Chapter 4A: Environmental cases and Article 260(2) TFEU

This online chapter has been updated to take into account case law developments as at end 2016 to coincide with the publication of the paperback of this book’s second edition.

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Brief concluding remarks
For a number of years subsequent to the second round infringement procedure’s establishment in 1993 by virtue of the Maastricht Treaty,¹ the Court of Justice of the EU (CJEU) did not have an opportunity to adjudicate upon its application or interpret the legal meaning of the relevant treaty provisions. Both the original treaty provisions on the second round procedure as well as the practice of the European Commission in processing casework contributed initially to relatively prolonged pre-litigation phases. It was not until mid 2000² before the first legal dispute involving (the predecessor to) Article 260(2) TFEU was decided by the CJEU, almost seven years having elapsed since the second round procedure had been inserted formally into the former EC Treaty framework. By the end of 2005 things had not changed that dramatically with the CJEU having ruled on only three cases, all of which concerned implementation failures relating to EU environmental law (namely, the *Kouroupitos* (2), *Spanish Bathing Waters* (2) and *French Fishing Controls* (2) cases.)³ However, subsequently the body of case law has steadily increased. By the end of 2013 an additional five environmental cases had been adjudicated by the CJEU (namely *French GMO Controls* (2), *Irish Urban Wastewater* (2), *Irish EIA* (2), *Belgian Urban Wastewater* (2) and *Luxembourg Urban Wastewater*(2)⁴). Between 2014-2016 the CJEU handed down seven more second round environmental infringement rulings (specifically, *Italian Illegal Landfills* (2), *Greek Illegal Landfills* (2), *Swedish Implementation of IPPC* (2), *Campania Waste* (2), *Greek Urban Wastewater* (2), *Portuguese Urban Wastewater* (2) and *Greek Hazardous Waste Planning* (2)).⁵ So as at the end of 2016, the CJEU had issued a total of 15 second round environmental infringement judgments. The relative paucity of case law on the second round
procedure that existed until relatively recently underlined the considerable period of time it has taken for the Commission in practice to bring second round actions to court; the Commission has often tolerated considerable periods of interaction and negotiation with defendant member states in the pre-litigation administrative phase of infringement proceedings. The treaty amendments to the infringement procedure introduced by virtue of the Lisbon Treaty in December 2009, namely the shortening of the second round pre-litigation administrative phase to include one written warning from the Commission (a LFN) as well as the possibility of penalties being made available in first round proceedings in respect of non-communication cases have been of some assistance in reducing the time taken for processing second round casework initiated after December 2009.

Notwithstanding the current body of case law on Article 260(2) TFEU is still relatively modest, it is notable that environmental disputes have featured prominently amongst second round infringement judgments. The fact that a substantial proportion of the judgments have concerned the environmental sector, specifically 15 out of a total of 28 cases (54%) as at the end of 2016, is no coincidence. For a considerable period now, Commission infringement action against member states involving non-implementation of EU environmental legislation has constituted a major segment of infringement litigation overall. The Commission’s annual report on monitoring the application of EU law for 2015 designated the environmental sector as one of the most infringement prone policy areas for that year. Specifically, in 2015 the EU’s environmental policy sector accounted for 10.5% of infringement complaints from the public (365 out of 3,450 (5th highest sector)), 11% of newly opened EU Pilot files (101 out of 881 (4th highest sector)) and 8% of new first round infringement cases (126
out of 1,552 (3rd highest sector)). In addition, the Commission report noted that the environment sector represented 20% of open (i.e. ongoing) first round infringement cases as at the end of 2015, the highest number of cases amongst EU policy sectors. Statistics on environmental infringements produced by the Commission’s Environment Directorate-General indicated that there were 40 ongoing second round environmental infringement cases as at the end of 2015. It would appear from the Commission’s annual reportson monitoring compliance as well as CJEU jurisprudence that environmental infringement cases, including notably those requiring major infrastructural changes or improvements, tend to be most challenging to resolve amicably out of court. The track record of member states in securing timely and correct fulfilment of their EU environmental legislative obligations has been relatively poor overall, and the introduction of the possibility of financial penalties under Articles 260(2)-(3) TFEU has not yet shown itself to be a sufficient motivation for change in current member state practice. This position may begin improve over time as a result of the 2007 Lisbon Treaty changes introduced to accelerate the processing of casework with effect from December 2009. There is arguably some indication that the treaty amendments may be having some degree of deterrent impact with regard to member state fulfilment with transposition-related obligations. For as at the end of 2016, notwithstanding several infringement cases being launched by the Commission, no member state had been subject to a court fine under the aegis of the special first round penalty infringement procedure under Article 260(3) TFEU in respect of belated transposition of an EU environmental legislative directive into national law. However, the picture appears less positive as far as member states’ fulfilment of duties regarding the practical implementation of EU environmental legislation is concerned, with the number of second round judgments having risen
steeply recently (the number of such rulings having almost doubled during 2014-16 (as compared with the period beforehand since the penalty infringement procedure first came into effect (1993-2013)). Details of the annual and cumulative number of second round infringement rulings, comparing relative numbers of environmental and non-environmental cases, are provided in two tables at the end of this updated chapter. More time is required, though, before it is possible to assess with precision the impacts of the Lisbon treaty changes on member state compliance with EU environmental law.

This chapter focuses on the second round environmental cases that have (as at the end of 2016) led to Article 260(2) TFEU judgments and is divided into two principal parts. Specifically, the first part considers how the CJEU has appraised disputes between the Commission and member states involving instances of bad application (i.e. failures with regard to the implementation of EU environmental legislation). The second part considers the CJEU’s judgments relating to situations of non-conformity (i.e. failures of national law to accord with EU environmental legislative requirements). The first three second round environmental cases to come before the CJEU (Kouroupitos (2), Spanish Bathing Waters (2) and French Fishing Controls (2)) all involved instances of bad application (failures with regard to the implementation of EU environmental legislation). These three judgments have been particularly significant from a legal perspective, with the CJEU setting out some important foundational principles of law relating to the second round procedure, and are considered accordingly in relatively more detail given their particularly ground-breaking impact. The other cases, whilst involving arguably more straightforward legal issues have also contributed to the development of the case law of the CJEU on
certain principles, notably including the application of the lump sum fine. This chapter then proceeds to compare the Commission’s and CJEU’s assessment of penalty amounts for defendant member states before closing with some brief reflections on developments in the CJEU’s case law.

4A.1 Second round cases involving bad application of EU environmental law

4A.1 Kouroupitos (2) (Case C-387/97)

The first occasion that the CJEU had to pronounce on the interpretation and application of Article 260(2) TFEU was in Kouroupitos (2), a notorious illicit landfill case on the island of Crete in Greece. The case dates back to 1987 when the Commission issued Greece with a letter of formal notice (LFN) under Article 258 TFEU in relation to problems posed by the poor state of management of waste in the region of Chania in Crete. The Commission had received complaints from a local inhabitant about the existence of an unlicensed rubbish tip on the Akrotiri peninsula at the mouth of the Kouroupitos river. For several years, the tip had been used by the local community as a place to dump various wastes. Waste streams included those from military sources, hospitals, poultry farms, slaughterhouses, salt factories, as well as from local municipalities. A sad irony in this squalid tale is the fact that the Akrotiri peninsula constitutes a site of outstanding natural beauty, hosting a variety of rare species of flora and fauna. Completely unmanaged, the state of the tip had deteriorated over time to the extent that it had begun to self-combust, with noxious gases and fumes affecting the local area. One local village had even to be evacuated.
In addition, a considerable amount of waste had been dumped into a coastal ravine, contaminating the Kouroupitos estuary and surrounding marine environs.

Following receipt of a complaint about the waste tip, the Commission considered that the Greek authorities had contravened a series of provisions of EU waste management legislation in force at the time, namely the original version of the Waste Framework Directive (former Directive 75/442) and former Directive 78/319 on toxic and dangerous waste. In accordance with the 1979 Act of Accession of Greece to the European Communities, these particular EU environmental legislative obligations applied to Greece with effect from 1 January 1981. The Commission considered in particular that the Greek authorities had breached EU waste legislation in failing to ensure safe management of the waste as well as to draw up waste management plans for the area. The Greek authorities responded in 1989 and throughout the pre-litigation and litigation phases of the initial infringement action by submitting that their planned programme for organising alternative better managed disposal sites had encountered opposition from the local population, thereby accounting for the need in their view to continue utilisation of the Kouroupitos site. On 7 April 1992, the CJEU declared that Greece had breached both directives, in failing to ensure that waste as well as toxic and dangerous waste from the Chania area was disposed of without endangerment to human health or without harm to the environment and in failing to draw up waste management plans.

However, having received no notification of any measures to comply with the CJEU ruling in over a year, in October 1993 the Commission issued a letter to the Greek authorities reminding them of their obligation under EU Law to adhere to the CJEU
judgment. During the course of the pre-litigation phase, the TEU entered into force on 1 November 1993. The amendments made to former EC Treaty included the establishment of the legal framework for second round infringement penalty proceedings in Article 228(2) of the former EC Treaty (now replaced by Article 260(2) TFEU). In September 1995, the Commission decided to initiate second round infringement proceedings, after promises made by the Greek authorities in 1994 of development of two new waste disposal sites failed to materialise. A RO was issued in August 1996, the Commission noting that the waste disposal programme planned by the local authorities remained at a preliminary stage and that waste continued to be deposited in an uncontrolled fashion at the Kouroupitos site. Greece was give two months to respond. However, the Commission remained dissatisfied with the state of progress made by Greece to implement measures in order to give effect to the CJEU’s judgment, eventually applying to the Court in late 1997 to impose a daily penalty payment of €24,600 on Greece until compliance with the first round judgment of 1992 had been achieved. By the time the case came before the CJEU a second time, changes had been effected to EU waste management legislation relevant to the litigation. Specifically, the original Waste Framework Directive 75/442 had been amended and Directive 78/319 on toxic and dangerous waste had been replaced by a new directive on hazardous waste. Given that the succeeding legislation had ensured that the EU obligations forming the subject-matter of litigation continued to apply in substance as before, albeit not necessarily in the same legislative provision or instrument, this factor proved no bar to the prosecution of second round infringement proceedings.
The Commission calculated its proposed fine of a daily penalty payment of €24,600 on the basis of its original 1996/97 guidance on the application of second round fines. It arrived at its figure by multiplying the basic flat rate starting payment of €500 by the coefficients chosen by it for seriousness (factor of 6 out of a possible range of 1 to 20), 28 duration (factor of 2 out of a possible range from 1 to 3) and relative financial ability of the member state to pay the penalty (factor of 4.1 based on GDP of the defendant member state and its voting power in the Council of the EU). 29

- Procedural and substantive legal aspects

The CJEU’s judgment in *Kouroupitos (2)* upheld most of the Commission’s complaints concerning the failure by the Greek Government to ensure that the terms of the Court’s first round judgment were adhered to within a reasonable time period. The CJEU first rejected the defendant’s assertion that the action should be held inadmissible, on the grounds that it was retroactive in nature. Greece had submitted that, given that second round proceedings were only introduced into the EU legal system after 1 November 1993, their application to events that transpired prior to this date should be barred, otherwise the defendant would effectively be facing a penalty in respect of a breach of law that did not exist at the material time of infringement. 30

The Court dismissed this interpretation of the nature and function of Article 260(2) TFEU. It noted that the pre-litigation phase of second round infringement proceedings in this case had been commenced in 1995, namely after the TEU had entered into force. 31 Accordingly, the Court limited the question of retroactivity as to when second round proceedings had been started, as opposed to the dates concerning Commission enforcement under the first round procedure of Article 258 TFEU.
Elsewhere, the judgment makes it plain that the CJEU considered the nature of Article 260(2) TFEU to be essentially prospective and not retrospective in nature, confirming that the principal aim of penalty payments is that the defendant should remedy the breach of obligations as soon as possible. The CJEU’s approach resonates with that followed by Advocate General Colomer in his Opinion in the case, who rejected the Greek Government’s contention that Article 260(2) TFEU possesses an essentially criminal (punitive) character. He underlined at some length the purpose of the penalty payment system as being a means of coercing defendants to take necessary measures to bring current violations of law to an end as swiftly as possible, as opposed to essentially revolving around the quest of exacting punishment in respect of past conduct. On the other hand, it is also evident from the Court’s ruling in Kouroupitos (2) that second round penalty proceedings do also involve elements of a retrospective nature in terms of the evaluation of the extent of penalties. In particular, the factors of seriousness and duration of violation form important integral parts of the framework for calculating penalty payments, as endorsed by the Court.

The findings of the Court on the substantive legal points at issue in illustrate some key difficulties that often face the Commission when pursuing infringement actions. One factor concerned the general wording of the basic safety provisions on waste management set out under the two former EU directives, and whether these were of a sufficiently precise nature so as to impose specific legal obligations on member states. It is not uncommon for ambiguities and generalisations to be incorporated into EU legislative texts, especially where there are internal divisions between the EU legislative institutions over the content of sensitive commitments. In particular,
suggestions on the part of the Commission and/or European Parliament for more
detailed and/or stricter environmental protection provision in a given area might
typically fail to command sufficient support within the Council of the EU for
legislative approval. On the other hand, legislation may be deliberately designed by
the EU legislature to embrace a large number of contexts and situations, the object of
which might well be defeated if very specific parameters are affixed to obligations.
The EU’s foundational legislative instrument on waste management, namely the
Waste Framework Directive 2008/98 (originally former Directive 75/442), is a case in
point, which is intended to lay down basic and essential legal obligations and
principles pertaining to the proper management of waste in general. The CJEU noted
that the basic environmental health and safety clause of the Waste Framework
Directive (at the time Article 4 of former Directive 75/442) does not specify the
actual content of measures to be taken in order to ensure that waste is disposed of
without harming human health and/or the environment. The provision is framed in a
negative manner offering no detailed parameters as to what might constitute ‘harm’.
The Commission maintained that it would have closed the file had the defendant
drawn up and implemented waste plans as prescribed by the relevant EU waste
management legislative at the time, taking the view that it would consider that the
safety obligations being satisfied if the plans were drawn up and implemented.
Nevertheless, the CJEU held that Article 4 of Directive 75/442 was binding on
member states as to the objective to be achieved, whilst leaving them a margin of
discretion in assessing the need for such measures. Echoing an earlier ruling, it
found that in principle it would be an indication that Article 4 had been breached and
the defendant state’s discretion exceeded in the event of a ‘significant deterioration in
the environment over a protracted period when no action has been taken by the competent authorities'.

In *Kouroupitos* (2) the CJEU agreed with the Commission that the available evidence indicated that the Greek authorities had failed to ensure proper management of waste within Chania in accordance with the requirements set out in its first round ruling, in that uncontrolled and illicit dumping of waste had been allowed to continue at the waste dump site. The various steps claimed to have been undertaken by the Greek authorities to improve waste management in the area had shown themselves over time to be essentially inadequate to deal with the environmental problem of uncontrolled dumping of waste. These included plans to establish a mechanical recycling and composting plant and landfill at a neighbouring location, Strongili Kefali, although this had been delayed due to local opposition. The Greek authorities also claimed that waste volumes at Kouroupitos had been decreased, with toxic and dangerous waste streams being diverted from the site, although this was not supported by independent verification. The CJEU noted that these developments did not constitute a definitive solution to the core problem, identified as needing to be rectified by its first ruling.

On the other hand, the CJEU considered that Greece had not been shown to have been in breach of the terms of its first round judgment as far as the management of toxic and dangerous waste streams were concerned. It noted that the Greek Government had maintained in its defence that various measures had been taken to control the movement of such waste in the local area, and that it was not being dumped at the Kouroupitos site. Specifically, it was claimed that since 1996 military waste from the local US base had not been deposited at Kouroupitos, that hydrocarbon sediment was
now placed into separate storage pending export, that waste mineral oils were being diverted to a reclamation plant and that septic tank waste was being transported to a dedicated biological sewage treatment plant. In the event the CJEU held that the Commission had failed to provide sufficient evidence to show that the Greek Government had failed to comply with the safety requirements contained in Article 5 of the former Directive 78/319 on toxic and dangerous waste, underlining that it was for the Commission to provide the Court with the information necessary to determine the extent to which a member state has complied with one of its judgments.\(^{43}\)

This part of the judgment illustrates the not inconsiderable challenges confronting the Commission in mounting second round infringement proceedings in bad application cases. In *Kouroupitos (2)* and subsequent case law, the CJEU has construed Article 260(2) TFEU as placing the burden of proof firmly on the shoulders of the Commission to show that a breach of the first round ruling has continued to occur. This legal interpretation has been rightly criticised for failing to take into account the real limitations placed on the Commission in terms of its law enforcement role, namely the lack of investigatory powers, human and financial resources in order to verify a defendant’s claims of this kind.\(^{44}\) In addition, it is submitted that the CJEU misinterpreted the legal framework on evidentiary burdens underpinning second round proceedings. Article 260(1) TFEU clarifies that it is the member state which is obliged to take necessary measures in order to comply with the (first round) judgment. Given that an infringement is found to have occurred when the first round judgment is delivered, the onus should at that stage be placed logically on the member state concerned to demonstrate that a situation of non-compliance has been subsequently transformed into a situation of compliance with EU law in adherence with the
requirements of the first round judgment. A basic tenet of Article 260(2) TFEU is that it is for the defendant member state to satisfy the Commission and ultimately the CJEU that it has complied with the terms of a judgment found against it under the auspices of Article 258 TFEU. Accordingly, in Article 260(2) proceedings it should be the case that the evidential burden is firmly placed on the defendant state to demonstrate fulfilment of its legal obligations, and not on the Commission to prove what it has already proven, namely a state of non-compliance with EU Law. If a member state fails to show to the Commission that it has taken any measures in response to a first round ruling under Article 258 TFEU, the Commission is clearly entitled to apply to the CJEU for a penalty payment or lump sum in order to seek to induce the member state to comply with its Union obligations. If that were not the case, silence and non-cooperation on the part of a member state in response to Commission LFN and RO would provide a simple escape route for the state from having to comply with the Article 258 judgment. These important practical considerations and challenges concerning the burden of proof shouldered by the Commission have been to some extent taken on board by the most recent case law of the CJEU, as discussed later below in section 4A.1.5.

