

OPINION OF ADVOCATE GENERAL
MISCHO

delivered on 12 June 2003¹

1. The thorny problem of the cleanliness of bathing water, which is highly topical in this pre-holiday period, is not, to say the least, a new one for the Court. This case is however significant in that it is the first to concern the implementation of a judgment in the matter.

3. The Directive requires Member States to set the values applicable to bathing water for the physical, chemical and microbiological parameters indicated in the annex thereto; those values may not be less stringent than those given in column I of the annex (Articles 2 and 3).

I — Community legislation

2. The purpose of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water² (hereinafter 'the Directive') is, as stated in the first recital in the preamble, to protect the environment and public health by reducing the pollution of bathing water and protecting such water against further deterioration.

4. Under Article 4(1) of the Directive, the quality of bathing water must conform to the limit values set in accordance with Article 3 within a period of 10 years following notification of the Directive.

5. Since Article 395 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties³ does not provide for any derogation from the Direc-

¹ — Original language: French.

² — OJ 1976 L 31, p. 1.

³ — OJ 1985 L 302, p. 23.

tive in favour of the Kingdom of Spain, the quality of Spanish bathing water should have conformed to the limit values set by the Directive as from 1 January 1986.

conformed to the limit values set in accordance with Article 3 of the Directive, the Kingdom of Spain had failed to fulfil its obligations under Article 4 thereof.

II — The Court's judgment in Case C-92/96 *Commission v Spain*

6. In its judgment of 12 February 1998,⁴ the Court held that, by failing to take all necessary measures to ensure that the quality of inshore bathing waters in Spain

⁴ — Case C-92/96 *Commission v Spain* [1998] ECR I-505.

III — The written procedure and the forms of order sought by the parties

7. In its application, the Commission alleges that the quality of inshore bathing waters in Spain does not always attain the standards set in the Directive. It has produced the following table in that regard:

Year	Number of areas	C(I) (%)	NF (%)	NC (%)	NB (%)
1998	215	73	0.9	25.6	0.5
1999	213	76.5	0.5	13.1	9.9
2000	202	79.2	1	14.9	5

C(I): Percentage of bathing areas from which sufficient samples have been taken and which conform to the prescribed values.

NF: Percentage of bathing areas from which sufficient samples have not been taken.

NC: Percentage of bathing areas from which no samples have been taken (or for which no data are available) or which do not conform to the prescribed values.

NB: Percentage of bathing areas at which bathing was prohibited during the entire season.

8. It observes, furthermore, that the Spanish Government has reduced the number of inshore bathing areas over the years.

day of delay from the date on which judgment is delivered in the present case until such time as the judgment in *Commission v Spain* is complied with.

9. The Commission adds that the action plan drawn up by the Spanish Government set out a series of measures both in progress and proposed, and specified a timetable for the execution of works, which were scheduled to be completed in 2003.

12. That sum is calculated by multiplying a uniform amount of EUR 500 by a coefficient of 4 (on a scale of 1 to 20) for the seriousness of the infringement, a coefficient of 2 (on a scale of 1 to 3) for the duration of the infringement and a coefficient of 11.4 (based on the Member State's gross domestic product and the weighting of votes in the Council), which is deemed to reflect the ability of that Member State to pay.

10. In light of those matters, it considers that the defendant has not adopted the measures necessary for complying with the Court's judgment in Case C-92/96 *Commission v Spain*, cited above.

13. The primary submission of the Spanish Government is that the action should be dismissed, on the ground that the Commission has not allowed a sufficient period of time to pass for it to be established that the judgment in Case C-92/96 *Commission v Spain* has not been complied with. It claims in the alternative that the imposition of a daily penalty payment is inappropriate in the present case. Lastly, in the further alternative, it challenges the amount of that payment.

11. The Commission notes that, according to the second sentence of the second subparagraph of Article 228(2) EC, the Commission is required to specify the amount of the lump sum or penalty payment which it considers appropriate in the circumstances. Relying on the method of calculation set out in its communications 96/C 242/07 of 21 August 1996 on applying Article 171 of the EC Treaty (now Article 228 EC),⁵ and 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty,⁶ the Commission has proposed that the Court should, in respect of failure to comply with the judgment in Case C-92/96 *Commission v Spain*, impose a penalty payment of EUR 45 600 for every

14. The Commission claims that the Court should:

— declare that, by not taking the necessary measures to ensure that the quality of inshore bathing water in Spanish

⁵ — OJ 1996 C 242, p. 6.

⁶ — OJ 1997 C 63, p. 2.

territory conforms to the limit values set in accordance with Article 3 of the Directive, notwithstanding its obligations under Article 4 of the Directive, the Kingdom of Spain has not complied with the judgment in Case C-92/96 *Commission v Spain* and has accordingly failed to fulfil its obligations under Article 228 EC;

- in the alternative, refuse to impose a daily penalty payment;
- in the further alternative, impose a daily penalty payment not exceeding EUR 11 400;
- in any case, order the Commission to pay the costs.
- order the Kingdom of Spain to pay to the Commission, into its 'European Community own resources' account, a penalty payment of EUR 45 600 per day of delay in adopting the measures necessary to comply with the judgment in Case C-92/96 *Commission v Spain*, from the date on which judgment is delivered in this case until the date on which the judgment in *Commission v Spain* is implemented;

IV — Analysis

A — *The failure to comply with the Court's judgment in Case C-92/96 Commission v Spain*

- order the Kingdom of Spain to pay the costs.

