Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

11 December 2012*

(Failure of a Member State to fulfil obligations — State aid — Judgment of the Court establishing a failure to fulfil obligations — Preliminary objection of inadmissibility — Article 228(2) EC and Article 260(2) TFEU — Failure to comply with the judgment — Financial penalties)

In Case C-610/10,

ACTION under Article 260(2) TFEU for failure to fulfil obligations, brought on 22 December 2010,

European Commission, represented by B. Stromsky and C. Urraca Caviedes, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

defendant,

supported by:

Czech Republic, represented by M. Smolek, D. Hadroušek and J. Očková, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, vice-President, A. Tizzano, M. Ilešič, T. von Danwitz and J. Malenovský, Presidents of Chambers, U. Lõhmus, E. Levits, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev (Rapporteur), C. Toader and J.-J. Kasel, Judges,

Advocate General: J. Mazák,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 June 2012,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

* Language of the case: Spanish.

Judgment

1 By its application, the European Commission claims that the Court should:

— declare that, by failing to adopt all the measures necessary to comply with the judgment of 2 July 2002 in Case C-499/99 *Commission* v *Spain* ECR I-6031, relating to the recovery of aid which, under Commission Decision 91/1/EEC of 20 December 1989 concerning aid in Spain which the central and several autonomous governments granted to Magefesa, producer of domestic articles of stainless steel and small electric appliances (OJ 1991 L 5, p. 18), was found to be unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under that decision and under Article 260(1) TFEU;

— order the Kingdom of Spain to pay the Commission, from the date on which judgment is delivered in the present case until the judgment in *Commission* v *Spain* is complied with, a daily penalty payment in the amount of EUR 131 136 for the delay in complying with the judgment in *Commission* v *Spain*;

— order the Kingdom of Spain to pay the Commission, from the date of the judgment in *Commission* v *Spain* until the date on which judgment is delivered in the present case or the date on which that Member State puts an end to the infringement, a lump sum in an amount calculated by multiplying a daily amount of EUR 14 343 by the number of days over which the infringement has continued; and

— order the Kingdom of Spain to pay the costs.

I – Background to the dispute

2 On 20 December 1989, the Commission adopted Decision 91/1, by which it declared unlawful and incompatible with the common market the aid granted by the Spanish central Government, and several autonomous regional governments, to the companies in the Magefesa group, in the form of loan guarantees, a loan at other than market conditions, non-repayable subsidies and an interest subsidy.

3 So far as is relevant for the present case, the Magefesa group consists of four industrial companies which manufacture household goods: Industrias Domésticas SA ('Indosa'), Cubertera del Norte SA ('Cunosa'), Manufacturas Gur SA ('GURSA') and Manufacturas Inoxidables Gibraltar SA ('MIGSA').

4 The aid which Decision 91/1 found to be unlawful and incompatible with the common market can be broken down, as regards the aid granted by the Autonomous Community of the Basque Country, as follows:

— a loan guarantee of ESP 300 million paid directly to Indosa;

— a loan guarantee of ESP 672 million to Fiducias de la cocina y derivados SA ('Ficodesa'), a management company created in the Basque Country in order to allocate that aid to companies belonging to the Magefesa group; and

— an interest subsidy of ESP 9 million.

5 By the same decision, the Spanish authorities were requested, in particular, to withdraw the loan guarantees, to convert the soft-loan into a normal loan and to recover the non-repayable subsidies.

II – The judgment in *Commission* v *Spain*

6 On 22 December 1999, the Commission brought an action under the second paragraph of Article 88(2) EC against the Kingdom of Spain for failure to fulfil obligations, seeking a declaration that the Kingdom of Spain had failed to adopt, within the prescribed period, the measures necessary to comply, inter alia, with Decision 91/1.

7 In *Commission* v *Spain*, the Court held, inter alia, that the Kingdom of Spain had failed to fulfil its obligation to adopt the measures necessary to comply with that decision, in so far as that decision declared the aid granted to Indosa, GURSA, MIGSA and Cunosa unlawful and incompatible with the common market.

III – The pre-litigation procedure

8 Following the judgment in *Commission* v *Spain*, the Commission and the Kingdom of Spain exchanged voluminous correspondence regarding compliance with that judgment.

