



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 11 January 2018<sup>1</sup>

**Case C-626/16**

**European Commission**

**v**

**Slovak Republic**

(Failure to fulfil obligations — Article 260 TFEU — Failure to comply with the judgment of 25 April 2013, *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) — Subject matter of the dispute — Pre-litigation procedure — Request for observations — Directive 99/31/EC — Landfill of waste — Žilina-Považský Chlmec waste site)

### **I. Introduction**

1. As is known, the pre-litigation procedure provided for in Article 258 TFEU is of great importance for delimitation of the subject matter of the dispute in infringement proceedings. Before the Commission may bring a case before the Court requesting a finding of an infringement of EU law by a Member State, it must first give that Member State an opportunity to respond to the allegation against it by sending it a letter of formal notice. The Commission must then provide a reasoned opinion specifying the alleged infringement and set the Member State a final deadline for bringing the infringement to an end. Only after that can the Commission initiate proceedings, and in such proceedings may only allege infringements which were previously referred to in the letter of formal notice and the reasoned opinion.

2. In the present proceedings, the Court is again<sup>2</sup> confronted with the question of the extent to which the requirements developed for Treaty infringement proceedings under Article 258 TFEU are to be carried over to the procedure for enforcement of judgments under Article 260(2) TFEU. In this regard, account must be taken of the differences from Article 228(2) EC, the previously applicable provision, which, like Article 258 TFEU, provided for a letter of formal notice and a reasoned opinion, unlike Article 260(2) TFEU which no longer requires a reasoned opinion.

3. The question also arises of the importance of the definition of the subject matter of the dispute on the basis of the judgment to be enforced.

<sup>1</sup> Original language: German.

<sup>2</sup> Judgment of 10 September 2009, *Commission v Portugal* (C-457/07, EU:C:2009:531, paragraph 52 et seq.).

4. These questions arise in connection with a long-existing landfill site in Slovakia, which has not yet been granted a permit under the Landfill Directive<sup>3</sup> but which has also not yet been closed in compliance with that Directive. In its judgment *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), the Court found this to constitute an infringement of Article 14 of the Directive. Of particular interest in this regard is the question of whether a definite decision within the meaning of this provision must be final, i.e. no longer capable of being contested in the courts.

## II. Legal context:

5. Article 13 of the Landfill Directive contains provisions concerning the closure of landfill sites:

‘Member States shall take measures in order that, in accordance, where appropriate, with the permit:

- (a) a landfill or part of it shall start the closure procedure:
  - (i) when the relevant conditions stated in the permit are met; or
  - (ii) under the authorisation of the competent authority, at the request of the operator; or
  - (iii) by reasoned decision of the competent authority;
- (b) a landfill or part of it may only be considered as definitely closed after the competent authority has carried out a final on-site inspection, has assessed all the reports submitted by the operator and has communicated to the operator its approval for the closure. This shall not in any way reduce the responsibility of the operator under the conditions of the permit;
- (c) after a landfill has been definitely closed, the operator shall be responsible for its maintenance, monitoring and control in the after-care phase for as long as may be required by the competent authority, taking into account the time during which the landfill could present hazards.

The operator shall notify the competent authority of any significant adverse environmental effects revealed by the control procedures and shall follow the decision of the competent authority on the nature and timing of the corrective measures to be taken;

- (d) for as long as the competent authority considers that a landfill is likely to cause a hazard to the environment and without prejudice to any Community or national legislation as regards liability of the waste holder, the operator of the site shall be responsible for monitoring and analysing landfill gas and leachate from the site and the groundwater regime in the vicinity of the site in accordance with Annex III.’

<sup>3</sup> Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1).

6. Article 14 of the Landfill Directive sets out rules for dealing with existing landfills:

‘Member States shall take measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of this Directive, may not continue to operate unless the steps outlined below are accomplished as soon as possible and within eight years after the date laid down in Article 18(1) at the latest:

- (a) with a period of one year after the date laid down in Article 18(1), the operator of a landfill shall prepare and present to the competent authorities, for their approval, a conditioning plan for the site including the particulars listed in Article 8 and any corrective measures which the operator considers will be needed in order to comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1;
- (b) following the presentation of the conditioning plan, the competent authorities shall take a definite decision on whether operations may continue on the basis of the said conditioning plan and this Directive. Member States shall take the necessary measures to close down as soon as possible, in accordance with Article 7(g) and 13, sites which have not been granted, in accordance with Article 8, a permit to continue to operate;
- (c) on the basis of the approved site-conditioning plan, the competent authority shall authorise the necessary work and shall lay down a transitional period for the completion of the plan. Any existing landfill shall comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1 within eight years after the date laid down in Article 18(1);
- (d) ...’

### III. Procedure and applications

7. In its judgment of 25 April 2013, *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), the Court of Justice found that, by authorising the operation of the Žilina-Považský Chlmec waste site without a site-conditioning plan and in the absence of a final decision on the continued operation on the basis of an approved site-conditioning plan, Slovakia had failed to comply with its obligations under Article 14(a) to (c) of the Landfill Directive. This decision was founded on the fact that no site-conditioning plan had been submitted for the landfill in question.