15. The Kingdom of Spain claims that the Court should:

16. The Kingdom of Spain's first ground of defence takes the form of a robust challenge to the Commission's assertion that there has been a failure to comply with the Court's judgment in Case C-92/96 *Commission v Spain*, or, which amounts to the same thing, that the defendant has failed to fulfil its obligations under the Directive.

- dismiss the action in its entirety;
- 17. A number of points should be emphasised in that regard. Firstly, it should be noted that, according to the settled case-

law of the Court, the Directive imposes a duty on Member States to ensure that certain results are achieved.⁷ It requires them to ensure that bathing areas conform to the values set out in the annex to the Directive and Member States are not entitled to rely on practical difficulties encountered to evade that obligation.

18. Secondly, it should be noted that the relevant date for determining whether a Member State has, or has not, failed to fulfil its obligations is that of the expiry of the period specified in the reasoned opinion. Thus, the first sentence of the second subparagraph of Article 228(2) EC states expressly that the Commission may bring a case before the Court 'if the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission'. That point is important in the present case, as the parties have both raised a number of issues of fact relating to the position after that date.

19. Those arguments are relevant, as will be seen, in the context of the issue of a possible penalty payment. On the other hand, they do not fall to be taken into account at the necessary preliminary stage of establishing whether or not there was, on the defendant's part, a failure to comply with its duty to implement the judgment of the Court.

20. It is appropriate to define this issue clearly at the outset. The Spanish Government does not deny that it did not fulfil its obligations under the Directive within the relevant timescale. It accordingly admits that it did not comply with the Court's judgment within the time-limit imposed on it by the Commission.

21. Plainly, the defendant could hardly have done otherwise. It follows undeniably from the figures put forward by the Commission that during the 2000 bathing season a certain proportion, of the order of 20%, of the bathing areas in question did not conform to the criteria laid down in the Directive. It was in the month of September of that year that the time-limit of two months set in the reasoned opinion of 27 July 2000 expired.

22. Admittedly, the defendant has strongly challenged a specific aspect of the Commission's approach, namely the treatment of those areas where bathing has been prohibited or those which have been removed from the list of bathing areas. It considers, unlike the applicant, that those areas should not be counted among those which do not conform to the requirements of the Directive. However, it freely accepts, that even if the Commission's figures were to be modified to that effect, the compliance figures achieved in Spain during the relevant period remain clearly below the 100% figure required to implement the Directive and, accordingly, the judgment of the Court.

⁷ — See, for example, Case C-198/97 *Commission v Germany* [1999] ECR I-3257.

23. It is therefore unnecessary, at this point of my analysis, to deal with the question of the consequences of prohibiting bathing or removing areas from the list for the purposes of assessing the extent to which bathing areas conform to the criteria laid down in the annex to the Directive. I have, moreover, had occasion to address certain aspects of that question already.⁸

24. Should it none the less be concluded at this early stage that the Commission has established a failure to comply with the judgment of the Court? That would be to misconstrue the defendant's position. The latter argues, in effect, that the Commission has not allowed it a sufficient period of time in which to comply with its obligations. It follows that the Court cannot find that there has been a breach of them.

25. Before considering, if necessary, whether this argument can succeed in the circumstances of the present case, it is appropriate to establish whether or not it is permissible in principle. It should be noted in that regard that the Court has consistently held,⁹ as the defendant itself mentions, that the Commission has a wide discretion in deciding whether it is expedi-

ent to bring infringement proceedings and when to do so.

26. It none the less remains the case, according to the defendant, that actions for failure to comply with a judgment possess certain special characteristics in this respect. The Treaty, in particular Article 228 EC, on the basis of which such actions are brought, does not specify any period within which a judgment of the Court requires to be complied with by a Member State.

27. It is therefore appropriate to refer to the Court's case-law, which states that a Member State is entitled to a reasonable time in which to comply with a judgment of the Court. That was not, it says, the case in the present matter.

28. I agree with the defendant's analysis. It should be emphasised in this regard that there is an important distinction between an action for failure to comply with a judgment finding that there has been a breach of a directive and one for failure to implement a directive. Generally speaking, the directive will have specified a time-limit, on the expiry of which the Member State should have complied with it.

8 — See my Opinion in Case C-226/01 *Commission v Denmark* [2003] ECR I-1219.

9 — See, for example, Case C-35/96 *Commission v Italy* [1998] ECR I-3851.

29. Where infringement proceedings are brought, the Court needs only establish that the time-limit has expired and that obligations under the directive have not been complied with. Unless the Member State can plead *force majeure*, it cannot argue that the time-limit is inadequate.

impossible' and in my view confirms the defendant's argument that it is necessary to assess in every case whether a Member State has been allowed such time as is reasonably necessary to take measures to achieve compliance with the judgment of the Court.

30. The present situation is quite different. The matter before the Court is the failure of a Member State to comply with a judgment. The defendant is right to point out that the Treaty does not specify any time-limit in that regard. On the other hand, the Court has already had occasion to address this problem, which is inherent in any action for failure to comply with a judgment.

