JUDGMENT OF THE COURT (Full Court)

25 November 2003 *

In Case C-278/01,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION, first, for a declaration that, by not taking the necessary measures to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1), notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not complied with the judgment of the Court of Justice in Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, and has accordingly failed to fulfil its obligations under Article 228 EC and, second, for

* Language of the case: Spanish.

an order that the Kingdom of Spain be required to pay to the Commission, into the account 'European Community own resources', a penalty payment of EUR 45 600 per day of delay in adopting the measures necessary to comply with the said judgment in *Commission* v *Spain*, from the date on which judgment is delivered in this case until the date on which the said judgment in *Commission* v *Spain* is complied with,

THE COURT (Full Court),

composed of: V. Skouris, President, C.W.A. Timmermans, C. Gulmann and J.N. Cunha Rodrigues (Rapporteur) (Presidents of Chambers), D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2003,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 13 July 2001, the Commission of the European Communities brought an action under Article 228 EC, first, for a declaration that, by not taking the necessary measures to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p.1, hereinafter 'the Directive'), notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not complied with the judgment of the Court of Justice in Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, and has accordingly failed to fulfil its obligations under Article 228 EC and, second, for an order that the Kingdom of Spain be required to pay to the Commission, into the account 'European Community own resources', a penalty payment of EUR 45 600 per day of delay in adopting the necessary measures to comply with the said judgment in *Commission* v *Spain*, from the date on which judgment is delivered in this case until the date on which the said judgment in *Commission* v *Spain* is complied with.

Community legislation

2 The purpose of the Directive, as stated in the first recital of the preamble thereto, is to protect the environment and public health by reducing the pollution of bathing water and protecting such water against further deterioration.

3 In Articles 2 and 3, the Directive requires the Member States to set values applicable to bathing water for the physical, chemical and microbiological parameters given in the Annex thereto, which may not be less stringent than those given in column 1 of that Annex.

4 Under Article 4(1) of the Directive, the quality of bathing water is to conform to the limit values set in accordance with Article 3 within 10 years following the notification of the Directive.

5 Since Article 395 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23) does not provide for any derogation from the Directive in favour of the Kingdom of Spain, the quality of Spanish bathing water should have conformed to the limit values set by the Directive as from 1 January 1986.

6 Article 13 of the Directive, as amended by Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment (OJ 1991 L 377, p. 48), provides as follows:

'Every year, and for the first time by 31 December 1993, the Member States shall send to the Commission a report on the implementation of this Directive in the current year. The report shall be drawn up on the basis of a questionnaire or outline drafted by the Commission in accordance with the procedure laid down in Article 6 of Directive 91/692/EEC. The questionnaire or outline shall be sent to the Member States six months before the start of the period covered by the report. The report shall be made to the Commission before the end of the year in question.

The Commission shall publish a Community report on the implementation of the Directive within four months of receiving the reports from the Member States.'

The judgment in *Commission* v *Spain*

7 In its judgment in the case of *Commission* v *Spain*, the Court of Justice declared that, by failing to take all necessary measures to ensure that the quality of inshore bathing water in Spain conforms to the limit values set in accordance with Article 3 of the Directive, the Kingdom of Spain had failed to fulfil its obligations under Article 4 thereof.

The pre-litigation procedure

8 By letter of 17 March 1998, the Commission drew the Spanish authorities' attention to the need to comply with the obligations ensuing from the judgment in *Commission* v *Spain*.

9 In response, by letters of 5, 11 and 19 June 1998, 5 January and 12 March 1999, the Spanish authorities notified the Commission of the measures adopted or in the course of being adopted to comply with that judgment. These included implementation of certain urban waste water purification projects undertaken in the context of the 1995 national purification plan, the supervision, monitoring and imposition of penalties for discharge and the prohibition on bathing in areas identified as not in conformity with the requirements, the adoption of certain specific measures and the launch in 1999 of a study of bathing areas, the

discharge affecting the various areas, the qualitative characteristics of bathing water and the effect of discharge in each area and the solutions provided for and proposed depending on the conclusions reached.

10 On 24 January 2000 the Commission sent to the Kingdom of Spain a letter of formal notice under Article 228 EC, taking the view that it had not taken the necessary measures to comply with the judgment in *Commission* v *Spain*.

