Judgment of the Court of Justice, Commission v France, Case C-304/02 (12 July 2005)

Caption: In its judgment of 12 July 2005, in Case C-304/02, Commission v France, in response to an action for failure to fulfil obligations, the Court of Justice orders the Member State at fault to pay the Commission both a daily penalty payment and a lump sum, in light of the fact that the failure to fulfil obligations has persisted for a long period since the judgment which initially established it and of the public and private interests at issue.

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Judgment of the Court (Grand Chamber) of 12 July 2005 (*)
Commission v France

Case C-304/02

(Failure of a Member State to fulfil obligations – Fisheries – Control obligations placed on the Member States – Judgment of the Court establishing a breach of obligations – Non-compliance – Article 228 EC – Payment of a lump sum – Imposition of a penalty payment)

In Case C-304/02,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 27 August 2002,

Commission of the European Communities, represented by M. Nolin, H. van Lier and T. van Rijn, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and A. Colomb, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann (Rapporteur) and C.W.A. Timmermans, Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M. Múgica Arzamendi, Principal Administrator, subsequently M.-F. Contet, Principal Administrator, and H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 3 March 2004,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2004,

having regard to the order of 16 June 2004 reopening the oral procedure and further to the hearing on 5 October 2004,

after hearing the oral observations of:

– the Commission, represented by G. Marenco, C. Ladenburger and T. van Rijn, acting as Agents,

– the French Republic, represented by R. Abraham, G. de Bergues and A. Colomb, acting as Agents,

– the Kingdom of Belgium, represented by J. Devadder, acting as Agent,

– the Czech Republic, represented by T. Boček, acting as Agent,

– the Kingdom of Denmark, represented by A.R. Jacobsen and J. Molde, acting as Agents,

– the Federal Republic of Germany, represented by W.D. Plessing, acting as Agent,

– the Hellenic Republic, represented by A. Samoni and E.M. Mamouna, acting as Agents,

– the Kingdom of Spain, represented by N. Diaz Abad, acting as Agent,

– Ireland, represented by D. O'Donnell and P. Mc Cann, acting as Agents,

– the Italian Republic, represented by I.M. Braguglia, acting as Agent,

– the Republic of Cyprus, represented by D. Lissandrou and E. Papageorgiou, acting as Agents,

– the Republic of Hungary, represented by R. Somssich and A. Muller, acting as Agents,

– the Kingdom of the Netherlands, represented by J. van Bakel, acting as Agent,

– the Republic of Austria, represented by E. Riedl, Rechtsanwalt,

– the Republic of Poland, represented by T. Nowakowski, acting as Agent,

– the Portuguese Republic, represented by L. Fernandes, acting as Agent,

– the Republic of Finland, represented by T. Pynnä, acting as Agent,

– the United Kingdom of Great Britain and Northern Ireland, represented by D. Anderson QC,

after hearing the Opinion of the Advocate General at the sitting on 18 November 2004,

gives the following

Judgment

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

– declare that, by failing to take the necessary measures to comply with the judgment of 11 June 1991 in Case C-64/88 Commission v France [1991] ECR I-2727, the French Republic has failed to fulfil its obligations under Article 228 EC;

– order the French Republic to pay to the Commission, into the account 'European Community own resources', a penalty payment in the sum of EUR 316 500 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-64/88 Commission v France, cited above, from delivery of the present judgment until the judgment in Case C-64/88 Commission v France has been complied with;

– order the French Republic to pay the costs.

Community legislation

Rules regarding controls

2. The Council has established certain control measures for fishing activities by vessels of the Member States. Those measures have been successively set out in Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1982 L 220, p. 1), in Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities (OJ 1987 L 207, p. 1) which repealed and replaced Regulation No 2057/82, and in Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the

common fisheries policy (OJ 1993 L 261, p. 1) which repealed and replaced Regulation No 2241/87 on 1 January 1994.

3. The control measures set out in those regulations are essentially identical.

4. Article 1(1) and (2) of Regulation No 2847/93 provides:

‘1.In order to ensure compliance with the rules of the common fisheries policy, a Community system is hereby established including in particular provisions for the technical monitoring of:

– conservation and resource management measures,

– structural measures,

– [measures] concerning the common organisation of the market,

as well as certain provisions relating to the effectiveness of sanctions to be applied in cases where the abovementioned measures are not observed.

2.To this end, each Member State shall adopt, in accordance with Community rules, appropriate measures to ensure the effectiveness of the system. It shall place sufficient means at the disposal of its competent authorities to enable them to perform their tasks of inspection and control as laid down in this Regulation.’

5. Article 2(1) of Regulation No 2847/93 states:

‘In order to ensure compliance with all the rules in force concerning conservation and control measures, each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and investigate all activities thus enabling verification of the implementation of this Regulation, including the activities of landing, selling, transporting and storing fish and recording landings and sales.’

6. Article 31(1) and (2) of Regulation No 2847/93 provides:

‘1.Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have [sic] not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation.

2.The proceedings initiated pursuant to paragraph 1 shall be capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind.’

Technical rules

7. The technical measures for the conservation of fishery resources which are envisaged by the rules regarding controls have been set out inter alia in Council Regulation (EEC) No 171/83 of 25 January 1983 (OJ 1983 L 24, p. 14), repealed and replaced by Council Regulation (EEC) No 3094/86 of 7 October 1986 (OJ 1986 L 288, p. 1), itself repealed and replaced with effect from 1 July 1997 by Council Regulation (EC) No 894/97 of 29 April 1997 (OJ 1997 L 132, p. 1), in turn partially repealed and replaced with effect from 1 January 2000 by Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (OJ 1998 L 125, p. 1).