33. That case-law also means that an action brought by the Commission for failure to comply with a judgment within a timescale that was so short that the Member State could not reasonably have taken the measures necessary to comply with the Court's judgment would require to be dismissed.

31. That case-law¹⁰ provides that the importance of immediate and uniform application of Community law means that the process of compliance with the Court's judgment must be initiated at once and completed as soon as possible. The use of the word 'possible' shows that some time may pass before a failure to comply with the judgment is clearly established, at least as regards the outcome of measures undertaken.

34. In that regard, the parties have adopted diametrically opposed positions in relation to the two criteria established under case-law, namely the immediate character of the Member State's initiation of the process of complying with the judgment, on the one hand, and the taking of measures to complete that process as quickly as possible, on the other.

32. The fact that the case-law refers to the process being completed 'as soon as possible' simply represents an application of the principle that 'no one is required to do the

35. Thus, the Commission is of the view that the action taken by the defendant is clearly inadequate from both points of view. It states in that regard that the first responses provided by the Spanish authorities, in the months following the Court's judgment, were far from providing, as the defendant claims, an exhaustive schedule and detailed plan of actions to be under-

¹⁰ — See Case C-387/97 *Commission v Greece* [2000] ECR I-5047, paragraph 82, and the cases cited there.

taken, including the financial aspects of the latter. On the contrary, the data supplied to the Commission were incomplete or out of date for a number of regions in the country. In particular, one would look in vain for a detailed plan of action.

begin to take action more quickly than the Spanish authorities did, and that they had in fact waited to receive the reasoned opinion before actually initiating compliance with the judgment.

36. Can it therefore be concluded that the Spanish authorities did not immediately initiate the process of compliance with the Court's judgment?

37. The applicant's first argument does not appear decisive. The inadequate nature of the initial data supplied to the Commission would not, of itself, prove inactivity on the part of the Spanish authorities. Those gaps could be explained by the fact that while the authorities had initiated the process of compliance with the Court's judgment, they had not yet managed to collect the most recent data from all the regional and local authorities concerned.

39. That argument is unconvincing. The fact that the Spanish authorities were able, in July 2000, to send a detailed plan to the Commission within a period of two months does not necessarily mean that they would have been able to do the same thing in 1998, and that they therefore did nothing between the date of delivery of the judgment requiring compliance and receipt of the reasoned opinion. The documents in the case show that the detailed plan was drawn up having particular regard to data collected during the period from 1998 to 2000. It has therefore not been shown that the Spanish authorities were in a position to draw up such a plan solely on the basis of information available to them in the months following the Court's judgment, particularly since that judgment was delivered shortly before the beginning of a bathing season, that is to say a new period for the taking of samples. The authorities might have wished to wait for the results of these.

38. The Commission also notes that, after the reasoned opinion was sent to the Spanish authorities in July 2000, it took the latter only two months to send the Commission a comprehensive plan, setting out in detail all the action to be undertaken. According to the Commission, that short period shows that it was entirely possible to

40. Moreover, the figures provided by the Commission itself show that there was an improvement, however slight, in the quality of the bathing water in question between 1998 and 1999, as the compliance rate passed from 73 to 76.5%. That was the

period immediately following the Court's judgment. Those figures tend therefore to contradict any allegation of inactivity on the part of the Spanish authorities during that time.

41. It follows from the above that the Commission has failed to prove that the Spanish authorities did not immediately initiate the process of compliance with the Court's judgment. It is settled case-law that the onus of proof lies on the Commission in such cases.¹¹

42. However, the obligations of a Member State are not limited to the taking of immediate steps to comply with the judgment in question. As was mentioned above, it is also under a duty to achieve compliance as quickly as possible. According to the Commission, the defendant failed to do so.

43. It notes in that regard that even now the standards set in the Directive have not all been attained. The dates of 2005, or, where applicable, 2003, specified by the Spanish Government in its defence as the due dates for compliance with the Court's

judgment could not be said to be 'as soon as possible', as case-law requires.

44. According to the Commission, there are two reasons which explain the failure to act on the part of the Spanish authorities. The first is that just referred to: they did not begin to comply with the judgment until after receipt of the reasoned opinion, that is to say two years after the delivery of the judgment. The second arises from the fact that the Spanish Government did not, at the outset, take the measures required to reduce the period for implementing the works necessary to put an end to the breach. This is shown by the fact that the relevant calls for tenders followed the standard procedure, instead of being declared to be urgent. That step was taken only in January 2001, that is to say three years after the judgment, and even then only in relation to some of them.

45. As regards the last point, the Spanish Government claims that the Community rules relating to public procurement did not permit the projects in question to be declared urgent. However, it does not explain why those projects which, as the Commission alleges without being challenged on the point, were ultimately none the less declared urgent were not so classified earlier.

46. It cannot moreover be denied that at the expiry of the time-limit set in the reasoned opinion the standards had still not been attained at a number of bathing areas. The precise number is the subject of

¹¹ — See, for example, Case C-387/97 *Commission v Greece*, cited above, paragraph 73.

disagreement between the parties, as it depends on the treatment of bathing prohibitions. As mentioned above, that question is not very important at this stage, as the figures attained are in any event inadequate.