8. Upon request by the Commission, Slovakia reported on 7 June 2013 that it intended to close the landfill. Subsequently, on 21 November 2013, in accordance with Article 260(2) TFEU, the Commission formally requested the Slovak Republic to submit its observations regarding compliance with the judgment, granting it a period of two months, ending on 21 January 2014, to do so.

9. In response to this request, and in further communications subsequently, the Slovak Republic declared what steps it had taken to close the Žilina-Považský Chlmec waste site.

10. It is clear from these communications that, firstly, the landfill has not been accepting waste for deposit since at least 8 January 2014.

11. In addition, the competent authorities had initially decided in 2013 to close sections 2a and 2b of the landfill, but had then reversed this decision on 10 April 2014, after expiry of the aforementioned period, in order to carry out an environmental impact assessment. Only on 15 August 2016 did they again decide to close these sections. The superior administrative authority confirmed this decision on 9 November 2016.

12. On the other hand, the proceedings regarding the decision on the remaining section of the landfill, section 2c, were stayed due to a dispute regarding ownership of that area.

13. Nevertheless, the Commission concluded that the Slovak Republic had not yet fully complied with the judgment. It therefore decided to bring an action under Article 260 TFEU.

14. The Commission requests the Court to:

- (1) declare that, by failing to adopt the measures necessary to comply with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), in which the Court of Justice declared that the Slovak Republic had failed to fulfil its obligations under Article 14(a) to (c) of the Landfill Directive, the Slovak Republic has failed to fulfil its obligations under Article 260(1) TFEU;
- (2) order the Slovak Republic to pay the European Commission, into the 'European Union own resources' account:
  - (a) a penalty payment of EUR 6 793.80 per day of delay in the adoption of measures necessary for the Slovak Republic to comply with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), payable from the date of delivery of the judgment in the present case until the date of adoption of the measures necessary for the Slovak Republic to comply with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271),
  - (b) a lump sum of EUR 743.60 per day, totalling a minimum of EUR 939 000, per day of delay in the adoption of the measures necessary for the Slovak Republic to comply with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), payable from the date of delivery of that judgment on 25 April 2013,
    - until the date of delivery of the judgment in the present case, or
    - until the date of the adoption of measures necessary for the Slovak Republic to comply with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), if that date precedes the date of delivery of the judgment in the present case, and
- (3) order the Slovak Republic to pay the costs of the proceedings.

15. The Slovak Republic requests the Court to:

- (1) dismiss the action as inadmissible,
- (2) in the alternative, to dismiss the action as inadmissible in part and otherwise unfounded or as unfounded in its entirety,
- (3) in the further alternative, to reduce the amount of the financial penalties sought by the applicant,
- (4) order the applicant to pay the costs.

16. The parties have submitted written observations. On 14 November 2017, after the closure of the written procedure, Slovakia sent to the Court further information on the closure of the landfill site in question and a current legislative proposal. This information does not, however, affect the decision that I propose in this Opinion.

#### IV. Analysis

17. In the following, it is necessary to examine firstly the admissibility of the action, then compliance with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), and finally the question of financial penalties.

##### A. Admissibility of the action

18. The Slovak Republic argues that the action is inadmissible. It finds this argument on the Commission's complaint, in its application, that the landfill at issue has not yet been fully closed within the meaning of Article 13 of the Landfill Directive. However, compliance with this provision was not the subject of the first judgment, nor did the Commission refer to infringement of the provision in its request for observations under Article 260 TFEU.

1. *Subject matter of the judgment of 25 April 2013, Commission v Slovakia* (C-331/11, not published, EU:C:2013:271)

19. It is true that the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) does not address Article 13 of the Landfill Directive. The judgment confines itself to finding that Article 14(a) to (c) of the Landfill Directive was infringed. This infringement results from the fact that Slovakia authorised the operation of the landfill without a site-conditioning plan and in the absence of a definite decision on the continued operation on the basis of an approved site-conditioning plan.

20. Adhering strictly to its wording, this finding could be understood as meaning that the Court viewed only the authorisation of the operation of the landfill as an infringement of Article 14 of the Landfill Directive.

21. However, statements of this kind by the Court must be interpreted in light of the rule which was infringed. In this regard, it is true that Article 14 of the Landfill Directive prohibits the continued operation of existing landfills if the conditions laid down therein are not satisfied.

22. As Slovakia itself concedes, however, Article 14(b) of the Landfill Directive offers Member States two ways of complying with their obligations with regard to these existing landfills. They may either authorise the continued operation of those landfills in accordance with the Landfill Directive, or take the necessary measures to close down as soon as possible, in accordance with Article 7(g) and Article 13, sites which have not been granted a permit to continue to operate.<sup>4</sup>

23. As regards the option of continued operation, the Court has previously held that the obligations under Article 14 of the Landfill Directive are not limited to the granting of final authorisation for continued operation on the basis of a site-conditioning plan. The measures provided for must also be implemented so as to ensure that the landfill is operated in accordance with the Directive.<sup>5</sup>

24. It is similarly insufficient, if authorisation for continued operation of the landfill is refused, merely to discontinue the deposit of waste. The activities necessary for closure must be implemented.<sup>6</sup> Even without additional waste, such landfills continue to present substantial environmental risks. Only definite closure in accordance with the Landfill Directive reduces these risks to an acceptable level.