In Kouroupitos (2) the CJEU appears to have considered erroneously that the question concerning who shoulders the onus of proof is to be addressed in Article 260(2) TFEU proceedings in the same manner as it is for first round actions under Article 258 TFEU. It is noteworthy that the Court differs substantially in its approach with that of the Advocate General, who had no problem in upholding the Commission’s findings in relation to mismanagement of toxic and dangerous waste. In noting the Commission’s pleading concerning the lack of evidence produced by the Greek
Government to support its claims of improvements to treatment of such waste streams in the Chania area, on the specific question of evidentiary burden Advocate General Colomer states:

‘It is my view that, in proceedings under Article [260 TFEU], it is for the defendant member state to prove that it has duly complied with the judgment establishing an infringement of the Treaty. On that basis, the Commission’s role can be confined to pointing out which obligations have not been fully shown to have been discharged. This is particularly true where, as here, the Community rule requires that a member state notify the Commission of the measures that it has adopted. It is therefore appropriate to find that the Hellenic Republic has failed to fulfil its obligations.’

It would be an error to construe the Advocate General’s interpretation of the onus of proof under Article 260(2) TFEU as one that undermines of fundamental rights of the defendant, such as the presumption of innocence or the right not have to disprove a negative. For the essential question of culpability over an alleged breach of EU law has been already been addressed in the context of the first round action, which the Commission has to prove to the satisfaction of the Court. The function of Article 260(2) TFEU proceedings is a different one to that of first round infringement proceedings, namely to ensure that the findings and requirements of the first round ruling are respected and adhered to by the defendant state. In having to shoulder the responsibility of demonstrating compliance with the terms of the Court’s first round judgment, the member state defendant in the context of a second round action should be deemed to be obliged to demonstrate appropriate positive steps have been taken by
it to terminate the situation of illegality as required. Such a task is neither unduly onerous nor impossible, and is certainly not akin to having to disprove a negative. It is not a question of the defendant state being obliged to prove not having committed a violation of law, but instead it is a question of the defendant being obliged to show credible evidence of active and effective measures having been taken by it in order to bring a proven state of illegality (for which it has been responsible) to a definitive conclusion.

In contrast with the evidentiary difficulties surrounding the part of the case concerning factual mismanagement of waste, the CJEU had relatively little difficulty in upholding the Commission’s complaint that the Greek Government had failed to draw up and implement comprehensive waste plans as required by the relevant EU waste legislation. \(^46\) In conformity with well-established case law\(^47\) the Court underlined that incomplete practical measures or fragmentary legislation cannot discharge the obligation to draw up a comprehensive programme with a view to attaining certain objectives. It found that the measures taken by the Greek authorities had amounted collectively to being steps of a preparatory nature, without being ‘capable of constituting an organised and coordinated system for the management of waste’. \(^48\) As the Advocate General had pointed out, the national legislative measures taken had failed to contain sufficient detail regarding types and quantities of waste involved, general technical requirements, suitable sites for its treatment and disposal or deposit and any other special arrangements as required by the EU waste management rules. The key specific decisions to be taken by Greek authorities on how to account for the various waste arisings in the Chania area had not yet materialised. This exemplifies how much easier and straightforward it is for the
Commission to supervise compliance with those EU environmental norms which require member states to produce particular documentation, whether in the form of national legislation, programmes or reports, than with those that require implementation with specific practical environmental effect. Given that it is a standard requirement incorporated into EU environmental legislation that member states are required to notify the Commission of the content of such documentation, the Commission’s task of ensuring that due implementation has been respected is crystallized into cross-checking whether the national measures comply with the relevant substantive legislative requirements. Evidentiary issues are usually irrelevant in this context.

-Determination of the penalty payment

The CJEU’s judgment in Kouroupitos (2) provided only a cursory insight into its thinking on how financial penalties are to be calculated under Article 260(2) TFEU. The Commission only requested the imposition of a penalty payment, given its mistaken view at the time that a penalty payment and lump sum could not be awarded simultaneously in a particular case. The Court held that Greece should be fined a daily penalty payment of €20,000 from delivery of the second round judgment until confirmation that of compliance with the first round judgment. It makes it clear that penalty payments imposed under Article 260(2) TFEU take on board a strong element of the state of prospective as opposed to historic track record of compliance. Specifically, a defendant member state found guilty of infringing Article 260(2) TFEU is to be required to make payments according to the length of time that it fails to adhere to the terms of the first round judgment after the date of delivery of the
second round judgment. No payments appear to be required to made in respect of any period of non-conformity confirmed by the Court as having occurred prior to this date, even though such an interpretation is not expressly ruled out under Article 260(2) TFEU. However, the Court did not expressly address this point nor did it provide a detailed analysis as to how it arrived at this final figure, merely indicating in outline the main factors influencing its decision.

In contrast, Advocate General Colomer provides a detailed breakdown and analysis of his suggested penalty payment figure of €15,375. He considered that the level of payment proposed by the Commission should be reduced on the grounds that the obligations to draw up and implement waste plans were effectively incorporated into the general requirements pertaining to safe management of waste laid down in Articles 4 and 5 of the former Directives 75/442 and 78/319 respectively. The Court disagreed with this approach, making it clear that the obligations should be considered as being distinct from one another.

One key aspect that had to be determined by the CJEU was the extent of its jurisdiction in setting financial penalties under Article 260(2) TFEU. For a variety of reasons, Advocate General Colomer opined that the wording of the provision provided the Court with only limited judicial review in relation to Commission proposals for financial penalties. First, he submitted that were the Court to have absolute discretion in setting an amount, the Commission’s role would be reduced as a consequence to that of one offering legal advice to the Court, a power it already enjoys in its capacity as party to proceedings. Second, he noted that a considerable amount of political expediency entered into any assessment as to the calculation in
monetary terms of the relative degree of seriousness and urgency attached to any given infringement, a function that the Commission would be better suited to tackle than the Court. Finally, he raised concerns about the rights of the defence being undermined if the Court carried out its role autonomously and without regard to the Commission’s proposal. In particular, he questioned whether the defendant would be able to have a sufficient opportunity to respond. Accordingly, the Advocate General considered that the CJEU’s function envisaged by those who drafted the text to Article 260(2) TFEU to be confined to assessing whether the Commission’s proposal was manifestly inappropriate in some way:

‘In my view, insofar as each of the Commission’s choices inevitably entails an assessment of expediency, the examination of the Court of Justice is required to carry out must be no more extensive than that which it undertakes in relation to acts adopted by a Community authority on the basis of complex evaluations.

In those circumstances, the case law of the Court of Justice recognises that the Community has a wide measure of discretion the exercise of which is subject to limited judicial review, which means that the Community judicature cannot substitute its own assessment of the facts for that carried out by that authority. The Community judicature restricts itself in such cases to examining the correctness of the facts and legal characterisations effected by the Community authority on the basis of those facts, and, in particular, whether the action of the latter is vitiated by a manifest error or a misuse of powers or whether it clearly exceeds the bounds of its discretion.’

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The case law to which the Advocate General referred relates to the jurisprudence of the CJEU concerning the administration of EU competition law. Under EU competition law, the Commission has specific powers to fine companies that engage in particular prohibited anti-competitive practices, such as entering into cartel agreements and abuses of a dominant market position. There are significant differences, though, that exist between the powers vested in the Commission in relation to the enforcement of competition and environmental protection rules. In particular, the Commission is specifically authorised under EU Law to impose fines on economic entities infringing Union competition rules, whereas it does not have such power in the context of EU environmental law enforcement. The EU legislature has not so far chosen to delegate the Commission with such a power in environmental cases, although as has been commented elsewhere this is would be perfectly possible under the EU Treaty framework. In the case of infringements of EU environmental law, the Commission has only a power to request the CJEU to impose a lump sum or penalty payment under the auspices of Article 260(2) TFEU. For non-communication cases brought before the CJEU under Article 260(3) TFEU, namely instances where a member state has failed to notify the Commission of its transposition of an EU environmental legislative directive, the CJEU may not impose a financial penalty in excess of that proposed by the Commission. As has already been mentioned above, the CJEU has underlined on a number of occasions, including in Kouroupitos (2), that the Commission’s the guidelines on financial penalties are not binding but instead a useful reference point as part of its appraisal of individual cases. The CJEU appears therefore to make it clear that it considers itself to have discretion to come to choose
methods of calculating a financial penalty which might differ from that proffered by the Commission.

In *Kouroupitos* (2) the Court’s legal reasoning revealed, though, that it followed in substance the analytical framework used by the Commission. The CJEU identified a number of factors which assisted it in determining its penalty payment decision. As a starting point, it made it clear that the guidance documentation published by the Commission provided a suitable basis for it to come forward to the Court with penalty proposals, which in particular would be consistent with essential basic procedural principles of transparency, foreseeability, legal certainty and proportionality. In the event, the CJEU followed the key points of reference used by the Commission for determining a penalty payment for Greece: namely, duration of infringement, degree of seriousness and relative ability of the defendant member state to pay. In applying those criteria, the Court confirmed regard would be had to the effects of non-compliance on private and public interests and to the factor of urgency in getting the defendant to fulfil its EU obligations. It accepted that a penalty payment was the appropriate sanction in the circumstances, as opposed to a lump sum, given the nature of the breaches of EU environmental law which it regarded as ongoing and particularly serious.

As far as the factor (coefficient) of duration was concerned, the CJEU considered it sufficient to note that the length of infringement had been ‘considerable’. It noted that this was the case, even if technically the starting date for the purposes of this particular litigation was when the TEU entered into force (1.11.93) and not the date when the first round judgment was delivered (7.4.92). The comments of the Court
reveal that its understanding of the temporal dimension to calculating the duration coefficient for penalty payments should be traced as from the time of the first round judgment.\textsuperscript{65} This accords with the Commission’s view. The text of Article 260(2) TFEU, though, is not entirely clear on this point, merely stating that the CJEU may impose a fine on the defendant if the latter ‘has not complied with its judgment’.

The EU treaty wording might appear at first sight to indicate that the Court is restricted in stipulating a financial penalty corresponding to the time that the defendant state has failed to observe the terms of a first round judgment since the date of that judgment itself.\textsuperscript{66} However, it is equally plausible that a different interpretation should be gleaned from the provision’s wording, namely that the CJEU is not so restricted in imposing a penalty. Specifically, it could be argued that the treaty text endows the Court with power to impose a financial sanction which would take into account the duration that a defendant state has been found by it to have failed to implement EULaw correctly, namely as from the elapse of the deadline set down by the RO under Article 258 TFEU and not merely from the date of its judicial ruling on the case. Had the Commission and CJEU adopted this interpretation of the scope of the Court’s powers, this would have provided the latter with the possibility to impose (higher) financial sanctions from the outset that would have taken full account of the time that EU environmental law is in fact infringed. This interpretation would have added a greater level of incentive for member states to avoid failing to ensure due and proper implementation of their EU obligations and being tempted to draw out disputes with the Commission. It would also have been in better alignment with the aims of the EU founding treaties to ensure a high level of protection of the environment.\textsuperscript{67}

From discussion in chapter 3, it is evident that a considerable period of time may elapse
between end of the pre-litigation stage and first round judgment. In the first round action in relation to the *Kouroupitos* litigation, this amounted to some 2 years alone.\(^68\)

As seen above, the CJEU’s judgment in *Kouroupitos* (2) established a number of important principles concerning the operation of second round infringement proceedings. Significantly, it endorsed the basic framework published by the Commission on calculating penalties under Article 260(2) TFEU, thereby providing at least to some extent greater transparency, predictability and legal certainty surrounding the process for determining individual cases. In other respects, some of its reasoning is questionable, such as with regard to the issue of evidentiary burdens shouldered by the parties to litigation and temporal limitation of sanctions. The Court also failed to produce a detailed breakdown of the elements of the penalty payment it imposed. It has been mooted that the CJEU may have simply subtracted from the Commission’s total of €24,600 a figure that would represent absence of a breach of Article 5 of former Directive 78/319.\(^69\) However, if the CJEU would have followed the Commission’s figures exactly, the penalty would have been €21,535 and not €20,000 as it actually determined (the Commission having attributed €3,075 weighting for the alleged breach of Article 5 of Directive 78/319). The difference is considerable, bearing in mind that a daily penalty was imposed which was anticipated at the time would be likely in the circumstances to accumulate for some considerable time to come.\(^70\) It is submitted that the Court should have offered a fuller insight into its own calculations, for the purposes of providing greater transparency and accountability in terms of its decision-making.\(^71\) The Court may have simply rounded
down the figures, but if so this requires an explanation as to why this should have been appropriate in the circumstances.

4A.1.2 Spanish Bathing Waters (2) (Case C-278/01)

On 25 November 2003, the CJEU delivered its second ruling on the application of Article 260(2) TFEU, namely in Spanish Bathing Waters (2) which also involved a failure by a member state to ensure the correct implementation of EU environmental legislation. On this occasion, the litigation originally it involved the Commission taking enforcement proceedings under Article 258 TFEU against Spain over the latter’s failure to adhere to various requirements set down by the EU’s first Bathing Water Directive, former Directive 76/160. Legal action had been taken against Spain on the basis of information derived from annual reports submitted by it to the Commission, concerning the state of implementation of the Directive. This culminated in an infringement ruling from the CJEU that the Spanish Government had breached the original EU directive by not ensuring that the limit values for water quality set down in the legislation were implemented with respect to its inshore bathing waters.

Annual Spanish bathing water reports subsequent to the Court’s judgment under Article 258 TFEU revealed that the EU directive’s limit values on bathing quality continued to be infringed with respect to a number of inland Spanish bathing waters. Specifically the bathing reports submitted to the Commission from Spain in respect of the years 1998-2000 revealed that over 20% of inland bathing waters continued to fall
short of the limit values. After a reminder letter issued in March 1998, the Commission issued Spain with a LFN in January 2000, taking the view that the Spanish Government had not taken the necessary measures in order to comply with the terms of the first round judgment. During the course of the pre-litigation stage, it was apparent that the Spanish Government was in the process of introducing a number of steps to bring itself into a state of compliance with the EU bathing water legislation, including the installation of water purification projects, establishment of greater levels of supervision and prosecution against illicit discharges as well as a prohibition on bathing in areas identified not to be in conformity with the Directive. The Spanish Government also decided to commission a belated study into the state of inland bathing waters in 2000 and set a timetable for action on measures to be taken, estimated to be completed by 2005. By the time the pre-litigation phase of the second round infringement action was entering its final stages in early 2001, the Spanish Government decided to accelerate its compliance timetable to 2003 and provided the Commission with an internal report drawn up by the national Ministry of the Environment on the state of progress on action taken to comply with the first round judgment.

Nevertheless, the Spanish authorities’ hopes of being able to persuade the Commission of desisting from referring the matter to the CJEU through these initiatives ultimately failed. For it became clear that by the time the deadline elapsed for responding to the Commission’s final written warning (RO), Spain had not ensured that all its inland bathing waters were in compliance with the EU bathing water legislation as required. Accordingly, by mid 2001 the Commission decided to apply to the CJEU for a daily penalty payment to be imposed on Spain of €45,600
pending fulfilment of its EU environmental obligations. The Commission considered that in the circumstances a penalty payment instead of a lump sum was an appropriate sanction. It was of the opinion that this was warranted, given the relative seriousness and duration of the infraction, as well as bearing in mind the need to ensure that an effective penalty is imposed in order to induce swift compliance. The Commission arrived at its figure by multiplying the basic flat rate starting payment of €500 by the coefficients chosen by it for seriousness (factor of 4 out of a possible range of 1 to 20), duration (factor of 2 out of a possible range from 1 to 3) and relative financial ability of Member state to pay the penalty (factor of 11.4 based on GDP of the defendant member state and its voting power in the Council of the EU).

Accordingly, the Commission’s calculation was made on the following basis:

\[ \text{€500} \times 4 \times 2 \times 11.4 = \text{€45,600} \]

- Procedural and substantive issues

Even though the Spanish Government did not contest the empirical evidence produced by the Commission showing that Spain had consistently failed to ensure conformity with the EU bathing water limit values since the first round judgment, it asserted that in the circumstances the action should be dismissed on other grounds. Specifically, it submitted that the Commission had failed to ensure that sufficient time had been allowed after the first judgment for it to be able to comply with the EU directive.