47. That point on its own might appear sufficient for a finding of infringement as, in principle, if a Member State has not complied with a judgment within the period set in the reasoned opinion, it has not done so as quickly as possible. The defendant claims, however, that the particular features of the present case show that conclusion to be incorrect. The difficulties of complying with the judgment in Spain were so great that even the quickest possible implementation, within the meaning of the case-law, could not be achieved by the expiry of the time-limit set in the reasoned opinion. It follows that the fact that the judgment had not been complied with by that date does not necessarily prove that the judgment was not implemented as quickly as possible.

48. That argument might appear at first sight to be excessively formalistic, particularly in the circumstances of the present case. It is not denied that all the standards set by the Directive have still not yet been attained and the judgment thus remains to be complied with. It therefore appears that, had the Commission delayed bringing proceedings, as the Spanish Government claims by implication that it should have done, the result would have been no

different. It might thus be unduly formalistic to dismiss the action on the grounds that the failure, which becomes evermore undeniable with the passage of time, would not yet have been evident when the time-limit set in the reasoned opinion expired.

49. However, it suffices merely to set out this argument to perceive its limitations. The subsequent course of events is irrelevant to establishing the point in time at which a breach requires be established. It follows indisputably both from settled case-law¹² and from the wording of Article 228 EC itself that the appropriate time for doing so is the expiry of the period laid down in the reasoned opinion.

50. Moreover, that is the solution required by the most basic rules of legal certainty. The facts of the dispute must have crystallised at a particular time, prior to proceedings being brought before the Court. Those proceedings cannot concern a situation which is still developing, where the outcome of the case will depend on the length taken by the Court to dispose of the matter.

51. But that would be the result of the Commission's argument that the defendant had available to it not only the years from 1998 to 2000, but also the subsequent

12 — See, for example, Case C-362/90 *Commission v Italy* [1992] ECR I-2353, paragraph 10.

period, until the Court delivered its judgment, to fulfil its obligations. That submission should therefore be rejected and it should be held that since the expiry of the period laid down in the reasoned opinion was at the end of September 2000, the period available to the defendant to implement the Court's judgment was approximately two years and seven months.

54. The Commission claims moreover that there should also be taken into account the 12 years between the period for implementation initially laid down in the Directive and the judgment requiring compliance. The defendant disputes this. In that regard, it is undeniable that that period is even longer than the period of 10 years initially allowed to Member States, and, accordingly, that Spain had more than ample time available to it before the Commission's first action, even assuming that it did not initiate compliance with the Directive until after its accession.

52. The case-law¹³ cited by the Commission at the hearing concerning the account taken by the Court of matters arising after the expiry of the period laid down in the reasoned opinion does not lead to a different conclusion. In those cases, the Court held that facts occurring after the period were similar to those referred to in the reasoned opinion and, accordingly, amounted to the same conduct. It was therefore a question of linking proven facts occurring before the time-limit with matters arising after it had expired.

55. It is true, as indeed the Commission points out, that the obligation to comply with the Court's judgment and that of implementing the Directive are substantially the same. It none the less remains the case that they are not entirely comparable. That applies particularly to the period for complying with the relevant obligations. The period for implementing the Directive is laid down under it, and has, in the present case, long since expired.

53. By contrast, the approach proposed by the Commission in the present case represents the direct opposite. It amounts in effect to placing reliance on matters occurring after the time-limit to prove the breach, whereas the breach was required to have arisen before the time-limit had expired.

56. By contrast, the period for complying with the Court's judgment did not start to run before the judgment was notified, and its expiry assumes the passage of a reasonable period of time, within the meaning of the Court's case-law referred to above. The reasonableness of the period depends on the measures remaining to be taken by the

13 — Case 42/82 *Commission v France* [1983] ECR 1013 and Case 113/86 *Commission v Italy* [1988] ECR 607.

Member State when the Court's judgment is delivered and may therefore vary depending on the circumstances of each actual case.

57. It may admittedly appear contradictory to refer to a time-limit within which a Member State must comply with its obligations when years have passed since a judgment finding an infringement, itself delivered 12 years after the expiry of the period allowed in the Directive. The fact remains, however, that it follows clearly, and in my opinion logically, from the case-law referred to above relating to failure to comply with a judgment, that the latter starts a new period running, which must be assessed according to the criteria laid down in that case-law.

58. In that regard, the defendant raises a number of arguments in support of its submission that the Commission should have allowed it a longer period of time.

59. It notes first of all the unusual length of the period laid down in the Directive itself for its implementation by the Member States. That period may be explained by the fact that the Community legislature itself recognised the considerable difficulties that would arise in meeting the criteria laid down in the Directive and that only long-term action would succeed in fulfilling them.

60. The defendant next refers to the specific features of the situation in Spain, where the implementation of the Directive presented particular difficulties. Spanish bathing areas are notable for very weak outflow from the rivers concerned and for a high proportion of areas containing stagnant water of little depth. Such water has limited diluting ability and does not renew itself adequately, which means that not only is the slightest impurity, which may be caused by something as trivial as the presence of a bather, enough for the standards to be exceeded, but also that it is very difficult to remedy constant excesses of this kind. That already endemic situation was further aggravated by the dryness of recent years.

