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Judgment of the Court of 4 July 2000. - Commission of the European Communities v Hellenic Republic. - Failure of a Member State to fulfil its obligations - Judgment of the Court establishing such failure - Non-compliance - Article 171 of the EC Treaty (now Article 228 EC) - Financial penalties - Periodic penalty payment - Waste - Directives 75/442/EEC and 78/319/EEC. - Case C-387/97.

European Court reports 2000 Page I-05047

Summary
Parties
Grounds
Decision on costs
Operative part

Keywords

1. Actions for failure to fulfil obligations - Judgment of the Court establishing such failure - Breach of the obligation to comply with the judgment - Action brought under Article 171(2) of the Treaty (now Article 228(2) EC) - Admissibility - Conditions

(EC Treaty, Art. 171(2) (now Art. 228(2) EC))

2. Environment - Disposal of waste - Directives 75/442 and 78/319 - Articles 4 and 5 respectively - Obligation on the Member States to ensure the disposal of waste and to take appropriate measures in respect of toxic and dangerous waste - Scope - Assessment of the need for measures - Discretion - Limits

(Council Directives 75/442, Art. 4, and 78/319, Art. 5)

3. Environment - Disposal of waste - Directives 75/442 and 78/319 - Articles 4 and 5 respectively - Obligation on the Member States to ensure the disposal of waste and to take appropriate measures in respect of toxic and dangerous waste - Identical effect in Directives 75/442 as amended and 91/689

(Council Directives 75/442, Art. 4, 78/319, Art. 5, and 91/689)

4. Member States - Obligations - Failure to fulfil obligations - Justification - Not permissible

(EC Treaty, Art. 169 (now Art. 226 EC))

5. Acts of the institutions - Directives - Implementation by the Member States - Directive requiring a plan to be drawn up for the attainment of certain objectives - Implementation of incomplete practical measures or fragmentary legislation - Obligation not discharged - Plans prescribed by Directives 75/442 and 78/319 on waste

(EC Treaty, Art. 189, third para. (now Art. 249, third para., EC); Council Directives 75/442, Art. 6, and 78/319, Art. 12)

6. Actions for failure to fulfil obligations - Judgment of the Court establishing such failure - Period allowed for compliance

(EC Treaty, Art. 171 (now Art. 228 EC))

7. Actions for failure to fulfil obligations - Judgment of the Court establishing such failure - Effects - Obligations of the defaulting Member State - Compliance with the judgment - Failure to comply - Financial penalties - Method of calculation - Power for the Commission to adopt guidelines - Suggestions submitted to the Court - Effect

(EC Treaty, Art. 171(2), first and second subparas (now Art. 228(2), first and second subparas, EC))

8. Actions for failure to fulfil obligations - Judgment of the Court establishing such failure - Breach of the obligation to comply with the judgment - Financial penalties - Periodic penalty payment - Determination of the amount - Criteria

(EC Treaty, Art. 171(2), third subpara. (now Art. 228(2), third subpara., EC))

Summary

1. Infringement proceedings brought by the Commission under Article 171(2) of the Treaty (now Article 228(2) EC) for a declaration that a Member State has failed to fulfil its obligations by not taking the necessary measures to comply with a judgment of the Court establishing a breach of obligations on its part and for an order requiring it to pay a periodic penalty payment are admissible where all the stages of the pre-litigation procedure, including the letter of formal notice, have occurred after the Treaty on European Union entered into force.

(see para. 42)

2. Whilst Article 4 of Directive 75/442 on waste did not specify the actual content of the measures to be taken by the Member States in order to ensure that waste is disposed of without endangering human health and without harming the environment, it was none the less binding on the Member States as to the objective to be achieved, while leaving to them a margin of discretion in assessing the need for such measures. A significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities is in principle an indication that the Member State concerned has exceeded the discretion conferred on it by that provision. The same analysis can be made as regards Article 5 of Directive 78/319 on toxic and dangerous waste.

(see paras 55-57)

3. The obligations flowing from Article 4 of Directive 75/442 on waste and Article 5 of Directive 78/319 on toxic and dangerous waste were independent of the more specific obligations contained in Articles 5 to 11 of Directive 75/442 concerning the planning, organisation and supervision of waste disposal operations and Article 12 of Directive 78/319 concerning the disposal of toxic and dangerous waste. The same is true of the corresponding obligations under Directive 75/442 as amended and Directive 91/689 on hazardous waste.

(see paras 48-49, 58)

4. A Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law.

(see para. 70)

5. Incomplete practical measures or fragmentary legislation cannot discharge the obligation of Member States to draw up a comprehensive programme with a view to attaining certain objectives.

Legislation or specific measures amounting only to a series of ad hoc normative interventions that are incapable of constituting an organised and coordinated system for the disposal of waste and toxic and dangerous waste cannot be regarded as plans which the Member States are required to adopt under Article 6 of Directive 75/442 on waste and Article 12 of Directive 78/319 on toxic and dangerous waste.

(see paras 75-76)

6. While Article 171 of the Treaty (now Article 228 EC) does not specify the period within which a judgment establishing that a Member State has failed to fulfil its obligations must be complied with, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible.

(see para. 82)

7. Article 171(1) of the Treaty (now Article 228(1) EC) provides that, if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, that State is required to take the necessary measures to comply with the Court's judgment. If the Member State concerned does not take those measures within the time-limit laid down by the Commission in the reasoned opinion adopted pursuant to the first subparagraph of Article 171(2) of the Treaty, the Commission may bring the case before the Court. As provided in the second subparagraph of Article 171(2), the Commission is to 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. 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. While these suggestions of the Commission cannot bind the Court, they are however a useful point of reference.

(see paras 81, 83-84, 89)

8. It is stated in the third subparagraph of Article 171(2) of the Treaty (now the third subparagraph of Article 228(2) EC) 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. First, since the principal aim of penalty payments is that the Member State should remedy the breach of obligations as soon as possible, a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned. Second, the degree of urgency that the Member State concerned should fulfil its obligations may vary in accordance with the breach. To that end, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.

(see paras 89-92)

Parties

In Case C-387/97,

Commission of the European Communities, represented by M. Condou-Durande, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, with an address for service at the British Embassy, 14 Boulevard Roosevelt,

intervener,

v

Hellenic Republic, represented by A. Samoni-Rantou, Legal Adviser in the Special Department for Community Legal Affairs in the Ministry of Foreign Affairs, E.-M. Mamouna, Assistant Lawyer in the same department, and G. Karipsiadis, Specialist Adviser in that department, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by failing to take the necessary measures to comply with the judgment of the Court of 7 April 1992 in Case C-45/91 Commission v Greece [1992] ECR I-2509 and, in particular, by still not having drawn up or implemented the plans necessary for the disposal of waste and toxic and dangerous waste from the area concerned without endangering human health and without harming the environment, the Hellenic Republic has failed to fulfil its obligations under Article 171 of the EC Treaty (now Article 228 EC), and for an order requiring the Hellenic Republic to pay to the Commission, into the account EC own resources, a daily penalty payment of ECU 24 600 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from notification of the present judgment,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm (Rapporteur), M. Wathelet and V. Skouris, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 28 September 1999,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 14 November 1997, the Commission of the European Communities brought an action under Article 171 of the EC Treaty (now Article 228 EC) for a declaration that, by failing to take the necessary measures to comply with the judgment of the Court of 7 April 1992 in Case C-45/91 Commission v Greece [1992] ECR I-2509 and, in particular, by still not having drawn up or implemented the plans necessary for the disposal of waste and toxic and dangerous waste from the area concerned without endangering human health and without harming the environment, the Hellenic Republic has failed to fulfil its obligations under Article 171 of the EC Treaty (now Article 228 EC), and for an order requiring the Hellenic Republic to pay to the Commission, into the account EC own resources, a daily penalty payment of ECU 24 600 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from notification of the present judgment.

Community legislation

2 In the versions in force on the expiry of the period of two months set in the reasoned opinion which culminated in the finding of a failure to fulfil obligations in Case C-45/91, Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39) and Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) provided for the harmonisation of national laws concerning the disposal of certain waste. As is apparent from the third recital in the preamble to

Directive 75/442 and the fourth recital in the preamble to Directive 78/319 respectively, those directives were designed, in particular, to protect human health and safeguard the environment against harmful effects caused by the collection, carriage, treatment, storage and tipping of such waste.

3 In order to ensure achievement of that objective, Directives 75/442 and 78/319 required the Member States to adopt certain provisions and to take certain other measures.

4 First of all, under Article 4 of Directive 75/442 the Member States were to take the measures necessary to ensure that waste was disposed of without endangering human health and without harming the environment, and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours and without adversely affecting the countryside or places of special interest.

5 Article 5(1) of Directive 78/319 provided that the Member States were to take the necessary measures to ensure that toxic and dangerous waste was disposed of without endangering human health and without harming the environment, and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours and without adversely affecting the countryside or places of special interest. Under Article 5(2) of that directive, the Member States were in particular to take the necessary steps to prohibit the abandonment and uncontrolled discharge, tipping or carriage of toxic and dangerous waste, as well as its consignment to installations, establishments or undertakings other than those referred to in Article 9(1) of the directive.

6 Article 5 of Directive 75/442 required the Member States to establish or designate the competent authority or authorities to be responsible, in a given zone, for the planning, organisation, authorisation and supervision of waste disposal operations.

7 Under the first paragraph of Article 6 of Directive 75/442, the competent authority or authorities designated were required to draw up as soon as possible one or several plans relating, in particular, to the type and quantity of waste to be disposed of, general technical requirements, suitable disposal sites and any special arrangements for particular types of waste. The second paragraph of that article provided that the plan or plans could, for example, cover the natural or legal persons empowered to carry out the disposal of waste, the estimated costs of the disposal operations, and appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste.

8 Under Article 6 of Directive 78/319, the Member States were to designate or establish the competent authority or authorities to be responsible, in a given area, for the planning, organisation, authorisation and supervision of operations for the disposal of toxic and dangerous waste.

9 The first subparagraph of Article 12(1) of Directive 78/319 stated that the competent authorities had to draw up, and keep up to date, plans for the disposal of toxic and dangerous waste. Those plans were to cover in particular the type and quantity of waste to be disposed of, the methods of disposal, specialised treatment centres where necessary, and suitable disposal sites.

10 In accordance with Article 145 of the Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties (OJ 1979 L 291, p. 17, hereinafter the Act of Accession), the Hellenic Republic had until 1 January 1981 to put into effect the measures necessary to comply with Directives 75/442 and 78/319.

The judgment in Case C-45/91

11 In its judgment in Case C-45/91, the Court held that the Hellenic Republic had failed to fulfil its obligations under Articles 4 and 6 of Directive 75/442 and Articles 5 and 12 of Directive 78/319.

12 According to that judgment, the Commission, having become aware of problems posed by the disposal of waste in the prefecture of Chania in Crete (Greece), asked the Greek Government to explain the situation. In particular, it asked for information regarding the existence of a rubbish tip at the mouth of the river Kouroupitos.

13 The Greek Government replied that it was going to put an end to the operation of that tip and create new disposal sites. However, it stated that, pending completion of the necessary work on the infrastructure for those new sites, the waste from the prefecture of Chania would continue to be deposited in the Kouroupitos tip until August 1988.

14 The Commission considered that reply to be unsatisfactory and sent the Hellenic Republic a letter of formal notice. In that letter it stated that, in its view, the Hellenic Republic, contrary to Article 4 of Directive 75/442 and Article 5 of Directive 78/319, had not taken any measures enabling the waste in question to be disposed of without endangering human health and without harming the environment. It also stated that the Hellenic Republic had still not drawn up either the waste disposal plan prescribed by Article 6 of Directive 75/442 or the plan for the disposal of toxic and dangerous waste required by Article 12 of Directive 78/319. Nor had it taken any measure regarding the disposal of waste as required by Article 7 of Directive 75/442. The Commission concluded that the Hellenic Republic had failed to fulfil its obligations under Articles 4, 5, 6, 7 and 13 of Directive 75/442 and Articles 5, 6, 12 and 21 of Directive 78/319.

15 In their reply to that letter, the Greek authorities referred to the opposition of the population of Chania to the plan to create new landfill sites and stated that the authorities in Chania therefore envisaged, in the medium term, the creation of landfill sites in smaller towns and, in the long term, the incineration and recycling of refuse.

16 On 5 March 1990 the Commission issued a reasoned opinion which it sent to the Hellenic Republic. In the reasoned opinion, the Commission expressed the view that the Greek authorities had failed to fulfil their obligations arising from the Treaty since they were still at the stage of preparing the necessary measures to comply with Directives 75/442 and 78/319 in the area of Chania.

17 In the Treaty infringement proceedings which it brought against the Hellenic Republic, the Commission submitted that the Greek authorities had taken no measure enabling waste from the Chania area to be disposed of without endangering human health and without harming the environment. It added that the competent authorities had not taken any steps to implement a proper plan which would lead to the correct management of waste in that area in accordance with a timetable. It made the same criticisms with regard to the toxic and dangerous waste from the area, in respect of which the Greek authorities had similarly not taken any appropriate measures or laid down a disposal plan.

18 In reply, the Hellenic Republic stated that several studies had been undertaken between 1989 and 1991 regarding the management and recycling of waste from the Chania area. However, implementation of the planned programme had been suspended because of the opposition of the local population.

