

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 29 April 2004¹

I — Introduction

1. These proceedings have been brought by the Commission under Article 228(2), second paragraph, EC as a sequel to the Court's judgment of 11 June 1991 in Case C-64/88 *Commission v French Republic*.² In that judgment the Court declared that by failing to carry out between 1984 and 1987 controls ensuring compliance with technical Community measures for the conservation of fishery resources,³ the French Republic had failed to fulfil its obligations under Article 1 of Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States⁴ and under Article 1 of Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities (hereinafter 'control regulations').⁵

2. More particularly, the Court found that the French Republic had failed to provide adequate controls of compliance with Community rules on:

- minimum mesh sizes,
- attachments to nets,
- by-catches and
- the minimum size of fish permitted to be sold.

1 — Original language: English.

2 — [1991] ECR I-2727.

3 — Council Regulation (EEC) No 171/83 of 25 January 1983 laying down certain technical measures for the conservation of fishery resources (OJ 1983 L 24, p. 14) and Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources (OJ 1986 L 288, p. 1).

4 — OJ 1982 L 220, p. 1.

5 — OJ 1987 L 207, p. 1.

In addition, the Court found that the French Republic had failed to fulfil its obligation to take action against the offenders against the relevant Community provisions, as required by the control regulations.

3. Some months after the Court's judgment the Commission requested the French Government to provide it with information on the measures it had taken to implement the judgment, as required by Article 228(1) EC. This proved to be the start of a protracted dialogue between the Commission and the French Government, lasting some 11 years, on the efforts made by France to enforce Community fisheries regulations. Although the Commission accepted, during this dialogue, that improvements had been made on most of these points, it remains unconvinced that the French Republic fully complies with its obligations relating to the catching and selling of undersized fish, in particular hake, and to the prosecution of offenders against the relevant rules.

4. The Commission now, therefore, requests the Court to declare that by continuing to fail to undertake control activities ensuring compliance with the technical measures for the conservation of fishery resources and by thus failing to comply with the Community control regulations, the French Republic has failed to apply all the measures necessary to implement the judgment of 11 June 1991 and consequently has failed to fulfil its obligations under Article 228(1) EC. In addition, the Commission requests the Court to order the French Republic to pay into the account 'own resources of the EC' a penalty payment of EUR 316 500 per day of delay in implementing the necessary measures to comply with that judgment, starting from

the delivery of the present judgment and until the implementation of the judgment of 11 June 1991. It finally requests the Court to order the French Republic to pay the costs.

5. The French Republic primarily requests the Court to reject as unfounded the action brought by the Commission. In the alternative, should the Court consider it appropriate to impose a penalty, the French Republic asks it to take account in its appreciation of all the circumstances of the case.

II — Relevant Community provisions

6. The Community provisions on controls in the fisheries sector which are at issue in this case were initially laid down in Council Regulation No 2057/82 and later in Council Regulation No 2241/87, both of which were referred to in paragraph 1. The controls regulation currently in force is Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy.⁶ (hereinafter Regulation No 2847/93).

⁶ — OJ 1993 L 261, p. 1.

7. In the terms of its first provision, Regulation No 2847/93 establishes a Community system in order to ensure compliance with the rules of the common fisheries policy. This system includes, in particular, provisions for the technical monitoring of, inter alia, conservation and resource management measures, as well as certain provisions relating to the effectiveness of sanctions to be applied in cases where these measures are not observed. The second paragraph of Article 1 contains the basic obligation of the Member States in respect of monitoring compliance with the Community fisheries provisions:

‘To this end, each Member State shall adopt, in accordance with Community rules, appropriate measures to ensure the effectiveness of the system. It shall place sufficient means at the disposal of its competent authorities to enable them to perform their tasks of inspection and control as laid down in this Regulation. ...’

8. Article 2(1) of Regulation No 2847/93 specifies that:

‘[i]n order to ensure compliance with all the rules in force concerning conservation and control measures, each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and

investigate all activities thus enabling verification of the implementation of this Regulation, including the activities of landing, selling, transporting and storing fish and recording landings and sales. ...’.

9. As to the enforcement measures to be taken by the Member States in respect of infringements of the Community fisheries provisions, Article 31(1) and (2) of Regulation No 2847/93 finally provide that:

‘1. Member States shall ensure that the appropriate measures be taken, including [the introduction] of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where [the provisions of the] common fisheries policy have not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation.’⁷

2. The proceedings initiated pursuant to paragraph 1 shall be capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the

⁷ — The words in square brackets were added following a comparison with other language versions of this provision as the English version in the Official Journal does not appear to be complete.

seriousness of such infringements, effectively discouraging further offences of the same kind'.

III — The pre-litigation procedure

10. In the present case the Commission asserts that monitoring and enforcement by the French authorities was inadequate in respect of Community conservation measures aimed at preventing the landing and sale of undersized fish, of hake in particular. The relevant Community measures are laid down in consecutive Council Regulations on technical measures for the conservation of fishery resources.⁸ The Regulation currently in force is Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms.⁹ Without it being necessary to quote the relevant provisions in full, it may be indicated in a more general way that this regulation contains various provisions aimed at preventing the catching, landing and sale of undersized fish. These include provisions on minimum mesh sizes of nets, a prohibition to attach devices to nets by means of which the meshes are obstructed or otherwise effectively diminished and a prohibition, *inter alia*, to land or sell undersized fish, with the exception of catches which only represent a limited percentage of the total catch.

11. As was indicated above, the question as to whether the French Republic has adopted measures to put an end to the infringements established by the Court in its judgment of 11 June 1991 was the subject of a lengthy dialogue between the Commission and the French authorities lasting from November 1991 up until the introduction of the present proceedings on 27 August 2002. Throughout this pre-litigation procedure, the Commission's position was supported by reports of Community fisheries inspectors¹⁰ containing factual findings made during regular visits to ports and auctions in various coastal regions in France.

12. In the initial correspondence between the Commission and the French Republic on the measures taken by the latter to terminate the infringements established in the judgment of 11 June 1991, the French authorities indicated that they were 'doing everything possible to act in conformity with the relevant Treaty provisions to comply with the judgment'. They referred *inter alia* to an 'action de longue haleine' aimed at reducing the landing of undersized fish.

8 — The first regulation in this field was Council Regulation (EEC) No 171/83, cited in footnote 3. Following repeated amendments this regulation was repealed and replaced by Council Regulation (EEC) No 3094/86, also cited in footnote 3, which itself was repealed and replaced by Council Regulation (EC) No 894/97 of 29 April 1997 (OJ 1997 L 132, p. 1).

9 — OJ 1998 L 125, p. 1.

10 — Article 29 of Regulation No 2847/93 provides for the verification of the application of the controls regulation by means of the examination of documents and on-the-spot visits by Community inspectors.

13. Following visits to a number of French ports in 1992, Community fisheries inspectors reported that the situation had improved, particularly as regards the legislative provisions on the monitoring of compliance with the Community fisheries provisions. Nevertheless, controls remained unsatisfactory in a number of respects. The main problems concerned the gauges used for measuring mesh sizes and the monitoring of by-catches and fish size. Furthermore, the prosecution of offenders was inadequate. Consequently, the Commission on 11 October 1993 sent a letter of formal notice to the French Republic indicating these points and inviting the French Government to submit its observations.

14. The information and explanations provided thereupon by the French Government permitted the Commission to draw the conclusion that the infringement in respect of monitoring Community rules on by-catches had been ended. However, it maintained that a number of deficiencies continued to exist, relating in particular to the measuring of mesh sizes and the landing and sale at the auctions of undersized fish. The Commission inferred from this latter fact that the French authorities adopted a permissive attitude to the landing and sale of undersized fish in violation of Community rules. Moreover, the 'action de longue haleine' had apparently been suspended in

part of Brittany, the pays Bigoudin,¹¹ because of the difficult socio-economic situation in that region and in view of the political sensitivity of the problem. The 'permissive attitude' in respect of monitoring was reinforced by prosecutions which on the whole did not lead to the imposition of sanctions which were proportionate to the seriousness of the infringements.