61. However, the Commission disputes that version of the facts, claiming that the situation in Spain is comparable to that of other Member States such as Greece or Italy. The defendant responds, without challenge on the Commission's part, that those Member States have designated a considerably lower number of bathing areas¹⁴ than Spain¹⁵ and that only some of them were of a comparable standard to those in Spain.

14 — According to Spain, Greece had designated 5 areas and only 46 Italian areas were comparable to the Spanish areas.

15 — In 1998, Spain had designated 215 areas.

62. In any event, the Commission has not responded to other points raised by the defendant. Thus, the latter observes that a distinction should be made between different situations. The requirement under the directives to ensure that certain results are achieved is not the same in each of them. So, in some cases, the action required of a Member State consists in adopting legislative or regulatory standards, which it is easy to do quickly. In other cases, such as the present one, the obligation to ensure that certain results are achieved consists in altering and monitoring a physical entity, covering an entire country, whose most strongly flowing water course, according to the defendant, would largely pass unnoticed in another Member State, except at its river mouth.

63. The defendant is correct to draw attention to those aspects of the present case. It should be borne in mind, as the case-law mentioned above shows, that the question is one of establishing whether the Member State has been allowed a reasonable time in which to comply with its obligations. That can only be decided in the light of its actual situation at the expiry of the period laid down in the reasoned opinion.

64. In that regard, a comparison between this case and other proceedings for failure to fulfil obligations is instructive, although without, of course, any legal significance. Thus, in cases which only require legislative amendments to be made, the time elapsing

before the Commission brings proceedings can vary between 2¹⁶ and 20¹⁷ years. In a case¹⁸ that was more directly comparable with the present matter, as it also involved the taking of specific measures to combat pollution, the Commission waited for over five and a half years after the delivery of the Court's judgment before bringing infringement proceedings, although the problem at that time, which involved the management of waste in part of Crete, might appear more localised than that faced by the Spanish authorities.

65. The same applies, moreover, to another case cited by the Commission at the hearing.¹⁹ That involved the position of the United Kingdom which was also the subject of an action for non-compliance with a judgment of the Court and included a request for an order imposing a penalty payment. It is interesting in that regard to note that in those proceedings the Commission allowed a period of six and a half years to pass before issuing a reasoned opinion. Furthermore, the problem arising in the United Kingdom was limited to a discrete area and might therefore appear to be of a scale smaller than that which arises in the present case.

16 — Case 131/84 *Commission v Italy* [1985] ECR 3531.

17 — Case C-334/94 *Commission v France* [1996] ECR I-1307.

18 — Case C-387/97 *Commission v Greece*, cited above.

19 — Case C-85/01 *Commission v United Kingdom* (removed from the Register).

66. In any event, there are other factors pointing to the particular difficulty of implementing the Directive, a difficulty which I have already had occasion to refer to in my Opinion in Case C-226/01 *Commission v Denmark* and which is, moreover, confirmed by the number of infringement proceedings relating to that directive.²⁰

67. A particularly revealing point is disclosed by the reports of the Commission itself, which have been cited by the defendant. It is apparent from Annex 1 to the report on the quality of bathing water for the 2000 season that the Commission explains the fact that, more than 20 years after the adoption of the Directive, some bathing areas have not complied for several years with the prescribed values laid down in it, by noting that it is difficult, especially where less significant and more diffuse sources of pollution are involved, to detect these problems and to remedy them. It even adds that in the majority of these cases several bathing seasons are required to detect the true source or the cycle of pollution. In some cases, the situation can only be resolved by the adoption of long-term improvement programmes relating to agricultural practices.

68. The above clearly shows that in some cases a period considerably greater than the two and a half years allowed to the defendant by the Commission is, even in the latter's own opinion, objectively necessary in order to comply with the Directive. None of the points raised by the Commission suggests that that is not the case here. It does not suggest that the works undertaken before the judgment in 1998 were sufficiently wide-ranging to prevent problems of this kind recurring and that compliance with the remaining obligations would thus be able to progress rapidly. Nor does it claim that the defendant was not faced with diffuse sources of pollution or with water flows from agricultural land in the present matter. On the contrary, it does not challenge the defendant's submissions which refer clearly and in detail to such circumstances.

69. It must be stated that the Commission's arguments have failed to demonstrate that the Member State in the present case has been allowed a reasonable period in which to comply with the Court's judgment. It has thus not shown that on the expiry of the period set in the reasoned opinion it was immediately clear that the defendant had failed to comply with its obligations.

70. It should be noted that this type of situation should be treated as exceptional. It is linked to the factual background to the case, which is characterised, on the one hand, by special factors relating to the implementation of the Directive and, on the other, by what must, in the context, be

20 — Case C-56/90 *Commission v United Kingdom* [1993] ECR I-4109; Case C-92/96 *Commission v Spain*, cited above; Case C-198/97 *Commission v Germany*, cited above; Case C-307/98 *Commission v Belgium* [2000] ECR I-3933; Case C-147/00 *Commission v France* [2001] ECR I-2387; Case C-368/00 *Commission v Sweden* [2001] ECR I-4605; Case C-427/00 *Commission v United Kingdom* [2001] ECR I-8535; Case C-226/01 *Commission v Denmark*, cited above.

termed a certain haste on the Commission's part, which might have been commendable in other circumstances.

context of which a penalty payment would hardly make sense, as it would not make possible that which was impossible, namely achieving the required result in a shorter period.

