# OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 19 January 1999 *

1. In the present case, the Commission is seeking a declaration that the French Republic has only partly — and, in any event, incorrectly — transposed into national law Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (hereinafter 'the Directive'). [1]

## The Directive

2. The Directive is designed to ensure that swift and effective review procedures are available at national law so that infringements of the Community public procurement rules can be prevented or remedied [2] and specifies the 'powers' to be conferred on review bodies. Article 2(1) allows Member States to choose between two — different but equivalent in terms of their practical effect — courses of action: [3] first, the 'suspension-annulment' option provided for in Article 2(1)(a) and (b); alternatively, the adoption (with maximum care) of other measures designed to attain the same result, such as '*making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented*'. [4] The French legislature chose the latter option, envisaged by Article 2(1)(c),

* Original language: Italian.

1 — OJ 1992 L 76, p. 14.

2 — See the fifth recital in the preamble thereto. Article 1 provides: '1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards: (a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and (b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies. ...'

3 — The so-called 'suspension-annulment' option is provided for in Article 2 as follows:
'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:
either
(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;
and
(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;
... .'

4 — My emphasis.

when transposing the Directive into national law.

3. Chapter II of the Directive governs the attestation system which is also relevant to the present case. Essentially, the Member States are to give contracting entities the possibility of 'having recourse to an attestation system', [5] the salient features of which are described in Articles 4 to 7. This system permits the entities in question to 'have their contract award procedures and practices which fall within the scope of Directive 90/531/EEC examined periodically with a view to obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law'. [6]

4. Chapter IV of the Directive introduces a conciliation system, available upon request. Pursuant to Article 9, application of this procedure may be requested by 'any person having or having had an interest in obtaining a particular contract falling within the scope of Directive 90/531/EEC and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules implementing that law'. [7] The task of the conciliators — provided, of course, that the contracting entity consents to initiation of the procedure in question — is to endeavour 'as quickly as possible to reach an agreement between the parties which is in accordance with Community law' [8] and to report to the Commission 'on their findings and on any result achieved'. [9]

5. The deadline set by the Directive for its implementation expired on 1 January 1993.

## The French implementing legislation

6. The Directive was transposed into French law by Law No 93-1416 of 29 December 1993 on review procedures relating to the award of certain supply and works contracts in the water, energy, transport and telecommunications sectors. [10] A copy of that Law was notified to the Commission under cover of a letter of 14 January 1994.

In order to implement Article 2 of the Directive, the French legislature chose the option

5 — See Article 3.
6 — See Article 4.
7 — See Article 10(1).
8 — See Article 10(4).
9 — See Article 10(5).
10 — JORF of 1 January 1994, p. 10.

provided for in Article 2(1)(c), under which the courts may be empowered '*[to make] an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented*'. [11]

To that end, Article 1 of Law No 93-1416 provides that on application by any person with an interest in concluding the contract and likely to be harmed by non-compliance on the part of the contracting entity, the President of the appropriate court may order the defaulting party to comply with its obligations and may prescribe the period within which it must do so. Where non-compliance persists, he may also order a periodic penalty payment (*astreinte provisoire*) to be made as from the expiry of the period prescribed. However, he may 'take into account the probable consequences of such a measure for all interests likely to be harmed, as well as the public interest, and may decide not to order such a measure where its negative consequences could exceed its benefits'. [12] The fourth paragraph of Article 1 provides that 'in setting the amount of the periodic penalty payment, regard shall be had to the conduct of the party against which the order has been made and to the difficulties which it has encountered in order to comply therewith'.

Subsequently, provision is made in the sixth paragraph of Article 1 for payment of a fixed sum by way of penalty (*astreinte définitive*): 'if, on settlement of the periodic penalty payment, the infringement in question has not been corrected, the court may order payment of a fixed sum'.

The penalty payment, whether periodic or fixed, is wholly distinct from damages and orders to make such payments may be cancelled, wholly or in part, if it is established that the default or delay in implementing the court's order has been caused, wholly or in part, by external factors. [13]

Article 4 of Law No 93-1416 confers similar powers on the President of an administrative court.