<sup>4</sup> Judgments of 16 July 2015, *Commission v Bulgaria* (C-145/14, EU:C:2015:502, paragraph 30), and of 25 February 2016, *Commission v Spain* (C-454/14, EU:C:2016:117, paragraph 59).

<sup>5</sup> Judgment of 25 February 2016, *Commission v Spain* (C-454/14, EU:C:2016:117, paragraph 42 et seq.).

<sup>6</sup> See judgment of 25 February 2016, *Commission v Spain* (C-454/14, EU:C:2016:117, paragraph 61).

25. Consequently, a Member State must also comply with the requirements laid down in Article 13 of the Landfill Directive if it complies with Article 14 not by authorising a landfill to continue to operate, but by closing it.

26. The same is necessarily the case if the Member State complies with Article 14 of the Landfill Directive after the Court has found it to have infringed this provision.

27. Thus compliance with Article 13 of the Landfill Directive falls, implicitly but necessarily, within the scope of the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) and may be enforced under Article 260 TFEU.

## 2. Subject matter of the pre-litigation procedure

### (a) The request for observations

28. Additionally, however, Slovakia takes the view that the action extends the subject matter of the proceedings with respect to the Commission's original request of 21 November 2013 asking Slovakia to submit its observations regarding the complaint that the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) had not been fully complied with. It states that such extension is inadmissible.

29. Slovakia had already stated that it intended to close the landfill before the Commission sent this request to Slovakia.

30. However, the Commission considered the measures announced to be inadequate. Specifically, it raised two objections.

31. Firstly, Article 14 of the Landfill Directive requires the operator of the landfill to present a conditioning plan. However, no conditioning plan was presented or announced. Nor had the competent authorities taken a definite decision on the basis of such plan.

32. Secondly, the regulations applicable to the landfill are not those on integrated pollution prevention and control,<sup>7</sup> but the more specific provisions on the landfill of waste, i.e. the regulations transposing the Landfill Directive into Slovak law. Here the Commission returned to the findings of fact, set out in paragraphs 32 to 36 of the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), that the rules on landfill of waste must be complied with when authorising operation of the landfill.

33. In contrast, the Commission complains in its application that, although the competent Slovak authorities have decided to close certain sections of the landfill (sections 2a and 2b), they have not yet done so fully in accordance with Article 13 of the Landfill Directive, and furthermore that the decision on closure is still not final. Secondly, it complains that no decision to close a further section of the landfill (section 2c) was even taken.

34. If the Court were to impose stringent requirements regarding agreement between the request for observations and the action, the permissible subject matter of the present proceedings would at most comprise the complaint regarding the absence of a definite or final decision on closure of the landfill. This is because the absence of a definite decision was mentioned in the request of 21 November 2013.

<sup>7</sup> In *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271, paragraphs 32 to 36) the Court referred in this connection to Council Directive of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26). These regulations are now part of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

35. On the other hand, the request does not refer, expressly or by implication, to any infringement of Article 13 of the Landfill Directive. Taking a strict approach, therefore, this complaint would be inadmissible in the judicial proceedings.

36. However, it is questionable whether this degree of congruence between the subject matter of the request and that of the action can be demanded.

37. That it can is supported by the case-law relating to Article 228(2) EC, the previously applicable provision (now, after amendment, Article 260(2) TFEU). The admissible subject matter of proceedings brought under this provision is circumscribed by the pre-litigation procedure provided for by that provision, meaning that the Commission, in its application, cannot extend the subject matter of the dispute by putting forward new complaints which were not in the reasoned opinion.<sup>8</sup>

38. The Court of Justice has also stressed that the Commission is required, in the reasoned opinion issued under Article 228(2) EC, to specify the points on which the Member State concerned has not complied with the Court's judgment finding a failure to fulfil obligations. Therefore, the subject matter of the proceedings cannot be extended to obligations not referred to in the reasoned opinion; otherwise essential procedural requirements intended to guarantee proper conduct of the proceedings would be infringed.<sup>9</sup>

39. As a result of the changes introduced by the Treaty of Lisbon, however, Article 260(2) TFEU no longer requires the Commission to deliver a reasoned opinion.

40. It is concluded from the elimination of the reasoned opinion that particularly stringent requirements must now be applied as regards determination of the subject matter of the dispute through the request. Adopting this interpretation, the formal notice would need to define the subject matter of the dispute precisely. This is because the request is the only formal statement by the Commission capable of specifying the subject matter of the dispute in proceedings under Article 260(2) TFEU.<sup>10</sup>

41. However, the fact that the Treaty of Lisbon abolished not the request for observations but the reasoned opinion, although the request for observations could have been abolished and this possibility was also discussed in the European Convention, argues against this.<sup>11</sup> It would be contradictory to abolish the stage subject to more stringent requirements only to impose stricter requirements on the stage that remained.

42. Furthermore, the objective pursued by streamlining the pre-litigation procedure was to bring about greater effectiveness and simplicity in the machinery for sanctions for failure to comply with a judgment of the Court.<sup>12</sup> Imposing stricter requirements in relation to the request for observations does not contribute to this objective.

