Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 4 September 2014[1]

Case C-196/13

European Commission
v
Italian Republic
andCase C-378/13
European Commission
v

Hellenic Republic

(Failure of a Member State to fulfil obligations — Article 260 TFEU — Failure to comply with judgments of the Court of Justice — Commission v Italy (C-135/05, EU:C:2007:250) and Commission v Greece (C-502/03, EU:C:2005:592) — Law on waste — Illegal landfills — Closure — Clean-up — Renewed permit pursuant to Directive 99/31/EC — Financial penalties — Imposition of a periodic penalty payment and a lump sum payment — Reduction of the periodic penalty payment in the event of partial compliance)

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I – **Introduction**

1. Application of the Union law on waste occasionally gives rise to difficulties. Such difficulties form the basis of the present proceedings. By reason of the existence of a large number of illegal landfills, the Commission initiated actions for failure to fulfil obligations against Greece and Italy, which resulted in the judgments in *Commission* v *Greece* (C-502/03, EU:C:2005:592) and *Commission* v *Italy* (C-135/02, EU:C:2007:250). It is now turning to the Court once more, since — in its view — neither of the two judgments has as yet been fully implemented. Since the two cases raise, in part, some similar questions, I intend to deal with them jointly in this Opinion.

2. The cases concern the use of illegal landfills and the failure to clean up illegal landfills which have been closed down. In addition, in the Italian proceedings, certain landfills also contained hazardous waste which was not identified or recorded and permits for some landfills were not renewed in accordance with the Landfill Directive.[2]

3. The initial problem lies in the applicable law: can and must the two judgments from 2005 and 2007 still be implemented even though the legal situation has changed in the meantime?

4. The infringements found to exist relate to the former Waste Directive,[3] and in the case of Italy also to the Hazardous Waste Directive[4] and the Landfill Directive. The former Waste Directive has now been repealed and, without any changes being made to its content, replaced by a consolidated version.[5] The Union subsequently adopted the new Waste Directive,[6] which repealed and replaced the codified Waste Directive and the Hazardous Waste Directive. It is therefore necessary to examine to what extent the original infringements still require the adoption of measures today.

2 — Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1), in the version amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

3 — In the first proceedings, Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), in the version amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

4 — Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 337, p. 20).

5 — Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

6 — Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

5. The Italian proceedings in particular also raise the question of the subject-matter of the first judgment and, thus, the scope of the duty of implementation. The Court found there to be a general and persistent failure to fulfil obligations,[7] without specifying which cases form the subject-matter of the finding of a failure to fulfil obligations. It is therefore necessary to clarify whether and how such a judgment must be implemented pursuant to Article 260 TFEU.

6. Further questions are raised relating to the possible imposition of a periodic penalty payment and/or a lump sum. Since both cases cover a significant number of individual situations, it is necessary to discuss how those individual situations are to be taken into account for the purposes of calculation and what consequences any implementation of the judgments in relation to some of those situations has for the amount of the periodic penalty payment. More specifically, the question arises as to whether a decreasing periodic penalty payment should be imposed, the periodically payable amount of which is reduced proportionately as soon as further progress is made in the implementation of the judgments.

II – **Legal context**

A – *The former Waste Directive*

7. Article 4 of the former Waste Directive lays down an obligation to ensure the protection of health and the environment in connection with the handling of waste and to prevent the illegal dumping of waste:

‘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 …

…

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

8. Article 8 of the former Waste Directive requires the Member States to take the necessary measures to ensure that any holder of waste either has it handled by a private or public undertaking which carries out the operations listed in Annexes II A or II B to that directive, or recovers or disposes of it himself in accordance with the provisions of that directive.

9. Article 9(1) of the former Waste Directive provides that, for the purposes of implementing, among others, Article 4 of that directive, any establishment or undertaking which carries out waste-disposal operations must obtain a permit from the competent authority responsible for the implementation of that directive.

B – *The Hazardous Waste Directive*

10. Article 2 of the Hazardous Waste Directive contains fundamental obligations to be observed in connection with the disposal of such waste:

‘1. Member States shall take the necessary measures to require that on every site where tipping (discharge) of hazardous waste takes place the waste is recorded and identified.

7 — Judgment in *Commission* v *Italy* (C-135/05, EU:C:2007:250), paragraph 45.

…’

C – *The new Waste Directive*

11. The Waste Directive and the Hazardous Waste Directive were repealed by Article 41 of the new Waste Directive with effect from 12 December 2010. That provision reads as follows:

‘References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex V.’

12. Articles 4, 8 and 9 of the former Waste Directive were replaced by Articles 13, 36(1), 15(1) and 23(1) and (2) of the new Waste Directive, without any significant amendments being made.

13. The functional equivalent of Article 2(1) of the Hazardous Waste Directive is Article 35(1) and (2) of the new Waste Directive:

‘1. The establishments or undertakings referred to in Article 23(1) [any establishment or undertaking intending to carry out waste treatment], the producers of hazardous waste and the establishments and undertakings which collect or transport hazardous waste on a professional basis, or act as dealers and brokers of hazardous waste, shall keep a chronological record of the quantity, nature and origin of the waste, and, where relevant, the destination, frequency of collection, mode of transport and treatment method foreseen in respect of the waste, and shall make that information available, on request, to the competent authorities.

2. For hazardous waste, the records shall be preserved for at least three years except in the case of establishments and undertakings transporting hazardous waste which must keep such records for at least 12 months.

Documentary evidence that the management operations have been carried out shall be supplied at the request of the competent authorities or of a previous holder.’

D – *The Landfill Directive*

14. Article 14(a) to (c) of the Landfill Directive governs the transition of previously existing landfill sites within the legislative framework of the Directive:

‘Member States shall take measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of this Directive, may not continue to operate unless the steps outlined below are accomplished …:

(a) within a period of one year after the date laid down in Article 18(1) [that is, not later than 16 July 2002], the operator of a landfill shall prepare and present to the competent authorities, for their approval, a conditioning plan for the site including the particulars listed in Article 8 and any corrective measures which the operator considers will be needed in order to comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1;

(b) following the presentation of the conditioning plan, the competent authorities shall take a definite decision on whether operations may continue on the basis of the said conditioning plan and this Directive. Member States shall take the necessary measures to close down as soon as possible, in accordance with Article 7(g) and 13, sites which have not been granted, in accordance with Article 8, a permit to continue to operate;

(c) on the basis of the approved site-conditioning plan, the competent authority shall authorise the necessary work and shall lay down a transitional period for the completion of the plan. Any existing landfill shall comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1 within eight years after the date laid down in Article 18(1).'

15. Under Article 18(1) of the Landfill Directive, the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than two years after its entry into force (that is, not later than 16 July 2001), and are forthwith to inform the Commission thereof.

III – **Background to the two cases**

16. This Opinion will deal with two proceedings brought under Article 260(2) TFEU against Italy and Greece relating to the implementation of two earlier judgments concerning the infringement of the Union law on waste on the basis of Article 258 TFEU.

A – *Commission v Italy, C-196/13*

17. On 26 April 2007, in *Commission* v *Italy* (EU:C:2007:250), the Court held that the Italian Republic had failed to fulfil its obligations under Articles 4, 8 and 9 of the former Waste Directive, under Article 2(1) of the Hazardous Waste Directive and under Article 14(a) to (c) of the Landfill Directive by failing to adopt all 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 to prohibit the abandonment, dumping or uncontrolled disposal of waste;

— any holder of waste has it handled by a private or public undertaking which carries out the operations of recovery or disposal, or recovers or disposes of it himself in accordance with the provisions of the Waste Directive;

— any establishment or undertaking which carries out waste-disposal operations is required to obtain a permit from the competent authority;

— on every site where tipping (discharge) of hazardous waste takes place the waste is recorded and identified, and

— as regards landfills which had already been granted a permit or were already in operation on 16 July 2001, the operator of a landfill, before 16 July 2002, prepared and presented to the competent authorities, for their approval, a conditioning plan for the site including particulars relating to the conditions of the permit and any corrective measures which the operator considered would be needed and that, following the presentation of the conditioning plan, the competent authorities took a definite decision on whether operations might continue, by closing down as soon as possible sites which had not been granted a permit to continue to operate, or by authorising the necessary work and laying down a transitional period for the completion of the plan.

18. After initial contacts, on 1 February 2008 the Commission requested that Italy submit its observations on the implementation of the judgment. Following a further exchange of correspondence, on 26 June 2009 the Commission sent a reasoned opinion to Italy. The period prescribed therein for the implementation of the judgment was extended by the Commission until 30 September 2009. Further communications from Italy followed, but the Commission found those communications to be unsatisfactory. Accordingly, on 16 April 2013, it brought the action in Case C-196/13.

B – *Commission v Greece, C-378/13*

19. On 6 October 2005, in *Commission* v *Greece* (EU:C:2005:592), the Court held that, by failing to take all the necessary measures to ensure compliance with Articles 4, 8 and 9 of the Waste Directive, the Hellenic Republic had failed to fulfil its obligations under that directive.

20. Intensive exchanges took place between the Commission and Greece about the implementation of that judgment. On 29 October 2010, the Commission sent to Greece a supplementary invitation to submit observations, in which it fixed a final two-month period within which the judgment was to be implemented. As the Commission also found the subsequent information provided by Greece to be unsatisfactory, on 2 July 2013 the Commission brought the action in Case C-378/13.

IV – **Forms of order sought by the parties**

21. In Case C-196/13, the Commission claims that the Court should:

(1) declare that, by having failed to take all the necessary measures to comply with the judgment in *Commission* v *Italy* (C-135/05, EU:C:2007:250) in which it was declared that the Italian Republic had failed to fulfil its obligations under Articles 4, 8 and 9 of the Waste Directive, under Article 2(1) of the Hazardous Waste Directive and under Article 14(a) to (c) of the Landfill Directive, the Italian Republic has failed to fulfil its obligations under Article 260(1) TFEU;

(2) order the Italian Republic to pay to the Commission a daily periodic penalty payment in an amount of EUR 256 819.20 for the delay in complying with the judgment in *Commission* v *Italy* (EU:C:2007:250), from the date of judgment in the present case until the date on which the judgment in *Commission* v *Italy* (EU:C:2007:250) is complied with;

(3) order the Italian Republic to pay to the Commission a lump sum, the amount of which is calculated by multiplying a daily amount of EUR 28 089.60 by the number of days over which the failure to fulfil obligations continues, from the date of delivery of *Commission* v *Italy*, EU:C:2007:250, until the date of judgment in the present case;

(4) order the Italian Republic to pay the costs.

22. The Italian Republic contends that the Court should declare the action to be inadmissible, groundless and in any event unfounded, and order the payment of costs as necessary.