19 In paragraph 21 of its judgment in Case C-45/91, the Court stated that, pursuant to Article 145 of the Act of Accession, Directives 75/442 and 78/319 should have been implemented in Greece by 1 January 1981 at the latest. It also pointed out that, in accordance with settled case-law, a Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law.

20 The Court accordingly held:

By failing to take the measures necessary to ensure that in the area of Chania waste and toxic and dangerous waste are disposed of without endangering human health and without harming the environment, and by failing to draw up for that area plans for the disposal of waste and of toxic and dangerous waste, the Hellenic Republic has failed to fulfil its obligations under Articles 4 and 6 of Council Directive 75/442/EEC of 15 July 1975 on waste, and Articles 5 and 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste.

Pre-litigation procedure

21 The Commission was not notified of any measures to comply with the judgment in Case C-45/91, and so it reiterated in a letter of 11 October 1993 to the Greek authorities that the Court had found against the Hellenic Republic in that judgment and pointed out that no measure to comply with the judgment had been communicated to it.

22 By letter of 24 August 1994 the Greek Government informed the Commission that the competent body for waste management at local level had obtained preliminary approval for two landfill sites at Kopinadi and Vardia. Studies to assess the impact of those sites on the environment were in the process of being prepared, in accordance with the national legislation transposing Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and were to be completed before the end of 1994. Following that procedure, the competent body could draw up the final study regarding the construction, operation, supervision and restoration of whichever of the two sites appeared the more suitable.

23 Having received no further information from the Greek Government, the Commission decided to initiate the procedure under Article 171(2) of the Treaty. On 21 September 1995 it called on the Greek Government to submit within two months its observations concerning its failure to comply with the judgment in Case C-45/91.

24 By letter of 14 December 1995 the Greek Government informed the Commission that the prefectorial council for Chania had selected a waste disposal site and that the waste disposal programme would therefore be implemented.

25 The Commission considered that that reply clearly showed that, four years after the judgment in Case C-45/91, the Greek authorities still had not taken the necessary measures to comply with the judgment, that adoption of those measures was still only at a preliminary stage and that the waste disposal plans still could not be implemented. Thus, according to the Commission, waste continued to be deposited in the Kouroupitos tip, endangering public health and harming the environment.

26 By reasoned opinion of 6 August 1996, the Commission found that, by failing to take the necessary measures to comply with the judgment in Case C-45/91 and, in particular, by still not having drawn up or implemented the plans necessary for the disposal of waste and toxic and dangerous waste from the area concerned without endangering human health and without harming the environment, the Hellenic Republic had failed to fulfil its obligations under the Treaty.

27 The Commission called on the Hellenic Republic, in accordance with Article 171(2) of the Treaty, to take the necessary measures to comply with the reasoned opinion within two months of its notification. In addition, the Commission drew the attention of the Greek authorities to the fact that a periodic penalty payment could be imposed for failure by the Hellenic Republic to comply with the judgment in Case C-45/91, stating that it would determine the amount of the penalty payment to be claimed in the Court proceedings pursuant to Article 171(2) of the Treaty in the light of the circumstances obtaining when it brought its action.

28 In their reply of 11 November 1996, the Greek authorities referred to a national waste management plan, guaranteed and implemented at prefectorial and regional level, for which the necessary funds were available and committed. As regards the regional waste management plan in the prefecture of Chania, the Greek authorities stated that it consisted in the implementation of an integrated management programme including:

- the sorting of waste at source;

- the construction and operation of a mechanical recycling plant;

- the provision and operation of a landfill site; and

- a programme for the reinstatement and restoration of the area on account of the uncontrolled disposal of waste in the Kouroupitos tip.

29 With regard to the waste deposited in the Kouroupitos tip, the Greek authorities indicated that they had taken specific actions and measures of intervention dealing with the local problems in order to resolve definitively the question of that site, for which they were drawing up separate management programmes.

30 As for the management of toxic and dangerous waste, especially hospital waste, the Greek authorities stated that they were implementing a series of actions and measures of intervention relating to the financing of waste management studies and works and, in particular, that the Chania prefectorial authorities had taken the steps necessary to set up a mechanical recycling plant and a landfill site. According to the competent authorities, completion of that programme would settle the problem of the river Kouroupitos and resolve the problem of waste management in the Chania area.

31 By letter of 28 August 1997 the Greek authorities provided supplementary information concerning progress with the procedure for waste management in the prefecture of Chania. They indicated in particular that preliminary approval had been granted for the location chosen for the landfill site and that the study relating to the environmental impact of the waste recycling and composting plant had been completed, as had the first stage of an international restricted tendering procedure.

32 The Commission considered that those replies were unsatisfactory and that the measures to comply with the judgment in Case C-45/91 had still not been implemented and consequently decided to bring the present action.

Forms of order sought

33 The Commission claims that the Court should declare that the Hellenic Republic has failed to fulfil its obligations under Article 171 of the Treaty, impose on it a penalty payment of EUR 24 600 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91 and order it to pay the costs.

34 By order of the President of the Court of 29 September 1998, the United Kingdom was granted leave to intervene in support of the form of order sought by the Commission. However, it has not filed pleadings.

35 The Greek Government claims that the Court should declare the action inadmissible or dismiss it as unfounded and order the Commission to pay the costs. In the alternative, it contends that the Court should set the penalty payment on the basis of coefficients of seriousness and duration which are more favourable to the Hellenic Republic than those applied by the Commission, taking account of the high degree of compliance with the judgment in Case C-45/91 achieved by the Hellenic Republic.

Admissibility

36 Relying on the judgments in Case 14/81 Alpha Steel v Commission [1982] ECR 749, at paragraph 28, and in Case C-331/88 Fedesa and Others [1990] ECR I-4023, at paragraph 42, the Opinion of Advocate General Fennelly in Case C-334/94 Commission v France [1996] ECR I-1307 and some of the legal literature, the Greek Government maintains that the action is inadmissible on the ground that Article 171(2) of the Treaty, which results from the Treaty on European Union, entered into force on 1 November 1993, after the initiation of the infringement procedure based on Article 171 of the Treaty for failure to comply with the judgment in Case C-45/91.

37 In its submission, Article 171(2) of the Treaty provides for the imposition of very severe penalties on the Member States and is therefore a stricter and more onerous rule which in principle cannot be applied retroactively.

38 The Greek Government states that the infringement procedure for failure to comply with the judgment in Case C-45/91 began on 11 October 1993 when the Commission, having received no information regarding compliance with that judgment, wrote to the Greek authorities reminding them that the Court had found against the Hellenic Republic and setting a time-limit for communication by them of the measures taken to comply with the Court's ruling.

39 The Greek Government argues that, although it relates to the future and not to the past and does not apply retroactively, the fine contains retroactive elements. The procedure under Article 171(2) of the Treaty essentially involves consideration of the past and the fine is calculated on the basis of factors and criteria referring to acts carried out in the past. The Commission seeks to penalise past conduct while pursuing the longer-term objective of avoiding future reoffending by the undisciplined Member State.

40 The Commission contends that Article 171(2) of the Treaty is not being applied retroactively. The present action can be distinguished from Commission v France, cited above, since here all the stages of the infringement procedure have taken place after the Treaty on European Union entered into force.

41 Nor are the penalties being applied retroactively. The penalty payment proposed by the Commission cannot be considered to be a penal sanction, because it is imposed to influence future conduct.

42 On this issue, it is sufficient to note, first, that all the stages of the pre-litigation procedure, including the letter of formal notice of 21 September 1995, occurred after the Treaty on European Union entered into force. The letter of 11 October 1993 to which the Greek Government refers does not form part of that procedure. Second, the argument put forward by the Greek Government concerning the relevance, when setting the penalty payment, of factors and criteria relating to the past is indissociable from consideration of the substance of the case, in particular as regards the object of penalty payments under Article 171(2) of the Treaty.

43 Accordingly, the plea of inadmissibility raised by the Greek Government must be rejected.

Substance

44 A preliminary point to be considered is whether the obligations which the Hellenic Republic owed under Articles 4 and 6 of Directive 75/442 and Articles 5 and 12 of Directive 78/319 still apply as Community law now stands.

45 Directive 75/442 was substantially amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32). The effect of Article 1 of Directive 91/156 is that Articles 1 to 12 of Directive 75/442 have been replaced by Articles 1 to 18 and three annexes have been added.

46 Directive 78/319 was repealed with effect from 12 December 1993 and replaced by Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1993 L 377, p. 20). Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689 (OJ 1994 L 168, p. 28) postponed the repeal of Directive 78/319 to 27 June 1995.

47 Comparative study of the abovementioned provisions shows that the amended directive tightened up certain provisions of Directive 75/442 (Case C-365/97 Commission v Italy [1999] ECR I-7773, paragraph 37). Thus, the obligations imposed on the Member States by Article 4 of Directive 75/442 remain applicable by virtue of the first paragraph of Article 4 of the amended directive (Commission v Italy, paragraph 61). The obligation laid down in Article 6 of Directive 75/442 to draw up waste disposal plans corresponds now to the obligation under Article 7 of the amended directive to draw up waste management plans.

48 Similarly, the obligations imposed on the Member States by Article 5 of Directive 78/319 are retained by virtue of Article 4 of Directive 75/442, as amended. First, the obligation under Article 5(1) of Directive 78/319 to dispose of toxic and dangerous waste without endangering human health or harming the environment now appears in the first paragraph of Article 4 of Directive 75/442, as amended, that directive having been rendered applicable to hazardous waste by Article 1(2) of Directive 91/689.

49 Second, Article 5(2) of Directive 78/319 imposed a specific obligation on the Member States to take the necessary steps to prohibit the abandonment and uncontrolled discharge, tipping or carriage of toxic and dangerous waste, as well as its consignment to installations, establishments or undertakings

other than those referred to in Article 9(1) of the directive. That obligation now appears in the second paragraph of Article 4 of Directive 75/442, as amended.

50 As regards the obligation laid down in Article 12 of Directive 78/319 to draw up, and keep up to date, plans for the disposal of toxic and dangerous waste, that obligation corresponds to the obligation to draw up plans for the management of hazardous waste, imposed by Article 6(1) of Directive 91/689.

51 It follows from the foregoing that the obligations owed by the Hellenic Republic under Articles 4 and 6 of Directive 75/442 and Articles 5 and 12 of Directive 78/319 still apply as Community law now stands.

Scope of the obligations found not to have been fulfilled in the judgment in Case C-45/91

52 The Commission maintains that the Hellenic Republic would have satisfied its obligation under Article 171 of the Treaty to comply with the judgment in Case C-45/91 had it drawn up and implemented the plans prescribed by Article 6 of Directive 75/442 and Article 12 of Directive 78/319. In its submission, the obligations flowing from Articles 4 and 6 of Directive 75/442 and Articles 5 and 12 of Directive 78/319 are fulfilled only if the plans prescribed by those directives are adopted and actually implemented.

53 It states that it is clear from the information provided by the Greek Government that the waste disposal plan required by Article 6 of Directive 75/442 and the plan for the disposal of toxic and dangerous waste required by Article 12 of Directive 78/319 were still at a preliminary stage and that the river Kouroupitos continued to serve as a site for the uncontrolled disposal of waste from the Chania area.

54 The Greek Government points out that a Member State might very well have drawn up and notified to the Commission the plans prescribed by Article 6 of Directive 75/442 and Article 12 of Directive 78/319 without, however, having taken the necessary measures required by Article 4 of Directive 75/442 and Article 5 of Directive 78/319. Conversely, a Member State could have taken the necessary measures required by Article 4 of Directive 75/442 and Article 5 of Directive 78/319 without having drawn up and given notification of the plans prescribed by Article 6 of Directive 75/442 and Article 12 of Directive 78/319, in which case the failure to fulfil obligations would relate solely to the latter provisions.

55 It should be noted that, whilst Article 4 of Directive 75/442 did not specify the actual content of the measures to be taken in order to ensure that waste is disposed of without endangering human health and without harming the environment, it was none the less binding on the Member States as to the objective to be achieved, while leaving to them a margin of discretion in assessing the need for such measures (Commission v Italy, cited above, paragraph 67).

56 Thus the Court has held that a significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities is in principle an indication that the Member State concerned has exceeded the discretion conferred on it by that provision (Commission v Italy, paragraph 68).

57 The same analysis can be made as regards Article 5 of Directive 78/319.

58 In addition, the obligations flowing from Article 4 of Directive 75/442 and Article 5 of Directive 78/319 were independent of the more specific obligations contained in Articles 5 to 11 of Directive 75/442 concerning the planning, organisation and supervision of waste disposal operations and Article 12 of Directive 78/319 concerning the disposal of toxic and dangerous waste. The same is true of the corresponding obligations under Directive 75/442 as amended and Directive 91/689.

59 Accordingly, in order to determine whether the Hellenic Republic has satisfied the obligation to comply with the judgment in Case C-45/91, it must be established in turn whether each of the obligations found by that judgment not to have been fulfilled has, in so far as those obligations are mutually independent, since been complied with.

Compliance with the obligations flowing from Article 171(1) of the Treaty

60 The Greek Government argues in defence that the volume of waste which continues to be tipped in the Kouroupitos ravine has decreased significantly because some of the waste is landfilled at appropriate sites located in four sub-prefectures of the prefecture of Chania (Sfakia, Kalives, Selino and Kissamo) and a paper sorting and recycling system has been set up.