<sup>8</sup> Judgment of 10 September 2009, *Commission v Portugal* (C-457/07, EU:C:2009:531, paragraph 56).

<sup>9</sup> Judgment of 10 September 2009, *Commission v Portugal* (C-457/07, EU:C:2009:531, paragraphs 58 and 60).

<sup>10</sup> See e.g. Hatje, A., 'Artikel 260 AEUV (ex-Artikel 228 EGV) [Wirkung und Durchsetzung von Urteilen; Zwangsgeld]', *Europäisches Unionsrecht*, Nomos, Baden-Baden, 2015, paragraph 18.

<sup>11</sup> Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice (document CONV 636/03 of 25 March 2003, paragraph 28(a)).

<sup>12</sup> Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice (document CONV 636/03 of 25 March 2003, paragraph 28).

43. On the contrary, from the point of view of rights of defence and legal certainty, it is usually sufficient if Member States are informed that the Commission is considering applying Article 260 TFEU and given an opportunity to submit observations.<sup>13</sup> In contrast, the subject matter of the proceedings under Article 260(2) TFEU is already sufficiently well defined by the Court's initial judgment. Member States are also fully aware both of their obligation to adopt the measures to comply with a judgment of the Court finding that a Member State has failed to fulfil its obligations and of the consequences which breach of that obligation may entail.<sup>14</sup>

44. Moreover, the Commission cannot be expected to mention all possible deficiencies in compliance with the judgment in its first and only formal communication. In particular, requiring it to do so would not result in greater effectiveness and simplicity in proceedings.

45. Therefore, the Commission is not required, in principle, to specify in the request for observations under Article 260(2) TFEU all conceivable grounds for doubt as to adequate compliance with an initial judgment.

46. However, the objective of bringing about greater effectiveness and simplicity in implementation of the judgments of the Court must also guide the application by the Commission of Article 260(2) TFEU. It follows in particular that a request for observations must not mislead the Member State and should contain as much useful guidance as possible regarding compliance with the initial judgment. To this end, the Commission must endeavour, in particular, to take appropriate account of the information available to it concerning the Member State's intentions regarding compliance. Only this, moreover, is consistent with the reciprocal duty of sincere cooperation between the Commission and Member States under Article 4(3) TEU.<sup>15</sup>

47. The request of 21 November 2013 does not meet this standard. Although the Commission was aware of Slovakia's intention to close the landfill, it did not mention the requirements relating to closure of existing landfills. Rather, it concerned itself with general questions of the procedure under Article 14 of the Landfill Directive and details of Slovak law. The application, on the other hand, reprises only some of these complaints.

48. Furthermore, the Commission had sufficient opportunity to clarify its objections and in particular the significance of Article 13 of the Landfill Directive in a supplementary request for observations before initiating proceedings. Over two years passed between receipt of the Slovak response to the request for observations on 14 January 2014 and the Commission's decision of 16 June 2016 to initiate proceedings.<sup>16</sup> Over three years had passed since the initial judgment of 25 April 2013.

49. Although Slovakia was certainly aware of its obligations under Article 13 of the Landfill Directive, it could not have expected the Commission to make these obligations the subject matter of an action under Article 260(2) TFEU.

50. For these reasons, I take the view that the action, in so far as it complains of a breach of Article 13 of the Landfill Directive, is inadmissible.

13 Judgment of 11 December 2012, *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 52).

14 Judgment of 11 December 2012, *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 50).

15 See judgments of 16 October 2003, *Ireland v Commission* (C-339/00, EU:C:2003:545, paragraph 71); of 4 March 2004, *Germany v Commission* (C-344/01, EU:C:2004:121, paragraph 79); and of 10 July 2014, *Nikolaou v Court of Auditors* (C-220/13 P, EU:C:2014:2057, paragraph 51).

16 Commission press release IP/16/2099.



*(b) The Commission's reply*

51. The Commission, in its reply, also complains that the decisions on closure taken in 2016 do not refer to a site-conditioning plan. This is a new plea in law not contained in the application which in accordance with Article 127(1) of the Rules of Procedure of the Court of Justice would be admissible only if it were based on matters of law or of fact which had come to light in the course of the procedure. There can be no question of this, however, as the Commission was fully aware at least of the decision of 15 August 2016 when it initiated proceedings.<sup>17</sup> Accordingly, that argument is also inadmissible.

*3. Interim conclusion*

52. Thus the action brought by the Commission is admissible and must be examined on its merits only to the extent that it complains of the lack of a definite decision within the meaning of Article 14 of the Landfill Directive. However, in case the Court considers the complaint regarding infringement of Article 13 to be admissible, I will look at this plea briefly, in the alternative in each case, in the following examination of the merits of the action and the financial penalties (sections IV. B. 3. and IV. C. 3.). I will not comment further on the similarly inadmissible plea in law regarding the lack of a site-conditioning plan.

***B. Substance of the action***

53. In its judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), the Court of Justice found that, by authorising the operation of the Žilina-Považský Chlmec waste site without a site-conditioning plan and in the absence of a final decision on the continued operation on the basis of an approved site-conditioning plan, Slovakia had failed to fulfil its obligations under Article 14(a) to (c) of the Landfill Directive.