23. In Case C-378/13, the Commission claims that the Court should:

(1) declare that, by failing to take the necessary measures to comply with the judgment in *Commission* v *Greece* (EU:C:2005:592), the Hellenic Republic has failed to fulfil its obligations under Article 260(1) TFEU;

(2) order the Hellenic Republic to pay to the Commission a proposed periodic penalty payment in the sum of EUR 71 193.60 for each day of delay in complying with the judgment in *Commission* v *Greece* (EU:C:2005:592), from the day on which the judgment is delivered in the present case until the day on which the judgment in *Commission* v *Greece* (EU:C:2005:592) has been complied with;

(3) order the Hellenic Republic to pay to the Commission a lump sum of EUR 7 786.80 per day from the day on which judgment was delivered in the judgment in *Commission* v *Greece* (EU:C:2005:592) until the date on which judgment is delivered in the present case, or the date on which the judgment in *Commission* v *Greece* (EU:C:2005:592) is complied with, if that occurs earlier;

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

24. The Hellenic Republic contends that the Court should:

(1) dismiss the Commission's action in its entirety;

(2) in the alternative, reject the forms of order sought relating to the imposition of a daily periodic penalty payment and a lump sum;

(3) in the further alternative, limit the daily periodic penalty payment proposed by the Commission to the absolute minimum taking into account the implementation of the judgment in *Commission* v *Greece* (EU:C:2005:592) and restrict the lump sum to the minimum provided for in respect of Greece, that is to EUR 2 181 000;

(4) order the Commission to pay the costs of the proceedings.

25. The parties have submitted written observations and, on 3 June 2014, presented oral argument.

V – **Legal assessment**

26. Before I consider whether Italy (see B below) and Greece (see C below) have implemented the two judgments, I shall first of all make some preliminary remarks which are relevant to both cases (see A below). Lastly, I will turn my attention to the financial penalties (see D below).

A – *Preliminary remarks*

27. It is necessary first of all to examine the extent to which the judgments at issue still need to be implemented (see 1 below), and then it must be clarified how the reference date for compliance with the duty of implementation is determined (see 2 below).

1. The continued existence of the duty of implementation

28. It is first and foremost necessary to establish to what extent the two judgments still require to be implemented. Although the relevant provisions of the Landfill Directive continue to apply, the former Waste Directive and the Hazardous Waste Directive have in the meantime been repealed and replaced by the new Waste Directive.

29. However, the obligation to implement the judgments cannot extend further than the application of the legal duties which the Court has found to have been infringed. The obligation to implement a judgment could otherwise even require in certain circumstances a further breach of Union law to be committed. The two judgments in *Commission* v *Sweden*[8] on data retention illustrate this point. In view of the finding that Directive 2006/24[9] was held to be invalid,[10] the further implementation of those judgments would potentially have infringed Article 15 of Directive 2002/58[11] as well as Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

30. Nevertheless, in proceedings brought under Article 258 TFEU, it is settled case-law that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the initial version of an EU measure, subsequently amended or repealed, and which were maintained in force under the new provisions.[12] This solution makes sense because, as a general rule, it must be assumed that — despite the new version of certain directives — the Union legislature did not want to make it more difficult to enforce obligations which continue to exist unchanged. After all, such purely formal amendments to EU law do not affect the specific objectives of the directives in question, which in accordance with the third paragraph of Article 288 TFEU are to be binding on the Member States. This is *a fortiori* true where the Union legislature introduces into the new measures provisions under which references to the repealed directives are to be regarded as references to the new directive and even includes correlation tables. This is precisely what happened with the new directives relating to the law on waste.[13]

31. Accordingly, the Court has already held that the repeal of the former Waste Directive by the codified Waste Directive during the pre-litigation procedure to an action under Article 258 TFEU had no bearing on ongoing infringement proceedings. This is because the more recent directive, which codified the Waste Directive for reasons of clarity and rationality, reincorporates the relevant provisions of the former directive.[14]

32. The Court has also already implicitly based a judgment under Article 260(2) TFEU on that notion, since the proceedings regarding Irish septic tanks[15] also concerned the application of Articles 4 and 8 of the former Waste Directive, which had already been replaced by the codified Waste Directive at the time the first judgment was delivered. In addition, the new Waste Directive had taken the place of the consolidated Waste Directive even before the action under Article 260 was brought. Nevertheless, without any further discussion of the applicable law, the Court imposed a periodic penalty payment and a lump sum.

33. The earlier obligations under the law on waste may therefore likewise continue to be enforced in these proceedings, provided that those obligations are maintained in the provisions in force. This point must be examined on a case-by-case basis.

8 — C-185/09, EU:C:2010:59, and C-270/11, EU:C:2013:339.

9 — Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

10 — Judgment in *Digital Rights Ireland* (C-293/12 and C-594/12, EU:C:2014:238).

11 — Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37), as last amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

12 — Judgments in *Commission* v *Italy* (*'San Rocco'*) (C-365/97, EU:C:1999:544, paragraph 36, concerning the law on waste); *Commission* v *France* (C-492/08, EU:C:2010:348, paragraph 31); and *Commission* v *Poland* (C-281/11, EU:C:2013:855, paragraph 37).

13 — See Article 20 of the consolidated Waste Directive and Article 41 of the new Waste Directive.

14 — Judgment in *Commission* v *Greece* (C-286/08, EU:C:2009:543, paragraph 8).

15 — Judgment in *Commission* v *Ireland* (C-374/11, EU:C:2012:827).

2. The reference date for the assessment of implementation

34. When examining whether a judgment has been implemented, the reference date for assessing whether there has been a failure to fulfil obligations under Article 260(1) TFEU is the date of expiry of the period prescribed in the invitation to submit observations, the letter of formal notice, issued under that provision.[16] Nevertheless, where the proceedings for failure to fulfil obligations have been brought on the basis of Article 228(2) EC, the previously applicable provision, and a reasoned opinion has been issued before the date of entry into force of the Treaty of Lisbon, namely 1 December 2009, the reference date is the date of expiry of the period prescribed in the reasoned opinion.[17]

B – *The proceedings brought against Italy*

1. Admissibility

35. Italy takes the view that the action is inadmissible because the Commission did not issue a supplementary reasoned opinion. However, a supplementary opinion would have been necessary only if the Commission had extended the proceedings as compared with those covered by the reasoned opinion.[18] No such extension is apparent. Since the action is in line with the opinion issued, a supplementary opinion was not required. This argument advanced by Italy must therefore be rejected.

36. Italy also submits that a letter from the Director-General of the Directorate-General for the Environment dated 14 June 2011 established the grounds for a legitimate interest in a further delimitation of the subject-matter of the proceedings.

37. In order to plead infringement of the principle of the protection of legitimate expectations, the administration must have given precise assurances.[19] Information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes such assurances.[20]

38. Italy has, however, failed to explain which precise assurances are to be deduced from that letter. This objection must likewise be rejected.

2. The implementation of the judgment in *Commission* v *Italy* (EU:C:2007:250)

39. The Commission sent a reasoned opinion to Italy concerning the latter's failure to implement the judgment in *Commission* v *Italy* (EU:C:2007:250) adequately. It extended the period prescribed in that judgment until 30 September 2009. Consideration must therefore be given first of all to whether, at that time, Italy had adopted the necessary measures to comply with the judgment.

40. In the judgment in question, the Court found there to have been infringement of Articles 4, 8 and 9 of the former Waste Directive, Article 2(1) of the Hazardous Waste Directive and Article 14(a) to (c) of the Landfill Directive.

16 — Judgments in *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraph 67) and *Commission* v *Czech Republic* (C-241/11, EU:C:2013:423, paragraph 23).

17 — Judgment in *Commission* v *Spain* (C-184/11, EU:C:2014:316, paragraph 36).

18 — See judgments in *Commission* v *Germany* (C-191/95, EU:C:1998:441, paragraph 55); *Commission* v *Spain* (C-186/06, EU:C:2007:813, paragraph 15); and *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 39).

19 — Judgments in *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416, paragraph 147); *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraph 81); and *Kahla Thüringen Porzellan* v *Commission* (C-537/08 P, EU:C:2010:769, paragraph 63).

20 — Judgments in *Kahla Thüringen Porzellan* v *Commission* (EU:C:2010:769, paragraph 63) and *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 72).

41. On expiry of the extended period prescribed in the reasoned opinion, that is, on 30 September 2009, the former Waste Directive had been replaced by the consolidated Waste Directive, but the deadline for transposition of the new Waste Directive had not yet expired. Since the consolidated directive did not contain any substantive changes, Italy was still required to implement the judgment on 30 September 2009.

42. The operative part of the judgment in *Commission* v *Italy* (EU:C:2007:250) is of only very limited use in identifying the implementation obligations, since it confines itself to reproducing the text of the provisions infringed. It must, however, be construed in the light of the grounds of the judgment.[21] Three types of infringement may be identified on the basis of those grounds, namely:

— the use of illegal landfills, sometimes involving the dumping of hazardous waste;

— the failure to clean up illegal landfills which had been closed down, some of which contain hazardous waste;

— the failure to obtain new permits for landfills still in operation in accordance with the Landfill Directive.

a) The use of illegal landfills

43. The Commission complained of the use of illegal landfills and claimed that Italy was under a duty to introduce additional legislation and control measures to prevent such failings in the future.

44. The Court found Articles 4 and 9 of the former Waste Directive and Article 2(1) of the Hazardous Waste Directive to have been infringed in paragraphs 39, 42 and 43 of the judgment in *Commission* v *Italy* (EU:C:2007:250) by virtue of the use of landfills which did not comply with the requirements laid down in those provisions. Those findings state that, there was, throughout Italy, a considerable number of tips, the operators of which had not ensured the recovery or disposal of waste in such a way as not to endanger human health and not to use processes or methods which could harm the environment, as well as sites of uncontrolled waste disposal.[22] In addition, numerous tips were operating without a permit having been obtained from the competent authorities.[23] Finally, the Court found that there were at least 700 illegal tips containing hazardous waste in Italy which were not subject to any control measures.[24]

i) The number of landfills still in use

45. It is true that the Commission had initially argued that, on the expiry of the period prescribed by it, there were at least 422 illegal landfills. However, on the basis of the information provided in the defence, it restricted that claim in the reply to 37 landfills, the closure of which was not demonstrated before the expiry of the period prescribed. On the basis of the statements made in the rejoinder, the Commission ultimately objected to the use of just two illegal landfills.

46. The landfills in question are an 'unauthorised' dump, Matera/Altamura Sgarrone on the border between Puglia and Basilicata, and a former local authority tip, Reggio Calabria/Malderiti in Calabria.