61 Toxic and hazardous waste from the American military base at Souda has not been deposited in the Kouroupitos ravine since 1996, but is entrusted to a private undertaking which transports it abroad in order for it to be treated. That is also the case with hospital waste, which is loaded into a special vehicle and stored in a cold chamber until it is incinerated. As for sediments of hydrocarbons, the Greek Government affirms that they are stored in an appropriate place until they are sent abroad. Used mineral oils are passed to the Chania prefectorial authorities for transportation to a reclamation plant, while tankers no longer deposit the contents of septic tanks into the Kouroupitos as a biological sewage treatment plant has been built in the Chania area.

62 It should be remembered that the present proceedings stem from a complaint received by the Commission on 22 September 1987, drawing its attention to uncontrolled waste disposal in the mouth of the river Kouroupitos, on the Akrotiri peninsula, by the majority of the municipalities in the prefecture of Chania. The waste included refuse from military bases in the area, hospitals and clinics, and residues from salt factories, poultry farms, slaughterhouses and all the industrial sites in the area.

63 In a study produced to the Court by the Greek Government entitled Environmental Impact of Uncontrolled Solid Waste Combustion in the Kouroupitos Ravine, Crete, which was carried out in June 1996 by the Laboratory of Environmental Engineering and Management of the Technical University of Crete, in collaboration with the Institute of Ecological Chemistry, Munich, it is stated:

... The solid wastes are disposed of in the Kouroupitos ravine located approximately 30 km east of Chania, on the Akrotiri peninsula. The wastes are dumped into the ravine from the top at a distance of 200 m from the sea without any other care. The wastes have been uncontrollably burning for at least 10 years, while the burning is self-supporting due to the high levels of organic matter. The improper waste disposal combined with the uncontrolled burning of the solid wastes has resulted in an environmentally hazardous situation, with the leachate seeping into the [sea], and the products of the burning process being transferred both to land and sea.

64 As regards, first, fulfilment of the obligation imposed by Article 4 of Directive 75/442 to dispose of waste without endangering human health and without harming the environment, the Greek Government does not dispute that solid waste, in particular household refuse, is still tipped into the river Kouroupitos.

65 It is clear from the letters from the Prefecture of Chania to the Ministry of the Environment of 7 May and 18 August 1998, disclosed by the Greek Government, that most of the waste still ends up, in the same uncontrolled and unlawful manner, in the Kouroupitos ravine, which today receives all the household waste from the urban area of Chania.

66 The Greek Government concedes in its rejoinder that in any event, only the definitive solution to the problem, that is to say discontinuing the operation at the river Kouroupitos and introducing a modern, lawful and effective system, could be regarded as fully satisfactory.

67 Moreover, it is apparent from paragraph 10 of the judgment in Case C-45/91 that the Greek Government had stated on 15 March 1988 in reply to the Commission that it was going to put an end to the operation of that tip after August 1988 and create new disposal sites.

68 The fact remains that that has still not been done.

69 It is true that, according to the Greek Government, the competent authorities, which have planned to establish and put into operation a mechanical recycling and composting plant and a landfill site at Strongilo Kefali in the municipality of Khordakios, have come up against opposition from the members of the public concerned, in the form of complaints and actions brought before the competent

administrative and judicial authorities challenging the administrative decisions concerning the location of the two installations.

70 However, as has already been pointed out in paragraph 21 of the judgment in Case C-45/91, it is settled case-law that a Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law.

71 It must therefore be held that the Hellenic Republic has not complied with the judgment in Case C-45/91 inasmuch as it persists in failing to fulfil its obligations under Article 4 of Directive 75/442 as regards adoption of the measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment.

72 As regards, second, fulfilment of the obligation imposed by Article 5 of Directive 78/319 to dispose of toxic and dangerous waste without endangering human health and without harming the environment, the Greek Government's assertion that toxic and dangerous waste have not been tipped into the river Kouroupitos since 1996 is supported by consideration of the file. Its assertion is disputed only partially by the Commission, which concedes that the quantities of toxic and dangerous waste have been reduced.

73 It is for the Commission in such circumstances to provide the Court, in the course of the proceedings, with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations.

74 Since no such information is available, it has not been proved that the Hellenic Republic has failed fully to comply with the obligation to dispose of toxic and dangerous waste from the area of Chania in accordance with Article 5 of Directive 78/319.

75 As regards, third, fulfilment of the obligations to draw up waste disposal plans and to draw up, and keep up to date, plans for the disposal of toxic and dangerous waste, imposed by Article 6 of Directive 75/442 and Article 12 of Directive 78/319 respectively, it is settled case-law that incomplete practical measures or fragmentary legislation cannot discharge the obligation of a Member State to draw up a comprehensive programme with a view to attaining certain objectives (Case C-298/97 Commission v Spain [1998] ECR I-3301, paragraph 16).

76 Contrary to the claims of the Greek Government, legislation or specific measures amounting only to a series of ad hoc normative interventions that are incapable of constituting an organised and coordinated system for the disposal of waste and toxic and dangerous waste cannot be regarded as plans which the Member States are required to adopt under Article 6 of Directive 75/442 and Article 12 of Directive 78/319 (see, by analogy, Case C-214/96 Commission v Spain [1998] ECR I-7661, paragraph 30).

77 It therefore follows that the Hellenic Republic has likewise failed to comply with the judgment in Case C-45/91 inasmuch as it persists in failing to fulfil its obligations under Article 6 of Directive 75/442 and Article 12 of Directive 78/319 so far as concerns the drawing up of waste management plans and plans for the disposal of toxic and dangerous waste.

78 On the basis of all the foregoing considerations it must be held that, by failing to take the measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Directive 75/442 and by failing to draw up for that area plans for the disposal of waste, pursuant to Article 6 of Directive 75/442, and of toxic and dangerous waste, pursuant to Article 12 of Directive 78/319, the Hellenic Republic has not implemented all the necessary measures to comply with the judgment in Case C-45/91 and has failed to fulfil its obligations under Article 171 of the Treaty.

Setting of the penalty payment

79 Relying on the method of calculation set out in its memorandum 96/C 242/07 of 21 August 1996 on applying Article 171 of the EC Treaty (OJ 1996 C 242, p. 6) and its communication 97/C 63/02 of 28

February 1997 on the method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty (OJ 1997 C 63, p. 2), the Commission has proposed that the Court should, in respect of failure to comply with the judgment in Case C-45/91, impose a penalty payment of ECU 24 600 for each day of delay from the date of notification of the present judgment until the breach of obligations has been remedied. The Commission contends that a financial penalty in the form of a periodic penalty payment is the most appropriate means of achieving the objective of compliance with the judgment as soon as possible.

80 The Greek Government claims that the Court should set the penalty payment on the basis of coefficients of seriousness and duration which are more favourable to the Hellenic Republic than those applied by the Commission. It contends that the coefficient relating to the duration of the infringement, determined unilaterally by the Commission without considering the extent to which the judgment has been complied with, does not reflect the existing situation and would be unfair to the Hellenic Republic. While the Commission has a discretion to determine coefficients relating to seriousness, duration and the Member States' ability to pay, without their assent, it is exclusively for the Court to assess what is just, proportionate and equitable.

81 As to that, Article 171(1) of the Treaty provides that, if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, that State is required to take the necessary measures to comply with the Court's judgment.

82 Article 171 of the Treaty does not specify the period within which a judgment must be complied with. However, in accordance with settled case-law, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (Case 131/84 Commission v Italy [1985] ECR 3531, paragraph 7, Case 169/87 Commission v France [1988] ECR 4093, paragraph 14, and Case C-334/94 Commission v France, cited above).

83 If the Member State concerned has not taken the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission in the reasoned opinion adopted pursuant to the first subparagraph of Article 171(2) of the Treaty, the Commission may bring the case before the Court. As provided in the second subparagraph of Article 171(2), the Commission is to 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.

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.

85 Memorandum 96/C 242/07 states that decisions as to the amount of a fine or penalty payment must be taken with an eye to their purpose, namely the effective enforcement of Community law. The Commission therefore considers that the amount must be calculated on the basis of three fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to continuation of the infringement and to further infringements.

86 Communication 97/C 63/02 identifies the mathematical variables used to calculate the amount of penalty payments, that is to say a uniform flat-rate amount, a coefficient of seriousness, a coefficient of duration, and a factor intended to reflect the Member State's ability to pay while ensuring that the penalty payment is proportionate and has a deterrent effect, calculated on the basis of the gross domestic product of the Member States and the weighting of their votes in the Council.

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.

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.

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.

90 First, since the principal aim of penalty payments is that the Member State should remedy the breach of obligations as soon as possible, a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned.

91 Second, the degree of urgency that the Member State concerned should fulfil its obligations may vary in accordance with the breach.

92 In that light, and as the Commission has suggested, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.

93 In the present case, having regard to the nature of the breaches of obligations, which continue to this day, a penalty payment is the means best suited to the circumstances.

94 As regards the seriousness of the infringements and in particular the effects of failure to comply on private and public interests, the obligation to dispose of waste without endangering human health and without harming the environment forms part of the very objectives of Community environmental policy as set out in Article 130r of the EC Treaty (now, after amendment, Article 174 EC). The failure to comply with the obligation resulting from Article 4 of Directive 75/442 could, by the very nature of that obligation, endanger human health directly and harm the environment and must, in the light of the other obligations, be regarded as particularly serious.

95 The failure to fulfil the more specific obligations of drawing up a waste disposal plan and drawing up, and keeping up to date, plans for the disposal of toxic and dangerous waste, imposed by Article 6 of Directive 75/442 and Article 12 of Directive 78/319 respectively, must be regarded as serious in that compliance with those specific obligations was necessary in order for the objectives set out in Article 4 of Directive 75/442 and Article 5 of Directive 78/319 to be fully achieved.

96 Thus, contrary to the Commission's submissions, the fact that specific measures have been taken, in accordance with Article 5 of Directive 78/319, to reduce the quantities of toxic and dangerous waste cannot have a bearing on the seriousness of the failure to comply with the obligation, under Article 12 of Directive 78/319, to draw up, and keep up to date, plans for the disposal of toxic and dangerous waste.

97 In addition, account should be taken of the fact that it has not been proved that the Hellenic Republic has failed fully to comply with the obligation to dispose of toxic and dangerous waste from the area of Chania in accordance with Article 5 of Directive 78/319.

98 As regards the duration of the infringement, suffice it to state that it is considerable, even if the starting date be that on which the Treaty on European Union entered into force and not the date on which the judgment in Case C-45/91 was delivered.

99 Having regard to all the foregoing considerations, the Hellenic Republic should be ordered to pay to the Commission, into the account EC own resources, a penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from delivery of the present judgment until the judgment in Case C-45/91 has been complied with.

Decision on costs

Costs

100 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has essentially been unsuccessful, the latter must be ordered to pay the costs. The United Kingdom is to bear its own costs, in accordance with Article 69(4) of the Rules of Procedure.

Operative part

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to take the measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste and by failing to draw up for that area plans for the disposal of waste, pursuant to Article 6 of Directive 75/442, and of toxic and dangerous waste, pursuant to Article 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste, the Hellenic Republic has not implemented all the necessary measures to comply with the judgment of the Court of 7 April 1992 in Case C-45/91 Commission v Greece and has failed to fulfil its obligations under Article 171 of the EC Treaty;

2. Orders the Hellenic Republic to pay to the Commission of the European Communities, into the account EC own resources, a penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from delivery of the present judgment until the judgment in Case C-45/91 has been complied with;

3. Orders the Hellenic Republic to pay the costs;

4. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

|

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 28 September 1999. - Commission of the European Communities v Hellenic Republic. - Failure of a Member State to fulfil its obligations - Judgment of the Court establishing such failure - Non-compliance - Article 171 of the EC Treaty (now Article 228 EC) - Financial penalties - Periodic penalty payment - Waste - Directives 75/442/EEC and 78/319/EEC. - Case C-387/97.

European Court reports 2000 Page I-05047

Opinion of the Advocate-General

I - Introduction

1 This will be the first case in which the Court of Justice has had to give a ruling on Article 171 of the EC Treaty (now Article 228 EC) as amended by the Treaty on European Union. That provision makes it possible for financial penalties to be imposed on Member States which have failed to comply with a

judgment delivered by the Court of Justice in Treaty-infringement proceedings under Article 169 of the EC Treaty (now Article 226 EC).

The concise nature of the text and the inherent complexity of the subject-matter itself raise a large number of legal issues, including, to mention but the most important, what form the penalties are to take, whether they are to be retroactive and, if so, to what extent, and what the respective powers of the Court and the Commission are to be in determining the type and amount of such penalties. It is unlikely, however, that delivery of the judgment will put an end to the uncertainty. Fundamental questions such as when the (total or partial) infringement ceases, what procedure is to be followed to verify that it has ceased, and what consequences should follow from the failure by the Member State concerned to pay the penalty imposed, as yet remain unanswered.