11 By letter of 26 May 2000 the Spanish authorities informed the Commission that the Ministry of the Environment had ordered a study to be carried out on the state of inshore waters designated for bathing in accordance with the Directive, a study which, according to those authorities, was to be completed in the course of the year 2000. The Spanish authorities also set out the objectives and scope of the study and a timetable of action to be taken to ensure compliance with the Directive which, according to estimates, was to be completed in 2005.

12 On 27 July 2000, taking the view that those measures did not demonstrate that the infringement had been brought to an end, the Commission sent the Kingdom of Spain a reasoned opinion under Article 228 EC. In that opinion it concluded that, having failed to fulfil its obligations under Article 4 of the Directive by not adopting the measures necessary to ensure that the quality of inshore bathing water in Spain conformed to the limit values set in accordance with Article 3 of the Directive, the Kingdom of Spain had failed to comply with the judgment in *Commission* v *Spain* and had accordingly failed to fulfil its obligations under Article 228 EC. The Commission drew Spain's attention to the fact that if the

case were brought before the Court of Justice, it would suggest that a penalty payment be imposed. It set a time-limit of two months for the Kingdom of Spain to adopt the measures necessary to comply with the reasoned opinion.

13 In response to that opinion, the Spanish Government sent two letters dated 26 and 27 September 2000 informing the Commission that there was a plan of action, notifying it of the extent of compliance of the quality of bathing water during the 1998 and 1999 bathing seasons and of the implementation of a national plan for the cleansing and purifying of urban waste water.

14 A meeting was held on 11 January 2001 between the Spanish Ministry of the Environment and the Commission's Directorate-General for the Environment in order to allow the Spanish Government to supplement the information relating to those measures.

15 On 16 January 2001 the Spanish Minister for the Environment sent to the Member of the Commission responsible for the environment a letter under cover of which he transmitted a new plan of action and undertook to complete the necessary steps in 2003.

16 On 26 March 2001 the Spanish authorities sent to the Commission a report drawn up by the Ministry of the Environment on progress on the action taken to comply with the judgment in *Commission* v *Spain*, together with a letter from the Secretary of State responsible for waters and coasts.

17 Taking the view that the Kingdom of Spain had not complied with that judgment, the Commission decided to bring this action.

Forms of order sought

18 The Commission claims that the Court should:

— declare that, by not taking the necessary measures to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of the Directive, notwithstanding its obligations under Article 4 of the Directive, the Kingdom of Spain has not complied with the judgment in *Commission* v *Spain* and has accordingly failed to fulfil its obligations under Article 228 EC;

— order the Kingdom of Spain to pay to the Commission, into its 'European Community own resources' account, a penalty payment of EUR 45 600 per day of delay in adopting the measures necessary to comply with the judgment in *Commission* v *Spain*, from the date on which judgment is delivered in this case until the date on which the judgment in *Commission* v *Spain* is implemented;

— order the Kingdom of Spain to pay the costs.

19 The Kingdom of Spain contends that the Court should:

— dismiss the action in its entirety;

— in the alternative, dismiss the application for imposition of daily penalty payments:

— in the further alternative, order that the daily penalty payment should not exceed EUR 11 400;

— order the Commission to pay the costs in any event.

Substance

Arguments of the parties

20 In its application the Commission argues, with regard to the quality of inshore bathing water in Spanish territory, that the percentage of bathing areas conforming to the mandatory values in the Directive was 73% for the 1998 bathing season, 76.5% for the 1999 bathing season and 79.2% for the 2000 bathing season.

21 During the course of the proceedings it also informed the Court that that percentage was 80% for the 2001 bathing season and 85.1% for the 2002 bathing season.

22 The Kingdom of Spain does not contest those figures which, moreover, result from reports communicated by it to the Commission under Article 13 of the Directive as amended.

23 The Kingdom of Spain none the less considers that the action ought to be dismissed on the ground that the Commission did not wait for a sufficient period of time before concluding that the judgment in *Commission* v *Spain* had not been

complied with. In its view, a longer period than that granted by the Commission, that is to say from 12 February 1998, the date on which the judgment was delivered, until 27 September 2000, the date on which the period laid down in the reasoned opinion issued in this case expired, was necessary to comply with the judgment fully, having regard to the particular features of the Directive and of Spanish waters.

