OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 9 December 1999 *

1. In the present proceedings, the Commission is seeking a declaration that Greece has not complied with the judgment of the Court of Justice of 23 March 1995 in Case C-365/93 between the same two parties, [1] and has suggested that the Court impose a penalty payment of EUR 41 000 per day on the defendant Member State until it has so complied.

I — Procedural background

2. In the original infringement case, the Commission had sought a declaration that by failing to adopt, and by failing to communicate to it within the prescribed period, the laws, regulations and administrative provisions needed to comply fully with Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, [2] Greece had failed to comply with its obligations under the EEC Treaty. In its defence in that case, Greece argued that a draft Presidential Decree which would fully transpose the Directive had been submitted to the President of the Republic for signature, that the Directive had already been transposed as regards the health and welfare professions, lawyers and auditors, and that the existing services and procedures were sufficient to enable all the applications from non-Greek Community nationals to be dealt with properly.

3. The Court expressly rejected this defence. It held that '[since] the directive was not fully implemented within the period laid down in Article 12 of the directive the failure to comply with Treaty obligations alleged by the Commission must be confirmed', [3] and granted the Commission the declaration it had requested.

4. As it had received no communication, following the judgment, from the Greek Government of the adoption of the measures required to comply with it, the Commission sent Greece a letter of formal notice on 2 May 1996. In the absence of any response, it sent Greece a reasoned opinion on 7 July 1997, setting a two-

* Original language: English.

1 — [1995] ECR I-499, hereinafter 'the original infringement case'.

2 — OJ 1989 L 19, p. 16, hereinafter 'the Directive'.

3 — Case C-365/93, cited in footnote 1 above, paragraph 11.

month deadline for compliance. In that opinion, it expressly drew attention to the possibility that a financial sanction could be imposed in the case of continued non-compliance. The Commission initiated the present proceedings pursuant to Article 171 of the EC Treaty as amended in crucial respects by the Treaty on European Union (now Article 228 EC).

5. The Commission, as required by Article 171(2), second indent, has proposed a penalty payment; the amount suggested is EUR 41 000 per day, being the product of the uniform flat rate amount (EUR 500) and the gravity and duration coefficients (10 and 2 respectively), adjusted to take account of Greece's ability to pay (4.1). The penalty should, in its view, be imposed as from the date of the judgment in the present proceedings until the measures are adopted to comply with it.

II — Analysis

(a) *Admissibility*

6. Before turning to the substantive issues in the case, I must deal with a point on admissibility. Greece claims that the omission of any mention of the penalty payment in the form of order sought renders the application vague on this point and hence inadmissible. The Commission has, as required by Article 171(2), clearly and unambiguously specified in its application 'the amount of the ... penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances'. Most of its application is devoted to explaining how it reached a figure of EUR 41 000 per day in this case. The form of order sought should be interpreted in the light of the submissions of the party concerned.[4] The Commission has indicated its views on the amount of the penalty payment with sufficient precision to enable Greece to defend its own position and the Court to come to judgment on the matter. I would therefore reject the argument on admissibility.

(b) *The defendant's position*

7. On the substance Greece admits that the Directive has not been fully transposed. It claims, none the less, that a wide range of important professional activities is already covered by a system of recognition of qualifications awarded abroad, and that this demonstrates its respect for the fundamental principles of the free movement of persons and of the relevant Community

4 — Joined Cases 46/59 and 47/59 *Meroni* v *High Authority* [1962] ECR 411, at pp. 419 and 420.

rules. The delay in the implementation of the general system is, it says, due to objective difficulties arising from the differences between the Member States in the organisation of certain professions. A draft Presidential Decree is about to be signed by the competent ministers.

8. As to the amount of the penalty payment, Greece claims only that the Commission has not taken account of the partial transposition of the Directive, or of the fact that there already exist systems, rules and mechanisms which allow the recognition of diplomas and access to legally protected professions, albeit not within the formal framework of the Directive. It does not, otherwise, address either the principles upon which the penalty payment is calculated or the correctness of their application to the circumstances of the case.

(c) *Article 171 of the EC Treaty as amended — some remarks*

9. I have discussed the procedure set out in Article 171 in an earlier Opinion. By reason of the transitional content of the facts, the Court did not have to rule on the matter. [5] More to the point, judgment is still pending in another case, in which I have the benefit of considering the Opinion of my learned colleague Mr Dámaso Ruiz-Jarabo Colomer. [6]

10. A few preliminary remarks may therefore be in order, before I examine the application of this provision proposed by the Commission in the present proceedings.

