JUDGMENT OF THE COURT (Grand Chamber)

9 December 2008 *

In Case C-121/07,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 28 February 2007,

Commission of the European Communities, represented by B. Stromsky and C. Zadra, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by E. Belliard, S. Gasri and G. de Bergues, acting as Agents,

defendant,

supported by

Czech Republic, represented, initially, by T. Boček and, subsequently, by M. Smolek, acting as Agents,

intervener,

* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas, K. Lenaerts, A. Ó Caoimh, J.-C. Bonichot and T. von Danwitz, Presidents of Chambers, K. Schiemann (Rapporteur), P. Kūris, E. Juhász, G. Arestis, L. Bay Larsen and P. Lindh, Judges,

Advocate General: J. Mazák,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 12 March 2008,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2008,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to:

— declare that, by failing to take all the measures necessary to comply with the judgment of 15 July 2004 in Case C-419/03 *Commission* v *France* concerning its failure to transpose into national law the provisions of Directive 2001/18//EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1), which diverge from or go beyond the provisions of Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15), the French Republic has failed to fulfil its obligations under Article 228(1) EC;

— order the French Republic to pay to the Commission, into the 'European Community own resources' account, a penalty payment of EUR 366 744 for each day of delay in implementing the judgment in Case C-419/03 *Commission* v *France*, from the day on which the Court delivers judgment in the present case until the day on which the judgment in Case C-419/03 is fully complied with;

— order the French Republic to pay to the Commission, into the 'European Community own resources' account, a lump sum of EUR 43 660 for each day of delay in complying with the judgment in Case C-419/03, from the date on which judgment was delivered in that case until either:

  — the judgment in Case C-419/03 has been fully complied with, if that is the case before judgment is delivered in the present case; or

— judgment is delivered in the present case, if the judgment in Case C-419/03 has not been fully complied with by that date;

— order the French Republic to pay the costs.

Legal context

2 Directive 2001/18 was adopted on the basis of Article 95 EC. The objective of the directive, as stated in Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment when, first, genetically modified organisms ('GMOs') are deliberately released into the environment for any purpose other than placing on the market within the European Community and, secondly, when GMOs are placed on the market within the Community as or in products.

3 Article 34(1) of that directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 17 October 2002.

4 Article 36 of Directive 2001/18 provides as follows:

'(1) Directive 90/220/EEC shall be repealed on 17 October 2002.

(2) References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex VIII.'

The judgment in Case C-419/03 *Commission* v *France*

5 At paragraph 1 of the operative part of the judgment in Case C-419/03, the Court declared that:

'By failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to transpose into national law the provisions of [Directive 2001/18] which differ from or go beyond those of [Directive 90/220], the French Republic has failed to fulfil its obligations under Directive 2001/18.'

The pre-litigation procedure

6 When questioned by the Commission on 5 November 2004 as to the stage reached in its compliance with the judgment in Case C-419/03, the French Republic replied by letter of 4 February 2005. It stated in that letter that, in the light of the fact that GMOs and, in

particular, their deliberate release into the environment, had become a major subject of debate in France, giving rise to conflict that was occasionally violent, as demonstrated by the numerous instances of crop destruction in open fields, a parliamentary fact-finding mission on the challenges presented by GMOs trials and use had been set up in October 2004, on the proposal of the President of the Assemblée Nationale (National Assembly). That letter also stated that the Government had decided that that mission should be permitted to complete its work, in the interest of promoting a measured and constructive debate on the draft law transposing Directive 2001/18 into national law. The mission was expected to complete its work by April 2005.

7 On 21 February 2005, the French authorities forwarded to the Commission the text of Decree No 2005-51 of 26 January 2005, amending Decree No 96-850 of 20 September 1996 on control of deliberate release and of the placing on the market, for civil purposes, of products wholly or partially composed of genetically modified organisms (JORF of 28 January 2005, p. 1474), which, in its view, contributed to the transposition of Directive 2001/18 by including reagents within the ambit of Decree No 96-850.

8 The Commission, taking the view that the French Republic had not taken the necessary measures to comply with the judgment in Case C-419/03, sent a letter of formal notice to that Member State, pursuant to Article 228 EC, on 13 July 2005.

