



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

17 October 2013 *

(Failure of a Member State to fulfil obligations — Directive 91/271/EEC — Urban waste-water treatment — Judgment of the Court establishing a failure to fulfil obligations — Non-compliance — Article 260 TFEU — Financial penalties — Imposition of a lump sum and a penalty payment)

In Case C-533/11,

ACTION under Article 260 TFEU for failure to fulfil obligations, brought on 19 October 2011,

European Commission, represented by G. Wils, A. Marghelis and S. Pardo Quintillán, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by C. Pochet, and T. Materne, acting as Agents, and M. Neumann, A. Lepière, E. Gillet, J. Bouckaert and H. Viaene, avocats,

defendant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by C. Murrell, acting as Agent, and D. Anderson QC,

intervener,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: French.

Judgment

- 1 In its application, the European Commission initially claimed that the Court should:
 - declare that, by failing to take the measures necessary to comply with the judgment of the Court of Justice of 8 July 2004 in Case C-27/03 *Commission v Belgium*, the Kingdom of Belgium has failed to fulfil its obligations under Article 260(1) TFEU;
 - order the Kingdom of Belgium to pay to the Commission a penalty payment of EUR 55 836 for each day of delay in complying with the judgment in *Commission v Belgium*, from the day of delivery of the judgment in the present case until the date on which the judgment in *Commission v Belgium* has been complied with;
 - order the Kingdom of Belgium to pay to the Commission a daily lump sum of EUR 6 204, from the date on which the judgment in *Commission v Belgium* was delivered, until delivery of the judgment in the present case or until the date on which the judgment in *Commission v Belgium* has been complied with, if earlier;
- 2 At the hearing taking account of the information submitted to it after 4 May 2012, the date of the reply in the present case, the Commission amended its claim. Thus, it asks the Court to order the Kingdom of Belgium to pay it:
 - a penalty payment of EUR 4 722 for each day of delay in complying with the judgment in *Commission v Belgium* from the date of delivery of the judgment in the present case, the amount of which is to be calculated on the basis of six-month periods reducing the total relating to such a period by a percentage corresponding to the proportion which represents the number of population equivalents ('p.e.'s) which comply with the judgment in *Commission v Belgium*, until the end of such a period as compared with the number of p.e.s which do not comply with the present judgment on the date of its delivery;
 - a daily lump sum of EUR 6 168 from the day of delivery of the judgment in *Commission v Belgium* until the day of delivery of the judgment in the present case or until the date on which the judgment in *Commission v Belgium* has been complied with in full if that date is earlier.

Legal context

- 3 According to Article 1 thereof, 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) ('Directive 91/271'), concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors. It aims to protect the environment from the adverse effects of the waste water discharges.
- 4 Article 2 of the directive defines 'urban waste water' as 'domestic waste water or the mixture of domestic waste water with industrial waste water and/or run-off rain water'.
- 5 Article 2 also defines waste water as being 'the organic biodegradable load having a five-day biochemical oxygen demand (BOD₅) of 60 g of oxygen per day'.
- 6 Article 3(1) of Directive 91/271 provides as follows:

'Member States shall ensure that all agglomerations are provided with collecting systems for urban waste water,

— at the latest by 31 December 2000 for those with a population equivalent (p.e.) of more than 15 000,

and

— at the latest by 31 December 2005 for those with a p.e. of between 2 000 and 15 000.

For urban waste water discharging into receiving waters which are considered “sensitive areas” as defined under Article 5, Member States shall ensure that collection systems are provided at the latest by 31 December 1998 for agglomerations of more than 10 000 p.e.

...’

7 Article 4(1) of Directive 91/271 provides:

‘Member States shall ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment as follows:

- at the latest by 31 December 2000 for all discharges from agglomerations of more than 15 000 p.e.,
- at the latest by 31 December 2005 for all discharges from agglomerations of between 10 000 and 15 000 p.e.,
- at the latest by 31 December 2005 for discharges to fresh-water and estuaries from agglomerations of between 2 000 and 10 000 p.e.’

8 Article 5 of Directive 91/271 provides:

‘1. For the purposes of paragraph 2, Member States shall by 31 December 1993 identify sensitive areas according to the criteria laid down in Annex II.