9 It is apparent from the file submitted to the Court that, although Indosa was declared insolvent on 19 April 1994, it continued its activities.

10 In response to the Commission's requests for information of 25 March and 27 July 2004 and 31 January 2005, the Spanish authorities inter alia stated, by letter of 31 March 2005, that the Indosa liquidation agreement had been approved on 29 September 2004; that that approval had been challenged, but with no suspensive effect; and that, accordingly, the procedure for the liquidation of Indosa's assets could begin.

11 By letters of 5 July and 16 December 2005, the Commission stated that, almost three years after delivery of the judgment in *Commission* v *Spain*, Indosa was continuing its activities; the procedure for the liquidation of its assets had not yet been initiated; and the unlawful aid had not been recovered. The Commission also requested that Indosa's activities be brought to an end and that the liquidation of its assets be completed by 25 January 2006 at the latest.

12 In the course of 2006, the Commission found that Decision 91/1 had been complied with as regards GURSA, MIGSA and Cunosa, as they had ceased their activities and their assets had been sold at market price.

13 By letter of 30 May 2006, the Kingdom of Spain informed the Commission that the Indosa liquidation agreement had become final on 2 May 2006.

14 However, the Commission maintained – in a series of letters dated, inter alia, 18 October 2006, 27 January 2007 and 26 September 2008 – that Indosa's activities had not actually ceased and that its assets had not been liquidated. The information provided by the Kingdom of Spain showed that Indosa's activities were being continued through its wholly-owned subsidiary – Compañía de Menaje Doméstico SA ('CMD') – which had been created by Indosa's insolvency administrator in order to market the company's products and to which all of Indosa's assets and staff had been transferred. Finding that Indosa's assets had not been transferred in accordance with an open and transparent procedure, the Commission concluded that CMD was continuing the subsidised activity and that in consequence, if Decision 91/1 was to be effectively implemented, the incompatible aid had to be recovered from CMD.

15 The Kingdom of Spain replied by a series of letters, including those of 8 October and 13 November 2008 and of 24 July and 25 August 2009, from which it emerges that CMD had declared itself insolvent on 30 June 2008 and that its court-appointed administrators had submitted a collective application for the termination of the contracts of employment of all the staff, which had been accepted by the competent national court.

16 By letters of 18 August and 7 and 21 September 2009, the Commission requested that it be sent a detailed timetable stating the exact date of cessation of CMD's activities and also further information on the procedure for the disposal of its assets, including evidence that that disposal had been carried out under market conditions. The Commission also asked the Kingdom of Spain to provide evidence to prove that the aid declared incompatible had been registered as a claim against CMD in the insolvency.

17 By letters of 21 September and 13 and 21 October 2009, the Kingdom of Spain replied, in essence, that CMD had ceased its activities on 30 July 2009, but did not provide the Commission with the detailed timetable which it had requested.

18 On 3 September 2009, the former employees of CMD created a limited liability company with worker ownership, called Euskomenaje 1870 SLL ('Euskomenaje'), the business activity of which is the manufacture and marketing of domestic articles and small electric appliances.

19 Following the creation of Euskomenaje, the administrators of the CMD insolvency authorised the provisional transfer of its assets to Euskomenaje pending conclusion of the liquidation procedure in respect of CMD.

20 On 23 November 2009, the Commission sent the Kingdom of Spain, pursuant to Article 228(2) EC, a letter of formal notice. In that letter the Commission stated that it reserved the right, once it had examined the observations of that Member State or if none were submitted, to issue, if appropriate, a reasoned opinion in accordance with that provision.

21 On 26 January 2010, the Kingdom of Spain replied to the letter of formal notice, stating that Indosa and CMD were in the process of being wound up and that they had ceased their activities.

22 On 22 March 2010, the Commission sent the Kingdom of Spain a supplementary letter of formal notice in which it called upon it, in accordance with Article 260(2) TFEU, to submit its observations to the Commission within two months of receipt of the letter. In that letter, the Commission stated that it reserved the right, once it had examined the observations of the Kingdom of Spain or if none were submitted, to bring the case before the Court under that provision.