15. The Commission therefore, pursuant to Article 171(2) of the EC Treaty (now Article 228(2) EC), addressed a reasoned opinion to the French Republic on 14 April 1996 in which it observed that the Court's judgment of 11 June 1991 had not yet been fully complied with on the following points:

- failure to comply with Community provisions on the measurement of minimum mesh sizes;
- insufficiency of controls, permitting the sale of undersized fish;
- permissive attitude of the French authorities which was encouraged by the fact

¹¹ — The pays Bigoudin is in Finistère in the south-west of Brittany. The ports of Le Guilvinec, Loctudy, Lesconil and St. Guénolé are situated in this region.

that the prosecution of offences did not, on the whole, lead to the imposition of penalties which were proportionate to the seriousness of the infringement and therefore were not dissuasive.

The Commission drew the attention of the French Republic to the possibility of pecuniary sanctions being imposed by the Court in case of non-compliance with the judgment of 11 June 1991. It was requested to react within two months following the notification of the reasoned opinion.

16. In its responses of 26 July 1996 and 27 May 1997 to the reasoned opinion the French Republic asserted that Community regulations on minimum mesh sizes were properly applied and that it had not received any complaints from Community fisheries inspectors on this issue. It also provided information and figures on inspections carried out, on sanctions imposed and on the resources allocated to the monitoring of compliance with the Community fisheries provisions. Finally, the French Republic complained that the reports with the findings of the Community fisheries inspectors had not been made available to it, thus depriving it of the opportunity to respond adequately to the facts mentioned in the reasoned opinion.

17. In further letters, the French Government provided additional information to the Commission on the increase of French

control effort and of the measures it had taken to improve the internal organisation of the services responsible for monitoring compliance with Community fisheries rules. In one letter (of 31 October 1997) it observes that a satisfactory balance in the application of Community and national provisions appears to have been achieved, 'besides the residual problem of the size of small hake ("merluchon") in the pays Bigouden'.

18. Despite these observations and the positive developments indicated by the French authorities at the organisational level, further visits by Community fisheries inspectors to French ports and auctions in the coastal regions from 1996 to 2000 revealed that the problem of the landing and sale of undersized fish was persistent. On various occasions, the Community inspectors noted that either no officials were present during landings and at auctions or that officials who were present did not take any action against the sale of undersized hake (visit to Le Guilvinec and Concarneau in September 1997 and to Marennes-Oleron, Arcachon and Bayonne in October 1997). One report (visit to Lorient, Le Guilvinec and Concarneau in August 1996) refers to the existence of 'a silent agreement between industry and authorities to accept landings of hake measuring 24 cm instead of the legal size of 27 cm'. Another report (visit to Douarnenez, Lorient and Le Guilvinec in March 1999) states that verbal instructions existed to the effect that local officials were to remove fish under 17 cm from the auction, but that fish measuring between 17 and 23 cm and 23 and 26 cm were to be permitted to be sold. A further finding was that this undersized hake, often sold as 'merluchon friture' (frying

hake), was usually auctioned openly under the grading '00' which was reserved for this category of fish as well as for undersized fish of other species (visit to Lorient, Benodet, Loctudy, Le Guilvinec, Lesconil and St. Guérolé in July 1999). Finally, during a visit to the Mediterranean ports of Sète, Agde and Port Vendres in April 2000 it became apparent that the practices described were not confined to Brittany, but that the problem was more widespread within the French Republic.

of the 'merluchon' (small hake) is politically sensitive, that it concerns one region in particular and that the problem has diminished significantly in recent years cannot, in its view, justify the non-application of technical conservation measures. As the measures concerned are aimed at protecting juvenile fish, the systematic disrespect of the Community provisions can have disastrous consequences for the state of the available stocks. The infringement of these provisions is therefore serious, particularly as the French authorities appear to have given instructions not to apply them. The Commission invited the French Government to take the necessary measures within two months of the notification of the supplementary reasoned opinion to remedy the infringements it had identified.

19. These findings by the Community fisheries inspectors led the Commission to issue a supplementary reasoned opinion on 6 June 2000. The Commission concludes that since the reasoned opinion of 17 April 1996 and the response of the French Government, undersized fish continues to be sold at auctions and directly to buyers, that national inspectors do not supervise landings and auctions with a view to detecting undersized fish, especially hake, and that infringements are only prosecuted sporadically. The Commission considers the use of code '00' in official documents relating to auctions particularly serious as this is a manifest infringement of the provisions of Council Regulation (EC) No 2406/96 of 26 November 1996 laying down common marketing standards for certain fishery products,¹² and of Article 2 in particular. The fact that the problem

20. The French Government replied on 1 August 2000, emphasising three points in particular. Firstly, it stated that the code '00' was never used as an indication for undersized fish, but that it was used to denote non-sorted fish of various sizes. Secondly, it maintained that in their reports Community fisheries inspectors had apparently confused persons responsible for the commercial operation of sales structures with persons charged with the application of fisheries regulations, who alone were competent to establish that an infringement had occurred. The French Government considers it excessive, and even unjust, to conclude that the surveillance services had displayed a permissive attitude in view of the figures communicated to the Commission on action taken by French authorities in respect of infringements of the rules on minimum fish size.

12 — OJ 1996 L 334, p. 1.

Thirdly, it explained that since the Community inspectors' report of July 1999 the organisational and legal framework for the monitoring of compliance with the fisheries regulations had been significantly improved. The reorganisation of the control services attests to the firm intention of the French authorities to increase the effectiveness of controls in the fisheries sector.

21. The Commission reacted (15 February 2001) by requesting further information on the measures taken by the French Republic to end the use of code '00'. In addition, having taken note of the willingness of the French Republic to reinforce its surveillance capability, the Commission pointed out that its supplementary reasoned opinion focused on the problem of the landing and sale of undersized hake in the Breton regions of Finistère and Morbihan in particular. It therefore requested the French authorities to communicate judgments to it relating to this particular type of infringement. This information was provided by the French Government on 16 October 2001. Firstly, it communicated a circular addressed to the regional and departmental authorities to put an end to the use of the code '00' by the end of 2001 at the latest. Next it referred to the fact that copies of official reports of offences and seizures and of relevant judgments had been sent to the Commission. It also pointed out that since 1998 the number of prosecutions in respect of infringements of the rules on minimum fish size has increased and dissuasive penalties have been imposed. Finally, the French Government referred to

a general control plan for the fisheries sector adopted in 2001 fixing priorities for monitoring compliance with fisheries provisions. These priorities included the execution of a plan for the restoration of hake and strict monitoring of minimum fish size.

22. In the meantime, Community fisheries inspectors had once again (in June 2001) made a visit to a number of ports in the pays Bigoudin and once again observed that the level and quality of controls was still inadequate. The inspectors concluded that the level of compliance with technical measures in this area cannot yet be deemed acceptable. Undersized hake was landed and marketed constantly without tangible control efforts being made to end these practices. They noted further that national authorities responsible were under-resourced, ill-equipped and not well enough trained. Administrative procedures were not sufficiently developed to meet the demands of the situation. Finally, they remarked that the level and quality of controls in auctions and at retail outlets was extremely low.

23. Considering that the information provided by the French Republic on the improvement of its monitoring efforts in general does not sufficiently address the problem of enforcing Community provisions in respect of undersized hake in the pays Bigoudin region, the Commission took the view that the French Republic had still not

taken adequate measures to comply with the Court's Judgment of 11 June 1991. Consequently, the Commission introduced the present proceedings under Article 228(2) EC by lodging its request on 27 August 2002. The conclusions of both parties have already been reproduced in paragraphs 4 and 5 of this Opinion.

ceedings with a view to ensuring compliance with the provisions on minimum fish size and to indicate the number of infringements and the legal action taken in respect of these infringements. Both parties provided the information requested on 30 January 2004.