11. The context in which this provision was introduced into the EC Treaty may be gleaned from a Commission staff paper on *Compliance with judgments of the Court of Justice*, published with the Commission's contributions to the Intergovernmental Conference which drafted the Treaty on European Union. Quoting from an earlier Commission opinion, the authors note that 'in the absence of sanctions, Court of Justice rulings are not always implemented ... [and that the] correct application of Community law suffers from the all too frequent reluctance of Member States to implement Court judgments declaring that they have failed to fulfil their obligations, even though Article 171 of the EEC Treaty requires them to comply'. [7] A number of different solutions are examined, including the possibility of granting the Court the power to inflict financial penalties through the withholding of Community funds or the imposition of fines, though the authors point out that 'the Member States which are the most frequent offenders are also

5 — Case C-334/94 *Commission* v *France* [1996] ECR I-1307.

6 — Case C-387/97 *Commission* v *Greece*.

7 — *Bulletin of the EC*, Supplement 2/91, p. 151.

those which suffer most from difficult economic and financial situations and need Community assistance'. The granting to the Court of 'the power to impose periodic penalty payments on Member States as an incentive to come into line' is also canvassed; while the authors note that this could give rise to the same practical difficulties as arise in respect of financial penalties, they estimate that 'the psychological effect on the national authorities of the recalcitrant Member State could be quite salutary'.

12. While the Treaty on European Union made important amendments to Article 171, the function of that Article and its Treaty content remain essentially unaltered. Articles 169, 170 and 171 of the EC Treaty (now Articles 226 EC, 227 EC and 228 EC) provide mechanisms for ensuring compliance by Member States with their Treaty obligations. The pivotal provision is Article 169. It assigns to the Commission the function, in exercising its supervisory duties under Article 155 of the EC Treaty (now Article 211 EC), of assuring respect by Member States of those obligations.

13. Prior to the amendment of these provisions, the failure of a Member State to take the necessary measures to comply with a judgment of the Court had the same quality as any other Member State breach. It was a breach of the Treaty, specifically of Article 171(1). It was amenable to the Court's jurisdiction, at the sole instance of the Commission via Article 169 or of a Member State via Article 170. In either event a reasoned opinion of the Commission was — as it remains — a precondition.

14. The change made by the Treaty on European Union was twofold. It established an independent judicial jurisdiction under Article 171 for what was previously justiciable only under Article 169. It supplemented this remedy, however, with the new judicial power to impose a penalty. Under the first subparagraph of Article 171(2), the Commission may initiate a second infringement action, subject to one substantive condition — that it consider that the Member State has failed to comply with the first judgment — and two procedural conditions, that the Member State be given the opportunity to submit its observations and that the Commission issue 'a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice'.

15. As under standard infringement proceedings, the Commission sets a deadline for compliance with the judgment in its reasoned opinion, and may, but is not obliged to, bring the matter to the Court

of Justice. Should it do so, however, the Commission is obliged [8] in addition to 'specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which [the Commission] considers appropriate in the circumstances' (second subparagraph of Article 171(2)). The third subparagraph of Article 171(2) provides as follows:

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

16. The new procedure pursuant to Article 171 thus replicates the essential features of Article 169. The right of action is reserved to the Commission alone. The fulfilment of the additional requirement, that the Commission specify 'the points on which the Member State concerned has not complied with the judgment of the Court of Justice', before the Court resorts to the powers made available to it by Article 171(2), could be particularly important in the context of Article 171 proceedings, where a Member State may have sought to comply, in whole or in part, with the judgment, though without having succeeded to the Commission's entire satisfaction.

17. In order to implement these provisions, the Commission adopted a Memorandum No 96/C 242/07 and a Communication No 97/C 63/02, which were published on 21 August 1996 and 28 February 1997 respectively. [9] In the former, the Commission took the view that '[the] basic object of the whole infringement procedure is *to secure compliance as rapidly as possible* and the Commission considers that *a penalty payment* is the most appropriate instrument for achieving it'. [10] In order to assess the amount of the penalty, it adopts three criteria: the seriousness of the infringement which gave rise to the first judgment, the duration of the failure to comply with that judgment, and the need to ensure that the penalty itself is a deterrent to further infringements. Seriousness is further defined by taking account of the importance of the Community provisions which have been infringed (for example, 'attacks on fundamental rights and the four freedoms enshrined in the Treaty should be regarded as serious'), and the effects of the infringement on general or particular interests (such as a loss of own resources, the damaging effects of pollution, or any impact on the functioning of the Community). The duration is calculated from the date of the original judgment and takes account of any action or omission on the part of the Member State which contributes to the lengthening of the procedure, such as a failure to respond to Commission communications.