7. The French legislation in issue contains no provision specifically intended to implement Chapters II and III of the Directive, which concern, respectively, the attestation system and the conciliation procedure.

**The pre-litigation procedure**

8. By formal letter of notice of 8 September 1995, the Commission informed the French authorities that the penalty payment system introduced by Law No 93-1416 did not constitute a correct transposition of Chapter I of the Directive into national law. It also pointed out that the Law in question makes no provision for the implementation of the attestation

11 — My emphasis.

12 — See Article 1, third paragraph. (Translated freely.)

13 — See Article 1, seventh paragraph.

system or the conciliation procedure envisaged by the Directive.

Not satisfied with the French authorities' reply, the Commission delivered a reasoned opinion to the French Government on 8 November 1996.

However, not even the reply to the reasoned opinion was found to be satisfactory and the Commission therefore brought the present proceedings under Article 169 of the Treaty.

**Substance**

9. The Commission put forward a number of grounds in support of its position that the Directive had not been correctly transposed into French national law: (i) the penalty payment system introduced by Law No 93-1416 did not correctly implement Article 2 of the Directive; (ii) the French legislature had made no attempt to implement the provisions of the Directive concerning the attestation system and the conciliation procedure.

*The penalty payment system*

10. With a view to transposing the Directive into national law, France chose option (c), that is to say, the 'financial deterrent' approach, rather than the suspension-annulment option. [14] Law No 93-1416 confers on the President of the competent judicial body power to order the defaulting party to comply. At the same time, he may impose penalty payments — initially in the form of a payment *per diem*, but which can later be converted to a fixed amount. [15]

11. The Commission does not in principle take issue with the French authorities' choice of option (c), but it maintains that Law No 93-1416 has not given full effect to the relevant provisions of the Directive. The penalty payment system introduced by the French legislature is not a sufficient deterrent as expressly required by Article 2(5) of the Directive. To be more exact, the Commission argues that Article 2(5) must be given full effect by a specific provision of national law, whereas under the French legislation the fixing of penalties at a level guaranteed to deter lies entirely within the discretion of the courts. In the Commission's view, it is no defence to argue that the national courts are required nevertheless to interpret national law in the light of the aims of the Directive, hence to set

14 — See above, point 2.
15 — See above, point 6.

the penalty payment at a level sufficiently high to ensure that it acts as a deterrent. On that point, the Commission refers to the case-law of the Court to the effect that the fact that the national courts can be presumed consistently to adopt an approach consonant with the spirit and wording of a directive is not enough to meet the requirements entailed by correct transposition into national law. [16]

What, according to the Commission, would have been the proper course of action? The Commission maintains that the special deterrent character of the penalty payment system should have been guaranteed directly by the legislature. That is to say, the amounts should have been fixed by statute rather than left to the discretion of the courts. In any event, the implementing legislation should have expressly stated that penalty payments must be fixed at a level high enough to have the necessary deterrent effect, or it should have laid down rules limiting the discretion of the courts in that regard, by prescribing a minimum amount or other suitable parameters.

12. In response, the French Government contends essentially that the penalty payment constitutes by definition an adequate deterrent. Moreover, nowhere in the Directive is there provision for minimum levels to be set for amounts payable under Article 2(1)(c); nor, *a fortiori*, for such levels to be set by statute. That approach was indeed suggested by the Commission in its proposal for a directive, but was not incorporated in the text finally adopted. [17]

13. The Commission's argument leaves me somewhat confused. Above all, I am not convinced by the theory that the French legislature should have specified that the penalty payment should act as a deterrent. To my mind, that would have been wholly gratuitous. By its very nature, the penalty payment is designed precisely to undermine resistance on the part of the defaulting party, quite simply because he is thereby compelled to pay a certain sum of money for every single day of delay in complying. The penalty payment is therefore a typical means of enforcing court orders; its deterrent effect stems from its particular mode of operation. That is why an express legislative provision baldly stating that the penalty payment must act as a deterrent does absolutely nothing to enhance the dissuasive character which already distinguishes that mechanism, being as it is a means

16 — See the judgment in Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459 and the case-law cited in paragraph 13 thereof.

