Opinion of Advocate General Poiares Maduro delivered on 26 January 2006

Commission of the European Communities v Italian Republic

Failure of a Member State to fulfil obligations - Judgment of the Court establishing failure - Non-compliance - Article 228 EC - Financial penalties - Recognition of acquired rights of former foreign-language assistants

Case C-119/04

European Court reports 2006 Page I-06885

I – Introduction

1. The issue in these proceedings is one that has given rise to several judgments of this Court: the conformity with Article 39 EC of the employment conditions of foreign-language assistants at universities in Italy. In its preliminary ruling in *Allué and Coonan* the Court held that a national law limiting the duration of employment contracts of foreign-language assistants, but not of other workers, was contrary to Community law. (2) The Court found that the Italian legislation under discussion discriminated indirectly against workers from other Member States. (3) Similarly, in its subsequent ruling in *Allué and Others* the Court held that 'it is contrary to [Article 39(2) EC] for the legislation of a Member State to limit the duration of employment contracts of foreign-language assistants in any event to one year, with the possibility of renewal, where in principle no such limit exists with regard to other teachers.' (4)

2. In 1995 the Italian Republic, with the aim of reforming foreign-language teaching in Italian universities, adopted Law No 236 of 21 June 1995 (hereinafter 'Law No 236'). (5) Under the terms of that law the post of foreign-language assistant was abolished and replaced by that of linguistic associate. However, after the law entered into force, the Commission received several complaints from former foreign-language assistants, alleging that the conversion to the new system had been accompanied by discriminatory treatment by Italian universities. The Commission initiated infringement proceedings against Italy. It contended that in the universities of La Basilicata, Milan, Palermo, Pisa, 'La Sapienza' in Rome, and the Eastern University Institute in Naples, linguistic associates had not had their former length of service as foreign-language assistants recognised in terms of pay and social security. According to the Commission, this amounted to an infringement of Article 39 EC.

3. The proceedings culminated in the judgment of this Court of 26 June 2001 in Case C-212/99 *Commission* v *Italy*. (6) The Court declared that 'by not guaranteeing recognition of the rights acquired by former foreign-language assistants who have become associates and mother-tongue linguistic experts, even though such recognition is guaranteed to all national workers', Italy had failed to fulfil its obligations under Article 39 EC.

4. On 4 March 2004 the Commission brought the present proceedings under Article 228(2) EC. The Commission claims that the Italian Republic has failed to take the necessary measures to comply with the judgment of the Court in Case C-212/99 and requests that a penalty payment be imposed on Italy.

II – The judgment of 26 June 2001 in *Commission* v *Italy*

5. In its judgment of 26 June 2001 in Case C-212/99 the Court examined, in respect of former foreign-language assistants, the collective agreements and individual employment contracts of the universities of La Basilicata, Milan, Palermo, Pisa, 'La Sapienza' in Rome, and the Eastern University Institute in Naples.

6. The Court used Law No 230 of 18 April 1962 on the regulation of fixed-term employment contracts (hereinafter 'Law No 230') as its measure of comparison to decide whether the system applying to former foreign-language assistants was similar to the general system applying to the national workforce. (7) Under that law, when a worker whose employment relationship is governed by private law is entitled to have his fixed-term employment contract converted into one of indeterminate duration, all his acquired rights are guaranteed from the date of his original recruitment.

7. The Court held that 'when a foreign-language assistant who is a national of another Member State and has been employed under a fixed-term contract is entitled to have that contract replaced by one of indeterminate duration, also governed by private law, the Italian authorities must ensure that he retains all his acquired rights from the date of his original recruitment, failing which there would be discrimination based on nationality, contrary to [Article 39] of the Treaty.' (8)

8. Although Law No 236 provided expressly for retention of the rights acquired by foreign-language assistants during former employment relationships, an evaluation of the contractual and administrative practices operated by the universities under consideration led the Court to conclude that discriminatory situations existed. (9) The Court consequently held that Italy had failed to fulfil its obligations under Article 39 EC.

III – The pre-litigation procedure

9. By letter of 31 January 2002 the Commission drew the attention of the Italian Government to the judgment of the Court in Case C-212/99 and to the obligation of the Italian Republic, under Article 228(1) EC, to take the necessary measures to comply with that judgment. By the same letter, the Italian Government was invited to

submit its observations in accordance with Article 228(2) EC concerning the possibility of an application being made for the imposition of pecuniary sanctions.

