

**A NEW DAWN FOR COMMISSION ENFORCEMENT UNDER
ARTICLES 226 AND 228 EC: GENERAL AND PERSISTENT (GAP)
INFRINGEMENTS, LUMP SUMS AND PENALTY PAYMENTS**

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1. Introduction

It has long been recognized that in most areas of Community law, such as the internal market, and consumer and environmental protection, the most tenacious problem is not the absence of adequate laws, but insufficient Member State transposition (of directives), as well as insufficient application and enforcement of those rules. Following increased efforts by the Commission to correct this state of affairs by initiating infringement proceedings under Article 226 EC and, more recently, requesting imposition of penalty payments under Article 228(2) EC, the situation has improved in many respects.¹ However, there remain deficiencies in these procedures. Although the Commission has used the infringement procedure to bring to a halt – and thereby also prevent – cases concerning untimely or incorrect transposition of EC directives, it has failed to address adequately the problem of insufficient application and enforcement of EC law – in particular in the area of environmental law.² In part, this is due to the fact that these types of breaches are more difficult to detect. Thus, in areas such as the environment, the Commission does not have competence to monitor the application of Community law in

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1. One indication of this lies in the fact that by 31 Dec. 2003, Member States had on average notified 98% of the national measures necessary for the implementation of directives in all sectors, which is the highest number ever (21st Annual Report on Monitoring the Application of Community Law (2003), COM(2004)839), 7.

2. In the field of environment, less than 1/3 (95) of the infringement proceedings brought in 2003 concerned lacking application, the main body of cases concerned non-communication (88) and non-conformity (118) of national implementing measures, see Fifth Annual Survey on Implementation and Enforcement of Community Environmental Law 2003 (SEC(2004)1025) (Fifth Annual Survey). These numbers reflect the Commission's policy in environmental matters, which focuses on "problems of communication and conformity" rather than non-application cases, see references and analysis in Hattan, "Implementation of EU environmental law", 15 *Journal of Environmental Law* (2003), 273 at 279.

the Member States.³ However, it is also a consequence of more structural deficiencies in the way the Commission has approached such infringements until now, i.e. by responding to individual incidents seemingly on an *ad hoc* basis, as is illustrated by the areas of environment⁴ and public procurement.⁵ This uncoordinated approach undermines the effectiveness of Articles 226 EC and 228 EC. Furthermore, although the Commission has recently brought proceedings resulting in the imposition of a penalty payment under Article 228 EC against Member States,⁶ this sanction in many cases is not effective as a deterrent. This is because the penalty payment only functions *ex post* in relation to the Article 228 EC judgment, and Member States can thus in practice delay implementing an Article 226 EC judgment until this point in time – which under current practice is several years – and still escape any sanctions. Both these deficiencies have been addressed and, it will be argued, remedied in two recent separate cases brought by the Commission against Ireland and France, respectively.⁷ The Article 226 EC case against Ireland established the doctrine of general and persistent (GAP) infringements, whilst the Article 228 EC judgment against France held that a lump sum and a penalty payment may be imposed simultaneously against Member States.

3. It is noteworthy that the Commission has monitoring powers in many other areas, e.g. competition, veterinary, customs, regional and fisheries policy. The European Parliament proposed years ago that the European Environmental Agency should be given such competence, but it quickly became evident that the Council was vehemently opposed to such an idea and the issue was put to sleep by an agreement to reconsider the issue within 2 years, which never happened; cf. Krämer, *EC Environmental Law* (2003).

4. The Commission has for instance within a short period of time brought 4 separate infringement proceedings against France for failing to set up special protection areas for birds and thus infringing Directive 79/409/EC on the conservation of wild birds: See Case C-166/97, *Commission v. France*, [1999] ECR I-1719; Case C-96/98, *Commission v. France*, [1999] ECR I-8531; Case C-374/98, *Commission v. France*, [2000] ECR I-10799; and Case C-202/01, *Commission v. France*, [2002] ECR I-11019.

5. E.g. the Commission has brought 5 Art. 226 EC cases against Germany for failing in individual cases to invite public service contracts for tender in violation of Council Directive 92/50/EC Relating to the Coordination of the Procedures for the Award of Public Services Contracts, see Joined Cases C-20 & 28/01, *Commission v. Germany*, [2003] ECR I-3609; Case C-126/03, *Commission v. Germany*, judgment of 18 Nov. 2004, nyr; Case C-125/03, *Commission v. Germany*, judgment of 9 Sept. 2004, not published, and Case C-414/03, *Commission v. Germany*, judgment of 3 March 2005, not published.

6. The Court has only delivered three judgments under Art. 228 EC so far, see section 3, but the Commission has recently started to pursue a much more aggressive use of Art. 228(2) EC, and in 2003 it had initiated as many as 69 cases, see 21st Annual Report, *supra* note 1.

7. Case C-494/01, *Commission v. Ireland*, judgment of 26 April 2005, nyr, with Opinion by A.G. Geelhoed of 23 Sept. 2004, nyr; and Case C-304/02, *Commission v. France*, judgment of 12 July 2005, nyr, with first Opinion by A.G. Geelhoed of 29 April 2004, nyr, and second Opinion by A.G. Geelhoed 18 Nov. 2004, nyr.

This article explores and develops the profound implications of these two judgments delivered in Grand Chamber, and concludes that their combined impact is an invigoration of the Commission's role as guardian of the *acquis communautaire*. The consequences of these cases for public enforcement of EC law may turn out to be as far-reaching as *Van Gend en Loos*⁸ and *Franco-vich*⁹ were for private enforcement.

2. Article 226 EC – *Commission v. Ireland (Irish Waste)*¹⁰

2.1. Introduction

Between 1997 and 2000, the Commission received several individual complaints concerning alleged illegal waste disposal in Ireland. The complaints, which mainly concerned waste operators working without permits and the existence of illegal waste sites, encompassed 18 waste incidents geographically spread throughout the Irish territory. The Commission subsequently lumped twelve of these complaints together in one case, and brought proceedings under Article 226 EC against Ireland for infringements of Articles 4, 5, 8, 9, 10, 12, 13 and 14 of Directive 75/442/EEC on Waste, as amended by Directive 91/156/EEC (hereinafter the Waste Directive).¹¹ With the exception of Article 12 of the Waste Directive, the action did not concern issues of the transposition of the Community legislation into national law. Rather, it concerned the obligation to create the necessary legal and administrative framework for the proper application and enforcement of those provisions, as well as failure *in casu* to apply and enforce the said provisions.

The distinct feature of the Commission's action is first of all that it decided to bundle so many complaints into one concerted judicial effort. More importantly, in addition to requesting the Court to establish infringements in respect of each of the different incidents, the Commission asked the Court to declare that Ireland had in a "general and persistent" manner infringed the Waste Directive. In respect of the first tier of the action, Advocate General Geelhoed found that infringements of Articles 4, 5, 8, 9 and 10 of the Waste Directive had occurred. These infringements were furthermore deemed to be persistent and wide-spread and, given that the said provisions constituted the core provisions of the Waste Directive, the Advocate General opined in

8. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I.

9. Joined Cases C-6 & 9/90, *Franco-vich and Bonifaci v. Italy*, [1991] ECR I-5357.

10. See *supra* note 7.

11. O.J. 1975, L 194/39, and O.J. 1991, L 78/32.

favour of the Commission's second submission, and concluded that Ireland had infringed the Waste Directive in a general and structural manner. The Court largely agreed with the Advocate General. It found, first, that each of the twelve complaints was well-founded, and that all of the relevant provisions of the Waste Directive had been infringed (Arts. 4, 5, 8, 9, 10, 12-14). Second, the Court declared that the failure by the Irish authorities to fulfil the permit requirements for waste operations, as laid down in Articles 9 and 10 of the Waste Directive, was of a general and persistent nature,¹² and concluded from this fact that Ireland necessarily "to the same extent", i.e. in a general and persistent manner, had infringed Articles 4, 5, 8, 12-14 of the Waste Directive, which all presupposed a working permit system.¹³

It is the possibility of extrapolating a "general and persistent" breach (hereinafter a GAP infringement or a GAP case) on the basis of what *prima facie* appear isolated infringements which is the novel feature of this case, and which warrants further analysis and comment. The Advocate General and the Court largely concurred in this respect, and their reasoning is therefore most appropriately dealt with in tandem. The discussion is divided into three parts: the legal justification for accommodating GAP cases under Article 226 EC, the substantive conditions for such an action, and the procedural conditions for establishing a general and persistent breach. The subsequent section will contain a commentary on the implications of GAP cases for the enforcement of EC law under Article 226 EC.