17 — See Article 11(2) of the Commission's proposal: 'The review body responsible for fixing the sum of money payable in accordance with paragraph 1 shall fix any such sum at a level designed to dissuade the contracting entity from committing or continuing the infringement. The amount shall at least cover any costs of preparing a bid or participating in the award procedure of the person seeking review. *The amount of such costs shall be deemed to be one per cent of the value of the contract unless the person seeking review proves that his costs were greater.* An order for payment of a sum of money in accordance with this provision shall bar any further claim by the person concerned to the recovery of the costs taken into account by the review body when fixing the order' (OJ 1990 C 216, p. 8; my emphasis).

— and a particularly effective one at that — of enforcing compliance with court rulings.

14. An altogether separate matter, and a more delicate one, is the question whether the French legislature should have made certain of the deterrent effect by specifying the relevant amounts in the implementing legislation, or by laying down specific criteria or other rules on the basis of which the amounts should be calculated so as to limit the discretion of the courts on that point. That, in my view, is the main thrust of the Commission's complaint. Article 2(5) provides, in fact, that '[t]he sum to be paid in accordance with paragraph 1(c) must *be set* at a level high enough to dissuade the contracting entity from *committing* or persisting in an infringement'. [18] The difficulty, however, lies in determining by whom the amount is to '*be set*': by the courts in the exercise of their discretion, as the French Government maintains; or indirectly by statute, through the setting of parameters within which the courts may do this.

To my mind, the correct approach is the former, which was adopted by the French legislature. The contrary view, sustained by the Commission, finds no support in the wording of the Directive: Article 2(5) does not specify that the legislature, rather than the courts, must fix the amount of the penalties payable. Moreover, the Commission acknowledges that this is not a requirement imposed directly by the Directive. On the contrary, the initial proposal made specific provision to that effect, but that formed no part of the text adopted. Admittedly, that is not in itself conclusive. It seems to me, however, that upon a proper construction of the Directive the only absolute obligation incumbent on Member States is to make the system *effective*; that is to say, to introduce a mechanism which enables infringements to be remedied and which also has a deterrent effect *vis-à-vis* future infringements. In other words, in order to give proper effect to the option provided for by the Directive at (c), the Member States must introduce a measure whereby, as a manner of speaking, a 'financial deterrent' is brought to bear, powerful enough to be *effective* in terms of attaining the objectives referred to above.

If that is indeed the position, the French legislature has correctly implemented Article 2 of the Directive through recourse to the penalty payment mechanism, which plays a special role in French law as one of the most efficient traditional methods of securing compliance with judicial rulings. [19] Moreover, I do not accept that the dissuasive force of penalty payments — which the Commission,

18 — My emphasis.

19 — See, by way of example, G. Couchez, *Voies d'Exécution*, Paris, 1994, p. 5, which emphasises the coercive nature — indirect, but particularly effective — of the penalty payment mechanism.

rightly, insists on — necessarily depends on the amount being fixed by statute in the legislation implementing the Directive. [20] On the contrary, I think that assumption is belied by the experience of those legal systems in which recourse to the penalty payment system is common: there is no doubt as to its deterrent effect, even though in many cases determination of the amount is a matter for the courts, at their discretion, rather than for the legislature. [21]

15. Certainly, the correct operation of 'option (c)' — and, particularly, the true deterrent effect of the penalty payments — depends on the prudent exercise of discretion by the courts called upon to set the amount payable. However, in my view, if the material provisions of this Directive are to be correctly implemented, the courts must be allowed to apply them with an appropriate measure of discretion. Infringements may take various forms. The conduct of contracting entities, too, may vary — according to whether or not they act in good faith, whether they are concerned to remedy infringements or to prevent them, and so on. It seems clear that such factors must be borne in mind when it comes to setting a figure to be paid under Article 2(1)(c) and there can be no body better placed to make such appraisals than the courts in the exercise of their discretion. Statutory determination of the amounts is a very blunt instrument to wield in this context. Admittedly, legislation under which the courts were able to set the figure between a minimum and a maximum amount would satisfy the requirement that penalty payments be set at an amount appropriate to the individual case. However, that approach would in no way displace the discretion of the courts when it came to quantifying the amounts in practice, albeit within the parameters set by statute. On the other hand, such parameters would have to be sufficiently wide to enable the courts to take into account the various situations which may arise. Moreover, it would not be appropriate for this Court to monitor the national legislature's exercise of discretion in fixing such thresholds when implementing the Directive.

