I — Introduction

1. This will be the first case in which the Court of Justice has had to give a ruling on Article 171 of the EC Treaty (now Article 228 EC) as amended by the Treaty on European Union. That provision makes it possible for financial penalties to be imposed on Member States which have failed to comply with a judgment delivered by the Court of Justice in Treaty-infringement proceedings under Article 169 of the EC Treaty (now Article 226 EC).

The concise nature of the text and the inherent complexity of the subject-matter itself raise a large number of legal issues, including, to mention but the most important, what form the penalties are to take, whether they are to be retroactive and, if so, to what extent, and what the respective powers of the Court and the Commission are to be in determining the type and amount of such penalties. It is unlikely, however, that delivery of the judgment will put an end to the uncertainty. Fundamental questions such as when the (total or partial) infringement ceases, what procedure is to be followed to verify that it has ceased, and what consequences should follow from the failure by the Member State concerned to pay the penalty imposed, as yet remain unanswered.

The present proceedings entail a further difficulty inasmuch as the infringement of which the Hellenic Republic is accused does not, as is often the case, boil down to non-transposition of a Community directive into internal law, but relates rather to the failure to take the material measures necessary to comply with the relevant European legislation. More specifically, the issue is whether, in the Chania area of Crete, waste is disposed of in accordance with Council Directive 75/442/EEC on waste and Council Directive 78/319/EEC on toxic and dangerous waste.

The difficulties mentioned define this analysis, which is undertaken in full awareness of the importance of practice in defining the as yet extremely vague characteristics of this new procedure under Community law.

* Original language: Spanish.

II — The legislative framework

**Directives 75/442 and 78/319**

2. Directives 75/442 and 78/319 are intended to eliminate the disparities between the provisions on waste disposal applicable in the various Member States, and to help protect the environment and improve the quality of life. Under Article 145 of the Act of Accession of the Hellenic Republic, Greece was required to implement both directives by 1 January 1981.

3. Article 4 of Directive 75/442 provides as follows:

> Member States shall take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment, and in particular:

— without risk to water, air, soil and plants and animals;

— without causing a nuisance through noise or odours;

— without adversely affecting the countryside or places of special interest.

4. Article 5 of Directive 75/442 provides that Member States ‘shall establish or designate the competent authority or authorities to be responsible, in a given zone, for the planning, organisation, authorisation and supervision of waste disposal operations’. According to Article 6 of that directive:

> The competent authority or authorities referred to in Article 5 shall be required to draw up as soon as possible one or several plans relating to, in particular:

— the type and quantity of waste to be disposed of;

— general technical requirements;
— suitable disposal sites;

— any special arrangements for particular wastes.

The plan or plans may, for example, cover:

— the natural or legal persons empowered to carry out the disposal of waste;

— the estimated cost of the disposal operations;

— appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste’.

6. Directive 78/319 lays down similar provisions with regard to toxic and dangerous waste. Article 5 of that directive provides:

1. Member States shall take the necessary measures to ensure that toxic and dangerous waste is disposed of without endangering human health and without harming the environment, and in particular:

— without risk to water, air, soil, plants or animals;

— without causing a nuisance through noise or odours;

— without adversely affecting the countryside or places of special interest.

2. Member States shall in particular take the necessary steps to prohibit the abandonment and uncontrolled discharge, tipping or carriage of toxic and dangerous waste, as well as its consignment to installations, establishments or undertakings other than those referred to in Article 9(1).’
7. Article 9(1) of Directive 78/319 requires that installations, establishments or undertakings which carry out the storage, treatment and/or deposit of toxic and dangerous waste must obtain a permit from the competent authorities.

The competent authorities of the Member States may include other specific aspects, in particular the estimated cost of the disposal operations.

8. Under Article 12 of Directive 78/319:

1. The competent authorities shall draw up and keep up to date plans for the disposal of toxic and dangerous waste. The plans shall cover in particular:

   — the type and quantity of waste to be disposed of;
   — the methods of disposal;
   — specialised treatment centres where necessary;
   — suitable disposal sites.

2. The competent authorities shall make public the plans referred to in paragraph 1. The Member States shall forward these plans to the Commission.

3. The Commission, together with the Member States, shall arrange for regular comparisons of the plans in order to ensure that implementation of this directive is sufficiently coordinated.'

9. Article 21(2) of Directive 78/319 requires that Member States communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this directive.

10. 'Waste' is defined in Article 1(a) of both directives as 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force'. 'Toxic and dangerous waste' is defined in Article 1(b) of Directive 78/319 as 'any waste containing or contaminated by the substances or materials listed in the Annex to this directive of such a nature, in such quantities or...
in such concentrations as to constitute a risk to health or the environment'.

B — Article 171 of the Treaty (now Article 228 EC)

11. The Treaty on European Union, which entered into force on 1 November 1993, added, by means of Article G.51, a paragraph (2) to the then Article 171 of the EEC Treaty. The resulting provision, which, since the entry into force of the Treaty of Amsterdam on 1 May 1999, has become Article 228 EC, reads as follows:

'1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 170.'

C — The Commission memorandum and communication on applying Article 171 of the EC Treaty and the method of calculating the penalty payments provided for therein respectively

12. Although not legislative texts stricto sensu, these documents are binding on the institution from which they emanate, at least in the sense that the institution in question may depart from them only if it duly states the reasons for so doing, since, otherwise, it would be in breach of the principle of equal treatment.

13. The Commission memorandum on applying Article 171 of the EC Treaty of
21 August 1996 ('the memorandum'), \(^3\) establishes, *inter alia*, the following:

that the amount must be calculated on the basis of three fundamental criteria:

1. *the seriousness of the infringement;*

2. *its duration;*

3. *the need to ensure that the penalty itself is a deterrent to further infringements.*

4. Article 171 offers a choice between two types of pecuniary sanction, *a lump sum or a penalty payment*. The basic object of the whole infringement procedure is *to secure compliance as rapidly as possible*, and the Commission considers that a *penalty payment* is the most appropriate instrument for achieving it.

This does not, however, mean that it will never ask for a *lump sum* to be imposed.

5. Decisions as to the *amount of the penalty* must be taken with an eye to its actual purpose, which is to ensure that Community law is effectively enforced. The Commission considers

6. As regards *seriousness*, an infringement in the form of failure to comply with a judgment is always quite clearly serious. However, for the specific purpose of fixing the amount of the penalty, the Commission will also take account of two parameters closely linked to the underlying infringement which gave rise to the original judgment, viz. *the importance of the Community rules which have been infringed and the effects of the infringement on general and particular interests.*

\(^3\) — OJ 1996 C 242, p. 6.
8. From the point of view of the effectiveness of the penalty, it is important to set amounts such that the penalty has a deterrent effect. To impose purely symbolic penalties would negate the whole purpose of this addition to the infringements procedure and run counter to the ultimate objective of the procedure, which is to ensure that Community law is fully enforced.

... Member States must be aware of how the financial penalties proposed by the Commission to the Court of Justice of the European Communities are to be calculated, and the method used must comply with the principles of proportionality and equal treatment for all the Member States. It is also important to have a clear and consistent method, since the Commission must explain to the Court how it determined the penalty proposed.

A decision as to whether to ask for a penalty to be imposed will depend on the circumstances of the case, as stated at point 3. But, once it has been found that a penalty should be imposed, for it to have a deterrent effect it must be set at a higher figure if there is any risk of a repetition (or where there has been a repetition) of the failure to comply, in order to cancel out any economic advantage which the Member State responsible for the infringement might derive in the case in point.

14. For its part, the communication entitled ‘Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty’, of 28 February 1997 (‘the Communication’), 4 provides, inter alia, as follows:

The amount of the daily penalty is calculated as follows:

— a uniform flat-rate amount is multiplied by two coefficients, one reflecting the seriousness of the infringement and the other the duration;

---

— the result is multiplied by a special factor \( (n) \) reflecting the ability to pay of the Member State concerned and the number of votes it has in the Council.