The present proceedings entail a further difficulty inasmuch as the infringement of which the Hellenic Republic is accused does not, as is often the case, boil down to non-transposition of a Community directive into internal law, but relates rather to the failure to take the material measures necessary to comply with the relevant European legislation. More specifically, the issue is whether, in the Chania area of Crete, waste is disposed of in accordance with Council Directive 75/442/EEC on waste (1) and Council Directive 78/319/EEC on toxic and dangerous waste. (2)

The difficulties mentioned define this analysis, which is undertaken in full awareness of the importance of practice in defining the as yet extremely vague characteristics of this new procedure under Community law.

II - The legislative framework

Directives 75/442 and 78/319

2 Directives 75/442 and 78/319 are intended to eliminate the disparities between the provisions on waste disposal applicable in the various Member States, and to help protect the environment and improve the quality of life. Under Article 145 of the Act of Accession of the Hellenic Republic, Greece was required to implement both directives by 1 January 1981.

3 Article 4 of Directive 75/442 provides as follows:

`Member States shall take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment, and in particular:

- without risk to water, air, soil and plants and animals;

- without causing a nuisance through noise or odours;

- without adversely affecting the countryside or places of special interest'.

4 Article 5 of Directive 75/442 provides that Member States `shall establish or designate the competent authority or authorities to be responsible, in a given zone, for the planning, organisation, authorisation and supervision of waste disposal operations'. According to Article 6 of that directive:

`The competent authority or authorities referred to in Article 5 shall be required to draw up as soon as possible one or several plans relating to, in particular:

- the type and quantity of waste to be disposed of;

- general technical requirements;

- suitable disposal sites;

- any special arrangements for particular wastes.

The plan or plans may, for example, cover:

- the natural or legal persons empowered to carry out the disposal of waste;

- the estimated cost of the disposal operations;

- appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste'.

5 Article 14 of Directive 75/442 requires Member States to communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by that directive.

6 Directive 78/319 lays down similar provisions with regard to toxic and dangerous waste. Article 5 of that directive provides:

`1. Member States shall take the necessary measures to ensure that toxic and dangerous waste is disposed of without endangering human health and without harming the environment, and in particular:

- without risk to water, air, soil, plants or animals;

- without causing a nuisance through noise or odours;

- without adversely affecting the countryside or places of special interest.

2. Member States shall in particular take the necessary steps to prohibit the abandonment and uncontrolled discharge, tipping or carriage of toxic and dangerous waste, as well as its consignment to installations, establishments or undertakings other than those referred to in Article 9(1).'

7 Article 9(1) of Directive 78/319 requires that installations, establishments or undertakings which carry out the storage, treatment and/or deposit of toxic and dangerous waste must obtain a permit from the competent authorities.

8 Under Article 12 of Directive 78/319:

`1. The competent authorities shall draw up and keep up to date plans for the disposal of toxic and dangerous waste. The plans shall cover in particular:

- the type and quantity of waste to be disposed of;

- the methods of disposal;

- specialised treatment centres where necessary;

- suitable disposal sites.

The competent authorities of the Member States may include other specific aspects, in particular the estimated cost of the disposal operations.

2. The competent authorities shall make public the plans referred to in paragraph 1. The Member States shall forward these plans to the Commission.

3. The Commission, together with the Member States, shall arrange for regular comparisons of the plans in order to ensure that implementation of this directive is sufficiently coordinated.'

9 Article 21(2) of Directive 78/319 requires that Member States communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this directive.

10 `Waste' is defined in Article 1(a) of both directives as `any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force'. `Toxic and dangerous waste' is defined in Article 1(b) of Directive 78/319 as `any waste containing or contaminated by the substances or materials listed in the Annex to this directive of such a nature, in such quantities or in such concentrations as to constitute a risk to health or the environment'.

B - Article 171 of the Treaty (now Article 228 EC)

11 The Treaty on European Union, which entered into force on 1 November 1993, added, by means of Article G.51, a paragraph (2) to the then Article 171 of the EEC Treaty. The resulting provision, which, since the entry into force of the Treaty of Amsterdam on 1 May 1999, has become Article 228 EC, reads as follows:

`1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing, 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 of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 170.'

C - The Commission memorandum and communication on applying Article 171 of the EC Treaty and the method of calculating the penalty payments provided for therein respectively

12 Although not legislative texts stricto sensu, these documents are binding on the institution from which they emanate, at least in the sense that the institution in question may depart from them only if it duly states the reasons for so doing, since, otherwise, it would be in breach of the principle of equal treatment.

13 The Commission memorandum on applying Article 171 of the EC Treaty of 21 August 1996 (`the memorandum'), (3) establishes, inter alia, the following:

`...

4. Article 171 offers a choice between two types of pecuniary sanction, a lump sum or a penalty payment. The basic object of the whole infringement procedure is to secure compliance as rapidly as possible, and the Commission considers that a penalty payment is the most appropriate instrument for achieving it.

This does not, however, mean that it will never ask for a lump sum to be imposed.

5. Decisions as to the amount of the penalty must be taken with an eye to its actual purpose, which is to ensure that Community law is effectively enforced. The Commission considers that the amount must be calculated on the basis of three fundamental criteria:

- the seriousness of the infringement;

- its duration;

- the need to ensure that the penalty itself is a deterrent to further infringements.

6. As regards seriousness, an infringement in the form of failure to comply with a judgment is always quite clearly serious. However, for the specific purpose of fixing the amount of the penalty, the Commission will also take account of two parameters closely linked to the underlying infringement which gave rise to the original judgment, viz. the importance of the Community rules which have been infringed and the effects of the infringement on general and particular interests.

...

8. From the point of view of the effectiveness of the penalty, it is important to set amounts such that the penalty has a deterrent effect. To impose purely symbolic penalties would negate the whole purpose of this addition to the infringements procedure and run counter to the ultimate objective of the procedure, which is to ensure that Community law is fully enforced.

A decision as to whether to ask for a penalty to be imposed will depend on the circumstances of the case, as stated at point 3. But, once it has been found that a penalty should be imposed, for it to have a deterrent effect it must be set at a higher figure if there is any risk of a repetition (or where there has been a repetition) of the failure to comply, in order to cancel out any economic advantage which the Member State responsible for the infringement might derive in the case in point.'

14 For its part, the communication entitled `Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty', of 28 February 1997 (`the Communication'), (4) provides, inter alia, as follows:

`...

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 the 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.

...

The penalty to be paid by the Member State is the sum of the amounts due in respect of each day's delay in implementing a judgment of the Court, beginning from the day on which the Court's second judgment was brought to the attention of the Member State concerned and ending when the latter complies with the judgment. ...

The amount of the daily penalty is calculated as follows:

- a uniform flat-rate amount is multiplied by two coefficients, one reflecting the seriousness of the infringement and the other the duration;

- the result is multiplied by a special factor (n) reflecting the ability to pay of the Member State concerned and the number of votes it has in the Council.

...

The uniform flat-rate amount is defined as the basic amount to which weightings will be applied. ... It has been determined in such a way that:

- the Commission retains a broad discretion when applying the coefficients;

- the amount is reasonable and tolerable for all the Member States;

- the amount is high enough to maintain pressure on whichever Member State is concerned.

The amount has been set at ECU 500 per day.

...

From a strictly legal viewpoint, of course, the infringement in such cases is always the same: non-compliance with a judgment of the Court finding that the Member State has failed to fulfil an obligation and breach of Article 171(1) of the Treaty.

...

Depending on the seriousness of the infringement, the flat-rate amount will be multiplied by a coefficient of at least 1 and no more than 20.

...

For the purposes of calculating the penalty payment, the duration of the infringement runs from the date of the first Court judgment. [...]

...

Depending on the duration of the infringement, the flat-rate amount will be multiplied by a coefficient of at least 1 and no more than 3.

...

The amount of the penalty payment should ensure that the penalty is proportionate and, at the same time, has a deterrent effect.

This deterrent effect should be sufficient to ensure that:

- the Member State decides to regularise its position and bring the infringement to an end (the penalty must, therefore, outweigh the advantage gained by the Member State from the infringement);

- the Member State will not repeat the infringement.

The need for the penalty to have a deterrent effect precludes any purely symbolic penalty. The penalty must exert sufficient pressure on the Member State for it to regularise its position. ...

The deterrent effect is achieved by applying a special factor n which is a geometric mean based on the Member State's gross domestic product (GDP) and the weighting of votes in the Council. The factor n combines the ability of each Member State to pay, as measured by the GDP, with the number of votes it has in the Council. The resulting formula gives a reasonable degree of variation between Member States (from 1.0 to 26.4).

n is equivalent to:

...

Greece: 4.1.

...

The amount of the daily penalty is arrived at by multiplying the flat-rate by the coefficients for the seriousness and duration of the infringement and by the special (invariable) factor n for the Member State in question. ...

...'

III - The facts

15 On 7 April 1992, the Court of Justice gave judgment in Case C-45/91. (5) In that judgment, it held that:

`... by failing to take the measures necessary to ensure that in the area of Chania waste and toxic and dangerous waste are disposed of without endangering human health and without harming the environment, and by failing to draw up for that area plans for the disposal of waste and of toxic and dangerous waste, the Hellenic Republic has failed to fulfil its obligations under Articles 4 and 6 of Council Directive 75/442/EEC of 15 July 1975 on waste, and Articles 5 and 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste.'

16 On 11 October 1993, having received no notification of any measures adopted to comply with the judgment in Case C-45/91, the Commission sent a letter to the Greek authorities in which it reminded them of their obligations under that judgment.

17 On 1 November 1993, the Treaty on European Union entered into force.

18 A meeting on the enforcement of Community law in environmental matters, attended by representatives from Greece and the Commission, was held in Athens on 18 and 19 April 1994.

19 In a letter received by the Commission on 24 August 1994, the Greek authorities explained that the prefectorial council for Chania, the competent body for waste management, had obtained `preliminary approval' for the opening of two new landfill sites in the regions of Kopidani and Vardia and that the corresponding environmental impact study was in the process of being prepared. On its completion, expected in late 1994, the council would conduct the final study regarding the construction, operation, supervision and restoration of whichever of the two sites proved more suitable. The competent authority, the Greek authorities went on, would inform the Commission of any new development in connection with that project.

20 On 21 September 1995, having received no information regarding the project, the Commission decided to initiate the procedure under Article 171(2) of the Treaty. By letter of the same date, it called on the Greek authorities to submit observations within two months.

21 By letter of 14 December 1995, the Hellenic Republic stated in reply that the competent local authorities had already selected a site and that it should therefore be possible to implement the waste disposal programme which had been drawn up.

The Commission considered that the wording of that reply showed that, four years after the judgment establishing the breach of obligations had been delivered, the Greek authorities had still not taken the necessary steps to remedy that breach. The waste disposal programme, still in its preliminary stages, had not yet been implemented and, consequently, waste continued to be deposited in the tip at the mouth of the river Kouroupitos, thereby endangering public health and harming the environment.

22 Taking the view that Greece had failed to fulfil its obligations under Article 171(1), the Commission issued a reason opinion to that effect to the Greek authorities on 6 August 1996, and at the same time called on them to remedy the infringement within two months.

In the same document, the Commission advised the Greek authorities that a periodic penalty payment could be imposed for failure to comply with a judgment of the Court of Justice, and that the amount of the penalty payment would be determined by the Commission when it brought its action before the Court.

23 The Greek authorities replied by letter of 11 November 1996. They stated, first of all, that a national waste management plan, implemented at local level, and with sufficient funds had been adopted and adequate funds had been allocated to it.

As regards the regional waste management plan for the prefecture of Chania, the Greek authorities stated that it consisted in the implementation of an integrated waste management plan including:

- the sorting of waste at source;

- the construction and operation of a mechanical recycling plant;

- the provision and opening of a landfill site; and

- a programme for the reinstatement and restoration of the area on account of the uncontrolled disposal of waste in the Kouroupitos tip.

In connection with the final step, the Greek authorities explained, without giving any further details, that they had taken specific measures to find a permanent solution to the problem of the Kouroupitos tip, and that they were drawing up special management plans to that end.

24 As regards the management of toxic and dangerous waste, as well as hospital waste, the Greek authorities stated that the competent ministry was still carrying out a series of measures, including the financing of waste management studies and works. In particular, the Chania prefectorial authorities had taken the steps necessary to set up a mechanical recycling plant and to convert an area into a landfill site. The competent authorities were of the view that completion of those programmes would resolve the problem of the river Kouroupitos and make good the deficiencies of the waste management arrangements in Chania generally.

25 By letter of 28 August 1997, the Greek authorities informed the Commission of the progress which had been made. They stated, for example, that the environmental impact study in connection with the recycling plant had been completed, as had the first stage of an international restricted tendering procedure.

26 The reply from the Greek authorities did not satisfy the Commission, which considered that the measures adopted were not sufficient to give effect to the judgment of the Court. It therefore brought the present action, proposing the imposition of a penalty payment of EUR 24 600 for each day of delay, to run from the date of delivery of the judgment bringing the present proceedings to an end.

IV - Analysis of the substance

27 The Greek Government disputes the admissibility of the application on the ground that it seeks to punish conduct retroactively. In the alternative, it contends, with regard to the amount of the penalty, inter alia, that there was no guilty intent on the part of the defendant State. The Greek authorities proceed from the premiss that the procedure and penalties provided for in Article 171 are penal or, at least, quasi penal, and that they are therefore subject to the principles of criminal law.