It is significant, on the other hand, that the Directive itself conferred on review bodies a broad discretion in the exercise of their powers under Article 2. Under Article 2(4), '[t]he Member States may provide that, when considering *whether* to order interim measures, the body responsible may take into account the probable consequences of the measures

20 — Of course, there are many cases where the legislature has laid down detailed rules for determining the amount of the *astreinte*. For example, Article 16 of Council Regulation No 17/62/EEC of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (English Special Edition, 1959-62 I, p. 87) confers on the Commission power to impose 'periodic penalty payments *of from 50 to 1000 units of account* per day [of delay]'; in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), the method adopted by the Community legislature was to fix a ceiling for the periodic penalty payment (Article 15). This does not mean, however, that the *astreinte* is effective only when the legislature has fixed minimum and/or maximum amounts.

21 — See, on the subject of the rules introduced into Belgian law by the uniform Benelux legislation on the *astreinte* (Agreement signed on 26 November 1973, *Tractatenblad*, 1974, 6), the comments of J. van Compernolle, *L'Astreinte*, Brussels, 1992, p. 47. With regard to the determination of amounts, the author points out that 'the courts enjoy *the broadest possible discretion as regards determination of the amount*. ... Taking into account all the circumstances of the case, including the conduct of the defaulting party and his financial position, *the courts are free to fix the amount considered sufficient to compel the defaulting party to comply with the main order*. ... In this area, the *power of assessment of the courts is absolute*' (my emphasis).

for all interests likely to be harmed, as well as the public interest, and may decide *not to grant such measures where their negative consequences could exceed their benefits. ...*' [22] That provision would be wholly frustrated if Member States were required to adopt a system under which the competent national bodies could do no more than mechanically apply the remedies prescribed by statute.

16. The Commission argues, however, that Law No 93-1416 — in so far as it provides that the courts, in the exercise of their discretion, are to set the amount of the penalty payments, unshackled by any statutory provision in that regard — in effect delegates to the courts responsibility for the correct implementation of the Directive. The Commission maintains, therefore, that, according to the case-law of the Court, even if it is assumed that the French courts make proper use of their discretion and construe the provisions of national law in a manner consistent with the aims of the Directive, the requirements entailed by correct transposition of the Directive into national law are not satisfied. It cites on that point the Opinion of Advocate General Léger in *Commission* v *Greece*: [23] '[n]ational case-law interpreting provisions of domestic law in a manner regarded as being in conformity with the requirements of a directive is not sufficient to make those provisions into measures transposing the directive in question'.

There are two points to be made here. In the first place, the courts — in common with all other State bodies — are required to construe provisions of national law in the light of the aims of a directive. [24] Thus, the French courts are also addressees of the Directive in issue. Arguably, indeed, Article 2(5) — in so far as it lays down that the amount payable must be fixed at a level sufficient to ensure that it acts as an effective deterrent — is directed primarily at the national courts, since it also specifies the nature of the powers to be conferred on them.

Secondly, I do not think that the precedent relied upon by the Commission is relevant here. In *Commission* v *Greece*, no implementing measure existed, and by way of defence the Greek Government merely

22 — My emphasis.

23 — Case C-236/95, cited above: point 26 of the Opinion.