8. The technical measures laid down by those regulations are essentially identical.

9. The measures concern, inter alia, the minimum mesh size for nets, the prohibition on attaching to nets certain devices by means of which the mesh is obstructed or diminished, and the prohibition on offering for sale fish of less than the minimum size (‘undersized fish’) except for catches representing only a limited percentage of the overall catch (‘by-catches’).

The judgment in Case C-64/88 Commission v France

10. In the judgment in Case C-64/88 Commission v France, the Court declared:

‘by failing to carry out between 1984 and 1987 controls ensuring compliance with technical Community measures for the conservation of fishery resources, laid down by [Regulation No 171/83] and by [Regulation No 3094/86], the French Republic has failed to fulfil its obligations under Article 1 of [Regulation No 2057/82] and under Article 1 of [Regulation No 2241/87]’.

11. In that judgment, the Court upheld five complaints against the French Republic:

– inadequate controls in relation to the minimum mesh size for nets (paragraphs 12 to 15 of the judgment);

– inadequate controls in relation to the attachment to nets of devices prohibited by the Community rules (paragraphs 16 and 17 of the judgment);

– failure to fulfil control obligations in relation to by-catches (paragraphs 18 and 19 of the judgment);

– failure to fulfil control obligations so far as concerns compliance with the technical measures of conservation prohibiting the sale of undersized fish (paragraphs 20 to 23 of the judgment);

– failure to fulfil the obligation to take action in respect of infringements (paragraph 24 of the judgment).

Pre-litigation procedure

12. By letter of 8 November 1991, the Commission requested the French authorities to inform it of the measures taken to comply with the judgment in Case C-64/88 Commission v France. On 22 January 1992 the French authorities replied that they ‘[intended] to do their utmost to comply with the [Community] provisions’.

13. In the course of a number of visits to French ports the Commission inspectors found that the situation had improved, but noted that the French authorities’ controls were inadequate in several respects.

14. After requesting the French Republic to submit its observations, on 17 April 1996 the Commission issued a reasoned opinion in which it stated that the judgment in Case C-64/88 Commission v France had not been complied with in the following respects:

– failure to comply with the Community rules in the measuring of the minimum mesh size of nets;

– inadequate controls, enabling undersized fish to be offered for sale;

– laxness on the part of the French authorities in taking action in respect of infringements.

15. Pointing out that financial penalties could be imposed for failure to comply with a judgment of the Court, the Commission set a time-limit of two months for the French Republic to take all the measures necessary in order to comply with the judgment in Case C-64/88 Commission v France.

16. In the course of an exchange of correspondence between the French authorities and Commission staff, the former kept the Commission informed of the measures that it had taken and was continuing to

implement to strengthen controls.

17. At the same time, inspection visits were made to French ports. On the basis of reports drawn up after visiting Lorient, Guilvinec and Concarneau from 24 to 28 August 1996, Guilvinec, Concarneau and Lorient from 22 to 26 September 1997, Marennes-Oléron, Arcachon and Bayonne from 13 to 17 October 1997, south Brittany and Aquitaine from 30 March to 4 April 1998, Douarnenez and Lorient from 15 to 19 March 1999 and Lorient, Bénodet, Loctudy, Guilvinec, Lesconil and Saint-Guénolé from 13 to 23 July 1999, the Commission staff reached the conclusion that two problems remained, namely inadequate controls enabling undersized fish to be offered for sale and the laxness on the part of the French authorities in taking action in respect of infringements.

18. The inspectors' reports prompted the Commission to issue a supplementary reasoned opinion on 6 June 2000, in which it stated that the judgment in Case C-64/88 Commission v France had not been complied with as regards the two matters mentioned above. The Commission indicated that, in this context, it regarded as 'particularly serious the fact that public documents relating to sales by auction officially use the code "00" in clear breach of Council Regulation (EC) No 2406/96 of 26 November 1996 laying down common marketing standards for certain fishery products' (OJ 1996 L 334, p. 1). It pointed out that financial penalties could be imposed.

19. In their response of 1 August 2000, the French authorities essentially contended that since the last inspection report national fisheries control had undergone significant change. An internal reorganisation had taken place, with the establishment of a fisheries control 'unit', which subsequently became a fisheries control 'task force', and the means of control had been strengthened, including the provision of patrol boats and of a system for the on-screen surveillance of vessels' positions and the circulation of instructions for the use of control staff.

20. On an inspection visit from 18 to 28 June 2001 to the communes Guilvinec, Lesconil, Saint-Guénolé and Loctudy, the Commission's inspectors recorded poor controls, the presence of undersized fish and the offering for sale of those fish under the code '00'.

21. By letter of 16 October 2001, the French authorities sent to the Commission a copy of an instruction addressed to the regional and departmental maritime directorates, enjoining them to put an end to use of the code '00' by 31 December 2001 and to apply from that date the statutory penalties to economic operators not complying with the instruction. The French authorities referred to an increase since 1998 in the number of proceedings for infringement of the rules on minimum sizes and to the deterrent effect of the penalties imposed. They also informed the Commission of the adoption in 2001 of a general fisheries control plan, which laid down priorities, including implementation of a hake recovery plan and strict control of compliance with minimum sizes.

22. Taking the view that the French Republic still had not complied with the judgment in Case C-64/88 Commission v France, the Commission brought the present action.