21 — Judgment in *Bosch*, 135/77 (EU:C:1978:75, paragraph 4); *Commission* v *Luxembourg* (C-526/08, EU:C:2010:379, paragraph 29); and *Commission* v *Germany* (C-95/12, EU:C:2013:676, paragraph 40).

22 — Paragraph 39.

23 — Paragraph 42.

24 — Paragraph 43.

47. In its defence,[25] Italy had continued to include those landfills in its lists without specifying a closure date and had even mentioned planned clean-up measures at those sites. However, in the rejoinder,[26] Italy stated that, following more recent on-site inspections, a former landfill site could not be found in the area of the alleged Matera/Altamura Sgarrone dump. In addition, in the case of the alleged Reggio Calabria/Malderiti tip, Italy stated that waste had indeed been dumped on that site in the past, but that that waste had been cleared some time ago.

48. This argument is, however, irrelevant as regards the analysis of whether illegal landfills were in fact still in use on expiry of the period prescribed by the Commission. First, the abovementioned new findings do not rule out the continued use of the landfills at that time. Secondly, Italy expressly refuses to make any statement regarding the extent to which the judgment in *Commission* v *Italy* (EU:C:2007:250) had been implemented at the time.[27] Italy therefore also failed to contest the use of those landfills on expiry of the period prescribed.

49. The claim that illegal landfills were still in use on expiry of the period prescribed by the Commission is therefore well-founded in relation to the Mater/Altamura Sgarrone dump and the Reggio Calabria/Malderiti tip.

ii) The introduction of additional legislation and control measures

50. However, in this connection, the Commission also complains that Italy did not take sufficient steps to strengthen its legislation on the prevention of illegal waste disposal sites or its system of waste control, even though Italian authorities had in the meantime announced related reforms with a view to implementing the judgment in *Commission* v *Italy* (EU:C:2007:250).

51. As regards that complaint, it may be argued that a general and persistent infringement of the provisions of the law on waste was held to have been committed in the judgment in *Commission* v *Italy* (EU:C:2007:250).[28] It is reasonable to deal with such an infringement using general measures of a legislative or systematic nature. They could contribute to preventing the emergence of new illegal landfills in the future.

52. However, the Court did not hold that the infringement necessitates the adoption of measures of that kind, nor does the Commission produce any evidence in that regard.

53. The fact that Italian authorities perhaps temporarily took the view that further legislation and systematic control measures were necessary is not sufficient in itself to prove that such measures are necessary in order to implement the judgment in *Commission* v *Italy* (EU:C:2007:250). This is *a fortiori* true inasmuch as Italy submits in the present proceedings that the purpose of those plans was not to comply with the implementation obligation.

54. On the contrary, it cannot be ruled out that — as Italy likewise argues — the consistent application of existing legislation alone would be sufficient to prevent waste being dumped in the future at a significant number of illegal landfills. A further argument supporting this assumption is that no mention has been made in the present proceedings of the emergence of new illegal landfills in the meantime.

25 — Annex 2 to the defence, paragraphs 34 and 74.

26 — Paragraph 14.

27 — Paragraph 8 of the defence.

28 — Paragraph 45.

55. Conversely, isolated individual cases — for example stemming from criminal activities — can scarcely be prevented with any certainty even given strict rules and sophisticated monitoring systems. Such cases are of a different nature to the general and persistent infringement found to exist in *Commission* v *Italy* (EU:C:2007:250).

56. This part of the action must therefore be dismissed.

b) The clean-up of illegal landfills.

57. The second infringement alleged by the Commission concerns the failure to clean up illegal landfills which had been closed down, some of which contained hazardous waste. The Commission states that, on expiry of the period prescribed by it, 422 landfills remained to be cleaned up.

58. This complaint raises complex questions. First of all, it is necessary to clarify whether an obligation to clean up illegal landfill sites which have been closed down is justified on the basis of the judgment in *Commission* v *Italy* (EU:C:2007:250) (see (i) below) and what significance is attached to the Hazardous Waste Directive in that connection (see (ii) below). Consideration must finally be given to determining which landfills are covered by the obligation to implement the judgment (see (iii) below).

i) The obligation to clean up landfills in general

59. Italy disputes that the judgment in *Commission* v *Italy* (EU:C:2007:250) in any way requires that illegal landfills which have been closed down must be cleaned up.

60. Italy is right to submit that the Court did not expressly find in the judgment in *Commission* v *Italy* (EU:C:2007:250), either in the operative part of that judgment or in the grounds stated for it, that the failure to clean up illegal landfills formed part of the infringements held to have been committed. However, the judgment does make clear that, in the arguments advanced by it, the Commission also complained of the continued failure thus far to clean up illegal landfills.[29] In addition, the Court did not reject those arguments, but rather allowed the action brought by the Commission in its entirety.

61. Furthermore, under paragraph 41 of the judgment in *Commission* v *Italy* (EU:C:2007:250), as regards the complaint alleging infringement of Article 8 of the Waste Directive, it was established that the Italian authorities had not ensured that holders of waste either recover or dispose of it themselves or have it handled by an undertaking which carries out the operations of recovery or disposal, in accordance with the provisions of the directive. Consideration of the documents cited[30] reveals that the Court substantiated that finding by reference to the fact that certain landfills in the regions of Umbria and Puglia had not yet been cleaned up.

62. The Court has already previously held that Article 8 of the former Waste Directive contains such an obligation to clean up illegal landfills, since, on receiving consignments of waste, the operator of an illegal tip becomes the holder of that waste. The abovementioned provision accordingly imposes on the Member State the obligation in regard to that operator to take the steps necessary to ensure that that waste is handed over to a private or public waste collector or a waste-disposal undertaking, where it is not possible for that operator himself to recover or dispose of the waste.[31]

29 — See, in particular, paragraphs 10 and 12.

30 — See pages 412 to 422 of the annexes to Italy's rejoinder in Case C-135/05.

31 — Judgments in *Commission* v *Italy ('San Rocco')* (EU:C:1999:544, paragraph 108); *Commission* v *Italy* (C-383/02, EU:C:2004:501, paragraphs 40, 42 and 44); *Commission* v *Italy* (C-447/03, EU:C:2004:751, paragraphs 27, 28 and 30); *Commission* v *Ireland* (C-494/01, EU:C:2005:250, paragraph 181); and *Commission* v *Portugal* (C-37/09, EU:C:2010:331, paragraphs 54 and 55).

63. Accordingly, the infringement of Article 8 of the former Waste Directive found to exist lies inter alia in the fact that illegal landfills had not yet been cleaned up.

64. It is true that the Commission submits that an infringement of Article 8 of the former Waste Directive exists only in relation to the two landfills the closure of which is contested.[32] However, if its argument is considered in its overall context, it becomes clear that the Commission has likewise not abandoned its action in relation to the infringement of Article 8 on account of the failure thus far to clean up illegal landfills, since it continues to demand such clean-up operations expressly and in a manner which Italy cannot fail to understand. The recognition of the implementation of the judgment in *Commission* v *Italy* (EU:C:2007:250) with regard to Articles 8 and 9 therefore relates solely to the infringement of those provisions by virtue of the insufficient prevention of illegal landfills and their use.

65. Furthermore, in accordance with a number of judgments which exist in French and the language of the relevant case only, the obligation to clean up illegal landfills also has its basis in Article 4(1) of the former Waste Directive, the infringement of which is likewise alleged by the Commission. The Court initially found this to be so in connection with cases in which it was established that illegally dumped waste posed a threat to the environment,[33] which is to be prevented pursuant to Article 4(1) specifically. It later relied on the consideration that the mere depositing of waste in an (illegal) landfill is harmful to the environment.[34] It is therefore only logical that it is not enough to close down an illegal landfill or to cover illegally dumped waste with earth and rubble in order to satisfy the requirements of Article 4(1).[35] As the Commission rightly submits, it is on the contrary necessary, as a minimum, to investigate whether an illegal landfill which has been closed down poses a threat to the environment or to health. If so, it must be cleaned up.

66. It must therefore be concluded that the infringement of Articles 4(1) and 8 of the former Waste Directive found to have been committed in the judgment in *Commission* v *Italy* (EU:C:2007:250) justifies the obligation to investigate whether illegal landfills need to be cleaned up and, if necessary, to clean them up.

67. This conclusion is supported by the fact that, as early as in Case C-135/05, but also in the present proceedings, Italy has provided continuous information about the cleaning-up of landfill sites. The Member State cannot therefore claim that it was unaware that the cleaning-up of landfill sites also falls within the scope of the present proceedings.

ii) Article 2(1) of the Hazardous Waste Directive

68. The finding of infringement of Article 2(1) of the Hazardous Waste Directive made in the judgment in *Commission* v *Italy* (EU:C:2007:250) means that specific obligations relating to hazardous waste are added to the obligation to clean up landfills.

69. In that connection, it must be borne in mind, first of all, that the fundamental obligations relating to the law on waste under the Waste Directive — including the clean-up obligation — are not recast by the Hazardous Waste Directive, but rather, pursuant to Article 1(2) of the latter, also apply to hazardous waste. Accordingly, illegal landfills which contain hazardous waste must also be cleaned up in accordance with the Waste Directive.

32 — See above, points 46 to 49.

33 — Judgments in *Commission* v *Italy* (EU:C:2004:501, paragraphs 32 and 36), and *Commission* v *Italy* (EU:C:2004:751, paragraphs 19 to 24).

34 — Judgments in *Commission* v *Spain* (C-361/05, EU:C:2007:298, paragraph 20), and *Commission* v *Portugal* (EU:C:2010:331, paragraph 37).

35 — Judgment in *Commission* v *Spain* (EU:C:2007:298, paragraphs 24 and 26), as clarified in *Commission* v *Portugal* (EU:C:2010:331, paragraph 37).

70. The Hazardous Waste Directive can, however, create further obligations. For example, Article 2(1) thereof requires that hazardous waste identified and recorded.

71. If the hazardous waste has not been identified and recorded in a case of illegal dumping, this omission must subsequently be rectified in the context of the clean-up. Identification at least is in fact typically a prerequisite for the actual clean-up, in order to obtain reliable data as to how the site is to be cleaned up and to prevent additional threats to the environment and human health from arising in the course of the clean-up.

iii) The landfills concerned

72. The parties to the proceedings continue to disagree as to which landfills are subject to the clean-up obligation. The question raised in this regard is, in principle, whether the judgment provided a sufficiently precise description of the scope of the infringement to permit enforcement under Article 260 TFEU, since the judgment does not contain — either in its operative part or in its grounds — a list of the landfills which are to be cleaned up.