It is therefore necessary, first of all, to examine the legal nature of the penalties provided for in Article 171 in order to determine whether or not they constitute measures of a penal or comparable nature. Next, following the scheme of the Treaty text, I shall consider what, if any, infringements of Article 171(1) have been committed, in order, finally, to examine the consequences that may follow from those infringements in accordance with Article 171(2).

A - First question: the nature of the penalties under Article 171

28 Article 171(1), which was not amended by the Maastricht Treaty, establishes the binding nature of judgments delivered by the Court of Justice under Article 169. The State against which judgment has been delivered `shall be required to take the necessary measures to comply with the judgment of the Court of Justice'.

29 Article 171(2) empowers the Commission to bring a further action against the defaulting Member State. It must first give notice to the authorities of the State concerned, affording them the opportunity to submit observations, and then issue a reasoned opinion stating precisely how the Member State in question has failed to comply with the judgment of the Court of Justice. If the Member State does not

take the measures necessary to comply with the judgment within the prescribed time-limit, the Commission may refer the case to the Court of Justice, specifying the amount of the lump sum or penalty payment to be paid by the Member State which it considers necessary.

30 In the paragraphs that follow, I shall attempt to demonstrate that the nature of the procedure under Article 171(2) is to be determined by reference to the fundamental objective which the Treaty assigns to infringement proceedings generally, which is, quite simply, to secure compliance by the Member States with their obligations as rapidly as possible. (6) My analysis will be concerned with the pecuniary sanction which the Commission may seek and which the Court may impose in the form of a penalty payment. A fine or, more correctly, a coercive sanction (7) is `a pecuniary penalty imposed by a court in order to compel the person liable to perform his principal obligation, and is generally set at a certain amount for each day of delay or on the basis of any other unit of time'. (8) However, the payment of a lump sum, to which the Commission makes no reference in its memorandum or its communication, (9) must likewise be regarded as a means of obtaining ultimate compliance and not as a penalty which serves to punish a Member State for its unlawful conduct or still less as a form of compensation for the damage caused as a result of the delay in compliance. Otherwise, the scheme of the procedure under Article 171(2) would be changed irrevocably, inasmuch as its nature would vary depending on the type of penalty sought by the Commission. (10)

31 I acknowledge from the outset that there is a great temptation to classify new, and therefore unknown, procedures under traditional headings that are entirely familiar to us. Because of the importance attached to the rights of the defence in any democratic society, that temptation is all the greater where the procedure in question shares (or appears to share) a particular characteristic with national criminal procedure. For some time now, that assimilation has largely blurred the distinction, in regard to their procedural treatment, formerly drawn between penalties depending on their criminal or administrative origin. It is now recognised that similar principles must apply to both. That development is to be welcomed, particularly from a Community perspective. It is, after all, not unusual for the same conduct to be punishable under criminal law in one Member State but to be the proper subject of administrative proceedings in another, a fact which at the same time highlights just how artificial the distinction is.

32 What is more debatable, in my view, is the application of the principles developed by criminal law to fields such as the protection of competition or the combating of discrimination on grounds of sex. In those cases, the aim of the legislature is to maintain or achieve a situation viewed in objective terms (freedom of competition, in one instance, and equality as between men and women, in the other), not to punish the allegedly unlawful intent of a particular trader. In the two examples cited, therefore, contrary to what would be the case in criminal law, there is no requirement for intention or even negligence to be present for the punishable act to have been committed. Although the punitive element can never be entirely disregarded, the financial penalties imposed in such circumstances are primarily intended, in the absence of more appropriate means, to coerce the trader indirectly into adjusting his conduct in a particular way, not to penalise unlawful conduct.

33 The same can be argued, in my opinion, with respect to the arrangement introduced by Article 171. It does not serve to punish the defaulting Member State but to encourage it to comply by applying pressure in the form of a substantial financial penalty which increases on a daily basis. I therefore consider that, if that arrangement had to be classified under a traditional legal heading, it would have to be described as a procedure for the enforcement of judgments. In ordinary proceedings for the judicial enforcement of judgments, courts not only have the obvious option of recourse to physical force; they can also impose financial penalties. This is common practice in civil and administrative proceedings in several continental Member States. (11)

34 In France, for example, civil courts have been imposing astreintes (periodic penalty payments), as created by the judiciary, since the beginning of the last century. Although there was some confusion initially as to whether or not they were compensatory in nature, such doubts were dispelled by the legislature. Law No 80-539 of 16 July 1980, on coercive sanctions in administrative proceedings and compliance with judgments by legal persons governed by public law, empowers the administrative courts to impose astreintes as an indirect means of enforcing adverse judgments; they are subordinate to and enhance the binding force of such judgments.

35 In Belgium, the Netherlands and Luxembourg, astreintes are governed by the Benelux Agreement of 26 November 1973 on uniform legislation relating to coercive sanctions. None of the three laws transposing the agreement into the national legal system attaches to the financial penalties which courts may impose the status of penal sanctions.

36 Article 354(1) of the Austrian law on the enforcement of judgments delivered by ordinary courts (Exekutionsordnung of 27 May 1896, as amended on several occasions since then) allows coercive sanctions, both pecuniary and custodial, to be imposed in cases where a judgment lays down an obligation to act which is not enforceable by third parties and the performance of which is dependent on the will of the person liable (unvertretbare Handlung).

37 The German code of civil procedure (Zivilprozeßordnung) contains a similar provision in Article 888, which relates specifically to the enforcement of judgments (Zwangsvollstreckung). The German courts have expressly held that the coercive sanctions under Article 888 are not of a penal or comparable nature but serve exclusively to encourage compliance. The principles of criminal procedure are not therefore applicable. (12)

38 Under the system of Community law, since it is difficult to imagine any form of legal force being used to induce a Member State to comply, there is no alternative, in seeking to overcome the resistance of a recalcitrant Member State, but to resort to coercion. This could have taken political or diplomatic form. It would, after all, have been perfectly in keeping with the traditional practice of international law for the Council to be entrusted with the task of enforcing the judgments of the Court of Justice, for example, and being empowered for that purpose to suspend the voting rights of the Member State concerned. That, to a certain extent, is what happens with the judgments of the European Court of Human Rights. Under Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the enforcement of judgments delivered by the European Court of Human Rights is entrusted to the Committee of Ministers, which is a permanent conference of Ministers for Foreign Affairs of the Member States of the Council of Europe and the organisation's governing body. (13) In itself, enforcement of a judgment delivered by the European Court of Human Rights, which, as that court has consistently held, is purely declaratory, consists merely in the payment of an amount by way of `just satisfaction' (Article 41 of the Convention). (14) That amount includes compensation for the material and non-material damage suffered as a result of the infringement of the Convention and partial or total reimbursement of the procedural expenses and costs incurred. However, it has been understood from the outset that, where an infringement of the rights and freedoms under the Convention which has been established by a judgment of the European Court of Human Rights derives from the legislation or administrative practice of the defendant Member State, enforcement of that judgment will also include amendments to the relevant legislation or practice. It goes without saying that, since the legislation in question often directly affects fundamental human rights, such amendments are not always easy to carry out. They may require constitutional changes or involve public authorities other than the central State which signed the Convention and which alone is internationally responsible for it.

39 The enforcement of judgments of the European Court of Human Rights is, above all in the context of the possible obligation to amend national legislation, similar, in terms of its consequences, to the enforcement of judgments establishing a breach of obligations delivered by the Court of Justice, inasmuch as a substantial proportion of the latter relate either to the failure by the relevant Member State to transpose a particular directive into national law, or to the maintenance in national law of legislation contrary to Community law.

The Committee of Ministers of the Council of Europe uses only diplomatic and political pressure as means of enforcing a judgment of the European Court of Human Rights. Under the Statute of the Council of Europe, it is authorised, in the event of a serious violation of the principles of the rule of law and the protection of human rights, to suspend the defaulting State's right of representation, and can even call upon it to withdraw from the Council of Europe.

40 Those measures therefore pursue exactly the same objective as Article 171, and yet few would venture to claim that that particular procedure for the enforcement of judgments might be capable of leading to a full re-hearing of the case in question, let alone that the defaulting State could, during the re-hearing, rely on the same guarantees as are enjoyed by the accused in a criminal trial.

41 There is at least one other reason why I do not consider it appropriate to regard the procedure under Article 171 as an action at criminal law. I refer to what might be called considerations of legal ontology. There is something highly irregular about granting to a defaulting Member State the same guarantees as are afforded to the accused in criminal proceedings, many of which derive from the fundamental principle of the presumption of innocence. That would be absurd! How can the State, which, as a democratic society, attaches primary importance to the principle of respect for the rule of law, claim any privilege for its own consistent failure to observe the same rule of law?

42 For the reasons I have given, I conclude that the procedure provided for in Article 171 cannot be treated in the same way as a procedure at criminal law, but is akin rather to a special judicial procedure for the enforcement of judgments. This does not mean, however, that the defendant State does not enjoy any procedural guarantees at all - which would also be absurd - but rather that the extent of the rights of the defence which are to be granted to it must be in keeping with the objective pursued.

43 Several significant consequences follow from the correct classification of the procedure under Article 171. It dictates, inter alia, the application in its entirety or otherwise of the system of guarantees available under criminal law (intention, characterisation of the offence, specification of the penalty, non-retroactivity), the nature of the Commission's powers in this context, and the scope of the examination which the Court of Justice will have to undertake. I shall now address each of those points separately, with reference to the present case.

B - Infringements of Article 171(1) of the Treaty

44 Article 171(1), which was not amended by the Maastricht Treaty, requires a Member State whose failure to fulfil an obligation under the Treaty has been established in a judgment of the Court of Justice to take the necessary measures to comply with that judgment.

45 As has been said, in its judgment in Case C-45/91, the Court of Justice found that the Hellenic Republic had failed in a number of respects to fulfil certain of its obligations under Community law, by virtue of the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC), in relation to waste management, namely:

- failure to fulfil the obligation arising from Article 4 of Directive 75/442: to dispose of waste without endangering human life and without harming the environment;

- failure to fulfil the obligation arising from Article 6 of the same directive: to draw up a waste-management plan;

- failure to fulfil the obligation arising from Article 5 of Directive 78/319: to dispose of toxic and dangerous waste without endangering human health and without harming the environment;

- failure to fulfil the obligation arising from Article 12 of Directive 78/319: to draw up and keep up to date plans for the disposal of toxic and dangerous waste.

46 I consider those obligations to be `divisible', in the sense that they can to a certain extent be fulfilled independently of each other, and that, despite the all-embracing approach that the Commission preferred to adopt when bringing these proceedings, the sound administration of justice requires that they be addressed separately. As I shall explain later, the approach I advocate in this respect is intended to enable the Court of Justice to adjust any penalty which is to be imposed on the basis of whether or not each of the obligations, considered individually, has been fulfilled.

47 I shall therefore look now at whether each of those obligations has been fulfilled, in order, afterwards, to consider the amount of any penalty payment which it may be appropriate to impose on the defendant Member State in respect of each of them. First of all, however, I must address two preliminary issues, namely (a) the continuing validity of the obligations failure to fulfil which constitutes the alleged infringement and (b) the period of time for which the judgment establishing a breach of obligations was or was not complied with.

(a) Whether the obligations arising from Directives 75/442 and 78/319 are in force

48 Although this question has not been raised by any of the parties, I think it useful to devote some attention to it. The issue is whether the obligations arising from the waste directives remain in force as they were at the time when the judgment establishing a breach of obligations was delivered, or whether, on the other hand, they have been amended or even abolished by subsequent legislation. In the latter case, if the original obligations no longer exist, the procedure under Article 171 has probably ceased to have any purpose, in so far as it serves to encourage compliance with an existing obligation.

49 It appears that Articles 4 and 6 of Directive 75/442 were amended by Directive 91/156/EEC of 18 March 1991, (15) while Directive 78/319 was repealed by Directive 91/689/EEC of 12 December 1991. (16) Both directives gave Member States a period of two years in which to bring into force the laws, regulations and administrative provisions necessary to give effect to them.

50 It should be recalled (see points 2 to 10 above) that Directives 75/442 and 78/319 laid down similar obligations with regard both to the disposal of waste and toxic and dangerous waste and to the drawing up of plans for such disposal. The present legal position is as follows.

51 As regards `solid' waste, Article 4 of Directive 91/156 provides:

`Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

- without risk to water, soil and plants and animals;

- without causing a nuisance through noise or odours;

- without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste'.

Article 7 of Directive 91/156, which replaces Article 6 of Directive 75/442, provides:

`1. In order to attain the objectives referred to in Articles 3, 4 and 5, the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans. Such plans shall relate in particular to:

- the type, quantity and origin of waste to be recovered or disposed of;

- general technical requirements;

- any special arrangements for particular waste;

- suitable disposal sites or installations.

Such plans may, for example, cover:

- the natural or legal persons empowered to carry out the management of waste;

- the estimated costs of the recovery and disposal operations;

- appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste.

2. Member States shall collaborate as appropriate with the other Member States concerned and the Commission to draw up such plans. They shall notify the Commission thereof.

3. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures.'

52 In short, as far as the disposal of solid waste is concerned, the amendments introduced by the new Community rules do not affect the obligations which the Court's judgment in Case C-45/91 found to have been breached.