9 Since the Commission was not satisfied with the response received, it sent a reasoned opinion to the French Republic on 19 December 2005, calling upon it to adopt the measures necessary to ensure compliance with that judgment within two months of its notification.

10 On 20 February 2006, the French authorities communicated to the Commission the text of a draft law on GMOs aimed at transposing Directive 2001/18, reforming the rules governing scientific experts' reports and setting up a compensation fund for farmers who had suffered as a result of the adventitious presence of GMOs in their 'non-GMO based' produce ('the 2006 draft law'). They also stated that that draft law and the related regulatory instrument would be adopted by the end of 2006.

11 On 8 May 2006, the French authorities informed the Commission that the 2006 draft law had been adopted by the Senate on 23 March 2006 and sent to the National Assembly on 24 March 2006.

12 On 21 February 2007, the French authorities orally notified the Commission staff that, in view of the National Assembly's busy agenda and the fact that its proceedings would be suspended on 25 February 2007, it appeared that it would no longer be possible for the 2006 draft law to be adopted by the current legislature and, accordingly, it was now envisaged that regulatory provisions designed to ensure the transposition of Directive 2001/18 would be swiftly adopted.

13 In those circumstances, since it considered that the French Republic had failed to comply with the judgment in Case C-419/03, the Commission brought the present action on 28 February 2007.

14 On the same day, the French authorities confirmed to the Commission the content of the abovementioned conversation and forwarded to it two draft decrees. According to

the French Republic, it was envisaged that those decrees, as well as other measures also aimed at ensuring the transposition of Directive 2001/18, would be published at the beginning of April 2007.

Developments in the course of the present proceedings

15 By letter dated 20 March 2007, the French authorities forwarded to the Commission a number of texts published on that date in the *Journal officiel de la République française* (collectively, 'the March 2007 implementing measures'), namely:

— Decree No 2007-357 of 19 March 2007, amending Decree No 93-774 of 27 March 1993 laying down the list of genetic modification techniques and the criteria for classifying genetically modified organisms;

— Decree No 2007-358 of 19 March 2007 concerning the deliberate release for any other purpose than that of placing on the market of products composed in whole or in part of genetically modified organisms;

— Decree No 2007-359 of 19 March 2007 concerning the authorisation procedure for the placing on the market of products which are not intended for consumption composed in whole or in part of genetically modified organisms;

— the order of 15 March 2007, amending the order of 2 June 1998 on the technical standards to be met by facilities subject to authorisation under heading 2680-2 of the nomenclature of facilities classified for the purpose of environmental protection;

— the order of 15 March 2007, amending Annex I to the order of 2 June 1998 on the general requirements applicable to facilities classified for the purpose of environmental protection and subject to declaration under heading 2680-1 — genetically modified organisms, and

— the order of 15 March 2007 on the labelling of genetically modified organisms made available to third parties only for the purposes of research, development and teaching.

16 Being of the view that the March 2007 implementing measures did not constitute full compliance with the judgment in Case C-419/03 and that Articles 8(2), 17(1), (2) and (9), 19 and 23 of Directive 2001/18 had still not been correctly transposed, the Commission, in its reply, amended the form of order it sought in its application as regards the financial penalties. At that point, it claimed that the Court should:

— reduce the amount of the daily penalty payment proposed in its application according to the extent to which the judgment in Case C-419/03 has been complied with;

— modify, according to the extent to which the judgment in question has been complied with, the amount of the lump sum payment proposed in its application, but only in relation to the period which has elapsed since 21 March 2007 until either:

— the judgment in Case C-419/03 has been fully complied with, if that occurs before judgment is delivered in the present proceedings; or

— judgment in the present proceedings is delivered, if the judgment in Case C-419/03 has not been fully complied with by that time.

17 At the hearing, however, the Commission indicated that it considered that additional measures for the transposition of Article 17 of Directive 2001/18 were no longer required in France.

