



**DKM Economic  
Consultants**

6 Grand Canal Wharf  
South Dock Road  
Ringsend  
Dublin 4

**Ph: 353 1 6670372**

**Fax: 353 1 6144499**

E-mail: [john.lawlor@dkm.ie](mailto:john.lawlor@dkm.ie)

Website: [www.dkm.ie](http://www.dkm.ie)

**Paper for Greenstar Ltd.**

**Potential Fines for  
Non-Compliance with the  
EU Landfill Directive**

**December 2009**

## **Contents**

Potential Fines for Non-Compliance with the EU Landfill Directive.....	<b>1</b>
1. Legal Background .....	<b>1</b>
2. Calculation of Fines.....	<b>2</b>
3. Incidences of Imposition of Fines .....	<b>4</b>

# Potential Fines for Non-Compliance with the EU Landfill Directive

## 1. *Legal Background*

This paper discusses the potential fines that Ireland might be liable for if the country fails to achieve the targets as set out in the EU Landfill Directive<sup>1</sup>.

Under the Directive, Ireland is committed to reducing the volume of Biodegradable Municipal Waste (BMW) going to landfill to 75% of its 1995 level by 2016, to 50% of the 1995 level by 2013 and to 35% of the 1995 level by 2016.

The procedure for enforcing Directives and imposing fines is set out in the Maastricht Treaty.

**Article 226** of the Treaty gives the Commission powers to take legal action against a Member State that is not respecting its obligations under EU law. This is seen as the first stage in the process.

If the Commission considers that there may be an infringement of EU law that warrants the opening of an infringement procedure, it addresses a "Letter of Formal Notice" (first written warning) to the Member State concerned, requesting it to submit its observations by a specified date, usually two months.

In the light of the reply or absence of a reply from the Member State concerned, the Commission may decide to address a "Reasoned Opinion" (final written warning) to the Member State. This clearly and definitively sets out the reasons why it considers there to have been an infringement of EU law, and calls upon the Member State to comply within a specified period, usually two months.

If the Member State fails to comply with the Reasoned Opinion within the required timeframe, the Commission may **decide to bring the case before the Court of Justice**. Where the Court of Justice finds that the Treaty has been infringed, the offending Member State is required to take the measures necessary to conform.

**Article 228** of the Treaty gives the Commission power to act against a Member State that does not comply with a previous judgement of the European Court of Justice. Again, there is a "Letter of Formal Notice" and a "Reasoned Opinion". The article also allows the Commission to **ask the Court to impose a financial penalty on the Member State** concerned. This is seen as the second stage in the process.

---

<sup>1</sup> Directive 1999/31/EC 26<sup>th</sup> April 1999 on the Landfill of Waste, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:182:0001:0019:EN:PDF>.

Article 228 states:

- “1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty.”

In 2005 the Commission issued a Communication as to how it intended to implement these procedures<sup>2</sup>.

The following sets out our understanding of the situation regarding the potential fines that could be imposed on Ireland for non-compliance with EU Directives<sup>3</sup>.

## **2. Calculation of Fines**

If Ireland exceeds its target for BMW diversion under the Landfill Directive, the EU commission can bring the State to the European Court of Justice (ECJ) for breach of European Community law. If the ECJ judgement is not complied with, the Commission can refer the matter back to the Court, and propose that a **periodic penalty** and a **lump sum fine** be imposed by the Court on the State. Note that, although article 228 talks about “impos(ing) a lump sum or penalty”, we understand that the Commission can ask the Court to impose both a lump sum fine and a periodic penalty.

The rationale for the two types of fine is as follows:

---

<sup>2</sup> Communication from the Commission Application of Article 228 of the EC Treaty SEC(2005) 1658 [http://ec.europa.eu/community\\_law/docs/docs\\_infringements/sec\\_2005\\_1658\\_en.pdf](http://ec.europa.eu/community_law/docs/docs_infringements/sec_2005_1658_en.pdf)

<sup>3</sup> We would emphasise that DKM are not legal experts and this paper should not be considered an authoritative interpretation of Community Law. It is based largely on the following sources: [http://ec.europa.eu/fisheries/press\\_corner/press\\_releases/archives/com05/com05\\_82\\_en.htm](http://ec.europa.eu/fisheries/press_corner/press_releases/archives/com05/com05_82_en.htm) and [http://ec.europa.eu/community\\_law/docs/docs\\_infringements/sec\\_2005\\_1658\\_en.pdf](http://ec.europa.eu/community_law/docs/docs_infringements/sec_2005_1658_en.pdf)

## Potential Fines for Non-Compliance with the EU Landfill Directive

- The periodic penalty is a penalty by day of delay after the delivery of the judgment under Article 228, and
- The lump sum is designed to penalise the continuation of the infringement between the judgment on non-compliance (under Article 226) and the judgment delivered under Article 228.

Although the level of penalty is a matter for the ECJ, it is likely to take into account the Commission's guidance. The commission has a formula for calculating the proposed periodic penalty payment. The amount payable equals the Daily Penalty, multiplied by the number of days the State is non-compliant.