The time span between the first round CJEU ruling and expiry of the date by which Spain had to respond to the Commission’s final written warning (RO) lasted 31 months (namely, from 12.2.98 to 27.9.00). Spain considered this to be an
unreasonably short period for the purposes of Article 260(1) TFEU, given that the implementation and corrective measures required to be taken were long term in nature. As already discussed above, this particular EU treaty provision requires the defendant state to take the necessary to comply with a judgment of the CJEU, notably one delivered under Article 258 TFEU. Although the treaty text is silent as to period of grace allowed to member states in order for them to ensure that they comply with its terms, well-established case law of the CJEU has underlined the importance of immediate and uniform application of EU Law across the respective territories of the member states and that Article 260(1) requires that the process of compliance must be initiated by the concerned member state at once and completed as soon as possible.79

In his opinion in Spanish Bathing Waters (2) Advocate General Mischo considered that the Commission’s action should be dismissed on grounds that Spain had not been offered a reasonable period in the circumstances to comply with the CJEU’s first round judgment of 1998, which in this instance had been effectively 2 years. He first rejected the Commission’s submission that Spain had failed to undertake corrective action as swiftly as possible after the first round judgment, as required under Article 260(2) TFEU in accordance with well-established jurisprudence of the Court. He opined that the Commission failed to prove its argument in referring to the fact that the Spanish Government was able to draw up a detailed programme of corrective action within the deadline stipulated by the final written warning in the pre-litigation phase but had not done so in the early months after delivery of the first round judgment in 1998.80 In his view, the Spanish Government required sufficient time to coordinate and crystallize implementation of the first judgment for all areas involved, which included time to conduct further tests on water quality.
The Advocate General considered that the Commission is implicitly under a general duty to allow for a reasonable period for compliance to take place under the terms of Article 260(2) TFEU. Although he was of the view that in principle liability will normally be proven in the event of a defendant failing to adhere to the terms of a first round judgment within the time limit set by the Commission’s final written warning, this particular case exhibited exceptional circumstances which would require a lengthier time for compliance. He listed a number of factors in support of this view. In particular, he noted the very long time limit prescribed in the EU Bathing Water Directive for member states to implement its limit values (10 years), constituting in his view recognition of particular long-term challenges faced by national authorities to secure implementation. He also noted the fact that the presence of mainly shallow and slow moving inland bathing waters in Spain constituted a particularly difficult technical hindrance to upgrading water quality, a feature not shared to such an extent in other member states. In addition, he underlined the relatively much more difficult task to implement ecological improvements on the ground than merely to transpose environmental directives into national law. He observed in this context that in some non-transposition cases the Commission had taken several years more than in the proceedings at hand to apply to the CJEU for a second infringement ruling. He also noted that the Commission had taken a considerably longer time in other environmental cases to close the pre-litigation phase. For instance, whereas some 5 years elapsed between the first round judgment and application to Court in the Kouroupitos litigation, in proceedings against the UK over 6 years expired between first round judgment and completion of the second round pre-litigation phase. Finally, he referred to the particularly challenging difficulties that national authorities faced in
tracing and eliminating sources of pollution in bathing water contexts, many of which may be diffuse (e.g. agricultural sources) and may well require general long term reform in terms of agricultural practices before improvements to aquatic environments may be detected. These factors were sufficient for the Advocate General to consider that the second round action against Spain should be dismissed, notwithstanding that the defendant had effectively been granted the opportunity of 15 years to comply with the Directive’s limit values, as measured from the deadline for compliance set in the EU legislation until the elapse of the time limit for compliance with the Commission’s RO issued under Article 260(2) TFEU (1986-2001). This was a period of time far longer than that granted to other member states under the terms of the EU Bathing Water Directive.84

In contrast with the Advocate General, the CJEU concluded in *Spanish Bathing Waters* (2) that the action should not be dismissed on the grounds that the Commission had provided Spain with an unreasonably short time to comply with the first round judgment. Consistent with previous case law, the CJEU preferred to avoid setting any general standard concerning the minimum time limit that should be allowed before the Commission could apply to the Court for a financial penalty. The Court instead reiterated well-established case law that the process of compliance with a first round ruling must be initiated at once and completed as soon as possible, as a means of upholding the importance of ensuring the immediate and uniform application of EU Law.85 This is not only understandable but also a wise approach, given the indefinite variety of situations in which implementation failures may arise, in terms of complexity and longevity. Instead, the Court chose to consider whether the 31 month period provided between date of delivery of first round judgment and elapse of the
time limit for compliance with the RO could be regarded as sufficient time in the circumstances for Spain adopt the relevant measures needed to comply with the first judgment. The reasoning of the CJEU implicitly accepts the proposition that a reasonable opportunity for attainment of compliance must be granted by the Commission in Article 260(2) TFEU proceedings. It considered that the length of time given to the defendant in the instant case was sufficient in the circumstances, namely covering three bathing seasons (1998-2000), even if compliance with the first round judgment may call for complex and long-term operations.\(^{86}\)

The CJEU’s approach is to be welcomed from a number of respects. First, it appears to provide a workable degree of certainty to the Commission when pursuing complex and long term environmental disputes in terms of what might be considered to be a reasonable period granted to a defendant to implement a first round Court ruling. Second, by taking into account the time taken up by the second round pre-litigation phase, the Court also ensures that second round proceedings will not be unnecessarily postponed or lengthened. One may draw from the Court’s reasoning that the Commission must in effect ensure that a reasonable period of time in the circumstances has been provided to the defendant prior to the close of pre-litigation phase for the latter to take steps to implement the CJEU’s first round judgment. Third, the Court’s refusal to adopt a more flexible approach in deference to member state claims of needing more time underpins the essential purpose of second round proceedings, namely to seek to ensure that a state of conformity is to be achieved as swiftly as possible. It also takes account implicitly of the fact that each member state has been provided a considerable period of time to implement their EU environmental obligations before a case comes to financial penalty stage. Spain should have
complied with the original Bathing Water Directive 76/160 already by the beginning of 1986. It therefore had in effect been granted in fact some 15 years on top of that foreseen for it to have to ensure that its bathing waters conformed with the Directive’s limit values before the Commission got to the stage of applying to the Court for the imposition of a penalty payment.

A notable factor that clearly played a significant role in terms of the prosecution of the case was the strategy employed by Spain of reducing the number of areas for inland bathing as a means of implementing the first round judgment. The Commission noted that there had been a reduction of 100 of such areas between 1996-2000 in Spain, and opined that the Spanish Government was seeking to comply with the judgment by artificially reducing the number of bathing areas as opposed to improving bathing water quality. This was clearly an important factor for the Commission in terms of its prosecution of the case, given that the longer proceedings were stretched out at pre-litigation phase the greater the opportunity for the defendant to be able to seek to comply with the terms of the first round judgment simply by closing polluted inland bathing areas without taking any steps to improve their environmental quality.

On technical grounds the CJEU elected not to comment on this point, noting that the material evidence proffered by the Commission in support of its case did not specifically include areas removed from the list of bathing areas reported to it by the Spanish Government. This is unfortunate, given that such a strategy employed by a state could, without check, readily undermine the efficacy and purpose of the EU legislation. Commission annual reports on the state of implementation of EU environmental law have noted that the practice of prohibiting or otherwise
declassifying bathing areas has been employed as a tactic by a number of member states as part of a strategy for ensuring compliance with the EU bathing water legislation. Under the terms of the original EU bathing water directive it was not readily clear whether member states were provided with absolute discretion to declassify bathing waters. The subsequent revision to the directive clarified that member states have such power.

-Determination of the penalty payment

The CJEU clarified in *Spanish Bathing Waters (2)* a number of legal points concerning the imposition of financial sanctions under Article 260(2) TFEU in the course of its judgment. In agreeing with the Commission that Spain had failed to adhere to the terms of its judgment made under Article 258 TFEU, the Court then determined what particular monetary sanction should be imposed on the defendant. In so doing, the Court differed in its approach from the Commission, electing to construct the penalty payment on a deferred and contingent basis as opposed to a standard daily penalty formula.

The Court first clarified the particular point in time as to when the Commission is entitled to specify a calculation as to the amount of penalty involved. This point had been left unaddressed by it in *Kouroupitos (2)*. In *Kouroupitos (2)* Advocate General Colomer had opined that this should be not before the last opportunity for the defendant to submit pleadings in the course of the litigation phase (i.e. either at the closure of written submissions to or the oral hearing before the Court). He considered that this interpretation would be in line with the purpose of second round
proceedings to encourage a recalcitrant member state to comply with a judgment establishing a breach of obligations. He rejected the completion of the pre-litigation phase as being the relevant moment in time, given that the function of Article 260(2) TFEU was not to obtain a declaration of failure to fulfil EU statutory obligations. The CJEU in *Spanish Bathing Waters (2)* rejected his interpretation by confirming that elapse of the period for responding to the final written warning in second round proceedings constituted the appropriate moment in time when the Commission was entitled to bring the matter to the Court for the purposes of imposing a financial sanction either in the form of a daily penalty or lump sum payment.\(^9\) Moreover, it was the circumstances at that particular point in time that the Commission had to assess in terms of specifying the amount it considered appropriate to be paid by the defendant.\(^9\)

The CJEU’s findings with regard to this point are convincing, as they enhance the elements of procedural efficacy as well as deterrence underpinning second round infringement proceedings under Article 260(2) TFEU. Advocate General Colomer’s suggested interpretation in *Kouroupitos (2)* would have allowed a defendant state to escape penalty by securing compliance at a very late stage in proceedings, notwithstanding a considerable period of time will have elapsed before the defendant actually got round to complying with the first round judgment. He doubted whether the Commission could be considered to have a legitimate interest in pursuing litigation after the point in time where a member state complies with a first round judgment.\(^9\) In effect, he implied that Article 260(2) proceedings were akin in this respect to legal action taken against EU institutions in respect of failures to act under Article 265 TFEU, where proceedings are deemed to be devoid of purpose once the
defendant institution has defined its position (i.e. actually taken action with
respect to the subject matter in question). The Court’s different interpretation in
Spanish Bathing Waters (2) has the advantage of minimising the possibility of
defendants of abusing the second round procedure by deliberately seeking to draw out
the length of litigation in order to gain extra time to comply with a first round
judgment. Moreover, the CJEU’s view lends an element of greater certainty and
predictability to proceedings, each party now having a relatively clear framework in
advance to calculate, at least in broad terms, the approximate level of a financial
penalty to be affirmed by the Court.

Unlike in Kouroupitos (2), the CJEU in Spanish Bathing Waters (2) shed some light
as to the nature of financial penalty to be imposed in any given case. Article 260(2)
TFEU refers to the possibility of the Court imposing either a lump sum or penalty
payment on the defendant state, without disclosing any details as to how one should
choose between these options in practice. Whereas in this case the Commission had
proposed a daily penalty payment of €45,600, the Court disagreed and considered that
a special annual penalty payment would be most appropriate in the circumstances.
Specifically, the Court held that the Spanish Government would be obliged to pay a
penalty payment of €624,150 per year and per 1% of the inland bathing areas found
not to be in conformity with its first round judgment, as from the time when the
quality of the bathing water achieved in the first bathing season following delivery of
the second round judgment is ascertained until the year in which the first round
judgment is found to be complied with. Moreover, the Court decided that the level
of fine specified by the Commission should be reduced considerably, to take account
of particular circumstances pertaining to the case, notably the degree of difficulty to
comply with the EU legislation and measures already taken by Spain to make progress on achieving full implementation of the EU limit values. Specifically, the fine imposed by the Court was comparable with a (deferred) daily penalty of €34,200, namely 75% of the amount requested by the Commission.

The CJEU justified its determination for a deferred annual penalty payment on two main grounds. First, it noted that in practice the defendant state would only be able to prove that the infringement has come to an end annually when it provides the Commission with its end of year bathing water implementation report. A situation could therefore conceivably arise where a daily penalty payment mechanism could accordingly require payments be made in respect of a period during which the Directive’s requirements might have already been met by the defendant. Second, it considered that a flat rate penalty payment here would fail to take account of progress made by Spain towards compliance with the first round judgment. The CJEU’s points here followed in substance the reasoning employed by the Advocate General in querying the relevance of a daily penalty payment. The Court noted the considerable difficulty in practice for member states to achieve complete implementation of the EU directive. It referred to the factors of difficulty pointed out by the Advocate General in his Opinion, who had noted that the challenges faced by national authorities to detect and eliminate all sources of water pollution were substantial and often took several years to overcome, as recognised by the Commission itself. In particular, a definitive solution to a particular problem might well only be able to be brought about through long-term programmes of reform for particular agricultural practices. Taking this into account the CJEU concluded:
‘In those circumstances, a penalty which does not take into 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.’

The CJEU appears here to be laying down a general benchmark for the Commission in determining how to calculate its penalty requests and has taken it on board in several later cases where it deems it appropriate to apply to individual case circumstances. The principle or benchmark that may be deduced from the Court’s reasoning here is that the Commission should ensure where feasible that the penalty payment it proposes is sufficiently sensitive to accommodate improvements made by the defendant in working towards complying with the first round judgment. In particular, the element of proportionality is not respected even if the Commission would seek to guarantee refunding the defendant in respect of any overpayments found in hindsight to have been made as a result of the daily penalty payment mechanism. The Commission will be particularly mindful of the need to adjust its penalty specifications in cases which its evidence is predicated upon periodic implementation reports supplied by member states in accordance with EU environmental legislation.

In its judgment the CJEU also decided for various reasons to reduce the level of the penalty requested by the Commission. The Court considered the factors of degree of seriousness, duration of infringement and relative ability to pay that underpin the Commission’s framework for calculating a fine. As in Kouroupitos (2) the Court approved the latter’s framework as one suitable for it to use, whilst making it also
clear that as a matter of legal principle the Commission’s actual specifications would not bind it and instead be simply a useful reference point. However, the CJEU also considered that the Commission had erred in its assessment of the factor of duration of infringement in this particular case. Specifically, it considered that compliance with EU bathing water law was in the circumstances relatively difficult to achieve within a short timescale. In addition to referring to problems of pollution detection, the need to draw up plans of action and implementation, the Court noted that application of EU public procurement legislation (required for bathing water area modification projects) would add specific minimum time-lengths in order to allow for open tendering procedures. As a result, the Court concluded that the coefficient for duration should be set at 1.5, lower than the figure of 2 proposed by the Commission.

The CJEU agreed with the Commission’s assessment with regard to the other coefficients of seriousness of breach and ability to pay. With regard to seriousness, the CJEU considered that the Commission, in applying a relatively low coefficient (namely factor 4 out of a possible range between 1 to 20), had given due account to the extent to which the original EU Bathing Water Directive had been implemented over time. It noted a rate of conformity of 79.2% in 2000 as compared with 54.5% in 1992. It was unimpressed with the Spanish Government’s submission that it was not provided with a similar length of time for implementing the legislation (i.e. 10 years) as was the case with other member states, commenting that opportunity for organising an extended period for transposition applicable to Spain would have been available for negotiation at the time of Spain’s accession to the EU. Spain could not now be allowed to plead retroactively for extra time, given that it had not considered it
necessary to do so in 1985. In sum, the Court computed the penalty payment on
the following basis:

\[ \text{€}500 \text{ (basic amount)} \times 1.5 \text{ (duration coefficient)} \times 4 \text{ (seriousness coefficient)} \times 11.4 \text{ (ability of Member state to pay coefficient)} = \]

\[ \text{€}34,200 \text{ (expressed as a daily penalty)} \]

or

\[ \text{€}12,483,000 \text{ (expressed as an annual penalty)} \]

The total annual penalty payment expressed the annual financial sanction that would
be applied if the same proportion of Spanish inland bathing waters as found not to be
in conformity with the Court’s first round judgment as at the end of the pre-litigation
stage (i.e. 20%) was reported to be still in a state of non-conformity by the time the
member state bathing reports for the 2004 bathing season emerges. The Court refined
its final figures by stipulating that for every 1% of inland bathing water area shown
not to conform with the terms of the first round judgment as from the first year after
the date of the second round judgment would be subject to an annual penalty payment
of €624,150, representing 1/20th of the total annual payment calculated on the basis of
a rate of 20% non-compliance for inland bathing waters.\textsuperscript{102}

The Court’s determination of the penalty payment in \textit{Spanish Bathing Waters (2)} may
be regarded as relatively generous to the defendant in the circumstances. In particular,
the CJEU failed to address what turns out to be a fundamental issue in this case, namely what exactly constituted conformity for the purposes of the Bathing Water Directive. As already noted earlier, the Court failed to consider whether a strategy on the part of the defendant to prohibit or otherwise unilaterally declassify bathing areas in order to reduce the number of sites subject to the terms of the original EU directive was legitimate. Whilst such a strategy may on the surface appear to render statistics that appear to point towards improvements in terms of the proportion of bathing areas in compliance with the EU’s limit values, in reality such action masks a toleration of deterioration of EU bathing water, something that the EU legislation is specifically intended to combat. The judgment of the Court left open the question whether Spain would be entitled to adopt such an approach within the first year of its second round judgment in order to avoid paying any cent of the fine.

The Court’s assessment of the application of the factor of duration of infringement is also questionable. The fact that it may, as the CJEU in this case points out, take a considerable period of time for a member state to ensure that its bathing areas comply with certain agreed qualitative criteria is an issue that the legislation itself should and does take into account. That the original Bathing Water Directive specifically allowed a relatively long period for compliance (10 years from the date of the Directive’s notification\(^{103}\)) is a reflection of the degree of political concern and agreement expressed by the EU’s legislative institutions on this point. EU environmental legislation frequently builds in considerable periods for the process of national implementation, precisely where substantial periods of time for implementation plans and infrastructural changes are envisaged to be required to take place. EU legislation on improvements to water quality,\(^{104}\) waste water treatment\(^{105}\) and solid waste
management\textsuperscript{106} are good examples this. It could be argued that the CJEU, by taking into account the relative length of time it may take to fulfil a first round Court judgment into the duration coefficient, is factoring in something that the EU legislature has already taken into account from the outset. The effect of the Court’s approach here is to tolerate the prospect of double accounting, whereby a member state pleads for the factor of time taken for due implementation to be taken into account twice: first with respect to the deadline for implementation of the legislation and second in respect of implementation of a first round judgment which itself is predicated upon the presence or otherwise of faulty implementation.

As in \textit{Kouroupitos (2)}, the CJEU in \textit{Spanish Bathing Waters (2)} stipulates that liability for a penalty payment applies prospectively, namely in the event that the breach of the first round judgment is shown to continue from the date of delivery of the second round judgment. One could question the assumption which the Court appears to make that financial sanctions should only run from the date of delivery of the second round judgment onwards. The text of Article 260(2) TFEU provides simply that either a penalty payment or lump sum may be imposed by the Court in the event of it finding that a member state has breached the terms of an earlier judgment made, such as under Articles 258 or 259 TFEU. Under Article 258 TFEU, as discussed above in Chapter 3, liability in respect of that provision is triggered by virtue of non-compliance as at the termination of the pre-litigation stage. The CJEU in \textit{Spanish Bathing Waters (2)} also appears to be suggesting this principle to apply in the context of second round proceedings, in confirming that the Commission is entitled to specify the penalty amount as soon as deadline for response to its RO has elapsed.\textsuperscript{107} However, it transpires from the Court’s rulings that whilst closure of the pre-litigation
stage marks the point in time that the defendant member state may be said to have definitively infringed Article 260(2) TFEU, this does not mark the point in time when the defendant becomes liable to make any penalty payment. If the defendant member state is able to demonstrate that it complies with the first round judgment as from the date of delivery of the second round judgment, then it appears that it may well not be liable to make a penalty payment.

It is evident that penalty payments, being periodic in nature, are clearly best suited to address situations where compliance has not yet been achieved and represent a form of continuous pressure or incentive for the defendant to achieve a state of legal conformity. Lump sum fines are better suited to address situations where the defendant failed to comply with a first round judgment as at closure of the pre-litigation stage but has attained compliance before the delivery of the second round judgment. The latter type of fine is therefore capable of expressing the clear requirement underpinning Article 260(2) TFEU that member states found by the CJEU to have failed to adhere to the terms of one of its previous rulings should incur a financial penalty, either in the form of a penalty payment or a lump sum. A key shortcoming in Spanish Bathing Waters (2) was the fact that no lump sum was requested by the Commission or imposed by the CJEU. A lump sum would have served to bring Spain to account for its considerable and unjustified delay in achieving compliance with the EU legislation. The Commission, though, was under the misapprehension at the time Article 260(2) TFEU required it to choose between the types of financial penalty in individual cases, and only requested a penalty payment given that the infringement was ongoing. The CJEU only rectified this
misunderstanding of the text of Article 260(2) TFEU in the subsequent case of

_French Fishing Controls (2)_, discussed in the next section.