Procedure before the Court

23. In answer to a question asked by the Court with a view to the hearing on 3 March 2004, the Commission informed the Court that, since the present action was brought, its staff had made three further inspection visits (from 11 to 16 May 2003 to Sète and Port-Vendres, from 19 to 20 June 2003 to Loctudy, Lesconil, Saint-Guénolé and Guilvinec, and from 14 to 22 July 2003 to Port-la-Nouvelle, Sète, Le Grau-du-Roi, Carro, Sanary-sur-Mer and Toulon). According to the Commission, it is apparent from the mission reports on those visits that the number of cases of undersized fish being offered for sale had decreased in Brittany but problems remained on the Mediterranean coast with regard to bluefin tuna, and that inspections on landing were infrequent.

24. The Commission explained that, in order to assess the effectiveness of the measures taken by the French authorities, it would need to have the reports and sets of statistics relating to implementation of the various

measures for the general organisation of fisheries control to which the French Government had referred.

25. After being requested by the Court to indicate the number of inspections at sea and on land which the French authorities had carried out since the bringing of the present action with a view to ensuring compliance with the rules relating to the minimum size of fish, the number of infringements recorded and the action taken by the courts in respect of those infringements, on 30 January 2004 the French Government lodged fresh statistics. They show that the number of inspections, findings of infringement and convictions was lower in 2003 than in 2002.

26. The French Government stated that the decrease in inspections at sea was due to the mobilisation of French vessels to fight the pollution caused by the shipwrecking of the oil tanker Prestige and that inspections on land had decreased because the discipline of fishermen had improved. It explained that the decrease in the number of convictions was due to the effects of Law No 2002-1062 of 6 August 2002 granting an amnesty (JORF No 185 of 9 August 2002, p. 13647), while pointing out that the average amount of the fines imposed had increased.

The breach of obligations alleged

The geographical area at issue

27. It should be noted as a preliminary point that the declaration made in the operative part of the judgment in Case C-64/88 Commission v France that the French Republic had failed to carry out controls ensuring compliance with technical Community measures for the conservation of fishery resources, laid down by Regulations Nos 171/83 and 3094/86, only concerned, as is apparent from the delimitation set out in Article 1(1) of those regulations, the taking and landing of fishery resources occurring in certain areas of the north-east Atlantic.

28. As submitted by the French Government and explained by the Commission at the hearing on 3 March 2004, the present action thus relates only to the situation in those areas.

The reference date

29. The Commission sent the first reasoned opinion to the French Republic on 14 April 1996 and, subsequently, a supplementary reasoned opinion on 6 June 2000.

30. It follows that the reference date for assessing the alleged breach of obligations is the date upon which the period laid down in the supplementary reasoned opinion of 6 June 2000 expired, that is to say two months after notification of that opinion (Case C-474/99 Commission v Spain [2002] ECR I-5293, paragraph 27, and Case C-33/01 Commission v Greece [2002] ECR I-5447, paragraph 13).

31. Since the Commission has claimed that the Court should impose a penalty payment on the French Republic, it should also be ascertained whether the alleged breach of obligations has continued up to the Court’s examination of the facts.

The extent of the obligations on the Member States under the common fisheries policy

32. Article 1 of Regulation No 2847/93, which constitutes a specific embodiment, in the field of fisheries, of the obligations imposed on the Member States by Article 10 EC, provides that the Member States are to adopt appropriate measures to ensure the effectiveness of the Community system for conservation and management of fishery resources.

33. Regulation No 2847/93 imposes in this regard a joint responsibility on Member States (see, in relation to Regulation No 2241/87, Case C-9/89 Commission v Spain [1990] ECR I-1383, paragraph 10). This joint responsibility means that when a Member State fails to fulfil its obligations, it prejudices the interests of the other Member States and of their economic operators.

34. It is imperative that the Member States fulfil the obligations incumbent on them under the Community rules in order to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their exploitation on a sustainable basis in appropriate economic and social conditions (see, in relation to failure to comply with the quota system for the fishing years 1991 to 1996, Joined Cases C-418/00 and C-419/00 Commission v France [2002] ECR I-3969, paragraph 57).

35. To this end, Article 2 of Regulation No 2847/93, which repeats the obligations laid down by Article 1(1) of Regulation No 2241/87, obliges the Member States to monitor fishing activity and related activities. It requires them to inspect fishing vessels and investigate all activities, including the activities of landing, selling, transporting and storing fish and recording landings and sales.

36. Article 31 of Regulation No 2847/93, which takes up the obligations laid down in Article 1(2) of Regulations Nos 2057/82 and 2241/87, requires the Member States to take action in respect of recorded infringements. It states that the proceedings initiated must be capable of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind.

37. Regulation No 2847/93 thus provides specific indications as to the content of the measures which must be taken by the Member States and which must seek to ensure that fishery operations are conducted properly with the objective of both preventing any breaches and punishing such breaches. That objective means that the measures implemented must be effective, proportionate and a deterrent. As the Advocate General has observed in point 39 of his Opinion of 29 April 2004, there must be a serious risk, for persons engaging in fishing activity and related activities, that in the event of infringement of the rules of the common fisheries policy, they will be detected and have sufficiently severe penalties imposed on them.

38. It is in light of those considerations that the question whether the French Republic has taken all the necessary measures to comply with the judgment in Case C-64/88 Commission v France should be examined.

The first complaint: inadequate controls

Arguments of the parties

39. The Commission maintains that it is clear from the findings made by its inspectors that the French authorities' controls regarding compliance with the Community provisions on the minimum size of fish are still deficient.

40. The increase in the number of inspections to which the French Government refers cannot modify those findings since only inspections at sea are involved. The control plans adopted by the French Government in 2001 and 2002 are not, in themselves, capable of bringing the alleged breach of obligations to an end. Implementation of those plans involves the prior setting of objectives, which are necessary in order to be able to assess the effectiveness and operability of the plans. Moreover, the plans must actually be implemented, which the visits made to French ports since the plans were established have not demonstrated.