18. Communication No 97/C 63/02 specifies the mathematical variables used in

8 — The Commission considers that it need not ask for a penalty in every case, but that it must state its reasons for refraining from so doing (Memorandum No 96/C 242/07, cited in footnote 9 below, paragraph 3).

9 — Respectively OJ 1996 C 242, p. 6 and OJ 1997 C 63, p. 2.

10 — Memorandum No 96/C 242/07, cited in footnote 9 above, paragraph 4 (emphasis in original).

calculating the amount of a penalty payment: the flat-rate amount (EUR 500), the seriousness coefficient (ranging from 1 to 20), the duration coefficient (ranging from 1 to 3), and a factor **n** intended to reflect the Member State's ability to pay while ensuring the penalty has a deterrent effect. The factor **n** is 'a geometric mean based on a Member State's gross domestic product (GDP) and the weighting of [its] votes in the Council';[11] it goes from 26.4 (Germany) to 1 (Luxembourg), with Greece being assessed at 4.1.

19. A number of conclusions may be drawn from these provisions. In the first place, the infringement in question in Article 171(2) proceedings is no longer merely the original infringement of the Treaty found by the Court in accordance with the procedure under Article 169 or Article 170 (hereinafter 'the underlying infringement'), but is treated as a compound infringement encompassing the original infringement within breach of the specific obligation under Article 171(1) to comply with the Court's judgment. Secondly, the object of the imposition of financial sanctions is, in the view of the Commission, either to induce the Member State to comply with the first judgment as soon as possible and hence to bring the underlying infringement to an end too, or to reduce the likelihood of such infringements recurring. Thirdly, while obliged to initiate the Article 171(2) procedure, the Commission enjoys a wide discretion on two essential matters: the decision to initiate proceedings before the Court, and the assessment of 'the amount of the lump sum or penalty payment ... which it considers appropriate in the circumstances'.

20. Article 171 has, in my view, even as amended, the same character and function as Article 169 and should be similarly interpreted. This, as I will explain, has a bearing on the legal value to be attributed to any proposal for a lump sum or penalty payment made by the Commission in its application as required by the second subparagraph of Article 171(2). I will now discuss this issue.

(d) *The scope of the Court's discretion in imposing a financial sanction*

21. At the hearing in this case, the agent for the Commission contended that the Court has a limited competence to review the Commission's evaluation both on the question of whether a financial sanction should be imposed, and as regards the nature and amount of any such sanction. In support of this proposition, it referred to the judgment in *R* v *MAFF and Others, ex parte National Farmers' Union and Others*,[12] and the Opinion of 28 September 1999 of Advocate General Ruiz-Jarabo Colomer in Case C-387/97.[13]

11 — Communication No 97/C 63/02, cited in footnote 9 above, section 4.

12 — Case C-157/96 [1998] ECR I-2211 (hereinafter '*National Farmers' Union*').

13 — Cited in footnote 6 above.

22. The legal character of the lump sum or penalty payment proposed by the Commission should, in my view, be deduced from its place in the general scheme of Articles 169 to 171 as I have sought to describe it (paragraphs 10 to 16 above).

23. The Commission, as is well established, has the burden of proof of any infringement it alleges against a Member State within the framework of Article 169. It must establish each aspect of its claim. No presumption is made against the defendant Member State. [14]

24. That burden of proof lies upon the Commission as much in respect of any failure to comply with a Court judgment pursuant to Article 171(1) as it does in respect of any other Treaty infringement. The creation of a new procedural remedy by amendment of Article 171(2) does not change that principle. If anything it reinforces it by obliging the Commission, in its reasoned opinion, to specify the points of non-compliance alleged. There is no obvious reason for a departure from that principle in respect of the lump sum or penalty payment which the Commission specifies and 'which it considers appropriate in the circumstances'.

14 — See, for example, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6.

25. I do not consider, therefore, that the Court is bound by the Commission's views in deciding whether or not to impose a financial sanction, in choosing the sanction, or in fixing the amount thereof. The wording of Article 171(2) contains nothing to justify the restrictive interpretation suggested by the Commission. While the second subparagraph of this provision obliges the Commission to 'specify the amount ... it considers appropriate', the third subparagraph makes no reference to the amount so specified. The Court *may*, if it finds the infringement proved, 'impose a lump sum or penalty payment'. These words do not limit the judicial discretion of the Court and, in particular, do not limit it to the amount proposed by the Commission. Unlike, for example, Title IV of the Protocol on the Statute of the Court of Justice of the EC which imposes a number of substantive restrictions on the Court's jurisdiction in dealing with appeals from the Court of First Instance, Article 171(2) imposes no such material limitations on the competence of the Court.