4A.1.3. _French Fishing Controls (2) (Case C-304/02)_

The third opportunity for the CJEU to rule on the application of Article 260(2) TFEU arose in the _French Fishing Controls (2)_ case, a case concerning the area of conservation of marine resources. Specifically, in that case the Commission had decided to bring ‘second round’ proceedings against France in respect of its failure to adhere to an earlier judgment of the CJEU, which had held that it had breached the requirements of EU legislation on controls relating to the fishing industry. In the earlier first round ruling, the Court had agreed with the Commission’s submissions that France had failed to adhere to EU rules on minimum mesh sizes of fishing nets, had failed to set up inadequate controls to prevent the sale of undersized fish and had failed to take steps to ensure that appropriate sanctions would be taken against persons found to infringe EU conservation requirements.

When referring its dispute with France to the CJEU for a second time, the Commission requested the Court to impose a daily penalty payment of €316,500 on France. The figure, based on the Commission’s original published guidance on calculation of penalty payments, was arrived at by multiplying the (then) basic amount of €500 by the following three co-efficients of seriousness (factor of 10), duration (factor of 3) and ability to pay (factor of 21.1).
-Procedural and substantive issues

In several respects, the issues surrounding compliance in *French Fishing Controls (2)* were relatively straightforward. The Commission, by way of evidence obtained through a number of inspections carried out by its officials in French fishing ports as well as its assessments of the relevant conservation control mechanisms existing in law and practice at national level, was able to demonstrate that France had continued to breach the terms of the first round ruling made against it by the CJEU under Article 258 TFEU. As a consequence, the CJEU was not faced with difficult questions of evidence pertaining to the substance of the case. The fact that the Commission had recourse to the use of supranational inspection systems in this case was pivotal in assisting it in meeting its burden of proof responsibilities under Article 260(2) TFEU.

In assessing the question of liability under the terms of Article 260(2) TFEU, the CJEU confirmed that the relevant reference date for assessing an alleged breach of obligations should be the deadline set for compliance with the final written warning issued by the Commission, which was at the time the deadline set by the RO for the member state’s response.\(^{110}\) This mirrors the position applicable under Article 258 TFEU. Accordingly, the CJEU confirmed that member states will not be able to evade liability under Article 260(2) TFEU by complying with the terms of the final written warning subsequent to that deadline and before the CJEU has had an opportunity to give a ruling on the case. The infringement action is not to be considered devoid of purpose, where a member state is able to show that it has complied with the terms of the final warning after the set deadline. This confirmation by the CJEU is to be welcomed, in that it prevents the possibility of member states being able to delay
compliance to the last possible minute. In other respects, the CJEU also reaffirmed fairly self-evident but nonetheless important procedural points. Specifically, in confirming that the Commission had the onus to prove that France had failed to adhere to a first round judgment, the CJEU held that the burden of proof shifts to the defendant where the Commission adduces sufficient evidence in support of its submissions of non-compliance. As was commented in relation to the *Kouroupitos (2)* judgment, the placement of the burden of proof on the Commission in the context of Article 260(2) TFEU cases may well be problematic in the context of cases involving bad application of EU environmental law, bearing in mind in particular the relative lack of resources and powers vested in the Commission services to carry out investigations. The fishing sector constitutes an exception to the norm in this regard, though, in respect of which the Commission is vested with powers and resources to carry out inspections within member states. In this case, the Commission services carried out a number of inspections at French fishing ports, which were seminal in being able to verify the existence of illicit practices of catching undersized fish. The Court’s reaffirmation of the initial burden of proof being placed on the Commission is unjustified also on other more basic grounds. Such an interpretation of the evidential requirements underpinning Article 260(2) TFEU undermines the effectiveness of the legal procedure. It appears unduly lenient on the part of the CJEU to hold that the onus of proof does not lie with the member state to demonstrate compliance with the terms of a court judgment, which has already confirmed that it is guilty of failing to comply with EU law.

Determination of the penalty payment and lump sum
The particular significance of the *French Fishing Controls (2)* case lies in the fact that it was the first case in which the CJEU imposed a lump sum fine on a member state. In addition, the judgment also throws considerably more light on the independent powers of the Court to impose financial penalties on defendants under Article 260(2) TFEU.

The CJEU upheld in its judgment the Commission’s request for a penalty payment to be imposed on France. The Commission had proposed a daily penalty payment of €316,500 to be levied on France, considering this to be the best type of sanction to be used in order to ensure rapid compliance with the terms of the first round Article 258 TFEU ruling. Whilst agreeing that a penalty payment is likely to have an effect of inducing compliance on the part of the defendant, the CJEU was keen to assert that the decision as to whether any fine should be imposed and, if so, its magnitude was ultimately a matter for it to settle, with a view to ensuring that it is determined appropriately in accordance with the particular circumstances and is proportionate both the breach of law established and ability to pay on the part of the defendant member state. The CJEU confirmed that the Commission’s published guidelines on penalty calculations are to be considered a useful reference point, and worked on the basis that a calculation should be premised on the three factors developed by the Commission’s guidelines of degree of serious of infringement, its duration and the defendant state’s ability to pay. In applying these considerations to the case at hand, the CJEU in essence agreed with the Commission’s penalty payment request. However, the Court considered that the penalty payment should be paid on a half-yearly as opposed to daily basis, to take into account measures already taken by the French authorities which could potentially serve as a basis for implementing the
relevant EU fisheries obligations. The CJEU thereby effectively provided the French authorities with a breathing space of six months to comply with the first round judgment.

The particular significance of this case concerns the decision of the CJEU to impose a lump sum fine on France, specifically a one-off payment of €20m addition to a penalty payment. In so doing, the CJEU clarified a number of legal issues. Firstly, it confirmed its independence in determining whether or not to levy penalties and lump sum fines in Article 260(2) TFEU cases, holding that the Commission’s request for financial penalties is not binding on the Court. In this particular case, the Commission had not requested the imposition of anything other than a penalty payment. Secondly, the CJEU held that the wording of Article 260(2) TFEU did not oblige the Commission or the Court to elect either a penalty payment or a lump sum fine. Article 260(2) specifies that the CJEU ‘may impose a lump sum or penalty payment’. The CJEU construed the terms of that provision to mean that the CJEU could choose to levy both types of financial sanction in any given case. It was supported in its views by the opinions of Advocate General in the case, the Commission and three Member states. By way of intervention, thirteen member states submitted to it a contrary opinion, arguing that the word ‘or’ in the treaty text should be construed as meaning that a choice had to be made between levying either a penalty payment or a lump sum fine. Nevertheless, the CJEU considered that the interpretation of the word ‘or’ was that it should be read in a cumulative as opposed to a disjunctive sense, taking into account the objective of Article 260 TFEU, namely to induce compliance on the part of the defendant member state.
Thirdly, the CJEU rejected submissions made by some member states that the imposition of two sanctions would be tantamount to a breach the principle of *non bis in idem*, holding that the functions of the two types of financial sanction were distinct from one another. Specifically, the CJEU considered that the imposition of a penalty payment was prospective in nature, namely particularly focused on inducing swift compliance by the defendant. In contrast, the Court viewed the lump sum fine as a sanction more attuned to assessing the effects on public and private interests of the failure on the part of the member state to achieve compliance with its EU obligations. The Court considered that imposition of a lump sum fine was particularly appropriate, where non-compliance with a first round judgment had persisted for a considerable period of time in this case. Some 14 years separated the first and second round judgments. Fourthly, the CJEU rejected the Belgian government’s submission that principles of legal certainty and transparency required clarification by the Commission in the form of guidelines on the criteria applicable to the levying of a lump sum fine. The CJEU reiterated the point that Article 260(2) did not require these to be established, given that the Court is vested with independent powers of adjudicating whether or not sanctions should be imposed and their levels in any given case. Finally, the Court dismissed arguments made by the French Government that the imposition of a lump sum fine in this case would breach the principle of equality of treatment of member states, notwithstanding that in previous second round cases neither of the defendant states in *Kouroupitos (2)* or *Spanish Bathing Waters (2)* had been subject to a lump sum fine. The Court ruled that each case would be determined in accordance with its particular merits, and no precedent could be implied from the absence of lump sum fines being imposed by it previously. The Court findings were
supported in its views by the two opinions issued by Advocate General Geelhoed in the proceedings.\textsuperscript{118}

What is remarkable, though, in the CJEU’s judgment is that it fails to provide any detailed analysis as to how it arrived at the figure of €20m for the lump sum payment. Guidelines from the Court on the application of the lump sum mechanism would have been clearly welcomed by the Commission, for the purpose of handling future cases. In addition, they would have underpinned the principles of transparency, consistency and legal certainty, which the Court itself indicated are required to be followed by the Commission in forwarding requests for sanctions. In this context the, Court did concede that such guidelines would be useful in ensuring that the Commission acts in accordance with those principles. It is difficult to see why such comments should not also apply to the decisions of the CJEU in relation to Article 260(2) TFEU.

Subsequent cases, as discussed in the next two sections, have revealed some general criteria used by the CJEU in setting lump sum fines but the Court appears keen to avoid revealing any detailed numerical insights into the methodology underpinning its calculations.

\textbf{4A.1.4 Belgian and Luxembourg Waste Water Treatment cases (Cases C-533/11 and C-576/11)}

In 2013, the CJEU had occasion to consolidate its jurisprudence concerning the application of Article 260(2) TFEU in respect of bad application of EU environmental law in two cases involving defective implementation of the EU’s legislative rules on
waste water treatment. The two cases concerned second round rulings by the CJEU against Belgium and Luxembourg in 2013, namely the judgments in Belgian Waste Water (2)\textsuperscript{119} and Luxembourg Waste Water (2).\textsuperscript{120} Both judgments add relatively little to the existing jurisprudence of the Court and need therefore only be briefly summarised here.

Both member states had got into difficulties in fulfilling their obligations under the EU Urban Waste Water Treatment Directive 91/271.\textsuperscript{121} In Belgium’s case the member state had originally been found by the CJEU in its first round ruling in 2004\textsuperscript{122} to have failed to comply with the directive’s obligations concerning collection and sensitive area stringent treatment of waste water as well as the establishment of an implementation programme. Some 174 agglomerations were affected as a result of defective implementation of the directive. As a result of delays by the Belgian authorities to attend to these problems, the Commission commenced second round action in January 2006. Subsequent to a further period of grace granted to the member state (the reasoned opinion was issued in June 2009) the Commission ultimately referred the matter to CJEU for a second ruling. Some 22 agglomerations were still not being serviced with appropriate waste water treatment systems when the Commission applied to the Court in October 2011 for financial sanctions. In Luxembourg’s case the member state had been condemned by the CJEU in a first round ruling in 2006\textsuperscript{123} over shortcomings in the implementation of the EU directive. Specifically, the CJEU found that that the state had failed to ensure that appropriate stringent waste water treatment had been implemented with respect to discharges from particular waste water treatment plants. By the time the Commission brought second
round proceedings before the CJEU in November 2011, it assessed that six waste water treatment plants were still non-compliant with the directive’s requirements.

-Procedural aspects

It was evident in both cases that the Commission was careful to ensure that the defendant member states received substantial amounts of time to comply with the first round judgments. No doubt it was aware that a relatively lengthy period of grace would be needed to be granted to the defendants in order to ensure that the latter had a reasonable amount of time to comply with the first round rulings in accordance with Article 260(1) TFEU, given that the implementation measures involved required relatively substantial amounts of investment, planning and construction work. Indeed, the UK government, in its capacity as an intervener in the litigation, submitted that a reasonable period of time had to be allowed in respect of implementation of large-scale infrastructure projects with the onus on the Commission to show that a period of non-compliance has been unreasonable. Whilst the CJEU did not specifically address this aspect, it did not have cause to query the amount of time allowed by the Commission for the defendants to comply with the first round rulings. Indeed, it found that the periods of non-compliance with the first round rulings were ‘excessive’ in the circumstances124 (7 years in Belgian Waste Water (2) and 5 years in Luxembourg Waste Water (2) between first round ruling and referral to the CJEU).

The CJEU also noted that the EU directive provided a substantial period for implementation.

-Determination of penalty payment and lump sum
In the second round ruling for Belgium, the CJEU employed an approach resonant of the one adopted by it in *Spanish Bathing Waters* (2). Specifically, the CJEU held that Belgium should be required to pay from the date of the second round judgment a daily penalty payment of €859,404 for each six month period of delay in taking the requisite measures to comply with the first round judgment. Furthermore, this amount would be reduced by an amount corresponding to the proportion of population equivalents brought into compliance with the directive’s requirements. In addition, the Court also noted that no penalty payment would be payable if the infringement was discontinued by the date of the second round judgment. This penalty payment formula, proposed to the CJEU by the Commission, is tailored to provide the member state with a clear financial incentive to undertake immediate action to address the outstanding non-compliance issues whilst at the same time allowing a further period of grace (of six months) before the first penalty payment is due. In the Luxembourg case, the CJEU opted to require a standard daily penalty formula, specifically €2,800 per day from the date of second round judgment until compliance is achieved with the first round ruling.

In both cases lump sum fines were imposed on the defendant member states in addition to penalty payments. These were €10m for Belgium and €2m for Luxembourg. It was evident that the CJEU was keen to note that the substantial amount of delays involved in complying with EU environmental protection obligations in these cases were significant factors counting against the defendants, notwithstanding that the obligations inherently involved a significant period of several years work to fulfil. In effect, the CJEU quite rightly took note of the fact that the
substantial period required for member states to upgrade their waste water systems was factored into the terms of the directive

4A.1.5 Update on second round bad application cases as at end 2016

Between 2014-2016 the CJEU handed down seven second round environmental infringement judgments concerning bad application of EU environmental law under the aegis of Article 260(2) TFEU. These cases mostly addressed instances of long-standing serious infrastructural shortcomings on the part of certain member states concerning the management of fundamental environmental problems and challenges as stipulated by long-standing requirements of EU environmental legislation. Four cases concerned failures to ensure the safe management of solid waste, two cases involved shortcomings in installing urban wastewater facilities and one case concerned failings regarding the upgrading of permits for installations covered by EU rules on integrated prevention, pollution and control. The cumulative effect of this litigation has been to provide greater clarity on the CJEU’s understanding of key legal principles underpinning the prosecution of second round infringements, in particular those relating to bad application of EU environmental law.

-Factual background to recent second round bad application cases (2014-16)

Before expanding on the CJEU’s consolidation of principles underpinning the second round infringement procedure as a result of this recent wave of litigation, it perhaps useful to first to outline the basic factual and legal background to these cases, several of which constitute very serious and long-standing violations of EU environmental
law resulting in requests from the Commission for the CJEU to impose relatively high financial penalties. As mentioned above, four of the cases concerned breaches of EU legislation concerning solid waste management: *Italian Illegal Landfills (2), Greek Illegal Landfills (2), Campania Waste (2) and Greek Hazardous Waste Planning (2)*. The *Italian Illegal Landfills (2)* concerned the long-standing failure by the Italian authorities across the member state to eliminate the presence of several illegal waste tips. In 2005 the CJEU had condemned the member state in first round infringement proceedings under Article 258 TFEU for having allowed a situation to arise in which there were general and persistent breaches of EU waste management legislation requiring safe disposal of waste including clean-up of illicit sites and the establishment of appropriate site conditioning plans for landfills. In 2002 it was estimated by the Italian National Forestry Authority that 4,866 illegal waste tips were in operation. When the Commission referred Italy to the CJEU in second round proceedings in 2013, it claimed that over 200 illegal waste tips had still not been rehabilitated, with 16 failing to meet requirements regarding hazardous waste management and 5 without a conditioning plan. The Commission requested the CJEU impose a daily penalty of €256,819.20 together with a lump sum fine €28,089.60 per day between first and second round rulings (which in total amounted to €77,948,640). *Greek Illegal Landfills (2)* involved a similar type of situation, with the Commission taking second round infringement action against Greece over its failure to close and clean up several illegal waste tips. Whilst in 2005 the CJEU found in its first round infringement ruling that the member state had failed to address the problem of 1,125 illegal waste tips, by the time the Commission referred Greece back to the CJEU for a second time, it claimed that 73 sites were still in operation and 223 had yet to be rehabilitated as required by EU waste legislation. The Commission requested the
CJEU to impose a daily penalty payment of €71,193.60 and a lump sum totalling €25,821,028.8.

The Campania Waste (2) infringement case concerned the long-standing failure by the Italian regional authorities in Campania (encompassing Naples) to ensure the existence of an adequate network of waste disposal installations in respect of municipal urban waste and thereby attain safe management of such waste as required by EU waste legislation. In 2008 the CJEU’s first round infringement judgment had found that the Italian authorities were in breach of EU waste management legislation, in having failed to address the ‘waste crisis’ that the regional authorities had identified as far back as 1997. By the time the Commission initiated second round infringement proceedings in 2011, the situation had hardly improved. The Commission had received numerous reports concerning large quantities of abandoned urban waste littering roadsides, a 15 year backlog of untreated waste that had been stored in temporary depositaries and evidence that 22% of waste generated in the region was being transported outside Campania for treatment. The Commission requested the CJEU to impose a daily penalty payment of €256,819.20 together with a lump sum fine €28,089.60 per day between first and second round rulings (which in total amounted to €55,027,426). The fourth solid waste case, Greek Hazardous Waste Planning (2), concerned a systematic failing on the part of the Greek state to provide for the safe management of hazardous waste. In 2009, the CJEU confirmed a number of breaches of EU waste legislation affecting the entire member state, specifically the absence of appropriate co-ordinated waste management planning, a failure to establish an adequate network of treatment (disposal) installations and by virtue of these deficiencies a failure to ensure that a backlog of stored hazardous
waste arisings was subject to safe definitive treatment. By the time the Commission brought second round proceedings before the CJEU in 2014, several of the breaches were still persisting with some 33% of hazardous waste estimated not subject to appropriate management. The Commission requested the imposition of a daily penalty payment of €72,864 together with a lump sum fine totalling €20,660,992.