53 With regard to toxic and dangerous waste (`dangerous waste' in the new terminology), Directive 91/689 refers also to Directive 75/442 (as amended), and at the same time introduces `additional, more stringent rules to take account of the special nature of such waste'. (17) It must be inferred from this that the obligations currently in force with respect to the disposal of dangerous waste are at least as rigorous as those in force in April 1992.

54 In conclusion, while it is true that the obligations which formed the subject-matter of the judgment in Case C-45/91 have undergone some formal amendments, they remain substantively the same, as does the requirement that every Member State take the necessary measures to give effect to them.

(b) The point in time to which the judgment of the Court of Justice must relate

55 The judgment to be given by the Court of Justice under the procedure provided for in Article 171(2) necessarily includes, in addition to any order to pay a financial penalty, a ruling on the fulfilment by the defendant Member State of its obligations under the earlier judgment delivered in accordance with the former Article 169 of the Treaty (now Article 226 EC).

56 That ruling will have to relate to a particular point in time. This is a particularly important question given the opportunity which a Member State has, over time, to comply with the Court's judgment in full or in part, and the bearing this will have on the calculation of any financial penalty which is to be imposed and indeed on whether such a penalty is appropriate at all.

57 What is the most appropriate time? In view of the silence of the Treaty on this matter and the similarity between the procedure under Article 171(2) and the action for failure to fulfil obligations under Article 169, the answer might be that the Commission's action and the Court's judgment must both relate to the deadline for compliance with that judgment which the Commission lays down in its reasoned opinion. That, after all, is the point at which the Court of Justice considers the matter to have become actionable in Treaty-infringement proceedings. (18) Thus, even when the default is later remedied, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, vis-à-vis other Member States, the Community or private parties. (19)

58 I do not think that that reasoning also applies to these proceedings, the purpose of which - as I have already said - is not to obtain a further declaration of failure to fulfil obligations but to encourage the recalcitrant Member State to comply with a judgment establishing a breach of obligations. It is no less true, however, that the Court of Justice can only perform its judicial function in relation to a state of affairs which is fixed at a particular point in time. For that reason, I consider that the last opportunity for the defendant State to submit pleadings in respect of the level of compliance it has achieved, and for the Commission to make submissions regarding the amount and form of the financial penalty which it is appropriate to impose, should be the public hearing or, failing that, the close of the written procedure. In other words, the point in the procedure at which the Court of Justice begins its adjudicatory function, inasmuch as the Advocate General delivers his Opinion and the relevant Chamber adopts and delivers its judgment. That view is further supported by the fact that, between the end of the period prescribed for complying with the reasoned opinion and, at the very least, the lodging of the application, a long time may pass (more than two years in the present case) during which the situation, both factual and legal, may have changed significantly.

59 In any event, the analysis that follows is based on the entire body of pleadings submitted by the parties prior to the actual hearing.

(c) Compliance with the obligation to dispose of waste without endangering human health and without harming the environment (Article 4 of Directive 75/442)

60 A preliminary observation is called for regarding the scope of the obligation to dispose of waste without endangering human health and without harming the environment. The same observation also applies to the disposal of toxic and dangerous waste, which I shall examine later.

61 According to the Greek Government, the judgment in Case C-45/91 requires it to fulfil four obligations which, although separate, can, by subject-matter, be placed in two groups: those relating to the disposal of waste and toxic and dangerous waste without endangering human health and without harming the environment; and those relating to the drawing up of plans for the disposal of waste and toxic and dangerous waste. While the former might be regarded as rules of `substantive' law, the latter are, in its view, in the nature of `procedural' or policy-planning provisions. Accordingly, implementation of the provisions on disposal measures is not conditional on implementation of the provisions on the drawing up and notification of plans; nor, conversely, is implementation of the provisions on the drawing up of plans conditional on compliance with the rules on the adoption of disposal measures.

The Commission, on the other hand, considers that, in order for waste to be properly managed, it must necessarily be deposited or disposed of in accordance with a plan.

62 I agree with the Commission's interpretation: to accept a Member State's view that, by drawing up waste management plans, and by disposing of such waste without endangering human health or harming the environment, but not in accordance with those plans, it has complied with the provisions of the directive, would be utterly absurd.

63 I therefore consider that the obligation incumbent on Member States to adopt measures to ensure that waste is disposed of without risk to water, air, soil and plants and animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest, in order to preserve human health and the environment (Article 4 of Directive 75/442), necessarily includes the obligation to make such measures conform to the management plan provided for in the same directive.

64 As regards whether or not it has in fact failed to fulfil its obligations, the Greek Government contends in its defence that the amount of solid waste which continues to be tipped in the Kouroupitos ravine has decreased significantly. That decrease had been made possible by the opening or extension of four landfill sites (in the municipalities of Sfakia, Kalyves, Selino and Kissamo), and the introduction of a paper-sorting and recycling system. Furthermore, an experimental aluminium-collection programme has been launched and plans have been drawn up for the establishment of a regional recycling centre. A study carried out by the Technical University of Crete detected only a very faint presence of toxic substances (dioxins and furans) in the area around the Kouroupitos and within a two-kilometre radius.

65 I take the view, like the Commission, that the body of measures adopted by the Greek authorities represents only partial and fragmented compliance with the provisions of Article 4 of Directive 75/442.

66 As the Greek Government itself admits, solid waste continues to be discharged in the area around the Kouroupitos. The following nuisances therefore still exist: `contamination of the sea, in particular when the river Kouroupitos bursts its banks', `the risk of fires caused by unauthorised incineration', `the proliferation of rodents and insects of all types', `offensive smells', `the impairment of a site of "exceptional beauty", the unique shoreline of the rocky area around Akrotiri'. (20) As the Commission has pointed out, the technical study cited by the Greek Government (21) contains the following passage:

`... high concentrations of various toxic substances such as polycyclic aromatic hydrocarbons, polychlorobiphenyls, polychlorodibenzodioxins, polychlorodibenzofurans and heavy metals have been

detected in the area around the Kouroupitos. The pollution from these dangerous substances is considerable in the area around the Kouroupitos and declines with distance'.

Finally, the Greek Government has not shown that the measures adopted to date form part of a solid-waste management plan for the area.

67 The Greek Government points to the various difficulties involved in choosing a suitable landfill site to replace the Kouroupitos tip. It refers in particular to the existence of an extensive water table, the proliferation of scattered population centres and the abundance of archaeological sites and places of natural and historic interest. It then lists the various research studies which had to be carried out before the Strongylo Kefali site was chosen.

68 The explanations given by the Greek Government relate to measures which, at best, constitute a preliminary stage in the process of discharging its obligations under Article 4 of Directive 75/442, but cannot in themselves be regarded as amounting to compliance.

69 It is therefore appropriate, in my view, to find that, by failing to comply with the judgment in Case C-45/91 as regards the obligations arising from Article 4 of Directive 75/442, the Hellenic Republic has infringed Article 171(1) of the Treaty.

(d) Fulfilment of the obligation to draw up a waste management plan (Article 6 of Directive 75/442)

70 The Commission considers that Greece has failed to fulfil its obligation to draw up a solid-waste management plan for the Chania area.

71 The Greek Government contends that Ministerial Resolutions No 114218 and No 113944 on the creation of a framework for solid-waste management projects and programmes and the national solid-waste management plan were adopted on 27 October 1997. (22) The waste management plan for the prefecture of Chania, which, according to the Greek Government, covers both solid waste and toxic and dangerous waste, was approved on 25 November 1997. The latter plan covers all the individual action plans and programmes adopted hitherto.

72 As far as the Commission is concerned, the document of 25 November 1997 is not a plan within the meaning of Article 6 of Directive 75/442 or Article 12 of Directive 78/319, but is a preparatory study for such a plan. Rather than decisions on waste management, it contains a series of proposals for each of the territorial units into which the prefecture is divided.

73 For my part, as I do not need to carry out an exhaustive analysis of the document in question, I shall merely refer to its preamble and the main body of the text (pages 14 and 15 of the first volume), both of which, as the Commission has pointed out, acknowledge the preliminary nature of the study and the fact that, `in order to supplement it, it will be necessary to produce all the reports envisaged in it'.

74 The document of 25 November 1997 cannot therefore be deemed, as far as solid waste is concerned, to contain sufficient detail as regards the types and quantities of waste to be disposed of, general technical requirements, suitable sites for its treatment and disposal or deposit and any other special arrangements, for it to be regarded as a plan within the meaning of Article 6 of Directive 75/442. Nor, as regards toxic and dangerous waste, does it contain any decisions as to the types and quantities of waste which are to be disposed of, the methods of disposal, specialised treatment centres or suitable disposal sites, such as would give effect to the provisions of Article 12 of Directive 78/319.

(e) Fulfilment of the obligation to dispose of toxic and dangerous waste without endangering human health and without harming the environment (Article 5 of Directive 78/319)

75 According to the Greek Government, no toxic or dangerous waste has been deposited in the Kouroupitos ravine since 1996; it is entrusted to a private undertaking which transports it abroad in order for it to be treated. That also applies to hospital waste, which is loaded into a special vehicle and stored in a cold chamber until it is incinerated. As for sediments of hydrocarbon deposits, the Greek

Government states that they are stored in an appropriate place until they are sent abroad. Used mineral oils are passed to the prefectorial authorities for removal to a reclamation plant, and tankers no longer deposit the contents of septic tanks into the Kouroupitos as a biological sewage treatment plant has been built in the Chania area.

In short, the Greek Government submits, toxic and dangerous waste in the Chania area is disposed of in a manner perfectly consistent with Directive 78/319, since the measures necessary to protect human health and safeguard the environment have been adopted.

76 The Commission maintains that the measures adopted by Greece are fragmented and limited in time. There is no evidence that all dangerous waste in the area will be transported abroad on a permanent basis. Nor does the Greek Government adduce any proof that all hospital waste is sent for incineration. Finally, the measures adopted do not form part of a comprehensive plan or programme for the management of toxic and dangerous waste.

77 It is my view that, in proceedings under Article 171, it is for the defendant Member State to prove that it has duly complied with the judgment establishing an infringement of the Treaty. On that basis, the Commission's role can be confined to pointing out which obligations have not been fully shown to have been discharged. This is particularly true where, as here, the Community rule requires that the Member State notify the Commission of the measures it has adopted. It is therefore appropriate to find that the Hellenic Republic has failed to fulfil its obligations. After all, `incomplete practical measures and fragmentary legislation cannot discharge the obligation of a Member State to draw up a comprehensive programme with a view to attaining certain objectives ...'. (23)

78 In any event, it has not been shown that the measures taken by the Greek authorities form part of a methodical, long-term plan for the disposal of toxic and dangerous waste, as required by Article 12 of Directive 78/319. As I stated earlier (see point 62 above), the obligation to dispose of waste in accordance with Directives 75/442 and 78/319 requires that such disposal be effected in accordance with the plans provided for in those directives.

79 For those reasons, I must conclude that the Hellenic Republic has not fully discharged the obligation to dispose of toxic and dangerous waste in the Chania area in accordance with Article 5 of Directive 78/319.

(f) Fulfilment of the obligation to draw up and keep up to date plans for the disposal of toxic and dangerous waste (Article 12 of Directive 78/319)

80 As regards the obligation to draw up a plan for the disposal of toxic and dangerous waste in the Chania area, the Greek Government has submitted that the document of 25 November 1997 (see point 71 above) covers plans for both solid waste and toxic and dangerous waste.

For a discussion of this issue, I therefore refer to the section relating to compliance with the judgment in Case C-45/91 as regards Article 6 of Directive 75/442.

C - The application of Article 171(2) of the Treaty

81 The main issue to be addressed here is the setting of the periodic penalty payment or lump sum which, if appropriate, the defendant Member State is to be required to pay. Since this is the first time that the Court of Justice has been called upon to address this issue, it is appropriate to examine the temporal limits applicable to the imposition of penalties and the respective functions of the Commission and the Court in the context of the procedure under Article 171(2). As I have already said, those factors are closely bound up with the legal status attributed to that procedure.

(a) The retroactive effect of Article 171(2)

82 As I stated earlier, the Greek Government considers the retroactive application of the procedure provided for in Article 171(2) to be unlawful. In its submission, taking into account the fact that the prior administrative procedure began on 11 October 1993 (see point 16 above), that is to say before the entry into force of the Maastricht Treaty, and that the new text of Article 171 provides for the imposition

of substantial financial penalties, the application of Article 171(2) would amount to the retroactive application of a more stringent rule, in breach of the general principle of nulla poena sine lege upheld by the Court in its judgment in Alpha Steel v Commission. (24)

83 However, the Alpha Steel case relied on by the defendant serves rather to illustrate my argument. It is true that, in that case, the Court of Justice recognised, albeit indirectly, the existence in Community law of the general principle of nulla poena sine lege. However, the Court was concerned, essentially, to make it clear that not every provision that imposes a burden on an individual constitutes a sanction. That case concerned certain provisions of Commission Decision No 2794/80/ECSC of 31 October 1980 (25) establishing a system of steel production quotas. Those provisions favoured any undertaking which had satisfied certain requirements, while at the same time excluding - and, in comparative terms, harming - other undertakings. The Court of Justice rightly held that those provisions did not in any way constitute sanctions against undertakings not fulfilling the conditions and could not therefore be considered to be in breach of the principle of nulla poena sine lege.