2.2. *Opinion and judgment*

2.2.1 Justification

During the judicial proceedings, Ireland fiercely objected the notion that the Commission could bring GAP cases. It maintained that the proceedings should be limited to the twelve complaints referred to in the reasoned opinion, and that the Court could not construct from these incidents a general "dereliction" of its obligations under the Waste Directive.

The Advocate General found, somewhat tentatively, that it could not be "ruled out", however, that a series of complaints could provide sufficient grounds for a finding that the incidents were not isolated events, but represented a structural infringement of relevant Community law.¹⁴ The essential question, in his view, concerned the conditions under which such a finding might be justifiable.

12. Para 139.

13. Paras. 152, 171, 185 and 193.

14. Opinion, para 19.

The Court in similarly brief manner held that “nothing prevented” the Commission from seeking, in parallel to a finding of infringements in individual instances, a declaration that those infringements were due to a general and persistent practice.¹⁵ In an attempt to justify this finding, the Court pointed out that it followed from settled case law that an administrative practice could be the subject matter of infringement proceedings.¹⁶ That reasoning misses the point, however, since the question was not whether an administrative practice could constitute an infringement – which is clear – but whether an administrative practice could be deduced from individual infringements. In the cases the Court referred to, the existence of an administrative practice was undisputed, whilst in the present case that was precisely the question. Indeed, commentators and notably the Court’s information service instantly recognized the ground-breaking nature of the judgment, and pointed out that this was the first time the Court had been susceptible for a finding of a general and persistent unlawful practice on the basis of individual infringements.¹⁷ However, some precedents exist, albeit by analogy. In *Commission v. Italy (San Rocco)*, the Court held that even though it could not be directly inferred from the fact that a situation was incompatible with the objectives of Article 4 of the Waste Directive that a Member State had not taken the requisite measures, where that situation persisted over a protracted period of time it might be an indication that the discretion had been exceeded.¹⁸ The Commission has also brought proceedings in cases concerning absence or inadequacy of waste management plans “based on the assumption that an illegal dump may provide evidence of an unsatisfied need for adequate waste management”.¹⁹ The present judgment employs similar reasoning, but on a general level: where there are many infringements of the Waste Directive which have persisted over a protracted period of time, it may be deduced that a Member State more generally has failed to apply the relevant provisions of the Directive. The fisheries cases against France, which

15. Para 27.

16. Para 28.

17. See Press Release No. 37/2005 curia.eu.int/en/actu/communiqués/cp05/aff/cp050037_en.pdf, and Noonan, “Environmental Objections and Appeals – What Access to Justice?”, Third Annual Seminar on Law and the Environment (2005), University College Cork.

18. Case C-365/97, *Commission v. Italy*, [1999] ECR I-7773, para 68.

19. See 5th Annual Report *supra* note 2 and e.g. Case C-446/01, *Commission v. Spain*, [2003] ECR I-6053. Furthermore, in the field of nature and bird protection the Commission has brought cases submitting that the Member State had failed on a general basis to designate sufficient numbers of SPAs under Council Directive 79/409/EEC on the conservation of wild birds, see e.g. Case C-240/00, *Commission v. Finland*, [2003] ECR I-2187, and Case C-378/01, *Commission v. Italy*, [2003] ECR I-2857.

are dealt with more fully below, also offer parallels to the GAP reasoning employed in this case.²⁰

Hence, *Irish Waste* should be seen as the outcome of an evolution rather than a revolution, but it nevertheless is the first time that the Court devised a practical legal framework for future GAP cases.

2.2.2. *Substantive conditions*

In his Opinion in *Irish Waste*, Advocate General Geelhoed held that account should be taken of three dimensions in order to determine whether a Member State was guilty of a “general and structural” infringement of Community law: a dimension of scale, a dimension of time and a dimension of seriousness.²¹ Although the notion of “dimensions” indicates that they are merely relevant legal factors rather than necessary requirements, the Advocate General used these terms inter-changeably with the word “conditions”, and held that “together” they could indicate a general and structural infringement.²² It appears therefore that the three dimensions were in fact intended to be cumulative conditions, all of which the Advocate General eventually deemed to have been fulfilled.

The first condition, the dimension of scale, related to the number of established infringements.²³ Whereas isolated cases may suffice to demonstrate an infringement, for the purposes of finding a general and structural infringement there had to be a more general practice of non-compliance which was likely to persist.²⁴ A relevant factor in this respect was that the infringements were not restricted to a particular locality. In this respect, the Advocate General noted that the Commission had established infringements in respect of all 12 incidents, and that these were not restricted to certain localities, but occurred throughout the Irish territory and fell within the remit of different local authorities.²⁵

The dimension of time pertained to the duration of the infringements of the relevant Community obligations. The Advocate General pointed out that whether a practice has become persistent depends on the subject matter, and has to be examined on a case-by-case basis.²⁶ The threshold is set quite high, though, and the relevant criterion is whether it is manifestly clear that the non-compliance has become persistent. Reasonable delays might be relevant

20. See sections 2.3.1 and 3.

21. Opinion, para 43.

22. Ibid.

23. Opinion, para 44.

24. See also the “global approach” advocated by A.G. Stix-Hackl in Case C-121/03, *Commission v. Spain*, Opinion of 26 May 2005, nyr.

25. Opinion, para 121.

26. Opinion, para 45.

in this regard, although such factors are normally not relevant for establishing a breach under Article 226 EC.²⁷ *Commission v. France*²⁸ (*Spanish Strawberries*) was referred to as a base-line. In this case, French authorities had neglected to prevent its farmers from blocking imports of strawberries for a period of ten years. In the case of Ireland, it was not necessary to fix more precise criteria in this respect, since the failure to put in place a fully operational licence system had existed some 24 years.²⁹

Finally, the dimension of seriousness concerns the discrepancy between the actual situation existing in a Member State, and the result required by Community law. A general and structural infringement is liable to have adverse effects on the specific interests protected by the relevant provisions, as well as the objective promoted by a directive.³⁰ More specifically in respect of the Waste Directive, the Advocate General noted that there was an inherent risk to human health and of environmental damage, as well as distortion of competition between waste operators. However, in the opinion of the Advocate General, it did not suffice that the general and structural infringement posed an immediate and likely risk of such adverse effects occurring (and which could thus have been presumed), but the Commission is apparently required to prove that damage had actually occurred. The fact that such a requirement does not form part of existing case law³¹ in his view did not affect this conclusion, as a general and structural infringement “necessarily implies the incidence of negative effects”.³² This latter condition was eventually also deemed to have been fulfilled because the Commission’s case provided several examples of serious environmental pollution and damage to wetlands.³³

The Court, in contrast, did not articulate explicit conditions for the establishment of a general and structural infringement. In order to determine whether the Court followed Advocate General Geelhoed’s methodology, we must therefore engage in an analysis of its appreciation of the factual background of the case in arriving at its final conclusion. On the face of it, the Court appeared to emphasize essentially the same criteria as Advocate General Geelhoed. Hence, in regard to Articles 9 and 10 of the Waste Directive, which lay down a permit requirement for waste operators, the Court noted that:

27. Ibid.

28. Case C-265/95, *Commission v. France*, [1997] ECR I-6959.

29. Opinion, para 120.

30. Opinion, para 47.

31. See e.g. Case C-209/88 *Commission v. Italy*, [1990] ECR I-4313, para 14 and Case C-333/99, *Commission v. France*, [2001] ECR I-1025, para 37.

32. Opinion, para 47.

33. Opinion, para 122.

- since 1977, Ireland had failed to make a permit system fully operational for municipal landfills;
- the complaints referred to incidents throughout the Irish territory, and;
- there was a general tendency among local authorities to tolerate situations which did not comply with those provisions.³⁴

With regard to Article 4, the Court also referred to the fact that the omissions of local and national authorities had led to a significant deterioration of the environment.³⁵

However, there are certain features in the judgment which suggest that the Court's approach subtly differs from that of Advocate General Geelhoed. First, the Court employs slightly different terminology. Whilst the Advocate General articulated the question in terms of a "general and structural" breach, the Court consistently referred to the notion of a "general and persistent" breach.³⁶ The latter would appear to present a lower hurdle for the Commission to bring a GAP case, as it essentially revolves around objective criteria of frequency, duration and the wide-spread nature of the infringements. "General and structural", on the other hand, implies an additional requirement for the Commission to prove that:

"the remedy lies not merely in taking action to resolve a number of individual cases which do not comply with the Community obligation at issue, but where this situation of non-compliance can only be redressed by a revision of the general policy and administrative practice of the Member State in respect of the subject governed by the Community measure involved".³⁷

Furthermore, although the Court referred to the existence of environmental damage, it did not appear to view this as a necessary condition for the establishment of a general and persistent breach. Thus, as regards Articles 9 and 10, it found a general and persistent infringement without referring to environmental damage, and in respect of Article 4 it observed that damage had occurred only after having already concluded that there existed a general and persistent infringement of the said provision.³⁸

In sum, the relevant question is whether there is a general and persistent breach, which must be examined by taking account of the number of infringements, the extent to which they occur at different localities (i.e.