From a strictly legal viewpoint, of course, the infringement in such cases is always the same: non-compliance with a judgment of the Court finding that the Member State has failed to fulfil an obligation and breach of Article 171(1) of the Treaty.

The uniform flat-rate amount is defined as the basic amount to which weightings will be applied. ... It has been determined in such a way that:

— the Commission retains a broad discretion when applying the coefficients; Depending on the seriousness of the infringement, the flat-rate amount will be multiplied by a coefficient of at least 1 and no more than 20.

— the amount is reasonable and tolerable for all the Member States; ...

— the amount is high enough to maintain pressure on whichever Member State is concerned.

For the purposes of calculating the penalty payment, the duration of the infringement runs from the date of the first Court judgment. ...

The amount has been set at ECU 500 per day.
Depending on the duration of the infringement, the flat-rate amount will be multiplied by a coefficient of at least 1 and no more than 3.

The deterrent effect is achieved by applying a special factor $n$ which is a geometric mean based on the Member State’s gross domestic product (GDP) and the weighting of votes in the Council. The factor $n$ combines the ability of each Member State to pay, as measured by the GDP, with the number of votes it has in the Council. The resulting formula gives a reasonable degree of variation between Member States (from 1.0 to 26.4).

The amount of the penalty payment should ensure that the penalty is proportionate and, at the same time, has a deterrent effect.

This deterrent effect should be sufficient to ensure that:

— the Member State decides to regularise its position and bring the infringement to an end (the penalty must, therefore, outweigh the advantage gained by the Member State from the infringement);

— the Member State will not repeat the infringement.

The need for the penalty to have a deterrent effect precludes any purely symbolic penalty. The penalty must exert sufficient pressure on the Member State for it to regularise its position.
III — The facts

15. On 7 April 1992, the Court of Justice gave judgment in Case C-45/91. In that judgment, it held that:

'... by failing to take the measures necessary to ensure that in the area of Chania waste and toxic and dangerous waste are disposed of without endangering human health and without harming the environment, and by failing to draw up for that area plans for the disposal of waste and of toxic and dangerous waste, the Hellenic Republic has failed to fulfil its obligations under Articles 4 and 6 of Council Directive 75/442/EEC of 15 July 1975 on waste, and Articles 5 and 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste.'

16. On 11 October 1993, having received no notification of any measures adopted to comply with the judgment in Case C-45/91, the Commission sent a letter to the Greek authorities in which it reminded them of their obligations under that judgment.

17. On 1 November 1993, the Treaty on European Union entered into force.

18. A meeting on the enforcement of Community law in environmental matters, attended by representatives from Greece and the Commission, was held in Athens on 18 and 19 April 1994.

19. In a letter received by the Commission on 24 August 1994, the Greek authorities explained that the prefectorial council for Chania, the competent body for waste management, had obtained 'preliminary approval' for the opening of two new landfill sites in the regions of Kopidani and Vardia and that the corresponding environmental impact study was in the process of being prepared. On its completion, expected in late 1994, the council would conduct the final study regarding the construction, operation, supervision and restoration of whichever of the two sites proved more suitable. The competent authority, the Greek authorities went on, would inform the Commission of any new development in connection with that project.

20. On 21 September 1995, having received no information regarding the project, the Commission decided to initiate the procedure under Article 171(2) of the Treaty. By letter of the same date, it called on the Greek authorities to submit observations within two months.
21. By letter of 14 December 1995, the Hellenic Republic stated in reply that the competent local authorities had already selected a site and that it should therefore be possible to implement the waste disposal programme which had been drawn up.

22. Taking the view that Greece had failed to fulfil its obligations under Article 171(1), the Commission issued a reason opinion to that effect to the Greek authorities on 6 August 1996, and at the same time called on them to remedy the infringement within two months.

23. The Greek authorities replied by letter of 11 November 1996. They stated, first of all, that a national waste management plan, implemented at local level, and with sufficient funds had been adopted and adequate funds had been allocated to it.

As regards the regional waste management plan for the prefecture of Chania, the Greek authorities stated that it consisted in the implementation of an integrated waste management plan including:

- the sorting of waste at source;
- the construction and operation of a mechanical recycling plant;
- the provision and opening of a landfill site; and
- a programme for the reinstatement and restoration of the area on account of the uncontrolled disposal of waste in the Kouroupitos tip.

In the same document, the Commission advised the Greek authorities that a periodic penalty payment could be imposed for failure to comply with a judgment of the Court of Justice, and that the amount of the penalty payment would be determined by the Commission when it brought its action before the Court.
In connection with the final step, the Greek authorities explained, without giving any further details, that they had taken specific measures to find a permanent solution to the problem of the Kouroupitos tip, and that they were drawing up special management plans to that end.

24. As regards the management of toxic and dangerous waste, as well as hospital waste, the Greek authorities stated that the competent ministry was still carrying out a series of measures, including the financing of waste management studies and works. In particular, the Chania prefectorial authorities had taken the steps necessary to set up a mechanical recycling plant and to convert an area into a landfill site. The competent authorities were of the view that completion of those programmes would resolve the problem of the river Kouroupitos and make good the deficiencies of the waste management arrangements in Chania generally.

25. By letter of 28 August 1997, the Greek authorities informed the Commission of the progress which had been made. They stated, for example, that the environmental impact study in connection with the recycling plant had been completed, as had the first stage of an international restricted tendering procedure.

26. The reply from the Greek authorities did not satisfy the Commission, which considered that the measures adopted were not sufficient to give effect to the judgment of the Court. It therefore brought the present action, proposing the imposition of a penalty payment of EUR 24 600 for each day of delay, to run from the date of delivery of the judgment bringing the present proceedings to an end.

IV — Analysis of the substance

27. The Greek Government disputes the admissibility of the application on the ground that it seeks to punish conduct retroactively. In the alternative, it contends, with regard to the amount of the penalty, inter alia, that there was no guilty intent on the part of the defendant State. The Greek authorities proceed from the premiss that the procedure and penalties provided for in Article 171 are penal or, at least, quasi penal, and that they are therefore subject to the principles of criminal law.

It is therefore necessary, first of all, to examine the legal nature of the penalties provided for in Article 171 in order to determine whether or not they constitute measures of a penal or comparable nature. Next, following the scheme of the Treaty text, I shall consider what, if any, infringements of Article 171(1) have been committed, in order, finally, to examine the consequences that may follow from those infringements in accordance with Article 171(2).
A — First question: the nature of the penalties under Article 171

28. Article 171(1), which was not amended by the Maastricht Treaty, establishes the binding nature of judgments delivered by the Court of Justice under Article 169. The State against which judgment has been delivered ‘shall be required to take the necessary measures to comply with the judgment of the Court of Justice’.

29. Article 171(2) empowers the Commission to bring a further action against the defaulting Member State. It must first give notice to the authorities of the State concerned, affording them the opportunity to submit observations, and then issue a reasoned opinion stating precisely how the Member State in question has failed to comply with the judgment of the Court of Justice. If the Member State does not take the measures necessary to comply with the judgment within the prescribed time-limit, the Commission may refer the case to the Court of Justice, specifying the amount of the lump sum or penalty payment to be paid by the Member State which it considers necessary.