Two of the second round infringement judgments decided between 2014-16 concerned instances of serious, long-term mismanagement of urban waste water in Greece and Portugal (Greek Urban Wastewater (2) and Portuguese Urban Wastewater (2)).\textsuperscript{135} Both cases concerned the failure by the member states to comply with the requirement contained in the EU’s 1991 Urban Wastewater Directive (Directive 91/271) to ensure that towns with a population over 15,000 install waste water collection and secondary treatment systems by the end of 2000.\textsuperscript{136} In the first round proceedings taken against Greece, the CJEU in 2007\textsuperscript{137} found that 21 Greek towns had yet to install collection systems and 22 were without secondary treatment. In its first round ruling against Portugal in 2009, the CJEU\textsuperscript{138} held that 7 towns had inadequate collection systems and 15 had yet to install secondary treatment facilities. When it referred Greece and Portugal for a second time to the CJEU in 2014, the Commission maintained that 6 Greek and 2 Portuguese towns were still in a situation of non-compliance. It requested the CJEU to impose a daily penalty payment of €47,462.40 and a lump sum fine totalling €15,106,392 on Greece and a daily penalty payment of €20,196 and a lump sum fine totalling €5,836,644 on Portugal.
The other second round infringement ruling concerned a failure on the part of Sweden to ensure that all of its industrial installations covered by EU legislation on integrated pollution prevention and control (IPPC) complied with permitting requirements. This case was less serious than the others, given in particular that the breach of EU law had been of a relatively shorter duration and the member state had taken steps which had ensured that the situation of non-compliance had largely been addressed by the time of the judicial hearing before the CJEU in second round proceedings. Specifically, the Swedish authorities had failed to ensure that by 30.10.2007 all installations existing prior to the entry into force of the first IPPC Directive (Directive 96/61) were upgraded so as to comply with the EU legislation’s permitting conditions set for new plants. In 2012, the CJEU confirmed in its first round infringement judgment that 29 of such ‘existing’ installations in Sweden had failed to be upgraded so as to be able to comply with IPPC permitting requirements. When the Commission first initiated infringement action in 2008, the member state admitted that 191 installations had yet to receive permitting authorisations. By the time the Commission referred Sweden for a second time to the CJEU in 2012, two installations had yet to receive the requisite authorisations. The Commission requested the CJEU impose a daily penalty payment of €7,456 and a lump sum totalling €4,795,140.

-European Commission’s management of second round cases (2014-16)

A number of aspects of the European Commission’s handling of this litigation are particularly interesting, as they provide useful insights into the EU institution’s overall approach towards addressing particularly serious instances of bad application
of EU environmental legislation. Specifically, the case reports shed some light on the challenges and interests to be weighed up by the Commission in such instances of long-term non-compliance.

One striking point to note is the approach taken by the Commission in calculating the amounts of financial penalties it proposes the CJEU to impose upon the defendant member states, specifically with regard to the calculation element of ‘seriousness’. As is discussed in detail Chapter 4, the Commission has published the methodology it uses for the purpose of calculating financial penalties for infringement cases in a 2005 Commission Communication, as amended and updated. The Commission’s criteria for determining penalty payments involve multiplying a flat rate amount (€670 as at end 2016) by co-efficients of seriousness, duration and ability to pay. Its criteria for determining lump sum fines involve multiplying a flat rate amount (€220 as at end 2016) by co-efficients of seriousness and ability to pay to arrive at an amount fixed for each day of non-compliance between first and second round infringement rulings. The Commission’s guidance establishes that the co-efficients of seriousness and duration may be set as factors on a scale between 1-20 and 1-3 respectively, depending on the relative gravity of the breach in the circumstances and length of non-compliance.

What is particularly notable in the series of cases decided between 2014-16 is that the Commission appears to be reluctant to apply a high seriousness factor even where it is confronted with a situation of a long-standing and systemic breach of foundational obligations within the EU environmental legislation acquis. In the four solid waste cases the Commission proposed a seriousness factor of no higher than 10 (out of a
maximum of 20) notwithstanding that in each case the member states concerned were still some way off from meeting their EU environmental legislative obligations. Whilst the Commission’s guidance indicates that mitigating factors should be taken into account, such as efforts and successes on the part of national authorities to address breaches of EU law as well as the defendant member state’s degree of co-operation in infringement proceedings, it is questionable as to why for instance in cases such as Italian Illegal Landfills (2) and Campania Waste (2) the Commission applied only a seriousness factor of 8, given the long-standing gravity of the situations of waste mismanagement in those cases and relative slow and limited progress made by the national authorities to address them.

The effect of the Commission’s rather modest levels of seriousness co-efficient factor had a significantly (depreciative) impact on overall amounts of financial penalties proposed to the CJEU. Had, for instance, the Commission assessed the seriousness factor to be 16 rather than 8 in Campania Waste (2), which in the author’s view would have been entirely defensible, the proposed daily penalty payment would have been double as large (namely €513,638.40). This underlines that the Commission’s 2005 calculation guidance, notwithstanding the appearance of precision and transparency, affords a great deal of discretion to the EU institution in practice in setting proposed amounts of financial penalties and should be subject of independent scrutiny (such as by the European Parliament’s Environment Committee). This issue matters not least because, whilst they are not legally binding on the CJEU, the Commission’s penalty requests in second round cases exercise some degree of influence on the CJEU. Moreover, for first round non-communication infringements pursued under Article 260(3) TFEU the CJEU may not impose a penalty payment or lump sum higher than
that requested by the Commission. In contrast, the Commission has been more consistent in selecting the highest factor for the duration co-efficient (namely, factor 3) where the second round litigation has been lengthy. In respect of all the six second round waste and urban wastewater cases, a factor of 3 was allocated to the duration co-efficient. Each case involved lengthy periods between first and second round CJEU judgments (an average of 7½ years).

Another interesting and revealing feature of the Commission’s approach to dealing with these ‘bad application’ cases involving serious and systemic non-compliance problems is how in practice the Commission is often prepared to take into account extenuating circumstances raised in defence by member states. From a strictly legal perspective, it is well-established in the case law of the CJEU that it is no defence to an infringement action brought under Article 258/260 TFEU for member states to plead internal difficulties as justification for failure to comply with their EU legal obligations (such as economic difficulties, third party intervention or lengthy timelines required for a situation of compliance to be achieved). Nevertheless, there appears little doubt that the Commission has been frequently prepared in practice to allow member states considerably more time in the administrative phase in such cases than would otherwise be strictly expected before referring cases to the CJEU. The Commission has often waited a considerable period before pulling the formal trigger for second round action, has often not kept to its standard two month deadline allowed for responses to the LFN and been prepared in some cases to delay proceedings to allow for periodic progress reports from member states. The Commission’s willingness to protract the administrative phase is underlined by the fact that the average duration between first round judgment and referral to the CJEU for a second
round ruling in the six solid waste and urban wastewater cases was
approximately 5½ years, a substantial period.\textsuperscript{149}

Another notable feature of the Commission’s handling of the bad application cases decided between 2014-16 is the emergence of a conscious and consistent effort on the part of the EU institution to build in financial incentives for member states within its penalty proposals to the CJEU, specifically to foresee reductions in penalties in proportion to the rate and degree to which a defendant member state works to achieve full compliance with the first round infringement court ruling. This evolution in Commission prosecution strategy is without doubt a response to the CJEU’s earlier 2003 ruling in \textit{Spanish Bathing Waters (2)}, in which the CJEU held that a penalty payment which did not take into account compliance progress on the part of the defendant state would be neither appropriate to the circumstances of the case nor in proportion to the breach which has been found.\textsuperscript{150} As a consequence, the Commission’s recommendations for penalty payments in bad application cases have become far more sophisticated and complex in nature, designed to take into account improvements instituted by the defendant subsequent to the date of the second round judgment. In all the seven bad application cases decided between 2014-16, the Commission had proposed a daily penalty payment framework that involved a degressive element, according to which a daily penalty payment would be reduced in proportion to the extent to which the defendant member state resolved outstanding instances of non-compliance with EU environmental legislation. In some (but not all) cases the Commission proposed that the daily payment should be payable at the end of six monthly periods, reduced in proportion to how many individual breaches covered by the infringement action had been satisfactorily addressed. This latter
added dimension introduces an extra incentive for the member state to comply, given that payment only falls at the end of each six month period (effectively providing an opportunity for the defendant to avoid paying the proportion of the daily penalty payment covered by the individual breach for the entire six month period).

Notable aspects of the CJEU’s second round judgments (2014-16)

During 2014-2016 the CJEU almost doubled the number of second round infringement judgments with the addition of these extra seven rulings. This recent body of case law has served to consolidate existing jurisprudence concerning core general principles underpinning the prosecution and sentencing of second round infringement proceedings. It also now appears to be relatively rare for Advocate General’s to consider it necessary to issue an advisory opinion to the CJEU, given that there appears to be fundamental agreement on most key legal issues. The CJEU’s recent case law has also added some further legal clarification concerning the adjudication of very serious bad application cases categorised as involving general and persistent (GAP) breaches of EU environmental law. In addition, this notable addition to the body of second round judgments has provided an opportunity for more meaningful comparisons to be made between the relative sizes of financial penalties recommended by the Commission and imposed by the CJEU. This latter aspect will be considered in the concluding section to this chapter.

Consolidation of existing jurisprudence on Art.260(2) TFEU
In a number of respects the CJEU’s judgments provided some useful consolidation of earlier jurisprudence of the Court on various legal aspects concerning second round infringements. This has been useful, given the relative paucity of judicial rulings under Article 260 TFEU prior to 2014.

Firstly, it is possible in light of the recent wave of litigation to establish with certainty the core leading general principles identified by the CJEU as being essential reference points used by it to determine existence of liability and the size of financial penalties. These may be distilled from the seven second judgments in summary, bullet point form here:

- General liability issues:
  
  - A member state is liable to have infringed Article 260(2) TFEU if, by the end of the deadline set for the (final) letter of formal notice (LFN), it has not complied with the first round infringement judgment.
  
  - Commission discretion: As a matter of general principle, the Commission retains discretion to determine the relative rapidity of completing the administrative phase of second round proceedings.¹⁵²
  
  - Defences: Internal difficulties experienced by a defendant member state regarding efforts to comply with EU law (such as financial hardship/crises, political protests, third party criminal activity) may not be considered as a defence to justify non-fulfilment of Union obligations. Also the fact that breaches may be have been substantially reduced prior to referral to the CJEU is irrelevant and will not render proceedings inadmissible (no de minimis defence).
-General CJEU powers: The CJEU has discretion to determine the appropriateness and amount of financial penalties, the Commission’s guidelines being non-binding but useful as a means of ensuring that the Commission’s actions are transparent, foreseeable and consistent with legal certainty.

- Penalty payments:
  - Imposition of a penalty payment will only be justified to the extent that non-compliance is established at the CJEU’s hearing of the facts and persists as at the date of the second round judgment.
  - The amount of penalty payment will be set by the CJEU in a way appropriate to the circumstances and proportionate to the infringement established.
  - The basic criteria to be taken into consideration for the purpose of ensuring that penalty payments have coercive effect and uniform application of Union law are: seriousness of the infringement, its duration and capacity of the defendant member state to pay.
  - Impact on public/private interests and urgency: Regard must be had in applying those criteria to the extent of adverse effects on public and private interests of non-compliance and to the urgent need for the defendant to be induced to fulfil its Union obligations.
  - Seriousness: As regards the criterion of seriousness, the CJEU has confirmed that breaches of EU legislation on waste management and urban wastewater management may be regarded as particularly serious. Relevant mitigating or aggravating factors to be taken on board here include the degree to which the member state has taken steps to rectify the infringement and has been successful in this regard.
- Capacity of member state to pay: The reference point for this factor should be taken as at the time when the CJEU examines the facts (not when the case is referred to it).

- Degression penalty framework: Where possible, the CJEU will endorse a penalty payment framework which takes into account the extent of progress made by the defendant member state towards achieving compliance with the first round infringement ruling. In the case of multiple breaches, the CJEU appears to be usually receptive to a penalty payment payable in six monthly tranches.153

- Lump sum amounts:

  - CJEU powers: the CJEU may in its discretion impose a lump sum fine together with a penalty payment (cumulative financial penalty).

  Relevant factors for determining whether a lump sum is appropriate: The CJEU will take into account the factors of the infringement’s characteristics, including impacts on public and private interests (especially in lengthy second round proceedings), the member state’s conduct in proceedings and extent of any previous infringement proceedings prosecuted successfully against the defendant state in the specific environmental policy sector. A previous record of several adverse infringement rulings is likely to be particularly influential in persuading the Court that a lump sum may be required as a dissuasive measure to ensure effective prevention of recidivist non-compliant behaviour.

  - Criteria for determining the lump sum amount: The CJEU has confirmed the relevance of three basic criteria (seriousness, duration and ability to pay) in assisting the Court to determine the amount of a lump sum fine in any given
case. Duration is assessed on the length of non-compliance since the first round judgment.

Article 260(2) TFEU and general and persistent (GAP) infringements

One distinctively new aspect to emerge from the series of second round judgments handed down between 2014-2016 has been some clarification provided by the CJEU on the implications of a failure on the part of a member state to adhere to a first round ruling in which the CJEU has found there to be a general and persistent (GAP) breach of EU law. As is discussed in chapter 3 (section 3.4.1.1), the CJEU first recognised the concept of a GAP infringement in the context of first round proceedings in its 2005 ruling in *Irish Waste*. The infringement proceedings concerned a multiplicity of similar breaches of EU environmental law, namely the Irish authorities’ failure to deal with several illicit waste dumps in accordance with Union waste management legislative obligations. As a result of the *Irish Waste* case the CJEU established a distinctively serious category of infringement of EU law, as well enabling the Commission to have the flexibility of bundling similar breaches of EU environmental law into a single set of infringement proceedings.

With the CJEU’s second round judgment in December 2014 in *Italian Illegal Landfills (2)*, the implications of a failure by a member state to address a GAP infringement ruling have become to some extent clearer. Firstly, matters are made more straightforward procedurally from the Commission’s perspective. Specifically, as confirmed by the CJEU, the success of the second round action is not predicated
upon finding that each breach of EU law found in the first round judgment is
found to have continued to the second round ruling. Indeed, the CJEU confirmed
in its judgment that similar new breaches to the ones existing at first round stage may
be added to the second round action without rendering having the effect of rendering
the later proceedings inadmissible. In addition, the Commission is entitled to
introduce new types of breaches (in this case non-conformity issues) that are
indicative of the nature of measures needing to be taken in order to ensure compliance
with the first round judgment. The CJEU also confirmed that in finding continuation
of a GAP breach at second round stage would constitute an aggravating factor in
determining the relative seriousness of the breach (seriousness factor) in relation to
determining penalty payment and lump sum amounts. However, rather surprisingly
the CJEU’s finding of a continued GAP situation in Italian Illegal Landfills (2) did
not appear to make a material impact on the actual size of financial penalties awarded,
with the CJEU setting a penalty payment amount almost 10% lower than that
recommended by the Commission which in turn had only recommended a relatively
modest factor of 8 (out of 20) for the seriousness co-efficient. The CJEU imposed a
lump sum fine 51.3% less than that requested by the Commission. It remains to be
seen in the future whether the CJEU may attach greater significance in practice to the
existence of a continued GAP infringement for the purposes of setting (second round)
financial penalties.

4A.2 Second round cases involving non-conformity with EU environmental law
Since the establishment of the second round penalty procedure the CJEU has also had a few occasions to pronounce judgment in relation to instances of failures on the part of member states to ensure that their national laws conform to the requirements of EU environmental legislation. As at the end of 2016, three environmental cases had come before the Court concerning non-conformity issues: Case C-121/07 French GMOs (2), Case C-374/11 Irish Waste Water (2) and Case C-279/11 Irish EIA (2). The CJEU has also ruled on a range of non-conformity cases in other areas of EU law.\(^{159}\) Whilst from an evidential perspective these cases are in theory relatively straightforward for the European Commission to prosecute, the Commission has also had to confront a number of challenges in order to ensure that proceedings are able to be pursued as effectively as possible. Notably, a major problem with the second round procedure until the recent Lisbon Treaty reforms was that defendant member states were effectively able to delay compliance with EU law as long as possible by drawing out second round litigation. Under the pre-Lisbon EU treaty architecture, so long as a member state was able to transpose an EU directive by the elapse of the deadline set by the second round RO they would be able to avoid any financial penalties being imposed. The introduction in December 2009 of Article 260(3) TFEU, by virtue of the Lisbon Treaty, has effectively closed that particular loophole as far as the issue of belated transposition of EU directives is concerned. For that provision enables the Commission to apply to the CJEU for financial penalties already at first round stage under the aegis of Article 258 TFEU infringement proceedings. As a result it is anticipated that in future the bulk of non-conformity casework will be dealt with under Article 258 TFEU rather than Article 260(2) TFEU.

4A.2.1 *French GMO Controls* (2) (Case-121/07)
The first of the second round environmental cases to come before the CJEU concerning the non-conformity of national law with EU environmental legislation was in *French GMO Controls (2)*, at a time (2007-8) when the Court already had established a range of key ground rules relating to the operation of second round infringement proceedings. The case involved the belated transposition by France of the EU’s second generation Directive on genetically modified organisms (Directive 2001/18). The member state should have transposed the EU directive into national law by 17 October 2002 but failed to do so, and was ultimately condemned for this by the CJEU in a first round judgment on 15 July 2004. Subsequently, the Commission pursued second round infringement action against France as a result of continued delay by the member state to introduce national implementing legislation. The French government offered a number of explanations for the delay, including intense domestic debate concerning the establishment of a national legislative framework for GMO licensing as well as difficulties in securing space within the national parliamentary agenda for legislative deliberation. Moreover, the French government decided to introduce transposition through a number of measures introduced at various stages rather than a single implementation instrument, which served to draw out completion of transposition. Initially, the Commission was rather tentative in its follow-up to the first round judgment but ultimately issued a LFN and then a final written warning in July and December 2005 respectively. Notwithstanding a two month deadline accompanying the final warning, the French government was able to string out the pre-litigation phase for a considerable period of time after that with promises of new draft legislation. The Commission finally lost patience, though, and referred the case to the CJEU in February 2007 requesting the imposition of both
a lump sum penalty as well as a penalty payment.\textsuperscript{162} Within a month of the referral, France notified to the Commission six legislative decrees intended to serve as implementing the EU directive. Contrary to the French government’s view, the Commission considered that these measures still did not achieve full compliance with the terms of Directive 2001/18 but requested the CJEU to reduce the amount of financial penalties (but only in respect of the period after they were notified 21.3.2007) in proportion to the degree of compliance achieved. When the French government notified adoption of additional implementation legislation in June 2008, subsequent to the Advocate General’s Opinion and oral hearing, the Commission was satisfied that full compliance had been attained and informed the CJEU that it considered its initial request for a penalty payment now to be devoid of purpose. However, the Commission maintained its request for a lump sum to be imposed by the Court, taking into account the belated transposition of the EU directive.