26. Nor do I consider the Commission's interpretation to be consistent with the general scheme or objective of this provision. On the contrary, as the obligation which gives rise to the liability to pay a financial sanction is principally the failure to comply with a judgment of the Court rather than the simple underlying breach of the Treaty which had given rise to the first infringement action, it is appropriate that the Court, rather than the Commission, should enjoy a wide discretion in deciding on the imposition of a financial sanction. That the Commission should be given the duty to propose a figure reflects in particular the necessity, which is not contested

by any of the parties and which I would in principle accept, that the Court take into account the ability of a Member State to pay, an assessment which requires the evaluation of data to which the Commission must be assumed to have access.

27. The Commission's reference to *National Farmers' Union* does not appear to me to be pertinent. Certainly the Court recognised in this judgment that, in areas where the Commission does enjoy a wide measure of discretion, its power to review Commission decisions is limited. [15] However, the Commission has no decision-making power in the matter of financial sanctions under Article 171. Its duty is placed in the litigious framework of Article 171. It makes a proposal for the consideration of the Court. Moreover, in *National Farmers' Union* the contested Commission decision was a safeguard measure adopted under legislative provisions drafted in wide terms, rather than the imposition of a sanction against a Member State as is here suggested.

28. I am conscious that my colleague, Advocate General Ruiz-Jarabo Colomer, takes the view that the role of the Court is in effect analogous to that which it plays in exercising judicial review of a decision adopted by a Community institution requiring the evaluation of a complex situation. [16] However, on the view I take, the Commission's proposal represents a procedural step, indeed an essential procedural requirement, in the process established by Article 171. It is not, however, a matter to which the canons of judicial review of binding legal acts should be applied any more than, for example, the reasoned opinion of the Commission in infringement proceedings.

29. I do not think that the interpretation I have proposed would reduce the role of the Commission to that of a simple *amicus curiae*; the Commission retains its unfettered discretion as to whether to initiate the Article 171 procedure and, by means of its reasoned opinion, fixes the material parameters of the failure of compliance which the Court must examine. The Commission thus exercises, in effect, the authority to investigate possible breaches of the duty of compliance with Court judgments, and to pursue them before the Court. I can, however, see nothing in the relevant provisions which would justify elevating the Commission, as regards the determination of a financial penalty, from the status of a party in this procedure to one approaching that of a court of first instance.

30. Nor do I agree that the decisions to impose a sanction and to determine the amount thereof are necessarily, or should be, coloured by appreciations of political opportunity, or that the vesting of the final power to take this decision in the Court would transfer the function of making such political appreciations to the judicial branch of the Community government.

15 — Case C-157/96, cited in footnote 12 above.

16 — Opinion cited in footnote 6 above, paragraphs 86 to 98.

Again, the differing views of Advocate General Ruiz-Jarabo Colomer on this aspect merit careful consideration. However, in my opinion, such appreciations may legitimately be made, by a political institution acting 'in the general interest of the Community', at an earlier stage of the procedure. Once the Commission has exercised its discretion in the matter of initiating proceedings, the matter of the Member State's alleged non-compliance with an earlier Court judgment is subjected to an essentially judicial procedure to which political considerations are irrelevant. The Court exercises in such proceedings an integral part of the judicial function, in deciding on the imposition of a sanction for a breach of a legal obligation. The fact that the Commission is only obliged to declare its position on the question of a sanction when it initiates proceedings before the Court, and that in such cases it has no discretion not to suggest a financial sanction, seems to me to be clearly designed to take this particular issue out of the political arena. The Commission was therefore correct in the present case to have simply mentioned the possibility of a financial sanction of unspecified amount, at the stage of the reasoned opinion.

31. The adoption by the Treaty authors of a novel mechanism designed to put pressure on Member States to comply with their Treaty obligations seems to me to be intended to get away from existing forms of sanction the imposition of which is indeed subject to political considerations. In particular, the Treaty authors did not follow the example already set nearly half a century ago by Article 88 of the ECSC Treaty, which allows the Commission itself to act against breaches of that Treaty either by suspending payments due to the offending Member State or by imposing or authorising other sanctions by derogation from Article 4 of the ECSC Treaty (now Article 4 CS). Recourse to this provision requires the assent of the Council acting by a two-thirds majority; it has never been applied. While the Commission is clearly independent of the Member States in this as in other respects, recognising that the exercise of its power to suggest a sanction should only be subject to marginal judicial review seems to me to run the converse risk to that to which my learned colleague adverted, that is, of transferring a judicial power to the executive. Moreover, the Commission's view in this case goes rather further than that which it expressed in its memoranda on the application of Article 171, where it merely claims the power to 'give its view on the actual amount of the lump sum or penalty payment'. [17] It would also come close to recognising that the Commission itself determines the amount of the lump sum or penalty payment, which solution was rejected by the authors of the Treaty on European Union.