34. Paras. 129–133.

35. Para 175.

36. The Opinion in *Commission v. Spain*, *supra* note 24 para 4, seems similarly to distinguish between "generalized defects" and "structural" shortcomings.

37. Opinion, para 48.

38. See paras. 174–175.

whether they are wide-spread), and their duration. Further case law will be required to clarify these conditions. However, it seems clear that Member States can be found guilty of GAP infringements for violations of Community law which are less flagrant than those which culminated in the present case. As for duration, the Advocate General found it manifestly clear that 10 years qualifies as persistent, which suggests that shorter periods may also suffice, depending on the nature of the Community obligations at stake. In *San Rocco*, for instance, the Court found that some eight years of illegal waste dumping in the San Rocco valley amounted to a protracted breach of Article 4 of the Waste Directive.³⁹ The Court has since gone further and ruled recently in *Commission v. Greece (Pera Galini)*, the facts of which were similar to *San Rocco*, that a failure by the national authorities for *four years* to recover or dispose of the unlawful waste at the Pera Galini site amounted to an infringement of Article 4 of the Waste Directive over a ‘protracted period’.⁴⁰

It is also possible for an administrative practice to be “general” without necessarily covering the entire territory of a Member State. Indeed, the Advocate General phrased this condition in the negative: the infringements should not be restricted to a particular locality.⁴¹ This allows for a GAP ruling in respect of an administrative practice occurring in a particular region, e.g. in a German *Land*. Hence, in *Commission v. Spain* Advocate General Stix-Hackl argued that environmental pollution and legal infringements coming from a large number of pig farms in the area of Baix Ter (Gerona Province) reflected a “generalized defect or structural shortcoming” of the application of the Waste Directive in that area.⁴²

2.2.3. Procedural conditions

The novel feature of GAP cases, compared to case-specific infringement proceedings normally brought by the Commission, provoked significant controversy in *Irish Waste*. In short, the issue was whether some of the existing procedural conditions under Article 226 EC should be adapted to accommodate GAP actions. As noted by the Advocate General, cases where the Commission seeks to demonstrate a general and persistent breach by a Member State are likely to be characterized by an abundance of factual material, and

39. See *Commission v. Italy*, *supra* note 18, paras. 88–91.

40. Case C-420/02, *Commission v. Greece*, [2004] ECR I-11175, paras. 24–33.

41. Opinion, para 44.

42. Opinion in *Commission v. Spain*, *supra* note 24, paras. 3–4 and paras. 23–25. The question never materialized since the Court found that the environmental pollution fell outside the scope of the Waste Directive.

the question of proof is likely to become particularly important.⁴³ In order for such actions to be viable and effective enforcement instruments, the Commission therefore argued in favour of modifying some of the conditions under Article 226 EC.

First, it submitted that the Court should abandon the orthodoxy of examining the alleged infringements only with reference to the situation prevailing at the expiry of the deadline for compliance fixed in the reasoned opinion. Instead, the Court should also take into account infringements that were terminated before this deadline passed. The Advocate General lend his support to this suggestion, albeit with rather convoluted reasoning to the effect that one should take account of the infringement “in the perspective of its evolution”.⁴⁴ The Court was more forthright:

“[T]he fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end.”⁴⁵

Indeed, when dealing with alleged infringements of Articles 9 and 10 later in the judgment, the Court noted that the fact that two of the infringements referred to had been terminated before expiry of the deadline in the reasoned opinion did not alter the fact that, at the time in question, “there was a general tendency in Ireland ... to tolerate situations in which those provisions were not complied with”.⁴⁶

The second issue was whether the Commission could, at the stage of judicial proceedings, adduce new evidence about infringements not mentioned in the reasoned opinion. This could serve to back up the alleged general and persistent nature of the disputed administrative practice, for example a report on large-scale dumping of waste in County Wicklow (96 cases), which had become available at a later stage. The Advocate General dismissed this idea out of hand,⁴⁷ but the Court again found in favour of the Commission. It noted that this *prima facie* conflicted with previous case law,⁴⁸ but ingeniously construed the *sui generis* nature of the case by arguing that, in the context of a GAP case, bringing new evidence concerning individual infringements did not alter the subject matter of the dispute, i.e. the general character of the alleged breaches of the Waste Directive.⁴⁹ The consequence

43. Opinion, para 40.

44. Opinion, para 59.

45. Para 32.

46. Para 132.

47. Para 60.

48. See e.g. Case C-446/01, *Commission v. Spain*, [2003] ECR I-6053, para 15.

49. Para 38.

of this is that private citizens alerted by infringement proceedings against national authorities may continue to feed the Commission with new evidence and complaints until this date. Hence, if the public is aware of the reasoned opinion, this may encourage it to engage in additional fact-finding on the basis of the alleged legal infringements. This may explain why the Irish authorities, in contrast to previous practice, did not make the reasoned opinion in *Irish Waste* public.⁵⁰

The third and final issue, deemed crucial by the Irish legal team and subject to much argumentation, concerned the burden of proof. Adhering closely to the Advocate General's Opinion, the Court first reiterated that whereas the Commission had to present sufficient information to demonstrate infringements in all of the incidents referred to in the reasoned opinion, it was for Ireland, in the spirit of loyal co-operation, to facilitate this task and to contest specifically the facts alleged in those complaints.⁵¹ If this duty also relates to new evidence brought by the Commission at the judicial proceedings stage, this could obviously place a significant burden on Member States. More importantly, the Court extended the application of these findings, which followed from settled case law, to the claim of a general and persistent breach, i.e. Member States must not only challenge in substance and in detail the information produced as concerns the individual breaches, but also the consequences flowing therefrom.⁵² In other words, if the Commission succeeds in establishing individual breaches indicating a general and persistent practice, it is for Member States to establish that these cases are isolated incidents, and that no general deficiencies underpin them. This outcome comes close to a reversal of the burden of proof in this respect.⁵³

The importance of the Court's ruling on these procedural matters cannot be overestimated. We noted above that the substantive conditions for establishing a GAP case are quite burdensome and that, without modifications to the procedural rules concerning proof, bringing a GAP case would become very difficult, and hence of limited use. Clearly conscious of this dilemma, the Court awarded the Commission the necessary tools to be effective as guardian of the Treaty, which to some extent goes at the expense of Member States' judicial protection.

50. See friendsoftheirishenvironment.org/fieblog/index.php?id=33, posted on 29 April 2005.

51. Paras. 44–46.

52. Para 47.

53. The Advocate General referred to a "shift" of burden of proof onto the Member State once the Commission had presented a *prima facie* case, see Opinion at para 53.

2.3. *Comment*

After having examined the anatomy of a GAP case, it is now possible to assess the implications of this case for the enforcement of EC law under Article 226 EC. We shall start by examining the added value of a GAP case, followed by an examination of the importance of this instrument for the enforcement of EC law generally, before rounding off with some thoughts on the potential for developing this instrument further.

2.3.1. *Added value of a GAP case*

The efficiency benefits in terms of coordinating efforts both at the Commission and the Court in bringing one collective infringement case instead of many isolated cases are obvious.⁵⁴ However, in this respect, the Commission could have been satisfied by securing a judgment finding infringements in respect of the twelve complaints, without additionally asking the Court to establish a general and persistent breach had occurred. What, then, is the added value of a GAP ruling? Although the Advocate General foresees that GAP cases “open the way to more effective enforcement of Community law obligations against Member States”,⁵⁵ neither he nor the Court explain why this is so.

In order to answer this question, it is necessary to juxtapose the effects of a “regular” infringement case with those of a GAP case. The crucial difference between the two resides in the scope of the judgments. Had the Commission simply asked for a declaration that the 18 incidents were incompatible with the relevant provisions of the Waste Directive, Ireland would merely have had to take the necessary measures to address those specific breaches. If the Commission had subsequently received fresh complaints of other sites operating without a permit, it would have had to initiate new Article 226 EC proceedings all over again.

In contrast, the consequence of the GAP judgment against Ireland is that the national authorities must now not only rectify the specific 18 infringements, but must also correct the *general* and persistent breaches of Articles 4, 5, 8, and 12–14 of the Waste Directive throughout its territory.⁵⁶ Hence, the Member State must deal with any existing or subsequent infringements

54. Opinion, para 5

55. *Ibid.*

56. But the judgment still fell short of the even stricter approach devised by A.G. Geelhoed, who wanted to further deduce that Ireland had generally and structurally breached the Waste Directive altogether, see Opinion, para 123. It appears difficult, however, to understand what the effects of such a ruling would be as regards the provisions of the Waste Directive which had not been infringed.

of the relevant obligations *ex officio*, regardless of whether these incidents have been subject of an infringement action.