- Procedural and substantive legal aspects

The CJEU judgment in \textit{French GMOs (2)} is particularly significant in that it confirms the distinctive and autonomous nature of the lump sum fine. Whilst the French government submitted that the Commission’s financial penalty requests should be considered devoid of purpose at the moment in time when France ultimately implemented Directive 2001/18 in full, the CJEU rejected this view and confirmed that the lump sum did not (unlike the penalty payment) need to have a function of coercion regarding an existing breach of Union law,\textsuperscript{163} but could be imposed by the Court in its discretion\textsuperscript{164} as a result of the defendant state failing to honour the deadline in the final written warning in the pre-litigation phase depending on the individual
circumstances of the case at hand. Whilst the CJEU confirmed that both types of financial penalty are intended to achieve the broad objective of inducing a defaulting state to comply with a CJEU judgment that has established a breach of EU obligations on the part of the defendant, the CJEU underlined that the lump sum has a distinctive role and set out some ground rules regarding its application. Specifically, the CJEU confirmed that the lump sum is based more upon the assessment of the effects of public and private interests of the state’s breach where this has persisted a long time since the first round judgment. In particular, the imposition of a lump sum depends upon the particular nature of the infringement established and the individual conduct of the defendant state. As is the case with all final penalties, the Court underlined that it is to exercise its discretion in a manner that is proportionate with regard to the breach of Union law and ability to pay by the defendant. The CJEU iterated that relevant factors in determining whether a lump sum should be imposed and, if so, its amount would include in particular the duration of the breach and the public and private interests involved.

In proceeding to weigh up the individual circumstances, the CJEU provided some useful clarification as to which factors are likely to be highly relevant in persuading the Court that a lump sum fine is warranted and assist it in determining the level of penalty. As regards the particular nature of infringement, the CJEU accepted that as a general proposition that where failure to comply with a CJEU judgment is likely to harm the environment and/or endanger health the protection of which is an EU policy, the breach is to be regarded as of a particularly serious nature. This judicial statement is important as it elevates the significance of EU environmental legislation
amongst the most important areas of EU policy as far as second round proceedings are concerned.¹⁶⁹

In terms of assessing the defendant’s behaviour, the CJEU adopted an objective as opposed to a subjective approach for the purpose of evaluation. Specifically, the CJEU ruled out the need to show that the defendant acted in bad faith or adopted deliberate delaying tactics (which it accepted had not been proven in this case)¹⁷⁰ and confirmed that internal circumstances within a member state (such as problems with the national parliamentary process) do not constitute a defence for the purpose of EU infringement proceedings.¹⁷¹ Instead the CJEU took into account the conduct of the defendant state in the light of an objective standpoint, namely that there was no justification in this case for delayed transposition,¹⁷² that in its assessment the French government had not taken any significant steps to comply with the EU directive by the time the case was referred to the CJEU¹⁷³ and that the CJEU had already delivered a number of judgments against France¹⁷⁴ and had second round infringement proceedings filed against it with respect to the first generation of EU legislation on GMOs (former Directive 90/220).¹⁷⁵ Significantly, the CJEU confirmed with regard to this last factor that repeated unlawful conduct in a specific EU policy sector could be an indication that effective prevention of future repetition of similar breaches might require adoption of dissuasive measures such as a lump sum payment.¹⁷⁶ At the same time, the CJEU nuanced its position somewhat by noting that the situation in this particular case was not as serious as a total non-transposition case, given that several provisions of Directive 2001/18 did not call for measures to be taken at national level (only three provisions required transposition by the time the matter was referred to the
Court and were ultimately transposed into national law prior to second round judgment).  

What is also particularly interesting about this case is that the CJEU adopts a relatively stricter position against defendant states than that favoured by the Advocate General with respect to the imposition of lump sum payments. In his opinion to the Court, Advocate General Mazák considered that a lump sum should only be imposed where the certain aggravating factors were established as having been present that served to exacerbate the defendant’s failure to comply promptly and fully with the first round judgment. These could include evidence of a failure on the part of the defendant to co-operate in good faith with the Commission, where public and private interests are affected to an ‘unacceptable extent’ or where the breach of EU law ‘impinges on a matter of compelling [Union] interest or compromises a fundamental [Union] principle’. He also opined that the CJEU should only take into consideration other infringements by the member state where the Commission establishes through evidence the presence of a structural or systemic failure on the part of the state to comply with first round judgments; the production of mere statistical data would suffice in his view. In this particular case, the Advocate General advised the Court not to impose a lump sum, give the absence of any such aggravating circumstances.

For a range of reasons, the CJEU was correct in rejecting the Advocate General’s analysis. Firstly, had the CJEU accepted his opinion, it would have resulted in the French government avoiding any financial penalty at all, notwithstanding that it had failed to transpose the EU directive on time and had delayed transposition without
justification by almost six years. This would have undermined the credibility of the second round procedure. Secondly, the Advocate General’s analysis would have required the Commission to produce evidence likely to be very difficult to pin down, namely that relating to bad faith on the part of the defendant. Thirdly, the introduction of the concept of aggravating circumstances would have established an extra element to the standard burden of proof expected of the Commission in infringement proceedings, there being nothing indicated in the treaty text to indicate this being warranted. Fourthly, the Advocate General’s proposed new test of aggravating circumstances would have undermined the element of deterrence that the CJEU has recognised as underpinning the framework of the second round infringement procedure. Fifthly, and following on from the previous point, it is difficult to see how the Advocate General’s position is in line with the Union’s express constitutional commitment in ensuring a high level of environmental protection (Art.191 TFEU); a strong element of deterrence underpinning the second round infringement procedure provides an important incentive for member states to ensure that at far as possible EU environmental legislation is implemented and applied within the states’ national legal orders on time.

-Determination of the lump sum

As is common in its jurisprudence, the CJEU regrettably provides little if any guidance on how it calculates lump sum fines in *French GMOs* (2). The Commission, in accordance with its published guidelines on penalties, proposed that France should be required to pay a lump sum of €43,660 per day from the date of the first round ruling until the date of compliance. This proposed calculation was arrived at by
multiplying the then applicable uniform base of 200 by a co-efficient of 10 (for seriousness) and co-efficient 21.83 (for ability to pay). The factors relied upon by the Commission for the purpose of assisting it in quantifying the relative degree of seriousness in this case included a failure to co-operate during the pre-litigation phase, prolonged failure to transpose the EU directive and comply with the first round judgment, the importance of the EU legislation for environmental and health protection and failure on the part of the French government to adhere to its own schedule for transposition after the Commission’s final written warning. The Commission also suggested that this figure could be commuted by the CJEU in order to take into account the steps taken by France to reduce the extent of its non-compliance prior to achieving full implementation of the EU legislation. The proposed lump sum calculation from the Commission would have resulted in a fine totalling in excess of €64m (not allowing for a commutation).

The CJEU agreed with the Commission (and thereby rejected the Advocate General’s position) that a lump sum should be paid by France, but substantially reduced the proposed fine to a lump sum of €10m. It decided not to provide any detailed breakdown of this figure, preferring instead to provide a list of factors before concluding with a declaration on the amount. The CJEU indicated that it considered the case in some respects to be less grave than that assessed by the Commission, taking into account that the bulk of the work on transposition had been completed by March 2007 and that there had been insufficient evidence to prove lack of good faith on the part of the defendant. However, the judgment fails to provide any detail on why the CJEU figure should be at such a reduced level as compared with the Commission’s proposal and this is a striking shortcoming in the Court’s reasoning. It
appears fairly evident from the way that it approaches the subject of the lump sum that the CJEU treats this particular head of a second round complaint as a matter falling very much within the discretion of the CJEU, which is free to determine such a financial sanction without reference to the Commission’s guidelines on penalties. The fact that the CJEU also arrives a rounded figure of €10m may also be viewed as a reflection of the Court’s strong preference to assert its discretionary power in this area (in practice far more so than with regard to daily penalty payments). Whilst the CJEU is undoubtedly technically correct in concluding that the EU treaty provisions on the infringement procedure vest it with power to determine the appropriateness and amount of any financial sanction to be imposed on a defendant member state, it is questionable whether the Court’s omission to provide a detailed justification as to how it arrives in deciding that a particular lump sum amount is appropriate in a particular case is consistent with the general principles of openness and transparency applicable to EU institutional decision-making which are embedded with the EU’s foundational legal framework. 182 This lack of transparency in the CJEU’s reasoning is particularly underlined in French GMO Controls (2), where the Court determined that a particular lump sum figure (€10m) would be appropriate notwithstanding it being 85% lower than that proposed by the Commission, the latter having arrived at its proposed amount for a lump sum according to a pre-published and relatively detailed computational framework.

4A.2.2 Irish Urban Wastewater (2) (Case C-374/11)
A more recent second round infringement judgment concerning an instance of non-conformity with EU environmental legislation has been Irish Urban Wastewater (2) (Case C-374/11) which was decided in December 2012. The case concerned Ireland’s failure to transpose certain provisions of a former version of the EU Waste Framework Directive (WFD)\(^\text{183}\) into national law concerning the management of domestic wastewater systems in rural areas. Specifically, in 2002 the Commission filed first round infringement proceedings against Ireland on the grounds that the defendant state had failed to ensure that its regulation of the disposal of domestic wastewater from septic tanks and other individual waste water treatment systems in countryside areas complied with the environmental safety as well as minimum waste collection requirements of the then WFD.\(^\text{184}\) The legal position was rendered somewhat complex by the fact that the EU legislative instrument contained a qualified exclusion of wastewater from its material scope, namely in so far as wastewater was covered by ‘other legislation’.\(^\text{185}\) However, the available EU legislation specifically dealing with wastewater only covers its treatment in urban areas,\(^\text{186}\) which meant that the WFD applied to rural wastewater management by default. In 2009 the CJEU confirmed that Ireland had breached the requirements of the WFD.

Subsequent to the first round judgment, the Commission placed immediate pressure upon Ireland by sending the state a letter within one month of the second round ruling, requesting Ireland provide it with an explanation as to how it would secure compliance as swiftly as possible. Ireland replied within a month, communicating a planned timetable for adoption of internal legislation, the creation of a working group to determine performance standards and building requirements as well as prospective adoption by the national environmental authority of a relevant code of practice. One
year later in November 2010 the Commission issued a letter of formal notice against Ireland. Subsequently, notwithstanding confirmation by Ireland of adoption of a draft legislative text by the national government in May 2011, the Commission referred the matter to the CJEU under the new curtailed post-Lisbon infringement procedure. During the course of the litigation phase the Commission confirmed that it was still dissatisfied with the Irish position subsequent to the formal adoption of fresh national legislation, as in its view the relevant provisions of the WFD had not been effectively transposed by the defendant state via the Irish Water Services (Amendment) Act 2012 in that relevant environmental safety and waste collection requirements remained contingent on future promulgation of national ministerial measures. The Commission requested the CJEU to impose both a penalty payment and a lump sum.187

One of the most significant legal issues arising from *Irish Urban Wastewater (2)* was how the CJEU would appraise the fact that the Commission had decided to prosecute second round proceedings relatively swiftly subsequent to the initial first round ruling declared under Article 258 TFEU. Specifically, the Commission had referred the matter to the CJEU within 21 months of the initial judicial ruling. Ireland contested that the referral to court had been premature, submitting that it had been provided with insufficient time to comply. Significantly, the CJEU rejected that submission, confirming its finding in *Spanish Bathing Waters (2)* that even though Article 260(1) TFEU does not provide for a specific time period within which compliance must be achieved, ‘it follows from settled case law that the importance of immediate and uniform application of EU law means process of compliance must be initiated at once and completed as soon as possible’.188 Moreover, whilst the CJEU recognised that
implementation of its first round judgment involved some degree of complexity regarding implementation, the period of time given by the Commission for achieving compliance (namely 13 months between the date of the first round judgment and two month deadline set by the LFN) could not be considered insufficient in the circumstances. The CJEU also reiterated its position that internal difficulties in meeting EU legal obligations as a matter of principle do not constitute a defence for the purpose for infringement proceedings.

It is interesting to note also that the litigation phase was also conducted relatively swiftly, aided by the fact that the Advocate General assigned to the case (AG Kokott) decided it was unnecessary to provide an advisory opinion to the Court which shortened the process by a number of months. The entire litigation phase lasted 17 months, meaning that the entire second round infringement process (pre-litigation and litigation phases combined) took just over 3 years (37 months). This timescale may be viewed as being very much in tune with the Commission’s policy aim to speeding up second round environmental proceedings, thereby provide a far more effective edge of deterrence to Article 260(2) TFEU.

In assessing whether financial penalties were warranted in this particular case, the CJEU both confirmed principles established by it in previous case law as well as adding some particular refinements. Notably, it confirmed that the relevant date for determining whether Article 260(2) TFEU had been breached was the deadline set by the LFN (as final written warning post-Lisbon) and that both types of penalties could be imposed cumulatively on a defendant. As far as the request for a penalty payment was concerned, the CJEU confirmed that the principal criteria to be used to
calculate this financial sanction included the duration of the infringement, degree of seriousness involved and relative ability to pay, with the CJEU having also regard to the effects on public and private interests affected by the breach as well as any degree of urgency involved. Factors weighing against the Irish government according to the CJEU were firstly the fact that over 19 years had elapsed since Ireland should have transposed its obligations under the amended WFD into national law and secondly the fact that the EU legislation at hand, in involving the protection of the environment and health, made the character of the breach of ‘indisputable gravity’. In mitigation, the CJEU took into account that Ireland had acted in close collaboration with the Commission, had adopted national legislation as well as some other measures (a register of waste treatment systems and established training of inspectors) with others in the pipeline. The CJEU concluded that the penalty payment should be set at €12,000 per day from the date of the second round judgment, which constituted a substantial reduction from the Commission’s request for a daily penalty of €26,173.44. Whilst the CJEU refrained from providing any detailed mathematical breakdown of this figure, it did provide some clarity with regard to the co-efficient of ability to pay. Specifically, the Court held that the relevant date for setting the co-efficient regarding the defendant’s ability to pay should be the date when the Court assesses the facts and not, as the Commission had assumed, when the litigation phase commenced. The effect of this judicial finding was to reduce the amount of the fine to be imposed on Ireland, give that Ireland’s ability to pay had been reduced since the referral to court as a result of the economic crisis.

Consistent with previous case law, the CJEU’s assessment of the request for a lump sum was notably brief and general in nature, setting out in outline only the factors
involved in determining whether a lump sum would be appropriate and, if so, the amount involved. The CJEU confirmed the key basic criteria for lump sum calculations as being factors relevant to the characteristics of the particular breach of EU law as well as member state conduct in the second round procedure.\textsuperscript{194} It also reiterated the factors of proportionality, ability to pay, duration of infringement since first round judgment and impact on public and private interests as being central to its assessment of lump sum calculations.\textsuperscript{195} The CJEU also confirmed that deterrence was a key element in its legal assessment, holding that in the particular circumstances of this case indicated that effective prevention of future repeats of similar breaches required adoption of a lump sum. Specifically, the CJEU considered relevant the fact that Ireland had a poor record in implementing EU legislation on water quality, having being condemned by the Court on three other occasions in infringement actions.\textsuperscript{196} It is potentially highly significant that the CJEU has interpreted the concept of deterrence broadly in this context, opening the way for greater levels of financial sanction to be imposed relative to the track record of individual states in the relevant policy sector. In conclusion, the CJEU held that in its discretion it decided that the amount of lump sum to be awarded against Ireland should be €2m, substantially lower than the request made by the Commission which, if it had been applied by the Court, would have led to a lump sum of over €5.3m being imposed.\textsuperscript{197} However, in keeping with previous case law, the CJEU omitted to provide any detailed justification for the difference between its figure and that proposed by the Commission, whilst at the same time coming up with a rounded figure indicative of impressionistic and discretionary decision-making as opposed to an attempt to arrive at a precise figure via mathematical modelling.
Another more recent second round case to concern non-transposition issues in relation to EU environmental law involving Ireland was in *Irish EIA (2)*. The litigation concerned the failure by Ireland to ensure correct transposition of certain requirements of the Union’s Environmental Impact Assessment (EIA) Directive into national law. Specifically, in a first round ruling of 2008 the CJEU upheld a Commission complaint that Ireland had failed to ensure that certain agricultural, silvicultural and aquacultural development projects covered by Annex II (a)-(c) and (f) in conjunction with Article 4(2) of the directive would be subject to an EIA as required the EU legislative instrument. Subsequent to the ruling, the Commission commenced second round infringement proceedings on account of further delayed transposition on the part of the Irish government, which led to a referral to the CJEU in June 2011. Prior to the Court’s judgment in December 2012, the Irish government notified the Commission that it had belatedly adopted the relevant transposition measures in September 2011. This resulted in the Commission dropping its request for a daily penalty payment, whilst maintaining its entreaty to the CJEU for the imposition of a lump sum fine to take account of the belated transposition.