30. In the paragraphs that follow, I shall attempt to demonstrate that the nature of the procedure under Article 171(2) is to be determined by reference to the fundamental objective which the Treaty assigns to infringement proceedings generally, which is, quite simply, to secure compliance by the Member States with their obligations as rapidly as possible.\(^6\) My analysis will be concerned with the pecuniary sanction which the Commission may seek and which the Court may impose in the form of a penalty payment. A *fine* or, more correctly, a *coercive sanction*\(^7\) is ‘a pecuniary penalty imposed by a court in order to compel the person liable to perform his principal obligation, and is generally set at a certain amount for each day of delay or on the basis of any other unit of time’\(^8\). However, the payment of a lump sum, to which the Commission makes no reference in its memorandum or its communication,\(^9\) must likewise be regarded as a means of obtaining ultimate compliance and not as a penalty which serves to punish a Member State for its unlawful conduct or still less as a form of compensation for the damage caused as a result of the delay in compliance. Otherwise, the scheme of the procedure under Article 171(2) would be changed irrevocably, inasmuch as its nature would vary depending on the type of penalty sought by the Commission.\(^10\)

31. I acknowledge from the outset that there is a great temptation to classify new, and therefore unknown, procedures under traditional headings that are entirely familiar to us. Because of the importance attached to the rights of the defence in

\(^6\) — See paragraph 4 of the memorandum (point 13 above).
\(^7\) — Use of the — broader — term ‘sanction’ does not prejudge the nature of the measure.
\(^9\) — Other than to point out that it does not waive the right to request that one be imposed.
\(^10\) — Alcalá-Zamora supplements his definition by saying that an ‘‘astreinte’’ ‘can also consist in a given sum payable by the person liable for every infringement which he commits’ (ibid.).
any democratic society, that temptation is all the greater where the procedure in question shares (or appears to share) a particular characteristic with national criminal procedure. For some time now, that assimilation has largely blurred the distinction, in regard to their procedural treatment, formerly drawn between penalties depending on their criminal or administrative origin. It is now recognised that similar principles must apply to both. That development is to be welcomed, particularly from a Community perspective. It is, after all, not unusual for the same conduct to be punishable under criminal law in one Member State but to be the proper subject of administrative proceedings in another, a fact which at the same time highlights just how artificial the distinction is.

32. What is more debatable, in my view, is the application of the principles developed by criminal law to fields such as the protection of competition or the combating of discrimination on grounds of sex. In those cases, the aim of the legislature is to maintain or achieve a situation viewed in objective terms (freedom of competition, in one instance, and equality as between men and women, in the other), not to punish the allegedly unlawful intent of a particular trader. In the two examples cited, therefore, contrary to what would be the case in criminal law, there is no requirement for intention or even negligence to be present for the punishable act to have been committed. Although the punitive element can never be entirely disregarded, the financial penalties imposed in such circumstances are primarily intended, in the absence of more appropriate means, to coerce the trader indirectly into adjusting his conduct in a particular way, not to penalise unlawful conduct.

33. The same can be argued, in my opinion, with respect to the arrangement introduced by Article 171. It does not serve to punish the defaulting Member State but to encourage it to comply by applying pressure in the form of a substantial financial penalty which increases on a daily basis. I therefore consider that, if that arrangement had to be classified under a traditional legal heading, it would have to be described as a procedure for the enforcement of judgments. In ordinary proceedings for the judicial enforcement of judgments, courts not only have the obvious option of recourse to physical force; they can also impose financial penalties. This is common practice in civil and administrative proceedings in several continental Member States.\textsuperscript{11}

34. In France, for example, civil courts have been imposing \textit{astreintes} (periodic penalty payments), as created by the judiciary, since the beginning of the last century. Although there was some confusion initially as to whether or not they were compensatory in nature, such doubts were dispelled by the legislature. Law No 80-539 of 16 July 1980, on coercive sanctions in administrative proceedings and compli-

\textsuperscript{11} — In common-law systems, there exists the concept of \textit{contempt of court}, which, although pursuing similar aims, is clearly penal in nature, since it is primarily characterised by the punishment of failures to comply with court orders, inasmuch as these represent a challenge to judicial authority.
OPINION OF MR RUIZ-JARABO — CASE C-387/97

35. In Belgium, the Netherlands and Luxembourg, astreintes are governed by the Benelux Agreement of 26 November 1973 on uniform legislation relating to coercive sanctions. None of the three laws transposing the agreement into the national legal system attaches to the financial penalties which courts may impose the status of penal sanctions.

36. Article 354(1) of the Austrian law on the enforcement of judgments delivered by ordinary courts (Exekutionsordnung of 27 May 1896, as amended on several occasions since then) allows coercive sanctions, both pecuniary and custodial, to be imposed in cases where a judgment lays down an obligation to act which is not enforceable by third parties and the performance of which is dependent on the will of the person liable (unvertretbare Handlung).

37. The German code of civil procedure (Zivilprozeßordnung) contains a similar provision in Article 888, which relates specifically to the enforcement of judgments (Zwangsvollstreckung). The German courts have expressly held that the coercive sanctions under Article 888 are not of a penal or comparable nature but serve exclusively to encourage compliance. The principles of criminal procedure are not therefore applicable. 12

38. Under the system of Community law, since it is difficult to imagine any form of legal force being used to induce a Member State to comply, there is no alternative, in seeking to overcome the resistance of a recalcitrant Member State, but to resort to coercion. This could have taken political or diplomatic form. It would, after all, have been perfectly in keeping with the traditional practice of international law for the Council to be entrusted with the task of enforcing the judgments of the Court of Justice, for example, and being empowered for that purpose to suspend the voting rights of the Member State concerned. That, to a certain extent, is what happens with the judgments of the European Court of Human Rights. Under Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the enforcement of judgments delivered by the European Court of Human Rights is entrusted to the Committee of Ministers, which is a permanent conference of Ministers for Foreign Affairs of the Member States of the Council of Europe and the organisation’s governing body. 13 In itself, enforcement of a judgment delivered by the European Court of Human Rights, which, as that court has consistently held, is purely

12 — See, by way of example, the judgment cited in Entscheidungen der Oberlandesgerichte in Zivilsachen, 1982, pp. 102 et seq. and E. Göhler: Das Einführungsgesetz zum Strafgesetzbuch, Neue juristische Wochenschrift, 1974, pp. 825 et seq., in particular p. 826.

13 — The Security Council is likewise empowered to take the measures necessary in the event of failure to comply with a judgment of the International Court of Justice (Article 94 of the Charter of the United Nations).
declaratory, consists merely in the payment of an amount by way of 'just satisfaction' (Article 41 of the Convention). That amount includes compensation for the material and non-material damage suffered as a result of the infringement of the Convention and partial or total reimbursement of the procedural expenses and costs incurred. However, it has been understood from the outset that, where an infringement of the rights and freedoms under the Convention which has been established by a judgment of the European Court of Human Rights derives from the legislation or administrative practice of the defendant Member State, enforcement of that judgment will also include amendments to the relevant legislation or practice. It goes without saying that, since the legislation in question often directly affects fundamental human rights, such amendments are not always easy to carry out. They may require constitutional changes or involve public authorities other than the central State which signed the Convention and which alone is internationally responsible for it.

39. The enforcement of judgments of the European Court of Human Rights is, above all in the context of the possible obligation to amend national legislation, similar, in terms of its consequences, to the enforcement of judgments establishing a breach of obligations delivered by the Court of Justice, inasmuch as a substantial proportion of the latter relate either to the failure by the relevant Member State to transpose a particular directive into national law, or to the maintenance in national law of legislation contrary to Community law.

40. Those measures therefore pursue exactly the same objective as Article 171, and yet few would venture to claim that that particular procedure for the enforcement of judgments might be capable of leading to a full re-hearing of the case in question, let alone that the defaulting State could, during the re-hearing, rely on the same guarantees as are enjoyed by the accused in a criminal trial.

41. There is at least one other reason why I do not consider it appropriate to regard the procedure under Article 171 as an action at criminal law. I refer to what might be called considerations of legal ontology. There is something highly irregular about granting to a defaulting Member State the same guarantees as are afforded to the accused in criminal proceedings, many of which derive from the fundamental principle of the presumption of innocence. That would be absurd! How can the State, which, as a democratic society, attaches primary importance to the principle of respect for the rule of law, claim any privilege for its own consistent failure to observe the same rule of law?

14 — As follows from the amendment introduced by Protocol No 11 of 11 March 1994.
42. For the reasons I have given, I conclude that the procedure provided for in Article 171 cannot be treated in the same way as a procedure at criminal law, but is akin rather to a special judicial procedure for the enforcement of judgments. This does not mean, however, that the defendant State does not enjoy any procedural guarantees at all — which would also be absurd — but rather that the extent of the rights of the defence which are to be granted to it must be in keeping with the objective pursued.