One might object that this obligation already flows from the binding force of the relevant Community provisions according to Article 249 EC read in conjunction with Article 10 EC. Whilst this is true, the crucial point here is that a failure in this respect would represent a violation of the 226 EC judgment, and that the Commission could hence proceed to bring an action under Article 228 EC. This will greatly enhance the deterrent effect of Article 226 EC judgments which, as we shall see below, has been further bolstered by the possibility of imposing lump sums in addition to penalty payments under Article 228(2) EC.⁵⁷

This conclusion, however, may have to be qualified, depending on the conditions that determine when a Member State is deemed to have failed to comply with a GAP judgment. If, after Ireland has been given a reasonable time to take the necessary measures to amend its flawed practices in accordance with the conditions set out in the judgment, the Commission learns that there is still a general and persistent failure by national authorities to apply the Waste Directive, e.g. as regards waste operators acting without permits, it may obviously bring Article 228(2) EC proceedings. This situation is analogous to *Commission v. France (French Fisheries II)* discussed below, where the Court imposed economic sanctions under Article 228(2) EC on the basis that the national authorities, several years after being condemned in *French Fisheries I*, still failed in a general and persistent manner to monitor and sanction infringements by its nationals of the relevant EC legislation implementing the Community's fisheries policy

A more difficult issue is whether the Commission could also bring Article 228(2) EC proceedings against Ireland on the basis of one or more *prima facie* isolated events infringing the operative part of the GAP judgment, e.g. one or more waste operators still acting without permits in violation of Articles 9 and 10 of the Waste Directive, without having to demonstrate that they are necessarily part of an on-going general and persistent practice.

The Court's case law under Article 228 EC offers limited guidance for this particular question. Of the mere three judgments yet handed down under Article 228(2) EC, only *French Fisheries II* is relevant for these purposes, as that case also related to failure to comply with a GAP type judgment – the other two cases concerned an isolated non-application incident in Greece (failure to rectify an illegal waste site) and incomplete implementation of a directive by Spain.⁵⁸ And as for *French Fisheries II*, it seems far-fetched to

57. See section 3.

58. These cases are commented upon in more detail in section 3.

deduce from the Court's finding that a general and persistent lack of monitoring and enforcement still occurred at the time of the Article 228 EC proceedings, that these factors are necessary conditions for establishing a failure to comply with a GAP judgment. Nowhere in that judgment did the Court argue that such a finding was a requisite under Article 228(2) EC, and its observations could be seen as merely in response to the Commission's submissions. Hence, for lack of any conclusive guidance in the Court's case law, it is necessary to assess this question in light of systematic considerations concerning Articles 226 and 228 EC, their objectives, and more specifically the *raison d'être* of the judgment in *Irish Waste*.

First, the essential issue around which this question revolves is what a Member State must do to comply with a GAP judgment, and more specifically what measures Ireland must take in order to implement the judgment in *Irish Waste*. It seems clear that it is not sufficient simply to improve administrative practices so that infringements may no longer be said to be general and persistent. The national authorities must do whatever is necessary to ensure that there are no further infringements of the relevant obligations. In respect of precise and absolute obligations, e.g. the requirements in Articles 9 and 10 of the Waste Directive that waste operators must have permits, the judgment against Ireland therefore entails an obligation of result.⁵⁹ One can draw a parallel here with the Article 228 EC judgment against Spain – the obligation flowing from that ruling was not limited to implementing the Bathing Water Directive in respect of *most of* the remaining 14.9 percent of its bathing sites which did not yet fulfil the requisite water quality limits, but to ensure a 100 percent compliance with these values.⁶⁰ Strictly speaking, therefore, if the Commission were to identify new waste sites in Ireland operating without a permit, this would amount to a breach of the Article 226 EC judgment even if those infringements could no longer be said to be part of a general and persistent failure to apply the Waste Directive.

Second, the *raison d'être* behind the GAP ruling devised in *Irish Waste* was clearly to make enforcement of EC law by the Commission more effective.⁶¹ If the Commission in Article 228 EC proceedings were required to demonstrate that the general and persistent breach has prevailed in the same manner since the Article 226 EC proceedings, the effectiveness of the GAP instrument would be severely restricted, both in its legal effects towards Member States, as well as by placing a heavy burden on the Commission due to the cumbersome process of establishing a GAP case. This would be rel-

59. See by analogy, Case C-60/01, *Commission v. France*, [2002] ECR I-5879, paras. 25–30.

60. See Case C-278/01, *Commission v. Spain*, [2003] ECR I-14141, para 32 cf. para 62.

61. Opinion paras. 3–4.

evant in particular in areas such as environment policy where the Commission does not have monitoring powers. The fact that the Commission nevertheless succeeded in this in *Irish Waste* is, in my opinion, not an argument for requiring it to do so under Article 228 EC. The rationale underpinning the GAP instrument seems rather quite the opposite – namely to provide for a broad Article 226 EC judgment, which would catch any future infringements of the generic kind, and to provide for a deterrent effect through the risk of facing Article 228 EC proceedings.⁶²

This leads to the conclusion that, after the national authorities have been given a reasonable time to comply with the *Irish Waste* judgment, the Commission may bring proceedings under Article 228 EC in respect of new infringements of the provisions of the Waste Directive which had been generally and persistently flouted, without the need to prove that those infringements are part of a continuing general and persistent practice. Although this will, of course, greatly enhance the effectiveness of the Commission's enforcement practice, the result is not as harsh on Member States as one might instinctively think. As demonstrated by the *Irish Waste*, only instances where a Member State completely ignores the binding effect of Community law over a protracted period may be subject to a GAP ruling. If, against this background, a Member State again fails to comply with the relevant Community obligations after having been alerted by the Commission to new infringements in the pre-judicial stage under Article 228 EC, it seems only fair that economic sanctions are imposed.

The final issue which is discussed here concerns the legal effects of the specific geographical scope of a GAP judgment. *Irish Waste* concerned incidents that occurred throughout the Irish territory, and the general and persistent breach was deemed to be nation-wide. The relevant geographical scope for assessing later infringements for the purposes of Article 228 EC proceedings is thus the whole of the Irish territory. However, GAP judgments are conceivable that are of more limited geographical scope, e.g. at a regional or provincial level.⁶³ This begs the question whether the relevant territory for assessing an infringement of such GAP cases for the purposes of Article 228 EC is restricted to those areas, or whether the whole national territory may be taken into account. *French Fisheries II*⁶⁴ illustrates this question, although the particular factual circumstances of that case limit its general application. One of the questions which arose in these Article 228 EC proceedings was whether instances of deficient enforcement by the national authorities of the

62. Ibid.

63. See Opinion in *Commission v. Spain*, *supra* note 24.

64. Case C-304/02, *Commission v. France*, judgment of 12 July 2005, nyr.

Community's Fisheries legislation in the Mediterranean region could be taken into account for the purposes of establishing a breach of the judgment in *French Fisheries I*, when the latter had only concerned infringements in the North-Atlantic region. The geographical scope of the first judgment was thus strictly limited to the Atlantic region. An additional complexity of the case was that the relevant Community legislation in force at the time of the first judgment against France did not cover the Mediterranean region, but only concerned fisheries in the North-Atlantic. The Opinion of Advocate General Geelhoed nevertheless held that the infringements in the Mediterranean were relevant, as the Commission complaints were aimed at the insufficiency of "controls as such", and the Court's finding in the first case against France "concerned the lack of monitoring effort in respect of the fisheries provisions then in force, irrespective of the territorial scope of these provisions".⁶⁵ Hence, his viewpoint was essentially that *French Fisheries I* established a "generic infringement" as far as deficient controls were concerned, and that later failures in this regard amounted to a persistent failure of the obligation to "control as such", regardless of the legislative scope of the relevant provisions and *a fortiori* the geographical scope of the judgment.

In contrast, the Court very briefly noted that the infringements in the Mediterranean region were irrelevant for the purposes of establishing a breach of the first case against France, since the scope of that judgment necessarily was limited to the geographical scope of the relevant Community obligations in force at that time.⁶⁶ The Court notably did not comment on the *factual* geographical scope of the first judgment, which arguably leaves the door open for a different result where the applicable legislation is nationwide. Hence, should the Court on the basis of, for instance, waste fills in Southern regions of Italy operating without permits declare a general and persistent violation of Articles 9 and 10 of the Waste Directive, one could argue – analogously to the abovementioned reasoning employed by Advocate General Geelhoed – that that judgment established a breach of the permit obligations in Article 9 and 10 "as such", irrespective of the geographical location of those incidents. The consequence of this view is that any subsequent infringements of those obligations would be relevant for assessing a failure to comply with the judgment in Article 228 EC proceedings, even if they took place in other regions of Italy.