32. Advocate General Ruiz-Jarabo Colomer has quite rightly stressed, at various points in his Opinion, the importance of the rights of the defence of the Member

17 — Memorandum No 96/C 242/07, paragraph 1.

State concerned. [18] However, it seems to me that the procedure laid down by Article 171(2) already provides the necessary guarantees. The Member State must be given the opportunity to be heard on the substantive question of the failure to comply before the reasoned opinion is issued, and may again at the litigious stage contest the Commission's position both on this primary issue and on the appropriateness of the penalty payment proposed. A Member State would be deprived of a key part of its rights as a defendant in infringement proceedings if it were not permitted the same latitude in criticising the financial consequences of any possible adverse judgment to the same extent as that which it enjoys regarding the issue of non-compliance. In deciding whether to impose a sanction and, if so, its amount the Court should have the benefit of the views of the Commission and the counterarguments, if any, of the defendant Member State. Giving the Commission a largely unchallengeable right to determine the nature and the amount of the financial sanction would not appear to me adequately to respect the rights of the defence of the Member State concerned.

33. This is not to say that in deciding on the imposition and the amount of a financial sanction the Court will act without regard to the views of the Commission, or, indeed, to those of the defendant Member State. It is the Commission which must supervise the compliance by Member States with judgments of the Court concerning infringements, and must establish the existence and extent of non-compliance; the Commission can also guide the Court, as Advocate General Ruiz-Jarabo Colomer has suggested, [19] in ensuring that the Court respect the principle of equal treatment in its decisions on the imposition of financial sanctions.

(e) *The establishment of a breach of Article 171(1) and the period in respect of which a penalty may be imposed*

34. Two other preliminary matters merit consideration here: the determination of the moment at which the breach of Article 171(1) is established, and the period of time in respect of which a penalty payment is payable. The obligation to comply with a judgment finding an infringement is effective from the date of that judgment, [20] and the duration of the infringement under Article 171(2) begins to run on that date. This provision none the less accords Member States a period of grace, until the expiry of the deadline for compliance fixed in the reasoned opinion, before the Commission can establish that the Member State is in fact in breach of its obligation to comply. This date also constitutes the beginning of any period in respect of which a financial penalty may be imposed; though the infringement of Article 171(1) exists from the date of the first judgment, it seems to me that Article 171(2) should be interpreted as meaning that a financial penalty may only

18 — See, for example, op. cit., paragraphs 31, 42 and 91.

19 — Op. cit., paragraph 97.

20 — Case 169/87 *Commission* v *France* [1988] ECR 4093, paragraph 14.

be imposed in respect of the period following the establishment by the Commission of the infringement. Clearly, the Court, in assessing the amount of any financial sanction, can take account of any development subsequent to the date of expiry of the deadline set in the reasoned opinion to which its attention has been drawn in due time.

35. It might be argued that the penalty payment may only cover the period from the date of expiry of the deadline for compliance set in the reasoned opinion until the Court's judgment in the Article 171(2) proceedings, on the ground that the Court cannot hold that a breach will continue to occur in the future. I would not subscribe to this view. In the first place, the imposition of such a financial sanction, which would in effect (though not necessarily in law) be a lump sum in that the amount could be precisely calculated on the day of the second judgment, would not serve to persuade a Member State to comply with the first infringement judgment, as its exposure to a financial sanction would be limited to the period before the Court's second judgment. In empowering the Court to impose a penalty payment as an alternative to a lump sum, Article 171(2) entitles the Court to impose a financial sanction for the future, unless the Member State can show the Court in good time that it has complied with the first judgment.

36. In the present proceedings, the Commission has suggested that the Court impose a penalty payment only for the future, namely, from the date of notification of the judgment in the present proceedings until the date of the cessation of the infringement, without indicating how or by whom a decision determining the latter date is to be taken. In the absence of any express indication in Article 171, it seems to me that the date of cessation of the failure to comply with the judgment in the first infringement should be determined by the Commission, as a corollary to its power to find the existence of that failure in the first place. In *Commission* v *France*, the Court based its finding that 'the Commission is ... under a duty to ensure ... that Member States comply with the judgments delivered by the Court of Justice' on Article 155 of the EEC Treaty (now Article 211 EC),[21] and I am of the view that a power for the Commission to decide that compliance has been effected can be based on the same provision.