43. Several significant consequences follow from the correct classification of the procedure under Article 171. It dictates, inter alia, the application in its entirety or otherwise of the system of guarantees available under criminal law (intention, characterisation of the offence, specification of the penalty, non-retroactivity), the nature of the Commission’s powers in this context, and the scope of the examination which the Court of Justice will have to undertake. I shall now address each of those points separately, with reference to the present case.

B — Infringements of Article 171(1) of the Treaty

44. Article 171(1), which was not amended by the Maastricht Treaty, requires a Member State whose failure to fulfil an obligation under the Treaty has been established in a judgment of the Court of Justice to take the necessary measures to comply with that judgment.

45. As has been said, in its judgment in Case C-45/91, the Court of Justice found that the Hellenic Republic had failed in a number of respects to fulfil certain of its obligations under Community law, by virtue of the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC), in relation to waste management, namely:

— failure to fulfil the obligation arising from Article 4 of Directive 75/442: to dispose of waste without endangering human life and without harming the environment;

— failure to fulfil the obligation arising from Article 6 of the same directive: to draw up a waste-management plan;

— failure to fulfil the obligation arising from Article 5 of Directive 78/319: to dispose of toxic and dangerous waste without endangering human health and without harming the environment;

— failure to fulfil the obligation arising from Article 12 of Directive 78/319: to draw up and keep up to date plans for the disposal of toxic and dangerous waste.
46. I consider those obligations to be 'divisible', in the sense that they can to a certain extent be fulfilled independently of each other, and that, despite the all-embracing approach that the Commission preferred to adopt when bringing these proceedings, the sound administration of justice requires that they be addressed separately. As I shall explain later, the approach I advocate in this respect is intended to enable the Court of Justice to adjust any penalty which is to be imposed on the basis of whether or not each of the obligations, considered individually, has been fulfilled.

47. I shall therefore look now at whether each of those obligations has been fulfilled, in order, afterwards, to consider the amount of any penalty payment which it may be appropriate to impose on the defendant Member State in respect of each of them. First of all, however, I must address two preliminary issues, namely (a) the continuing validity of the obligations failure to fulfil which constitutes the alleged infringement and (b) the period of time for which the judgment establishing a breach of obligations was or was not complied with.

(a) Whether the obligations arising from Directives 75/442 and 78/319 are in force

48. Although this question has not been raised by any of the parties, I think it useful to devote some attention to it. The issue is whether the obligations arising from the waste directives remain in force as they were at the time when the judgment establishing a breach of obligations was delivered, or whether, on the other hand, they have been amended or even abolished by subsequent legislation. In the latter case, if the original obligations no longer exist, the procedure under Article 171 has probably ceased to have any purpose, in so far as it serves to encourage compliance with an existing obligation.

49. It appears that Articles 4 and 6 of Directive 75/442 were amended by Directive 91/156/EEC of 18 March 1991, while Directive 78/319 was repealed by Directive 91/689/EEC of 12 December 1991. Both directives gave Member States a period of two years in which to bring into force the laws, regulations and administrative provisions necessary to give effect to them.

50. It should be recalled (see points 2 to 10 above) that Directives 75/442 and 78/319 laid down similar obligations with regard both to the disposal of waste and toxic and dangerous waste and to the drawing up of plans for such disposal. The present legal position is as follows.

51. As regards 'solid' waste, Article 4 of Directive 91/156 provides:

‘Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, soil and plants and animals;

— without causing a nuisance through noise or odours;

— without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste'.

Article 7 of Directive 91/156, which replaces Article 6 of Directive 75/442, provides:

‘1. In order to attain the objectives referred to in Articles 3, 4 and 5, the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans. Such plans shall relate in particular to:

— the type, quantity and origin of waste to be recovered or disposed of;

— general technical requirements;

— any special arrangements for particular waste;

— suitable disposal sites or installations.'
Such plans may, for example, cover:

— the natural or legal persons empowered to carry out the management of waste;

— the estimated costs of the recovery and disposal operations;

— appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste.

2. Member States shall collaborate as appropriate with the other Member States concerned and the Commission to draw up such plans. They shall notify the Commission thereof.

3. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures.

52. In short, as far as the disposal of solid waste is concerned, the amendments introduced by the new Community rules do not affect the obligations which the Court's judgment in Case C-45/91 found to have been breached.

53. With regard to toxic and dangerous waste (‘dangerous waste’ in the new terminology), Directive 91/689 refers also to Directive 75/442 (as amended), and at the same time introduces ‘additional, more stringent rules to take account of the special nature of such waste’. It must be inferred from this that the obligations currently in force with respect to the disposal of dangerous waste are at least as rigorous as those in force in April 1992.

54. In conclusion, while it is true that the obligations which formed the subject-matter of the judgment in Case C-45/91 have undergone some formal amendments, they remain substantively the same, as does the requirement that every Member State take the necessary measures to give effect to them.

(b) The point in time to which the judgment of the Court of Justice must relate

55. The judgment to be given by the Court of Justice under the procedure provided for

17 — Fourth recital in the preamble to Directive 91/689.
in Article 171(2) necessarily includes, in addition to any order to pay a financial penalty, a ruling on the fulfilment by the defendant Member State of its obligations under the earlier judgment delivered in accordance with the former Article 169 of the Treaty (now Article 226 EC).

56. That ruling will have to relate to a particular point in time. This is a particularly important question given the opportunity which a Member State has, over time, to comply with the Court's judgment in full or in part, and the bearing this will have on the calculation of any financial penalty which is to be imposed and indeed on whether such a penalty is appropriate at all.

57. What is the most appropriate time? In view of the silence of the Treaty on this matter and the similarity between the procedure under Article 171(2) and the action for failure to fulfil obligations under Article 169, the answer might be that the Commission's action and the Court's judgment must both relate to the deadline for compliance with that judgment which the Commission lays down in its reasoned opinion. That, after all, is the point at which the Court of Justice considers the matter to have become actionable in Treaty-infringement proceedings. Thus, even when the default is later remedied, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, vis-à-vis other Member States, the Community or private parties.

58. I do not think that that reasoning also applies to these proceedings, the purpose of which — as I have already said — is not to obtain a further declaration of failure to fulfil obligations but to encourage the recalcitrant Member State to comply with a judgment establishing a breach of obligations. It is no less true, however, that the Court of Justice can only perform its judicial function in relation to a state of affairs which is fixed at a particular point in time. For that reason, I consider that the last opportunity for the defendant State to submit pleadings in respect of the level of compliance it has achieved, and for the Commission to make submissions regarding the amount and form of the financial penalty which it is appropriate to impose, should be the public hearing or, failing that, the close of the written procedure. In other words, the point in the procedure at which the Court of Justice begins its adjudicatory function, inasmuch as the Advocate General delivers his Opinion and the relevant Chamber adopts and delivers its judgment. That view is further supported by the fact that, between the end of the period prescribed for complying with the reasoned opinion and, at the very least, the lodging of the application, a long time may pass (more than two years in the present case) during which the situation, both factual and legal, may have changed significantly.

59. In any event, the analysis that follows is based on the entire body of pleadings

---

18 — See, for example, the judgment in Case C-361/88 Commission v Germany [1991] ECR I-2567, paragraph 31.

19 — Ibid.
submitted by the parties prior to the actual hearing.

(c) Compliance with the obligation to dispose of waste without endangering human health and without harming the environment (Article 4 of Directive 75/442)

The Commission, on the other hand, considers that, in order for waste to be properly managed, it must necessarily be deposited or disposed of in accordance with a plan.

60. A preliminary observation is called for regarding the scope of the obligation to dispose of waste without endangering human health and without harming the environment. The same observation also applies to the disposal of toxic and dangerous waste, which I shall examine later.

61. According to the Greek Government, the judgment in Case C-45/91 requires it to fulfil four obligations which, although separate, can, by subject-matter, be placed in two groups: those relating to the disposal of waste and toxic and dangerous waste without endangering human health and without harming the environment; and those relating to the drawing up of plans for the disposal of waste and toxic and dangerous waste. While the former might be regarded as rules of 'substantive' law, the latter are, in its view, in the nature of 'procedural' or policy-planning provisions. Accordingly, implementation of the provisions on disposal measures is not conditional on implementation of the provisions on the drawing up and notification of plans; nor, conversely, is implementation of the provisions on the drawing up of plans conditional on compliance with the rules on the adoption of disposal measures.