41. The French Government observes, first of all, that the inspection reports upon which the Commission relies were never made known to the French authorities, which were not in a position to respond to the statements that they contain. Furthermore, those reports are founded on mere suppositions.

42. It also submits that since delivery of the judgment in Case C-64/88 Commission v France it has been constantly strengthening its control mechanisms. This strengthening has taken the form of an increase in the number of inspections at sea and the adoption, in 2001, of a general control plan, supplemented, in 2002, by a 'minimum catch sizes' control plan. With regard to the effectiveness of those measures, it points out that it has been possible to record no marketing of undersized fish on several inspection visits made by

Commission inspectors.

43. Finally, in the French Government's submission, the Commission merely asserts that the measures taken by it are inappropriate without indicating the measures capable of bringing the alleged breach of obligations to an end.

Findings of the Court

44. Like the procedure laid down in Article 226 EC (see, in relation to failure to comply with the quota system for the fishing years 1988 and 1990, Case C-333/99 Commission v France [2001] ECR I-1025, paragraph 33), the procedure laid down in Article 228 EC is based on the objective finding that a Member State has failed to fulfil its obligations.

45. In the present instance, the Commission has adduced in support of its complaint mission reports drawn up by its inspectors.

46. The French Government's line of argument, put forward at the stage of its rejoinder, that the reports to which the Commission referred in its application cannot be used as evidence that the breach of obligations has persisted on the ground that they were never made known to the French authorities, cannot be upheld.

47. It can be seen from the reports adduced by the Commission that all the reports subsequent to 1998, which have been put in evidence in their entirety or in the form of extensive extracts, refer to accounts of meetings in the course of which the competent national authorities were informed of the results of the inspection visits and were therefore able to present their observations on the findings of the Commission's inspectors. While this reference is not found in the earlier reports, put in evidence in the form of extracts limited to the findings of fact made by the inspectors, it is sufficient to point out that in its letter of 1 August 2000, sent to the Commission in response to the supplementary reasoned opinion of 6 June 2000, the French Government set out its observations on the content of those reports without putting in issue the circumstances of their disclosure to the French authorities.

48. That being so, it should be examined whether the information contained in the mission reports adduced by the Commission is such as to establish an objective finding that a breach by the French Republic of its control obligations has persisted.

49. As regards the situation on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000, it is apparent from the reports to which the Commission referred in that opinion (see paragraph 17 of this judgment) that the inspectors were able to record the presence of undersized fish, on each of the six visits that they made. They were able to record, in particular, that there was a market for undersized hake, offered for sale under the name 'merluchons' or 'friture de merluchons' (small hake) and, in breach of the marketing standards laid down by Regulation No 2406/96, under the code '00'.

50. On five of those six visits, the landing and offering for sale of the undersized fish took place without monitoring by the competent national authorities. As the French Government acknowledged in its response of 1 August 2000 to the supplementary reasoned opinion of 6 June 2000, the persons whom the inspectors were able to meet 'did not fall within the classes of officers empowered to find infringements of the fishery rules and were not attached to the maritime authorities'. On the sixth visit, the inspectors recorded that undersized fish had been landed and offered for sale in the presence of national authorities empowered to find infringements of the fishery rules. However, those authorities refrained from taking action against the offenders.

51. This evidence enables it to be found that, in the absence of effective action by the competent national authorities, a practice of offering undersized fish for sale persisted which was sufficiently constant and widespread to prejudice seriously, by reason of its cumulative effect, the objectives of the Community system for conservation and management of fishery resources.

52. Moreover, the similarity and recurrence of the situations recorded in all the reports enable it to be held that those instances can only have resulted from structural inadequacy of the measures implemented by the French authorities and, consequently, from a failure on their part to fulfil the obligation imposed on them by the Community rules to carry out controls that are effective, proportionate and a deterrent (see, to this effect, Case C-333/99 Commission v France, cited above, paragraph 35).

53. It must therefore be found that, on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000, the French Republic, by failing to carry out controls of fishing activities in accordance with the requirements laid down by the Community provisions, had not taken all the necessary measures to comply with the judgment in Case C-64/88 Commission v France and was accordingly failing to fulfil its obligations under Article 228 EC.

54. As regards the situation on the date of examination of the facts by the Court, the information available shows that significant deficiencies persisted.

55. On the visit made to Brittany in June 2001 (see paragraph 20 of this judgment), the Commission inspectors were once again able to record the presence of undersized fish. A decrease in the number of cases of such fish being offered for sale was recorded on a subsequent visit to the same area in June 2003 (see paragraph 23 of the present judgment). However, that fact is not decisive in light of the concurring findings, set out in the reports drawn up at the time of those two visits, concerning the ineffectiveness of the controls on land.

56. Where the Commission has adduced sufficient evidence to show that the breach of obligations has persisted, it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences (see, to this effect, Case 272/86 Commission v Greece [1988] ECR 4875, paragraph 21, and Case C-365/97 Commission v Italy [1999] ECR I-7773, paragraphs 84 to 87).

57. In this connection, it is to be noted that the information concerning the increase in inspections in pursuance of the plans adopted in 2001 and 2002, on which the French Government relied in its defence, conflicts with the information supplied by it in answer to the Court’s questions (see paragraph 26 of this judgment), according to which the number of inspections at sea and on land was lower in 2003 than in 2002.

58. Even if divergent information of that kind can, as the French Government contends, be regarded as showing an improvement in the situation, the fact remains that the efforts made cannot excuse the failures that occurred (Case C-333/99 Commission v France, paragraph 36).