24 — See Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 and Case 31/87 *Beentjes* [1988] ECR 4635.

contended that the case-law of the Council of State already afforded 'sufficient judicial protection to meet the requirements of the directive'. [25] Quite properly, therefore, the Advocate General and the Court decided in that case that the situation did not meet the fundamental requirements demanded of implementing measures, namely, 'those of legal certainty and adequate publicity'. [26] The present case, however, is different. The Directive was transposed into national law by means of a specific legislative instrument and the French authorities can scarcely be criticised for not incorporating therein a provision that is neither required by the Directive nor essential for the attainment of its aims. As regards the requirements of legal certainty, to my mind these are fully satisfied — as the Court has consistently held [27] — as soon as individuals are in a position to ascertain the existence and scope of their rights under the Directive. In the present case, this means that that fundamental requirement is satisfied if the undertakings concerned are in a position to realise that remedies are available in respect of failure to comply with the Community rules on public procurement, and if the courts are able to make penalty payment orders in cases where the contracting entity fails to comply with court rulings. Prior knowledge of the level of penalty payments is not required under the Directive; nor, when considered more closely, would it satisfy any of the requirements of legal certainty. Such knowledge would in any event be merely indicative and incomplete since determination of the amount — for the reasons set out above — depends on a number of factors which are not predictable.

17. A further ground of complaint raised by the Commission against Law No 93-1416 is that the penalty payment system provided for derogates from the rules which ordinarily govern penalty payments in French law, particularly with respect to the Law of 1991 on the reform of civil enforcement procedures. [28] Thus the French authorities have infringed Article 1(2) of the Directive, which provides that 'Member States shall ensure that there is no discrimination between undertakings likely to make a claim for injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules'.

However, this ground of complaint should be dismissed, too. As the French Government correctly pointed out, the area governed by Law No 93-1416 falls outside the scope of Law No 91-650. The latter concerns the performance of obligations which have already been defined and enables the courts, *inter alia*, to make penalty payment orders. Accordingly, Law No 91-650 could not be appropriated *sic et simpliciter* as the basis for

25 — See *Commission* v *Greece*, cited above, paragraph 8.

26 — See the Opinion of the Advocate General, point 24. The Court referred, in paragraph 13 of the judgment, to a consistent line of case-law according to which 'it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts' (see Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7; and Case C-59/89 *Commission* v *Germany* [1991] ECR 2607, paragraph 18).

27 — See the judgments cited in footnote 26.

28 — Law No 91-650 of 9 July 1991 (JORF of 14 July 1991, p. 9228).

transposing the Directive into French law. It does not enable either the ordinary courts or the administrative courts to intervene in public procurement procedures. Accordingly, the adoption of Law No 93-1416 cannot be said to indicate an intention on the part of the French legislature to set up a special and less coercive procedure distinct from the rules of civil law in force. The only feature shared by the two bodies of rules is that they both provide for recourse to the penalty payment system. Otherwise, they are wholly dissimilar. Consequently, I fail to detect any infringement of Article 1(2) since, given the inapplicability of the rules laid down in Law No 91-650, the national legislature laid down special implementing rules to accommodate the particular needs which arise in disputes governed by the Directive in question.

18. Lastly, the Commission's final complaint against Law No 93-1416 remains to be examined. This concerns the distinction between periodic penalty payment orders and fixed penalty payment orders. Specifically, the Commission maintains that it is incompatible with the Directive to allow — as does Law No 93-1416 — the courts first to make a periodic penalty payment order and then, when a definitive figure is arrived at, a fixed penalty payment order. That, according to the Commission, is neither provided for nor permitted under the Directive: the Community legislature merely provided that the payment 'may be made to depend upon a final decision that the infringement has in fact taken place'. [29] Secondly, by contrast with Law No 93-1416, nowhere in the Directive is power conferred on the courts to adjust the amount payable or, in determining the amount, to take into account the conduct of the party against whom the order is made. According to the Commission, this weakens the deterrent effect of the French system.

I cannot agree. Admittedly, the Directive does not expressly draw any distinction between periodic and fixed penalty payment orders; on the other hand, neither does it expressly preclude such a distinction. The only test that can be applied in order to ascertain whether the implementing legislation correctly transposes the Directive into national law is whether or not the mechanism introduced is effective. It does not seem to me that the interplay between periodic and fixed penalty payment orders impairs its deterrent effect. Rather, to my mind, the reverse is true. [30] Indeed, the fact that, when the amount has been set, the court makes a fixed penalty payment order, taking into account the conduct of the defaulting contracting entity, means that the latter remains *sub judice*, so to speak. Where non-compliance persists, the conduct of the defaulting party may lead the court to increase the amount initially decided upon when the level of the periodic penalty payment was fixed. As for the possibility that, when quantifying the fixed penalty payment, the court may reduce the amount in order to take account of the defaulting party's conduct, it seems to me that that represents a proper

29 — See Article 2(5).