10. The Italian Government responded to that letter in three written communications of 10 April 2002, 8 July 2002 and 16 October 2002. In its first written communication the Italian Government announced that a legislative measure would be adopted at national level in order to modify the contractual regime of linguistic associates who had previously been foreign-language assistants. The communication also included a copy of a letter from the Italian Minister for Education, Universities and Scientific Research of 27 March 2002. The letter, addressed to the six universities in question, calls on those universities to comply with the judgment in Case C-212/99 within 45 days.

11. By its second written communication, of 8 July 2002, the Italian Government sent a copy of what it considered to be the necessary measures, adopted by the six universities, to ensure due recognition of the length of service of former foreign-language assistants. The third written communication, of 16 October 2002, contained further explanations concerning the measures taken to comply with the Court's judgment in respect of each of the six universities.

12. By letter of 11 December 2002 the Commission requested clarification from the Italian authorities regarding the methods and the criteria applied by the different universities to calculate the increase in remuneration of former foreign-language assistants who had become associates and linguistic experts. The Italian Government replied by letter of 24 January 2003, to which it attached a draft collective agreement, signed by the unions for university staff and by ARAN, the governmental agency charged with negotiating employment contracts in the public sector. According to the Italian Government the draft agreement, which contained specific rules for former foreign-language assistants, would be signed by the interested parties immediately after approval by the Committee of the University Sector, the President of the Council of Ministers and the Court of Auditors.

13. Considering the measures communicated to it by the Italian Government to be unsatisfactory, the Commission addressed a reasoned opinion to the Italian Republic on 30 April 2003. In its reasoned opinion the Commission observed that, by failing to take the necessary measures to comply with the judgment of the Court of 26 June 2001 in Case C-212/99, the Italian Republic had breached its obligations under Article 39 EC. In addition, the Commission drew attention to the possibility of pecuniary sanctions being imposed by the Court. The Italian Republic was requested to react within two months following the notification of the reasoned opinion.

14. The Italian Government responded with several letters. With its first letter of 17 June 2003 it enclosed a copy of the national collective agreement for staff in the university sector for the years 2000-2001, signed on 13 May 2003. In its subsequent letter of 25 July 2003 the Italian Government replied to the grounds set out in the reasoned opinion and claimed that it had taken steps to comply with the judgment in Case C-212/99. In addition, on 12 November 2003, the Italian Government submitted a list of measures the competent administrative authorities intended to take within a short period. The Italian Government subsequently submitted a letter of 5 December 2003 from the Minister for Education, Universities and Scientific research, together with a copy of a letter sent to the six universities concerned by that ministry's legislative department. Thereafter, the Italian Government sent a letter dated 11 December 2003 to which was attached a copy of a draft decree-law, with explanatory notes. Lastly, on 28 January 2004, the Italian Government submitted a copy of decree-law No 2 of 14 January 2004, containing urgent provisions relating to the financial treatment of linguistic associates in certain universities and concerning equivalent qualifications. (10)

15. Taking the view that the Italian Republic had still not complied with the judgment in Case C-212/99 *Commission* v *Italy*, the Commission brought the present action. The Commission asks that the Court impose on the Italian Republic a penalty payment of EUR 309 750 for each day's delay in complying with that judgment, with effect from the day on which the Court delivers its judgment in the present proceedings.

IV – Assessment

A – Compliance with the obligation imposed by Article 228(1) EC

16. First it must be determined whether the infringement of Article 39 EC established by the Court in its judgment of 26 June 2001 in Case C-212/99 *Commission* v *Italy* has persisted. (11)

17. The Italian Government maintains that it has taken the necessary measures to comply with the judgment of the Court. It argues that Law No 236 already provides the legal framework for the recognition of acquired rights of former foreign-language assistants. There is consequently no need to adopt further legislative measures in order to give effect to the judgment of the Court. It would suffice to bring the national collective agreement and the collective agreements of the six universities into conformity with Law No 236. However, the amendment of those agreements is the responsibility not of the Italian State but of the private parties involved in the negotiations. The State is not entitled to interfere with the contractual autonomy of those parties. Therefore, the Italian State cannot be held responsible for the absence of provisions in collective agreements that would ensure compliance with the judgment of the Court. The Italian Government adds that the anti-discrimination rule in Article 39(2) EC cannot be interpreted as calling in question the use of collective negotiations as an instrument for regulating employment relationships.