59. In this connection, the French Government’s argument that the increase in inspections is justified by the improved discipline of fishermen cannot be upheld either.

60. As the French Government has itself pointed out in its defence, actions designed to change behaviour and mentality involve a long process. It must therefore be considered that the structural deficiency, extending over a period of more than 10 years, of the controls designed to ensure compliance with the rules relating to the minimum size of fish resulted in behaviour on the part of the economic operators concerned that it will be possible to correct only after action over a lengthy period.

61. Accordingly, in light of the detailed evidence submitted by the Commission, the information adduced by the French Government is not sufficiently substantial to demonstrate that the measures which it has implemented regarding the control of fishing activities display the efficacy necessary to meet its obligation to ensure the effectiveness of the Community system for conservation and management of fishery resources (see paragraphs 37 and 38 of the present judgment).

62. It must therefore be found that, on the date upon which the Court examined the facts which were presented to it, the French Republic, by failing to carry out controls of fishing activities in accordance with the requirements laid down by the Community provisions, had not taken all the necessary measures to

comply with the judgment in Case C-64/88 Commission v France and was accordingly failing to fulfil its obligations under Article 228 EC.

The second complaint: inadequacy of action taken

Arguments of the parties

63. The Commission contends that the proceedings brought by the French authorities for infringement of the Community provisions concerning the minimum size of fish are insufficient. Generally, the inadequacy of the controls is reflected in the number of proceedings. Furthermore, it is apparent from the information provided by the French Government that, even when infringements are recorded, action is not systematically taken.

64. The Commission observes that the statistics submitted by the French Government before the period laid down in the supplementary reasoned opinion of 6 June 2000 expired are too general in that they concern the whole of France and do not specify the nature of the infringements in respect of which proceedings were brought.

65. The information provided subsequently cannot be taken as showing that the French authorities apply a policy of deterrent penalties so far as concerns infringements of the rules relating to the minimum size of fish. The Commission points out that, for 2001, the French Government notified, pursuant to Council Regulation (EC) No 1447/1999 of 24 June 1999 establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy (OJ 1999 L 167, p. 5) and Commission Regulation (EC) No 2740/1999 of 21 December 1999 laying down detailed rules for the application of Regulation No 1447/1999 (OJ 1999 L 328, p. 62), 73 cases of infringement of the rules relating to the minimum size of fish. However, only eight cases, that is to say 11%, resulted in imposition of a fine.

66. While the Commission acknowledges that the circular of the Minister for Justice of 16 October 2002, to which the French Government refers, constitutes an appropriate measure, it considers nevertheless that the way in which the circular will be applied should be checked. In this connection, it observes that the latest figures notified by the French Government for 2003 show a reduction in the number of convictions.

67. The French Government contends that since 1991 the number of infringements in respect of which proceedings have been brought, and the sentences, have been constantly increasing. It stresses, however, that a purely statistical examination of the number of infringements in respect of which proceedings are brought cannot, by itself, give an account of the effectiveness of a control system since it rests on the entirely unproven presupposition that the number of infringements is stable.

68. The French Government refers to a circular which the Minister for Justice addressed on 16 October 2002 to the Principal State Prosecutors at the cours d’appel (Courts of Appeal) of Rennes, Poitiers, Bordeaux and Pau, recommending that proceedings be systematically brought in respect of infringements and that deterrent penalties be demanded. It acknowledges, however, that the circular could not have full effect in 2002 or 2003 because of Law No 2002-1062, which granted an amnesty in respect of infringements committed before 17 May 2002 in so far as the fine did not exceed EUR 750.

Findings of the Court

69. The obligation on the Member States to make sure that penalties which are effective, proportionate and a deterrent are imposed for infringements of Community rules is of fundamental importance in the field of fisheries. If the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised (see, in relation to failure to comply with the quota system for the fishing years 1991 and 1992, Case C-52/95 Commission v

France [1995] ECR I-4443, paragraph 35).

70. So far as concerns, in this instance, the situation on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000, it is sufficient to recall the findings made in paragraphs 49 to 52 of the present judgment. Since it has been established that infringements which the national authorities could have found to exist were not recorded and since reports were not drawn up in respect of offenders, it is clear that those authorities failed to fulfil the obligation to take action, which the Community rules impose on them (see, to this effect, Case C-64/88 Commission v France, paragraph 24).

71. As regards the situation on the date upon which the Court examined the facts, reference should be made to the findings in paragraphs 54 to 61 of the present judgment, according to which significant deficiencies in the controls persisted. In light of those findings, the increase in the number of infringements in respect of which proceedings were brought, to which the French Government has referred, cannot be considered sufficient. As the French Government has observed, a purely statistical examination of the number of infringements in respect of which proceedings are brought cannot, by itself, give an account of the effectiveness of a control system.

72. Furthermore, as the Commission has pointed out, it is clear from the information provided by the French Government that proceedings are not brought in respect of all the infringements that are recorded. It is also apparent that deterrent penalties are not imposed in respect of all the infringements in respect of which proceedings are brought. The fact that numerous fisheries infringements were eligible to benefit from Law No 2002-1062 attests that, in all those cases, fines of less than EUR 750 were imposed.

73. Accordingly, in light of the detailed evidence submitted by the Commission, the information adduced by the French Government is not sufficiently substantial to demonstrate that the measures which it has implemented so far as concerns the taking of action in respect of infringements of the fisheries rules display the efficacy, proportionality and deterrence necessary to meet its obligation to ensure the effectiveness of the Community system for conservation and management of fishery resources (see paragraphs 37 and 38 of the present judgment).