37. As a decision refusing to recognise that compliance has been effected would have legal effects on the situation of the Member State concerned, it would in principle be amenable to judicial review in ordinary annulment proceedings. In recognising that the Commission enjoys such a power, which is not expressly granted by the Treaty, it should not be thought that this institution would in some way be able to modify a decision of the Court; as the Court's imposition of a penalty payment depends on the continuance of a particular factual and legal situation, a Commission decision recognising the cessation of the failure to comply would merely constitute a finding of fact that the situation has changed. Such a decision could be taken

21 — Order in Joined Cases 24/80 R and 97/80 R [1980] ECR 1319, paragraph 11.

on the basis of the same criteria as those which obtain when the Commission decides whether or not to issue a reasoned opinion under the first subparagraph of Article 171(2). Because the objective of the imposition of a penalty payment is to ensure complete compliance with the first judgment, I do not consider that the Commission would be entitled, for example, to reduce the amount of a penalty payment imposed by the Court to take account of any partial compliance claimed by the Member State.

(f) *The criteria for choosing a financial sanction and evaluating the amount thereof*

38. Article 171 distinguishes between two categories of financial sanction, the lump sum and the penalty payment, without giving any indication as to the criteria for choosing between them. The distinction is a familiar one in Community law, and in particular in the area of competition law; Articles 15 and 16 of Regulation No 17 of 1962, for example, empower the Commission to impose fines and periodic penalty payments on undertakings for breaches of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) and for procedural infringements in this area. [22] Though the circumstances in which these provisions may be applied are quite different from those which obtain in proceedings under Article 171(2), it is reasonable to assume that the authors of the Treaty on European Union borrowed the distinction from this area of law. Whether or not this was the case, the imposition of a penalty payment is the more appropriate course for the Court to take to deal with a continuing failure of compliance by a Member State with a judgment finding it to have committed an infringement of its Treaty obligations. I would agree with the position adopted by the Commission in its Memorandum No 96/C 242/07 that such a sanction would contribute to ensuring compliance as rapidly as possible. [23] The imposition of a lump sum payment, on the other hand, might be more appropriate where the Member State has complied with the original infringement judgment after Article 171 proceedings have been initiated before the Court but before judgment has been given, and where the Court considers that such a payment would serve a useful purpose, for example to compensate for a loss to the own resources of the Community as a result of the wrongful action or inaction of the Member State or as a deterrent to other instances of non-compliance.

39. The Commission bases its assessment of the amount of the penalty payment on the seriousness of the underlying infringement, its duration and the deterrent effect of the sanction. Both the initiative of proposing publicly accessible general criteria for the calculation of the amount of a penalty payment, and the general criteria themselves, as set out in Commission Communication No 97/C 63/02, [24] seem to me at first sight and, in the absence of any cogent criticisms in the present case, to be unexceptionable. However, I am unconvinced by the specific criterion by which the

22 — EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty; OJ, English - Special Edition, Series I (1959-1962), p. 87.

23 — Cited in footnote 9 above, paragraph 4.

24 — Cited in footnote 9 above.

Commission estimates the ability of a Member State to pay. The factor **n** is calculated as being the square root of the product of the offending Member State's GDP divided by that of the smallest Member State, and the number of votes that Member State exercises in a qualified majority vote in the Council divided by the number of votes granted the smallest Member State.[25] In effect, a figure representing the comparative GDP of the offending Member States is multiplied by a figure representing its comparative voting strength in the Council to give its **n** factor, with the aim of arriving at the geometric mean of the two elements.

40. While a Member State's comparative GDP is incontestably a relevant consideration in assessing its ability to pay, the Commission has failed to demonstrate the relevance of the comparative voting strength in the Council of the Member State in default. This latter figure results from a political arrangement which is in practice renegotiated on each occasion new Member States are admitted to the Community, and now Union.[26] Whatever factors are taken into account in determining the number of votes in Council a Member State enjoys, there is nothing in the Treaty, and in particular in the figures set out in Article 148(2) of the EC Treaty (now Article 205(2) EC), to indicate that such a determination is in any way related to the ability of Member States to pay the amount of penalty payments imposed on them.[27] This is illustrated by the fact that for this purpose all the Member States but two (Spain and Luxembourg) are put into groups, regardless of possibly considerable differences within each group regarding their ability to bear financial sanctions. If the comparative voting strength factor is not relevant to a Member State's ability to pay, then it follows that factor **n** is not a proper basis on which to assess the amount of a penalty payment.