2. Member States shall ensure that urban waste water entering collecting systems shall before discharge into sensitive areas be subject to more stringent treatment than that described in Article 4, by 31 December 1998 at the latest for all discharges from agglomerations of more than 10 000 p.e.

...

4. Alternatively, requirements for individual plants set out in paragraphs 2 and 3 above need not apply in sensitive areas where it can be shown that the minimum percentage of reduction of the overall load entering all urban waste water treatment plants in that area is at least 75% for total phosphorus and at least 75% for total nitrogen.

5. Discharges from urban waste water treatment plants which are situated in the relevant catchment areas of sensitive areas and which contribute to the pollution of these areas shall be subject to paragraphs 2, 3 and 4.

...’

9 Article 17 of Directive 91/271 provides that Member States are by 31 December 1993 to establish a programme for implementing the directive, and by 30 June 1994 to provide the Commission with information on that programme.

- 10 According to Article 17(4) of Directive 91/271 the methods and formats to be adopted for reporting on the national programmes are to be determined in accordance with the procedure laid down in Article 18.
- 11 For that purpose, the Commission adopted Decision 93/481/EEC of 28 July 1993 concerning formats that Member States must use drawing up their final report on their national programmes for implementing Directive 91/271 (OJ 1993 L 226, p. 23). That decision laid down the format that the Member States are required to use in drawing up their final report relating to their natural programme for the implementation of Directive 91/271.

The judgment in *Commission v Belgium*

- 12 In the operative part of the judgment in *Commission v Belgium*, the Court held that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3, 5 and 17 of Directive 91/271 in full, the latter read in conjunction with Articles 3 and 4 thereof and Decision 93/481, the Kingdom of Belgium had failed to fulfil its obligations under Article 226 EC, the directives and the decision.
- 13 The Court held, thereby, that the Kingdom of Belgium had infringed those provisions on the ground that 114 agglomerations in the Flemish Area, 60 agglomerations in the Walloon Region and the Brussels-Capital Region failed to comply with the requirements of Directive 91/271.

The pre-litigation procedure

- 14 In the course of monitoring compliance with the judgment in *Commission v Belgium*, the Commission requested the Kingdom of Belgium to set out the measures that it intended to take to comply with that judgment. In the light of the answers concerning the three Belgian regions the Commission, first, sent that Member State a letter of formal notice, dated 30 January 2006, pursuant to Article 228 EC (now Article 260 TFEU), as a very large number of agglomerations in the Walloon, Flemish and Brussels-Capital Regions were still not provided with collecting systems and urban waste-water treatment plants. Moreover, the Commission took the view that it was impossible to verify whether the treatment plants situated in the Flemish Region operated in accordance with the requirements of Directive 91/271.
- 15 Thereafter, it sent that Member State a further letter of formal notice, dated 23 October 2007, on the ground that there were still a large number of agglomerations in the Walloon, Flemish and Brussels-Capital Regions which failed to comply with the requirements in Directive 91/271.
- 16 Following the answers concerning the three regions, the Commission then sent a reasoned opinion to the Kingdom of Belgium pursuant to Article 228 EC, dated 26 June 2009, on the ground that 20 agglomerations in the Flemish Region did not comply with Article 5 of Directive 91/271 and 50 agglomerations in the Walloon Region and the Brussels-Capital Region still had not complied with the judgment in *Commission v Belgium* as regards the obligation to have a complete collecting system for urban waste water or with the obligation to provide treatment for waste water after collection, obligations laid down in Articles 3 and 5 respectively of Directive 91/271. In its reasoned opinion, the Commission requested the Kingdom of Belgium to take the measures necessary to comply with that reasoned opinion within two months of its receipt.
- 17 According to the Commission, it follows from the examination of the answers from the Belgian authorities to the reasoned opinion of 26 June 2009 and their subsequent communications, that up to the date when the present action to fulfil obligations was brought, that Member State had not complied in full with the judgment in *Commission v Belgium*. One Flemish agglomeration did not

comply with the requirements in Article 5(2) and (3) of Directive 91/271 and 21 agglomerations in the Walloon Region and the Brussels-Capital Region failed to comply with Articles 3 and/or 5(2) and (3) of Directive 91/271.