24 In most cases several bathing seasons are necessary to determine the true sources of pollution and, once the problem has been uncovered, plans of action, or even long-term programs for improving agricultural practices must be drawn up and implemented to resolve it. The solution to the problems of bathing water quality is achieved by undertaking works, sometimes major, that necessitate strictly-defined steps under the Community directives on public procurement. Furthermore account must be taken of the large number of bathing areas declared by the Spanish authorities and of the fact that water courses in Spain do not have a significant rate of flow compared to water courses in the majority of the other Member States. Consequently the Commission should have waited until the action timetable transmitted to it in response to the letter of formal notice had been fully implemented, which was initially announced for the end of 2005, as indicated in the letter of 26 May 2000 from the Spanish authorities, and, subsequently, for 2003, as stated in the letter of 16 January 2001 from the Spanish Minister for the Environment.

Findings of the Court

25 In its judgment in *Commission* v *Spain* the Court found that, by failing to take all necessary measures to ensure that the quality of inshore bathing water in Spain conforms to the limit values set in accordance with Article 3 of the directive, the Kingdom of Spain had failed to fulfil its obligations under Article 4 thereof.

26 Under Article 228(1) EC the Kingdom of Spain was required to take the necessary measures to comply with that judgment.

27 Article 228 EC does not specify the period within which the judgment must be complied with. However, in accordance with settled case-law, the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 82, and case-law cited).

28 According to Article 228(2) EC, if the Member State concerned has not taken the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission in its reasoned opinion, the latter may bring the case before the Court of Justice, specifying the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

29 In order to do this, the Commission must assess the circumstances as they appear on the expiry of the time-limit laid down in its reasoned opinion, issued on the basis of the first subparagraph of Article 228(2) EC.

30 It should be noted that there were three bathing seasons between the delivery of the judgment in *Commission* v *Spain* and expiry of the time-limit laid down in the reasoned opinion in this case. Even if compliance with that judgment calls for complex and long-term operations, as the Spanish Government claims, a period of that length must be regarded as sufficient to adopt the measures needed to comply with the Court's judgment under Article 228 EC.

31 The considerations relied on by the Spanish Government relating to the complexity and length of operations necessary to comply with the judgment in *Commission* v *Spain* cannot therefore lead to this application being dismissed.

32 As regards the measures taken by the Kingdom of Spain with a view to complying with that judgment, the most recent statistics communicated to the Court of Justice indicate that there has been some progress in the rate of compliance of the bathing water in question with the mandatory values set in accordance with the Directive, reaching 85.1% for the 2002 bathing season. None the less, it is common ground that inshore bathing water in Spanish territory has not yet been brought into conformity with those mandatory values.

33 The Commission also observed that the Spanish Government has, over the years, reduced the number of bathing areas in inshore bathing water without justifying that reduction. According to the Commission, 39 areas were eliminated in 1998, 10 in 1999 and 14 in 2000. The numbers of bathing areas in inshore bathing water decreased from 302 in 1996 to 202 in 2000. The Kingdom of Spain is therefore attempting to comply with the judgment in *Commission* v *Spain* not by improving the quality of that water but by contriving to reduce the number of bathing areas.

34 The merits of that argument will not be considered. Suffice it to observe that it is not relevant to a finding of failure to fulfil obligations in this case because the Commission based this action on figures appearing in its annual reports and reproduced at paragraphs 20 and 21 of this judgment, which do not include areas which have been removed from the list of bathing areas.

35 In the light of all the foregoing considerations, it must be held that, by not taking the measures necessary to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of the Directive, notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not taken all the measures necessary to comply with the Court's judgment in *Commission* v *Spain* and has accordingly failed to fulfil its obligations under Article 228 EC.

Determination of the penalty payment

Arguments of the parties

36 On the basis of the calculation method defined in its communications 96/C 242/07 of 21 August 1996 on applying Article [228] of the Treaty (OJ 1996 C 242, p. 6) and 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2), the Commission proposes that the Court impose on the Kingdom of Spain a penalty payment of EUR 45 600 per day of delay by way of penalty for non-compliance with the judgment in *Commission* v *Spain*, from the date of delivery of the judgment in this case until the date on which the judgment in *Commission* v *Spain* is complied with.

37 The Commission considers that an order for a penalty payment is the most appropriate instrument for putting an end as soon as possible to an infringement which has been established and that, in this case, a penalty payment of EUR 45 600 per day of delay is commensurate with the seriousness and length of the infringement, due regard being had to the need to ensure that the penalty is effective. That sum is calculated by multiplying a uniform base of EUR 500 by a coefficient of 4 (on a scale of 1 to 20) for the seriousness of the infringement, a coefficient of 2 (on a scale of 1 to 3) for the duration of the infringement and a

coefficient of 11.4 (based on the gross domestic product of the Member State concerned and the weighting of its votes in the Council), which is deemed to reflect the ability of that Member State to pay.