71. In any event, it follows from the above that the Commission's action should be dismissed, because the failure which it alleges has not been proved. It is therefore only for the sake of completeness that I shall consider the conflicting reasoning of the parties regarding the arrangements relating to and the amount of the penalty payment.

74. Thus, once imposed by the Court, the penalty payment would, in the absence of any other solution, be due in respect of those months until compliance with the values set in the Directive could be checked, namely at the end of the first bathing season after its imposition (from 15 April to 23 October in the case of Spain). The same would apply in any other year until the percentages could be checked at the end of the following bathing season.

B — The principles relating to the setting of a penalty payment and its amount

72. In this context, the defendant claims, firstly, that a daily penalty payment is not an appropriate mechanism for ensuring compliance with the judgment having regard to the actual circumstances of the case. The purpose of a penalty payment is not simply to penalise a Member State, but to encourage it to comply immediately. In the present case, the Member State required to establish what the problems were, which it had already done, to develop action plans, which it had also done, to implement them and to consider the results at the end of each annual bathing season.

75. For the Commission, the possibility or impossibility of complying with the judgment immediately is not a relevant matter, having regard in particular to the fact that the imposition of the penalty occurred some years after the obligation arose which it is sought to implement, namely that of complying with the Court's first judgment.

73. It follows that the Member State would be faced with irreducible timescales, in the

76. It adds that, ultimately, the question of whether the penalty payment is appropriate depends only on whether or not the breach continues. If that is the case, the payment of a penalty represents the most appropriate means of ensuring that the breach is terminated. That is all the more so if one takes into account the fact that, in order to put an end to the breach of the Directive, the Kingdom of Spain must take certain

specific measures, such as the control of diffuse pollution and illegal discharges of waste, and the construction of purification stations for wastewater, which require to be undertaken throughout the year.

77. For my part, I would willingly agree that in principle the only relevant question for deciding whether the imposition of a penalty payment is appropriate is that of whether or not the breach is a continuing one. If so, the measure is appropriate because its aim is to require the Member State to comply with its obligations as soon as possible. By contrast, if the breach has ended before the Court gives a ruling, there is, by definition, no longer any need to require the Member State to take any steps and the penalty payment should therefore no longer be imposed.

78. In the present case, the latest data provided to the Court by the parties show that the standards set in the Directive have still not been attained in all Spanish inshore bathing waters. The breach is therefore a continuing one, and thus so the need persists to require the Member State to remedy it as quickly as possible. Admittedly, the penalty payment will not enable the judgment to be complied with more quickly, as that depends on a whole series of works to be undertaken by the Member State or the regional or local authorities. It nevertheless remains the case that the penalty payment is a means of dissuading the national authorities from slackening their efforts, for example in favour of other priorities, thereby delaying compliance with the Court's judgment.

79. The defendant also submits that the imposition of a daily penalty payment is inappropriate in the present case because findings of compliance with the standards set in the Directive are made annually, at the end of each bathing season. It follows that the penalty payment would of necessity be due over a long period.

80. I understand the defendant to mean by this that the imposition of the penalty payment would be inappropriate because it would be due on a daily basis whereas, since any finding that the breach has ended is made annually, the penalty would be paid during periods when the standards set in the Directive had in fact been attained, but a finding as to that state of affairs could only be reached many days later. The Member State would thus be required to pay the penalty for periods when the breach had in fact terminated.

81. Indeed, the Directive itself makes it clear that findings in relation to the state of bathing areas are to be made annually.²¹ That periodicity represents an integral part of the obligations arising under the Directive and a Member State is not entitled to assume, before those findings are made, that it is already in compliance with the Directive and that a penalty payment will no longer be due.

21 — Cf. Article 13 of the Directive, as amended by Article 3 of Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain directives relating to the environment (OJ 1991 L 377, p. 48).

82. Nevertheless, the Spanish Government's argument deserves in my opinion to be considered in greater detail. One might also ask whether, in circumstances such as those in the present case, where implementation of the Member State's obligations will of necessity be gradual, a penalty payment should not be regarded as inappropriate by reason of its being a fixed amount. The sum is set having regard to the situation in the Member State at the time of the Court's decision and is not capable of being reduced as and when the judgment is complied with by the Member State.

83. The Commission argued at the hearing that those problems are not insurmountable. A Member State could make an application to the Commission, supported by the necessary evidence, showing that it had made progress in implementing its obligations and that the amount of the penalty payment should be reduced. Were the Commission to refuse the application, or to set a new amount which the Member State considered still to be too high, that would be subject to review by the Court by way of an application for declaration of failure to act or for annulment, according to the circumstances.

84. That argument is unconvincing. It is to say the least doubtful that the parties are entitled to apply the Court's decision on the amount of the penalty payment in that way.

85. One might even ask whether, in cases where the measure to be taken by the Member State consists in the adoption of a legislative or regulatory act, a finding as to the adequacy of that act and the corresponding lifting of the penalty payment should not be made by way of a decision of the Court, as it was the latter which determined the breach and imposed the penalty payment. However, I think that that would be to take an unduly formalistic approach.