18 In those circumstances the Commission decided to bring the present action.

19 By order of the President of the Court of 18 April 2012, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Kingdom of Belgium.

Developments during the present proceedings

20 It must be stated, first of all, that, in its reply, the Commission further limited the subject-matter of the dispute and requested that the failure to fulfil obligations should be found in respect of 13 Walloon agglomerations and the Brussels-Capital Region.

21 By letter of 4 March 2013, the Court requested the Belgian Government and the Commission to provide information, before 8 April 2013 inclusive, regarding the exact stage of compliance with the judgment in *Commission v Belgium* as of 1 April 2013, listing the agglomerations, together with the corresponding p.e. values in respect of which the collection, treatment and discharge of urban waste water did not yet comply with the provisions of Directive 91/271. That information was also to indicate the proportion which the total number of agglomerations and p.e. values bore to the total of the non-compliant agglomerations and p.e. values at the date of delivery of the judgment in *Commission v Belgium*.

22 At the hearing, the Commission agreed that, as a result of the information that it received after 4 May 2012, the date of the reply in the present case, only five agglomerations had failed to take measures to comply with the judgment in *Commission v Belgium*.

23 Two of the five agglomerations, namely Amay and Malmedy, fail to comply with Article 3(1) and Article 5(2) and (3) of Directive 91/271. The other three, namely Herve, Bastogne-Rhin and Liège-Sclessin, fail to comply with Article 5(2) and (3) of Directive 91/271. Those agglomerations together represent a total of 225 710 p.e.s. which are non-compliant.

24 The Commission estimates that, with regard to Amay and Herve, the Kingdom of Belgium has not provided any information concerning the quality of the discharge within the meaning of Tables 1 and 2 in Annex I to Directive 91/271. As regards the other three agglomerations, Bastogne-Rhin, Liège-Sclessin and Malmedy, that Member State has failed to provide information concerning the quality of discharge within the meaning of Tables 1 and 2 in Annex I to Directive 91/271 for a sufficient period of time.

25 In the light of that information, the Commission amended its claims, as set out in paragraph 2 of the present judgment.

The failure to fulfil obligations

Arguments of the parties

26 As regards the alleged infringement, the Commission recalls that, under Article 260(1) TFEU, where the Court finds that a Member State has failed to fulfil an obligation under the FEU Treaty that Member State must take the necessary measures to comply with the judgment of the Court. As regards the period within which such a judgment must be complied with, the Commission states that,

according to settled case-law, the importance of immediate and uniform application of European Union law means that the process of compliance must be initiated at once and completed as soon as possible (Case C-121/07 *Commission v France* [2008] ECR I-9159, paragraph 21 and the case-law cited).

- 27 The Kingdom of Belgium takes the view that, since the judgment in *Commission v Belgium*, the Flemish, Walloon and Brussels-Capital Regions have initiated substantial investment projects to ensure compliance with that judgment.
- 28 Thus, at the date of the hearing, all those agglomerations have been provided with purification systems and thus comply with that judgment. The dispute merely concerns the evidence of compliance with regard to only five agglomerations in the Walloon Region.
- 29 The United Kingdom argues that, in the context of large scale infrastructure projects such as those at issue in the present case, the Commission must lay down a reasonable period for compliance, taking account of all the parameters, such as the design of the project, its technical implementation or the nature of the regulatory provisions to be complied with. The Commission should, where necessary, also take account of events which are not attributable to the Member State concerned, like natural disasters. Among the factors which would allow an assessment of whether or not a time-limit is reasonable are the administrative and judicial procedures provided for by European Union and national law. Finally, the United Kingdom argues that it is for the Commission to prove that the time taken to comply with a judgment establishing an infringement of obligations is unreasonable.
- 30 According to the United Kingdom, the Commission must be prepared to give the Member State concerned a reasonable period within which to undertake not only the minimum works necessary, but also a more ambitious project which is more beneficial to the environment which a Member State may wish to undertake in order to comply with a judgment delivered pursuant to Article 258 TFEU.