41. When questioned on this issue at the hearing, the agent for the Commission argued that the comparative voting strength of a Member State was an objective criterion which reflected the importance of each Member State in the decision-making process. This rather overlooks the fact that not all the obligations imposed on Member States are adopted by the Council by a qualified majority; taken to its logical conclusion the comparative voting factor should be 1 for each Member State where the underlying breach concerns Treaty provisions or provisions adopted by the Council acting unanimously, and 0 where the underlying obligation arises under legislation adopted by the Commission, and should be halved for each Member State where the legislation imposing the obligation was adopted by the Council and the European Parliament under the codecision procedure.

25 — See footnote 12 of Communication No 97/C 63/02, cited in footnote 9 above.

26 — See the Protocol on the institutions with the prospect of enlargement of the European Union annexed to the Treaty on European Union and the three Community Treaties, adopted along with the Treaty of Amsterdam, OJ 1997 C 340, p. 111.

27 — My colleague Advocate General Ruiz-Jarabo Colomer also has some doubts on this point: Opinion cited in footnote 6 above, paragraph 112, footnote 40.

42. Exclusion of the element of comparative voting strength would leave comparative GDP as the sole frame of reference for taking account of a Member State's ability to pay. It does not follow that all other considerations should be excluded. It will be open to the Commission to review its method of calculation for future cases. In this context, it seems useful to refer to the provisions of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure. [28] This regulation contains, *inter alia*, provisions to implement Article 104c(11) of the EC Treaty (now Article 104(11) EC), which empowers the Council, albeit in very specific circumstances, to impose fines on a Member State which has failed to comply with a Council decision laying down measures to reduce its excessive government deficit. Article 12 of the regulation requires a defaulting Member State to make a deposit comprising 'a fixed component equal to 0.2% of GDP, and a variable component equal to one tenth of the difference between the deficit as a percentage of GDP in the preceding year and the reference value of 3% of GDP', up to a maximum of 0.5% of GDP. The deposit may be converted into a fine if the Member State fails to correct its deficit within two years.

43. Whether or not the Court shares my scepticism regarding the n factor, I am in full agreement with the Commission that the amount of any financial sanction imposed on a Member State should take account of both the seriousness of the underlying infringement (of which the duration is in my view merely one aspect) and the requirement that the sanction have a sufficient deterrent effect. The former is a reflection of the principle of equal treatment which is so fundamental to the Community's legal order, and which requires that equal situations be treated equally and unequal situations be treated unequally. [29] It would therefore be wrong to treat with equal severity, for example, an infringement arising from an erroneous application in good faith of a possibly ambiguous rule of Community law, and one which results from a deliberate and flagrant breach of a well-established rule. [30] The same principle would justify the Court's normally [31] being required to take account of a Member State's ability to pay a financial sanction in evaluating the amount thereof. The requirement of a sufficient deterrent effect is inherent in the conferral on the Court of a power to impose financial sanctions in the first place, and the need to give Article 171(2) its useful effect. Faced with a similar lack of precision in the definition of sanctions required to give effect to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [32] the Court held in *Von Colson and Kamann* that Member States must ensure that any such sanction be 'effective and that it has a

28 — OJ 1997 L 209, p. 6.

29 — See, for example, the formulation in Case 106/83 *Sermide* v *Cassa Conguaglio Zucchero* [1984] ECR 4209, paragraph 28.

30 — See Communication No 97/C 63/02, cited in footnote 9 above, paragraph 3.1.1.

31 — Where a financial penalty is imposed in order to compensate for a loss to the Community's own resources, the amount thereof should reflect the amount of the loss.

32 — OJ 1976 L 39, p. 40.

deterrent effect'.[33] The same requirements can, in my view, be applied to the sanctions the Court applies under Article 171(2). The amount of any financial sanction should also, in my view, be consistent with the principle of proportionality, as formulated in the third paragraph of Article 3b of the EC Treaty (now the third paragraph of Article 5 EC), that '[any] action of the Community shall not go beyond what is necessary to achieve the objectives of the Treaty'.

(g) *Application to the present case*

44. The doubts I have expressed in the previous section concerning the Commission's criteria for assessing the amount of the penalty payment it suggests should be imposed on Greece do not affect the issue of whether the Court should impose such a penalty payment in the present case. In the first place, as explained above, I take the view that the Court is not bound by the Commission's proposal, and therefore no error of law or appreciation on the part of the Commission would affect the Court's determination. Secondly, while it has in effect contested the Commission's assessment of the seriousness and the duration of the failure to comply, Greece has not sought to argue that the financial sanction proposed fails to take account of its ability to pay.