IV — The current situation

24. In preparation of the oral hearing, on 19 December 2003 the Court addressed a number of written questions to the Commission and the French Republic on the current situation in respect of the problem of the landing and sale of undersized fish. The Commission was asked whether Community fisheries inspectors had conducted on-the-spot inspections since the introduction of the present proceedings, if so, to submit the inspectors' reports and, in the event that it was reported that the sale of important quantities of undersized fish persisted, to indicate which measures should be adopted by the French authorities to end this situation. The French Republic was requested to provide information on the number of controls conducted at sea and on land (both within and outside the auctions) since the introduction of the present pro-

25. The Commission answered that three on-the-spot verifications had taken place since the introduction of the present proceedings. During these visits it had been established that although the offering of undersized hake for sale had decreased in Brittany, and the pays Bigoudin in particular, this was not the case in the Mediterranean regions. Community inspectors noted the lack of controls aimed at preventing the sale of undersized fish during landing and observed that an official report was not drawn up in all cases of infringement. Despite the measures adopted by the French authorities since 1998 to improve controls, the Commission was unable to establish that these had had a real effect. On the contrary, it has reason to believe that this is not the case. In order to be able to conclude that the infringement had indeed been terminated it would need to be provided with complete and exhaustive information on all controls carried out in the years 2001, 2002 and 2003 in respect of undersized fish and of hake in particular. During the oral hearing the Commission added that adequate compliance with Regulation No 2847/93 requires that the whole chain of activities relating to fisheries should be monitored and that

monitoring of landings is particularly important in that series of events. The information and figures provided by the French Government are not specific enough to be able to conclude that the infringement has been ended.

27. During the oral hearing the French Government responded to the Commission's observation that although it recognised that the landing of undersized hake had diminished in the area which preoccupied it most, the pays Bigoudin in Brittany, a problem remained in respect of the Mediterranean coast. It comments that as at the time of the Court's judgment of 11 June 1991 no specific conservation measures applied to fisheries in the Mediterranean, the fact that compliance with Regulation No 2847/93 is not yet satisfactory in that region cannot be regarded as being a failure to implement the Court's judgment.

26. In its response the French Government provided figures on inspections at sea and on land for the years 2001 to 2003. It appears from these figures that there was a sizeable decrease in both types of inspection in 2003 compared with the two preceding years. The decrease in inspections at sea in 2003 was explained by the deployment of maritime vessels to combat the pollution following the sinking of the oil tanker *Prestige*. According to the French Government, the decrease in controls on land was due to an improvement of discipline on the part of fishermen, which had also been noted by the Commission inspectors during an unannounced visit in June 2003. No undersized fish was observed on that occasion. The figures on penalties imposed also showed a decrease from 2001 to 2002. This was caused by an amnesty law¹³ pardoning those condemned to fines below EUR 750 and only granting a pardon to those condemned to higher fines after these had been duly paid. The fines imposed in relation to infringements of the rules on fish size were considerably higher.

V — Assessment

A — Preliminary observations: the duty to enforce in the context of the CFP

28. Before embarking on an assessment of the measures adopted by the French Republic in order to comply with the relevant Community fisheries provisions following the Court's judgment of 11 June 1991, the problem which is at issue in this case should first be placed in its proper context, i.e. the importance of the enforcement of provisions of Community law, particularly in the field of the common fisheries policy.

13 — Loi n° 2002-1062 of 6 August 2002 (Loi portant amnistie).

29. In a general sense the Community legal order, although it is autonomous, is a dependent legal order to the extent that, in most fields, it depends on the efforts of the Member States to ensure full compliance with the obligations it imposes on economic operators. Member States are under a general obligation under Article 10 EC to take all measures necessary to ensure that Community law is applied and enforced effectively and that its 'effet utile' is achieved. More particularly, Member States must ensure that an adequate regulatory framework is in place for the application and enforcement of Community measures, that competent authorities have been appointed, that sufficient resources are made available and that appropriate action is taken against offenders. Where enforcement effort in the Member States is inadequate, it will be impossible to attain the objectives of the relevant Community provisions in a more or less uniform fashion throughout the Community.

30. Although the Member States enjoy a large measure of discretion in determining how to attain this objective, the Court in its case-law has laid down certain standards in respect of the procedural rules which apply to the enforcement of Community rights and obligations. More particularly, it has held in well established case-law that such rules may not be less favourable than those governing similar domestic actions (the principle of equivalence) and may not render virtually impossible or excessively difficult the exer-

cise of rights conferred by Community law (the principle of effectiveness).¹⁴ Furthermore the Court has clarified that the obligations incumbent on the Member States under Article 10 EC in respect of enforcement require them to ensure 'that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws'.¹⁵

31. Strict compliance with these general obligations in respect of the effective application and enforcement of Community measures is of particular importance in the context of the common fisheries policy (hereafter: CFP) for a number of reasons. These reasons concern the nature of fishing as an economic activity, the fact that fish stocks in Community waters must be regarded as a resource common to the Member States, the interdependence

14 — I will only refer to one of the most recent statements of this principle in Case C-63/01 *Evans*, judgment of 7 January 2004, not yet published in the ECR at paragraph 45.

15 — See Case 68/88 *Commission v Greece* [1989] ECR 2965, at paragraphs 24 and 25 of the judgment.

between Member States' interests in this area and the moral hazard involved in imposing restrictions on the exploitation of resources.

basic fact explains why detailed rules on controls and enforcement have been an integral part of the CFP from the outset.

32. The management of a natural resource such as fish stocks involves reconciling (short term) economic interests aimed at maximum exploitation on the one hand with the interest of maintaining stocks at a biologically and ecologically acceptable level to ensure exploitation in the long term on the other. This basic tension is also expressed by Article 2 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy,¹⁶ according to which the main objective of the CFP is to 'ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions'. In this formula the notion of sustainability is the guiding principle. For, one of the peculiarities of fishing as an economic activity is that the product is also the source of production. It is a renewable resource. This means that there is a natural, biologically tenable limit to the level of exploitation of fish stocks. If measures designed to limit fishing effort or to protect juvenile stocks are not complied with, this will necessarily affect the reproductive capacity of fish stocks in the longer term. This

33. The Court, too, underlined the need for strict compliance with conservation measures in the fisheries sector with a view to maintaining productive capacity in the longer term where it observed that '[i]t is imperative that the Member States fulfil the obligations incumbent on them under the Community rules for the conservation and management of fish stocks in order to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions'.¹⁷ In the same vein, it indicated that '[i]f the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for ... infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised'.¹⁸

34. Fish stocks must be regarded as a common resource of the Member States to be managed by all in the interest of all. Lack of compliance with Community conservation measures in one Member State automatically affects the interests of (the fishing

17 — See Joined Cases C-418/00 and C-419/00 *Commission v France*, [2002] ECR I-3969, at paragraph 57 of the judgment.

18 — See Case C-52/95 *Commission v France* [1995] ECR I-4443 at paragraph 35 of the judgment, Case C-454/99 *Commission v United Kingdom*, [2002] ECR I-10323 at paragraph 60 of the judgment and Case C-140/00 *Commission v United Kingdom* [2002] ECR I-10379 at paragraph 57 of the judgment.

industry in) other Member States. There is, in other words, a strong degree of interdependence in this sector implying a 'joint responsibility'¹⁹ of the Member States to monitor the system of catch limitations and to enforce the provisions aimed at protecting fish stocks from overexploitation.

non-compliance. Scarcity resulting from the fact that lower quantities of fish may be landed will lead to higher prices which in itself will make it profitable for fishermen to contravene the relevant rules. Imposing restrictions thus creates an economic incentive to continue exploiting stocks which are already under pressure. This in itself is a reason to increase surveillance and enforcement effort in respect of fisheries which are threatened by overexploitation.

35. One other aspect of this interdependence is that attaining the objectives of the CFP obviously depends in the first place on the cooperation of the fishing industry. It may be presumed that the willingness to accept and comply with restrictions imposed on fishing activity will be greater if fishermen can rely on these restrictions being enforced equally by all Member States and consequently operate under conditions comparable to those to which their competitors from other Member States are subject. Differences in the way the CFP provisions are enforced by the Member States may be perceived as discriminatory leading to distortion of competition. Equality of enforcement is one aspect of the level playing-field on which they should be able to operate.