65. Opinion of 29 April 2004 (First Opinion), *ibid.*, para 63.

66. Para 27.

2.3.2. General application of a GAP case

Shortly after *Irish Waste* was rendered, Environmental Commissioner Stavros Dimas said that his staff would be looking carefully to see how the ruling might help “to focus our enforcement efforts more efficiently in the future”.⁶⁷ Other Directorates General will undoubtedly follow suit, including the Commission’s Legal Service, as GAP cases may change the enforcement landscape of not only EC environmental law, but of virtually any other area of EC law. One prime candidate in this respect is the internal market, which is only second to the environment in terms of the number of infringements proceedings brought by the Commission under Article 226 EC.⁶⁸ More specifically, the Advocate General mentioned the field of public procurement, where successive instances of infringements by the same Member State have been brought before the Court.⁶⁹ The Court has for instance handed down five judgments against Germany for failing in individual cases,⁷⁰ at different locations in the national territory, to invite for tender public contracts in violation of Article 8 of Council Directive 92/50/EC Relating to the Coordination of the Procedures for the Award of Public Services Contracts (the Public Services Procurement Directive),⁷¹ and in respect of two of these cases the Commission has initiated Article 228 EC proceedings for failing to implement the relevant rulings.⁷² If more infringements of this type were to occur, the Commission could in the future very well decide to bring a GAP case against Germany for failing to apply the Public Services Procurement Directive correctly. If this would find favour with the Court, Germany would accordingly be bound to bring its practices in line at a regional or possibly even national level (depending on the scope of the GAP case and the Court’s future view on the effects of a regional GAP case, as discussed in the previous section), and new infringements could subsequently pave the way for Article 228 EC proceedings.

As illustrated by *Irish Waste*, GAP cases are particularly relevant for two phases of the implementation process. The first type concerns the organizational part of the transposition phase, i.e. the setting up of the “legal and administrative framework for the proper application and enforcement of the transposing legislation”, which includes designating proper authorities, fa-

67. ENDS Environment Daily, 26 April 2005 (Issue 1867). Indeed, another GAP case on the Waste Directive is already on its way, see Case C-135/05, *Commission v. Italy*.

68. 21st Annual Report *supra* note 1, 4.

69. Opinion in *Commission v. Ireland*, *supra* note 7, para 4.

70. Joined Cases C-20 & 28/01, Case C-126/03, Case C-125/03, and Case C-414/03, all of these cases are *Commission v. Germany*, and cited *supra* note 5.

71. O.J. 1992, L 209/1.

72. Case C-503/04, *Commission v. Germany*, pending.

cilitating monitoring and enforcement etc.⁷³ The second category relates to the operational part of the transposition phase, i.e. the actual and continuous process according to which national authorities use the organizational apparatus to apply and enforce the Community norms.⁷⁴ These phases are by their nature not limited to transposition of directives, but apply to Community law in general. GAP cases may therefore concern organizational as well as operational practices in respect of Treaty provisions, regulations and directives.

As seen, the operational phase involves not only the practical application of Community rules, but also enforcement of the relevant obligations. However, it seems that the Commission has traditionally been most preoccupied with securing application, rather than enforcement.⁷⁵ The latter, which involves effective monitoring, controls and dissuasive sanctions, is likely to become increasingly important in view of the progressive decentralization of enforcement following recent enlargement. A particularly important example is competition law, where Regulation (EC) No. 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82 of the Treaty⁷⁶ has conferred increased powers on national authorities to serve as guardians of the *acquis communautaire* in this field. The possibility of bringing GAP cases in response to general and persistent failures to ensure that EU nationals abide by EC competition rules may thus play an important role in alleviating concerns that decentralization will result in inadequate enforcement of those rules.

2.3.3. *Further development of the GAP doctrine*

The scope and effects of GAP judgments are far-reaching, but could be further broadened in the future. The obligation to apply and enforce Community law may be specified in secondary law, but follows also more generally from the obligation of loyal cooperation articulated in Article 10 EC.⁷⁷ GAP cases may in principle therefore be brought against general and persistent breaches of Article 10 EC. This raises questions about the proper delimitation of GAP rulings. For example, a GAP ruling concerning general and persistent failures to apply Article 8 of the Public Services Procurement Directive would still have fairly limited consequences: Article 228 EC proceedings could

73. Opinion in *Commission v. Ireland*, *supra* note 7, para 26.

74. *Ibid.*, para 27.

75. In the field of environment, the Commission has stated that “without abandoning the pursuit of incorrect application cases the Commission...concentrates on problems of communication and conformity”, see 18th Annual Report on the monitoring the application of Community law (COM(2001)309), 49–50.

76. O.J 2003, L 1/1.

77. Similar, Opinion in *Commission v. Ireland*, *supra* note 7, para 28.

only be brought for continued infringements of this specific obligation. A GAP ruling condemning a Member State for failing to enforce Articles 81 or 82 EC, read in conjunction with Article 10 EC, could have very far-reaching consequences. Strictly interpreted it would mean that the Commission could bring Article 228 EC proceedings for any new, similar failures to enforce these rules. A GAP case under Article 10 EC can therefore probably not be brought on the basis of deficient enforcement in general, but the Commission would have to specify a specific type of breach in this regard, e.g. a general and persistent practice of imposing fines for infringements of Articles 81 and 82 EC⁷⁸ which are inadequate to function as a deterrent.⁷⁹

Another possibility is that the Commission will start bringing sectoral GAP cases, e.g. general and persistent infringements of inter-connected directives which regulate a certain policy field. Public procurement, for instance, from 31 January 2006 will be regulated by Directives 2004/17/EC⁸⁰ and 2004/18/EC,⁸¹ which essentially require invitations for tender in respect of projects in the water, energy, transport and postal services sectors, and for award of public works contracts, public supply contracts and public service contracts. If there is a general and persistent breach of the basic obligation to invite for tenders in these areas, the Commission may decide to bring a GAP case in respect of both Directives. This may have several advantages. Broadening the scope of the action in this way may be conducive to revealing a pattern which might otherwise be hidden if approached on a directive-by-directive basis, e.g. five incidents of failures to invite for tender under any of the two Directives might not suffice to be characterized as a general and persistent breach, but added up they represent ten infringements, which may indicate a general practice. The corollary of bundling the public procurements Directives into one GAP action is that an affirmative judgment will oblige the Member State in respect of both Directives, and new infringements occurring under any of them may subsequently pave the way for an Article 228 EC action.

One could also imagine the Commission bringing GAP cases in response to infringements of directives which share a certain type of obligation. One example is the frequent obligation to make environmental directives operational by drawing up certain plans and programmes, often referred to as management plans. A GAP case could thus be lodged against a Member State for failing to draw up management plans pursuant to directives on

78. See Art. 5 of Regulation 1/2003, *supra* note 76

79. See by analogy, *Commission v. France*, *supra* note 7, para 72. See also Opinion of 29 April (First Opinion), note 7 *supra*, paras. 29–30.

80. O.J. 2004, L 134/1.

81. O.J. 2004, L 134/114.

waste⁸² or nature conservation⁸³ for instance. Subsequent failures to comply with the judgment in regard to any of these directives could then trigger Article 228 EC proceedings. Such GAP cases could be broadened even further: the Commission could argue that the failure to draw up management plans represented a general and persistent failure, not just in respect of the relevant directives, but a generic failure to comply with the obligation to draw up management plans in the environmental sector.⁸⁴ If the Member State subsequently fails to provide such plans in the context of another directive, for example, Directive 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy,⁸⁵ this could be understood as a failure to comply with the initial judgment, and Article 228 EC proceedings may be brought.

The future will tell how far the Commission and the Court are willing to stretch the scope of GAP cases, but as long as the Commission is struggling to deal with the backlog of cases in many areas of EC law, it is likely that both the Commission and the Court will be sympathetic to developing the GAP case's potential further.

3. Article 228 EC – *Commission v. France*⁸⁶ (*French Fisheries II*)

3.1. Introduction

As has been recalled several times above, Article 228 EC allows the Commission to bring proceedings against Member States for failing to comply with an Article 226 EC ruling within reasonable time. Until 1993, Article 228 EC merely allowed for a declaration of failure to comply with an Article 226 EC judgment, but the Maastricht Treaty introduced the possibility of imposing economic sanctions in the form of lump sums or penalty payments. The Commission has been very reserved about taking advantage of this amendment, however, and until recently only two Article 228 EC cases –

82. See Art. 7 of the Waste Directive, *supra* note 11; Art. 6 of Directive 91/689/EEC on hazardous waste, O.J. 1991, L 377/20; and Art. 6 of Directive 94/62/EC on packaging and packing waste, O.J. 1994, L 365/10.