73. Such a list may at best be compiled indirectly on the basis of the procedural documents in Case C-135/05. The landfills directly or indirectly referred to by the Commission would be relevant in this regard. In the case of most regions, the key document would be the report produced by the Italian National Forestry Authority of 22 October 2002, on which the Commission had based its action. That report recorded the illegal tips in the forest and mountainous areas of the ordinary regions in Italy, that is all the Italian regions except Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige and Valle d'Aosta.

74. However, a list compiled in that way would in all likelihood not include all landfills, the clean-up of which the Commission is demanding in the present proceedings. Indeed, in response to a question put by the Court, Italy has produced a list containing 71 of the landfills mentioned by the Commission which in Italy's view, did not form the subject-matter of the proceedings in Case C-135/05.

75. The Commission does not submit that those landfills were identified in the proceedings relating to Case C-135/05. It expressly makes submissions in relation solely to the two landfills the existence of which is contested.[36] However, it is quite clear from the arguments advanced by it that the Commission continues to insist that the other 69 landfills should also be cleaned up. Forty-four of those landfills are to be found in the regions in which the Forestry Authority had conducted inspections; the remaining 25 are located in regions for which the Forestry Authority is not the competent authority, mostly in Sicily and Sardinia. It is therefore questionable whether the latter landfills in particular were identified by the Commission in the proceedings connected with Case C-135/05.

76. However, the purpose of the findings made by the Court in the judgment in *Commission* v *Italy* (EU:C:2007:250) is specifically not to determine whether and how particular landfills were identified by name in those proceedings. Indeed, in Case C-135/05, Italy had already unsuccessfully complained of the general and non-specific nature of the Commission's allegation that it had failed to fulfil obligations. The Court did, however, state that the Commission may oppose a general administrative practice which is responsible for a repeated and continued infringement of Union law.[37] Logically, it

36 — See above, point 46.

37 — Judgment in *Commission* v *Italy* (EU:C:2007:250, paragraphs 18 to 22).

expressly held in paragraph 45 of that judgment that Italy had, generally and persistently, failed to fulfil its obligations under the law on waste. In addition, it did not substantiate the various infringements on the basis of a comprehensive analysis of the cases presented, but rather contented itself with, for example, references to the situation in particular regions. [38]

77. The finding of the infringement of Union law made in the judgment in *Commission* v *Italy* (EU:C:2007:250), in particular that of Articles 4 and 8 of the Waste Directive and of Article 2(1) of the Hazardous Waste Directive, therefore goes beyond the individual cases presented to the Court. [39] The finding is rather to be understood as meaning that, over a long period of time, Italy did not take the necessary steps across its entire national territory to clean up illegal landfills, that is to say, to dispose of the illegally dumped waste properly in accordance with the abovementioned provisions. At the root of that failure to fulfil obligations is the fact that Italy did not make sufficient efforts to prevent the use of illegal landfills.

78. It is, however, questionable to what extent such a finding of a general and persistent infringement, which is not restricted to the individual cases presented (by way of example) to the Court, requires a Member State under Article 260(1) TFEU to take measures which may be enforced under Article 260(2).

79. If the same degree of precision were required in connection with the application of Article 260 TFEU as with an enforceable act, it would likely be impossible to enforce the judgment in *Commission* v *Italy* (EU:C:2007:250) with regard to the clean-up of landfills. In the case of acts imposing pecuniary obligations within the meaning of Articles 192 and 187 of the EEC Treaty (now, after amendment, Articles 280 and 299 TFEU), the Court held that those obligations could not be expressed in the European units of account which still existed at the time despite the possibility of their conversion, since the obligations could be met only in a national currency. [40] If, however, neither the judgment nor the procedural documents in Case C-135/05 clearly identify which specific landfills are to be cleaned up, the possibility of enforcement appears to be precluded.

80. Similar requirements cannot, however, be imposed in relation to the application of Article 260 TFEU. [41] This is apparent not least from the fact that the judgments to be complied with under Article 258 TFEU are merely of a declaratory nature. Aside from the decision as to costs, they do not therefore identify any specific measures which a Member State must adopt in order to put an end to an infringement of Union law found to exist. Such judgments instead normally afford the Member States considerable scope as regards their implementation.

81. Accordingly, the benchmark should rather be the principle of a fair hearing, which must benefit all parties to proceedings before the Union judicature, irrespective of their legal status. [42] In order to satisfy the requirements associated with that principle, it is necessary that the parties be apprised of, and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings. [43] All judgments must therefore be reasoned to enable the defendant to understand why judgment has been pronounced against him. [44] The extent of the obligation to give reasons may vary according to the nature of the decision and must be examined, in the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that decision. [45]

38 — Paragraphs 32 and 39 to 44.

39 — See judgment in *Commission* v *Germany* (C-160/08, EU:C:2010:230, paragraph 110).

40 — Judgment in *Société anonyme Générale sucrière* v *Commission*, 41/73, 43/73 and 44/73 (EU:C:1977:41, paragraphs 14 and 15).

41 — Judgment in *Commission* v *France* (C-304/02, EU:C:2005:444, in particular paragraph 91).

42 — See, to this effect, the judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 53).

43 — Judgment in *Commission* v *Ireland and Others* (EU:C:2009:742, paragraph 56).

44 — Judgment in *Trade Agency*, C-619/10 (EU:C:2012:531, paragraph 53).

45 — Judgment in *Trade Agency* (EU:C:2012:531, paragraph 60).

82. Requirements relating to the statement of reasons are in some cases conditional upon the possibility of bringing an appeal, which is not relevant in infringement proceedings.[46] However, even in infringement proceedings, a judgment must at least be sufficiently clear to enable the Member State concerned to determine which defects it must rectify in order to comply with that judgment. The Member State must likewise be in a position to defend its compliance to the Commission.

83. Nevertheless, the requirements governing the precision of findings cannot mean that it is not necessary to comply with a finding of a general and persistent practice, since otherwise findings of that kind — the possibility of which the Court has recognised in its settled case-law —[47] would be deprived of any practical effect. They would be reduced to being purely declaratory in nature.

84. Furthermore, the need for such relatively abstract findings which do not specifically identify every individual case concerned stems from the conduct of the Member State in question. It initially tolerates a general and persistent infringement of Union law and then, in the pre-litigation procedure of the first infringement proceedings, and in breach of its duty of cooperation in good faith, fails to provide comprehensive and precise information to the Commission about the scale of the failing. To require that the Commission nevertheless define the infringement of Union law committed in precise terms — despite it having no specific powers of investigation of its own — in order subsequently to enforce the termination of that infringement would allow the Member State to derive a further advantage from the infringement of Union law.

85. Finally, in at least one similar case, the Court has already applied the relevant provision in force at the time, that is to say Article 228 EC (now, after amendment, Article 260 TFEU). The judgment given against France for its insufficient control of fishing activities concerned a persistent, structural deficiency in the application of Union law,[48] but did not lay down specific requirements for the remedying of that deficiency.

86. It must therefore be sufficient if, on the basis of the judgment, if necessary having asked for an interpretation of that judgment in accordance with Article 43 of the Statute, the Member State is able to determine what steps must be taken in order to comply with that judgment.

87. With regard to the obligation to clean up landfills, the judgment in *Commission* v *Italy* (EU:C:2007:250) satisfies those requirements. As I have already shown,[49] Italy — as the Member State party to the proceedings — was able to deduce from the judgment and the procedural documents that that judgment covers the clean-up of illegal landfills which have been closed down. The landfills in question had to be those, the use of which contrary to Articles 4, 8 and 9 of the former Waste Directive — and in some cases also contrary to Article 2(1) of the Hazardous Waste Directive — Italy had failed to prevent as part of a general and persistent practice. This is because the need to clean up those landfills is the consequence of that use.[50]

46 — See, by way of illustration, judgment in *Trade Agency* (EU:C:2012:531, paragraphs 53 and 60).

47 — See, for example, judgments in *Commission* v *France*, 21/84 (EU:C:1985:184, paragraph 13); *Commission* v *Germany* (C-387/99, EU:C:2004:235, paragraph 42); *Commission* v *Ireland* (EU:C:2005:250, paragraph 28); and *Commission* v *Germany* (EU:C:2010:230, paragraph 106).

48 — Judgment in *Commission* v *France* (EU:C:2005:444, in particular paragraphs 52 and 60).

49 — See above, points 76 and 77.

50 — It is not necessary to determine whether the Commission could even now identify other landfills or could in the future bring further proceedings under Article 260 TFEU based on as yet unknown illegal landfills. However, such additional landfills could be covered by the judgment in *Commission* v *Italy* (EU:C:2007:250) at most if they are still the result of the general and persistent practice found to exist in that judgment of illegal landfills being put to use. By contrast, new and isolated individual cases, which have arisen despite an — in principle — commensurate enforcement of the law on waste and a sufficient related infrastructure, may occur in any place and would not constitute examples of the general and persistent infringement of Union law complained of in the judgment.

88. Italy was likewise aware of the scope of this obligation at all times. As early as in the proceedings relating to Case C-135/05, and again later in the pre-litigation procedure of the present case, the Member State therefore identified landfill sites which had been closed down but still had to be cleaned up.

89. More specifically, it is clear from communications from Italy to the Commission that, on expiry of the period prescribed in the reasoned opinion, between 368[51] and 422[52] illegal landfills had not yet been cleaned up as at 30 September 2009. According to information provided by Italy in the pre-litigation procedure, at least 15,[53] and perhaps as many as 23,[54] of those landfills contained hazardous waste. Accordingly, at that time, the judgment had not yet been implemented as far as the clean-up of landfills was concerned. This is sufficient to justify a further judgment under Article 260(2) TFEU.

c) The grant of new permits for landfill sites still in operation in accordance with the Landfill Directive

90. In addition, the Court also held in the judgment in *Commission* v *Italy* (EU:C:2007:250) that Article 14(a) to (c) of the Landfill Directive had been infringed. Those provisions govern the circumstances in which landfills which, on expiry of the deadline for transposition of the directive, that is to say, on 16 July 2001, had been granted a permit or were in operation may continue to operate.

91. Under Article 14(a) of the Landfill Directive, the operator is required no later than 16 July 2002 to prepare a conditioning plan and to present that plan to the competent authorities for their approval. Article 14(b) provides that the authority is to decide on the basis of that plan whether operation of the landfill may continue or whether it should be closed down. In accordance with Article 14(c), in the event of the landfill's continued operation, the authority is required to authorise the necessary site-conditioning work and lay down a transitional period ending no later than 16 July 2009.