Findings of the Court

- 31 Under Article 260(2) TFEU, if the Commission takes the view that the Member State concerned has not taken all the measures necessary to comply with a judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations, specifying the amount of the lump sum or penalty to be paid by that State which it considers appropriate in the circumstances.
- 32 In that connection, the reference date which must be used for assessing whether there has been a failure to fulfil obligations under Article 260(1) TFEU is that of the expiry of the period prescribed in the letter of formal notice issued under that provision (Case C-610/10 *Commission v Spain* [2012] ECR, paragraph 67, and Case C-241/11 *Commission v Czech Republic* [2013] ECR, paragraph 23). Where, however, the proceedings for failure to fulfil obligations were commenced on the basis of Article 228(2) EC, the reference date for assessing whether there has been a failure to fulfil obligations is the date of expiry of the period prescribed in the reasoned opinion issued before entry into force of the Lisbon Treaty, that is, December 2009 (see, to that effect, Case C-496/09 *Commission v Italy* [2011] ECR I-11483, paragraph 27).
- 33 It is common ground that on the expiry of the period prescribed by the reasoned opinion, the Kingdom of Belgium had not adopted all the measures necessary to comply in full with the judgment in *Commission v Belgium*.
- 34 In those circumstances, it must be found that, by failing to adopt the necessary measures to comply with the judgment in *Commission v Belgium*, the Kingdom of Belgium has failed to fulfil its obligations under Article 260(1) TFEU.

The financial penalties

Arguments of the parties

- 35 The Commission claims that the amount of the lump sum claimed, EUR 6 168 per day of infringement, and the amount of the daily penalty payment of EUR 4 722 have been established in accordance with the criteria laid down by the Communication of 13 December 2005 on the application of Article 228 EC (SEC(2005) 1658), as updated by the Communication from the Commission on the implementation of Article 260 TFEU and updating the data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings (SEC(2010) 923), made applicable to proceedings governed by Article 260(2) TFEU by virtue of the Communication from the Commission concerning the implementation of Article 260(3) TFEU (OJ 2011 C 12, p. 1) and the Communication from the Commission of 31 August 2012 updating data used to calculate lump sums and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings (C(2012) 6106 final).
- 36 The Commission submits that the amount of the daily penalty payment should be calculated by multiplying the standard flat-rate of the penalty payment, EUR 600 per day, by the coefficient for seriousness of the infringement, set at 6 (on a scale of 1 to 20), multiplied by a coefficient of duration, which is 3 in the present case, and by the 'n' factor, representing the Kingdom of Belgium's ability to pay, that is 5.14. The amount obtained using that method is EUR 55 512 per day and corresponds to a penalty payment equivalent to 2 653 000 p.e. of non-compliant discharges on the date on which the application was lodged. As the Commission observed at the hearing, the non-compliant discharges represent only 225 710 p.e., which, by multiplying 225 710 by 55 512 and dividing the total by 2 653 000 produces an amount of EUR 4 722 for each day of infringement.
- 37 According to the Commission, the amount of the penalty payment is arrived at by multiplying the basic flat-rate amount of EUR 200 per day by the coefficient for seriousness of the infringement, set at 6 in the present case, and by the 'n' factor which represents the Kingdom of Belgium's ability to pay, that is 5.14.
- 38 The Commission takes the view that the coefficient for seriousness adopted in the present case is appropriate on account of the fact, as regards the environment, the rules infringed in the present case are of very great importance and are essential for the well-being of citizens, their quality of life, their health, and also for the preservation of natural resources and ecosystems.
- 39 The Commission submits that the consequences of the infringement for public and private interests are particularly serious in so far as the incomplete compliance with the judgment in *Commission v Belgium* affects the quality of bodies of surface water and the aquatic and terrestrial ecosystems associated with them. The consequences of that incomplete compliance are even more important because the Kingdom of Belgium has designated the whole of its territory as being a 'sensitive area' and that is capable of affecting compliance with other environmental standards.
- 40 However, as regards the factors to take into consideration when assessing the seriousness of an infringement of European Union law, the Commission submits that the Kingdom of Belgium cooperated in good faith. Furthermore, the Commission states that that Member State has made substantial financial and tangible investments for the completion of those complex infrastructures for collection and treatment of urban waste water.
- 41 However, the Commission takes the view that the measures intended to comply with the judgment in *Commission v Belgium* were only begun several years after the delivery of that judgment which is not justified even in the light of the scale of the works undertaken.