18 While acknowledging that it had not complied with the judgment in Case C-419/03 by the date on which the deadline imposed in the reasoned opinion expired, the French Republic is nonetheless of the view that the March 2007 implementing measures have, since that date, fully transposed Directive 2001/18 and, therefore, that judgment has been complied with in its entirety. Accordingly, it considers that the claims that it should pay a penalty payment and a lump sum are now devoid of purpose or, in the alternative, are unfounded or, in any event, excessive. It therefore contends that those claims should be dismissed.

19 Subsequent to the close of the oral procedure, the French Republic notified the Court and the Commission, by letters of 27 June 2008, of the adoption of Law No 2008-595 of 25 June 2008 on genetically modified organisms (JORF of 26 June 2008, p. 10218) ('the Law of 25 June 2008').

20 After examining that document, the Commission informed the Court, by letter of 30 July 2008, of its view that, with effect from its entry into force, namely from 27 June 2008, that law fully completed the transposition of Directive 2001/18 and, accordingly, the judgment in Case C-419/03 had been complied with in its entirety. The Commission also stated in that letter that its request that the French Republic be ordered to pay a penalty payment was, therefore, devoid of purpose.

The failure to fulfil obligations

21 Although Article 228 EC does not specify the period within which a judgment must be complied with, in accordance with settled case-law, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (see, inter alia, Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraph 27 and the case-law cited).

22 Moreover, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see, inter alia, Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 19 and the case-law cited).

23 In this instance, it is obvious that, by the date on which the period prescribed in the reasoned opinion of 19 December 2005 had expired, the period within which the judgment in Case C-419/03, requiring measures to be adopted for the transposition of Directive 2001/18, should have been complied with had long since elapsed, as almost 19 months had passed since the delivery of that judgment.

24 Moreover, it is not disputed that, by the time that deadline had expired, the French Republic had not taken any steps to comply with that judgment, with the exception of the adoption of Decree No 2005-51, a measure of extremely limited scope in the light of the obligation incumbent upon it at that time to transpose the directive.

25 In those circumstances, the French Republic — as, moreover, it acknowledges — has failed to fulfil its obligations under Article 228(1) EC.

Financial penalties

The penalty payment

26 As stated at paragraphs 19 and 20 above, the Commission has indicated its view that, with the entry into force of the Law of 25 June 2008, the judgment in Case C-419/103 was complied with in its entirety and that its request that the French Republic be ordered to pay a penalty payment is, therefore, devoid of purpose.

27 As is clear from established case-law, the imposition of a penalty payment pursuant to Article 228 EC, the purpose of which, as reiterated by the Court on numerous occasions, is one of coercion with regard to the ongoing failure to comply (see, inter alia, Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraphs 90 and 92), is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court persists (see, inter alia, to that effect, Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraphs 45 and 46, and *Commission* v *Germany*, paragraph 40).

28 In the light of the foregoing, the Court considers the imposition of a penalty payment to be unnecessary.

The lump sum payment

Arguments of the parties

29 The Commission states that, as indicated at paragraph 10 of its Communication SEC(2005) 1658 of 13 December 2005 ('the 2005 Communication'), where a case is brought before the Court pursuant to Article 228 EC, it intends henceforth automatically to propose that the defaulting Member State be ordered to pay a lump sum and that it will persist with such a request, no longer withdrawing its application, even when, in the course of proceedings, the earlier judgment of the Court has been complied with.

30 According to the Commission, that new approach is justified in order that the authority of the judgments of the Court, the principles of legality and of legal certainty and the effectiveness of Community law should not be undermined. If absolutely no financial penalties were imposed in a case in which a breach was remedied belatedly, in the course of proceedings, there would be the risk, as tends to occur with increasing frequency in practice, that Member States would be encouraged not to comply with judgments of the Court with all due diligence and systematically to adopt delaying tactics.