62. I agree with the Commission's interpretation: to accept a Member State's view that, by drawing up waste management plans, and by disposing of such waste without endangering human health or harming the environment, but not in accordance with those plans, it has complied with the provisions of the directive, would be utterly absurd.

63. I therefore consider that the obligation incumbent on Member States to adopt measures to ensure that waste is disposed of without risk to water, air, soil and plants and animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest, in order to preserve human health and the environment (Article 4 of Directive 75/442), necessarily includes the obligation to make such
measures conform to the management plan provided for in the same directive.

64. As regards whether or not it has in fact failed to fulfil its obligations, the Greek Government contends in its defence that the amount of solid waste which continues to be tipped in the Kouroupitos ravine has decreased significantly. That decrease had been made possible by the opening or extension of four landfill sites (in the municipalities of Sfakia, Kalyves, Selino and Kissamo), and the introduction of a paper-sorting and recycling system. Furthermore, an experimental aluminium-collection programme has been launched and plans have been drawn up for the establishment of a regional recycling centre. A study carried out by the Technical University of Crete detected only a very faint presence of toxic substances (dioxins and furans) in the area around the Kouroupitos and within a two-kilometre radius.

65. I take the view, like the Commission, that the body of measures adopted by the Greek authorities represents only partial and fragmented compliance with the provisions of Article 4 of Directive 75/442.

66. As the Greek Government itself admits, solid waste continues to be discharged in the area around the Kouroupitos. The following nuisances therefore still exist: ‘contamination of the sea, in particular when the river Kouroupitos bursts its banks’, ‘the risk of fires caused by unauthorised incineration’, ‘the proliferation of rodents and insects of all types’, ‘offensive smells’, ‘the impairment of a site of “exceptional beauty”, the unique shoreline of the rocky area around Akrotiri’.\(^{20}\) As the Commission has pointed out, the technical study cited by the Greek Government\(^ {21}\) contains the following passage:

‘... high concentrations of various toxic substances such as polycyclic aromatic hydrocarbons, polychlorobiphenyls, polychlorodibenzodioxins, polychlorodibenzofurans and heavy metals have been detected in the area around the Kouroupitos. The pollution from these dangerous substances is considerable in the area around the Kouroupitos and declines with distance’.

Finally, the Greek Government has not shown that the measures adopted to date form part of a solid-waste management plan for the area.

67. The Greek Government points to the various difficulties involved in choosing a suitable landfill site to replace the Kourou-
pitos tip. It refers in particular to the existence of an extensive water table, the proliferation of scattered population centres and the abundance of archaeological sites and places of natural and historic interest. It then lists the various research studies which had to be carried out before the Strongylo Kefali site was chosen.

68. The explanations given by the Greek Government relate to measures which, at best, constitute a preliminary stage in the process of discharging its obligations under Article 4 of Directive 75/442, but cannot in themselves be regarded as amounting to compliance.

69. It is therefore appropriate, in my view, to find that, by failing to comply with the judgment in Case C-45/91 as regards the obligations arising from Article 4 of Directive 75/442, the Hellenic Republic has infringed Article 171(1) of the Treaty.

70. The Commission considers that Greece has failed to fulfil its obligation to draw up a solid-waste management plan for the Chania area.

71. The Greek Government contends that Ministerial Resolutions No 114218 and No 113944 on the creation of a framework for solid-waste management projects and programmes and the national solid-waste management plan were adopted on 27 October 1997. The waste management plan for the prefecture of Chania, which, according to the Greek Government, covers both solid waste and toxic and dangerous waste, was approved on 25 November 1997. The latter plan covers all the individual action plans and programmes adopted hitherto.

72. As far as the Commission is concerned, the document of 25 November 1997 is not a plan within the meaning of Article 6 of Directive 75/442 or Article 12 of Directive 78/319, but is a preparatory study for such a plan. Rather than decisions on waste management, it contains a series of proposals for each of the territorial units into which the prefecture is divided.

73. For my part, as I do not need to carry out an exhaustive analysis of the document in question, I shall merely refer to its preamble and the main body of the text (pages 14 and 15 of the first volume), both

22 — Greek Official Gazette 1016/B/17.11.97.
of which, as the Commission has pointed out, acknowledge the preliminary nature of the study and the fact that, 'in order to supplement it, it will be necessary to produce all the reports envisaged in it'.

74. The document of 25 November 1997 cannot therefore be deemed, as far as solid waste is concerned, to contain sufficient detail as regards the types and quantities of waste to be disposed of, general technical requirements, suitable sites for its treatment and disposal or deposit and any other special arrangements, for it to be regarded as a plan within the meaning of Article 6 of Directive 75/442. Nor, as regards toxic and dangerous waste, does it contain any decisions as to the types and quantities of waste which are to be disposed of, the methods of disposal, specialised treatment centres or suitable disposal sites, such as would give effect to the provisions of Article 12 of Directive 78/319.

75. According to the Greek Government, no toxic or dangerous waste has been deposited in the Kouroupitos ravine since 1996; it is entrusted to a private undertaking which transports it abroad in order for it to be treated. That also applies to hospital waste, which is loaded into a special vehicle and stored in a cold chamber until it is incinerated. As for sediments of hydrocarbon deposits, the Greek Government states that they are stored in an appropriate place until they are sent abroad. Used mineral oils are passed to the prefectorial authorities for removal to a reclamation plant, and tankers no longer deposit the contents of septic tanks into the Kouroupitos as a biological sewage treatment plant has been built in the Chania area.

In short, the Greek Government submits, toxic and dangerous waste in the Chania area is disposed of in a manner perfectly consistent with Directive 78/319, since the measures necessary to protect human health and safeguard the environment have been adopted.

76. The Commission maintains that the measures adopted by Greece are fragmented and limited in time. There is no evidence that all dangerous waste in the area will be transported abroad on a permanent basis. Nor does the Greek Government adduce any proof that all hospital waste is sent for incineration. Finally, the measures adopted do not form part of a comprehensive plan or programme for the management of toxic and dangerous waste.
77. It is my view that, in proceedings under Article 171, it is for the defendant Member State to prove that it has duly complied with the judgment establishing an infringement of the Treaty. On that basis, the Commission's role can be confined to pointing out which obligations have not been fully shown to have been discharged. This is particularly true where, as here, the Community rule requires that the Member State notify the Commission of the measures it has adopted. It is therefore appropriate to find that the Hellenic Republic has failed to fulfil its obligations. After all, 'incomplete practical measures and fragmentary legislation cannot discharge the obligation of a Member State to draw up a comprehensive programme with a view to attaining certain objectives ...'.

78. In any event, it has not been shown that the measures taken by the Greek authorities form part of a methodical, long-term plan for the disposal of toxic and dangerous waste, as required by Article 12 of Directive 78/319. As I stated earlier (see point 62 above), the obligation to dispose of waste in accordance with Directives 75/442 and 78/319 requires that such disposal be effected in accordance with the plans provided for in those directives.

79. For those reasons, I must conclude that the Hellenic Republic has not fully discharged the obligation to dispose of toxic and dangerous waste in the Chania area in accordance with Article 5 of Directive 78/319.

(f) Fulfilled of the obligation to draw up and keep up to date plans for the disposal of toxic and dangerous waste (Article 12 of Directive 78/319)

80. As regards the obligation to draw up a plan for the disposal of toxic and dangerous waste in the Chania area, the Greek Government has submitted that the document of 25 November 1997 (see point 71 above) covers plans for both solid waste and toxic and dangerous waste.

For a discussion of this issue, I therefore refer to the section relating to compliance with the judgment in Case C-45/91 as regards Article 6 of Directive 75/442.