- 42 As regards the criterion relating to the duration of the infringement, which, according to the Commission's claim, is relevant only for the calculation of the penalty payment, the Commission observes that more than 71 months have passed between that judgment and the Commission's decision to initiate infringement proceedings against the Kingdom of Belgium, which justifies a maximum coefficient of duration of 3.0.
- 43 In its written and oral submissions, the Kingdom of Belgium argues that neither the seriousness, the duration of the infringement nor the cooperative and diligent attitude that it adopted during the procedure justify the order for payment of a lump sum or a penalty payment in the present case. In the alternative, that Member State challenges the method of calculating those sums.
- 44 As regards the calculation of the seriousness of the infringement, the Kingdom of Belgium takes the view that, although the objectives pursued by the requirements of Directive 91/271 are of a fundamental nature, the environmental consequences of the failure to fulfil those obligations laid down by that directive have not been evaluated in the light of the specific circumstances. In the Walloon Region and Brussels-Capital Region, the relevant studies and related comments are exaggerated and/or incorrect as regards the reduction of phosphorous emissions, the quality of the surface water, human health, the ecological quality of water courses, the total polluting load not collected and/or treated and the impact of tourism and economic activity. As regards the Flemish Region, it has been established that all the agglomerations of more than 10 000 p.e. have an adequate purification infrastructure.
- 45 In any event, if the Court were to take the contrary view and apply the method of calculation adopted by the Commission in order to determine the amount of the lump sum, the coefficient for seriousness adopted should necessarily be substantially less than 4. That coefficient for seriousness should necessarily take account of the practical difficulties in complying with and interpreting the judgment in *Commission v Belgium* and the difficulties regarding the changing interpretation of the scope of Directive 91/271.
- 46 As regards the inclusion of the duration in the coefficient of seriousness, the Kingdom of Belgium challenges the factors adopted by the Commission to determine it. According to the case-law of the Court, and, in particular, Case C-407/09 *Commission v Greece* [2011] ECR I-2467 and the Communication from the Commission SEC(2005) 1658, as updated, the criteria of seriousness and duration of the infringement must be determined in a strictly separate manner.
- 47 As to the duration of the infringement, the Kingdom of Belgium submits that the three Belgian Regions began to adopt measures in order to comply with the judgment in *Commission v Belgium* immediately after its delivery, and the Commission has wrongly alleged that certain works were commenced only several years after the delivery of that judgment. Having regard to the considerable difficulties involved in complying in full with that judgment, the duration of the failure to comply fully with Directive 91/271 cannot in any respect be considered excessive, and the coefficient for seriousness of the infringement should be reduced to 1 in the light of its duration.
- 48 The starting point for the calculation of the lump sum cannot, in any event, begin from the day on which the judgment establishing the first failure to fulfil obligations was delivered, since it could not have been already complied with on that date, but could begin from a reasonable period for its compliance.