31 In that regard, the Commission states that, between December 1996 and October 2005, it issued, pursuant to Article 228 EC, 296 letters of formal notice, 50 of which were sent to the French Republic, and 125 reasoned opinions, 25 of which were directed at that Member State. During that same period, the Commission decided in 38 instances to institute proceedings before the Court of Justice pursuant to that provision, 7 of those decisions relating to the French Republic, and in 23 cases it actually brought proceedings before the Court, 6 of which were against that Member State. Only 6 of the sets of proceedings thus initiated culminated in a judgment of the Court, the breaches being remedied belatedly in all the other cases before the legal proceedings concluded. The situation shows signs, moreover, of worsening, the Commission having been obliged to issue 50 letters of formal notice under Article 228 EC between 1 January and 24 October 2005.

32 As an instrument of persuasion, the special judicial procedure for the enforcement of judgments provided for in Article 228(2) EC should, therefore, be adapted both to the particular circumstances in each case and to more general circumstances, which include the developments described in the preceding paragraph.

33 Unlike penalty payments, which have a persuasive function as regards the ongoing breach and are intended to prevent its continuing after judgment has been delivered by the Court pursuant to Article 228 EC, lump sum payments, which are payable regardless of the approach adopted by the Member State concerned to that breach once such a judgment has been delivered, are intended rather to penalise the past behaviour

of that Member State. They are thus designed to deter and prevent the repetition of similar infringements. The threat of such a penalty being imposed is likely, in particular, to encourage a Member State to comply with the original judgment establishing its failure to fulfil obligations as soon as possible and, in particular, before proceedings are initiated before the Court a second time.

34 The Commission proposes that, for the purpose of calculating the lump sum, two periods should be distinguished, namely the period from the date when judgment was delivered in Case C-419/03 until 20 March 2007, when the March 2007 implementing measures were published, and the period after 20 March 2007.

35 Referring to the method of calculation set out in the 2005 Communication, the Commission therefore proposes, first, that the French Republic be ordered to pay the sum of EUR 43 660 per day in respect of the period from 15 July 2004 to 20 March 2007.

36 As provided for in that method of calculation, that daily amount is arrived at by multiplying a flat-rate amount of EUR 200 by a coefficient reflecting the seriousness of the infringement, in this case fixed at 10 on a scale of 1 to 20, and by factor *n*, which reflects the capacity of each Member State to pay, that factor being fixed in the case of the French Republic at 21.83. The lump sum due in respect of the abovementioned period is thus EUR 42 743 140 (EUR 43 660 x 979 days).

37 According to the Commission, the choice of the coefficient of 10 to reflect the seriousness of the infringement is justified in this case in the light of the manifest nature of the failure to transpose a directive, the long duration of the breach, the importance of the measure infringed, which is intended to protect human health and the environment while at the same time guaranteeing free movement of GMOs, and the fact that the French Republic has repeatedly failed to fulfil its obligations in this area. In that

connection, the Commission refers to the judgments in Case C-296/01 *Commission* v *France* [2003] ECR I-13909, and Case C-429/01 *Commission* v *France* [2003] ECR I-14355 and, with regard to the latter judgment, its enforcement after proceedings had been instigated before the Court pursuant to Article 228 EC (see order for removal from the register of 7 February 2007 in Case C-79/06 *Commission* v *France*). The Commission also claims that the French authorities failed to cooperate in good faith and lacked the will to resolve matters by complying with the judgment in Case C-419/03.

38 With regard to the adverse effects of the French Republic's failure to fulfil its obligations on public and private interests, the Commission places particular emphasis on the legal uncertainty that has arisen for operators as regards their rights and obligations. The 'guides' issued by the Ministry of Agriculture for prospective applicants for authorisation to conduct experiments with GMOs to which the French Republic refers in its defence do not have any binding legal force and could not, in particular, establish such rights and obligations in the same manner as the correct transposition of Directive 2001/18. That legal uncertainty is illustrated by a judgment of the Tribunal administratif de Clermont-Ferrand (Administrative Court, Clermont-Ferrand) of 4 May 2006, which annulled an authorisation to conduct experiments on the ground that, as that directive had not been transposed, there was no legal basis for the decision.

39 The Commission also submits that the failure to transpose the directive has created the risks of cross-border release of GMOs not liable to sanctions under criminal law, of discouragement of biotechnical research into and trade in GMOs or, indeed, of international trade conflicts due to the fact that the Community legislation applicable to GMOs imported from non-member countries is not based on a coherent internal Community legal framework that can justify such legislation.