37. These observations demonstrate that adequate supervision and enforcement in the fisheries sector are vital to ensuring that fish stocks are exploited in a sustainable manner. As insufficiency in this respect has repercussions for the conservation of resources common to all Member States, their enforcement efforts must meet high standards. This means that the obligations imposed on the Member States by Regulation No 2847/93 must be interpreted strictly.

36. Furthermore, it should be realized that where a given fishery is limited for reasons of conservation, this entails the moral hazard of

38. Taken as a whole Article 1 of Regulation No 2847/93 requires the Member States 'to adopt ... appropriate measures to ensure the effectiveness of the system' set up 'to ensure compliance with the rules of the common fisheries policy'. Article 2 adds that they are to monitor fishing activity and related activities and to inspect fishing vessels and investigate all activities enabling verification

¹⁹ — Case C-9/89 *Spain v Council* [1990] ECR I-1383 at paragraphs 10 and 31 of the judgment.

of the implementation of the regulation, including the activities of inter alia landing and selling of fish. Finally, Article 31 obliges the Member States to adopt appropriate measures against natural and legal persons who have not respected CFP rules and either to deprive those responsible of the economic benefit of the infringements or to take measures 'proportionate to the seriousness of the infringements, effectively discouraging further offences of the same kind'.

39. The result to be achieved by the Member States under Regulation No 2847/93 is therefore to ensure that their surveillance and enforcement activities are indeed effective. 'Effective' in this context must be understood as meaning that there is a credible probability that, in case of non-compliance, fishermen will be running a high risk of being detected and of sanctions being imposed which would at least deprive them of any economic benefit accruing from the transgression of the fisheries provisions. Control effort and the threat of repressive action must generate sufficient pressure to make non-compliance economically unattractive and therefore to ensure that the situation envisaged by the relevant fisheries provisions is realised in practice.

40. This is the standard which must be applied in assessing whether the alleged infringement by the French Republic still subsists.

B — Two general points: date of reference and evidence

41. Firstly, in proceedings under Article 228 (2) EC, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion issued by the Commission. In the present case the Commission addressed an initial reasoned opinion to the French Republic on 14 April 1996. This was supplemented by a second reasoned opinion of 6 June 2000. As the time-limit set in this latter document for putting an end to the infringement was two months, the moment for determining whether the French Republic has fulfilled its obligation under Article 228(2) EC to comply with the Court's judgment of 11 June 1991 is 6 August 2000.²⁰

42. This implies that for the purposes of determining whether or not the alleged infringement subsists no account can be taken of developments since that date.²¹ Such developments are, however, relevant in

²⁰ — Case C-474/99 *Commission v Spain* [2002] ECR I-5293, at paragraph 27 of the judgment; Case C-33/01 *Commission v Greece* [2002] ECR I-5447 at paragraph 13 of the judgment.

²¹ — Case C-147/00 *Commission v France* [2001] ECR I-2387 at paragraph 26 of the judgment; Joined Cases C-418/00 and C-419/00 *Commission v France* cited in footnote 17 above at paragraph 66 of the judgment.

assessing whether it is expedient to impose a lump sum or a periodic penalty payment, as provided for in Article 228(2), third paragraph, EC. I will return to this aspect below.

the Commission relies were never communicated to it so that it did not have the opportunity of reacting to the findings in these reports. In its view, the various arguments advanced by the Commission are not supported by precise facts and are based on simple suppositions, which gives them a subjective flavour.

43. The second point concerns evidence. The Commission's allegation concerning the insufficiency of controls and of action taken pursuant to infringements of the Community rules on minimum fish size is based largely on the reports (present in the case-file) drawn up by Community fisheries inspectors on their regular on-the-spot verifications in coastal regions in France. These reports cover the years from May 1994 to July 2003.

45. It is true that the establishment of an infringement within the meaning of Articles 226 and 228 EC must be based on the objective finding²³ that the Member State has failed to fulfil its obligations under the Treaty or secondary legislation. In this respect the question is whether the information contained in the reports of the Community fisheries inspectors is sufficient to constitute such an objective finding.

44. The French Government objects to the fact that the Commission confines itself to stating that the measures adopted by the French authorities with a view to terminating the remaining infringements were inappropriate without indicating which measures would have been suitable. It also complains that the Commission simply dismissed the facts and figures provided by it as being insufficient, without refuting them, whereas it is up to the Commission to demonstrate that the Member State concerned is still in breach of its Treaty obligations.²² In addition, it claims that the reports of the Community fisheries inspectors on which

46. In the circumstances of the present case, I indeed consider the reports to be a reliable source on the situation in respect of surveillance practice in the French ports and auctions visited by them. Taken together, these reports provide an overall and consistent picture of the practice of monitoring compliance with the Community conservation measures in the French Republic in the past 10 years. Although the French Government states that the reports themselves were not sent to it, these do include accounts of debriefing meetings during which the competent national authorities were informed of

22 — Case C-387/97 *Commission v Greece* [2000] ECR I-5047 at paragraphs 72 et seq. of the judgment.

23 — Case C-71/97 *Commission v Spain* [1998] ECR I-5991 at paragraph 14 of the judgment; Case C-333/99 *Commission v France* [2001] ECR I-1025 at paragraph 33 of the judgment.

the results of the verification visits. Furthermore, it may be recalled that the Court accepted similar reports of Community inspectors in its judgment of 11 June 1991 as evidence of the infringement of the control regulations, given the fact that the French Government had reports drawn up by its own departments in respect of the inspections in question and therefore was in a position to challenge the correctness of the findings of the Community inspectors.²⁴

suitable as monitoring catches landed and fish sold at auctions. Though welcoming the adoption of control plans of 2001 and 2002, the Commission remarks that these cannot in themselves end the infringement, as this depends on the way they are implemented in practice. The Commission has not been able to establish that the situation has indeed improved. As to the fact that no undersized fish were discovered during the mission of September 2002, the Commission indicates that the object of this mission was the management of fish quotas and that this fact must not be regarded as an implicit finding in relation to the monitoring of compliance with the rules on undersized fish.

C — The first complaint: the insufficiency of controls

47. As to the Commission's first complaint, the French Government observes that since the Court's judgment of 11 June 1991 it has not ceased reinforcing its surveillance capability. In this context it refers to three aspects in particular: (a) the rise in the number of inspections, (b) the adoption of control plans and (c) the fact that during a visit by Community fisheries inspectors in September 2002 no undersized fish had been detected.

48. The Commission retorts that the figures on the increase in inspections related to inspections at sea and that these are not as

49. The French Government objects to the fact that the Commission does not explain why inspections at sea are less effective than on land and regards its arguments relating to its first complaint as incoherent and unfounded. It points out that the control plans of 2001 and 2002 provide for controls being carried out at all stages of the chain of production, both at sea and on land and at all stages of commercialisation. The increase in the number of controls is borne out by figures relating to the period from September 2001 to February 2002. The French Government maintains that the Commission's answer on the subject of the mission of September contradicts the fact that it relies on the findings of precisely this mission to prove the weakness of controls.

²⁴ — Case C-64/88 *Commission v France* cited in footnote 2 above at paragraph 11 of the judgment.

50. Regulation No 2847/93 requires Member States to monitor all activities relating to fisheries from catching to commercialisation in an effective manner. It must be recognised that the French Republic has adopted various measures aimed at improving the monitoring of compliance with the provisions of the CFP in general, such as increasing inspections at sea, allocating extra resources to monitoring, reorganising its internal control services, improving its legal framework and drawing up control plans, programmes and circulars instructing regional officials to monitor compliance with the Community rules on minimum fish size. However, although such measures are obviously necessary to attain the objectives of the control regulation, they can only be regarded as being effective if, as I pointed out in paragraph 39 of this Opinion, they result in a situation in practice which corresponds to that envisaged by the provisions of the CFP.