84 In other words, only measures which may properly be described as sanctions merit the special protection afforded in criminal proceedings, not every provision which entails adverse financial consequences for a particular individual. In Alpha Steel v Commission, the financial damage arose from the fact that better terms were granted to undertakings competing in an industrial promotion exercise. In the present case, the financial damage which may ultimately be suffered by the defendant Member State must be regarded as an exhortation to implement Community law, not as a penalty or a punishment.

85 In short, as a new measure intended to promote compliance with judgments of the Court of Justice establishing a breach of obligations, in the interests of the implementation of Community law, the imposition of penalties under Article 171 is not subject to the rule that penal provisions must not have retroactive effect. Coercive measures are to be regarded as procedural instruments ancillary to the first judgment establishing a breach of obligations, and not as provisions of a penal or comparable nature.

(b) The functions of the Commission and the Court of Justice in the context of the procedure under Article 171(2)

86 Article 171(2) merely provides, in very concise terms, that, subject to prior completion of the relevant administrative procedure, (26) the Commission may bring an action and specify the amount which it considers appropriate to the circumstances, it being for the Court of Justice, should it so decide, to impose the penalty, if it considers that the Member State concerned has not complied with its judgment. The legislature has said nothing further. The complex task of drawing up criteria for quantifying coercive sanctions is delegated entirely to the Court of Justice, assisted by the Commission, which is responsible for producing an initial assessment. I am not casting any doubt on the seriousness of the political difficulties which prevented those who negotiated the Maastricht Treaty from arriving at a more satisfactory solution, nor do I subscribe to the naïve view that the function of a court is confined to the application of legal provisions which predate the dispute pending before it. I do, however, wish to express my unease at the thought that the power to devise rules which are ultimately intended to make up for the ineffectiveness of other, essentially political, means of encouraging Member States to comply with Community law has been relinquished to the body responsible for settling disputes within the Union.

That said, I shall now examine the rules for setting coercive sanctions laid down in Article 171(2) and, in particular, the scope of the powers which the Commission and the Court of Justice enjoy in this matter.

87 According to Article 171(2), the Commission is to specify the amount it considers appropriate to the circumstances, and the Court, where necessary, is to impose a sanction if it considers that the Member State has indeed failed to fulfil its obligations. The wording of that paragraph does not therefore establish any link between the Commission's power to specify and the Court's power to impose. I do not, however, believe that these are fully autonomous powers, in the sense that the Court of Justice can depart at will from the general direction and amount of the Commission's proposal. I do not think so for the following four reasons.

88 First of all, because, if that were the case, that is to say 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 which proposes a solution on the basis of its knowledge and understanding of the case. And in any event, that power is already enjoyed by any other parties which may have taken part in the proceedings, namely the Member States and the other institutions. In my view, if the Treaty provides that, once an action under Article 171 has been brought, the Commission must specify the form and amount of the penalty it considers appropriate, it must be looking for something more than a mere obligation on the Commission to lend the Court guidance on an essential point of the procedure. 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.

89 The second reason has to do with the very nature of the procedure under Article 171(2). As I have pointed out, the purpose of that procedure is not to punish the Member State for failing to fulfil its obligations but to encourage it to discharge them. To that end, the Commission has the widest discretion, in the sense that it is under no obligation to respond to an infringement of Article 171(1). The reason for this is that, when deciding whether or not to bring an action, the Commission must take into account not only legal considerations but also criteria of political expediency. However, the process of imposing and setting a coercive sanction cannot be divorced from considerations of political expediency either. From that perspective, 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 sanctions to be no more than mere suggestions which have not the slightest bearing on the decision ultimately to be taken by the Court.

90 The third reason is merely a corollary to the second. The Community legislature did not wish to lay down rigid rules under which each type of infringement would attract a predetermined sanction. Since that is not the arrangement, the decision as to the imposition and amount of a penalty necessarily entails, albeit only partly, a political choice. The Commission appears to have decided, for the purposes of setting the amount of the penalty, to give expression to that choice by introducing a criterion relating to the `seriousness of the infringement'. However, if the Court of Justice, after taking advice from the Commission, 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. What standing does the Court of Justice have to decide whether the repeated infringement of the provisions of the waste directives, the subject-matter of the present proceedings, is more or less serious than the repeated infringement of Directive 89/48/EEC on the recognition of higher-education diplomas, (27) and to what extent? (28)

91 The fourth reason is purely procedural but is no less important for that. 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 the defence?

92 It is no less true, however, that Article 171 does not require the Court to be bound by the guidance from the Commission. What, then, are the limits of the Court's power? In order to answer that question, it is appropriate first of all to consider the content of the Commission's proposal.

93 It seems logical that, in its proposal, the Commission will comment on (a) the advisability or otherwise of imposing a sanction, (29) (b) the type of sanction that should be imposed (lump sum or penalty payment) and (c) the amount of the sanction which it considers appropriate to the circumstances. As regards the latter factor, the Commission must state in full why it considers that the proposed sanction is appropriate to the circumstances of the case in question.

94 In my view, in so far as each of the Commission's choices inevitably entails an assessment of expediency, the examination which the Court of Justice is required to carry out must be no more extensive than that which it undertakes in relation to acts adopted by a Community authority on the basis of complex evaluations.

In those circumstances, the case-law of the Court of Justice recognises that the Community has a wide measure of discretion the exercise of which is subject to limited judicial review, which means that the Community judicature cannot substitute its own assessment of the facts for that carried out by that authority. The Community judicature restricts itself in such cases to examining the correctness of the facts and the legal characterisations effected by the Community authority on the basis of those facts, and, in particular, whether the action of the latter is vitiated by a manifest error or a misuse of powers or whether it clearly exceeds the bounds of its discretion. (30)

95 Within the framework of the present proceedings, the fact is that limited review by the Community judicature is inherent in the very act of exercising the discretion necessary to determine what is expedient in the context of the three choices set out in point 93. Accordingly, 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. It will of course have to verify the correctness of the facts and ensure that the proposal for a sanction is not vitiated by a manifest error. It is less likely that the mere act of specifying and setting a sanction will be such as to amount, even technically, to an infringement such as a misuse of powers, or that, in so doing, the Commission will manifestly exceed the bounds of its discretion. 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. (31)

96 It is settled case-law that, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. (32) In the context of the procedure under Article 171(2), the Court must establish whether, within the broad margin of discretion necessarily involved in any assessment of expediency, the Commission's proposal is suitable and proportionate in relation to the objective it pursues, which is quite simply to bring to bear upon the defendant Member State effective persuasion to comply with the judgment establishing an infringement of the Treaty.

97 The Court of Justice has likewise held that the prohibition of discrimination requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified. (33) Under the present procedure, the Court of Justice must ensure that different sanctions are not applied to infringements which are in principle comparable, unless the Commission can give sound reasons for such differentiation.

98 This, in my view, is the ambit within which judicial review of the proposal provided for in Article 171(2) must be exercised: affording the Commission a broad discretion to accommodate the assessment of expediency which its proposal inevitably entails, the Court of Justice will conduct a limited examination, and may not, under any circumstances, substitute its own assessment for that contained in the proposal. By virtue of the very nature of the proposal, the purpose of the Court's limited examination will be to identify any manifest error of assessment and to verify observance of the principles of proportionality and equal treatment.

99 I am now able to express my views on the proposal for a sanction put forward by the Commission.

(c) The proposal for a sanction put forward by the Commission

100 In the interests of transparency, the Commission has made public two documents (a communication and a memorandum) concerning, respectively, the application of Article 171 of the EC Treaty and the method of calculating the periodic penalty payment provided for therein. The very nature of the present proceedings prevents me from expressing a general view on the lawfulness of the criteria contained in those two documents. I shall instead examine whether, in so far as those criteria have been applied to this case, the limits I defined above have been observed. This does not mean of course that I consider the communication and the memorandum to be entirely without legal effect. On the contrary, they are, in my opinion, binding on the institution from which they emanate to such an extent that it must not venire contra factum proprium; any breach of that principle might be relied upon in legal proceedings as a possible expression of the principle of non-discrimination. (34) In any event, there would be no point in the Commission's being transparent if it did not consider itself bound by its own communications. (35)

101 As regards the obligations arising from the judgment in Case C-45/91, the original proposal from the Commission sought the following orders:

(a) that a sanction be imposed on the Hellenic Republic;

(b) that that sanction take the form of a penalty payment;

(c) that the amount of the penalty payment be EUR 24 600 per day payable from the day on which the judgment was delivered until such time as the State concerned had fully complied with the judgment establishing its failure to fulfil obligations.

That amount was arrived at by multiplying the basic lump sum (EUR 500) by the coefficients chosen by it for seriousness (6) and duration (2) and, finally, by the coefficient relating to the `ability to pay' of the State concerned (4.1). (36)

102 The Court of Justice requested the Commission in writing to consider the possibility that each of the infringements of which the Hellenic Republic stood accused was independent, and to specify the coefficients for seriousness and duration that would apply to each of them.

103 In its reply, the Commission specified and gave reasons for the following coefficients for seriousness:

- coefficient 4 for infringement of Article 4 of Directive 75/442;

- coefficient 2 for infringement of Article 6 of Directive 75/442;

- coefficient 1 for infringement of Article 5 of Directive 78/319;

- coefficient 1 for infringement of Article 12 of Directive 78/319.

The Commission assigned to each of the infringements the same coefficient for duration: 2.

Application of each of those coefficients to the basic amount (500) multiplied by the coefficient for `ability to pay' (4.1) gives a total of EUR 32 800 (37) per day for the infringements as a whole, which is again payable, in respect of each obligation, from delivery of the judgment bringing the proceedings to an end until each of those obligations, considered independently, has been fulfilled.

104 I must confess to being a little confused by the Commission's position. I do not subscribe to the principle that the application of coefficients for seriousness and duration in respect of each of the provisions infringed leads to a total amount greater than that applicable to all the infringements considered collectively. The Commission has given no justification for that contradictory result.

On the contrary, I take the view that, where compliance with a judgment establishing a breach of obligations entails the performance of various obligations which can be fulfilled independently of each other, it is not only possible but also desirable that the proposal from the Commission and the decision by the Court of Justice should give an indication of the relative importance of each of those obligations in its calculation of the sanction. This is fully consistent with the purpose of the sanctions procedure, which is quite simply - as I have already said - to encourage the recalcitrant Member State to implement Community law. The possibility of partial or gradual compliance and a corresponding reduction of the sanction are entirely consistent with that objective. Moreover, only by taking into account the various separable obligations will the Court of Justice be able to adjust the proposed sanction so as to reflect the obligations which it finds not to have been fulfilled in the course of the judicial proceedings. Finally, the fact that the obligations are dealt with individually makes the present procedure more like a procedure for the enforcement of judgments and, at the same time, less like what may be seen as a political appraisal of a Member State's conduct within a particular sector of Community activity.

105 I therefore consider that the approach consisting in an individual assessment of whether each of the obligations arising from the judgment establishing a breach has been fulfilled is to be preferred, in so far as those obligations are sufficiently autonomous to be fulfilled separately.

106 As I stated earlier, in my view, the obligations to draw up plans and programmes laid down in Article 6 of Directive 75/442 and Article 12 of Directive 78/319 are entirely autonomous, in the sense that they are capable of being fulfilled independently. The same is not true of the obligations arising from Article 4 of Directive 75/442 and Article 5 of Directive 78/319. The obligations imposed on Member States to adopt measures to ensure that waste, including toxic and dangerous waste, is disposed of without risk to human health and the environment include the obligation to do so within the framework of a plan or programme (see points 63 and 78 above).

107 The judgment in Case C-45/91 can therefore be fully complied with through the proper management of waste, including toxic and dangerous waste, in accordance with waste-management plans, whilst the proper drawing up of such plans - being an autonomous obligation - would constitute only partial compliance.

108 As regards the form of sanction and the amount that may be considered `appropriate to the circumstances', I would repeat that the starting point must of necessity be the Commission's proposal, subject, where appropriate, to the limited judicial examination I referred to above. The problem lies in the fact that, in this case, the Commission has proposed two amounts. First of all, a penalty payment of EUR 24 600 per day for Greece's infringements, taken together, and, subsequently, a series of penalty payments for the individual provisions infringed, amounting in total to EUR 32 800 per day.

109 I can understand that the Commission may have preferred to take a comprehensive approach, prompting it to propose a sanction relating to all the provisions held by the judgment of the Court of Justice to have been infringed. I do not understand, however, why, when the infringements are considered individually, the sum of the amounts due in respect of the various sanctions should be higher - much higher - than that considered appropriate under the first method. The Commission, as I have said, merely begs the question. (38) I therefore take the view that the Commission's second proposal is in fact a new assessment which, since it is not substantiated, must be dismissed on the basis that administrative measures should not be arbitrary, and, where there is a choice between two adequate penalties, the less severe is to be preferred (as expressed by the maxim in dubio, pro libertate).

110 It is therefore appropriate to examine the Commission's proposal that a periodic penalty payment of EUR 24 600 per day be imposed.

111 The criteria applied by the Commission in calculating that amount are as follows: the seriousness of the infringement; the duration of the infringement; and the `ability to pay' factor.