45. I have expressed the view that the Commission's proposal regarding financial sanctions should be treated as the proposal of one party to a judicial proceeding, subject to the normal burden of proof but also to the right of the defendant Member State to contest it and, ultimately, to the exercise of the judicial assessment of the Court. In most cases this would mean that, where a cogent and credible argument is made by one party, the Commission, and is not contested by the other, the Member State, it would be accepted by the Court. However, three elements present in these proceedings lead me to propose a different approach in respect of the element of voting rights. Firstly, this is only the second of the cases referred to the Court to have been heard under this new procedure. The Court has not, at the time of writing, given judgment in the first case. It is important that clear guidelines be established for future cases, to the extent that this is possible in the context of these proceedings. Secondly, the inclusion of the element of comparative voting strength raises an important issue of principle which should not, in my view, be passed over. Thirdly, it seems, at first sight, that no Member State would have an interest in contesting the inclusion of this element. For all Member States except Luxembourg, which is taken as the point of reference, its inclusion will

33 — Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 28; see also the Opinion of Advocate General Rozès, ibid., pp. 1917 to 1919, paragraphs 3 and 4.

have the effect of reducing the amount of the financial sanction proposed.[34] In the case of Luxembourg, it is neutral. In this respect, it seems to raise doubts as to the equality of treatment of Member States.

46. Greece has not contested its failure to comply with the judgment in the original infringement case. Apart from the admissibility point dealt with above, its sole defence is that certain professions are already covered and that the signature of a draft Presidential Degree is imminent, which are the same arguments it relied upon unsuccessfully in the original case. At the hearing, Greece argued that it had a very advanced system for the recognition of qualifications awarded by foreign educational establishments; at the same time, it informed the Court that in the 22-month period ending in October 1999, the competent administrative authority had rejected one third of the 12 000 requests submitted to it. Neither of these facts, even if they were proven, suffices to show that Greece has complied with the judgment in the original case, and, moreover, Greece explicitly admits that the transposition of the Directive in the Greek legal order is not complete.

47. I agree with the Commission that a penalty payment is the proper financial sanction in the present case, that the underlying infringement which gave rise to the judgment in the first infringement case is a serious one, and that the duration of the failure to comply is sufficiently long to be reflected in the amount of the periodic payment. I am somewhat perplexed, however, by the Commission's assertion that it took account of all the measures adopted by the Greek authorities to deal with this problem, when neither party has shown, to cite the Commission's agent at the hearing in Case C-387/97, the shadow of an outline of a suggestion of a commencement to respect the original judgment. The failure of a Member State to take any concrete action to comply with a judgment finding an infringement must be considered an aggravating factor.

48. In the absence of either any indication in the Treaty or any established practice in this regard, I would suggest that the Court adopt the Commission's figures in the present case regarding the uniform flat rate amount and the gravity and the duration coefficients. However, for the reasons given above, I do not consider that a Member State's voting strength in the Council is a relevant factor for determining its ability to pay, and would therefore propose that the simpler figure of its comparative GDP be adopted instead. In the case of Greece, working back from the Commission's suggested n factor would give an ability to pay of 6.724, or a penalty payment of EUR 67 240 per day. I am aware that this figure is somewhat higher than that suggested by the Commission. I do not con-

34 — Thus, for example, the application of the n factor reduces Germany's ability to pay coefficient from approximately 140 to 26.4.

sider, however, that the increased figure I have suggested is so much greater than the Commission's as to affect Greece's rights to defend itself or to infringe the principle of proportionality referred to above. In the matter of imposing financial sanctions under Article 171, I consider that the Court enjoys unlimited jurisdiction in the sense of Article 172 of the EC Treaty (now Article 229 EC). While it is not in itself decisive, I might add that there is no evidence to show that Greece was sufficiently deterred by the figure of EUR 41 000 per day, proposed by the Commission in submitting its application in May 1998, to take any useful action to comply with the first infringement judgment, even partially, in the 17 months up to the hearing.

(h) *Costs*

49. As Greece has been unsuccessful in all its submissions, and as the Commission has asked for costs to be awarded against the defendant Member State, I would recommend that the Court so order.

III — Conclusion

50. In the light of the foregoing, I would propose to the Court that it:

— Declare that, by failing to take the necessary measures to comply with the judgment of the Court of Justice of 23 March 1995 in Case C-365/93 *Commission of the European Communities* v *Hellenic Republic*, the Hellenic Republic has failed to fulfil its obligations under Article 171(1) of the EC Treaty (now Article 228(1) EC);

— Order the Hellenic Republic to pay to the Commission a penalty payment of EUR 67 240 per day until the necessary measures have been taken; and

— Order the Hellenic Republic to pay the costs of the present proceedings.