92. According to the undisputed information provided by the Commission, there were at least 93 such landfills on expiry of the period prescribed in the reasoned opinion. They included 69 landfills in nine regions notified to the Commission by Italy in response to the reasoned opinion, and a further 24 landfill sites in the region of Puglia, about which Italy informed the Commission only at a later stage. Accordingly, in that respect too, the judgment in *Commission* v *Italy* (EU:C:2007:250) had not yet been implemented on expiry of the period prescribed.

d) Interim conclusion

93. By failing to adopt all the necessary measures to comply with the judgment in *Commission* v *Italy* (EU:C:2007:250) as at 30 September 2009, when the period prescribed by the European Commission in the reasoned opinion expired, the Italian Republic therefore failed to fulfil its obligations under Articles 4, 8 and 9 of the Waste Directive, Article 2(1) of the Hazardous Waste Directive, Article 14 of the Landfill Directive and Article 260(1) TFEU.

51 — Communication of 30 October 2009.

52 — Communication of 1 October 2009.

53 — Communication of 1 October 2009.

54 — Communication of 30 October 2009.

C – *The proceedings brought against Greece*

94. The subject-matter of the proceedings brought against Greece is more narrowly defined than that of the proceedings brought against Italy. In the judgment in *Commission* v *Greece* (EU:C:2005:592), the Court found only Articles 4, 8 and 9 of the former Waste Directive to have been infringed.

95. The parties to the proceedings are in agreement that that infringement relates both to the use of illegal landfills and to their clean-up.

96. The reference date results from the supplementary invitation to submit observations of 29 October 2010, in which the Commission fixed a deadline of 29 December 2010.

97. Since the deadline for transposition of the new Waste Directive had expired on 12 December 2010, the continuation of the obligation to implement the judgment in *Commission* v *Greece* (EU:C:2005:592) turns on whether the new directive reproduces Articles 4, 8 and 9 of the former Waste Directive.

98. This is achieved in principle by means of Articles 13, 36(1), 15(1) and 23 of the new Waste Directive, which contain only insignificant amendments.

99. Similarly, the clean-up obligation is not, in principle, called into question by Article 2(1)(b) of the new Waste Directive. That provision supplemented the law on waste by providing that the Waste Directive does not apply to land (*in situ*) including unexcavated contaminated soil. However, illegally dumped waste is not land and nor is it found *in situ*, that is in its original location.[55] If this were not the case, the door would be opened to the circumvention of the law on waste through the illegal dumping of waste. The removal of such waste can therefore still be required under waste legislation.

100. Accordingly, the judgment in *Commission* v *Greece* (EU:C:2005:592) still had to be implemented on the expiry of the period prescribed by the Commission.

101. The extent of the implementation of the judgment in *Commission* v *Greece* (EU:C:2005:592) on 29 December 2010 is unclear from the arguments put forward by the parties. However, six months later Greece confirmed that 82 illegal landfills were still in use and 596 illegal landfills which had been closed down still had to be cleaned up.

102. By failing to adopt all the necessary measures to comply with the judgment in *Commission* v *Greece* (EU:C:2005:592) as at 29 December 2010, when the period prescribed by the European Commission in the supplementary invitation to submit observations expired, the Hellenic Republic therefore failed to fulfil its obligations under Articles 4, 8 and 9 of the Waste Directive and Article 260(1) TFEU.

D – *Financial penalties*

103. It is for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required, to determine the financial penalties appropriate for making sure that the judgment which previously established the breach is complied with as swiftly as possible and preventing similar infringements of EU law from recurring.[56]

55 — See the order of the Verwaltungsgericht Aachen (Administrative Court, Aachen) of 16 July 2009 (9 L 153/09, Juris, paragraphs 17 to 21).

56 — Judgment in *Commission* v *Italy* (C-496/09, EU:C:2011:740, paragraph 36).

104. Accordingly, the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by that institution is transparent, foreseeable and consistent with legal certainty. [57]

1. The periodic payment

105. The imposition of a periodic penalty payment pursuant to Article 260 TFEU is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court persists. [58]

106. The findings made thus far regarding the insufficient implementation of the judgments on expiry of the periods prescribed by the Commission therefore do not, on their own, justify a periodic penalty payment. Consideration must rather additionally be given to whether the judgments will still require further implementation when the Court delivers its judgment.

107. In that connection, in order for the failure to fulfil obligations to persist, the provisions infringed must also have been continued in substance, despite amendments made to the law on waste in the meantime, when the Court gives judgment.

108. This changes nothing as far as the proceedings brought against Greece are concerned, since — in the context of the above analysis of the implementation of the judgment — on expiry of the period prescribed by the Commission the new Waste Directive was already in force. [59]

109. However, in the case of the more broadly framed proceedings brought against Italy, consideration has thus far had to be given to the consolidated Waste Framework Directive only. [60] It is nevertheless clear from the submissions relating to the Greek proceedings that the new Waste Directive does not call into question the clean-up obligation which must be inferred from the former Waste Directive. In addition, Article 35 of the new Waste Directive continues the obligation under Article 2(1) of the Hazardous Waste Directive by requiring the establishments or undertakings referred to in Article 23, that is to say, inter alia the operators of landfills, to keep a chronological record of the quantity, nature and origin of hazardous waste. This obligation can therefore likewise continue to be enforced.

a) Case C-196/13, *Commission* v *Italy*

110. In order to decide on the imposition of a periodic penalty payment on Italy, it is necessary to examine first of all to what extent the infringements persisted on expiry of the period prescribed by the Commission. Next, the form of that payment must be determined, in particular the issue of whether it is to be imposed as a set amount or such that it is to decrease in line with the implementation of the judgment, as well as the basic amount of the payment and the conditions under which it will cease to be payable.

57 — Judgments in *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 34); *Commission* v *Greece* (C-369/07, EU:C:2009:428, paragraph 112); *Commission* v *Italy* (EU:C:2011:740, paragraph 37); *Commission* v *Belgium* (C-533/11, EU:C:2013:659, paragraph 64).

58 — Judgments in *Commission* v *France* (C-121/07, EU:C:2008:695, paragraph 27); *Commission* v *Greece* (EU:C:2009:428, paragraph 59); *Commission* v *Italy* (EU:C:2011:740, paragraph 42); *Commission* v *Spain* (EU:C:2012:781, paragraph 96); and *Commission* v *Luxembourg* (C-576/11, EU:C:2013:773, paragraph 43).

59 — See above, point 97 et seq.

60 — See above, point 41.

i) The continued existence of the infringements

111. As far as the vast majority of cases were concerned, the continued existence of the infringements at the time of the hearing was not actually in dispute. However, two cases in relation to which Italy presents more recent findings in the rejoinder require further discussion.

– The cases not in dispute

112. It is true that Italy has made further progress as compared with that made on expiry of the period prescribed in the reasoned opinion. Nevertheless, according to information provided by both parties, 196 landfills still have to be cleaned up, that is, the 218 landfills mentioned in the application less 20 landfills which the Commission has recognised as having been cleaned up in the meantime,[61] and two landfill sites to which consideration must be given below. According to the uncontested information provided by the Commission, 13 of those 196 landfill sites contain hazardous waste.[62] The parties were also in agreement at the hearing that, as things now stand, only two more landfills require a new permit under the Landfill Directive.

– The two disputed cases

113. The cases of the 'unauthorised' dump, Matera/Altamura Sgarrone on the border between Puglia and Basilicata, and the former local authority tip, Reggio Calabria/Malderiti in Calabria do, however, require further discussion.

114. As I have already pointed out,[63] it is true that Italy had continued to include those landfill sites in its lists in the defence[64] without specifying a closure date and had even mentioned planned clean-up measures at those sites. However, in the rejoinder,[65] Italy stated that, following more recent on-site inspections, a former landfill site could not be found in Matera/Altamura Sgarrone. In addition, in the case of the alleged Reggio Calabria/Malderiti tip, Italy stated that waste had indeed been dumped on that site in the past, but that that waste had been cleared some time ago.

The continued use of illegal landfills

115. The Commission claims that Italy allowed the use of illegal landfills to continue at those two locations, but Italy argued as early as in the defence that at that time *none* of the illegal landfills concerned by the present proceedings was still in use.

116. The Commission must therefore prove the use of those landfills. It relies on the fact that Italy did not give notice of a date of closure.

117. The failure to state a date of closure does not, however, prove that illegal landfills are actually still in use at the two locations.

118. Since the Commission has failed to produce any further evidence of the use of illegal landfills in Matera/Altamura Sgarrone and Reggio Calabria/Malderiti, the action must be dismissed as far as this point is concerned.

61 — See paragraph 8 of the Commission's response of 13 May 2014 to the questions put by the Court.

62 — Calabria: Firmo/Sciolle; Emilia Romagna: S. Giovanni in Persiceto/V. Samoggia 26 (sito Razzaboni); Lazio: Riano/Piana Perina; Liguria: Careare/Premara Paleta, La Spezia/Pitelli — discarica Ruffino Pitelli, La Spezia/Pitelli IPODEC and Lerici/Pertusola; Lombardy: Mantova/Valdaro; Zanica/Ex cava Cuter; Marche: Ascoli Piceno/SGL Carbon; Piedmont: Serravalle Scrivia/La Luminosa; Umbria: Gualdo Tadino/Vigna Vecchia; Sicily: Priolo Gargallo/Penisola Magnisi.

63 — See above, points 46 to 49.

64 — Annex 2 to the defence, paragraphs 34 and 74.

65 — Paragraph 14.

The need to clean up the two landfills

119. However, the dispute relating to the two cases also concerns the obligation to clean up landfills.

120. Italy acknowledged in the defence and in the pre-litigation procedure that former illegal landfills needed to be cleaned up in Matera/Altamura Sgarrone and Reggio Calabria/Malderiti. However, Italy's new argument amounts to claiming that those two cases were erroneously included in the list of former illegal landfills needing to be cleaned up. This therefore constitutes a change to its defence.

121. Under Article 127(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

122. Italy bases its new plea in law on such matters of fact, since the finding that the two landfills were actually wrongly included on the list of landfills to be cleaned up is based on on-site inspections which were carried out *after* the defence.[66]

123. It is true that those new findings ultimately reveal Italy's failure to elucidate the facts of the matter fully and in good time, which inter alia is a requirement of the duty of cooperation in good faith with the Commission. However, Article 127(1) of the Rules of Procedure does not preclude an amendment of pleas in law where the new matters of fact should already have been known beforehand.

124. This generosity with regard to new pleas in law is also reasonable in the present case at least. If the Court were to give judgment against Italy in relation to these two cases regardless of the new pleas introduced, the implementation of the judgment on this point would be very difficult in practice. How is Italy meant to prove that those alleged landfill sites were cleaned up if they do not (or no longer) actually exist?

125. This new plea in law is therefore admissible.

126. In the rejoinder, that plea is based on new evidence, or at least on an offer of additional evidence, namely the findings of more recent on-site inspections. Under Article 128(1) of the Rules of Procedure, new evidence may be produced or further evidence offered at this time, provided that reasons are given for the delay. This requirement is likewise satisfied, since the reason for the delay is that this information came to light only after more recent inspections.