I do not find in the choice of those criteria any evidence of a manifest error of assessment or a failure to observe the principles of proportionality and equal treatment. As I explained earlier, it is not for the Community judicature to comment on the advisability of choosing one rather than another criterion or on how such criteria are to be applied to a particular case. If it did, it would be substituting its own assessment for that of the Commission.

It is therefore sufficient for the Court of Justice to be satisfied that the criteria which the Commission proposes to use are, like many others, suitable for the purpose of attaining the objective pursued by Article 171(2). I think it necessary here, with regard to the `appropriateness' of the method chosen by the Commission, to clarify certain points on which the Commission itself did not elaborate in its Communication.

112 If the ultimate objective of the procedure under Article 171(2) - far from being to punish unlawful conduct - is the implementation of Community law, its immediate objective is quickly to overcome the resistance of the recalcitrant Member State through the indirect coercion of a financial penalty. (39) To be effective, such coercion must take into account the economic standing of each State. There is therefore every reason to adjust the sanction on the basis of a factor relating to `ability to pay'. (40)

113 What seems more tenuous is the possible link between the unwillingness of the State concerned (41) and the criteria of the duration and seriousness of the infringement relied on by the Commission. Neither the Memorandum nor the Communication gives a clear explanation of why the Commission adopted those parameters, which are very similar to others used in criminal proceedings. If they serve the same ends as the latter, they should, in my view, be declared contrary to the rationale of Article 171(2). The penalty payment `is intended to break down the resistance to compliance, by requiring the person liable himself to discharge his obligations (indirect compulsion or "astreinte"); that is not the purpose of a sanction, which serves rather (whatever its general objectives might be) to obtain redress for unlawful conduct already perpetrated'. (42) I consider, however, that it is possible to salvage the validity of the criteria in question by interpreting them as serving to express not the degree of severity of a penalty on the basis of the seriousness and duration of the offence, but the relative urgency, in each instance, of reinstating the rule of Community law. In other words, increasing the amount of the coercive sanction in accordance with the seriousness and duration of the infringement would convey determination that the speed of compliance, which is likely to be directly proportionate to the amount of the fine, should be greater in the case of persistent infringements of provisions protecting important Community interests than in the case of short-term infringements of less significant substantive rules. From that perspective, the criteria of seriousness and duration appear to me to be consistent with the purpose of Article 171, which is to urge compliance as soon as possible.

114 As regards the application of those criteria to the case in point, the Commission has adopted a coefficient of 6 out of 20 for seriousness and 2 out of 3 for duration. The reasons given by the Commission are adequate and fall within its proper discretion to determine what is expedient. They do not, in principle, exhibit any manifest error and are not disproportionate or discriminatory.

115 I therefore provisionally conclude that the Commission's proposal that a pecuniary penalty of EUR 24 600 per day be imposed on the Hellenic Republic in order to prompt it to comply with the judgment in Case C-45/91 is appropriate to the circumstances for the purposes of Article 171(2) of the EC Treaty.

116 However, as I explained earlier, in the case of both the proposal from the Commission and the judgment of the Court of Justice, preference is to be given to an approach which makes it possible to consider individually whether each of the obligations arising from the judgment establishing a breach has been fulfilled, in so far as they are sufficiently independent to be fulfilled separately.

117 For the sake of consistency, I am bound to express my views on the relative importance to be attached to each of the infringements in question. In so doing, I shall rely once again on the opinion of the Commission, which is responsible for making the value judgment inevitably involved in such an assessment. In its proposal for individual penalties, the Commission arrives at a total within which the infringements of the various provisions have the following weightings:

- for infringement of Article 4 of Directive 75/442: 50%;

- for infringement of Article 6 of Directive 75/442: 25%;

- for infringement of Article 5 of Directive 78/319: 12.5%;

- for infringement of Article 12 of Directive 78/319: 12.5%.

Or, expressed in euro per day:

- for infringement of Article 4 of Directive 75/442: 12 300;

- for infringement of Article 6 of Directive 75/442: 6 150;

- for infringement of Article 5 of Directive 78/319: 3 075;

- for infringement of Article 12 of Directive 78/319: 3 075.

118 I consider once again that the reasons put forward by the Commission for thus quantifying the relative importance of each of the infringements fall within the broad discretion it enjoys in this context, except as regards the infringement of Article 12 of Directive 78/319. That article provides that Member States are to draw up and keep up to date plans for the disposal of toxic and dangerous waste. As I explained earlier, Article 5 of the same directive requires that the obligation to dispose of such waste be fulfilled in accordance with a plan. From that point of view, fulfilment of the obligation contained in Article 5 inevitably discharges the obligation contained in Article 12. It seems illogical for the same relative importance to be attached to both the whole and the part. The weighting applied to the infringement of the obligation to draw up plans for the treatment of toxic waste should therefore be reduced by the same proportion as exists between the values for Articles 4 and 6 of Directive 75/442, that is to say from unity to half. In the case of Article 12 of Directive 78/319, the value will have to be reduced from 12.50% to 6.25%. With a view to avoiding any reformatio in pejus, this downward adjustment of the figure for relative seriousness will involve a proportionate reduction of the total amount for the infringement. The amount of EUR 24 600 per day will have to be reduced by 6.25%, that is to say by EUR 1 537.50 per day. This gives the following correction:

- for infringement of Article 12 of Directive 78/319: 1 537.50

119 The same rules of deductive reasoning prompt me to conclude that only those sanctions relating to the obligation to dispose of waste (Article 4 of Directive 75/442 and Article 5 of Directive 78/319) should be imposed, since - as I have already said - they incorporate the obligations to draw up plans (Article 6 of Directive 75/442 and Article 12 of Directive 78/319). The sanctions relating to the latter obligations will be purely notional, in the sense that they will be used to calculate any reduction that is to be applied in the event of partial fulfilment, that is to say if the Member State concerned draws up plans but fails to dispose of waste in accordance with them. It follows from this that the coercive sanction to be imposed should be made up as follows:

- for infringement of Article 4 of Directive 75/442: 12 300

- for infringement of Article 5 of Directive 78/319: 3 075.

This is subject to the possibility of a reduction of EUR 6 150 per day being applied in the event of partial fulfilment of the obligations arising from Article 6 of Directive 75/442, and of EUR 1 537.50 per day in the event of partial fulfilment of the obligations arising from Article 12 of Directive 78/319.

120 I therefore propose that a penalty payment of EUR 15 375 per day be imposed on the Hellenic Republic, payable from the day of notification to it of the judgment of the Court of Justice until such time as it complies in full with the judgment in Case C-45/91.

V - Costs

121 Since I propose that the application be upheld in its entirety, the Hellenic Republic must be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure.

VI - Conclusion

122 In view of the foregoing, I propose that the Court of Justice:

(1) Declare that, inasmuch as it has not yet fulfilled its obligations with regard to adoption of the measures necessary to ensure that waste and toxic and dangerous waste in the Chania area are disposed of without endangering human health or harming the environment, and with regard to the drawing up of plans for the disposal of waste and toxic and dangerous waste for that area, the Hellenic Republic has failed to comply with the judgment of 7 April 1992 in Case C-45/91 Commission v Greece;

(2) Impose on the Hellenic Republic a penalty payment of EUR 15 375 per day payable from the date of notification of the judgment bringing the present proceedings to an end until the infringements cease;

(3) Order the Hellenic Republic to pay the costs.

(1) - Directive of 15 July 1975 (OJ 1975 L 194, p. 39).

(2) - Directive of 20 March 1978 (OJ 1978 L 84, p. 43).

(3) - OJ 1996 C 242, p. 6.

(4) - OJ 1997 C 63, p. 2.

(5) - Case C-45/91 Commission v Greece [1992] ECR I-2509.

(6) - See paragraph 4 of the memorandum (point 13 above).

(7) - Use of the - broader - term `sanction' does not prejudge the nature of the measure.

(8) - N. Alcalá-Zamora y Castillo: Cuestiones de terminología procesal, Mexico, 1972, p. 54, cited by S. Aragoneses Martínez: Las `astreintes', Madrid, 1985, p. 17.

(9) - Other than to point out that it does not waive the right to request that one be imposed.

(10) - Alcalá-Zamora supplements his definition by saying that an `astreinte' `can also consist in a given sum payable by the person liable for every infringement which he commits' (ibid.).

(11) - In common-law systems, there exists the concept of contempt of court, which, although pursuing similar aims, is clearly penal in nature, since it is primarily characterised by the punishment of failures to comply with court orders, inasmuch as these represent a challenge to judicial authority.

(12) - See, by way of example, the judgment cited in Entscheidungen der Oberlandesgerichte in Zivilsachen, 1982, pp. 102 et seq. and E. Göhler: Das Einführungsgesetz zum Strafgesetzbuch, Neue juristische Wochenschrift, 1974, pp. 825 et seq., in particular p. 826.

(13) - The Security Council is likewise empowered to take the measures necessary in the event of failure to comply with a judgment of the International Court of Justice (Article 94 of the Charter of the United Nations).

(14) - As follows from the amendment introduced by Protocol No 11 of 11 March 1994.

(15) - Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (OJ 1991 L 78, p. 32).

(16) - Council Directive 91/689/EEC of 12 December 1991 on waste (OJ 1991 L 377, p. 20).

(17) - Fourth recital in the preamble to Directive 91/689.

(18) - See, for example, the judgment in Case C-361/88 Commission v Germany [1991] ECR I-2567, paragraph 31.

(19) - Ibid.

(20) - As set out in the complaint lodged on 22 September 1987 - the truth of which has never been disputed by the Greek Government - which is contained in the Report for the Hearing in Case C-45/91, cited above ([1992] ECR I-2510).

(21) - Which, significantly, bears the title `Environmental impact of uncontrolled solid waste combustion in the Kouroupitos'.

(22) - Greek Official Gazette 1016/B/17.11.97.

(23) - Judgment in Case C-298/97 Commission v Spain [1998] ECR I-3301, paragraph 16.

(24) - Case 14/81 Alpha Steel v Commission [1982] ECR 749, paragraph 28.

(25) - OJ 1980 L 291, p. 1.

(26) - Which is identical to that provided for in Article 169 of the Treaty, except for the fact that, in its reasoned opinion, the Commission is required to specify the `points' on which the Member State concerned has failed to comply with the first judgment.

(27) - Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16), the subject-matter of Case C-197/98 Commission v Greece, which also concerns proceedings under Article 171.

(28) - From a strictly legal viewpoint, all cases of non-compliance with a judgment of the Court of Justice are in fact equally serious, inasmuch as they represent - it is worth repeating - failures to implement a binding decision (see, in this connection, the first paragraph of point 3.1 of the Communication, point 14 above).

(29) - I do not think it appropriate to read any more than this into Article 228 EC, which appears to require that the Commission specify that a sanction be imposed. In any event, to be consistent with the latter reading of the provision, the Commission need only propose a symbolic sanction.

(30) - See, in particular, the judgments in Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299; Case 55/75 Balkan-Import Export [1976] ECR 19, paragraph 8; Case 9/82 hrgaard and Delvaux v Commission [1983] ECR 2379, paragraph 14; Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraphs 24 and 25; and Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 39.

(31) - To the same effect, see the second paragraph of point 1 of the Commission's Communication, point 14 above.

(32) - See, among many others, the judgment in Case C-256/90 Mignini [1992] ECR I-2651, paragraph 16.

(33) - See, for example, the judgment in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 67.

(34) - As indeed the Court of Justice has held in proceedings relating to the European civil service. See, inter alia, Case 148/73 Louwage and Another v Commission [1974] ECR 81, paragraph 12, and Case 25/83 Buick v Commission [1984] ECR 1773, paragraph 15.

(35) - See in this connection, in the context of the policy on State aids, T. Jestaedt and U. Häsemeyer: `Die Bindungswirkung von Gemeinschaftsrahmen und Leitlinien im EG-Beihilfenrecht', Europäische Zeitschrift für Wirtschaftsrecht, 1995, p. 787 et seq.

(36) - 500 x 6 x 2 x 4.1 = 24 600.

(37) - - Article 4 of Directive 75/442: 500 x 4 x 2 x 4.1 = 16 400

- Article 6 of Directive 75/442: 500 x 2 x 2 x 4.1 = 8 200

- Article 5 of Directive 78/319: 500 x 1 x 2 x 4.1 = 4 100

- Article 12 of Directive 78/319: 500 x 1 x 2 x 4.1 = 4 100.

(38) - In its written reply to the question from the Court, the Commission states that `the approach consisting in proposing, where appropriate, seriousness and duration coefficients for each provision infringed would, if several directives or provisions had been infringed, lead to amounts adding up to quite a substantial overall penalty payment'.

(39) - See, in this connection, J. Díez-Hochleitner: `La respuesta del TUE al incumplimiento de las sentencias del Tribunal de Justicia por los Estados miembros', Revista de instituciones europeas, 1993, pp. 837-899, in particular p. 879.

(40) - However, it is strange that, in calculating each Member State's `ability to pay', regard has been had to the number of votes it has on the Council (see paragraph 4 of the Communication, point 14 above).

(41) - The concept of `will', when applied to a State, is always metaphorical. An infringement for which the central authorities of a State cannot be held responsible, for example, would still be regarded as an example of that State's `unwillingness to comply'.

(42) - E. García de Enterría and T.-R. Fernández: Curso de derecho administrativo, vol. I, Madrid, 1989, p. 743.