54. When examining whether this judgment has been implemented, the reference date which must be used for assessing whether there has been a failure to fulfil obligations under Article 260(2) TFEU is that of the expiry of the period prescribed in the letter requesting observations issued under that provision.<sup>18</sup> In the present proceedings, therefore, the situation prevailing on 21 January 2014 must be examined.

55. When examining the imposition of a lump sum and/or a penalty payment under Article 260(2) TFEU, the situation on the date of the decision of the Court in the present proceedings is also relevant. In particular, the imposition of a penalty payment is justified only in so far as the failure to comply with an earlier judgment of the court persists.<sup>19</sup>

56. I will therefore examine below firstly compliance with the original judgment of 21 January 2014, and then the current situation.

<sup>17</sup> Paragraph 17 and Annex A.15 to the application.

<sup>18</sup> Judgments of 11 December 2012, *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 67), and of 25 June 2013, *Commission v Czech Republic* (C-241/11, EU:C:2013:423, paragraph 23).

<sup>19</sup> Judgments of 9 December 2008, *Commission v France* (C-121/07, EU:C:2008:695, paragraph 27); of 7 July 2009, *Commission v Greece* (C-369/07, EU:C:2009:428, paragraph 59); of 17 November 2011, *Commission v Italy* (C-496/09, EU:C:2011:740, paragraph 42); of 11 December 2012, *Commission v Spain* (C-610/10, EU:C:2012:781, paragraph 96); and of 28 November 2013, *Commission v Luxembourg* (C-576/11, EU:C:2013:773, paragraph 43).

### 1. Compliance on expiry of the period prescribed

57. As outlined above, compliance with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) requires either an authorisation for continued operation of the landfill on the basis of a site-conditioning plan or a definite decision on closure which must inter alia be implemented in accordance with Article 13 of the Landfill Directive. Slovakia opted for closure, but the Commission considers the measures which have been adopted to date to be inadequate.

58. According to the undisputed submissions of the Slovak Republic, use of the landfill has been prohibited since 7 January 2014, meaning in particular waste is no longer being deposited there.

59. As the Commission correctly maintains, however, this is not sufficient. Rather, under Article 14(b) of the Landfill Directive, the competent authorities must take a definite decision on whether operations at the landfill may continue. Consequently, a new permit must be issued or a decision taken to close the landfill.

60. Although the competent authorities had decided to close parts of the landfill, specifically sections 2a and 2b, on 21 October 2013, this decision was reversed on 10 April 2014 in order, in the first instance, to carry out an environmental impact assessment. On the other hand, the closure procedure with regard to the remaining section, section 2c, was stayed, as ownership of that area was disputed (and continues to be disputed).

#### (a) Sections 2a and 2b

61. It is necessary to examine, first, whether the decision to close sections 2a and 2b, which was in force as of the date of expiry of the period prescribed, is to be recognised as a definite decision within the meaning of Article 14(b) of the Landfill Directive.

62. The fact that, according to information available, the competent authorities did intend by this decision definitely to close the sections concerned supports this.

63. While this decision could still be contested in the courts, meaning that it was not final, Article 14(b) of the Landfill Directive requires only that the competent authority takes a definite decision. Such decision cannot be required to be final.

64. In a European Union governed by the rule of law which guarantees effective judicial protection — particularly in relation to implementation of EU law<sup>20</sup> — a decision taken by an authority cannot, prior to expiry of periods allowed for appeal, be final in the sense that judicial review is excluded. Nor do the competent authorities have the power to prevent challenges to such decisions being brought in good time. And despite the eight-year duration of the period for the definite decision provided for in Article 14 of the Landfill Directive, it could not be guaranteed that all judicial proceedings relating to such decisions would be concluded on expiry of that period. In addition, this period must be regarded as having been set to take account of possible difficulties in connection with site conditioning or closure of landfills rather than in view of possible appeals.

65. Consequently, it must, as a general rule, be sufficient for an official decision — such as the decision of 21 October 2013 — to be intended to definitively settle the individual case at hand.

<sup>20</sup> Judgment of 8 November 2016, *Lesoochránárske zoskupenie VLK* (C-243/15, EU:C:2016:838, in particular paragraph 50).

66. However, on 10 April 2014, and thus after expiry of the period prescribed in the request for observations, the competent authorities reversed this decision. This reversal is, firstly, a new breach of the duty to comply with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) which did not exist on the relevant date, i.e. on expiry of the period prescribed. Secondly, however, it simultaneously has the effect of annulling the decision on closure retrospectively and thus with effect for the date of expiry of the period prescribed.

67. Consequently, Slovakia did not implement the judgment at issue with regard to sections 2a and 2b in good time.

68. However, Slovakia argues that any greater progress towards closure of these sections was impossible because of the time needed for the necessary administrative proceedings.