40 Secondly, with regard to the period after 20 March 2007, the Commission is of the view that the March 2007 measures did not achieve full compliance with the judgment in Case C-419/03, since, in its view, Articles 8(2), 19 and 23 of Directive 2001/18 were still

incorrectly transposed at that stage and, accordingly, the imposition of a daily lump sum payment, proportionate to the seriousness of the ongoing breach, remains necessary in respect of that period.

41 The Commission proposes that the daily lump sum to be paid by the French Republic with effect from 21 March 2007 should be calculated by multiplying a coefficient which reflects the seriousness of the infringement — to be determined by the Court but which is proportionate to the infringement ongoing at that time — by the basic amount of EUR 200 and by the factor *n* referred to at paragraph 36 above. Moreover, that daily amount should be imposed up to the date on which the judgment in Case C-419/03 was fully complied with.

42 The method of calculation thus advocated by the Commission would, in its view, make it possible, at the point when the Court delivers judgment, to arrive at a global lump sum which is proportionate to the seriousness of the infringement and takes account of any belated good will on the part of the Member State in question.

43 Lastly, the Commission states that the fact that a lump sum payment of EUR 20 million was imposed in Case C-304/02 *Commission* v *France* [2005] ECR I-6263 should not be regarded as a benchmark for other cases, since that sum was symbolic and can be explained by procedural circumstances that were particular to that case.

44 As its principal argument, the French Republic maintains that the judgment in Case C-419/03 was fully complied with as a result of the adoption of the March 2007

implementing measures and that the Commission's request that it be ordered to pay a lump sum therefore no longer has any purpose.

45 The sole function of such an order is, in its view, to encourage the Member State to comply with a judgment of the Court finding that it has failed to fulfil its obligations and, thereby, ensure that Community law is in fact applied; it is not its purpose to prevent the commission of any future infringements. Furthermore, the judgments delivered thus far by the Court on the basis of Article 228 EC support the contention that, where the infringement has been brought to an end, there are no longer grounds for ordering the defaulting Member State to pay such a lump sum.

46 In the alternative, the French Republic considers that it cannot be ordered to pay a lump sum on the basis of considerations of a general nature but only where there are very specific circumstances that are particular to the case, of the kind referred to by the Court in Case C-304/02, which relate to the fact that an extremely lengthy period elapsed before a judgment of the Court was complied with and the consequences of the breach were considered to be particularly serious.

47 According to the French Republic, such circumstances are not to be found in the present case. First, the period which has elapsed since judgment was delivered in Case C-419/03 is, in the circumstances, far shorter and, what is more, that judgment was complied with very shortly after proceedings were initiated before the Court. Secondly, the breach relates to only some of the provisions of Directive 2001/18, namely those which diverge from or go beyond the provisions of Directive 90/220 and, moreover, had only minor practical consequences. The present case thus has strong affinities with all the other cases in which the Court did not consider it appropriate to order the payment of a lump sum.

48 In the further alternative, the French Republic considers that the amount of the lump sum proposed is, in any event, excessive. It is, primarily, disproportionate when compared with the sum of EUR 20 million ordered to be paid in Case C-304/02 *Commission* v *France*.

49 Next, the method of calculation employed distorts the flat-rate nature of the penalty, the daily amount proposed being more in the nature of a retroactive penalty payment.

50 Finally, the French Republic contends that the proposed coefficient reflecting the seriousness of the infringement is too high.

51 First of all, failure to transpose Directive 2001/18 had only very minor practical consequences. On the one hand, the most frequent uses of GMOs are covered by other legislation, such as Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1), whereas applications for authorisation based on Directive 2001/18 are still extremely few and far between. On the other hand, a procedure for authorising experiments involving genetically modified higher plants, based on two guides issued by the Ministry of Agriculture, was indeed put in place and the authorisations issued on that basis actually made it possible for the objectives of Directive 2001/08 concerning requests for authorisation, information and public consultation, and also the objective of limiting the risk of the release of micro-organisms, and cross-border release in particular, to be met. That is shown, inter alia, by the content of those guides, an individual authorisation decision produced by the French Republic and, lastly, a number of judgments delivered by the Conseil d'État (the French Council of State).