18. To my mind, this argument is out of place in the present proceedings, since it puts into question the finding of the Court, in its judgment of 26 June 2001, that the Italian Republic had infringed Community law. In fact, in the infringement proceedings leading to that judgment the Italian Government had raised the same argument, but it was rejected by the Court. (12)

19. Article 228(1) EC provides that, once the Court has found that a Member State has failed to fulfil an obligation under the Treaty, 'the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice'. Hence, in proceedings under Article 228 EC, the responsibility of the Member State to ensure compliance with the judgment cannot be questioned. It is only necessary to consider whether the breach of Community law established by the Court has been remedied.

20. The Italian Government contends that the breach has been remedied. It stresses that decree-law No 2/2004 was adopted specifically in order to resolve the deadlock of the collective negotiations and to oblige the universities to recognise the acquired rights of former foreign-language assistants. The decree-law prescribes that, as a point of reference, the universities must have regard to the financial treatment of part-time-tenured researchers.

21. The Commission considers this to be insufficient to give effect to the Court's judgment. It emphasises that the choice of part-time researchers as the reference category has far-reaching consequences for former foreign-language assistants in terms of arrears of salary and accrued pension rights. The Commission points out that the Italian Corte Costituzionale (Constitutional Court) has recognised that there is a substantial similarity between the functions exercised in universities by former foreign-language assistants and by tenured researchers. (13) According to the Commission, a full-time foreign-language assistant should receive treatment equivalent to that of a full-time-tenured researcher.

22. The Commission also argues that when decree-law No 2/2004 was converted into law, (14) an element was added that constitutes an additional obstacle to the correct execution of the Court's judgment. The law in question uses a reference criterion of 500 teaching hours per year for the position of full-time former foreign-language assistants. Where the employment contract of a former foreign-language assistant was concluded for a lesser number of hours, the total arrears of salary and accrued pension rights are reduced correspondingly. The reference criterion is based on the number of teaching hours per year for linguistic associates under the 1994-1997 national public sector collective agreement. The Commission is of the opinion that, instead of using the reference criterion of 500 teaching hours per year, the reinstatement of acquired rights of former foreign-language assistants should be based on the actual terms of the previous individual employment agreements or, if that is not possible, on the collective agreement of each university.

23. The Italian Government maintains that it is impossible to assimilate foreign-language assistants to full-time-tenured researchers. Referring again to case-law of the Italian Corte Constituzionale, (15) the Italian Government emphasises that the principal task of tenured researchers is to perform scientific research, whilst their teaching duties are merely ancillary. This is reflected in the fact that they must pass entry exams that are specifically devised to assess their research abilities. Entirely equal treatment, in financial terms, of foreign-language assistants and tenured researchers ought therefore to be excluded. In order to avoid relative undervaluation of the work of tenured researchers, the standard of reference should be the financial treatment of part-time researchers, not that of full-time researchers.

24. In reviewing the arguments put forward by the Commission and the Italian Government, it is worth recalling that where the Commission has adduced sufficient evidence to show that a breach of obligations has persisted, 'it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences'. (16)

25. The Italian Republic has submitted evidence to show, essentially, that the six universities concerned currently recognise acquired rights of former foreign-language assistants that are equivalent to the rights they would have acquired had they worked as part-time-tenured researchers. As the Commission admitted, this represents a step in the right direction. However, the Italian Republic has not demonstrated that, by guaranteeing recognition of acquired rights equivalent to those of part-time-tenured researchers, it has remedied the discrimination between national workers and former foreign-language assistants.

26. In its judgment of 2001 the Court held that 'if workers are entitled, under Law No 230, to reinstatement from the point of view of increases in salary, seniority and the payment by the employer of social security contributions, from the date of their original recruitment, former foreign-language assistants who have become linguistic associates must also be entitled to similar reinstatement with effect from the date of their original recruitment.' (17)

27. That judgment requires the Italian Republic to ensure recognition of the acquired rights of former foreign language assistants. Moreover, it is common ground that proper implementation of the judgment would require full and not merely partial recognition of those rights. The question in the present case, however, is what full recognition of the rights acquired by former foreign-language assistants amounts to. In other words, what is in dispute is the extent of those rights.