In other cases, national officials were present, but did not take action against offenders. In general, it was observed more than once that the quality and level of controls were low, that there was a lack of human resources and that where inspections were carried out this was done inefficiently. It was also reported on occasion that in view of the political sensitivity of the problem, national inspectors had received oral instructions only to act against the landing and sale of extreme cases of undersized hake (below 17 cm), but to permit the sale of undersized hake above that level. Reference was also made to the existence of a tacit agreement between the fishermen and the authorities to permit the landing of undersized hake. The fact that there was a market for undersized hake was evidenced by the use of the diminutive for hake (merlu), 'merluchon' or 'merluchon friture', usually auctioned under a special code '00' in contravention of Community rules on marketing standards for fishery products.

51. In order to ascertain whether this is the case, the reports of the Community fisheries inspectors constitute a valuable source of information. These reports contain numerous and repeated indications of failure to monitor compliance in an efficient and effective manner in the sense indicated above. Although noting improvements in the legal framework and efforts to improve monitoring, they consistently register the landing and sale at the auctions of undersized fish, particularly in Brittany, in the pays Bigoudin, but also in other regions, such as Normandy and the Mediterranean. In some cases this occurred in the absence of national authorities competent for detecting infringe-

52. On this basis, it appears to me completely justified that the Community inspectors reported as their general impression that the French authorities displayed a tolerant or permissive attitude towards monitoring compliance with the Community provisions on fish size. Where the French Government contends that the Commission bases its case on presumptions, I would consider that the fact that undersized fish could be continu-

ously landed and sold is clearly indicative of inadequate and ineffective control effort.²⁵ Moreover, it is significant that at one stage of the pre-litigation procedure the French Republic itself recognised in its correspondence with the Commission that the problem in the pays Bigoudin was 'residual'.

— Even when the responsible authorities are present during landings, they do not carry out effective landing controls.

— Insufficient attention is paid to the removal of undersized fish from commercialisation.

53. The continued existence of this unsatisfactory situation was confirmed by a report following a visit to the Breton coast in June 2001, i.e. after the expiry of the time-limit in the supplementary reasoned opinion. I will quote the main conclusions in this report:

— The grading procedures in Le Guilvinec and Lesconsil comprise the use of the denominations NT and 00 for the smallest size hake, which has already been sorted before landing.

— 'Although very small hake (under 20 cm) is no longer commercialised in the pays Bigoudin area, undersized hake is continuously landed, auctioned and further commercialised there.

— The control of the activities of the auctions is not carried out adequately. ...'

— The resources available for control purposes in the pays Bigoudin area are clearly insufficient.

54. The series of reports drawn up in the past 10 years, in my view, do not merely register isolated incidents. They testify to a structural situation which has lasted for many years, particularly in the Breton region, the pays Bigoudin. More importantly for the purposes of the present proceedings, this situation still existed at the end of the time-limit laid down in the supplementary reasoned opinion of 6 June 2000.

25 — Cf. Case C-333/99 *Commission v France* cited in footnote 23 above at paragraph 35 of the judgment.

55. In contending that it has ended the alleged infringement the French Government refers to its increased surveillance efforts at sea, to the general control plans of 2001 and 2002 and the specific control plan of 2002 aimed at undersized fish and to the fact that during a visit by Community fisheries inspectors in September 2002 no undersized fish were observed.

56. None of these arguments, in my opinion, are sufficient to counter the evidence provided by the reports of the Community fisheries inspectors. Where the French Government objects that the Commission merely asserts that inspections at sea are less effective than inspections on land, this point may be dismissed as irrelevant as Article 2(1) of Regulation No 2847/93 obliges the Member States not only to inspect fishing vessels, but to investigate all activities enabling verification of the implementation of that regulation, including landing, selling, transporting and storing fish. Member States are, therefore, required to exercise controls both at sea and on land, irrespective of their own judgment as to which type of surveillance is more or less effective. As to the control plans of 2001 and 2002, I would point out that in order to be able to contribute to ending the alleged infringement, it must be shown that they are effective in practice. At any rate these plans were only adopted after the expiry of the time-limit imposed in the supplementary reasoned opinion, so for that

reason alone they cannot be taken into consideration.²⁶ For the same reason, the reference to the visit of September 2002 is not pertinent.

57. On the whole, it emerges from the documents and information presented to the Court that the French Republic only started taking measures to comply with the Court's judgment of 11 June 1991 gradually and that the control plans were adopted at a very late stage. From the repeated reports of the landing and sale of undersized hake, it is clear that the measures it did adopt were not effective with a view to ensuring compliance with Community provisions on fish size. In the years under discussion hake stocks suffered a decline which led to a significant reduction of the total allowable catch for hake towards the end of 2000, the adoption of special conservation measures and the adoption of a programme for the restoration of hake. In such circumstances Member States have a particular responsibility to enforce the relevant conservation measures.

58. On the basis of the foregoing I consider that by not adequately monitoring compliance with technical conservation measures on minimum fish size in conformity with

26 — See the cases referred to in footnote 21 above.

Articles 1(2) and 2(1) of Regulation No 2847/93 as of 6 August 2000 the French Republic had not complied with the Court's judgment of 11 June 1991 at the end of the time-limit set in the supplementary reasoned opinion of 6 June 2000.

59. In view of the fact that these proceedings were brought under Article 228(2) EC and the Commission has requested that a periodic penalty payment be imposed from the day of the delivery of the judgment in this case till the time the French Republic has fully complied with the obligations at issue, it must be further considered whether the current situation is in conformity with Regulation No 2847/93.

60. Since the expiry of the time-limit set in the supplementary reasoned opinion, the adoption of the control plans in 2001 and 2002 demonstrates that the problem of monitoring compliance with Community conservation measures is being taken more seriously at the policy level in the French Republic. As I observed earlier, the question is whether the implementation of these plans (of which it must be said that they were adopted extremely late having regard to the duration of the infringement) has resulted in a situation which is in line with that envisaged by the Community provisions on the conservation of fish stocks.

61. The information provided by the Commission in response to the written questions put by the Court suggests that although the situation in the pays Bigoudin has improved, problems still subsist in other coastal regions, especially in the Mediterranean region. The French Republic on the other hand refers to figures which show a downward trend in the number of inspections carried out at sea and on land in 2003 in comparison with 2002. Where it ascribes the decrease in the number of inspections on land to an improvement of discipline on the part of the fishermen, I consider this to be contradictory. If compliance with Community fisheries regulations in the pays Bigoudin has improved as a result of more effective monitoring, it would seem more logical to maintain monitoring effort at that level, particularly in a region where overexploitation of hake stocks has been endemic for more than a decade.

62. The French Government observed during the oral hearing that whereas the Commission considers that the situation in the pays Bigoudin has improved, it is now apparently concerned about the controls carried out in the Mediterranean region. However, in its view, that problem cannot be regarded as non-compliance with the Court's judgment of 11 June 1991, as Community conservation measures for that region were only adopted some years after the judgment.

63. On this issue I would point out that in its judgment of 11 June 1991 the Court established that the French Republic had failed to comply with its obligations under the control regulations then in force, Regulation No 2057/82/EEC and Regulation No 2241/87/EEC. It must be realized that the CFP evolves over time, both *ratione loci* and *ratione materiae*, in the light of the developments in the fisheries sector and the state of fish stocks. Although, from a substantive point of view, the obligations to monitor and enforce compliance with the conservation measures obviously follow the scope of these measures at any given moment in time, these are self-standing obligations. The Commission's complaints are aimed at the insufficiency of controls as such. This was illustrated most emphatically by reference to the monitoring of the fisheries relating to undersized hake in the pays Bigoudin in particular. However, the subject of both Case C-64/88 and the present case remains the insufficiency of controls. The Court's finding in its judgment of 11 June 1991 concerned the lack of monitoring effort in respect of the fisheries provisions then in force, irrespective of the territorial scope of these provisions. The fact that the provisions which are the subject of the obligations of control themselves may change does not affect the basic obligation to monitor compliance and enforce these provisions. The French Government's argument that the situation in the Mediterranean region may not be taken into account, a point moreover which it did not refer to earlier even though it was raised by the Commission during the pre-litigation procedure (see paragraph 18 of this Opinion), I therefore consider to be irrelevant for the purposes of assessing whether or not the infringement still exists.