The Daily Penalty is a uniform flat-rate amount of €600, multiplied by:

- Two coefficients, one reflecting the seriousness (ranging from 1 to 20) of the infringement and the other to its duration (ranging from 1 to 3), and
- A factor (n) reflecting the State's ability to pay (based on GDP) and the number of votes it has in the Council.

The Commission has wide discretion in determining the seriousness coefficient, but must take into account a list of factors (see page 6 of SEC(2005) 1658). The duration coefficient is calculated at a rate of 0.10 per month from the date the Article 226 judgment was delivered. It thus reaches its maximum after 2½ years.

The n factor is fixed for each State. Ireland's is currently 3.14, while for instance the UK's is 21.99. Thus the fine imposed on the UK for a particular breach should be roughly 7 times the level imposed on Ireland for the same breach.

On this basis, the Daily Penalty that might be imposed on Ireland for non-compliance with an ECJ judgement would range from €1,884 for the least serious infringement that has been in place for a very short time to €113,040 for the most serious infringement that has been in place for 2½ years or more after the relevant judgement. The table below shows the basis for the calculation:

	<b>Flat Rate</b>	<b>Ireland's n factor</b>	<b>Seriousness Coefficient</b>	<b>Duration Coefficient</b>	<b>Daily Penalty</b>
	<b>a.</b>	<b>b.</b>	<b>c.</b>	<b>d.</b>	<b>a. x b. x c. x d.</b>
Minimum	€600	3.14	1	1	€1,884
Maximum	€600	3.14	20	3	€113,040

These annualise to €0.7 million and €42 million respectively.

In addition, a lump sum fine can be recommended by the Commission. This lump sum is the greater of:

- (i) a minimum fixed lump sum, based on the n factor x 500,000, and
- (ii) a calculation based on a daily amount multiplied by the number of days the infringement persists.

The minimum lump sum for Ireland = 3.14 x 500,000 = €1.57 million.

The daily amount for the purposes of calculating the lump sum is calculated in a similar way as under the period penalty, except that the flat rate is €200, and there is no duration coefficient. Thus the range of possible daily amounts is:

	<b>Flat Rate</b>	<b>Ireland's n factor</b>	<b>Seriousness Coefficient</b>	<b>Daily Amount</b>
	<b>a.</b>	<b>b.</b>	<b>c.</b>	<b>a. x b. x c.</b>
Minimum	€200	3.14	1	€628
Maximum	€200	3.14	20	€12,560

For an infringement that lasts one year, the lump sum fine for Ireland would range between €229,200 and €4,584,400 (the daily amounts x 365).

It is the stated intention of the Commission to revise the minimum lump sum every three years in line with inflation. However, we are not aware of any such revisions as of December 2009.

### **3. Incidences of Imposition of Fines**

To date, fines have been imposed on Member States only rarely. As of 2009 we understand that only seven fines have been imposed (France 3; Greece 2; Spain 1; Portugal 1). Some instances:

#### **1. Case C-387/97 Commission v Greece of 4 July 2000**

In 2000, the Court of Justice imposed a daily penalty of €20,000 (€7.3 million per annum) on Greece for operation of an illegal rubbish dump at the mouth of the river Kouroupitos on Crete. This was in the context of non-compliance with a 1992 judgement C-45/91.

In the latter judgment, the Court held that Greece had failed to fulfil its obligations under Articles 4 and 6 of Directive 75/442 and Articles 5 and 12 of Directive 78/319.

In November 1997, the Commission brought an action under Article 171 of the EC Treaty (now Article 228 EC) for a declaration that, by failing to take the necessary measures to comply with the judgment of the Court in Case C-45/91 Commission v Greece [1992] and, in particular, by still not having drawn up or implemented the plans necessary for the disposal of waste and toxic and dangerous waste from the area concerned without endangering human health and without harming the environment, Greece had failed to fulfil its obligations under Article 171 of the EC Treaty (now Article 228 EC). The commission sought to have a daily penalty of €24,600 imposed.

The case was decided in 2000, in favour of the Commission, with a daily penalty of €20,000 plus the costs of the case imposed on Greece. Full details of the case are available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0387:EN:HTML>

## 2. Case C-278/01 Commission v Spain of 25 November 2003

In 2003, the ECJ imposed a penalty payment of €624,000 per year and per 1% of bathing areas in Spanish inshore waters which had been found not to conform to the limit values laid down under Directive 76/160.

This case flowed from Spain's non-compliance with a 1998 judgment (C-92/96), in which the Court had declared that, by failing to take all necessary measures to ensure that the quality of inshore bathing water in Spain conformed to the limit values set in accordance with Article 3 of the Directive, Spain had failed to fulfil its obligations under Article 4 thereof.

In January 2000 the Commission sent a *letter of formal notice* to Spain under Article 228. On receiving what it considered an unsatisfactory response, it issued a *reasoned opinion* in July 2000. Following this, Spain undertook to be in compliance with the Directive by 2003.