38 The Kingdom of Spain argues that a daily penalty payment is not a suitable mechanism to achieve compliance with the judgment in *Commission* v *Spain*. Such a penalty payment would not cease to be applicable if the Member State adopted all the measures necessary to comply with the judgment. It is necessary to wait until the information relating to the following bathing season is available before assessing whether the result obtained is that desired. The Commission should have examined whether it was expedient to propose an annual penalty to be paid when the results for each bathing season were available. There is no sense in imposing a daily penalty payment to enforce compliance with an obligation which can only be achieved from one year to the next.

39 In the alternative the Kingdom of Spain argues that the amount of the penalty proposed is in any event excessive. As regards the coefficient for the duration of the infringement, the small number of bathing seasons since the judgment in *Commission* v *Spain* was delivered would justify a coefficient not of 2 but of 1. In relation to the coefficient for the seriousness of the infringement, account should be taken of the fact that, when the application was filed in this case, the percentage of bathing zones in inshore bathing water in Spain conforming to the mandatory values in the Directive had reached 79.2%. Regard must also be had to the fact that the Kingdom of Spain did not benefit from the 10 year implementation period available to the other Member States. In view of those two factors it is appropriate for the coefficient for the seriousness of the infringement to be reduced from 4 to 2. Applying those two corrections to the calculation of the daily penalty payment, the amount of the payment would be reduced to EUR 11 400.

Findings of the Court

40 Having found that the Kingdom of Spain has not complied with its judgment in *Commission* v *Spain*, the Court may, under the third subparagraph of Article 228(2) EC, impose on it a lump sum or penalty payment.

41 In that connection it must be pointed out that the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. In exercising its discretion, it is for the Court to fix the lump sum or penalty payment that is appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the Member State concerned (see *Commission* v *Greece*, cited above, paragraphs 89 and 90).

42 Clearly a penalty payment is likely to encourage the Member State in infringement to put an end as soon as possible to the breach that has been found. For the purposes of determining the penalty payment in this case it is, first of all, necessary to consider the frequency of the proposed penalty payment; secondly, whether its amount should stay the same or decrease; and thirdly, the exact calculation of its amount.

43 As regards the frequency of the proposed penalty payment in this case, it should be noted that, under Article 13 of the Directive, as amended, the state of bathing water is assessed on an annual basis. Pursuant to that provision the Member States are required to send to the Commission a report on the implementation of the Directive every year. The report must be made to the Commission before the end of the year in question.

44 It follows that any finding that the infringement has been brought to an end can only occur annually when those reports are submitted.

45 A daily penalty payment could therefore be due for a period during which the requirements imposed by the Directive have already been met and even though it is only possible to ascertain subsequently that the Directive has been implemented. The Member State could therefore be required to pay the penalty for periods in which the infringement has in fact ended.

46 The penalty payment must therefore be imposed not on a daily basis but on an annual basis, following submission of the annual report relating to the implementation of the Directive by the Member State concerned.

47 With regard to the unchanging nature of the amount of the penalty payment proposed by the Commission, it must be observed that it is particularly difficult for the Member States to achieve complete implementation of the Directive, as the Advocate General has pointed out at points 66 and 67 of his Opinion.

48 In the light of that particular factor, it is conceivable that the defendant Member State might manage significantly to increase the extent of its implementation of the Directive but not to implement it fully in the short term. If the amount of the penalty payment were to stay the same it would continue to be due in its entirety for as long as the Member State concerned had not achieved complete implementation of the Directive.

49 In those circumstances, a penalty which does not take account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found.

50 In order for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the breach which has been found, the amount must take account of progress made by the defendant Member State in complying with the judgment in *Commission* v *Spain*. To that end it is necessary to require that Member State to pay annually an amount calculated according to the percentage of bathing areas in Spanish inshore waters which do not yet conform to the mandatory values laid down under the Directive.

51 The payment will be due from the time when the quality of bathing water achieved in the first bathing season following delivery of this judgment is ascertained and, if appropriate, at the time when it is subsequently ascertained annually.

52 As regards the amount of the fine, the basic criteria which must be taken into account are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay (see *Commission* v *Greece*, paragraph 92).