52 Secondly, between 2003 and 2006, France ranked second among Member States in terms of both the number of applications for authorisation for release for experimental purposes and the production of GMOs for commercial purposes, which shows that neither trade in GMOs nor biotechnological research was discouraged as a result of the failure to transpose Directive 2001/18.

53 Thirdly, the transposition of that directive was never raised in international trade negotiations.

54 Fourthly, the French Republic contends that it did not fail to cooperate or deliberately abstain from complying with the judgment in Case C-419/03, the delays that occurred, as stated during the pre-litigation stage, being attributable in particular to the wish to calm public order disturbances caused by the cultivation of GMO crops and to facilitate public acceptance of those crops as a result of more ambitious reforms than those required by mere transposition of Directive 2001/18.

55 Fifthly and finally, the Commission cannot rely on circumstances which gave rise to other infringement proceedings that are now concluded.

Findings of the Court

56 While an order for a penalty payment, which is essentially intended to be coercive as regards the ongoing breach, is made, as is apparent from paragraph 27 above, only in so

far as the failure to comply with the judgment which originally established that failure continues, there is no requirement for the same approach to be adopted with regard to the imposition of a lump sum payment.

57 According to the established case-law of the Court, the procedure laid down in Article 228(2) EC is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, thereby ensuring that Community law is in fact applied, and the measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective (Case C-304/02 *Commission* v *France*, paragraph 80).

58 While the imposition of a penalty payment seems particularly suitable for the purpose of inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment initially establishing it was delivered (Case C-304/02 *Commission* v *France*, paragraph 81).

59 It is for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required, to determine the financial penalties appropriate for making sure that the judgment which previously established the breach is complied with as swiftly as possible and preventing similar infringements of Community law from recurring (Case C-304/02 *Commission* v *France*, paragraph 97).

60 The fact put forward by the French Republic that, until now, the payment of a lump sum has not been imposed by the Court in situations in which the original judgment was fully complied with before the procedure laid down in Article 228 EC was concluded

cannot prevent such an order being made in another case, should that be necessary in the light of the details of the individual case and the degree of persuasion and deterrence required.

61 With regard to the proposals in the 2005 Communication for the imposition of lump sum payments relied on by the Commission in this case, it must be borne in mind that, while guidelines such as those in the Commission's communications may indeed help to ensure that the Commission acts in a manner that is transparent, foreseeable and consistent with legal certainty, the fact nevertheless remains that such rules cannot bind the Court in the exercise of the power conferred on it by Article 228(2) EC (see, in particular, Case C-304/02 *Commission* v *France*, paragraph 85 and the case-law cited).

62 The decision whether to impose a lump sum payment 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 228 EC.

63 The wording of Article 228 EC does not indicate, any more than does its purpose mentioned above, that an order for the payment of a lump sum should be made automatically, as the Commission contends in the 2005 Communication. By providing that the Court 'may' impose a lump sum payment or a penalty payment on the defaulting Member State, that provision confers a wide discretion upon the Court in deciding whether it is necessary to impose such sanctions.

64 If the Court decides to impose a penalty payment or lump sum payment, it must do so, in exercising its discretion, 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 (see *Commission* v *Spain*, paragraph 41 and the case-law

cited). More specifically, as regards the imposition of a lump sum payment, the relevant factors to be taken into account include, in particular, factors such as how long the breach of obligations has persisted since the judgment which initially established it was delivered and the public and private interests involved (see Case C-304/02 *Commission* v *France*, paragraph 114).

65 In the present case, the Court considers that regard must be had to the following circumstances for the purpose of giving a decision on the Commission's request that the defendant be ordered to pay a lump sum.

66 First of all, with regard to the approach adopted by the French Republic to its Community obligations in the specific field of GMOs, as the Commission has observed, judgment has already been given against that Member State in a number of cases, based on Article 226 EC, finding that it was in breach of its obligations as it had failed correctly to transpose directives adopted in that field.