64. According to the most recent information in the case-file on the current situation

Community inspectors did not detect any undersized fish during a visit to the pays Bigoudin in June 2003. They did report, however, a noticeable lack of controls on landing, which is arguably the most vital monitoring moment in the chain of fisheries activities. Similar observations were made for the Mediterranean region following visits of May and July 2003 where undersized hake was observed. On the other hand, where one of these missions was in part aimed at compliance with the minimum size for bluefin tuna, no undersized specimens were found.

65. The Commission, in its response to the written questions put by the Court, states that it has been unable to determine that the control plans adopted by the French authorities have had a real effect. On the basis of the most recent reports of its fisheries inspectors it is inclined to think the contrary. At the same time, it indicates that in order to be able to conclude that the infringement has been ended it would need to be provided with accurate and exhaustive information on a number of points.

66. In this case it has already been established that at the end of the time-limit set in the supplementary reasoned opinion the French Republic had not yet complied with the Court's judgment of 11 June 1991. On the basis of the information available to the Court and in view of the structural and protracted nature of this infringement, it

cannot be determined conclusively that the French Republic at the present moment, which cannot be regarded in isolation from the past situation, has brought its practice of monitoring compliance with and enforcement of the Community fisheries conservation measures in line with the standard imposed by Regulation No 2847/93.

which a sizeable fine was imposed concerned a Spanish vessel and related to six separate infringements, only one of which was the catching of undersized hake. The Commission recognises that a circular of the Minister of Justice of 16 October 2002 addressed to the public prosecutors in the coastal regions inciting them to act strictly against offenders against fish size regulations is a step in the right direction towards ending the infringement. However, it alone cannot assure the imposition of dissuasive penalties. The way in which it is applied and its geographical scope both need to be verified.

D — The second complaint: the insufficiency of action taken against offenders

67. In reaction to the Commission's second complaint, the French Government refers to the increase in the number of prosecutions and to the significance of the sanctions imposed.

68. The Commission observes that the figures submitted by the French Government are very general, in that they concern the whole of the French territory and that most of the convictions concern transgressions detected at sea and did not relate to the catching of undersized fish. It appears from statistics on criminal procedures initiated in 2001 in respect of serious violations of the CFP provisions that sanctions were imposed in only 11 % of the cases concerning undersized fish. As to the significance of the sanctions imposed, the Commission cannot infer from the figures provided for the year 2001 that a strict policy is followed in respect of the enforcement of the rules on the minimum size of fish. The only case in

69. The French Republic states that given the figures on action taken in respect of the violations which it had detected in the context of its plan of 2001 for the restoration of hake stocks, it cannot be maintained that the French authorities do not prosecute offenders against the Community provisions on fish size, in particular in relation to hake. It adds that a mere statistical analysis of the number of prosecutions is not sufficient to judge the effectiveness of a system of controls and enforcement. The Commission simply relies on one such statistic, without demonstrating why the national measures are not 'appropriate measures' within the meaning of Article 31 of Regulation No 2847/93. Regarding the severity of the action taken, the French Government observes that it is quite clear from the information provided to the Commission that infringements are prosecuted systematically. The circular of the Minister of Justice of 16 October 2002, which gives effect to the plan on the supervision of minimum fish size, requires (i) the systematic prosecu-

tion of infringements, (ii) limited use of the possibility to offer offenders a compromise ('transaction') and (iii) the imposition of dissuasive penalties. It adds that infringements of the sea fisheries regulations are not as such pardonable under the amnesty law of 2002, but that this depends on the level of the fine. First reports on the application of the circular in the period up until March 2003 indicate that it is indeed effective.

general preventive effect. This is borne out by the second paragraph of Article 31 which provides that proceedings brought in respect of infringements must 'be capable ... of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind'. The last part of this provision, in my view, denotes this more general preventive effect.

70. Again, in assessing whether the French Republic has ended the infringement under this second heading of complaint, a distinction must be made between the situation prevailing at the end of the time-limit set in the supplementary reasoned opinion and the current situation.

72. I must immediately point out that where the English language version of Article 31(1) of Regulation No 2847/93 distinguishes between 'administrative action' and 'criminal proceedings', thus creating the impression that the second paragraph (which refers to 'proceedings') only applies to criminal proceedings, most other language versions do not make this distinction, so that the second paragraph applies to both types of enforcement. Given the objective of Regulation No 2847/93 to effectively ensure compliance with the CFP provisions, it is evident that these other language versions express the meaning of Article 31 more accurately.

71. It may be recalled that according to Article 31(1) of Regulation No 2847/93 Member States are to adopt 'appropriate measures' where they have established a breach of the provisions of the CFP. The term 'appropriate' in this context can only mean that such measures must be capable of inciting compliance with these provisions, as was already explained in paragraphs 37 to 39 of this Opinion. The measures taken must be such that not only do they have a preventive effect specifically on those responsible for the infringement, they also must have a more

73. In order to attain the objectives of the CFP, offences need to be the subject of a clear and credible enforcement policy. This implies that breaches of the Community

fisheries provisions are systematically followed up by either administrative or criminal proceedings leading to effective penalties being imposed. Such an enforcement policy must have sufficient credibility to act as a deterrent. The potential negative consequences of infringing the fisheries provisions must be perceived as outweighing the economic benefits of non-observance of these rules.

74. In the course of the pre-litigation procedure the French Republic provided the Commission with a variety of statistics to demonstrate that over the years following the Court's judgment of 11 June 1991, it had increasingly taken steps against persons who had breached the fisheries regulations and that the penalties imposed had become more severe. The Commission objected that these figures were too general in character, in that they concerned the whole of French territory and referred to various kinds of infringements of fisheries provisions. They did not address the specific problem which preoccupied it, namely the landing and selling of undersized hake in the South-West of Brittany.

75. As the French Government pointed out, the effectiveness of a system of monitoring and enforcement cannot be judged on the basis of statistics alone. This must be determined by reference to the results it is designed to achieve. Here again, I consider that the findings in the reports of the Community fisheries inspectors are decisive in respect of the situation existing at the end

of the time-limit laid down in the supplementary reasoned opinion. Even though the figures furnished by the French Republic contain indications of an increase in the number of prosecutions of infringements and of growing severity of penalties imposed, the fact remains that at that point in time, the basic problem of landing and selling undersized fish, and in particular hake in the pays Bigoudin, had not been solved. This in itself is a clear sign that the efforts towards increased enforcement were not effective in the sense indicated above.

76. I would add that where the French Government complains that the Commission did not indicate which measures would be adequate to terminate the remaining infringements, it is the primary responsibility of the Member State concerned to ensure that it complies with its obligations under the Treaty and secondary legislation with the means and resources at its disposal.

77. I therefore conclude that by not having ensured, as of 6 August 2000, that appropriate measures were taken against natural and legal persons responsible for the breach of provisions of the common fisheries policy as required by Article 31 of Regulation No 2847/93, the French Republic had not

complied with the Court's Judgment of 11 June 1991 at the end of the time-limit set in the supplementary reasoned opinion of 6 June 2000.

78. The current situation on enforcement must be assessed in the light of the information provided by both parties in response to the written questions put by the Court as further elucidated at the oral hearing.

79. The Commission reports relating to visits in 2003 contain various indications that, contrary to the circular of the Minister of Justice of 16 October 2002, official reports are not always drawn up following the establishment of an infringement and that consequently these cases are also not brought before the courts. The most recent statistical information provided by the French Government cannot be regarded to be entirely representative as the figures for 2002 were affected by an amnesty law, the figures for 2003 are not complete and at any rate these figures are not specific enough. The figures on the average level of penalties imposed do suggest a more effective approach. Yet at the same time, as they only refer to the sale, the storage and the purchase of undersized fish, they do not provide insight into the catching, landing or transport of undersized fish.

80. On the basis of the most recent information provided I conclude that it cannot be determined with sufficient certainty that current practice in the French Republic on enforcing the provisions of the CFP is in conformity with Regulation No 2847/93. The French Republic has not yet therefore wholly complied with the Court's judgment of 11 June 1991 in this respect either.

E — *Consequences of these findings*

81. According to Article 228(2), third paragraph, EC where the Court finds that a Member State has failed to comply with a judgment delivered pursuant to Article 226 EC and declaring that that Member State has infringed its obligations under the EC Treaty, it may impose a lump sum or a penalty payment on it.

