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Advocate General's Opinion in Case C-304/02

Commission v France

ADVOCATE GENERAL GEELHOED MAINTAINS HIS OPINION THAT THE COURT MAY IMPOSE A LUMP SUM FINE ON A MEMBER STATE FOR A PERSISTENT AND STRUCTURAL INFRINGEMENT OF COMMUNITY LAW

However, in order to guarantee the rights of defence he suggests that the oral procedure be reopened so as to allow the parties to submit their observations on the specific fine proposed.

In 1991 the Court, at the request of the Commission, found that between 1984 and 1987 France had infringed Community law by failing to carry out controls aimed at ensuring compliance with Community fisheries conservation measures. Following numerous inspections carried out by Community inspectors in various French ports during the next eleven years, the Commission remained unconvinced that France had fully complied with its obligations. The Commission therefore asked the Court to declare that France has failed to comply with the Court judgment of 1991 and to order France to pay EUR 316,500 per day of delay in implementing that judgment from the date of delivery of the present judgment.

On 29th April 2004 Advocate General Geelhoed delivered his first Opinion in this case suggesting that, for the first time, the Court impose a lump sum fine on a Member State for a structural and persistent infringement of Community law. In this Opinion the Advocate General argued that a daily fine commencing only after the second judgment of the Court would not induce a Member State to end an infringement as soon as it is established by the Court. On the contrary, a Member State could continue to infringe Community law right up to the point where the fine is imposed, thereby undermining Community law.

Given that this Opinion raised new questions as to the interpretation of Article 228 of the Treaty, which had not been discussed during the proceedings, the Court decided to reopen the oral procedure in order to hear the views of the parties and other Member States on the question of whether the Court may impose such a lump sum payment or both a lump sum and a periodic penalty payment when the Commission has only requested the Court to impose a daily fine.

Advocate General Geelhoed has today delivered his second Opinion in this case.

As a preliminary remark, the Advocate General emphasises that the purpose of Article 228 is to ensure Member State compliance with Community law. In this respect the sanctions provided for in that article serve a twofold purpose. Firstly they should have a, dissuasive, preventive effect by making it economically unattractive for a Member State to infringe Community law. Secondly they have a specific, persuasive, effect by allowing sufficient pressure to be brought to bear on a Member State to ensure compliance with Community law after an infringement has been determined by the Court. Moreover the Advocate General stresses that these sanctions are particular to the Community legal order and cannot be compared to existing sanction mechanisms at national level.

As regards the **Court's ability** to depart from the proposed penalty advanced by the Commission so as **to impose a lump sum**, Advocate General Geelhoed first notes that, in past judgments, the Court has clearly stated that the proposals made by the Commission cannot bind the Court, a fact which flows directly from the wording and structure of Article 228. Moreover, as the Member State is being fined for non-compliance with a Court judgment, the Advocate General opines that it is the Court who is best placed to assess the extent of compliance and the seriousness of any continued infringement. The necessity of imposing a sanction can only be determined in light of the Court's finding in its judgment and such a decision cannot depend on the Commission's views.

The Advocate General notes that three potential restrictions to the Court's jurisdiction in imposing a sanction were raised by the Member States: the principle of equal treatment; the principle of legal certainty; and the Member State's rights of defence.

In relation to the principle of **equal treatment**, Advocate General Geelhoed states that the situation in this case is not comparable to the previous two cases where the Court has imposed a fine. He considers the infringement by France to be a serious infringement which had consequences, not only within France, but also adversely affected other Member States and their fisherman. Imposing **sanctions of a different type** are therefore **justified by the different character and consequences of the infringement**.

As concerns the principle of **legal certainty**, the Advocate General notes that the Court has stressed in previous cases that it is not bound by the Commission's suggestions. **It is therefore foreseeable that the Court could impose any of the sanctions available**, which includes a lump sum fine.

As regards the **rights of defence**, Advocate General Geelhoed observes that the existing procedure allows the Member State to respond both to the substance of the request and the propriety of the sanction suggested by the Commission. Whilst the power to determine the appropriate sanction lies wholly with the Court, the Advocate General considers it **essential that the Court be informed of the views of the parties on the effects of any sanction** in achieving its objectives. He therefore considers it **appropriate that the parties be given the opportunity to respond adequately to any proposition of a sanction other than that suggested by the Commission**. In the present case, as the parties have not yet had the opportunity to present their views on the specific sanction proposed by him, the Advocate General suggests that the Court once again reopen the oral procedure.

Finally the Advocate General argues that when determining **whether the Court can impose both a lump sum and a periodic penalty payment**, the objective and rationale of Article

228 is decisive. As stated above, the Advocate General considers that the purpose of this article is to ensure that Member States fulfil their obligations under Community law. By their nature the lump sum and the periodic penalty payment serve different purposes, the first being dissuasive and the second persuasive. In order to maintain both the dissuasive and persuasive effects of Article 228 **it must be open for the Court to impose both sanctions simultaneously.**

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

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Languages available: EN, FR, DE, DA, EL, ES, FI, IT, NL, PL, PT, SV

The full text of the Opinion may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day of delivery.

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