28. The precise extent of the rights to be recognised as acquired by former foreign-language assistants is not specified in the Court's decision in Case C-212/99. This is only logical, since it is not for the Court to lay down the employment conditions of foreign-language assistants in Italy. The Court's judicial task is purely to review whether those conditions give rise to prohibited discrimination on grounds of nationality.

29. Both the Commission and the Italian Republic rely on the post of tenured researcher as their standard of reference. However, whereas the Commission maintains that the rights acquired by former foreign-language assistants must be equivalent to the rights acquired by tenured researchers, the Italian Republic is of the view that tenured researchers deserve more favourable treatment.

30. It does not follow from the judgment in Case C-212/99 that the Italian Republic is obliged to identify a comparable category of workers and then to completely assimilate the treatment of former foreign-language assistants to the treatment of that category of workers. Community law does not prohibit every difference in treatment between former foreign-language assistants and other university teachers and researchers. However, the Italian Republic must be able to justify any disadvantageous treatment of former foreign-language assistants regarding the reinstatement of their acquired rights, otherwise it would remain in breach of its obligation to give effect to the judgment in Case C-212/99. Therefore, the essential issue is whether the disadvantageous treatment of former foreign-language assistants as compared with tenured researchers is objectively justified and proportionate. (18)

31. The reason given by the Italian Government for the differential treatment in question is that the research and teaching activities performed by tenured researchers should be more highly valued than the teaching activities performed by former foreign-language assistants. In this respect, a margin of discretion must be left to the national authorities. Nevertheless, while certain elements, such as the level of professional qualifications required, could justify differential treatment, the Italian Republic has not sufficiently explained why the differences between former foreign-language teachers and tenured researchers should give rise to such a large discrepancy in terms of the amount of arrears of salary and accrued pension rights.

32. It must therefore be concluded, in my opinion, that, by failing to comply with the judgment in Case C-212/99, the Italian Republic has failed to fulfil its obligations under Article 228 EC.

B – The appropriate financial penalty

33. Relying on the method of calculation which it set out in its Communication 97/C 63/02 of 28 February 1997, (19) the Commission suggests that the Court should impose on the Italian Republic a penalty payment of EUR 309 750 for each day's delay in complying with the judgment in Case C-212/99, from the day on which the Court delivers its judgment in the present proceedings until the day the judgment in Case C-212/99 is complied with. That sum is arrived at by multiplying a uniform basic amount of EUR 500 by a coefficient of 14 (on a scale of 1 to 20) for the seriousness of the infringement, by a coefficient of 2.5 (on a scale of 1 to 3) for the duration of the infringement and by a coefficient of 17.7 (based on the gross domestic product of the Member State in question and the weighting of votes in the Council of the European Union), which is deemed to reflect the ability to pay of the Member State concerned.

34. While suggestions made by the Commission cannot bind the Court, they are considered 'a useful point of reference' and constitute the point of departure in determining which penalty would be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned. (20) The three basic criteria which the Court takes into account are, in principle, the degree of seriousness of the infringement, its duration and the ability of the Member State to pay. (21) In particular, the Court considers the effects of the failure to comply on private and public interests, and the urgency of persuading the Member State concerned to fulfil its obligations. (22)

The seriousness of the infringement

35. As to the seriousness of the infringement, it is worth recalling that Article 39 EC lays down one of the fundamental principles of the Treaty and must be regarded as part of the foundations of the common market. (23) The freedom of citizens of the European Union to work in any Member State is also recognised as a fundamental right in Article 15(2) of the Charter of Fundamental Rights of the European Union. The exercise of this right requires that Member States abolish any form of discrimination based on nationality between the workers of the Member States as regards employment, remuneration and other conditions of work and employment. (24)

36. The failure of the Italian Republic to comply with the judgment of 26 June 2001 entails considerable financial consequences for former foreign-language assistants and thus has a serious effect on their interests. According to the Commission, the number of individuals concerned is approximately 450 for the six universities under consideration. This figure was arrived at on the basis of a report submitted to it by the Italian Government in August 1997. In its correspondence with the Commission during the pre-litigation procedure, the Italian Government makes the assumption that the number of persons concerned must be significantly lower. However, the Italian Government has not adduced evidence to that effect and has not challenged the Commission's figure in its submissions to this Court. As a consequence, the Commission's view as to the number of individuals affected must be accepted. (25)

37. On the other hand, as I have mentioned at point 31 above, some margin of discretion must be left to the national authorities as to the appraisal of the relative value of different types of employment. The Commission appears not to have considered this factor when assessing the seriousness of the infringement, since it has insisted from the outset on a strict parallelism between former foreign-language assistants and full-time-tenured researchers. Yet, in my view, this factor must also be taken into account when assessing the seriousness of the infringement. (26)

38. Having regard to those factors, the coefficient of 14 proposed by the Commission seems slightly on the high side. Instead, I suggest a coefficient of 12 to reflect the seriousness of the infringement.