82. The Commission considers that the imposition of a periodic penalty payment is the most appropriate instrument to induce a Member State to terminate an infringement of its Treaty obligations as quickly as possible. In line with the approach and calculation method set out in its communications of 21 August 1996²⁷ and 28 February 1997²⁸ respectively, it now proposes that the Court impose a daily penalty

27 — OJ 1996 C 242, p. 6.

28 — OJ 1997 C 63, p. 2.

payment of EUR 316 500 on the French Republic. This amount was calculated on the basis of a flat-rate amount of EUR 500 which is multiplied by a number of coefficients indicating the seriousness of the infringement (scale running from 1 to 20), the duration of the infringement (scale from 1 to 3) and the Member State's ability to pay (calculated on the basis of its gross national product and the number of votes in Council). In the present case the Commission holds that in view of the serious consequences of the non-observance of Community rules on fish sizes for the state of the stocks a factor 10 on the scale for gravity is justified. It points out that the zone to the South of Brittany is a reproduction zone for hake and is therefore of great importance for the maintenance of the stock. Given the time-lapse since the judgment of 11 June 1991 and taking account of the entry into force of Article 228(2) EC (formerly Article 171(2) of the EC Treaty) on 1 November 1993, it proposes that a coefficient of 3 should be used to indicate the duration of the infringement. As the French Republic's ability to pay renders a coefficient of 21.1 this results in a daily periodic penalty payment of $10 \times 3 \times 21.1 \times \text{EUR } 500 = \text{EUR } 316\,500$.

83. The French Republic submits that, in the event that the Court deems it necessary to impose a periodic penalty payment, the amount suggested by the Commission is disproportionate. It refers to the Court's judgment in *Commission v Greece*,²⁹ in which a coefficient of 6 was applied to indicate the seriousness of an infringement which posed a serious threat to public health.

As to the duration of the infringement it submits that as measures taken to implement the Court's judgment could not have an immediate effect, the Court should not take the full period between the first judgment and the judgment in the present case into account.

84. The Court has already clarified, in the two judgments it has given under Article 228 (2) EC up until the present moment, that it cannot be bound by the Commission's suggestions on the pecuniary consequences to be attached to a finding that a Member State has not complied with its earlier judgment.³⁰ These suggestions merely constitute a useful point of reference for the Court in exercising its discretion under this provision. The application of this provision, in other words, falls within the full jurisdiction of the Court.

85. In my assessment, I made a distinction between the situation prevailing at two points in time for establishing whether the French Republic has complied with the judgment of 11 June 1991: the situation at the expiry of the time-limit set in the supplementary reasoned opinion and the current situation. This distinction is, in my

30 — Case C-387/97 *Commission v Greece* cited in footnote 22, at paragraph 89 of the judgment; Case C-278/01 *Commission v Spain* judgment of 25 November 2003, ECR I-14141, at paragraph 41 of the judgment.

29 — Case C-387/97 cited in footnote 22 above.

view, relevant for determining how Article 228(2) EC should be applied in the present case.

86. The primary objective of Article 228(2) EC is to ensure that Member States ultimately comply with their Treaty obligations by terminating infringements at the shortest possible delay. It must be emphasised, however, that the question of the imposition of a pecuniary measure only arises after the Court has found earlier in proceedings under Article 228 EC that the Member State concerned was in breach of its Treaty obligations and after it has been given the opportunity in the context of a second pre-litigation procedure to remedy the situation as required by Article 228(1) EC. In the time between the first judgment and a second judgment establishing that the former has not been complied with, the infringement subsists, usually undermining the effectiveness of the relevant Community rules and probably affecting the interests of other Member States or of other parties.

87. In view of the potentially damaging consequences of enduring non-compliance with the Treaty obligations for obtaining the objectives of measures adopted by the Community institutions, I consider that Article 228(2) EC must be applied in such a way that in certain circumstances the pecuniary measures are not only suited to bringing about compliance, but that they also must have a preventive effect. In this sense they should have a deterrent effect similar to that indicated in paragraph 73 of this Opinion.

88. A periodic penalty payment need not have a dissuasive effect in respect of future non-compliance with the Community obligations involved as it is a penalty which is conditional in character. Where a Member State succeeds in complying with the obligations it neglected before such a penalty is payable, the final result may be that no sanction is imposed. Though effective in finally ensuring compliance, the imposition of a periodic penalty payment may not therefore always be an appropriate response to the infringement in question. In order to have a dissuasive effect, a pecuniary measure to be imposed under Article 228(2) EC ought to be based on all the relevant circumstances of the infringement concerned.

89. In the present case I have concluded on the one hand that at the expiry of the time-limit set in the supplementary reasoned opinion of 6 June 2000 the French Republic had not yet complied with the Court's judgment of 11 June 1991 and on the other hand that, although improvements have been made in the application of Regulation 2847/93 since that time, these cannot yet be regarded as sufficient to constitute full compliance.

90. As the Court has consistently held, although no time-limit has been specified in Article 228(1) EC 'the importance of immediate and uniform application of Com-

munity law means that the process of compliance must be initiated at once and completed as soon as possible'.³¹ Given the fact that catching undersized fish is particularly damaging for the sustainability of exploitation, it might have been expected that following the establishment of this infringement the French authorities would have acted swiftly, in accordance with Article 228(1) EC, to ensure that they monitored compliance with the relevant provisions within its jurisdiction and that it took appropriate action against offenders against these provisions. The fact that Community fisheries inspectors established during visits to French coastal regions that as late as the year 2000 undersized fish was still being landed and sold, often in the absence of national inspectors, is a clear indication that the obligation to terminate the infringement 'as soon as possible' was not at any rate complied with. This conclusion may be drawn even taking into account that adopting the measures required to give full effect to the control regulations is a matter of 'longue haleine' as was observed by the French authorities during one stage of the pre-litigation procedure.

91. Although it obviously takes time before the situation in practice can be brought into line with Community obligations, it appears from the documents presented to the Court that the French Republic only adopted measures gradually and that the most

important measures referred to by the French Republic were the control programmes adopted in 2001 and 2002 and the instructions issued to the public prosecutors by the Minister of Justice in October 2002, i.e. after the introduction of the present proceedings. Moreover, these measures were usually of an administrative character and could not, at any rate, be qualified as effective measures in the sense intended by the control regulations. In addition, the French authorities did not adequately address the specific problem which the Commission repeatedly brought to their attention. I consider the attitude of the French authorities in this respect to have been evasive.

92. It should not be overlooked that the Commission provided the French Republic with ample opportunity in the context of the pre-litigation procedure to adopt the measures necessary to terminate the infringement of Regulation No 2847/93. A reasoned opinion was only issued some five years after the Court's judgment of 11 June 1991 and this was followed another four years later by a, procedurally unnecessary, supplementary reasoned opinion. During that period the French authorities only cooperated with the Commission in a formal sense by responding to requests for information and clarifications, but not by taking concrete steps towards effectively remedying the situation. This lack of sincere cooperation, which is

31 — Case C-387/97 *Commission v Greece* cited in footnote 22 above at paragraph 82 of the judgment; Case C-278/01 *Commission v Spain* cited in footnote 30 above at paragraph 27 of the judgment.

required by Article 10 EC,³² I regard as an aggravating circumstance.

93. The structural failure by the French Republic to monitor and enforce Community provisions on minimum fish size for almost two decades must be regarded as a particularly serious infringement of its Community obligations. As I explained in paragraphs 31 to 37 of this Opinion, strict compliance with the measures aimed at conserving fish stocks is essential for ensuring sustainable exploitation in the long term. I also pointed out that as fish stocks must be regarded as a resource common to the Member States, neglecting these obligations affects the interests of (economic operators in) other Member States engaged in exploiting the stocks concerned. Where fish stocks are threatened by serious overexploitation, as was the case with the hake stocks involved in the present case, Member States have a special responsibility to take steps to ensure full compliance with provisions aimed at their conservation.