30 — See, to that effect, A. Frignani, 'Le Penalità di Mora e le Astreintes nei Diritti che si Ispirano al Modello Francese', in *Riv. Dir. Civ.*, 1981, I, p. 511: '[t]he option of increasing the level of the *astreinte* is specifically designed to enable any resistance on the part of the defaulting party to be overcome more easily. That also makes it necessary to determine definitively the amount payable'.

application of the principle of proportionality. [31] It would be contrary to that fundamental principle if the courts were compelled to determine definitively the amount payable by the contracting entity without being able to take into consideration its willingness to comply, its attempts to remedy the infringement, or any other particular features characterising the individual case.

*The attestation system*

19. The Commission alleges that France failed to adopt any measure implementing Chapter II of the Directive concerning the attestation system. The French Government, for its part, acknowledges that Law No 93-1416 does not contain any specific provisions on that subject, but maintains that these were not necessary in the circumstances. Proper effect is given to Chapter II of the Directive simply if contracting entities are made aware that they may submit their procurement procedures for attestation in accordance with its provisions. This the French authorities achieved by publishing Directive 92/13/EEC in a review which specialises in the public procurement sector and which has a particularly wide circulation. [32] So far no attestator has been designated, for the simple reason that no contracting entity has as yet requested attestation.

To my mind, the Commission's complaint in this respect must be upheld. As the Commission points out, the provisions of Chapter II of the Directive require adoption of specific provisions in the implementing legislation designed to set out in detail the attestation system decided upon, the rules governing the designation of attestators, the professional qualifications required, and so on. There is no such provision in Law No 93-1416. Furthermore, according to established case-law, the provisions of a directive must be implemented 'with unquestionable binding force, [and] with the specificity, precision and clarity required ... to satisfy the requirement of legal certainty'. [33] Consequently, 'in order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question'. [34] The mere act of publishing the Directive in a review, albeit a review with a particularly wide circulation in the public procurement sector, is not enough to satisfy the stringent requirements laid down by that case-law.

31 — In my view, it is no accident that Article 15(3) of the Regulation on the control of concentrations, cited in footnote 20, provides that 'Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, *the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision*' (my emphasis). Nor does it seem to me that that provision, which is entirely consonant with the principle of proportionality, diminishes the deterrent effect of the penalty payment.

32 — The French Government refers to the April-May 1992 edition of the review entitled *Marchés Publics*.

33 — See Case C-59/89 *Commission* v *Germany*, cited above, paragraph 24.

34 — See Case C-59/89, cited above, paragraph 28.

*The conciliation procedure*

20. Lastly, the Commission maintains that the French authorities failed to transpose into national law the provisions of Chapter IV of the Directive concerning the conciliation procedure. The French Government does not contest this, but contends that, in the present case, there was no need for any express implementing provision. Under the Directive, Member States are obliged solely to notify to the Commission requests for conciliation from interested parties; [35] moreover, the latter are sufficiently aware that recourse to such a procedure is possible under the Directive, thanks to its publication in *Marchés Publics*, the review mentioned above.

To my mind, the defence offered by the French Government is untenable. Indeed, the restricted role assigned to Member States under Chapter IV of the Directive in the context of conciliation procedures does not relieve the national authorities of their obligation to adopt measures designed to ensure that those provisions are implemented — all the more since, as the French Government acknowledges, their transposition into national law is intended to enable interested parties to learn of the existence of such a procedure, as well as the fact that they may have recourse to it. This fundamental requirement of publicity — for reasons similar to those cited in connection with the attestation system — cannot be considered satisfied by mere publication of the Directive in the edition of *Marchés Publics* referred to, which does not quite meet the requirements laid down by the case-law of the Court.

## Conclusion

21. In the light of the above considerations, I propose that the Court:

(1) declare that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with Chapters II and IV of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under that Directive;

(2) order the French Republic to pay the costs.

35 — See Article 9(2).