74. It must therefore be found that, both on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000 and on the date upon which the Court examined the facts which were presented to it, the French Republic, by failing to ensure that action was taken in respect of infringements of the rules governing fishing activities in accordance with the requirements laid down by the Community provisions, had not taken all the necessary measures to comply with the judgment in Case C-64/88Commission v France and was accordingly failing to fulfil its obligations under Article 228 EC.

Financial penalties for the breach of obligations

75. To punish the failure to comply with the judgment in Case C-64/88 Commission v France, the Commission suggested that the Court should impose a daily penalty payment on the French Republic from delivery of the present judgment until the day on which the breach of obligations is brought to an end. In light of the particular features of the breach that has been established, the Court considers that it should examine in addition whether imposition of a lump sum could constitute an appropriate measure.

The possibility of imposing both a penalty payment and a lump sum

Arguments of the parties and submissions made to the Court

76. When invited to give their views on whether, in proceedings brought under Article 228(2) EC, the Court may, where it finds that the Member State concerned has not complied with the Court’s judgment, impose both a lump sum and a penalty payment on it, the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments answered in the affirmative.

77. Their reasoning is based, essentially, on the fact that those two measures are complementary, in that each of them respectively seeks to achieve a deterrent effect. A combination of those measures should be regarded as one and the same means of achieving the objective laid down by Article 228 EC, that is to say not only to induce the Member State concerned to comply with the initial judgment but also, from a wider viewpoint, to reduce the possibility of similar infringements being committed again.

78. The French, Belgian, Czech, German, Greek, Spanish, Irish, Italian, Cypriot, Hungarian, Austrian, Polish and Portuguese Governments have put forward a contrary view.

79. They rely on the wording of Article 228(2) EC and on the use of the conjunction ‘or’, to which they accord a disjunctive sense, and on the objective of this provision. The provision is not punitive in nature, since Article 228(2) EC does not seek to punish the defaulting Member State, but only to induce it to comply with a judgment establishing a breach of obligations. It is not possible to distinguish several periods of a breach of obligations; only its entire duration is to be taken into consideration. The imposition of more than one financial penalty is contrary to the principle prohibiting the same conduct from being punished twice. Furthermore, in the absence of Commission guidelines concerning the applicable criteria for calculating a lump sum, imposition of such a sum by the Court would conflict with the principles of legal certainty and transparency. It would also compromise equal treatment between Member States, since such a measure was not envisaged in the judgments in Case C-387/97 Commission v Greece [2000] ECR I-5047 and Case C-278/01 Commission v Spain [2003] ECR I-14141.

Findings of the Court

80. The procedure laid down in Article 228(2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective.

81. Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.

82. That being so, recourse to both types of penalty provided for in Article 228(2) EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist.

83. This interpretation cannot be countered by reference to the use in Article 228(2) EC of the conjunction ‘or’ to link the financial penalties capable of being imposed. As the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments have submitted, that conjunction may, linguistically, have an alternative or a cumulative sense and must therefore be read in the context in which it is used. In light of the objective pursued by Article 228 EC, the conjunction ‘or’ in Article 228(2) EC must be understood as being used in a cumulative sense.

84. The objection raised, in particular by the German, Greek, Hungarian, Austrian and Polish Governments, that imposition of both a penalty payment and a lump sum, taking into consideration the same period of breach twice, would infringe the principle non bis in idem must also be rejected. Since each penalty has its own function, it is to be determined in such a way as to fulfil that function. It follows that, where the Court imposes a penalty payment and a lump sum simultaneously, the duration of the breach is taken into consideration as one of a number of criteria, in order to determine the appropriate level of coercion and deterrence.

85. The argument, relied on by the Belgian Government in particular, that, in the absence of guidelines adopted by the Commission for calculating a lump sum, imposition of a lump sum would conflict with the principles of legal certainty and transparency cannot be upheld either. While such guidelines do help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty (see, in relation to the guidelines concerning calculation of penalty payments, Case C-387/97 Commission v Greece, cited above, paragraph 87), the fact remains that exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which, in any event, cannot bind the Court (Case C-387/97 Commission v Greece, paragraph 89, and Case C-278/01 Commission v Spain, cited above, paragraph 41).

86. As to the objection, raised by the French Government, that imposition of both a penalty payment and a lump sum in the present case would compromise equal treatment since it was not envisaged in the judgments in Case C-387/97 Commission v Greece and Case C-278/01 Commission v Spain, it is for the Court, in each case, to assess in light of its circumstances the financial penalties to be imposed. Accordingly, the fact that both measures were not imposed in the cases decided previously cannot in itself constitute an obstacle to the imposition of both in a subsequent case, if, having regard to the nature, seriousness and persistence of the breach of obligations established, that appears appropriate.

The Court's discretion as to the financial penalties that can be imposed

Arguments of the parties and submissions made to the Court

87. The Commission and the Czech, Hungarian and Finnish Governments have answered in the affirmative the question whether the Court may, where appropriate, depart from the Commission's suggestions and impose a lump sum on a Member State although the Commission did not suggest this. In their submission, the Court has a discretion in the matter, which extends to determining the penalty considered to be the most appropriate, irrespective of the Commission's suggestions in this regard.

88. The French, Belgian, Danish, German, Greek, Spanish, Irish, Italian, Netherlands, Austrian, Polish and Portuguese Governments take an opposing view. They put forward substantive and procedural arguments. With regard to substance, they submit that exercise by the Court of such a discretion would infringe the principles of legal certainty, predictability, transparency and equal treatment. The German Government adds that the Court in any event lacks the political legitimacy necessary to exercise such a power in a field where assessments of political expediency play a considerable role. At the procedural level, the aforementioned governments stress that so extensive a power is incompatible with the general principle of civil procedure common to all the Member States that courts cannot go beyond the parties' claims, and dwell upon the need for an interpartes procedure enabling the Member State concerned to exercise its rights of defence.