C — The application of Article 171(2) of the Treaty

81. The main issue to be addressed here is the setting of the periodic penalty payment or lump sum which, if appropriate, the defendant Member State is to be required
to pay. Since this is the first time that the Court of Justice has been called upon to address this issue, it is appropriate to examine the temporal limits applicable to the imposition of penalties and the respective functions of the Commission and the Court in the context of the procedure under Article 171(2). As I have already said, those factors are closely bound up with the legal status attributed to that procedure.

(a) The retroactive effect of Article 171(2)

82. As I stated earlier, the Greek Government considers the retroactive application of the procedure provided for in Article 171(2) to be unlawful. In its submission, taking into account the fact that the prior administrative procedure began on 11 October 1993 (see point 16 above), that is to say before the entry into force of the Maastricht Treaty, and that the new text of Article 171 provides for the imposition of substantial financial penalties, the application of Article 171(2) would amount to the retroactive application of a more stringent rule, in breach of the general principle of nulla poena sine lege upheld by the Court in its judgment in Alpha Steel v Commission.24

83. However, the Alpha Steel case relied on by the defendant serves rather to illustrate my argument. It is true that, in that case, the Court of Justice recognised, albeit indirectly, the existence in Community law of the general principle of nulla poena sine lege. However, the Court was concerned, essentially, to make it clear that not every provision that imposes a burden on an individual constitutes a sanction. That case concerned certain provisions of Commission Decision No 2794/80/ECSC of 31 October 198025 establishing a system of steel production quotas. Those provisions favoured any undertaking which had satisfied certain requirements, while at the same time excluding — and, in comparative terms, harming — other undertakings. The Court of Justice rightly held that those provisions did not in any way constitute sanctions against undertakings not fulfilling the conditions and could not therefore be considered to be in breach of the principle of nulla poena sine lege.

84. In other words, only measures which may properly be described as sanctions merit the special protection afforded in criminal proceedings, not every provision which entails adverse financial consequences for a particular individual. In Alpha Steel v Commission, the financial damage arose from the fact that better terms were granted to undertakings competing in an industrial promotion exercise. In the present case, the financial damage which may ultimately be suffered by the


defendant Member State must be regarded as an exhortation to implement Community law, not as a penalty or a punishment.

85. In short, as a new measure intended to promote compliance with judgments of the Court of Justice establishing a breach of obligations, in the interests of the implementation of Community law, the imposition of penalties under Article 171 is not subject to the rule that penal provisions must not have retroactive effect. Coercive measures are to be regarded as procedural instruments ancillary to the first judgment establishing a breach of obligations, and not as provisions of a penal or comparable nature.

(b) The functions of the Commission and the Court of Justice in the context of the procedure under Article 171(2)

86. Article 171(2) merely provides, in very concise terms, that, subject to prior completion of the relevant administrative procedure, the Commission may bring an action and specify the amount which it considers appropriate to the circumstances, it being for the Court of Justice, should it so decide, to impose the penalty, if it considers that the Member State concerned has not complied with its judgment. The legislature has said nothing further. The complex task of drawing up criteria for quantifying coercive sanctions is delegated entirely to the Court of Justice, assisted by the Commission, which is responsible for producing an initial assessment. I am not casting any doubt on the seriousness of the political difficulties which prevented those who negotiated the Maastricht Treaty from arriving at a more satisfactory solution, nor do I subscribe to the naive view that the function of a court is confined to the application of legal provisions which pre-date the dispute pending before it. I do, however, wish to express my unease at the thought that the power to devise rules which are ultimately intended to make up for the ineffectiveness of other, essentially political, means of encouraging Member States to comply with Community law has been relinquished to the body responsible for settling disputes within the Union.

That said, I shall now examine the rules for setting coercive sanctions laid down in Article 171(2) and, in particular, the scope of the powers which the Commission and the Court of Justice enjoy in this matter.

87. According to Article 171(2), the Commission is to specify the amount it considers appropriate to the circumstances, and the Court, where necessary, is to impose a sanction if it considers that the Member State has indeed failed to fulfil its obligations. The wording of that paragraph does not therefore establish any link between the Commission's power to specify and the Court's power to impose. I do not, however, believe that these are fully autonomous powers, in the sense that the Court of Justice can depart at will from the general direction and amount of the Com-

26 — Which is identical to that provided for in Article 169 of the Treaty, except for the fact that, in its reasoned opinion, the Commission is required to specify the 'points' on which the Member State concerned has failed to comply with the first judgment.
mission's proposal. I do not think so for the following four reasons.

88. First of all, because, if that were the case, that is to say if the Court of Justice had complete freedom to decide, on its own initiative, whether or not to impose a financial penalty and to set the amount of any penalty it did impose, the Commission's function, once it had brought the action, would be reduced to that of an amicus curiae which proposes a solution on the basis of its knowledge and understanding of the case. And in any event, that power is already enjoyed by any other parties which may have taken part in the proceedings, namely the Member States and the other institutions. In my view, if the Treaty provides that, once an action under Article 171 has been brought, the Commission must specify the form and amount of the penalty it considers appropriate, it must be looking for something more than a mere obligation on the Commission to lend the Court guidance on an essential point of the procedure. In view of the special reference which the Treaty makes to it, the Commission's proposal must have greater legal significance than the pleadings or observations of the parties.

89. The second reason has to do with the very nature of the procedure under Article 171(2). As I have pointed out, the purpose of that procedure is not to punish the Member State for failing to fulfil its obligations but to encourage it to discharge them. To that end, the Commission has the widest discretion, in the sense that it is under no obligation to respond to an infringement of Article 171(1). The reason for this is that, when deciding whether or not to bring an action, the Commission must take into account not only legal considerations but also criteria of political expediency. However, the process of imposing and setting a coercive sanction cannot be divorced from considerations of political expediency either. From that perspective, it would be contrary to the scheme of Article 171 for the Commission to be the orchestrator of the proceedings — since it alone has authority to decide to initiate them and the power to terminate them by withdrawing its action — but for its proposals regarding sanctions to be no more than mere suggestions which have not the slightest bearing on the decision ultimately to be taken by the Court.

90. The third reason is merely a corollary to the second. The Community legislature did not wish to lay down rigid rules under which each type of infringement would attract a predetermined sanction. Since that is not the arrangement, the decision as to the imposition and amount of a penalty necessarily entails, albeit only partly, a political choice. The Commission appears to have decided, for the purposes of setting the amount of the penalty, to give expression to that choice by introducing a criterion relating to the 'seriousness of the infringement'. However, if the Court of Justice, after taking advice from the Commission, had unfettered discretion as regards the imposition and setting of the coercive sanction, it would also take over the task of assessing considerations of political expediency, which would seriously upset the existing division of powers between the institutions of the Union. What standing does the Court of Justice have to decide whether the repeated infringement of the provisions of the waste directives, the subject-matter of the present proceedings, is more or less serious than the repeated
infringement of Directive 89/48/EEC on the recognition of higher-education diplomas, and to what extent?

91. The fourth reason is purely procedural but is no less important for that. If the Court of Justice were to have complete freedom to impose and set the penalty it considered appropriate, without taking into account the Commission's proposal — with which, logically, the exchange of arguments between the parties will be concerned — what would become of the rights of the defence?

92. It is no less true, however, that Article 171 does not require the Court to be bound by the guidance from the Commission. What, then, are the limits of the Court's power? In order to answer that question, it is appropriate first of all to consider the content of the Commission's proposal.

93. It seems logical that, in its proposal, the Commission will comment on (a) the advisability or otherwise of imposing a sanction, (b) the type of sanction that should be imposed (lump sum or penalty payment) and (c) the amount of the sanction which it considers appropriate to the circumstances. As regards the latter factor, the Commission must state in full why it considers that the proposed sanction is appropriate to the circumstances of the case in question.

94. In my view, in so far as each of the Commission's choices inevitably entails an assessment of expediency, the examination which the Court of Justice is required to carry out must be no more extensive than that which it undertakes in relation to acts adopted by a Community authority on the basis of complex evaluations.