Whilst the CJEU’s judgment offers relatively little new in terms of adding to the existing body of legal principles already developed by the Court in relation to the second round infringement process, the ruling is nevertheless interesting in light of the way which the CJEU determined the lump sum fine to be paid. By way general points, the CJEU confirmed a number of the key principles it set out in *French GMO Controls (2)* that establish guidance points for determining whether a lump sum fine
should be imposed and, if so, the relative gravity of the breach of Union law for the purposes of setting a lump sum figure. Specifically, it confirmed that evidence of repeated unlawful conduct on the part of a member state would be an indication that imposition of a lump sum payment would be appropriate as a means of deterring recidivist behaviour. This factor was relevant to the Irish EIA (2) case as Ireland had been subject of four other adverse CJEU rulings since 1999 over compliance with the EIA Directive. The CJEU also confirmed that, in determining the factor of seriousness in relation to lump sum fines, a failure to comply with a first round Court ruling likely to harm the environment would count as a breach of a ‘particularly serious nature’. In addition, the Court confirmed that any lump sum fine imposed would need to be set at a level appropriate to the particular case’s circumstances, proportionate to the breach of Union law as well as the relative ability of the defendant to pay. Above all, the CJEU’s reaffirmed its autonomy to decide over fining, which would be based essentially on the Court’s assessment of the effects on public and private interests resulting from non-compliance, in particular where the breach had persisted for a lengthy period after the first round ruling.

The CJEU accepted the Commission’s argument that a lump sum fine was warranted in this case, the defendant member state having failed to transpose the particular EU legislative requirements into national law by the deadline set by the second round final written warning. The Commission submitted that the lump sum fine to be paid by Ireland should be divide into two tranches. The first tranche would be based on the delay since first round ruling by Ireland to enact national legislative measures to transpose the EU EIA requirements into Irish law (20.11.2008 - 8.9.2011). The Commission calculated this part of the proposed fine to be €4.26m, applying a serious
co-efficient of 7 as well as GDP rating for Ireland as at 2008 figures. The Commission also requested a second tranche amounting to €125,244, taking into the fact that subsequent to the adoption of transposition legislation the Irish government took additional time to publish certain notices foreseen in the legislation in order to make them completely effective (8.9.2011 – 21.12.2011). The CJEU decided, contrary to the Commission’s suggestions, to impose a much reduced single lump sum fine of €1.5m. As usual, the CJEU did not provide any detailed analysis of the methods by which it came to this figure. However, a notable factor signalled by the CJEU for the reduced level of fine was the fact that the Court was persuade by the Irish government to take account of the defendant’s ability to pay as at the time of the second round judgment, as opposed to the time of the infraction as requested by the Commission.  

4A.3 Comparison of financial penalty amounts recommended by the Commission and imposed by the CJEU

A notable feature of the emergent case law of the second round infringement procedure is that frequently the Commission and CJEU differ markedly over their respective assessments of the financial penalties that should be paid by individual defendant member states under the auspices of Article 260(2) TFEU. In particular, the CJEU appears in most cases to impose pecuniary amounts significantly lower than
that recommended by the Commission. Whilst this appears to be a general occurrence in the case law, so not confined to the environmental sector, this section will focus on the track record of second round environmental litigation. Given that relatively few second round environmental judgments have been decided to date (namely 15 as at end 2016), one should perhaps be cautious before drawing any definitive conclusions from the data made available thus far. Nevertheless, the existing cluster of cases (spanning over a decade) would appear to bear out a relatively consistent tendency for the Commission to be more hawkish than the Court in determining levels of fines.

A comparison of the Commission’s recommendations and CJEU’s decisions on financial penalties across the 15 second round environmental rulings decided by the end of 2016 reveals a general and substantial overall difference of assessment in practice between the two EU institutions. On average across the 15 environmental judgments, the CJEU imposed penalty payments 43% lower and lump sum fines 66% lower than the amounts requested by the Commission. For bad application cases (12 judgments), the CJEU’s penalty payments and lump sum fines were 33% and 51% lower than the Commission’s recommendations. As regards non-conformity cases (3 judgments), the Court’s penalty payments and lump sum fines have been 54% and 71% lower than the monetary figures proposed by the Commission. Whilst the CJEU’s penalty payment decisions have been similar to those proposed by the Commission in five cases\(^\text{206}\) (so one-third of the second round environmental rulings), for a substantial majority of penalty payment outcomes and all lump sum awards the difference between Commission and CJEU has been quite marked. A table
comparing the amounts adopted by the two Union institutions is provided at the end of this section.

This data underlines a number of facets of the roles, responsibilities and inter-relationship between the Commission and CJEU in the context of second round infringement procedure. Firstly, it emphasises the independence of the CJEU in determining pecuniary penalties, a feature regularly underscored by the Court as a core principle of Article 260(2) TFEU; the Commission’s recommendations being regarded as a useful reference point but ultimately non-binding. This position stands in stark contrast with the accelerated single round penalty infringement procedure foreseen by the EU treaty framework for non-communication cases, according to which the CJEU may not exceed the fine levels proposed by the Commission. Secondly, the substantial disparity between the penalty amounts assessed by the Commission and CJEU raises the question as to whether and how such a wide and persistent disparity may be justified. Whilst the CJEU has set out the general principles and considerations which underpin its judicial decision-making, it does not explain why it differs from the Commission’s recommendations. On the now relatively rare occasion when an Advocate General proffers a legal opinion on the application of the second round infringement procedure, as in Advocate General Kokott did in *Italian Illegal Landfills (2)* and *Greek Illegal Landfills (2)*, the opinion has typically provided a detailed calculation underpinning the judicial advisor’s recommended penalties. The absence of the Court’s disclosure of a breakdown of its figures throws into question whether the Court is being sufficiently transparent with regard to its decision-making concerning the setting of penalty amounts in individual
cases. The principle of transparency in EU decision-making is a principle binding on all Union institutions, including the CJEU.\textsuperscript{208}
Table A
Art.260(2) TFEU - Second round environmental judgments as at end 2016
Penalties: Comparison between fines proposed by Commission and decided by Court of Justice of the EU (CJEU)

<table>
<thead>
<tr>
<th>CJEU judgment</th>
<th>Commission penalty requests</th>
<th>CJEU penalty decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Penalty payment (daily unless otherwise indicated)</td>
<td>Lump sum</td>
</tr>
<tr>
<td>C-387/97</td>
<td>€24,600</td>
<td>-</td>
</tr>
<tr>
<td>C-278/01</td>
<td>€45,600</td>
<td>-</td>
</tr>
<tr>
<td>C-304/02</td>
<td>€316,500</td>
<td>-</td>
</tr>
<tr>
<td>C-121/07</td>
<td>-</td>
<td>€64,398,500</td>
</tr>
<tr>
<td>C-279/11</td>
<td>-</td>
<td>€4,262,470.80</td>
</tr>
<tr>
<td>C-374/11</td>
<td>€26,173.44</td>
<td>€5,467,795.20</td>
</tr>
<tr>
<td>C-533/11</td>
<td>€870,890 each 6 months (with deductions to be made to reflect any improvements in state of compliance)</td>
<td>€20,884,848</td>
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<td>C-576/11</td>
<td>€11,340</td>
<td>€3,194,800</td>
</tr>
<tr>
<td>C-196/13</td>
<td>€46,860,000 each 6 months (with deductions to be made to reflect any)</td>
<td>€77,948,640</td>
</tr>
<tr>
<td></td>
<td>improvements in state of compliance</td>
<td>improvements in state of compliance</td>
</tr>
<tr>
<td>---</td>
<td>-------------------------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>C-378/13</td>
<td>€71,193.60 (with deductions to be made to reflect any improvements in state of compliance)</td>
<td>€25,821,028.8</td>
</tr>
<tr>
<td>C-243/13</td>
<td>€7,456</td>
<td>€4,795,140</td>
</tr>
<tr>
<td>C-653/13</td>
<td>€256,819.20</td>
<td>€55,027,526</td>
</tr>
<tr>
<td>C-167/14</td>
<td>€8,661,888 each 6 months (with progressive deduction built in each 6 months)</td>
<td>€15,106,392</td>
</tr>
<tr>
<td>C-557/14</td>
<td>€18,003.57 <em>(figure adjusted to take account of updated state of compliance by MS)</em></td>
<td>€5,836,644</td>
</tr>
<tr>
<td>C-584/14</td>
<td>€72,864 (with deductions to be made to reflect any improvements in state of compliance)</td>
<td>€20,660,992</td>
</tr>
</tbody>
</table>
**Brief concluding remarks**

As at the end of 2016 the second round infringement procedure under Article 260(2) TFEU had been in force for over 20 years. The CJEU’s involvement in its application and interpretation has only spanned the latter half of that period, primarily because of the length of proceedings taken to reach it initially but also because of the legal uncertainty surrounding several of its aspects in the early stages. Gradually, the CJEU has settled a range of key legal issues concerning the procedure as the number of cases referred to it has steadily increased.

One notable feature of the emerging case law so far is that the EU environmental policy sector has constituted the bulk of second round judgments (15 out of 28 rulings (54%)). This underscores a longstanding feature of infringement proceedings in general, namely that environmental cases have tended to be the most persistent and difficult to resolve out of court. Two charts are provided at the end of this chapter indicating the relative numbers of environmental and non-environmental second round infringement rulings between 2000 (the date of first CJEU ruling) and the end of 2016.

Within the range of second round environmental cases brought before the CJEU certain specific environmental policy areas have featured heavily, notably management of the solid waste (5 rulings) and urban wastewater (5 rulings). Moreover, so far only a relatively small cluster of member states have been the focus of second round environmental rulings with the majority of cases involving member states having lost more than one set of proceedings: Greece (4), Italy (2), Ireland (2)...
and France (2). These particular member states have also featured strongly in environmental infringement casework in general under Article 258 TFEU over the years and currently, as has Spain (one of the other member states having lost second round proceedings). This data reflects long-standing and continuing difficulties amongst a small number of member states who joined the Union prior to 2004 in successfully implementing key long-term major infrastructural requirements contained in EU environmental legislation.

To what extent in the future the post-2004 intake of member states will begin to feature more prominently in second round infringements case law remains to be seen. A key factor here may well lie in whether the member states are prepared at some stage to ratchet up the deterrence effect of Article 260(2) TFEU via treaty reform, such as align it with the single infringement procedure applicable to non-communication cases under Article 260(3) TFEU. The speedier nature of the latter procedure has appeared to have had a positive impact, in that between its entry into force in December 2009 and the end of 2016 not a single member state was subject to a fine by the CJEU, as disputes over non-transposition of EU legislative directives between the Commission and member states have been resolved out of court or after referral to the CJEU but prior to judgment.

Another notable aspect of the second round environmental cases that have come before the CJEU so far is that the majority have concerned bad implementation disputes. Specifically, 12 out of the 15 environmental Article 260(2) TFEU judgments concerned failures to implement EU environmental legislation. A number of reasons may account for this, including the lack of independent investigative powers for the
Commission to assess suspected instances of deficient implementation, the relative ease for the Commission in being able to detect and follow up issues of non-conformity of national law with EU legislative obligations as well as the introduction since December 2009 of a single (and therefore relatively swift) infringement penalty procedure for non-communication cases by virtue of Article 260(3) TFEU. The predominance of bad implementation cases featuring at second round stage raises the question as to whether stronger supervisory and enforcement powers vested in the Commission and/or member state environmental authorities might be required to be introduced under EU law, such as along the lines established in EU competition policy. It appears highly doubtful, though, to think that the EU will be willing or able to summon sufficient collective political will amongst its member states to work towards engineering such changes via treaty reform in the immediate future.
Second Round Infringement Judgments (Art. 260 TFEU)

Annual numbers

Cumulative Chart

(As at 27.2.17)
The TEU originally entered into force on 1 November 1993.

2The CJEU issued its first second round infringement judgment on 4 July 2000 in Case C-387/97 Kouroupitos (2) [2000] ECR I-5047.

3Cases C-387/97 Kouroupitos (2), C-278/01 Spanish Bathing Waters (2) and C-304/02 French Fishing Controls (2) respectively. (Full case report references of judgments cited in this chapter are provided in the Table of cases (pp xvi-xxxi) at the beginning of this book except for the judgments referred to in the updated version of this chapter (cases decided between 2014-16) in respect of which full case report references are provided in the endnotes).

4Specifically, Cases C-121/07 French GMO Controls (2), C-374/11 Irish Urban Wastewater(2), Case C-279/11 Irish EIA (2), Case C-533/11 Belgian Urban Wastewater (2) and Case C-576/11 Luxembourg Urban Wastewater (2).

5Specifically: Case C-196/13 Commission v Italy (Italian Illegal Landfills (2)) EU:C:2014:2407; Case C-378/13 Commission v Greece (Greek Illegal Landfills (2)) EU:C:2014:2405; Case C-243/13 Commission v Sweden (Swedish IPPC (2)) ECLI:EU:C:29014:2413; Case C-653/13 Commission v Italy (Campania Waste (2)) ECLI:EU:C:2015:478; Case C-167/14 Commission v Greece (Greek Urban Wastewater (2)) EU:C:2015:684; Case C-557/14 Commission v Portugal (Portuguese Urban Wastewater (2)) ECLI:EU:C:2016:471; and Case C-584/14 Commission v Greece (Greek Hazardous Waste Planning (2)) ECLI:EU:C:2016:636.

6By virtue of Art.260(3) TFEU.

7The 13 non-environmental second round infringement judgments handed down as at the end of 2016, and which are referred to in detail in endnote 3 of Ch4, are: Cases C-177/04, C-119/04, C-503/04, C-70/06, C-568/07, C-109/08, C-369/07, C-457/07, C-407/09, C-496/09, C-610/10, C-270/11 and C-95/12.


9The Commission also reported that the EU environment policy sector was the 3rdhighest in terms of late transposition infringement cases opened in 2015 (16% - 88 out of 543 cases)


11As at the end of 2013, the CJEU had issued 8 second round environmental infringement rulings as compared with the 7 it delivered between 2014-16 (see endnotes 3-5 above).

12Case C-387/97 Commission v Greece.

13A US military base is located within 2-3 km of the waste dump at Souda.

14As confirmed by the CJEU (see para. 61 of judgment in Case C-387/97).

15A technical study carried out in 1996 by the Greek Government acknowledged the presence of high concentrations of various toxic substances in and around the Kouroupitos site, including polycyclic aromatic hydrocarbons, polychlorobiphenyls, polychlorodibenzoxyxins, polychlorodibenzofurans and heavy metals (referred to in para. 66 of Advocate General Colomer’s Opinion on Case C-387/97 Kouroupitos (2), delivered on 28.9.99). The study found that the waste dump had been uncontrollably burning at least a decade (see extracts of study cited in CJEU’s judgment, para 63, in Case C-387/97 Kouroupitos (2).


19In 1999, the EU promulgated specific requirements with respect to landfill management under the Landfill Directive 1999/31 (OJ 1999 L182/1). The Directive does not apply to landfills already in existence at the time of its entry into force, so is not applicable in respect to waste sites such as that at the mouth of the Kouroupitos.

20Specifically, Articles 4 and 5 of Directives 75/442 and 78/319 respectively. Article 4 of the former has been recast in Art.13 of Directive 2008/98 which stipulates that:

‘Member states shall take the necessary measures to ensure that waste is disposed of without endangering human health , without harming the environment, and in particular:
  a) without risk to water, air, soil and plants or animals;
  b) without causing a nuisance through noise or odours; and
  c) without adversely affecting the countryside or places of special interest.’
As required at the time by Article 6 and 12(1) of former Directives 75/442 and 78/319 respectively. The waste planning obligations have now been recast within Art.28 of Directive 2008/98.

As required at the time by former Art.228(1) EC, now superseded by Art.260(1) TFEU.

At the time, given that the second round penalty infringement procedure had not yet been established, the Commission had relaunched infringement proceedings under the aegis of former Article 226 EC (now Art.258 TFEU).


See paras. 44-51 of CJEU judgment in Case C-387/97 Kouroupitos (2) and comments by Advocate General Colomer at paras. 53-4 of his Opinion in the case.

The following coefficients for seriousness were applied in respect of the particular breaches of EU waste management law, the highest figure being attributed to a grave violation of the general safety requirements: coefficients 4 and 2 in respect of infringements of Article 4 (safety) and 6 (waste plans) of the former Waste Framework Directive 75/442 respectively; a coefficient of 1 in respect of infringements of Articles 5 (safety) and 12 (waste plans) of former Directive 78/319. The Commission thereby considered that in terms of seriousness of infringement, less weight should be attached to the breaches of Directive 78/319 than Directive 75/442, as a reflection of the relative importance of the legislative instruments with respect to Greece meeting the terms of the first round CJEU judgment.

The calculation was made accordingly: €500 x 6 x 2 x 4.1 = €24,600.

The Greek Government was in effect pleading a breach of the former Waste Framework Directives 75/442 and 78/319. The Commission thereby considered that in terms of seriousness of infringement, less weight should be attached to the breaches of Directive 78/319 than Directive 75/442, as a reflection of the relative importance of the legislative instruments with respect to Greece meeting the terms of the first round CJEU judgment.

The calculation was made accordingly: €500 x 6 x 2 x 4.1 = €24,600.

The Greek Government was in effect pleading a breach of the general principle against retroactivity (nulla poena sine lege), recognised as one of the general principles of EU law (e.g. Case 63/83 R v Kent Kirk). This principle is also enshrined as a fundamental right in Art.49 of the EU Charter of Fundamental Rights 2000 (now an integral part of the EU legal order by virtue of the 2007 Lisbon Treaty) (OJ 2010 C83/2) and Art.7 of the European Convention on Human Rights and Fundamental Freedoms 1950.

Case C-387/97 Kouroupitos (2) at para. 42 of judgment.

Ibid. at para. 90 of judgment.

See paras. 28-43 of the Advocate General’s Opinion in Case C-387/97 Kouroupitos (2) (especially para.33).

See paras. 79-99 of CJEU judgment in Case C-387/97 Kouroupitos (2).

For the adoption of EU environmental measures, the TFEU specifies that a qualified majority of Council votes (QMV) is required in the majority of cases except for fiscal provisions and measures affecting town and country planning, quantitative management of water resources, affecting their availability, land use (except waste management) and measures significantly affecting affecting member states’ choice between energy sources and general structure of energy supply (see Article 192 TFEU). In practice, though, the Council seeks to form a consensus view where at all possible, and is more often than not reluctant to proceed readily or directly on a QMV basis. The EU adopted specific legislative rules on the management of landfills in 1999 by virtue of Directive 1999/31 (OJ 1999 L182/1).

Subsequently rehoused within Art.13 of Directive 2008/98 (OJ 2008 L312/3), the current version of the WFD.

See para. 55 of judgment of Case C-387/97 Kouroupitos (2).

Articles 6 and 12 of former Directives 75/442 (OJ 1975 L194/39) and 78/319 (OJ 1978 L84/43) respectively.