Findings of the Court

89. With regard to the arguments derived from the principles of legal certainty, predictability, transparency and equal treatment, reference should be made to the findings made in paragraphs 85 and 86 of this judgment.

90. So far as concerns the German Government's argument as to the Court's lack of political legitimacy to impose a financial penalty not suggested by the Commission, the various stages involved in the procedure laid down in Article 228(2) EC should be distinguished. Once the Commission has exercised its discretion as to the initiation of infringement proceedings (see, inter alia, in relation to Article 226 EC, the judgment in Case C-74/02 Commission v Germany [2003] ECR I-9877, paragraph 17, and the judgment of 21 October 2004 in Case C-477/03 Commission v Germany, not published in the ECR, paragraph 11), the question of whether or not the Member State concerned has complied with a previous judgment of the Court is subjected to a judicial procedure in which political considerations are irrelevant. It is in performance of its judicial function that the Court assesses the extent to which the situation prevailing in the Member State in question

complies with the initial judgment and, where appropriate, assesses the seriousness of a persisting breach of obligations. It follows that, as the Advocate General has observed in point 24 of his Opinion of 18 November 2004, the appropriateness of imposing a financial penalty and the choice of the penalty most suited to the circumstances of the case can be appraised only in the light of the findings made by the Court in the judgment to be delivered under Article 228(2) EC and therefore fall outside the political sphere.

91. The argument that, in departing from or going beyond the Commission's suggestions, the Court infringes a general principle of procedural law which prohibits courts from going beyond the parties' claims is not well founded either. The procedure provided for in Article 228(2) EC is a special judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure. The order imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct.

92. As regards the rights of defence that the Member State concerned must be able to exercise, which have been dwelt upon by the French, Belgian, Netherlands, Austrian and Finnish Governments, the procedure laid down in Article 228(2) EC must, as the Advocate General has observed in point 11 of his Opinion of 18 November 2004, be regarded as a special judicial procedure for the enforcement of judgments, in other words as a method of enforcement. It is in this context, therefore, that the procedural guarantees which must be available to the Member State in question are to be assessed.

93. It follows that, once it has been found in interpartes proceedings that a breach of Community law persists, the rights of defence which are to be accorded to the defaulting Member State so far as concerns the financial penalties envisaged must take account of the objective pursued, namely securing and guaranteeing that the law is again complied with.

94. In the present case, so far as concerns the truth with regard to the conduct liable to give rise to the imposition of financial penalties, the French Republic had the opportunity to defend itself throughout a pre-litigation procedure which lasted nearly nine years and gave rise to two reasoned opinions, and, in the present proceedings, in the course of the written procedure and at the hearing of 3 March 2004. That examination of the facts led the Court to find that a breach by the French Republic of its obligations persisted (see paragraph 74 of the present judgment).

95. The Commission which, in the two reasoned opinions, had drawn the risk of financial penalties to the attention of the French Republic (see paragraphs 15 and 18 of the present judgment), indicated to the Court the criteria (see paragraph 98 of the present judgment) capable of being taken into consideration when determining the financial penalties intended to exert sufficient economic pressure on the French Republic to prompt it to put an end to its breach of obligations as rapidly as possible, and the respective weightings to be given to those criteria. The French Republic set out its views on the criteria in the written procedure and at the hearing on 3 March 2004.

96. By order of 16 June 2004, the Court requested the parties to give their views on whether, where the Court finds that a Member State has not taken the necessary measures to comply with a previous judgment and the Commission has requested the Court to impose a penalty payment on that State, the Court may impose on the Member State a lump sum or, as the case may be, a lump sum and a penalty payment. The parties stated their views at the hearing on 5 October 2004.

97. It follows that the French Republic has been able to make its submissions on all the matters of law and of fact necessary for establishing that the breach of obligations alleged against it has persisted and for deciding upon the seriousness of the breach and the measures which may be adopted in order to bring it to an end. On the basis of those matters, which have been the subject of inter partes proceedings, it is for the Court to determine, according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties appropriate for making sure that the judgment in Case C-64/88 Commission v France is complied with as rapidly as possible and preventing similar infringements of Community law from

recurring.

The financial penalties appropriate in the present case

Imposition of a penalty payment

98. On the basis of the method of calculation which it has set out in its communication 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2), the Commission suggested that the Court should impose on the French Republic a penalty payment of EUR 316 500 for each day of delay by way of penalty for non-compliance with the judgment in Case C-64/88 Commission v France, from the date of delivery of the judgment in the present case until the day on which the judgment in Case C-64/88 Commission v France has been complied with.

99. The Commission considers that an order imposing a penalty payment is the most appropriate instrument for putting an end as soon as possible to the infringement which has been established and that, in the present case, a penalty payment of EUR 316 500 for each day of delay fits the seriousness and duration of the infringement, due regard being had to the need to make the penalty effective. That sum is calculated by multiplying a uniform basic amount of EUR 500 by a coefficient of 10 (on a scale of 1 to 20) for the seriousness of the infringement, by a coefficient of 3 (on a scale of 1 to 3) for the duration of the infringement and by a coefficient of 21.1 (based on the gross domestic product of the Member State in question and the weighting of votes in the Council of the European Union), which is deemed to reflect the ability to pay of the Member State concerned.

100. The French Government submits that there is no reason to impose a penalty payment because it has brought the breach of obligations to an end and, in the alternative, that the amount of the penalty payment requested is disproportionate.