69. In principle, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law. The Court has therefore rejected similar arguments regarding compliance with judgments in relation to waste legislation,<sup>21</sup> but also in relation to transposition of the Waste-water Directive,<sup>22</sup> which frequently requires the construction at great expense of sewage treatment works and sewerage networks.<sup>23</sup>

70. However, Slovakia stresses in particular that under the EIA Directive<sup>24</sup> an environmental impact assessment had to be carried out. In this regard, it must be acknowledged that such assessment is indeed required for a definite decision on closure of a landfill, if such closure concerns a change — through works or interventions involving alterations to its physical aspect — of the landfill site and may have significant (adverse)<sup>25</sup> effects on the environment.<sup>26</sup>

71. Nevertheless, even the need for an environmental impact assessment provided for in EU law cannot justify the delay in compliance with the judgment at issue. Slovakia must have been aware of its obligations under the Landfill Directive and the effort involved in complying with them for a very long time. It therefore had sufficient time to comply with the Landfill Directive with regard to the landfill at issue. And in the case of insuperable difficulties, Slovakia should have agreed an extension of time on its accession to the European Union in 2004.

72. Thus Slovakia did not implement the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) with respect to sections 2a and 2b within the period prescribed set in the request for observations.

#### (b) Section 2c

73. No decision on closure was ever taken with regard to section 2c of the landfill.

21 Judgments of 2 December 2014, *Commission v Greece* (C-378/13, EU:C:2014:2405, paragraph 29), and of 7 September 2016, *Commission v Greece* (C-584/14, EU:C:2016:636, paragraph 53).

22 Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p. 40), as amended by Commission Directive 98/15/EC of 27 February 1998 (OJ 1998 L 67, p. 29).

23 See judgments of 15 October 2015, *Commission v Greece* (C-167/14, EU:C:2015:684, paragraph 28 et seq.), and of 22 June 2016, *Commission v Portugal* (C-557/14, EU:C:2016:471, paragraph 41).

24 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

25 See my Opinion in *Ecologistas en Acción-CODA*, (C-142/07, EU:C:2008:254, paragraph 50). However, the judgment of 25 July 2008, *Ecologistas en Acción-CODA* (C-142/07, EU:C:2008:445, paragraph 41) also requires an assessment if significant beneficial effects are possible.

26 Judgment of 19 April 2012, *Pro-Braine and Others* (C-121/11, EU:C:2012:225, paragraph 33).

74. According to information provided by Slovakia, the delay resulted from disputes regarding ownership of that area. However, these disputes have been ongoing since at least 2009, and Slovakia has failed to explain why they have not yet been concluded. In any case, such disputes cannot justify acceptance of the environmental risks associated with a landfill that has not been correctly closed.

75. Thus, Slovakia also did not implement the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) with respect to section 2c within the period prescribed in the request for observations.

*(c) Interim conclusion*

76. Thus, by failing to take a definite decision on closure of the Žilina-Považský Chlmec waste site by 21 January 2014, the Slovak Republic has not complied with its obligation under Article 260(1) TFEU and with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271).

*2. The current situation*

77. The current situation differs from that prevailing on expiry of the period prescribed in that a decision was taken by the competent authorities on 15 August 2016 discontinuing use of sections 2a and 2b of the landfill and ordering their closure and restoration. The competent supervisory authority confirmed this decision, following an objection, on 9 November 2016. Although a judicial appeal has now been lodged, this will not prevent enforcement of the decision.

78. Although the Commission disputes that this is a definite decision because it is not final, as previously described a definite decision cannot be required to be final.

79. Consequently, the Commission's argument that the decisions in respect of sections 2a and 2b of the landfill are not definite must be rejected.

80. In contrast, there has still not been any decision regarding closure and restoration of section 2c.

81. The Commission therefore rightly continues to take issue with the lack of a decision on section 2c.

82. As of today, therefore, by failing to take a definite decision on closure of section 2c of the Žilina-Považský Chlmec landfill, the Slovak Republic is not in compliance with its obligation under Article 260(1) TFEU and with the judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271).

*3. In the alternative: Application of Article 13 of the Landfill Directive*

83. Should the Court consider the Commission's action to be admissible in so far as it alleges infringement of Article 13 of the Landfill Directive, it would also need to find a further deficiency in compliance. It is not in dispute between the parties that the landfill was not closed in terms of Article 13 of the Landfill Directive by the date of expiry of the period prescribed and has not been closed to date.

### C. *Financial penalties*

84. In the application of Article 260(2) TFEU, it is for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required, to determine the financial penalties appropriate for making sure that the judgment which previously established the breach is complied with as swiftly as possible and preventing similar infringements of EU law from recurring.<sup>27</sup>

85. The Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by that institution is transparent, foreseeable and consistent with legal certainty.<sup>28</sup>

#### 1. *Penalty payment*

86. For the purposes of determining the amount of penalty payments, the basic criteria which must be taken into consideration in order to ensure that penalty payments have coercive effect and that EU law is applied uniformly and effectively are, in principle, the seriousness of the infringement, its duration (since the first judgment) and the capacity of the Member State concerned to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations.<sup>29</sup>

87. As regards, in the first place, the *seriousness of the infringement*, the Commission, on the basis of its action, which concerns both the absence of a final decision for the landfill as a whole and the absence of measures for closure of the landfill under Article 13 of the Landfill Directive, proposes a seriousness coefficient for this infringement of 2 out of a maximum of 20.