Findings of the Court

The lump sum

- 49 As regards the lump sum, it must be recalled that, according to the first subparagraph of Article 260(2) TFEU, the Commission is to set out in its proposal an amount which it considers to be ‘appropriate to the circumstances’. The exercise of the Court’s powers is also guided by the consideration of all the circumstances of the case which are submitted to it.
- 50 According to the case-law, the question whether such an order should be made and the fixing, if necessary, of the amount of the lump sum must, in each individual case, depend on all the relevant factors pertaining to both the particular nature of the infringement established and the individual conduct of the Member State involved in the procedure instigated pursuant to Article 260 TFEU (see *Commission v Czech Republic*, paragraph 41 and the case-law cited).
- 51 That provision confers in that regard a wide discretion upon the Court in deciding whether or not to impose such a penalty and determining, if necessary, its amount. In particular, an order requiring a Member State to pay a lump sum cannot be made automatically (see, *Commission v Czech Republic*, paragraph 42 and the case-law cited).
- 52 For that purpose, the Commission’s suggestions cannot bind the Court and are merely guidance. Likewise, guidelines concerning orders for payment of lump sums, such as those appearing in the Communication from the Commission SEC(2005) 1658, as updated, which the Commission relied on in the present case, do not bind the Court, but may contribute to ensuring that the Commission’s actions are transparent, foreseeable and consistent with legal certainty (see *Commission v Czech Republic*, paragraph 43 and the case-law cited).
- 53 In those circumstances, it is for the Court, in exercising its discretion, to determine the amount of the penalty payment in a manner that is appropriate to the circumstances and proportionate both to the breach that has been established and the ability to pay of the Member State concerned. Relevant considerations in this respect include factors such as the length of time for which the breach of obligations complained of has persisted since the judgment establishing it was delivered, and the seriousness of the infringement (see *Commission v Spain*, paragraphs 143 and 144 and the case-law cited).
- 54 As to the duration of the infringement, it must be stated that the infringement established by the judgment in *Commission v Belgium* persisted for approximately 9 years, which is excessive, even if it must be recognised that the tasks to be carried out required a significant period of several years and that compliance with that judgment must be regarded as substantial, or almost complete.
- 55 As regards the seriousness of the infringement, it must be noted that Directive 91/271 aims to protect the environment. By classifying the whole of its territory as a ‘sensitive area’, in accordance with Article 5(1) of and Annex II thereto, the Kingdom of Belgium has recognised the need for increased environmental protection on its territory. The lack of treatment for urban waste water constitutes damage to the environment.
- 56 Furthermore, where failure to comply with a judgment of the Court is likely to harm the environment, the protection of which is one of the European Union’s policy objectives, as is apparent from Article 191 TFEU, such a breach is of a particularly serious nature (see judgment of 19 December 2012 in Case C-279/11 *Commission v Ireland*, paragraph 72 and the case-law cited).

- 57 It must be recalled, however, that the number of agglomerations for which, at the date of the hearing, the defendant Member State had not provided evidence of compliance with Directive 91/271 are but a relatively small number out of the total number of agglomerations which were the subject-matter of the judgment in *Commission v Belgium*.
- 58 As regards the observations of the Kingdom of Belgium and the United Kingdom that, in the context of large scale infrastructure projects such as those at issue in the present case, the Commission should allow a reasonable period for compliance having regard to the size and difficulty of completing those projects, the starting point for determining the duration of the infringement being the expiry of that period, it must be held that it is plain that the date of 26 August 2009 laid down in the reasoned opinion must not be regarded as premature or unreasonable.
- 59 It is clear from the file submitted to the Court that the Kingdom of Belgium agreed to substantial investments in order to comply with the judgment in *Commission v Belgium* and has made considerable progress. The progress made by the Kingdom of Belgium was already substantial on the expiry of the period laid down in the reasoned opinion.
- 60 Moreover, it must be stated that the Kingdom of Belgium has fully cooperated with the Commission during the proceedings.
- 61 Consequently, the Court takes the view that all the legal and factual circumstances pertaining to the infringement established indicate that effective prevention of future repetition of similar infringements of European Union law requires the adoption of a deterrent measure, such as the imposition of a lump sum payment (see, to that effect Case C-374/11 *Commission v Ireland*, paragraph 48 and the case-law cited).
- 62 On the basis of those factors and in the light of what is set out above, the circumstances of the case will be fairly assessed by setting the amount of the lump sum which the Kingdom of Belgium will have to pay at EUR 10 million.
- 63 The Kingdom of Belgium must therefore be ordered to pay to the Commission, into the ‘European Union own resources’ account, a lump sum of EUR 10 million.

The penalty payment

- 64 According to settled case-law, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court’s examination of the facts (Case C-374/11 *Commission v Ireland*, paragraph 33 and the case-law cited).
- 65 It must be held that in the present case, at the date of the hearing, the measures necessary to comply with the judgment in *Commission v Belgium* had not yet been adopted in full.
- 66 In those circumstances, the Court considers that the imposition of a penalty payment on the Kingdom of Belgium constitutes an appropriate financial means to ensure full compliance with the judgment in *Commission v Belgium* (see Case C-374/11 *Commission v Ireland*, paragraph 35 and the case-law cited).
- 67 However, in view of the continuing progress towards full compliance with the judgment in *Commission v Belgium* which is also recognised by the Commission, it is not impossible that the judgment in *Commission v Belgium* will have been fully complied with by the date of delivery of this judgment. Accordingly, the penalty payment will be imposed only if the infringement is continuing on the date of delivery of this judgment.