83. Art. 6 of Directive 92/43/EC on the conservation of natural habitats and wild fauna and flora, O.J. 1992, L 206/7.

84. See by analogy the reasoning by A.G. Geelhoed in the Opinion in *Commission v. France*, *supra* note 7, concerning infringements of the “generic” [P.W] obligation to “monitor”, discussed above in section 2.3.1.

85. O.J. 2000, L 327/1.

86. Case C-304/02, *Commission v. France*, judgment of 12 July 2005, nyr.

against Greece and Spain respectively⁸⁷ – had been brought before the Court. Furthermore, in both cases – which concerned EC environmental law – the Commission only asked for penalty payments whilst ignoring the possibility of proposing lump sums, either in addition to or instead of penalty payments. The impression that the Commission has ignored the double-barrelled instrument represented by Article 228(2) EC is further reinforced by the fact that it has drawn up guidelines for the calculation of penalty payments, but not for lump sums. Frustrated by this state of affairs, Advocate General Geelhoed – who was also the architect of the GAP doctrine, albeit that time in tandem with the Commission – proposed in *French Fisheries II* that both a lump sum and penalty payment should be imposed under Article 228(2) EC.⁸⁸ Once again, the Commission had only called for the imposition of penalty payments.

These proceedings had been brought by the Commission in response to the alleged failure by France to comply with the *French Fisheries I* judgment of 1991 in which the Court found that the national authorities had infringed Article 1 of Regulation (EC) No. 2057/82 Establishing Certain Control Measures for Fishing Activities by Vessels of the Member States and Article 1 of Council Regulation 2241/87 Establishing Certain Control Measures for Fishing Activities.⁸⁹ These infringements related more specifically to failures to provide adequate controls with regard to Community rules on minimum mesh size, attachment of nets, by-catches and the minimum size of fish permitted to be sold. The Court found in the second case against France that it had failed to comply with the 1991 judgment, since there were still inadequate controls in respect of, *inter alia*, the minimum size of fish sold, as well as insufficient sanctions imposed on fishermen violating the Community rules. More importantly, the Court again found in favour of Advocate General Geelhoed's Opinion and decided that *both* a lump sum and a penalty payment should be imposed, and proceeded to impose a lump sum of € 20 000 000 and a bi-annual penalty payment of € 57 761 250.

The novelty of this judgment – apart from the staggering sum of pecuniary sanctions imposed – lies foremost in the fact that the Court, first, found that it had complete discretion in determining the appropriate economic sanctions under Article 228(2) EC regardless of the Commission's submission and, second, that a lump sum and a penalty payment could be imposed simultaneously. The next section will focus on the legal reasoning pertaining to these two issues. We will then analyse the method of calculation for a pen-

87. Case C-387/97, *Commission v. Greece*, [2000] ECR I-5047; and Case C-278/01, *Commission v. Spain*, [2003] ECR I-14141.

88. Opinion of 29 April 2004 (First Opinion), para 95.

89. Case C-64/88, *Commission v. France*, [1991] ECR I-2727.

alty payment and a lump sum respectively, which is followed by a comment on the judgment's consequences for the future application of Article 228(2) EC. Since the Court again closely followed the Advocate General's Opinion, except for the calculation of the lump sum penalty, the latter will only be referred to for purposes of clarifying the judgment.

3.2. Judgment

3.2.1. *The Court's discretion under Article 228(2) EC*

The first question was whether the Court could impose a lump sum when the Commission had only proposed a penalty payment. At first glance this question should be answered in the affirmative since, as has become clear from the two previous Article 228 EC cases, the Court is bound neither by the Commission's submissions, nor its guidelines on the calculation of penalty payments.⁹⁰ However, the difference with the two previous cases is that they concerned the Court's discretion to stipulate the size of a penalty payment, whereas the issue in these proceedings was whether the Court may select a different type of sanction, *in casu* a lump sum. This question involves more fundamental questions of legal certainty and the right to a proper defence, as noted by France and most intervening Member States. Nevertheless, the Court reiterated that the exercise of powers conferred on the Court by Article 228(2) EC was not subject to the condition that the Commission had provided guidelines on the imposition of lump sums. It followed, *a fortiori*, that the Court was free to determine the nature of the proper sanction regardless of the Commission's submissions in the proceedings.⁹¹

In response to the bold but not altogether surprising submission from Germany that the Court lacked political legitimacy to impose a financial sanction not suggested by the Commission, the Court held that, in contrast to the administrative phase of the Article 228 EC proceedings conducted by the Commission, political considerations were irrelevant in the judicial procedure before the Court.⁹² It added that the appropriateness of the choice of the penalty most suited to the case could only appraised in the light of findings made by the Court, and therefore outside the political sphere.⁹³ However, by referring to the fact that it is best placed to determine the most proper sanc-

90. See *Commission v. Greece*, *supra* note 87, paras. 89–90, and *Commission v. Spain*, *supra* note 87, para 41.

91. Para 85.

92. Para 90.

93. *Ibid.*

tion, the Court missed the fundamental point which rather concerns the doctrine of separation of powers.

The intervening Member States argued next that the Court would violate a general principle of procedural law by going beyond the parties' claim. The Court rejected the applicability of this civil law principle, however, with reference to the "special judicial procedure" laid down in Article 228(2) EC, which was "not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established".⁹⁴ This explanation is somewhat vague, and one might query why the Court did not instead rely on the generally accepted *dictum* – which it itself has applied in relation to national courts' obligation to raise Community law issues *ex officio*⁹⁵ – that courts may deviate from their passive role in *inter partes* proceedings where pressing public interests require it to do so.

Finally, several of the intervening Member States argued that the right of defence was threatened insofar as the Court raised matters of law which had not been raised by the Commission, and which France could not respond to. This argument was not altogether correct, since the Court had in fact invited France and the other Member State to provide submissions at an extraordinary hearing to express their views on the Court's power to impose a lump sum where the Commission had not proposed such a sanction.⁹⁶ But the question remains how the Court is going to deal with this issue in the future since it is not likely to organize extraordinary hearings every time it considers a different sanction from that proposed by the Commission. The Advocate General suggested that the rights of the defence could be safeguarded by reopening the oral hearing in accordance with Article 61 of the Rules of Procedure, and if necessary preceded by written observations under Articles 60 and 45(2)b of the Rules of Procedure, should the Court consider a different sanction from that proposed by the Commission, or simply by allowing the Member State to be heard straight away if the issue arose before the oral hearing.⁹⁷ The Court emphatically did not comment on this issue. If anything, by repeating the special judicial procedure under Article 228(2) EC and that the procedural guarantees must be assessed in light of this particular context, the judgment implies that the right of defence does not necessarily warrant any such specific procedures in respect of the sanction to be im-

94. Para 91.

95. See e.g. Joined Cases C-430 & 431/93, *Van Schijndel and Others* [1995] ECR I-4705, para 15; Case C-126/97, *Eco-Swiss v. Benetton*, ECR [1999] I-3055, paras. 36–37; and Joined Cases C-240–244/98, *Océano*, ECR [2000] I-4941, para 29.

96. Para 96.

97. Opinion of 18 Nov. 2004 (Second Opinion), para 36.

posed. Although the judgment does not really offer much guidance on how this issue is to be dealt with in future cases, the Court seems to take the view that Member States must now be alerted to the possibility of any sanction, regardless of the Commission's submissions, and that they must accordingly decide whether to provide submissions *ex officio* on this matter in future cases.

3.2.2. *Imposing lump sums and penalty payments*

The second question was whether the Court could impose a lump sum and a penalty payment simultaneously. One immediate problem in this respect is that Article 228(2) EC refers to a lump sum *or* a penalty payment. The Court noted, as it has done in respect of other Treaty provisions,⁹⁸ that that conjunction could equally well be understood in the cumulative as the alternative sense. It proceeded to focus on the different objectives which the two sanctions promoted, and which suggested that they were complementary.⁹⁹ Whilst a penalty payment was suitable for inducing a Member State to end an infringement as soon as possible, a lump sum was rather concerned with the detrimental effects on public and private interests caused by the failure to comply with the initial judgment.¹⁰⁰ Following a similar logic, the Court also refuted the notion that imposing a lump sum and a penalty payment amounted to having a Member State pay twice for one and the same infringement. In response to the argument that the duration of the infringement was taken into account twice, it added more specifically, that that factor was only one of a number of the criteria determining the sanctions,¹⁰¹ the other two being the seriousness of the breach and the ability of the Member State to pay.