86. In any event, it should be noted that in Case C-387/97 *Commission v Greece*, cited above, the Court held that the amount of the penalty payment must be 'appropriate to the circumstances'. As mentioned above, those are characterised by the annual nature of the finding as to compliance, while the penalty payment proposed by the Commission is a daily one, and by the fact that the implementation by a Member State of its obligations of necessity will be gradual, while the penalty payment is set at a fixed amount.

87. Those aspects of the present case have significant practical consequences. Thus, even if, at the end of a given bathing season, it is found that the bathing waters in Spain are almost in compliance with the requirements of the Directive, the penalty payment proposed by the Commission will continue to be due in its entirety, for every day until the next annual finding is made.

88. The defendant would therefore be liable to continue paying a daily penalty for another year even though, on the one hand, the number of areas remaining in breach was disproportionate to the sum which continued to be payable, and, on the other, as the number of relevant areas would hypothetically be considerably reduced, it would be quite likely that compliance, in fact if not in law, would be attained shortly afterwards and, in any case, well before the next annual finding was made.

89. It is difficult to consider that a mechanism is 'appropriate to the circumstances' where the non-compliance of 2 or 3 areas out of over 200²² may give rise to an obligation to pay on a daily basis, for an entire year, or even longer, a considerable sum, which is identical to that which was due at the time when the number of areas failing to comply was almost 10 times higher.

90. It follows from the above, in my opinion, that the Court should not impose a periodic penalty payment on the defendant of the kind proposed by the Commission. The Court should thus consider whether a penalty payment calculated by reference to other parameters should be imposed, having regard to the fact — accepted, it should be recalled, only as an alternative hypothesis — that an infringement is established and that it persists.

91. It should be noted in that regard that the Court held in *Commission v Greece*, cited above, that it was not bound by the suggestions of the Commission.²³ It is therefore entitled to set a periodic penalty payment having regard to factors other than those suggested by the Commission. Indeed, that is what was done in *Commission v Greece*, where the Court imposed a lower amount than that suggested by the Commission.

92. The need to resolve the problems just described should in my opinion govern the arrangements relating to the imposition of the penalty payment.

93. I therefore consider that the Court should require the defendant to pay an annual sum calculated by reference to the number of areas still not complying with the standards set in the Directive. If the approach taken by the Court in Case C-387/97 *Commission v Greece* is adopted, and the Commission's suggestion is taken as a useful reference point, it will be noted that it considered a daily sum of EUR 45 600 to be appropriate where almost 20% of bathing areas did not comply with the criteria laid down in the Directive.

22 — As mentioned above, in 1998 Spain had designated a total of 215 bathing areas.

23 — Paragraph 89.

94. That information enables a sum to be calculated which reasonably reflects the annual value which 1% of non-compliant bathing areas represents. If 20% of the areas correspond to EUR 45 600 per day, one can establish what 1% a year actually corresponds to.

95. This produces a figure of EUR 562 500 per year. I therefore suggest, in the alternative, it should be recalled, that it would be 'appropriate to the circumstances', within the meaning of Article 228 EC, to order the Kingdom of Spain to pay an amount of EUR 562 500 per year for each per cent of the number of designated areas that were found to be non-compliant with the Directive.

96. Payment would be due from the time when findings were made as to the quality of bathing water attained at the end of the first season after delivery of the judgment to be delivered by the Court and, if relevant, at the time when subsequent annual findings were made.

97. A practical example will illustrate how the suggested mechanism would work. Presuming the Court delivers judgment in 2003, the first relevant annual finding will be that relating to the 2004 season. Let us assume that it is then found that 90% of the bathing areas have attained the relevant standards; it would follow that 10% did not. The amount due by the defendant

would then be EUR 562 500 multiplied by 10. If at the end of the following bathing season, for 2005, it is found that 95% of areas comply, this will mean that 5% do not. The amount due will not be more than EUR 562 500 multiplied by five. Ultimately, when it appears that all areas comply, the amount will be nil.

98. The above example clearly shows how the suggested mechanism will enable a Member State to see itself rewarded for the fruits of its efforts as soon as their result has been established. That constitutes a positive incentive, in accordance with the logical basis underlying the penalty payment, to encourage the Member State to remedy the situation in the shortest possible timescale.

99. I shall now consider the question of the amount of the penalty payment calculated by the Commission, which the defendant challenges in the further alternative.

100. As regards the factor related to the duration of the breach, the Commission points out that more than three years have passed since delivery of the Court's judgment and it accordingly proposes to apply, on a scale of 1 to 3, a factor of 2. The defendant points out that in the period between the Court's judgment and the bringing of the action there were only three bathing seasons, which would not justify using a coefficient of 2. The Commission

claims, however, that if the minimum coefficient of 1 were applied in the present matter, there would be no difference between a case where calculation of the penalty payment by the Commission was undertaken a year after the judgment and the current case, where three years and three months have elapsed between the Court's judgment and the Commission's decision to bring proceedings.

101. I agree with the applicant's approach. Once one accepts that the period allowed to the defendant was not inadequate, the fact that it was brief has no bearing on the duration of the infringement. In order to determine that duration, the Court need merely refer to the time which has elapsed between its first judgment and the finding that the breach is continuing. The period in question now amounts to more than five years and the Directive is still not being complied with in Spain; it follows that the imposition of a coefficient of 2 out of 3 cannot be said to be wrong.