See para. 52 of judgment of Case C-387/97 Kouroupitos (2).

See Case C-365/97Commission v Italy.

Para. 56 of judgment in Case C-387/97 Kouroupitos (2).

At para. 65 of its judgment, the CJEU noted that correspondence in 1998 from the Chania Prefecture to the Greek Ministry of the Environment revealed this to be the case.

Paras. 73-74 of judgment.

See Krämer (2002a) at p399.

Para. 77 of Advocate General Colomer’s Opinion in Case C-387/97.

Specifically, Articles 6 and 12 of former Directives 75/442 (OJ 1975 L194/39) and 78/319 (OJ 1978 L84/43) respectively (now enshrined in Article 28 of Directive 2008/98).

See e.g. Case C-298/97Commission v Spain.

See para. 76 of judgment in Case C-387/97 Kouroupitos (2).

Such as from close of the pre-litigation stage of second round proceedings.

See paras. 100-120 of his Opinion.
The common environmental policy framework in the TFEU (Arts. 191-193) is broad enough to encompass measures designed to enhance compliance with EU environmental law: see Case C-444/05 Commission v Council (Ship source pollution).

For first round non-communication cases the Commission effectively sets a maximum limit on any penalties imposed by the CJEU by virtue of Art.260(3) TFEU.

Subsequent case law has confirmed that the duration coefficient spans between the date of first round judgment through to when the CJEU assesses the facts in the second round action: Case C-70/06 Commission v Portugal.

Art.260(1) TFEU also lends some support to such an interpretation, which refers to the member state as being obliged to take necessary measures in order ‘to comply with the judgment of the Court of Justice’. This obligation obviously only runs from the date of judgment.

As required by Arts.3(3) TEU and Art.191(2) TFEU.

It would seem that any change to the current official interpretation of the relevant treaty text in Art.260(2) TFEU would either require an express TFEU amendment or a CJEU judgment altering its position on the duration coefficient (which is most unlikely to occur).

See e.g. Krämer (2002a) at p401.

In the event, though, the Commission decided that penalty payments should cease to be required to be made by Greece within one year of the second round judgment. A daily penalty of €21,500 would have required Greece in total to pay approximately an additional €300,000 than that required by the actual daily fine imposed by the Court of €20,000.

See Article 41 of the EU Charter of Fundamental Rights. Article 41(1) obliges EU institutions to handle every person’s affairs impartially, fairly and within a reasonable time and Article 41(2) specifies that this right requires the ‘administration’ to give reasons for its decisions. The Charter, adopted in 2000, is an integral binding part of EU law by virtue of Art.6 TEU.

Case C-278/01 Commission v Spain (Spanish Bathing Waters (2)).


Such annual reports have been required to be completed by each member state and notified to the Commission under the EU bathing water legislation since 1993 (originally by virtue of Art.13 of former Dir.76/160).

Case C-92/96Commission v Spain (Spanish Bathing Waters (1))

Art.3 of former Dir.76/160 (OJ 1976 L31/1).

Commission figures, not contested by Spain, revealed the following percentages of inshore bathing areas conforming with the requisite limit values from 1998 onwards: 1998 (73%), 1999 (76.5%), 2000 (79.2%), 2001 (80%) and 2002 (85.1%).

This particular latter tactic is a highly controversial move, and one not infrequently employed by other member states. It is clearly against the spirit of the Directive, the purpose of which is to induce
member states to enhance bathing water quality as opposed to providing cover for national schemes designed to avoid carrying out their environmental protection commitments.

See e.g. para. 82 of Case C-387/97 Kouroupitos (2) and section 4.1.1. above.

See paras. 36-41 of his Opinion in Case C-278/01 Spanish Bathing Waters (2).

See especially paras. 32 and 63 of his Opinion.

See para. 64 of the Advocate General’s Opinion, where he notes that in one case it took some 20 years before the Commission applied to the CJEU for a second round judgment (e.g. Case C-334/94). He fails to take into account though that this case came to Court before the infringement penalty proceedings were initially introduced into the EU treaty framework, and at the time the CJEU could only issue a declaration of illegality.

Case C- 85/01 Commission v UK.

Article 4 of the former Bathing Water Directive 76/160 (OJ 1976 L31/1) stipulated a period of 10 years for implementation of the directive’s limit values (set out in Article 3).

Case C-278/01 Commission v Spain (Spanish Bathing Waters (2)) at para. 27 of judgment.

Para. 30 of judgment, ibid.


See Art.1(3) of Directive 2006/7 (OJ 2006 L64/37) as amended.

See paras. 55 to 59 of his Opinion in Case C-387/97 Kouroupitos (2).

Para. 28 of judgment in Case C-278/01 Spanish Bathing Waters (2).

See para.29 of the CJEU’s judgment.

See para. 58 of his Opinion.

See e.g. Case 13/83 European Parliament v Council.

See para. 2 of the specific terms of the CJEU’s judgment in Case C-278/01 Spanish Bathing Waters (2).

See para. 45 of CJEU’s judgment, ibid.

See paras. 72 et seq. of Advocate General’s Opinion in case C-278/01 Spanish Bathing Waters (2).

Para. 49 of CJEU’s judgment, ibid.

See para. 52 of CJEU’s judgment, ibid. The CJEU also specifically endorsed the Commission’s proposal of €500 set as a basic amount by which the three coefficients would be multiplied (see para. 60 of judgment).

Para. 41 of CJEU’s judgment, ibid.

See para. 53 of CJEU’s judgment, ibid.

See para.60 of CJEU’s judgment, ibid.

Article 4 of former Directive 76/160 (OJ 1976 L31/1).


See Directive 91/271 on urban wastewater treatment (OJ 1991 L135/40) as amended which allowedmember states until end 2005 to ensure that agglomerations with a population equivalent of between 2-15,000 are provided with collecting systems for urban wastewater. States were required to provide such systems for agglomerations in excess of 15,000 p.e. by the end of 2000.


See paras. 28-29 of judgment in Case C-278/01 Spanish Bathing Waters (2).

See also Advocate General Mischo’s Opinion in Case C-278/01 at paras.76-78.

Case C-64/88 Commission v France (French Fishing Controls (1))

Para. 30 of judgment in Case C-304/02 French Fishing Controls (2).

Para. 56 of judgment, ibid.

Para. 103 of judgment, ibid.

Namely, the Governments of Denmark, the Netherlands, Finland and the UK.

Namely, the Governments of France, Belgium, the Czech Republic, Germany, Greece, Spain, Ireland, Italy, Cyprus, Hungary, Austria, Poland and Portugal.

See paras. 80 and 83 of the judgment in Case C-304/02 French Fishing Controls (2).

See paras. 81-84 of the judgment, ibid.

Para. 85 of the judgment, ibid.

Opinions of 19.4.2004 and 18.11.2004 in Case C-304/02 French Fishing Controls (2).

Case C-533/11 Commission v Belgium (Belgian Urban Wastewater Treatment (2)).

Case C-576/11 Commission v Luxembourg (Luxembourg Urban Wastewater Treatment (2)).


Case C-27/03 Commission v Belgium(Belgian Urban Wastewater (1)).
12) Case C-452/05 Commission v Luxembourg (Luxembourg Urban Wastewater (1)).
13) See para. 54 of judgment in Case C-533/11 Commission v Belgium and para. 52 of judgment in Case C-576/11 Commission v Luxembourg.
14) Para. 74 of judgment in Case C-533/11.
15) Para. 67, ibid.
16) Specifically Case C-196/13 Commission v Italy, Case C-378/13 Commission v Greece, Case C-653/13 Commission v Italy and Case C-584/14 Commission v Greece respectively. (See endnote 5 for full references).
19) Case C-502/03 Commission v Greece ECLI: EU:C:2005:592
20) Case C-297/08 Commission v Italy ECLI:EU:C:2010:115.
22) Case C-286/08 Commission v Greece ECLI: EU:C:2009:543.
24) Cases C-167/14 Commission v Greece and Case C-557/14 Commission v Portugal decided in 2015 and 2016 respectively (see endnote 5 for full references).
27) Case C-530/07 Commission v Portugal ECLI:EU:C:2009:292.
30) See section 4.3.1 of Ch4.
32) SEC (2010) 923/3 Commission Communication Application of Article 260 of the Treaty on the Functioning of the European Union. Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings.
33) Most recent update as at end 2016: C(2016)591 Commission Communication Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings, 9.8.2016. For further details see: http://ec.europa.eu/atwork/applying-eu-law/infraingrvements-proceedings/financial-sanctions/index_en.htm
34) The Commission’s factors selected for the seriousness co-efficient in the four particular second round cases were as follows: 8 in Italian Landfills (2) (Case C-196/13); 9 in Greek Landfills (2) (Case C-378/13); 8 in Campania waste (2) (Case C-653/13) and 10 in Greek Hazardous Waste Planning (2) (Case C-584/14).
35) The duration between first and second round rulings in the 6 cases was approximately as follows: 7½ years in Italian Landfills (2) (Case C-196/13); 9 years in Greek Landfills (2) (Case C-378/13); 5½ years in Campania waste (2) (Case C-653/13); 7 years in Greek Hazardous Waste Planning (2) (Case C-584/14) ; 8 years in Greek Urban Wastewater (2) (Case C-167/14); and 7 years in Portuguese Urban Wastewater (2) (Case C-557/14).
36) See general analysis of the CJEU’s case law on defences in Ch3 (section 3.5.1) in respect of the first round infringement procedure under Art.258 TFEU and in Ch4 (section 4.2.2.2) with regard to second round infringement actions under Art.260 TFEU.
37) Periodic progress reports were required by the Commission in Italian Landfills (2), Greek Landfills (2), Campania Waste (2) (see endnote 5 for full references).
38) The duration of the period between first round infringement judgment and referral to the CJEU for a second round infringement ruling in the 6 solid waste and urban wastewater cases was approximately as follows: 6 years in Italian Landfills (2) (Case C-196/13); 7½ years in Greek Landfills (2) (Case C-378/13); 3 years and 2 months in Campania waste (2) (Case C-653/13); 5½ years in Greek Hazardous Waste Planning (2) (Case C-584/14) ; 6½ years in Greek Urban Wastewater (2) (Case C-167/14); and 5½ years in Portuguese Urban Wastewater (2) (Case C-557/14).
39) See paragraph 93 of judgment in Spanish Bathing Waters (2) (Case C-278/01).
In only two of the seven second round judgments between 2014-16 did an Advocate General consider it necessary to deliver an opinion. Moreover, the opinion provided by Advocate General Kokott jointly for Italian Illegal Landfills (2) (case C-196/13) and Greek Illegal Landfills (2) (Case C-378/13) did not appear to provide anything new in terms of substantive legal appraisal of key principles and issues concerning the interpretation of Article 260(2) TFEU.

See paragraph 58 of judgment in Swedish IPPC(2) (see endnote 5 for full case reference) in which the Swedish government complained about the relative short amount of time (13 months) between first round judgment and formal commencement of second round proceedings via LFN. See also Ch4 (section 4.2.1). This also resonates with the CJEU’s first round infringement ruling in the Campania Waste litigation (paragraph 87 of judgment in Case C-297/08) where the Court rejected the Italian government’s complaints about the relatively long period of time (10 years) taken for the Commission to initiate infringement proceedings as irrelevant. The CJEU confirmed that the Commission is not bound to comply with fixed time limits regarding the prosecution of infringement litigation (under Article 258 TFEU). See also Ch3 (section 3.5.6).

A six monthly penalty payment framework was set by the CJEU in the following cases: Italian Landfills (2) (Case C-196/13); Greek Landfills (2) (Case C-378/13); Greek Hazardous Waste Planning (2) (Case C-584/14); Greek Urban Wastewater (2) (Case C-167/14); and Portuguese Urban Wastewater (2) (Case C-557/14). However, the CJEU decided not to set up a six monthly periodic penalty payment format in Campania Waste (2) (Case C-653/13) notwithstanding this being proposed by the Commission. The reasons for this are not entirely clear but one may surmise that the imposition instead of a daily penalty payment until complete compliance with the first round judgment had been achieved was done perhaps in order to place increased pressure on the Italian government to secure compliance, reflecting the degree with which the Court viewed the seriousness of the infringement and the urgent need for its rectification. (See paragraphs 82-86 of judgment in Campania Waste (2)).

Case C-494/01 Commission v Ireland.

See paras. 33 and 36 of judgment in Italian Illegal Landfills (2) (Case C-196/13).

See paras. 100 and 118-119 of judgment in Italian Illegal Landfills (2),

Specifically, the CJEU imposed a periodic penalty payment of €42,800,000 to be paid each 6 months (minus deduction to take account of progress in achieving compliance with the first round ruling) as compared with the Commission’s request for a six monthly penalty payment of €46,860,000.

Specifically, the CJEU imposed a lump sum fine of €40,000,000 as compared with the Commission’s request for a lump sum of €77,948,640.

As at the end of 2016 these included the following judgments: Case C-177/04 Commission v France, C-119/04 Commission v Italy, Case C-70/06 Commission v Portugal, Case C-568/07 Commission v Greece, Case C-109/08 Commission v Greece, Case C-457/07 Commission v Portugal, Case C-407/09 Commission v Greece and Case C-270/11 Commission v Sweden.


Case C-419/03 Commission v France (French GMOs (1)).

Specifically, the Commission requested that France be required to pay a penalty payment of €366,744 per day from the day of the second round judgment until compliance and a lump sum of €43,660 per day from the date of the first round judgment until the date of the second round judgment (or earlier if transposition would be effected in full before judgment).

See paras. 27 and 56 of judgment in Case C-121/07 French GMOs (2).

The CJEU confirmed that ultimately it is for the Court to determine whether a lump sum should be imposed and the amount (see paras. 59, 61 and 63 of judgment, ibid).

Para. 57 of judgment, ibid.

Para. 58 of judgment, ibid.

Para. 64 of judgment, ibid.

See paras. 75-77 of judgment, ibid.

The CJEU also referred to breaches of EU law on free movement of factors of production as constituting especially serious violations of Union law (see para. 78 of judgment, ibid).

Para. 86 of judgment, ibid.

Para. 72 of judgment, ibid.

Para. 70 of judgment, ibid.

Para. 79 of judgment, ibid.

Cases C-296/01 and C-429/01 Commission v France

See paras. 66-68 of Case C-121/07 French GMOs (2)
Para.69 of judgment, ibid.

See paras.84-85 of judgment, ibid.

Para. 76 of Advocate General’s Opinion in Case C-121/07 French GMOs (2), of 5.6.2008.

The Commission’s position is summarised in para. 64-65 of the Advocate General’s Opinion in French GMOs (2).

Taking into account the total duration of the French government’s failure to adhere to the first round judgment (15.7.2004-30.7.2008 (some 48 months)) the proposed Commission’s lump sum would have been €64,398,500.

Para. 76 of Advocate General’s Opinion in Case C-121/07 French GMOs (2), of 5.6.2008.

The Commission’s position is summarised in para. 64-65 of the Advocate General’s Opinion in French GMOs (2).

The Commission had requested a lump sum of €4,711.2 per day between the date of the first round ruling (29.10.2009) and the date of the second round judgment (19.11.2012). The author calculates that this corresponds with a total figure of €5,394,324 (based on 1,145 days x €4,711.2).

Case C-279/11 Commission v Ireland.


Case C-66/06 Commission v Ireland (Irish EIA (1)).

Para. 70 of judgment in Case C-279/11 Irish EIA (2).

Para.72 of judgment, ibid.

Para.76 of judgment, ibid.

Para.50-51 of judgment, ibid.

Paras.48-49 of judgment, ibid.

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Para. 70 of judgment in Case C-279/11 Irish EIA (2).

Para.72 of judgment, ibid.

Para.76 of judgment, ibid.

Paras.47 of judgment, ibid.

Paras.50-51 of judgment, ibid.

Paras.48-49 of judgment, ibid.

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Para.72 of judgment, ibid.

Para.76 of judgment, ibid.

Paras.50-51 of judgment, ibid.

Paras.48-49 of judgment, ibid.

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Case C-279/11 Commission v Ireland.


Paras.48-49 of judgment, ibid.

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Case C-279/11 Commission v Ireland.


Para.47 of judgment, ibid.

Paras.50-51 of judgment, ibid.

Paras.48-49 of judgment, ibid.

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Case C-66/06 Commission v Ireland (Irish EIA (1)).

Para. 70 of judgment in Case C-279/11 Irish EIA (2).

Para.72 of judgment, ibid.

Para.76 of judgment, ibid.

Paras.65-66 of judgment, ibid.

Paras.78-79 of judgment, ibid.

Namely, Kouroupitos (2) (Case C-387/97), French Fishing Controls (2) (case C-304/02), Belgian Urban Wastewater (2) (Case C-533/11), Italian Illegal Landfills (2) (Case C-196/13) and Greek Illegal Landfills (2) (Case C-378/13) in which cases the CJEU imposed penalty payment (PP) amounts that corresponded to 81%, 100%, 98.7%, 91.3% and 111.8% respectively of the PPs proposed by the Commission.

Art.260(3) TFEU.

See notably Arts.1 and 11 TUE as well as Art.15(1) TFEU which impose a general duty of openness on all EU institutions (thus including the CJEU).

The European Commission’s Environmental Directorate-General’s (DG ENV) website on statistical information concerning environmental infringements notes that France, Greece, Italy and Ireland represented 6.3%, 9.4%, 7% and 4.5% respectively of ongoing environmental infringement action pursued by the Commission against the 28 EU member states at the end of 2015. France, Greece, Italy and France were member states with the 4th, 2nd, 3rd and 8th highest number of infringement cases respectively. See: http://ec.europ.eu/environment/legal/law/statistics.htm

Spain was reported by DG ENV of the European Commission as being subject to 9.8% of ongoing environmental infringement casework as at the end of 2015, the highest number amongst all the member states.
The same DG ENV website also reports France, Greece, Italy and Spain as being the member states subject to the highest number of ongoing second round infringement actions as at the end of 2015: a 10%, 20%, 12.5% and 15% share of cases respectively. Collectively, the 4 member states accounted for 57.5% of all second round environmental infringement cases as at the end of 2015. See: http://ec.europ.eu/environment/legal/law/statistics.htm

See notably Regulation 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L1/1). See also Ch5, especially section 5.1.