In those circumstances, the case-law of the Court of Justice recognises that the Community has a wide measure of discretion the exercise of which is subject to limited judicial review, which means that the Community judicature cannot substitute its own assessment of the facts for that carried out by that authority. The Community judicature restricts itself in such cases to examining the correctness of the facts and the legal characterisations effected by the Community authority on the basis of those facts, and, in particular, whether the action of the latter is vitiated by a manifest error or a misuse of powers or whether it

---


28 — From a strictly legal viewpoint, all cases of non-compliance with a judgment of the Court of Justice are in fact equally serious, inasmuch as they represent — it is worth repeating — failures to implement a binding decision (see, in this connection, the first paragraph of point 3.1 of the Communication, point 14 above).

29 — I do not think it appropriate to read any more than this into Article 228 EC, which appears to require that the Commission specify that a sanction be imposed. In any event, to be consistent with the latter reading of the provision, the Commission need only propose a symbolic sanction.
clearly exceeds the bounds of its discretion. 30

95. Within the framework of the present proceedings, the fact is that limited review by the Community judicature is inherent in the very act of exercising the discretion necessary to determine what is expedient in the context of the three choices set out in point 93. Accordingly, the Court must ensure that it does not substitute its own assessment for that carried out by the Commission so as not to distort the most important aspect of the judicial function it performs. It will of course have to verify the correctness of the facts and ensure that the proposal for a sanction is not vitiated by a manifest error. It is less likely that the mere act of specifying and setting a sanction will be such as to amount, even technically, to an infringement such as a misuse of powers, or that, in so doing, the Commission will manifestly exceed the bounds of its discretion. The judicial review of a proposal for a sanction of this kind must seek rather to ensure observance of the principles of proportionality and equal treatment. 31

96. It is settled case-law that, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. 32 In the context of the procedure under Article 171(2), the Court must establish whether, within the broad margin of discretion necessarily involved in any assessment of expediency, the Commission’s proposal is suitable and proportionate in relation to the objective it pursues, which is quite simply to bring to bear upon the defendant Member State effective persuasion to comply with the judgment establishing an infringement of the Treaty.

97. The Court of Justice has likewise held that the prohibition of discrimination requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified. 33 Under the present procedure, the Court of Justice must ensure that different sanctions are not applied to infringements which are in principle comparable, unless the Commission can give sound reasons for such differentiation.

98. This, in my view, is the ambit within which judicial review of the proposal provided for in Article 171(2) must be exercised: affording the Commission a broad discretion to accommodate the assessment of expediency which its proposal inevitably entails, the Court of Justice


31 — To the same effect, see the second paragraph of point 1 of the Commission’s Communication, point 14 above.

32 — See, among many others, the judgment in Case C-256/90 Migriini [1992] ECR I-2651, paragraph 16.

33 — See, for example, the judgment in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 67.
will conduct a limited examination, and may not, under any circumstances, substitute its own assessment for that contained in the proposal. By virtue of the very nature of the proposal, the purpose of the Court’s limited examination will be to identify any manifest error of assessment and to verify observance of the principles of proportionality and equal treatment.

99. I am now able to express my views on the proposal for a sanction put forward by the Commission.

100. In the interests of transparency, the Commission has made public two documents (a communication and a memorandum) concerning, respectively, the application of Article 171 of the EC Treaty and the method of calculating the periodic penalty payment provided for therein. The very nature of the present proceedings prevents me from expressing a general view on the lawfulness of the criteria contained in those two documents. I shall instead examine whether, in so far as those criteria have been applied to this case, the limits I defined above have been observed. This does not mean of course that I consider the communication and the memorandum to be entirely without legal effect. On the contrary, they are, in my opinion, binding on the institution from which they emanate to such an extent that it must not *venire contra factum proprium*; any breach of that principle might be relied upon in legal proceedings as a possible expression of the principle of non-discrimination. In any event, there would be no point in the Commission’s being transparent if it did not consider itself bound by its own communications.

101. As regards the obligations arising from the judgment in Case C-45/91, the original proposal from the Commission sought the following orders:

(a) that a sanction be imposed on the Hellenic Republic;

(b) that that sanction take the form of a penalty payment;

(c) that the amount of the penalty payment be EUR 24,600 per day payable from the day on which the judgment was delivered until such time as the State concerned had fully complied with the judgment establishing its failure to fulfil obligations.

---


That amount was arrived at by multiplying the basic lump sum (EUR 500) by the coefficients chosen by it for seriousness (6) and duration (2) and, finally, by the coefficient relating to the 'ability to pay' of the State concerned (4.1).\(^{36}\)

102. The Court of Justice requested the Commission in writing to consider the possibility that each of the infringements of which the Hellenic Republic stood accused was independent, and to specify the coefficients for seriousness and duration that would apply to each of them.

103. In its reply, the Commission specified and gave reasons for the following coefficients for seriousness:

- coefficient 4 for infringement of Article 4 of Directive 75/442;

- coefficient 2 for infringement of Article 6 of Directive 75/442;

- coefficient 1 for infringement of Article 5 of Directive 78/319;


The Commission assigned to each of the infringements the same coefficient for duration: 2.

Application of each of those coefficients to the basic amount (500) multiplied by the coefficient for 'ability to pay' (4.1) gives a total of EUR 32 800\(^{37}\) per day for the infringements as a whole, which is again payable, in respect of each obligation, from delivery of the judgment bringing the proceedings to an end until each of those obligations, considered independently, has been fulfilled.

104. I must confess to being a little confused by the Commission's position. I do not subscribe to the principle that the application of coefficients for seriousness and duration in respect of each of the provisions infringed leads to a total amount greater than that applicable to all the infringements considered collectively. The Commission has given no justification for that contradictory result.

\(^{36}\) - 500 \times 6 \times 2 \times 4.1 = 24 600.

\(^{37}\) - Article 4 of Directive 75/442: 500 \times 4 \times 2 \times 4.1 = 16 400
- Article 6 of Directive 75/442: 500 \times 2 \times 2 \times 4.1 = 8 200
- Article 5 of Directive 78/319: 500 \times 1 \times 2 \times 4.1 = 4 100
- Article 12 of Directive 78/319: 500 \times 1 \times 2 \times 4.1 = 4 100.
On the contrary, I take the view that, where compliance with a judgment establishing a breach of obligations entails the performance of various obligations which can be fulfilled independently of each other, it is not only possible but also desirable that the proposal from the Commission and the decision by the Court of Justice should give an indication of the relative importance of each of those obligations in its calculation of the sanction. This is fully consistent with the purpose of the sanctions procedure, which is quite simply — as I have already said — to encourage the recalcitrant Member State to implement Community law. The possibility of partial or gradual compliance and a corresponding reduction of the sanction are entirely consistent with that objective. Moreover, only by taking into account the various separable obligations will the Court of Justice be able to adjust the proposed sanction so as to reflect the obligations which it finds not to have been fulfilled in the course of the judicial proceedings. Finally, the fact that the obligations are dealt with individually makes the present procedure more like a procedure for the enforcement of judgments and, at the same time, less like what may be seen as a political appraisal of a Member State’s conduct within a particular sector of Community activity.

106. As I stated earlier, in my view, the obligations to draw up plans and programmes laid down in Article 6 of Directive 75/442 and Article 12 of Directive 78/319 are entirely autonomous, in the sense that they are capable of being fulfilled independently. The same is not true of the obligations arising from Article 4 of Directive 75/442 and Article 5 of Directive 78/319. The obligations imposed on Member States to adopt measures to ensure that waste, including toxic and dangerous waste, is disposed of without risk to human health and the environment include the obligation to do so within the framework of a plan or programme (see points 63 and 78 above).

107. The judgment in Case C-45/91 can therefore be fully complied with through the proper management of waste, including toxic and dangerous waste, in accordance with waste-management plans, whilst the proper drawing up of such plans — being an autonomous obligation — would constitute only partial compliance.

108. As regards the form of sanction and the amount that may be considered ‘appropriate to the circumstances’, I would repeat that the starting point must of necessity be the Commission’s proposal, subject, where appropriate, to the limited judicial examination I referred to above. The problem lies in the fact that, in this case, the Commission has proposed two amounts.
First of all, a penalty payment of EUR 24 600 per day for Greece's infringements, taken together, and, subsequently, a series of penalty payments for the individual provisions infringed, amounting in total to EUR 32 800 per day.