The duration of the infringement

39. The duration of the infringement of Article 228(1), which must be calculated from the date the Court delivered its judgment in Case C-212/99, is at present four years and seven months. The Treaty does not indicate within what period a judgment must be implemented, but according to the case-law the process of compliance must be initiated at once and completed as soon as possible. (27)

40. The Italian Government has contended throughout its submissions that account should be taken of the autonomous status of Italian universities. Yet, in this regard, it is important to note that the first formal step taken by the Italian authorities, which aimed at ensuring compliance by the universities with the initial judgment of the Court, was taken almost 31 months after that judgment was delivered, on 14 January 2004 in the form of decree-law No 2/2004. Moreover, the existing differences in treatment between tenured researchers and former foreign-language assistants, which the Italian authorities have been unable to justify, are endorsed by that decree-law.

41. Accordingly, the coefficient of 2.5 suggested by the Commission appears appropriate.

The Italian Republic's ability to pay

42. The Court has repeatedly held that a coefficient based on the gross domestic product of the defaulting Member State and on the number of votes which it has in the Council is 'an appropriate way of reflecting that

Member State's ability to pay, while keeping the variation between Member States within a reasonable range'. (28)

43. The coefficient for the Italian Republic, as indicated in the Commission's communication 97/C 63/02 of 28 February 1999, is 17.7. (29)

44. In the light of those circumstances, I consider that a penalty payment of EUR 265 500 per day (500 x 12 x 2.5 x 17.7) should be imposed by the Court.

Whether a lump sum should be imposed

45. In order to place the defaulting Member State under sufficient financial pressure to induce it to put an end to the breach established, the Court may decide to impose a lump sum in addition to a penalty payment. (30)

46. Whereas a penalty payment functions as an inducement to a Member State to remedy an infringement as soon as possible after the Court has given judgment in proceedings under Article 228 EC, the possibility of imposing a lump sum provides a means of ensuring that Member States will not find it preferable to await the commencement and outcome of such proceedings before taking measures to remedy a breach established by the Court in infringement proceedings.

47. Even though it had not been proposed by the Commission, the Court recently considered it essential to impose the payment of a lump sum in Case C-304/02 *Commission* v *France* in the light of the interests at stake and, particularly, because of the long period that had elapsed since the breach was initially established. (31)

48. No departure from the Commission's proposal to impose only a penalty payment is, in my view, required in this case. Although the period that has elapsed since the judgment in Case C-212/99 is substantial, it is not in the same league as the exceedingly long period under consideration in *Commission* v *France*. (32)

49. I therefore propose that the Court order the Italian Republic to pay EUR 265 500 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-212/99, from delivery of the present judgment until the judgment in Case C-212/99 has been complied with.

50. Since the Commission has applied for costs, I propose that the Italian Republic, as the unsuccessful party in these proceedings, be ordered to pay the costs in accordance with Article 69(2) of the Rules of Procedure.

V – Conclusion

51. In the light of the foregoing considerations, I suggest that the Court should:

– declare that, by not guaranteeing recognition of the rights acquired by former foreign-language assistants who have become linguistic associates and mother-tongue linguistic experts, even though such recognition is guaranteed to all national workers, the Italian Republic has not implemented all the necessary measures to comply with the judgment of 26 June 2001 in Case C-212/99 *Commission* v *Italy* and has accordingly failed to fulfil its obligations under Article 228 EC;

– order the Italian Republic to pay to the Commission of the European Communities, into the account 'EC own resources', a penalty payment of EUR 265 500 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-212/99, from delivery of the present judgment until the judgment in Case C-212/99 has been complied with;

– order the Italian Republic to pay the costs.

---

1 – Original language: Portuguese.

2 – Case 33/88 [1989] ECR 1591, in particular paragraph 19.

3 – Ibid., paragraph 12. The Court noted that only a minority of foreign-language assistants were Italian nationals and that, as a result, the time-limit essentially concerned workers who were nationals of other Member States.