94. More generally, I believe that once it has been established that a Member State has acted in violation of its Community obligations, the longer it permits this situation to endure, most probably to the benefit of its

own nationals and to the detriment of the interests of the nationals of other Member States, the more liable it becomes to the imposition of a punitive measure.

95. In these circumstances, I am of the opinion that it would be appropriate to respond to the failure of the French Republic to comply with the Court's judgment of 11 June 1991 by imposing a lump sum as provided for by Article 228(2) EC. In addition, in view of the fact that the current situation remains defective, a periodic penalty payment should be imposed under suitable conditions until such time as it may be established that the infringement has been terminated.

96. The terms and amounts of both penalties must be determined taking into account the criteria and principles which the Court has already applied in its two judgments under Article 228(2) EC. Although neither of these judgments concerned the imposition of a lump sum, these criteria and principles are *mutatis mutandis* relevant to both categories of pecuniary sanctions.

97. Any pecuniary sanction must be determined in function of the seriousness and the duration of the infringement and be set at such a level that it acts as a deterrent to the continuation of an infringement and to further infringements. This approach was

32 — Cf. Case C-2/88 Imm. *Zwartveld* [1990] ECR I-3365 at paragraph 17 of the Court's order.

suggested by the Commission and has since been broadly endorsed by the Court,³³ even though it retains the ultimate responsibility to determine the method of calculation and the amount of the penalty and to set the conditions under which it is imposed.

98. The amount proposed by the Commission constitutes a useful point of reference for calculating the amount of both the lump sum and the periodic penalty payment. This sum was arrived at by applying coefficients of seriousness, duration and ability to pay to a basic flat rate amount (see paragraph 82 of this Opinion). The French Government contests the level of seriousness applied and refers to the approach followed in *Commission v Greece*. It also, more implicitly, contests the fact that the Commission applied the maximum coefficient of duration. To my mind there can be no doubt that applying a coefficient of 3 to indicate the duration of the infringement is completely justified, given the fact that it actually has subsisted since 1984. As to the seriousness, I consider the application of a coefficient of 10 on a scale running from 1 to 20 to be lenient. The comparison the French Government makes with the situation at issue in *Commission v Greece* testifies to a serious underestimation of the gravity of this infringement. Taking account, furthermore, of the fact that the Court indicated in its judgment in that case that in applying these criteria regard should be had to the effect of failure to comply on private and public interests and to the urgency of getting the Member State

concerned to fulfil its obligations,³⁴ I conclude that it is expedient in this case to apply the amount of EUR 316 500 per day proposed by the Commission as a basis for calculation.

99. As to the lump sum, it must first be noted that the Commission did not suggest that such a penalty be imposed in the present case, nor has it developed a specific method of calculating the amount of such a penalty. In its judgment in *Commission v Greece*, the Court observed that the Commission's guidelines in respect of the calculation of a periodic penalty payment help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty and that they are designed to achieve proportionality in the amounts it proposes.³⁵ Where these guidelines refer to the approach followed by the Commission under Article 228(2) EC and do not bind the Court, they serve as a general framework on the application of this Treaty provision which creates a degree of clarity for the Member States.

100. I do not believe that the absence of specific guidelines should induce the Court to refrain from imposing a lump sum in the

33 — See the calculation of the penalty payment in Case C-278/01 *Commission v Spain* cited in footnote 30 above at paragraph 52 to 62 of the judgment.

34 — Case C-387/97 *Commission v Greece* cited in footnote 22 above at paragraph 92 of the judgment.

35 — Case C-387/97 *Commission v Greece* cited in footnote 22 above at paragraph 87 of the judgment.

present case. As I observed in paragraph 29 of this Opinion, the Community legal order depends on the efforts of the Member States to monitor compliance with Community provisions and to take action against violations of these provisions. These efforts are essential to attaining the objectives of the Treaty. To abstain from reacting to a structural failure by a Member State to comply with this fundamental obligation would put the effectiveness and the credibility of the Community legal order at stake. As the Court has observed on various occasions: 'in permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a state unilaterally to break, according to its own conception of national interest, the equilibrium between the advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order'.³⁶

101. Furthermore, refraining from imposing a pecuniary sanction in the circumstances of

36 — Case 39/72 *Commission v Italy* [1973] ECR 101 at paragraphs 24 and 25 of the judgment; Case 128/78 *Commission v United Kingdom* [1979] ECR 419 at paragraph 12 of the judgment.

the present case would be tantamount to accepting that following an initial finding by the Court that a Member State has infringed its Treaty obligations, that Member State could freely permit this situation to exist, most probably with detrimental consequences for Community interests and the interests of other Member States, until the Commission decides to institute a second round of infringement proceedings, this time under Article 228(2) EC.

102. I do consider, however, that the fact that the question of imposing a lump sum has now been raised for the first time since the entry into force of the Treaty on European Union, that the Commission did not propose imposing such a penalty and that, as yet, no practice exists to provide guidance in this respect are valid grounds for calculating the sum in a more lenient way than would be justified in the light of the seriousness of the infringement.

103. The daily sum calculated by the Commission as the basis for the periodic penalty payment is an expression of the seriousness and the duration of the infringement and of the deterrent effect of the penalty payment. The amount of a lump sum ought normally to be calculated taking into account these same general criteria and in particular the enduring character and the seriousness of the infringement. In this case, I would propose imposing as a lump sum the

periodic penalty payment proposed by the Commission calculated over one year only. This leads to an amount of $365 \times \text{EUR } 316\,500 = \text{EUR } 115\,522\,500$.

104. As regards the periodic penalty payment, the volume and the terms under which it is imposed must be aimed at securing full, effective, and enduring compliance with the Community obligations at issue taking account of the most recent information on the current state of affairs.

105. As things stand it would appear that the French Republic has adopted a variety of legislative and administrative measures aimed at improving the application of the control regulations, but that it remains for these measures to be implemented in practice in such a way that the result prescribed by the Community fisheries provisions is achieved in practice throughout its territory. The Commission, for its part, has indicated that it requires additional detailed information on inter alia controls, prosecutions and penalties imposed in order to be able to determine whether the French authorities have brought the structural infringement of the Community controls regulations to an end.

106. As monitoring and enforcement practice cannot be adapted instantaneously, it is clear in these circumstances that setting a periodic penalty payment on a daily basis

would not be appropriate.³⁷ On the one hand the French Republic should be permitted a reasonable, yet specified-period to adopt the measures necessary for compliance, whilst on the other hand, the Commission should be given sufficient time to assess on the basis of the additional information it requires and further on-the-spot verifications whether these measures are indeed effective in the sense indicated in paragraph 39 of this Opinion.

107. I consider that an initial period of six months should suffice for permitting the French Republic to take the required steps, so that the penalty payment should be payable subject to verifications by the Commission at intervals of six months. This period should also be more than sufficient for the French Republic to supply the Commission with the information it requires to form a definitive view on the current situation regarding compliance with Regulation No 2847/93.

108. In this light the periodic penalty payment should be set at an amount of $182.5 \times \text{EUR } 316\,500 = \text{EUR } 57\,761\,250$ for every six-monthly interval that the Commission establishes that the infringement subsists, starting on the date of the Court's judgment in this case.

³⁷ — Cf. the Court's approach in Case C-278/01 *Commission v Spain* cited in footnote 30 above at paragraphs 42-46 of the judgment.

VI — Conclusion

109. For these reasons I am of the opinion that the Court should:

- declare that by not complying with Court's judgment of 11 June 1991 at the end of the time-limit set in the Commission's supplementary reasoned opinion of 6 June 2000 the French Republic has failed to fulfil its obligations under Article 228(1) EC;
- impose, for that reason, a lump sum of EUR 115 522 500;
- declare that by currently not having ensured full and complete compliance with that judgment, the French Republic has still not yet implemented all the necessary measures to fully comply with the Court's judgment of 11 June 1991;
- impose, with a view to securing full and complete compliance with that judgment, a periodic penalty payment of EUR 57 761 250 for each six-monthly interval that the Commission establishes that the infringement subsists, starting on the date of the Court's judgment in this case;
- order the French Republic to pay the costs.