109. I can understand that the Commission may have preferred to take a comprehensive approach, prompting it to propose a sanction relating to all the provisions held by the judgment of the Court of Justice to have been infringed. I do not understand, however, why, when the infringements are considered individually, the sum of the amounts due in respect of the various sanctions should be higher — much higher — than that considered appropriate under the first method. The Commission, as I have said, merely begs the question.

100. It is therefore appropriate to examine the Commission's proposal that a periodic penalty payment of EUR 24 600 per day be imposed.

111. The criteria applied by the Commission in calculating that amount are as follows: the seriousness of the infringement; the duration of the infringement; and the 'ability to pay' factor.

I do not find in the choice of those criteria any evidence of a manifest error of assessment or a failure to observe the principles of proportionality and equal treatment. As I explained earlier, it is not for the Community judicature to comment on the advisability of choosing one rather than another criterion or on how such criteria are to be applied to a particular case. If it did, it would be substituting its own assessment for that of the Commission.

It is therefore sufficient for the Court of Justice to be satisfied that the criteria which the Commission proposes to use are, like many others, suitable for the purpose of attaining the objective pursued by Article 171(2). I think it necessary here, with regard to the 'appropriateness' of the method chosen by the Commission, to clarify certain points on which the Commission itself did not elaborate in its Communication.
112. If the ultimate objective of the procedure under Article 171(2) — far from being to punish unlawful conduct — is the implementation of Community law, its immediate objective is quickly to overcome the resistance of the recalcitrant Member State through the indirect coercion of a financial penalty.\(^39\) To be effective, such coercion must take into account the economic standing of each State. There is therefore every reason to adjust the sanction on the basis of a factor relating to ‘ability to pay’.\(^40\)

113. What seems more tenuous is the possible link between the unwillingness of the State concerned\(^41\) and the criteria of the duration and seriousness of the infringement relied on by the Commission. Neither the Memorandum nor the Communication gives a clear explanation of why the Commission adopted those parameters, which are very similar to others used in criminal proceedings. If they serve the same ends as the latter, they should, in my view, be declared contrary to the rationale of Article 171(2). The penalty payment ‘is intended to break down the resistance to compliance, by requiring the person liable himself to discharge his obligations (indirect compulsion or “astreinte”); that is not the purpose of a sanction, which serves rather (whatever its general objectives might be) to obtain redress for unlawful conduct already perpetrated’.\(^42\) I consider, however, that it is possible to salvage the validity of the criteria in question by interpreting them as serving to express not the degree of severity of a penalty on the basis of the seriousness and duration of the offence, but the relative urgency, in each instance, of reinstating the rule of Community law. In other words, increasing the amount of the coercive sanction in accordance with the seriousness and duration of the infringement would convey determination that the speed of compliance, which is likely to be directly proportionate to the amount of the fine, should be greater in the case of persistent infringements of provisions protecting important Community interests than in the case of short-term infringements of less significant substantive rules. From that perspective, the criteria of seriousness and duration appear to me to be consistent with the purpose of Article 171, which is to urge compliance as soon as possible.

114. As regards the application of those criteria to the case in point, the Commission has adopted a coefficient of 6 out of 20 for seriousness and 2 out of 3 for duration. The reasons given by the Commission are adequate and fall within its proper discretion to determine what is expedient. They do not, in principle, exhibit any manifest error and are not disproportionate or discriminatory.

115. I therefore provisionally conclude that the Commission’s proposal that a pecuniary...
ary penalty of EUR 24,600 per day be imposed on the Hellenic Republic in order to prompt it to comply with the judgment in Case C-45/91 is appropriate to the circumstances for the purposes of Article 171(2) of the EC Treaty.

116. However, as I explained earlier, in the case of both the proposal from the Commission and the judgment of the Court of Justice, preference is to be given to an approach which makes it possible to consider individually whether each of the obligations arising from the judgment establishing a breach has been fulfilled, in so far as they are sufficiently independent to be fulfilled separately.

117. For the sake of consistency, I am bound to express my views on the relative importance to be attached to each of the infringements in question. In so doing, I shall rely once again on the opinion of the Commission, which is responsible for making the value judgment inevitably involved in such an assessment. In its proposal for individual penalties, the Commission arrives at a total within which the infringements of the various provisions have the following weightings:

- for infringement of Article 4 of Directive 75/442: 50%;
- for infringement of Article 6 of Directive 75/442: 25%;
- for infringement of Article 5 of Directive 78/319: 12.5%;
- for infringement of Article 12 of Directive 78/319: 12.5%.

Or, expressed in euro per day:

- for infringement of Article 4 of Directive 75/442: 12,300;
- for infringement of Article 6 of Directive 75/442: 6,150;
- for infringement of Article 5 of Directive 78/319: 3,075;

118. I consider once again that the reasons put forward by the Commission for thus quantifying the relative importance of each
of the infringements fall within the broad discretion it enjoys in this context, except as regards the infringement of Article 12 of Directive 78/319. That article provides that Member States are to draw up and keep up to date plans for the disposal of toxic and dangerous waste. As I explained earlier, Article 5 of the same directive requires that the obligation to dispose of such waste be fulfilled in accordance with a plan. From that point of view, fulfilment of the obligation contained in Article 5 inevitably discharges the obligation contained in Article 12. It seems illogical for the same relative importance to be attached to both the whole and the part. The weighting applied to the infringement of the obligation to draw up plans for the treatment of toxic waste should therefore be reduced by the same proportion as exists between the values for Articles 4 and 6 of Directive 75/442, that is to say from unity to half. In the case of Article 12 of Directive 78/319, the value will have to be reduced from 12.50% to 6.25%. With a view to avoiding any reformatio in pejus, this downward adjustment of the figure for relative seriousness will involve a proportionate reduction of the total amount for the infringement. The amount of EUR 24 600 per day will have to be reduced by 6.25%, that is to say by EUR 1 537.50 per day. This gives the following correction:

- for infringement of Article 12 of Directive 78/319: 1 537.50

The same rules of deductive reasoning prompt me to conclude that only those sanctions relating to the obligation to dispose of waste (Article 4 of Directive 75/442 and Article 5 of Directive 78/319) should be imposed, since — as I have already said — they incorporate the obligations to draw up plans (Article 6 of Directive 75/442 and Article 12 of Directive 78/319). The sanctions relating to the latter obligations will be purely notional, in the sense that they will be used to calculate any reduction that is to be applied in the event of partial fulfilment, that is to say if the Member State concerned draws up plans but fails to dispose of waste in accordance with them. It follows from this that the coercive sanction to be imposed should be made up as follows:

- for infringement of Article 4 of Directive 75/442: 12 300

This is subject to the possibility of a reduction of EUR 6 150 per day being...
applied in the event of partial fulfilment of the obligations arising from Article 6 of Directive 75/442, and of EUR 1,537.50 per day in the event of partial fulfilment of the obligations arising from Article 12 of Directive 78/319.

120. I therefore propose that a penalty payment of EUR 15,375 per day be imposed on the Hellenic Republic, payable from the day of notification to it of the judgment of the Court of Justice until such time as it complies in full with the judgment in Case C-45/91.

V — Costs

121. Since I propose that the application be upheld in its entirety, the Hellenic Republic must be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure.

VI — Conclusion

122. In view of the foregoing, I propose that the Court of Justice:

(1) declare that, inasmuch as it has not yet fulfilled its obligations with regard to adoption of the measures necessary to ensure that waste and toxic and dangerous waste in the Chania area are disposed of without endangering human health or harming the environment, and with regard to the drawing up of plans for the disposal of waste and toxic and dangerous waste for that area, the Hellenic Republic has failed to comply with the judgment of 7 April 1992 in Case C-45/91 Commission v Greece;
(2) impose on the Hellenic Republic a penalty payment of EUR 15,375 per day payable from the date of notification of the judgment bringing the present proceedings to an end until the infringements cease;

(3) order the Hellenic Republic to pay the costs.