67 In addition to the finding in the judgment in Case C-419/03 that Directive 2001/18 had not been transposed, the failure to comply with that judgment giving rise to the present proceedings, it was also held in Case C-296/01 *Commission* v *France* and Case C-429/01 *Commission* v *France* that the French Republic had failed to fulfil its obligations, since it had not fully transposed Directive 90/220 and Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms (OJ 1990 L 117, p. 1), respectively.

68 Moreover, it is apparent from the order for removal from the register of 7 February 2007 in Case C-79/06 *Commission* v *France* that it was only after the Commission had

brought an action for a declaration that the judgment in Case C-429/01 had not been complied with that the French Republic took the steps necessary to comply with its obligations, following which the Commission withdrew its action.

69 As submitted by the Commission, where a Member State repeatedly engages in unlawful conduct in such a manner in a specific sector governed by Community rules, this may be an indication that effective prevention of future repetition of similar infringements of Community law may require the adoption of a dissuasive measure, such as a lump sum payment.

70 Secondly, with regard to the length of time for which the breach persisted after judgment was delivered in Case C-419/03, there is nothing in the circumstances of this case that can justify the considerable delay that occurred, after that judgment had been delivered, in actually transposing Directive 2001/18, which, in essence, simply required national legislative provisions to be adopted.

71 It should be noted, in particular, that even though the French Republic does not deny that it failed in its obligations to comply with that judgment by the date on which the period prescribed in the reasoned opinion expired, the March 2007 implementing measures, which were the first measures of any substance adopted in order to ensure that that judgment was complied with, were not adopted until more than a year after that period had expired.

72 As to the contention, which is in fact substantiated by the file submitted to the Court, that the outdoor cultivation of GMOs has provoked and continues to provoke violent demonstrations in France, entailing, inter alia, the uprooting of plants, and that the delay in implementing the judgment in Case C-419/03 was attributable, in particular, to the concern that guidance should be given to the Parliament in its work and a more ambitious reform should be undertaken than that required under Directive 2001/18, it is necessary first of all to point out that, according to settled case-law, a Member State

cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under Community law (see, inter alia, *Commission* v *Italy*, paragraph 25). In particular, even on the assumption that the social unrest referred to by the French Republic is in fact attributable in part to the implementation of Community rules, a Member State may not plead difficulties of implementation which emerge at the stage when a Community measure is put into effect, including difficulties relating to opposition on the part of certain individuals, to justify a failure to comply with obligations and time-limits laid down by Community law (see *Commission* v *Greece*, paragraphs 69 and 70).

73 Thirdly, with regard to the seriousness of the breach, especially in the light of its impact on the public and private interests involved, the objective of Directive 2001/18, as stated in Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States on the placing on the market and deliberate release into the environment of GMOs and to protect human health and the environment.

74 Moreover, as is apparent from Article 1 and recitals 6 and 8 of the preamble to Directive 2001/18, the rules laid down in that directive are based on the precautionary principle and the principle that preventive action should be taken, which are fundamental principles of environmental protection, as referred to in particular in Article 174(2) EC.

75 As stated at recitals 4 and 5 in the preamble to Directive 2001/18, living organisms, whether released into the environment in large or small amounts for experimental purposes or as commercial products, may reproduce in the environment and cross national frontiers, thereby affecting other Member States. The effects of such releases on the environment may be irreversible. The protection of human health and the environment also requires that due attention be given to controlling risks from the deliberate release into the environment of GMOs.

76 By approximating national laws, Directive 2001/18, which was adopted on the basis of Article 95 EC, also seeks to facilitate the free movement of GMOs as or in products.

77 As previously stated, where failure to comply with a judgment of the Court is likely to harm the environment and endanger human health, the protection of which is, indeed, one of the Community's environmental policy objectives, as is apparent from Article 174 EC, such a breach is of a particularly serious nature (see, to that effect, *Commission* v *Greece*, paragraph 94, and *Commission* v *Spain*, paragraph 57).

78 The same applies, in principle, where the free movement of goods continues to be hindered, in breach of Community law, notwithstanding the existence of a judgment of the Court establishing an infringement in that respect.