127. The Commission may have been surprised by this argument, but it would have been free to apply to the Court for an appropriate period of time in which to conduct its own investigations.

128. Italy's new plea in law is ultimately also well-founded.

129. It is true that, at first glance, Italy's submission relating to the objection raised by the Commission to the earlier line of argument does appear to be largely unconvincing, in particular given the clean-up measures planned. This is because the planning of such clean-up measures would be expected only if there were actually landfills to be cleaned up.

66 — This argument differs in that regard from a plea in law rejected in the judgment in *Commission* v *Malta* (C-351/09, EU:C:2010:815, paragraphs 23 and 24), which already existed prior to the submission of the defence.

130. However, it is unclear why Italy should have knowingly provided false information to the Court and the Commission about two of some 200 individual cases at this stage of the proceedings, information which could presumably have been refuted with relative ease. For example, satellite images of the area in question could have been analysed at very limited cost, and even a site visit would not have necessitated excessive expenditure. However, the Commission did not endeavour to obtain such evidence to rebut the new argument advanced by Italy.

131. Furthermore, it seems conceivable for a Member State which is required to deal with infringements against Union law on waste in relation to several hundred illegal landfills to have incorrectly recorded a certain number of cases and to have discovered those errors only at a relatively late stage. Accordingly, in the pre-litigation procedure, in particular in connection with the response to the reasoned opinion, the Commission accepted the communication of such incorrect records and their removal from the lists.

132. The Commission's reference to the contradiction with earlier communications is therefore insufficient to rebut the argument advanced by Italy.

133. Since, in the context of an action for failure to fulfil obligations, the Commission must prove the existence of the alleged infringement,[67] and since it does not advance any further arguments in that regard, it cannot thus be held that former illegal landfills which need to be cleaned up can be found in Matera/Altamura Sgarrone and Reggio Calabria/Malderiti.

134. The action brought by the Commission in Case C-196/13 must therefore likewise be dismissed as far as this point is concerned.

– Interim conclusion

135. Since, despite those two individual cases, significant parts of the judgment in *Commission* v *Italy* (EU:C:2007:250) had still not yet been fully implemented at the time of the hearing, an order imposing a periodic penalty payment on the Italian Republic is, in principle, an appropriate financial means by which to encourage the Italian Republic to take the measures necessary to put an end to the infringement established and to ensure full compliance with the judgment.[68]

ii) Form of the periodic penalty payment — fixed or decreasing?

136. As far as the form of the periodic penalty payment is concerned, the question arises whether the periodically payable penalty payment should be fixed in the form of a set amount which the Italian Republic pays until it has fully implemented the judgment in *Commission* v *Italy* (EU:C:2007:250). The alternative is the decreasing amount proposed by the Commission which is reduced in line with the further implementation of the judgment.

137. One argument supporting a set amount is that in the judgment to be implemented the Court did not find there to be a bundle of individual infringements, but rather one general and persistent infringement. A penalty payment of a single set amount would be consistent with a single infringement.

67 — Judgment in *Commission* v *Italy ('Altamura')* (C-179/06, EU:C:2007:578, paragraph 37).

68 — See judgments in *Commission* v *Italy* (EU:C:2011:740, paragraph 45); *Commission* v *Spain* (EU:C:2012:781, paragraph 114); and *Commission* v *Luxembourg* (EU:C:2013:773, paragraph 45).

138. That argument may, however, be countered by the argument that that infringement is characterised by various individual situations, each of which requires that individual measures be taken in order to implement the judgment. A rough breakdown between those situations can be made on the basis of the simple fact that, on the one hand, infringement of Articles 4 and 8 of the Waste Directive and of Article 2(1) of the Hazardous Waste Directive requires that illegal landfills which have been closed down are cleaned up and, on the other hand, infringement of Article 14 of the Landfill Directive requires that a new permit be obtained for landfills which continue to be operated in accordance with that directive. Each individual landfill concerned requires the adoption of individual measures in relation to both aspects. The structuring of the duty of implementation in this way alone suggests that an amount should be fixed which decreases in line with the further implementation of the judgment. [69]

139. However, more importantly, only the latter approach can guarantee that the periodic penalty payment payable continues to be consistent with the incomplete compliance with the judgment in *Commission* v *Italy* (EU:C:2007:250). After all, following further progress made by Italy in the implementation of the judgment, a set amount which reflects the implementation status at the time that amount is fixed would no longer be appropriate to the particular circumstances of the case and would therefore be disproportionate to the breach which has been found. [70] The principle of proportionality, which is one of the general principles of Union law, requires that measures adopted by Union institutions — including the Court — do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [71]

140. For this reason, the Court has already imposed decreasing periodic penalty payments in three judgments relating to failures to fulfil obligations of a similar kind. Those cases related to the quality of a significant number of bathing areas, [72] the repayment of a significant number of state aid measures [73] and the connection of residents to waste-water treatment plants. [74]

141. However, in the most recent proceedings of this kind, despite a failure to fulfil obligations of a similar kind relating to the construction of waste-water treatment plants and a corresponding form of order sought by the Commission, [75] the Court imposed a periodic penalty payment of a set amount. [76]

142. Nevertheless, that case does not mark a fundamental departure from the practice of fixing a decreasing periodic penalty payment in appropriate circumstances, not least because the Court does not give any reasons for the deviation from the earlier case-law. Such a statement of reasons would have been required not only on account of the form of order sought by the Commission, but also because only a month earlier the Court had again imposed a decreasing periodic penalty payment. [77] Accordingly, the most recent judgment can at most be based on an undisclosed assessment of particular circumstances of the individual case.

69 — See judgments in *Commission* v *Spain* (C-278/01, EU:C:2003:635, paragraph 50); *Commission* v *Italy* (EU:C:2011:740, in particular paragraph 51); *Commission* v *Belgium* (EU:C:2013:659, paragraph 73); and the Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Greece ('Kouroupitos')* (C-387/97, EU:C:1999:455, point 104).

70 — See judgments in *Commission* v *Spain* (EU:C:2003:635, paragraphs 48 and 49), and *Commission* v *Italy* (EU:C:2011:740, paragraph 49).

71 — Judgments in *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81); *S.P.C.M. and Others* (C-558/07, EU:C:2009:430, paragraph 41); and *Afton Chemical* (C-343/09, EU:C:2010:419, paragraph 45).

72 — Judgment in *Commission* v *Spain* (EU:C:2003:635).

73 — Judgment in *Commission* v *Italy* (EU:C:2011:740).

74 — Judgment in *Commission* v *Belgium* (EU:C:2013:659).

75 — Judgment in *Commission* v *Luxembourg* (EU:C:2013:773, paragraphs 48 to 50). By contrast, the request of the Member State concerned which was rejected in the most recent judgment in *Commission* v *Portugal* (C-76/13, EU:C:2014:2029, paragraph 74) concerned a failure to fulfil obligations which was not easily divisible.

76 — Judgment in *Commission* v *Luxembourg* (EU:C:2013:773, paragraph 54).

77 — Judgment in *Commission* v *Belgium* (EU:C:2013:659).

143. By contrast, in the present case, there are no identifiable factors which would make it necessary to impose a fixed periodic penalty payment which does not reduce as the judgment is further implemented in line with the principle of proportionality.

144. In particular, possible shortcomings in Italy's cooperation with the Commission do not constitute grounds for imposing the periodic penalty payment as a set amount. It is true that some of the information provided by Italy was incomplete or contradictory. However, the Court normally takes account of such breaches of the duty of cooperation in good faith when calculating the lump sum, by factoring in the conduct of the Member State concerned.[78]

145. Conversely, insufficient cooperation during the application of the penalty payment would automatically operate to the detriment of the Member State. After all, the clean-up of a landfill or the renewal of its permit can be acknowledged only once the Member State has provided all the information necessary for the related claim to be examined.[79] If it provides incomplete and/or late information, the penalty payment is thus incurred for longer than is necessary.

146. The periodic penalty payment should therefore be imposed in such a way that the amount of the payment decreases.

147. As the Commission proposes, the reduction should take into consideration the differing nature of the various partial infringements, in particular the threats to the environment. Accordingly, the risk associated with the 183 illegal landfills which have been closed down, need to be cleaned up and do not contain hazardous waste is the lowest. Such sites should be taken into account applying a factor of 1. The two new landfills for which permits must be obtained are associated with a higher risk, since they are larger sites which are being operated even though it is at least unclear that they comply fully with the Landfill Directive. They should be taken into account applying a factor of 2. The greatest risk is posed by the 13 illegal landfills which have been closed down, need to be cleaned up and contain hazardous waste, since such waste poses particularly serious environmental threats. A factor of 3 should therefore be applied to these landfills. Multiplying the respective numbers of landfills involved by the corresponding factors and adding up those results gives a total of 226.

iii) Basic amount

148. In exercising its discretion, it is for the Court to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned. Accordingly, in the assessment carried out by the Court, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Union law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay. In applying those criteria, the Court is required to have regard, in particular, to the effects of its failure to comply on public and private interests and to the urgency for the Member State concerned to fulfil its obligations.[80]

78 — Judgment in *Commission* v *France* (EU:C:2008:695, paragraph 62); *Commission* v *Spain* (EU:C:2012:781, paragraph 141); and *Commission* v *Luxembourg* (EU:C:2013:773, paragraph 58).

79 — See, to that effect, judgment in *Commission* v *Italy* (EU:C:2011:740, paragraphs 50 to 55).

80 — Judgments in *Commission* v *Greece* (EU:C:2009:428, paragraphs 114 and 115); *Commission* v *Italy* (EU:C:2011:740, paragraphs 56 and 57); *Commission* v *Spain* (EU:C:2012:781, paragraphs 118 and 119); and *Commission* v *Luxembourg* (EU:C:2013:773, paragraphs 46 and 47).

149. The Commission submits that the amount of the daily periodic penalty payment should be calculated by multiplying the basic amount of the periodic penalty payment which applies to all Member States, namely EUR 640 per day, by the coefficient for seriousness of the infringement, set at 8 (on a scale of 1 to 20), multiplied by a coefficient of duration, which is 3 in the present case (on a scale of 1 to 3), and by the 'n' factor, representing Italy's ability to pay, that is 16.72. The amount obtained using that method is EUR 256 819.20 per day.

150. Although this proposal is a good starting point, it does however require more in-depth discussion.

151. First of all, when calculating the periodic penalty payment, the updated data laid down by the Commission in its Communication of 21 November 2013 [81] should be applied. This is because account must be taken of the ability to pay of the Member State concerned, that is, recent trends in inflation and GDP, as it stands in the light of the latest economic data submitted for appraisal by the Court. [82] Those data give a basic flat-rate amount of EUR 650 and an ability to pay, the 'n' factor, of 16.57.