53 With regard to the duration of the infringement, it must be acknowledged that compliance with the judgment in *Commission* v *Spain* by the Member State concerned is difficult to achieve in a short time. In this case such compliance presupposes detection of the problems, drawing up plans of action and implementing those plans. In that context, account must amongst other things be taken of the fact that the Community directives on public procurement require, inter alia, that the specifications be drawn up exhaustively before the public procurement procedure is initiated and they cannot be amended

subsequently. Furthermore, the directives require the awarding authorities to comply with certain time-limits which may not be reduced, and they strictly limit the possibility of urgent procedures.

54 Having regard to those considerations, it must be concluded that the coefficient of 2 (on a scale of 1 to 3) proposed by the Commission to reflect the duration of the infringement is too harsh in this case and that a coefficient of 1.5 is more appropriate.

55 With regard to the seriousness of the breach, the Spanish Government's argument that account ought to be taken, in the fixing of the penalty payment, of the fact that 79.2% of the bathing areas concerned already conformed to the limit values in the Directive at the time when this action was brought must be rejected. It is clear from the file in the case that in its proposal the Commission has taken into consideration the extent to which the Directive has been implemented by the Spanish authorities by improving the rate of conformity of the waters in question from 54.5% in 1992 to 79.2% in 2000.

56 The Spanish Government's argument that it was unable to take advantage of the 10 year period for implementing the Directive available to the other Member States must also be rejected. It was open to the Kingdom of Spain to request a transitional period for application of the Directive when it acceded to the European Communities. Since it did not make any such request it cannot now rely on its failure to do so to claim a reduction in the penalty payment.

57 It must further be observed that the purpose of bringing bathing water into conformity with the limit values of the Directive is to protect public health and the environment. In so far as the breach found at paragraph 35 of this judgment

can endanger human health and damage the environment it is clearly of significance.

58 Having regard to those factors, the coefficient of 4 (on a scale of 1 to 20) proposed by the Commission seems adequately to reflect the seriousness of the infringement.

59 The Commission's proposal to multiply a basic amount by a coefficient of 11.4 based on the gross domestic product of the Kingdom of Spain and on the number of votes it has in the Council is an appropriate way of reflecting that Member State's ability to pay, while keeping the variation between Member States within a reasonable range (see *Commission* v *Greece*, paragraph 88).

60 Multiplying the basic amount of EUR 500 by a coefficient of 11.4 (for ability to pay), 4 (for the seriousness of the breach) and 1.5 (for the duration of the breach) gives an amount of EUR 34 200 per day, or EUR 12 483 000 per year. That amount is based on the consideration that 20% of the bathing areas concerned did not conform to the limit values in the Directive; it must therefore be divided by 20, to obtain an amount corresponding to 1% of areas not in conformity, that is, EUR 624 150 per year.

61 The particular circumstances of the case will therefore be properly taken into account if the amount of the penalty payment is fixed at EUR 624 150 per year and per 1% of bathing areas which do not conform to the limit values in the Directive.

62 Consequently, the Kingdom of Spain must be ordered to pay to the Commission, into the account 'European Community own resources', a penalty payment of EUR 624 150 per year and per 1% of bathing areas in Spanish inshore waters which have been found not to conform to the limit values laid down under the Directive for the year in question, as from the time when the quality of bathing water achieved in the first bathing season following delivery of this judgment is ascertained until the year in which the judgment in *Commission* v *Spain* is fully complied with.

Costs

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

On those grounds,

THE COURT (Full Court),

hereby:

1. **Declares that, by not taking the measures necessary to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set**

in accordance with Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not taken all the measures necessary to comply with the Court's judgment of 12 February 1998 in Case C-92/96 *Commission* v *Spain* and has accordingly failed to fulfil its obligations under Article 228 EC;

2. Orders the Kingdom of Spain to pay to the Commission of the European Communities, into the account 'European Community own resources', a penalty payment of EUR 624 150 per year and per 1% of bathing areas in Spanish inshore waters which have been found not to conform to the limit values laid down under Directive 76/160 for the year in question, as from the time when the quality of bathing water achieved in the first bathing season following delivery of this judgment is ascertained until the year in which the judgment in *Commission* v *Spain* is fully complied with;

3. Orders the Kingdom of Spain to pay the costs.

Skouris Timmermans Gulmann

Cunha Rodrigues Edward La Pergola

Puissochet Schintgen Macken

Colneric von Bahr

Delivered in open court in Luxembourg on 25 November 2003.

R. Grass

Registrar

V. Skouris

President