88. However, as I have said above, the action is inadmissible as regards the requirements set out in Article 13 and is no longer well founded in relation to the decision regarding sections 2a and 2b. The only outstanding item is a final decision regarding section 2c, which covers about half of the area of the landfill.

89. This calls for a significantly lower seriousness coefficient than that proposed by the Commission.

90. Nevertheless, it must also be taken into account that infringements of waste management law are, as a rule, a matter for particularly serious concern, that contrary to the submissions of the parties the environmental impacts are not necessarily purely local, and that the problem has persisted for a relatively long period, but also that the Court has not previously found Slovakia to be in breach of waste management law.

91. In particular, the Court has previously held that the obligation to dispose of waste without endangering human health and without harming the environment forms part of the very objectives of EU environmental policy, as is apparent from Article 191 TFEU.<sup>30</sup> In each case, the Court inferred from this that the breaches of waste management law at issue were particularly serious.

27 Judgment of 17 November 2011, *Commission v Italy* (C-496/09, EU:C:2011:740, paragraph 36)

28 Judgments of 10 January 2008, *Commission v Portugal* (C-70/06, EU:C:2008:3, paragraph 34); of 7 July 2009, *Commission v Greece* (C-369/07, EU:C:2009:428, paragraph 112); of 17 November 2011, *Commission v Italy* (C-496/09, EU:C:2011:740, paragraph 37); and of 17 October 2013, *Commission v Belgium* (C-533/11, EU:C:2013:659, paragraph 64).

29 Judgments of 15 October 2015, *Commission v Greece* (C-167/14, EU:C:2015:684, paragraph 54), and of 22 June 2016, *Commission v Portugal* (C-557/14, EU:C:2016:471, paragraph 70).

30 Judgments of 2 December 2014, *Commission v Italy* (C-196/13, EU:C:2014:2407, paragraph 98), and of 7 September 2016, *Commission v Greece* (C-584/14, EU:C:2016:636, paragraph 77).

92. This also applies in principle to an infringement of Article 14 of the Landfill Directive in respect of an individual landfill. As the Court stated in paragraph 34 of its judgment in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), compliance with this provision forms the basis for satisfaction of the requirements of the Landfill Directive by the landfill at issue. This is therefore not a purely formal infringement.<sup>31</sup>

93. Moreover, Slovakia discontinued operation of the landfill on 7 January 2014. Although the creation of new risks to human health and/or the environment is therefore ruled out, this situation raises doubts as to whether it is possible to operate the landfill in accordance with the Landfill Directive at all without major difficulty. In fact, there is a danger that past operation was associated with significant risks of those kinds. In order to control such risks, the landfill must at least be correctly closed down. This is not possible without a definite decision on closure.

94. Regarding the submissions of *both* parties about the local nature of possible adverse effects, it should be noted that the landfill at issue is located on the banks of the Váh, which could be affected by any contamination and could disperse it downstream.

95. Moreover, the infringement of EU Law has persisted since 16 July 2009, the latest date by which a definite decision regarding continued operation or closure of the landfill should have been taken under Article 14 of the Landfill Directive, that is to say for over eight years. In principle, Slovakia should have had sufficient time to take such decision, even if an environmental impact assessment was indeed required to do so, following its accession to the European Union in 2004.

96. On the other hand, Slovakia correctly argues that the Court has never found it to be in breach of waste management law, although the Court has previously dealt with cases involving Slovakia in this field of policy.<sup>32</sup>

97. Overall, I consider therefore that a seriousness coefficient of just 0.5 is appropriate.

98. As regards, in the second place, the *duration of the infringement* since delivery of the initial judgment establishing a failure to fulfil obligations, that must be assessed by reference to the date on which the Court assesses the facts in the content of those proceedings.<sup>33</sup> In the present case, the duration of the infringement to be examined is considerable; if judgment is delivered at the end of April next year, five years will have passed from the date of delivery of the initial judgment on 25 April 2013, even though the only requirement was to make a final decision on closure in order to remedy the present complaint. Therefore, based on the Commission's method, which applies a coefficient of 0.1 per month, the duration coefficient should be assessed at 6.

99. Therefore, taking into account Slovakia's *ability to pay*,<sup>34</sup> this produces a daily penalty payment of EUR 3 345.60. The Court should round this amount down to EUR 3 300 and impose that figure as a daily penalty payment, payable until the date of adoption of a definite decision regarding section 2c of the landfill.

<sup>31</sup> See also the judgment of 25 February 2016, *Commission v Spain* (C-454/14, EU:C:2016:117, paragraph 63).

<sup>32</sup> In the Order of 28 January 2013, *Commission v Slovakia* (C-305/12, EU:C:2013:38, paragraph 4), the President of the Court found that Slovakia had complied with its obligation to implement Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives (OJ 2008 L 312, p. 3) only during the course of the proceedings before the Court, i.e. around two years late. The President of the Eighth Chamber, made a similar finding in relation to implementation of the Landfill Directive in the Order of 19 May 2011, *Commission v Slovakia* (C-253/10, EU:C:2011:325, paragraph 4), although the delay was significantly longer. In contrast, the judgment of 15 January 2013 in *Križan and Others* (C-416/10, EU:C:2013:8) was given on a reference for a preliminary ruling and therefore made no findings as to whether there had been any infringement of EU law in relation to the landfill at issue in those proceedings.