152. It is settled case-law that it is for the Court to determine the duration of the infringement, taking as a basis the time when it assesses the facts, not the time at which the case is brought before it by the Commission. [83]

153. Since, as I have made clear in point 112 of this Opinion, the Italian Republic has in fact conceded that it has not put an end to its failure to comply with the judgment in *Commission* v *Italy* (EU:C:2007:250), that failure has continued for more than seven years. In connection with the repayment of aid, the Court has deemed that period of time to be 'very considerable'. [84]

154. In addition, in the judgment in *Commission* v *Italy* (EU:C:2007:250) the Court found there to be a general and continuing infringement of obligations under the law on waste, some of which had applied since as early as the expiry of the deadline for transposition laid down in the first Waste Directive, that is to say, since 1977, and in the case of the Landfill Directive since 2002 at least. Accordingly, account should likewise be taken of the fact that this is a case of failings which have persisted for an exceptionally long period of time. [85]

155. However, it must be acknowledged that, in particular, the clean-up of illegal landfills which have been closed down can prove very expensive, and it is justified in principle for priorities to be set in that regard in order to deal with particularly serious environmental threats as a matter of priority.

156. It is therefore appropriate for the Commission to propose the highest coefficient of duration available under its system, that is to say 3. There is, however, no need to go beyond that framework and opt for an even higher coefficient. [86]

157. Finally, the assessment of the seriousness of the infringement represents the greatest challenge.

81 — C(2013) 8101 final, http://ec.europa.eu/eu_law/docs/docs_infringements/c_2013_8101_en.pdf.

82 — See judgments in *Commission* v *Greece* (C-407/09, EU:C:2011:196, paragraph 42); *Commission* v *Spain* (EU:C:2012:781, paragraph 131); and *Commission* v *Ireland* (C-279/11, EU:C:2012:834, paragraph 78).

83 — Judgments in *Commission* v *Greece* (EU:C:2009:428, paragraph 116); *Commission* v *Italy* (EU:C:2011:740, paragraph 58); and *Commission* v Spain (EU:C:2012:781, paragraph 120).

84 — Judgment in *Commission* v *Italy* (EU:C:2011:740, paragraph 59).

85 — Judgments in *Commission* v *Spain* (EU:C:2012:781, paragraph 122) and *Commission* v *Ireland* (EU:C:2012:827, paragraph 38).

86 — With regard to this possibility, see judgment in *Commission* v *France* (C-177/04, EU:C:2006:173, paragraph 71).

158. In that connection, it follows from case-law that the failure to comply with a judgment is of a particularly serious nature where that failure is likely to harm the environment, the protection of which is one of the European Union's policy objectives, as is apparent from Article 191 TFEU.[87] The Court has also already held that the lengthy duration of non-compliance with the law on waste can give additional weight to an infringement,[88] though that fact is already factored into the calculation of the coefficient of duration and would thus be taken into account twice.

159. In addition, it is not individual isolated cases which are at issue here but rather a general practice. If the Commission had brought all the cases individually before the Court, it would have been reasonable to propose a minimum coefficient for seriousness of 1 in respect of each landfill to be cleaned up or to be granted a new permit, which would give a total of at least 198. As early as in the very first proceedings involving a penalty payment, it even proposed a coefficient for seriousness of 6 in connection with the operation of a single illegal landfill, in which hazardous waste had also been dumped.[89]

160. When implementing a judgment relating to a general practice which concerns hundreds of individual cases, proposing a coefficient of seriousness of 8, rather than 198 or even higher, therefore amounts to a 'bulk discount',[90] the entitlement to which could be questioned. However, the purpose of the periodic penalty payment is not to compensate for damage or to hand down a commensurate punishment.[91] The aim is rather to encourage the implementation of the first judgment and to prevent new infringements. It may therefore be justified not to increase the coefficient of seriousness on a linear basis according to the number of cases concerned.

161. In any event, it must be acknowledged in Italy's favour that the present proceedings — contrary to form of order sought by the Commission — are no longer concerned with the operation of illegal landfills, but now solely with their clean-up and the grant of new permits for landfills still in operation in accordance with the Landfill Directive. Significant process can be seen in both areas as compared with the situation set out in the judgment in *Commission* v *Italy* (EU:C:2007:250) and that existing on expiry of the period prescribed in the reasoned opinion and when the action was brought. It must be concluded from this that the need to increase pressure on Italy by means of the periodic penalty payment is not very great.

162. I therefore consider it appropriate to reduce the coefficient of seriousness proposed by the Commission considerably, from 8 to 5.

163. Multiplying the basic flat-rate amount of EUR 650 by the 'n' factor, representing the ability to pay, of 16.57, a coefficient of seriousness of 5 and a coefficient of duration of 3 gives a daily penalty payment of EUR 161 557.50.

164. In order to facilitate the gradual reduction of the penalty payment taking into account the significance attributed to the individual partial infringements, I propose that that amount be rounded down to EUR 158 200. That amount may be divided by the weighted total number of individual infringements, that is to say 226.[92] As soon as an illegal landfill which has been closed down and which contains hazardous waste is cleaned up, that amount can be reduced by EUR 2 100, following the clean-up of any other landfill by EUR 700, and following the grant of a new permit for a landfill

87 — Judgments in *Commission* v *Greece ('Kouroupitos')* (C-387/97, EU:C:2000:356, paragraph 94); *Commission* v *France* (EU:C:2008:695, paragraph 77); *Commission* v *Ireland* (EU:C:2012:834, paragraph 72); and *Commission* v *Belgium* (EU:C:2013:659, paragraph 56).

88 — Judgment in *Commission* v *Ireland* (EU:C:2012:827, paragraph 38).

89 — Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Greece ('Kouroupitos')* (EU:C:1999:455, point 101).

90 — Instead of a daily periodic penalty payment of EUR 256 819.20, as the Commission proposes, a sum of EUR 6 356 275.20 per day would be payable applying a coefficient of seriousness of 198.

91 — See *Commission* v *France*, EU:C:2005:444, in particular paragraph 91.

92 — See above, point 147.

still in operation in accordance with the Landfill Directive by EUR 1 400. Once the partial infringements of the judgment in *Commission* v *Italy* (EU:C:2007:250) discussed in the present proceedings have been fully resolved, a periodic penalty payment would therefore no longer be payable.

165. If Italy resolves further partial infringements prior to judgment being delivered, it should notify the Commission of their resolution immediately. The periodic penalty payment would then be reduced at once in line with the abovementioned criteria.

166. Italy should therefore be ordered to pay to the Commission, into the 'European Union own resources' account, a daily periodic penalty payment of EUR 158 200 until the judgment in *Commission* v *Italy* (EU:C:2007:250) has been implemented in full. That basic amount should be reduced by EUR 2 100 each time Italy proves to the Commission that an illegal landfill which has been closed down and which contains hazardous waste has been cleaned up, by EUR 700 once it is proven that another landfill has been cleaned up, and by EUR 1 400 once it is proven that a landfill still in operation has been granted a new permit in accordance with the Landfill Directive.

b) Case C-378/13, *Commission* v *Greece*

167. Though, up to the hearing, Greece made further progress as compared with that made on expiry of the deadline fixed in the supplementary invitation to submit observations, 70 illegal landfills are still in use and a further 223 illegal landfills which have been closed down need to be cleaned up.

168. Accordingly, an order imposing a periodic penalty payment on the Hellenic Republic is an appropriate financial means by which to encourage the Hellenic Republic to take the measures necessary to put an end to the infringement established and to ensure full compliance with the judgment in *Commission* v *Greece* (EU:C:2005:592). [93]

169. As in the case of Italy, it is necessary first of all to determine a basic amount and to reduce that amount in line with the further implementation of the judgment in *Commission* v *Greece* (EU:C:2005:592) (see (i) below). However, the recognition of full implementation in relation to the closure of illegal landfills raises particular problems (see (ii) below).

i) Basic amount of the periodic penalty payment

170. The Commission submits that the amount of the daily penalty payment should be calculated by multiplying the basic amount of the periodic penalty payment, which it proposes and applies to all Member States, that is to say, EUR 640 per day, by the coefficient for seriousness of the infringement, set at 9 (on a scale of 1 to 20), multiplied by a coefficient of duration, which is 3 in the present case (on a scale of 1 to 3), and by the 'n' factor, representing Greece's ability to pay, that is 4.12. The amount obtained using that method is EUR 71 193.60 per day.

171. However, when calculating the periodic penalty payment, the updated data laid down by the Commission in its Communication of 21 November 2013 [94] should again be applied. [95] Those data give a basic flat-rate amount of EUR 650 and, on account of the ongoing economic crisis in Greece, a slightly lower ability to pay factor, 'n', of 3.87.

93 — See judgments in *Commission* v *Italy* (EU:C:2011:740, paragraph 45); *Commission* v *Spain* (EU:C:2012:781, paragraph 114); and *Commission* v *Luxembourg*, (EU:C:2013:773, paragraph 45).

94 — C(2013) 8101 final, http://ec.europa.eu/eu_law/docs/docs_infringements/c_2013_8101_en.pdf.

95 — See above, point 151.

172. As far as the coefficient of duration is concerned, the order imposing a periodic penalty payment on Greece does indeed date back to two years earlier than the order imposing a periodic penalty payment on Italy. However, in comparison with Italy, it must be acknowledged in Greece's favour that the obligations under the Union law on waste have been binding on that Member State not since 1977, but only from the date of its accession, that is, 1 January 1981. It is therefore likewise appropriate in the case of Greece to accept the proposed coefficient for duration of 3.

173. The infringement found to exist in the judgment in *Commission* v *Greece* (EU:C:2005:592) is of a reduced legal scope as compared with the infringement for which Italy was held responsible. The Court did not hold there to be infringement of the Hazardous Waste Directive or the Landfill Directive. However, unlike in Italy, illegal landfills are still in use in Greece, and there is thus a high likelihood of new and additional damage to the environment and risks to health. Furthermore, almost 300 landfills still need to be cleaned up in Greece, some 50% more than in Italy, even though Greece is a considerably smaller Member State. The coefficient of seriousness proposed by the Commission should therefore be reduced, but only to 7.5.

174. Multiplying the basic flat-rate amount of EUR 650 by the 'n' factor, representing the ability to pay, of 3.87, a coefficient of seriousness of 7.5 and a coefficient of duration of 3 gives a daily penalty payment of EUR 56 598.75.