79 In this case, even though Directive 2001/18 should have been transposed by 17 October 2002, it has previously been stated that, notwithstanding the fact that judgment was given in Case C-419/03 on 15 July 2004, at the time when the present proceedings were instigated the French Republic had still not taken any significant steps to comply with that judgment and thereby ensure that the primary objectives thus pursued by the Community legislature were fully met.

80 All the foregoing considerations suffice to justify the imposition of a lump sum payment in this case.

81 For the purpose of determining the amount of that lump sum payment, it is appropriate to have regard, in addition to the considerations set out at paragraphs 66 to 79 above, to the following circumstances.

82 First of all, as is apparent, in particular, from recitals 1 and 3 of the preamble to Directive 2001/18, that provision replaced Directive 90/220, which had a similar purpose, by making a number of improvements to it and at the same time recasting it. Thus, in its judgment in Case C-419/03, the Court found that the French Republic had breached its obligations by failing to transpose Directive 2001/18 only in so far as the obligations imposed upon the Member States by that directive diverge from or go beyond those imposed by Directive 90/220.

83 In its application in these proceedings, the Commission also pointed out in that regard, by reference to paragraph 5 of the judgment in Case C-419/03, that, considered individually, Articles 1, 2, 4 to 6(1), (3) and (5), 8(1), 10 to 12, 15(1) and (3), 21, 22, 24, 25, 27 to 34 and 36 to 38 of Directive 2001/18 did not call for measures to be taken to comply with that judgment.

84 It follows in particular from the foregoing that the failure on the part of the French Republic to take any significant steps to transpose Directive 2001/18 until the March 2007 implementing measures were adopted does not present the same degree of seriousness, especially in terms of protecting the environment, human health, the free movement of goods and the public and private interests involved, as that presented by a situation in which Community legislation pursuing objectives as important as those established in that directive had not been implemented at all in the legal order of the Member State concerned, notwithstanding a judgment of the Court finding that the Member State concerned had failed to fulfil its obligations.

85 Secondly, account may be taken, to a certain extent, of the fact that, in spite of their belated nature, the March 2007 implementing measures ensured a far-reaching transposition of Directive 2001/18, only three of its provisions remaining, according to the Commission, improperly transposed until 27 June 2008.

86 Thirdly, the Court concurs with the view expressed by the Advocate General at point 82 of his Opinion that it is not possible to conclude, on the basis of the circumstances set out at paragraph 72 above and the conduct of the pre-litigation procedure as described in particular at paragraphs 6 to 13 above, that, in addition to failing to fulfil their obligation to comply with the judgment in Case C-419/03, as previously established in this judgment, the French authorities also failed in their duty to cooperate in good faith during the period leading up to their complying with that judgment, as the Commission maintains, or that they adopted deliberate delaying tactics for the sole purpose of avoiding expeditious performance of their obligations in that regard.

87 In the light of all the foregoing considerations, the circumstances of the case are fairly assessed by setting the amount of the lump sum which the French Republic will have to pay at EUR 10 million.

88 The French Republic must therefore be ordered to pay to the Commission, into the 'European Community own resources' account, a lump sum of EUR 10 million.

Costs

89 Under Article 69(2) 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 applied for costs and the French Republic's failure to fulfil its obligations has been established, the latter must be ordered to pay the costs.

90 The Czech Republic, which intervened in support of the form of order sought by the French Republic, must bear its own costs, in accordance with the first paragraph of Article 69(4) of the Rules of Procedure.

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

1. **Declares that, by failing to take, by the date on which the deadline imposed in the reasoned opinion expired, all the measures necessary to comply with the judgment of 15 July 2004 in Case C-419/03 *Commission* v *France* concerning its failure to transpose into national law the provisions of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, which diverge from or go beyond the provisions of Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms, the French Republic has failed to fulfil its obligations under Article 228(1) EC;**

2. **Orders the French Republic to pay to the Commission of the European Communities, into the 'European Community own resources' account, a lump sum of EUR 10 million;**

3. **Orders the French Republic to pay the costs;**

4. **Orders the Czech Republic to bear its own costs.**

[Signatures]