4 – Joined Cases C-259/91, C-331/91 and C-332/91 [1993] ECR I-4309.

5 – Law No 236 of 21 June 1995 (GURI No 143 of 21 June 1995, p. 9).

6 – [2001] ECR I-4923.

7 – Case C-212/99 *Commission* v *Italy*, paragraph 25.

8 – Case C-212/99 *Commission* v *Italy*, paragraph 22.

9 – Ibid., paragraph 31.

10 – GURI No 11 of 15 January 2004, p. 4 (hereinafter: 'decree-law No 2/2004').

11 – As to the point in time to which the assessment must relate, see: Case C-304/02 *Commission* v *France* [2005] ECR I-0000, paragraph 31, and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, at point 58.

12 – Case C-212/99 *Commission* v *Italy*, paragraph 35. As the Court recalled, 'a Member State may not plead provisions, practices or situations existing in its internal legal order to justify the failure to comply with obligations arising from Community law'.

13 – The Commission refers to judgment No 284 of 23 July 1984 and, especially, to judgment No 496 of 28 November 2002.

14 – Law No 63/2004 of 5 March 2004 (GURI No 60 of 12 March 2004).

15 – The Italian Government refers to orders Nos 94/2002, 262/2002 and 160/2003.

16 – Case C-304/02 *Commission* v *France*, paragraph 56.

17 – Case C-212/99 *Commission* v *Italy*, paragraph 30.

18 – See Gerards, J.H., *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005, p. 669-675.

19 – On the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2).

20 – Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraphs 89 and 90; Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraph 41; Case C-304/02 *Commission* v *France*, cited above, paragraph 103; and the Opinion of Advocate General Geelhoed delivered on 24 November 2005 in Case C-177/04 *Commission* v *France*, pending before the Court, at point 62.

21 – Case C-304/02 *Commission* v *France*, paragraph 104; Case C-387/97 *Commission* v *Greece*, paragraph 92; Case C-278/01 *Commission* v *Spain*, paragraph 52.

22 – Case C-304/02 *Commission* v *France*, paragraph 104; Case C-387/97 *Commission* v *Greece*, paragraph 92.

23 – See Article 3(1)(c) EC and, for example, Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 102.

24 – Article 39(2) EC.

25 – To the same effect: Case C-304/02, *Commission* v *France*, paragraph 56.

26 – See, by analogy, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 56. Of course, I am not suggesting that the infringement by the Italian Republic is not sufficiently serious to give rise to Member State liability.

27 – Case C-387/97 *Commission* v *Greece*, paragraph 82. See also the Opinion of Advocate General Mischo in Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, at point 31.

28 – Case C-304/02 *Commission* v *France*, paragraph 109; Case C-278/01 *Commission* v *Spain*, paragraph 59; Case C-387/97 *Commission* v *Greece*, paragraph 88.

29 – The Court, so far, has been content to apply the coefficients as set out in the Commission's Communication of 1997, even though these coefficients were calculated many years ago on the basis of the GDP of Member States and the weighting of votes in the Council. Both factors have undergone changes in the meantime. The new Communication on the Application of Article 228 of the EC Treaty (SEC(2005)1658final) must for that reason be welcomed. According to the new Communication, the coefficient for ability to pay of Italy is slightly higher. However, in light of the Court's established practice, I do not consider it appropriate to apply the new calculation method already, especially since the Commission, in its proposal in the present case, relies on its Communication of 1997.

30 – Case C-304/02 *Commission* v *France*, paragraphs 89 to 97. See also point 10 of the Opinion delivered in that case on 18 November 2004 by Advocate General Geelhoed, who emphasises the importance of the preventive effect, in addition to the persuasive effect, of the financial sanctions provided for by Article 228(2) EC.

31 – Case C-304/02 *Commission* v *France*, paragraphs 81 and 114 to 119.

32 – As Advocate General Geelhoed observed at point 93 of his Opinion of 29 April 2004 in C-304/02 *Commission* v *France*, the infringement by France of its obligations to monitor and enforce Community provisions on minimum fish size lasted for almost two decades. See also his Opinion of 18 November 2004 in the same case, at point 49. The judgment in the initial infringement proceedings against France dated back to 11 June 1991, almost 10 years before the judgment in Case C-212/99 was delivered. See Case C-64/88 *Commission* v *France* [1991] ECR I-2727.