- 68 It should be recalled that, in exercising its discretion, it is for the Court to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned (see Case C-374/11 *Commission v Ireland*, paragraph 36 and the case-law cited).
- 69 In the assessment carried out by the Court, the criteria which must be taken into account in order to ensure that penalty payments have coercive force and that European Union law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay. In applying those criteria, the Court is required to have regard, in particular, to the effects on public and private interests of failure to comply and to the urgency with which the Member State concerned must be induced to fulfil its obligations (see, *Commission v Spain*, paragraph 119 and the case-law cited).
- 70 In the present case, it should be observed that the Commission proposes to take into consideration, for the calculation of the amount of the penalty payment, the progressive reduction in the number of p.e.s which do not comply with the requirements of Directive 91/271, which would take account of the progress made by the Kingdom of Belgium with regard to compliance with the judgment in *Commission v Belgium* and the principle of proportionality.
- 71 It must be observed that, at the hearing, the Commission stated that the number of non-compliant p.e.s on the date of the application on 19 October 2011 was 2 653 000 p.e. and on the date of the hearing on 18 April 2013 the total was 225 710 p.e.s.
- 72 Taking account of all of the circumstances of the present case, including the information and findings in the part of this judgment under the heading ‘the lump sum’, the Court considers that the imposition of a penalty payment of EUR 4 722 per day is appropriate.
- 73 As regards the frequency of the penalty payment, in accordance with the Commission’s proposal, given that the provision of evidence of the compliance with Directive 91/271 may require a certain amount of time and in order to take account of any progress made by the defendant Member State, the Court considers it appropriate for the penalty payment to be calculated on the basis of six-month periods, reducing the total relating to such periods by a percentage corresponding to the proportion representing the number of p.e.s which have been brought into compliance with the judgment in *Commission v Belgium*.
- 74 The Kingdom of Belgium must therefore be ordered to pay to the Commission, into the ‘European Union own resources’ account, a penalty payment of EUR 859 404 for each six-month period of delay in taking the measures necessary to comply with the judgment in *Commission v Belgium*, from the date of delivery of this judgment until the date on which the judgment in *Commission v Belgium* has been complied with in full, the actual amount of which is to be calculated at the end of each six-month period by reducing the total relating to such periods by a percentage corresponding to the proportion which the number of p.e.s which have been brought into compliance with the judgment in *Commission v Belgium* by end of such a period bears to the number of p.e.s which were not brought into compliance with this judgment on the day of its delivery.

Costs

- 75 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of those Rules of Procedure, under which Member States which have intervened in the proceedings are to bear their own costs, it must be held that the United Kingdom of Great Britain and Northern Ireland is to bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. Declares that, by failing to take all the measures necessary to comply with the judgment of 8 July 2004 in Case C-27/03 *Commission v Belgium*, establishing the failure of the Kingdom of Belgium to fulfil its obligations under Articles 3 and 5 of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, as amended by Commission Directive 98/15/EC of 27 February 1998, that Member State has failed to fulfil its obligations under Article 260(1) TFEU;
2. Orders the Kingdom of Belgium to pay to the European Commission, into the ‘European Union own resources’ account, a lump sum of EUR 10 million;
3. Declares that, if the failure to fulfil obligations found in point 1 has continued until the day of delivery of the present judgment, the Kingdom of Belgium shall be ordered to pay to the European Commission, into the ‘European Union own resources’ account, a penalty payment of EUR 859 404 for each six-month period of delay in taking the measures necessary to comply with the judgment in *Commission v Belgium*, from the date of delivery of this judgment until the date on which the judgment in *Commission v Belgium* has been complied with in full, the actual amount of which is to be calculated at the end of each six-month period by reducing the total relating to such periods by a percentage corresponding to the proportion which the number of population equivalents which have been brought into compliance with the judgment in *Commission v Belgium* by end of such a period bears to the number of population equivalents which were not compliant with this judgment on the day of its delivery;
4. Orders the Kingdom of Belgium to pay the costs;
5. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

[Signatures]