Considering this to be unsatisfactory, in July 2001 the Commission brought an action under Article 228, under two headings:

- (i) For a declaration that, by not taking the necessary measures to ensure that the quality of inshore bathing water in Spanish territory conformed to the limit values set in accordance with Article 3 of Council Directive 76/160/EEC concerning the quality of bathing water, notwithstanding its obligations under Article 4 of that directive, that Spain had not complied with the judgment in C-92/96, and had accordingly failed to fulfil its obligations under Article 228, and,

- (ii) For an order that Spain be required to pay a penalty payment of €45,600 per day of delay in adopting the necessary measures to comply with the C-92/96 judgment, from the date on which judgment is delivered in this case until the date on which the C-92/96 judgment is complied with.

The Court imposed a fine of €624,000 per year and per 1% of bathing areas in Spanish inshore waters which had been found not to conform to the limit values laid down under the Directive. The basis for this was as follows: multiplying the basic amount of €500 (as it was then) by a coefficient of 11.4 (Spain's n factor at the time) by 4 (for the seriousness of the breach) and by 1.5 (for the duration of the breach) gives an amount of €34,200 per day, or €12.483 million per year.

That amount is based on the consideration that 20% of the bathing areas concerned did not conform to the limit values in the Directive in 2002. This sum was therefore divided by 20, to obtain an amount corresponding to 1% of areas not in conformity, i.e., €624,150 per year. Thus for example, if in 2003 it was found that 10% of the waters were not compliant, the penalty for that year would be €6.2415 million.

Costs were also awarded against Spain.

Full details of the case can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0278:EN:HTML>

### **3. C-304/02 Commission v France of 12 July 2005**

For non-compliance with a 1991 judgment regarding consideration of fisheries resources, the ECJ imposed both a penalty payment of €57.8 million for each period of six months of non-compliance from July 2005 onwards, plus a lump sum fine of €20 million.

The Commission took this case in August 2002 arising from failure by France to take the necessary measures to comply with Case C-64/88 Commission v France [1991] ECR I-2727). It sought a penalty payment €316,500 per day (€115.5 million per annum), but did not seek a lump sum fine.

In the C-64/88 judgement, the Court had declared:

“by failing to carry out between 1984 and 1987 controls ensuring compliance with technical Community measures for the conservation of fishery resources, laid down by [Regulation No 171/83] and by [Regulation No 3094/86], the French Republic has failed to fulfil its obligations under Article 1 of [Regulation No 2057/82] and under Article 1 of [Regulation No 2241/87].”

The Court specifically upheld five complaints against France:

- inadequate controls in relation to the minimum mesh size for nets
- inadequate controls in relation to the attachment to nets of devices prohibited by the Community rules
- failure to fulfil control obligations in relation to by-catches
- failure to fulfil control obligations so far as concerns compliance with the technical measures of conservation prohibiting the sale of undersized fish
- failure to fulfil the obligation to take action in respect of infringements.

In view of unsatisfactory steps by France to comply with C-64/88, in April 1996 the Commission issued a *reasoned opinion*, giving France two months to comply fully. After further exchanges and port inspections, the Commission issued a supplementary *reasoned opinion* in June 2000. Finally in August 2002 it took the case to the ECJ.

The Court found in favour of the Commission, and imposed the proposed daily penalty. It also decided to impose a lump sum fine, “In light of the particular features of the breach”. There was considerable debate over whether it was appropriate to impose both fines. Many Member States were represented at the case as observers. Some, along with the Commission, argued for the two fines on the basis that they were complementary, while a larger number (including Ireland) argued against on the basis *inter alia* that the wording of Article 228 states: “If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum **or** penalty” (DKM emphasis). They also argued that two fines were inappropriate since the Commission had only proposed one.

The court concluded that:

“Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.

That being so, recourse to both types of penalty provided for in Article 228(2) EC is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist.”

The court imposed a daily penalty in line with the Commission's proposals, i.e. the flat rate €500 (as it was) by France's n factor 21.1 (as it was then) by 10 (for seriousness) and by 3 (for duration) to give €316,500. The fine was imposed on a 6-monthly basis, i.e. €316,500 x 182.5 = €57.76 million every 6 months of non-compliance.

There is no description of the derivation of the lump sum fine of €20 million in the judgement. It compares to a minimum lump sum that could have been imposed on France of €10.55 million at the time. This is the only instance we are aware of where both a periodic and lump sum penalty were imposed.

Costs were also awarded against France.

Full details of the case can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0304:EN:HTML>.

Two noteworthy characteristics of these cases are that:

- a) It takes several years from when infringements first arise to when fines are finally imposed. This at least partly reflects the number of stages that must be gone through in the process. On this basis, Ireland is unlikely to face fines for a number of years, even if the various obligations under the Landfill Directive are not met on time. However, the longer the infringement persists, the higher the fines are likely to be.
- b) The Court does not necessarily accept the penalty level proposed by the Commission. It may impose lower fines, but may also impose more fines than are proposed.