<sup>33</sup> Judgments of 2 December 2014, *Commission v Greece* (C-378/13, EU:C:2014:2405, paragraph 57), and of 7 September 2016, *Commission v Greece* (C-584/14, EU:C:2016:636, paragraph 80).

<sup>34</sup> In accordance with Commission Communication C(2016) 5091 final of 9 August 2016, a flat rate amount of EUR 680, multiplied by a coefficient of 1.64, is to be applied. In its application, the Commission relies on Communication C(2015)5511 of 5 August 2015, which was in force when it decided on 16 June 2016 to initiate proceedings.

## 2. *The lump sum*

100. The Court is empowered, in exercising the discretion conferred on it in the field in question, to impose a penalty payment and a lump sum payment cumulatively. An order to pay a lump sum is based essentially on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period after the judgment initially establishing it was delivered. The imposition of a lump sum payment must depend in each individual case on all the relevant factors relating both to the characteristics of the failure to fulfil obligations established and to the conduct of the Member State involved in the procedure initiated under Article 260 TFEU. That provision confers in that regard a wide discretion on the Court in deciding whether to impose such a penalty.<sup>35</sup>

101. The Commission proposes that the lump sum be calculated on the basis of a daily flat rate amount of EUR 230, the same 'n' factor for ability to pay of 1.64, the same seriousness coefficient (in the case 0.5) multiplied by the number of days between the judgment of 25 April 2013 in *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271) and the judgment in the present proceedings. Accordingly, the amount to be imposed for each day is EUR 188.60.

102. Assuming that this latter judgment is delivered after exactly five years, on 25 April 2018, the lump sum will be approximately EUR 344 195.

103. When determining the amount of the lump sum, however, it must be taken into account that the final decision to close sections 2a and 2b was not taken until 2016.<sup>36</sup> Prior to that date, the infringement must be considered to be approximately twice as important, because no definite decision had been taken as required in respect of any part of the landfill. Therefore, in addition to the initial amount, a further EUR 188.60 is payable in respect of 1 575 days. This would result in an additional EUR 297 045.

104. Rounded down, this produces a lump sum of EUR 600 000. While this sum is lower than the minimum lump sum of EUR 939 000 proposed for Slovakia by the Commission, I nevertheless consider it to be appropriate. In particular, it is not a purely symbolic amount, which the Commission wishes to avoid by setting a minimum base.<sup>37</sup>

## 3. *In the alternative: Infringement of Article 13 of the Landfill Directive*

105. If the Court considers that the infringement of Article 13 of the Landfill Directive should also be dealt with in these proceedings, the amount of the penalty payment should be quadrupled and the amount of the lump sum tripled. This proposal is based on the consideration that although a definite decision under Article 14(b) is a condition for closure, the other measures for closure under Article 13 are of significantly greater practical importance.

## V. **Costs**

106. Article 138(3) of the Rules of Procedure [of the Court of Justice] states that where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

<sup>35</sup> Judgment of 2 December 2014, *Commission v Greece* (C-378/13, EU:C:2014:2405, paragraphs 71 to 73).

<sup>36</sup> See judgment of 2 December 2014, *Commission v Greece* (C-378/13, EU:C:2014:2405, paragraph 78).

<sup>37</sup> Communication of 13 December 2005 on 'Application of Article 228 of the EC Treaty' (SEC[2005] 1658), point 20.

107. Although the Court does not view divergence from the form of order sought by the Commission in relation to the penalty payment and the lump sum as a partial failure on the part of the Commission,<sup>38</sup> in the present case the Commission's action is, in addition, in part inadmissible and in part unfounded.

108. Therefore, it should be held that the Commission and Slovakia have succeeded on some and failed on other heads. Consequently, the parties should be ordered to bear their own costs.

## VI. Conclusion

109. Accordingly, the Court should in my opinion:

- (1) Declare that, by failing to take a definite decision on closure of the Žilina-Považský Chlmec landfill by 21 January 2014, the Slovak Republic has failed to fulfil its obligation under Article 260(1) TFEU and the judgment of 25 April 2013, *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271);
- (2) In the event that, on the date of delivery of the present judgment, Slovakia has not yet taken a definite decision in accordance with Article 14(b) of Directive 1999/31/EC on the landfill of waste with regard to section 2c of the Žilina-Považský Chlmec landfill as is necessary for compliance with the judgment of 25 April 2013, *Commission v Slovakia* (C-331/11, not published, EU:C:2013:271), order the Slovak Republic to pay the European Commission a penalty payment of EUR 3 300 per day of delay in adopting the decision, payable from the date of delivery of the judgment in the present case until the date of adoption of the decision;
- (3) Order the Slovak Republic to pay the European Commission a lump sum of EUR 600 000;
- (4) Dismiss the action as to the remainder;
- (5) Order the European Commission and the Slovak Republic to bear their own costs.

<sup>38</sup> See, in particular, judgment of 22 June 2016, *Commission v Portugal* (C-557/14, EU:C:2016:471, paragraph 43 and 44, 62 and 63, and 102), and my Opinion in that case (EU:C:2016:119, point 92 and the case-law cited there).