3.2.3. *Methods of calculation*

3.2.3.1. *Penalty payments* Before examining the judgment in *Commission v. France*, it may be worthwhile to consider the legal framework for calculating the penalty payment. The Commission has set out the objectives and methods of calculation for penalty payments in a 1996 Memorandum on Applying Article 171 of the EC Treaty [Article 228 EC]¹⁰² and a 1997 Communication on the Method of Calculating the Penalty Payments Provided for Pursuant to Article 171 of the EC Treaty [Article 228 EC].¹⁰³ The basic crite-

98. E.g. in respect of Arts. 5, 48 and 81 EC, see Second Opinion, *ibid.*, para 45.

99. Para 83.

100. Para 81.

101. Para 84.

102. O.J. 1996, C 242/6.

103. O.J. 1997, C 63/2.

ria to be applied include the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. The calculation is made by employing a unit amount of € 500, which is then multiplied with the degree of seriousness (1-20), the duration of the infringement (1-3), and a coefficient determined with reference to the Member State's gross national product and its votes in the Council.¹⁰⁴ The Court has in principle accepted this approach, while reserving the right to specify the precise amount of the penalty payment.¹⁰⁵ It has introduced a fourth additional variable, namely the effects of a failure to comply on private and public interest and the urgency of obtaining compliance.¹⁰⁶ It would appear that this element to some extent is commensurable with the degree of seriousness of the non-compliance.

In the case against France, the Court followed the Commission's submissions and the Advocate General's opinion on all points in respect of the penalty payment. As for the seriousness of the infringement, the Court noted that it constituted a significant threat to certain fish species and fishing grounds, and thus jeopardized the common fisheries policy. It therefore deemed that the failure to comply with *French Fisheries I* warranted a seriousness coefficient of 10, which is the highest yet, and compares to 6 in the case against Greece (that was the Commission's estimate, the Court did not explicitly stipulate the degree of seriousness) and 4 against Spain.¹⁰⁷ Despite objections from France, a seriousness of 10 out of a maximum 20 appears lenient, considering the severe and potentially irreversible effects of the French infringements, which also distorted competition and discriminated against foreign fishermen.¹⁰⁸ It appears therefore that higher degrees of seriousness will require fault, for instance a complete failure to take any measures to comply with the Community obligations. The French authorities had after all taken some steps to improve controls and the effectiveness of its sanctions, although the Court found that those measures had not been implemented in a sufficiently serious manner to reduce the graveness of the breach that had been established. The Court's relatively lenient attitude might also be explained by it wishing to avoid departing from the Commission on yet another point of law, thus risking even more criticism for judicial activism. It is

104. The co-efficient for the old (15) Member States are as follows: Luxembourg 1.0, Ireland 2.4, Finland 3.3, Portugal 3.9, Greece 4.1, Austria 5.1, Sweden 5.9, Belgium 6.2, Netherlands 7.6, Italy 7.7, Spain 11.4, UK 17.8, France 21.1, and Germany 26.4.

105. *Commission v. Greece*, *supra* note 87, paras. 89-90, and *Commission v. Spain*, *supra* note 87, para 42.

106. Case *Commission v. Greece*, *ibid.*, para 92.

107. See Opinion in *Commission v. Greece*, *ibid.*, para 101; and *Commission v. Spain*, *supra* note 87, para 58.

108. The latter was hinted at in the First Opinion, see paras. 35-36 and 94 read in conjunction.

therefore possible that the Court will be inclined to take more full advantage of the seriousness scale in future cases.

The duration of the infringement was regarded “considerable”, even if the starting point for determining the relevant period was the entry into force of the Treaty on European Union (which is when provision for economic sanctions was inserted into Article 228(2) EC) rather than the first judgment against France.¹⁰⁹ The relevant duration was therefore just short of 12 years,¹¹⁰ and the Court set the co-efficient at the maximum of 3 (scale of 1-3). This means that failure to comply with an Article 226 EC judgment for 12 years will always warrant a co-efficient of 3, which – although seemingly quite reasonable – represents a more stringent approach compared to the case against Spain, where a 10 year duration resulted in a modest 1.5 co-efficient.¹¹¹

The co-efficient of the French ability to pay (determined by the gross domestic product and the weighing of votes in the Council) has been pre-set in the Commission guidelines at 21.1,¹¹² and, as in previous cases, the Court accepted this without further ado.¹¹³

Multiplying these co-efficients with the basic amount of € 500 resulted in a total of € 316 500 per day. However, the Court held that the necessary adjustments to previous practices which the French authorities had to realize, and to some extent had already undertaken, could neither be “instantaneous”, nor could their impact be discerned immediately.¹¹⁴ From this the Court drew the conclusion that the penalty payment should be bi-annual (€ 57 761 250) in order to give France a chance to comply with the judgment.¹¹⁵ This reflects the fact that the penalty payment is not a punitive sanction but a behaviour-inducing tool.

Following similar logic, in the case against Spain the Court had devised a relative rate of penalty payment which decreased progressively depending on the degree of implementation of the relevant Community rules,¹¹⁶ but in the

109. Para 108.

110. For the purposes of penalty payments the duration will be assessed up to the Court’s examination of the facts, see by analogy para 31.

111. *Commission v. Spain*, *supra* note 87, paras. 53–54. But it is noteworthy that in coming to this conclusion in the case against Spain the Court emphasized the complexity of the measures which had to be undertaken, and – somewhat puzzlingly – that the requirements in the public procurement directives provided for inherent delays.

112. See *supra* note 102 and note 103.

113. Para 109.

114. Para 111.

115. Para 112.

116. *Commission v. Spain*, *supra* note 87, paras. 47–50. See also case comment by Ruffert, 41 CML Rev. (2004), 1378–1393; and Janssen, 13 EELR (2004), 130.

present case the Court nevertheless decided to apply a flat-rate without passing any comments on this issue. This difference probably does not reflect a change of opinion, but rather stems from the fact that the Spanish case concerned partial non-implementation of the Bathing Water Directive (14.9 percent of the relevant Spanish bathing waters did not correspond to the Community rules) which easily translates in grades of compliance, which is more problematic in respect of deficient enforcement as in the case against France.

3.2.3.2. *Lump sums* The Court's treatment of the lump sum to be imposed, in contrast, was very brief. It neither applied the Commission's guidelines on the calculation of penalty payments analogously, as the Advocate General did,¹¹⁷ nor did it devise a method of calculation of its own. It merely noted in sweeping fashion that the failure to comply with the initial judgment had persisted for "a long period", and that the public and private interests at issue warranted a lump sum. In light of these "specific circumstances" the Court "fairly assessed" the lump sum at € 20 000 000.¹¹⁸ Although it would be easy to make a mockery of this reasoning, or lack thereof, the explanation for the Court's terse treatment of this question most likely is that it did not want to pre-empt future Commission guidelines on the calculation of lump sums, work which is surely underway following this judgment.

As argued by the Advocate General, pending articulation of such guidelines, it seems likely that the factors relevant for determining the penalty payment (duration, seriousness and ability to pay) should also govern the amount of the lump sum.¹¹⁹ Any difference between the sanctions should, if at all, be reflected by different scales in the co-efficients. For example, it makes sense for duration to play a more important role for the purposes of a lump sum than for a penalty payment, given that the former relates to past behaviour whilst the latter is oriented towards future conduct. Hence, one might expect a maximum co-efficient higher than 3 for duration for purposes of calculating a lump sum. Another option is that the Commission proposes that a lump sum should be calculated on the basis of the guidelines for penalty payments, for example that the lump sum should be equivalent to a years worth of penalty payments, as was suggested by the Advocate General. This led him to propose a lump sum of € 115 522 500 in the case against France.¹²⁰ Staggering as this sum is, the Advocate General argued that his

117. First Opinion, para 103.

118. Para 115.

119. First Opinion, paras. 96 and 103.

120. *Ibid.*, para 103.

approach was lenient - justified by the fact that this was the first time a proposal for a lump sum had been made, that the Commission had not suggested such a penalty, and no practice existed to provide guidance – and he implied thus that for the future the lump sum may be set at the equivalent of several years worth of penalty payments.¹²¹ When the Court set the lump sum considerably lower than this at € 20 000 000, it reflected perhaps not only sensitivity to the specific judicial context of the proceedings, but also the highly political connotations of the case, in particular bearing mind the outcome of the French referendum on the Constitution.