175. When reducing the amount of the penalty payment, a factor of 1 should be applied for each clean-up and each closure respectively. In view of the 223 landfills which have been closed down but need to be cleaned up and the 70 landfills which have to be closed down and cleaned up, the total of those factors comes to 363. It therefore makes sense, for the sake of simplicity, to round down the daily penalty payment to EUR 54 450 and to reduce that amount by EUR 150 each time it is proven that an illegal landfill has been closed down or cleaned up.

ii) Recognition of the closure of landfills

176. As the Commission rightly points out, there is, however, the risk when illegal landfills are closed that those sites will be replaced by new uncontrolled dumping sites. Due account must be taken of that risk when reducing the penalty payment.

177. It appears difficult in practice to implement the approach proposed by the Commission in the written procedure, consisting of calculating the level of the periodic penalty payment on the basis of the number of illegal landfills that is to say, by reference to the illegal landfills known to be still in use together with new illegal landfills which replace landfills which have been closed down. There is reason to fear that replacement illegal landfills might be concealed. In addition, on the Greek islands in particular, there is also the risk of the uncontrolled dumping of waste into the sea and of that practice not being discovered in good time.

178. The proposal made by the Commission at the hearing to accept the closure of an illegal landfill only if it is proven at the same time that sufficient capacities for the lawful recovery or disposal of waste exist and are also used is therefore more effective. Without such capacities, the waste produced will inevitably be illegally dumped.

iii) Interim conclusion

179. The Hellenic Republic should therefore be ordered to pay to the European Commission, into the 'European Union own resources' account, a daily periodic penalty payment of EUR 54 450 until the judgment in *Commission* v *Greece* (EU:C:2005:592) has been implemented in full. That basic amount should be reduced by EUR 150 each time Greece proves to the Commission that an illegal landfill has been closed and sufficient capacities provided, and used, for the lawful recovery or disposal of waste, or that an illegal landfill which has already been closed down has been cleaned up.

2. Lump sum

180. It is settled case-law that a lump sum payment may be imposed in addition to a periodic penalty payment. [96] The decision whether to impose a lump sum payment must, in each individual case, depend on all the relevant factors pertaining both to the particular nature of the infringement established and to the individual conduct of the Member State involved in the procedure initiated pursuant to Article 260 TFEU. [97] That provision confers a wide discretion upon the Court in deciding whether or not to impose such penalties. [98]

181. The Commission proposes that, when calculating the lump sum payment, a method should be applied which consists in multiplying the fixed basic amount of EUR 210 per day by the coefficient of seriousness and the factor 'n', the amounts of which would accord with the values proposed for the calculation of the periodic penalty payment, as well as by the number of days which have passed since the first judgment was delivered.

a) Case C-196/13, *Commission* v *Italy*

182. If those data are updated in line with my proposal for the penalty payment to be imposed on Italy, taking as a basis the basic flat-rate amount of EUR 220 increased in line with the most recent Communication from the Commission, the factor 'n' — representing the ability to pay — of 16.57 and the coefficient of seriousness of 5, this gives a basic amount of EUR 18 227. Based on the date of the reading of this Opinion, 2 687 days after judgment was delivered in the judgment in *Commission* v *Italy* (EU:C:2007:250), this gives a lump sum of EUR 48 975 949. If judgment is delivered in the present case four months after the Opinion, a lump sum of EUR 51 163 189 might be imposed.

183. The question is whether that amount is appropriate.

184. In addition to the considerations which I have presented in connection with the periodic penalty payment, it is settled case-law that the 'conduct' of the Member State concerned must be taken into account when determining the amount of the lump sum payment. [99]

185. If that were to be understood to include the Member State's recognition that it is responsible for an infringement of Union law, Italy's criticism of the judgment in *Commission* v *Italy* (EU:C:2007:250) could be held against it. That criticism relates in particular to the evidence relied upon and the allegedly insufficient precision of the Court's findings.

96 — Judgments in *Commission* v *France* (EU:C:2005:444, paragraphs 80 to 86); *Commission* v *Greece* (EU:C:2009:428, paragraph 143); and *Commission* v *Spain* (EU:C:2012:781, paragraph 140).

97 — Judgments in *Commission* v *France* (EU:C:2008:695, paragraph 62); *Commission* v *Spain* (EU:C:2012:781, paragraph 141); and *Commission* v *Luxembourg* (EU:C:2013:773, paragraph 58).

98 — Judgments in *Commission* v *Spain* (EU:C:2012:781, paragraph 141); *Commission* v *Ireland* (EU:C:2012:827, paragraph 47); and *Commission* v *Sweden* (EU:C:2013:339, paragraph 40).

99 — See the references in footnote 97.

186. Nevertheless, this argument is the logical consequence of the legal position adopted by Italy. The principle of effective legal protection, which also benefits the Member States, prohibits penalties being increased simply because a Member State defends its legal standpoint, even where the Court does not agree with that standpoint. The situation may be different where a Member State relies on clearly absurd views and, by so doing, seeks merely to impede the proceedings. The legal positions adopted by Italy are, however, defensible, in particular because certain aspects of the judgment to be implemented require interpretation.

187. By contrast, account must in any event be taken of the shortcomings in Italy's cooperation with the Commission and the Court. [100] In this connection, it is particularly significant that Italy sought to provide comprehensive information only in its response to the reasoned opinion. In view of that fact, it was unsurprising that some of that information was erroneous and therefore required frequent corrections and additions, even in the course of the procedure before the Court. [101]

188. The Court has also made clear in this connection that, where a Member State repeatedly engages in unlawful conduct in a specific sector, this may be an indication that effective prevention of future repetition of similar infringements of Union law may require the adoption of a dissuasive measure, such as a lump sum payment. [102] The Court has already imposed sanctions on Italy in more than 20 cases for infringements of the law on waste. [103]

189. I therefore consider it to be appropriate to increase the lump sum in the present case by approximately EUR 9 million to EUR 60 million.

b) Case C-378/13, *Commission* v *Greece*

190. In the case of Greece, the basic flat-rate amount of EUR 220 should be multiplied by an ability to pay factor 'n' of 3.87 and a coefficient of seriousness of 7.5. This gives a daily amount of EUR 6 385.50. Multiplied by the 3 258 days since judgment was delivered in *Commission* v *Greece* (EU:C:2005:592), this comes to a lump sum of EUR 20 803 959 at the date of the delivery of this Opinion. If judgment were delivered in the present case four months later, that amount would have increased to EUR 21 570 219.

191. Greece's conduct cannot be criticised as far as cooperation with the Commission is concerned. However, account must be taken of the fact that sanctions have likewise been imposed on Greece on multiple occasions for issues relating to the law on waste. I would draw attention in particular to the first ever imposition of a penalty payment in relation to the illegal Kouroupitos landfill site on Crete. [104]

192. I therefore propose that a lump sum of EUR 22 million be imposed on Greece.

VI – **Costs**

193. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

100 — Judgment in *Commission* v *Greece* (EU:C:2011:196, paragraph 33).

101 — See above, point 47.

102 — Judgments in *Commission* v *France* (EU:C:2008:695, paragraph 69); *Commission* v *Italy* (EU:C:2011:740, paragraph 90); *Commission* v *Ireland* (EU:C:2012:834, paragraph 70); and *Commission* v *Spain* (EU:C:2014:316, paragraph 78).

103 — The first such judgment, *Commission* v *Italy* (30/81 to 34/81, EU:C:1981:317), concerned the failure to transpose various directives regarding the law on waste, and the latest, *Commission* v *Italy* (C-297/08, EU:C:2010:115) related to significant failings in waste management in Campania.

104 — Judgment in *Commission* v *Greece ('Kouroupitos')* (EU:C:2000:356).

194. In Case C-196/13, the Commission has applied for the Italian Republic to be ordered to pay the costs and the latter has been unsuccessful in the vast majority of its arguments. Where it has been successful, it failed to provide some of the relevant information during the pre-litigation procedure. It must therefore be ordered to pay all the costs of these proceedings. [105]

195. Greece must bear the costs of the proceedings in Case C-378/13 since it has been unsuccessful in all its arguments and submissions.

VII – **Conclusion**

196. In Case C-196/13, *Commission* v *Italy*, I therefore propose that the Court should:

(1) Declare that, by failing to adopt all the necessary measures to comply with the judgment in *Commission* v *Italy* (EU:C:2007:250) as at 30 September 2009, when the period prescribed by the European Commission in the reasoned opinion expired, the Italian Republic has failed to fulfil its obligations under Articles 4, 8 and 9 of Directive 75/442/EEC on waste in the version amended by Directive 91/156/EEC, Article 2(1) of Directive 91/689/EEC on hazardous waste, Article 14 of Directive 1999/31/EC on the landfill of waste and Article 260(1) TFEU;

(2) Order the Italian Republic to pay to the European Commission, into the 'European Union own resources' account, a daily periodic penalty payment of EUR 158 200 until the judgment in *Commission* v *Italy* (EU:C:2007:250) has been implemented in full. That basic amount should be reduced by EUR 2 100 each time Italy proves to the Commission that an illegal landfill which has been closed down and which contains hazardous waste has been cleaned up, by EUR 700 once it is proven that another landfill has been cleaned up, and by EUR 1 400 once it is proven that a landfill still in operation has been granted a new permit in accordance with Directive 1999/31/EC;

(3) Order the Italian Republic to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 60 million;

(4) Dismiss the action as to the remainder;

(5) Order the Italian Republic to pay the costs of the proceedings.

105 — See judgments in *Commission* v *Luxembourg* (C-32/05, EU:C:2006:749, paragraph 87), and *Commission* v *Spain* (C-151/12, EU:C:2013:690, paragraph 57).

197. In Case C-378/13, *Commission* v *Greece*, the Court should:

(1) Declare that, by failing to adopt all the necessary measures to comply with the judgment in *Commission* v *Greece* (EU:C:2005:592) as at 29 December 2010, when the permit prescribed by the European Commission in the reasoned opinion expired, the Hellenic Republic has failed to fulfil its obligations under Articles 4, 8 and 9 of Directive 75/442/EEC on waste in the version amended by Directive 91/156/EEC and Article 260(1) TFEU;

(2) Order the Hellenic Republic to pay to the European Commission, into the 'European Union own resources' account, a daily periodic penalty payment of EUR 54 450 until the judgment in *Commission* v *Greece* (EU:C:2005:592) has been implemented in full. That basic amount should be reduced by EUR 150 each time Greece proves to the Commission that an illegal landfill has been closed down and that sufficient capacities have been provided, and used, for the lawful recovery or disposal of waste, or that an illegal landfill which has already been closed down has been cleaned up.

(3) Order the Hellenic Republic to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 22 million.

(4) Order the Hellenic Republic to pay the costs of the proceedings.