102. As for the factor relating to the seriousness of the infringement, the Commission proposes to apply a factor of 4, on a scale of 1 to 20. It justifies that figure in particular by the importance of the Community provisions in question, whose aim is to protect human health, and by the time that has passed since the deadline for implementation laid down in the Directive. On the other hand, it has also taken into account the degree of compliance achieved and, in particular, the slight degree of progress disclosed by the figures for 1999 and 2000.

103. The defendant claims, on the other hand, that the Commission has failed to have regard to the fact that almost four fifths of the areas were already in compliance. Furthermore, it should have taken into consideration the time that has elapsed since the judgment and not since the time when the Directive should have been implemented. Lastly, it has overlooked the fact that, because of the date of its accession, the defendant had not benefited from a period of 10 years in which to implement the Directive, unlike other Member States.

104. It is however clear from the terms of the application itself that the Commission had regard to the increase in the rate of compliance, which it notes had risen from 54.5% in 1992 to 79.2% in 2000. As regards the account taken of the time that has elapsed since the date set by the Directive, I also agree with the Commission's approach. It is true that that period should not be taken into account in establishing the duration of the infringement which is the subject of the present proceedings, as that infringement consists in the failure to comply with the Court's judgment. That implies by definition that it should run only from the date of the latter. It none the less remains the case that that time is relevant in assessing not the duration of the infringement but its seriousness. As the Commission points out, it is objectively more serious to fail to comply with a directive over a long period of time than over a shorter period.

105. Lastly, as regards the defendant's argument contending that it did not benefit from an additional period for implementing the Directive, the Commission's response that it could have requested such a period, as Portugal did, is hardly satisfactory. Although it is true that the Kingdom of Spain was entitled to make such a request, it cannot be said with certainty that it would have been granted.

designated as such. Some of the areas which were wrongly removed did not comply with the requirements laid down in the annex to the Directive.

108. The defendant vehemently disputes that submission.

106. That said, I am of the view that the other arguments raised by the Commission, in particular the importance of the provisions in question for public health, a criterion that was moreover applied by the Court in *Commission v Greece*,²⁴ cited above, justify setting a factor of 4 relating to the seriousness of the breach.

109. I have already observed that this question was of no relevance in establishing whether an infringement has occurred. The same applies in the context of assessing the penalty payment because the Commission itself records that it was calculated on the basis of the figures appearing in its annual reports, which disregard areas that have been removed from the list.

107. Before I conclude, reference should briefly be made to the dispute that can only be termed bitter between the Commission and the defendant on the question of the removal of a number of bathing areas from the list. The Commission claims in its application that the compliance figures in its annual reports should be adjusted downwards to reflect the unjustified removal of some bathing areas from the list of areas

110. One may nevertheless wonder to what extent the question could be of importance for the implementation of its obligations by a Member State. That could be the case where the degree of compliance with the Directive attained by the bathing areas was challenged because the Commission took the view that the result had only been achieved by means of the unjustified removal of areas from the list.

24 — Paragraph 94.

111. The following points should be made in that regard.

112. It is beyond dispute that a Member State is entitled to remove bathing areas from the list of those which it has designated. That is not in any event challenged by the Commission. The Directive cannot be regarded as requiring Member States to fix the use of water in their territory for evermore.

113. The dispute relates to the consequences of such a removal and the detailed rules applying to it.

114. As regards the consequences of removal, two situations should be distinguished. The first is where a State fails to prohibit bathing in the area in question at the same time. In that case, the area has been wrongly removed from the list. The requirements of the Directive must continue to apply. A Member State cannot withdraw an area from their purview without undermining the public health objective of the Directive. The harmonious development of the internal market, to which the recitals in the preamble to the Directive also refer, would be compromised as well, since the conditions of competition between bathing areas in the different States would be distorted.

115. That solution, which the objectives of the Directive require, is also supported by the decision in *Commission v Belgium* cited above.

116. In the second example, the area withdrawn from the list would be subject to a prohibition on bathing. It follows plainly from Article 1(2)(a) of the Directive that the latter applies only to water in which bathing is authorised. Accordingly, the standards set in it cannot be applied to water which does not meet that requirement.

117. Admittedly, it could be said that a solution of this nature, which is compatible with the protection of health, is not, by contrast, necessarily compatible with the objective of the protection of the environment which also underlies the Directive. However, that objective should be seen in the context of the scope of the Directive: it cannot be relied upon to extend the latter's field of application further than the provisions of the Directive expressly require. It should be noted in that regard that under settled case-law a provision whose wording is entirely clear cannot be subject to interpretation.

118. As to the detailed rules relating to removal, the question arises in particular of where the relevant onus of proof lies. In

that regard, it is appropriate to note the settled case-law, already referred to above, pursuant to which it is for the Commission to prove the alleged breach.

119. In the present case, that means that it is for the Commission to establish that one or more areas were removed from the official list without bathing being prohibited there.

V — Conclusion

120. For the above reasons, I propose that the Court should:

- dismiss the action by the Commission;
- order the Commission to pay the costs of the action.