3.3. *Comment*

The question scholars and national authorities will probably particularly ponder after this judgment is the precise delimitation of the lump sum and the penalty payment under Article 228(2) EC: when is the Court likely to hand down a lump sum, when a penalty payment, and when will it apply both? The judgment is quite ambiguous on these issues, although some hints were offered in relation to the different objectives of the sanctions. Before looking more closely at these statements, it may be useful first to consider the doctrinal clarity presented by the Advocate General. In his view, a lump sum has a dissuasive effect, whilst a penalty payment has a persuasive effect.¹²² Accordingly, a lump sum was applicable once the deadline for implementing the Article 228 EC reasoned opinion had expired, and a penalty payment should be imposed if the infringement persisted at the time of the judicial proceedings.¹²³ A lump sum should consequently be imposed in all cases where Member States have failed to comply with the reasoned opinion, regardless of whether the situation was different at the time of judgment, whereas both a lump sum and a penalty payment should be awarded if the situation still persisted.¹²⁴

The Court was less clear about the different objectives of the two sanctions and the temporal applicability of them. It merely observed:

“While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular

121. See First Opinion, paras. 102–103 and Second Opinion, para 49.

122. Second Opinion, para 41.

123. First Opinion, para 85 et seq.

124. *Ibid.*, para 95.

where the breach has persisted for a long period since the judgment which initially established it. That being so, recourse to both types of penalty provided for in Article 228(2) EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist.”¹²⁵

The objective and application of the penalty payment are relatively clear, but the quoted paragraph is vague as regards the lump sum. It would seem that for a lump sum to be imposed, it is not necessarily sufficient for a Member State to have failed to comply with a reasoned opinion, but that that decision must also be guided by the effects on private and public interest and the duration of infringement. If the judgment indeed must be understood this way,¹²⁶ it seems that the Court is confusing the conditions under which a lump sum may be imposed under Article 228(2) EC and the criteria determining the amount of the pecuniary sanction. The duration of the infringement and its effects on private and public interests are, in my view, only relevant for the latter.

More specifically concerning the duration of the infringement in this context, it is noteworthy that the Court has, on the one hand, interpreted Article 228 EC as requiring that “the process of compliance [with the initial judgment] must be initiated at once and completed as soon as possible”.¹²⁷ On the other hand – given that the Article 228 EC does not stipulate the period according to which the initial judgment must have been complied with – the Commission is only entitled to initiate the administrative phase of Article 228 EC and give formal notice to the Member State after a “reasonable period”, i.e. after the Member State has had sufficient time to comply with the Article 226 EC judgment.¹²⁸ On top of this comes the passage of time pending the delivery of the reasoned opinion – or even a second reasoned opinion, as in the case against France¹²⁹ – and a further time limit to comply with

125. Para 85.

126. The Court said that it was “essential” to impose lump fines under such circumstances, see para 114, which may suggest that these factors are still not necessary conditions for doing so.

127. *Commission v. Greece*, *supra* note 87, para 82; and *Commission v. Spain*, *supra* note 87, para 27.

128. This issue was raised by the defendant in *Commission v. Spain*, *ibid.*, and although supported by the Opinion of A.G. Mischo (para 69), was eventually rejected by the Court on the merits of the facts, see para 30.

129. In the case against France the first reasoned opinion was issued more than 5 years after the initial judgment, followed by a second one 4 years later. It is noteworthy that the second opinion is procedurally unnecessary and should therefore be avoided in order not to unduly delay proceedings.

that act.¹³⁰ If the Member State still fails to comply with the reasoned opinion(s) in time it would, in my view, contradict the “primary objective of Article 228(2) EC [which] is to ensure that the Member States ultimately comply with their Treaty obligation by terminating infringements at the shortest possible delays”¹³¹ if the Court were nevertheless to decline to impose a lump sum with reference to the fact that the duration of the infringement was not sufficient.¹³² If the Court judges that a Member State has not had sufficient time to comply with the judgment, it may dismiss the proceedings on the basis that the Commission has violated the Member State’s procedural rights,¹³³ but otherwise it seems that duration cannot be used as an argument for not imposing lump sums.

The relevance of effects on private and public interests appears equally limited in this respect. It should be recalled that in order to establish an infringement of Article 228(1) EC, a Member State must first have infringed specific Community law obligations in violation of Article 249 EC, then must have omitted to comply with a judgment of the Court formally declaring an infringement of those obligations, and finally must have failed to comply with the Commission’s repeated efforts (formal notice and reasoned opinion) to secure compliance from the Member State. The public interest which resides in respect for the Community legal order and its effectiveness is manifestly sufficient to warrant a sanction under such circumstances. It would be tantamount to ignoring the binding effect of Community law to refrain from imposing a lump sum with reference to the fact that the specific public and private interests protected by the relevant Community rules were not sufficiently important to warrant the sanction envisaged by Article 228(2) EC.

A different conclusion would also undermine the main purpose of Article 228(2) EC, which, as mentioned, is to ensure compliance with Article 226 EC judgments. The penalty payment mechanism is meant to be conducive to ensuring compliance with the subsequent Article 228 EC judgment, and it falls therefore to the lump sum instrument to induce compliance with Article 226 EC judgments. This rationale implies that lump sums be imposed as a matter of course when Member States fail to comply with an Article 228 EC reasoned opinion. Otherwise, Member States may speculatively delay com-

130. The Commission usually allows for a 2-months’ time limit to comply with reasoned opinions.

131. First Opinion, para 86.

132. It is noteworthy that the Art. 228 EC judgments against Spain, Greece and France were handed down 5, 8 and 14 years, respectively, after the Art. 226 EC judgments were issued. This brings the overall duration of these infringements (from the first formal letter of notice was dispatched under Art. 226 EC until the Art. 228 judgment) to a stunning 134, 170 and 256 months, respectively.

133. As proposed in the Opinion in *Commission v. Spain*, *supra* note 87, para 71.

plying with Article 226 EC judgments until the start of judicial proceedings under Article 228 EC, during which no penalty payment could be imposed.¹³⁴ This would in many cases allow Member States to benefit financially from their infringements of Community law, which is precisely what Article 228 EC was designed to avoid. Take for example the Article 228 EC case pending against Germany for failing to comply with an Article 226 EC judgment finding that national authorities had failed to invite certain public works for tender:¹³⁵ what is required to comply with that judgment is termination of those contracts which have been entered into, which would require national authorities to compensate the private operators for the remaining period of those contracts.¹³⁶ In this case, national authorities may find it economically beneficial to drag their feet and allow these contracts to remain valid until the Court proceedings, terminate the contracts at this point, thereby reducing damages owed to contractors while escaping penalty payments under Article 228(2) EC. It is clear that in order to avoid such speculation, a lump sum must be imposed once the deadline for complying with the reasoned opinion has expired, whilst the duration and effects on private and public interests may only influence the size of the lump sum which is eventually imposed.

4. Conclusion

Following the judgments against Ireland and France, it appears that the Commission now possesses a formidable set of tools under Articles 226 and 228 EC to tackle infringements of Community law effectively. The potentially broad scope of GAP cases alleviates the need for bringing successive Article 226 EC cases in response to isolated incidents, and allows the Commission to depart from what in German is known as *Kurieren am Symptom*, and focus instead on the underlying practices which underpin these cases, i.e. general and persistent infringements of Community obligations.¹³⁷ The corollary of this is that the effects of Article 226 EC judgments become much more far-reaching and envelop also infringements not specifically identified in the

134. Similar, Second Opinion, para 42. This proposition is supported by the Member States' poor record in complying with Art. 226 EC judgments. In 2002, there were 58 judgments which had not been complied with at the end of the year, see Annex V of the 20th Annual Report on monitoring the application of Community law (COM(2003)699).

135. Case C-503/04, *Commission v. Germany*, pending.

136. See by analogy, Case C-126/03, *Commission v. Germany*, judgment of 18 Nov. 2004, nyr, paras. 25–26.

137. Opinion in *Commission v. Ireland*, *supra* note 7, para 4.

proceedings, but which fall within the generic scope of those obligations that have been violated in a general and persistent manner. Should new infringements of this type occur, the Commission may immediately initiate Article 228 EC proceedings, thus bypassing a new round of Article 226 EC cases in respect of these infringements. Hence, by virtue of the GAP instrument, the significance of infringements proceedings is no longer restricted to their *ex post facto* effect but also, and possibly even particularly, extends to their *ex ante facto* effects.¹³⁸

The deterrent effect which flows from this innovation has been further bolstered by the possibility of imposing a lump sum under Article 228(2) EC. Since the lump sum is imposed retroactively, it no longer suffices to end the breach at the stage of the judicial proceedings under Article 228(2) EC, which suggests that Member States will be well advised to comply with Article 226 EC judgments as soon as possible. Add to this the possibility of combining a lump sum with a penalty payment if Member States have failed to comply with Community law at the time of the judicial proceedings under Article 228 EC, and it becomes clear, considering the severity of these sanctions, that Member States in the future simply cannot afford to flout Community law.

Finally, as regards cries of judicial activism which inevitably follow in the wake of landmarks rulings such as these, suffice to say that the Court merely fleshed out Articles 226 and 228 EC in a way corresponding to what Article 10 EC requires of the Member States: “appropriate measures to ensure the effectiveness of the Community system” and “penalties which are effective, proportionate and a deterrent... for infringements of Community rules”.¹³⁹

138. *Ibid.*

139. See by analogy, *Commission v. France*, *supra* note 7, paras. 32 and 69.