101. It points out that, so far as the seriousness of the infringement is concerned, in Case C-387/97 Commission v Greece the Commission suggested a coefficient of 6, although the breach of obligations compromised public health and no measure had been taken with a view to complying with the previous judgment, two factors which are absent here. Accordingly, the coefficient of 10 suggested by the Commission in the present case is not acceptable.

102. The French Government also maintains that the measures required to comply with the judgment in Case C-64/88 Commission v France were unable to produce immediate effects. Given the inevitable time-lag between the adoption of the measures and their impact becoming perceptible, the Court cannot take into account the whole of the period passing between delivery of the first judgment and that of the forthcoming judgment.

103. As to those submissions, while it is clear that a penalty payment is likely to encourage the defaulting Member State to put an end as soon as possible to the breach that has been established (Case C-278/01 Commission v Spain, paragraph 42), it should be remembered that the Commission’s suggestions cannot bind the Court and are only a useful point of reference (Case C-387/97 Commission v Greece, paragraph 89). In exercising its discretion, it is for the Court to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned (see, to this effect, Case C-387/97 Commission v Greece, paragraph 90, and Case C-278/01 Commission v Spain, paragraph 41).

104. In that light, and as the Commission has suggested in its communication of 28 February 1997, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of

getting the Member State concerned to fulfil its obligations (Case C-387/97 Commission v Greece, paragraph 92).

105. As regards the seriousness of the infringement and, in particular, the effects of failure to comply on private and public interests, it is to be remembered that one of the key elements of the common fisheries policy consists in rational and responsible exploitation of aquatic resources on a sustainable basis, in appropriate economic and social conditions. In this context, the protection of juvenile fish proves decisive for reestablishing stocks. Failure to comply with the technical measures of conservation prescribed by the common policy, in particular the requirements regarding the minimum size of fish, therefore constitutes a serious threat to the maintenance of certain species and certain fishing grounds and jeopardises pursuit of the fundamental objective of the common fisheries policy.

106. Since the administrative measures adopted by the French authorities have not been implemented in an effective manner, they cannot reduce the seriousness of the breach established.

107. Having regard to those factors, the coefficient of 10 (on a scale of 1 to 20) is therefore an appropriate reflection of the degree of seriousness of the infringement.

108. As regards the duration of the infringement, suffice it to state that it is considerable, even if the starting date be that on which the Treaty on European Union entered into force and not the date on which the judgment in Case C-64/88 Commission v France was delivered (see, to this effect, Case C-387/97 Commission v Greece, paragraph 98). Accordingly, the coefficient of 3 (on a scale of 1 to 3) suggested by the Commission appears appropriate.

109. The Commission’s suggestion of multiplying a basic amount by a coefficient of 21.1 based on the gross domestic product of the French Republic and on the number of votes which it has in the Council is an appropriate way of reflecting that Member State’s ability to pay, while keeping the variation between Member States within a reasonable range (see Case C-387/97 Commission v Greece, paragraph 88, and Case C-278/01 Commission v Spain, paragraph 59).

110. Multiplying the basic amount of EUR 500 by the coefficients of 21.1 (for ability to pay), 10 (for the seriousness of the infringement) and 3 (for the duration of the infringement) gives a sum of EUR 316 500 per day.

111. As regards the frequency of the penalty payment, account should, however, be taken of the fact that the French authorities have adopted administrative measures which could serve as a framework for implementation of the measures required to comply with the judgment in Case C-64/88 Commission v France. Nevertheless, it is not possible for the necessary adjustments to previous practices to be instantaneous or their impact to be perceived immediately. It follows that any finding that the infringement has come to an end could be made only after a period allowing an overall assessment to be made of the results obtained.

112. Having regard to those considerations, the penalty payment must be imposed not on a daily basis, but on a half-yearly basis.

113. In light of all of the foregoing, the French Republic should be ordered to pay to the Commission, into the account ‘European Community own resources’, a penalty payment of 182.5 x EUR 316 500, that is to say of EUR 57 761 250, for each period of six months from delivery of the present judgment at the end of which the judgment in Case C-64/88 Commission v France has not yet been fully complied with.

Imposition of a lump sum

114. In a situation such as that which is the subject of the present judgment, in light of the fact that the breach of obligations has persisted for a long period since the judgment which initially established it and of

the public and private interests at issue, it is essential to order payment of a lump sum (see paragraph 81 of the present judgment).

115. The specific circumstances of the case are fairly assessed by setting the amount of the lump sum which the French Republic will have to pay at EUR 20 000 000.

116. The French Republic should therefore be ordered to pay to the Commission, into the account 'European Community own resources', a lump sum of EUR 20 000 000.

Costs

117. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that:

– by failing to carry out controls of fishing activities in accordance with the requirements laid down by the Community provisions, and

– by failing to ensure that action is taken in respect of infringements of the rules governing fishing activities in accordance with the requirements laid down by the Community provisions,

the French Republic has not implemented all the necessary measures to comply with the judgment of 11 June 1991 in Case C-64/88 Commission v France and has accordingly failed to fulfil its obligations under Article 228 EC;

2. Orders the French Republic to pay to the Commission of the European Communities, into the account 'European Community own resources', a penalty payment of EUR 57 761 250 for each period of six months from delivery of the present judgment at the end of which the judgment in Case C-64/88 Commission v France has not yet been fully complied with;

3. Orders the French Republic to pay to the Commission of the European Communities, into the account 'European Community own resources', a lump sum of EUR 20 000 000;

4. Orders the French Republic to pay the costs.

[Signatures]

(*) Language of the case: French.