair sanction. However, it also raises serious concerns in terms of transparency, predictability and equal treatment of Member States. The strong points of one method are thus the weak points of the other, and vice-versa.

It is therefore important that sanctions be determined in a way that is transparent, predictable and equal for all Member States, while being at the same
time fair and respectful of the principle of equality of arms. Having to choose between these two methods is therefore not a satisfactory solution. Rather, a just equilibrium between the two should be sought. This could be achieved by a unified two-step approach that combines the strengths of each of the two methods while minimizing their respective weaknesses. The first step of this approach should consist of applying precise formulas and coefficients, while the second step should allow for a final global appreciation *ex aequo et bono.*