23 By letters of 2 and 9 June 2010, the Kingdom of Spain described the steps taken to comply with the judgment in *Commission* v *Spain*. It stated, inter alia, that the Autonomous Community of the Basque Country was not on the list of CMD's creditors in respect of the aid declared unlawful and incompatible with the common market by Decision 91/1, but that it was going to be a party to the insolvency proceedings in respect of that company by seeking to have the liability relating to that aid registered in the schedule of liabilities. On 10 June 2010, a liability of EUR 16 828.34 was declared by the Autonomous Community. The Autonomous Community subsequently corrected that statement a number of times, increasing the amount of the liability in question, which, according to its last statement of 7 December 2011, amounted to EUR 22 683 745.

24 By letter of 7 July 2010, the Kingdom of Spain sent the Commission the liquidation plan for CMD and the order of the competent national court of 22 June 2010 approving that plan. It is apparent from that liquidation plan that the unlawful aid at issue is not listed among the acknowledged liabilities.

Furthermore, under the plan, all CMD's assets were to be sold to its creditors – that is to say, primarily to CMD's employees – as partial compensation for their claims, unless a better offer was submitted within 15 days of the plan's publication.

25 Unconvinced by the explanations provided by the Kingdom of Spain, the Commission brought the present action.

26 By order of the President of the Court of Justice of 13 May 2011, the Czech Republic was granted leave to intervene in support of the form of order sought by the Kingdom of Spain.

IV – Developments after the case was brought before the Court

27 By order of 12 January 2011, the Juzgado de lo Mercantil No 2 (Commercial Court No 2) of Bilbao (Spain) ordered the cessation of CMD's activities and the closure of its places of business.

28 On 3 March 2011, the Autonomous Community of the Basque Country submitted an application to that court requesting that the activities of Euskomenaje which were taking place in CMD's facilities be stopped.

29 On 10 March 2011, the Autonomous Community of the Basque Country appealed against the order of 22 June 2010 approving the liquidation plan for CMD.

30 By order of 16 January 2012, the Audiencia Provincial (Provincial Court) of Bizkaia (Spain) set aside that order and ordered CMD's assets to be liquidated under conditions of competition which were free, transparent and open to third parties.

31 By order of 4 April 2012 of the Juzgado de lo Mercantil No 2 of Bilbao, a claim of EUR 22 683 745 on the part of the Autonomous Community of the Basque Country was registered against CMD.

V – Admissibility

A – *Arguments of the parties*

32 Supported by the Czech Republic, the Kingdom of Spain disputes the admissibility of the present action on the ground that the Commission did not send it a reasoned opinion pursuant to Article 228(2) EC, that provision being applicable in the present case, given that the procedure was initiated on 20 November 2009, that is to say, before the entry into force of the Treaty of Lisbon. Under that provision, the Member State concerned must be sent both the letter of formal notice and a reasoned opinion.

33 The Kingdom of Spain contends that, to the extent that Article 260(2) TFEU could be construed as removing the stage relating to the issuing of a reasoned opinion, the retroactive application of that provision to a procedure initiated before the entry into force of the Treaty of Lisbon is contrary to the principle of legal certainty, the principle of the non-retroactivity of rules which provide for less favourable penalties and the principle of the legality of criminal offences and penalties.

34 According to the Kingdom of Spain, it is apparent, moreover, from paragraph 42 of the judgment in Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, that rules set out in a new provision of a Treaty apply only if all the stages of the pre-litigation procedure took place after that treaty entered into force.

35 Furthermore, Protocol No 36 on transitional provisions, which is attached as an Annex to the FEU Treaty, does not contain any provision allowing Article 260(2) TFEU to be applied to a procedure initiated before that Treaty entered into force.

36 In the alternative, the Kingdom of Spain contends that Article 260(2) TFEU cannot be construed as meaning that the stage relating to the issuing of a reasoned opinion has been removed from the pre-litigation phase of the procedure. An interpretation to the contrary would reduce the procedural guarantees and the rights of the defence of the Member State concerned.

37 In the further alternative, the Kingdom of Spain contends that the first paragraph of Article 288 TFEU, under which, to exercise their competences, the institutions of the European Union are to adopt regulations, directives, decisions, recommendations and opinions, requires the issuing of a reasoned opinion in the course of the procedure provided for in Article 260(2) TFEU.

38 The Commission submits that the preliminary objection of inadmissibility put forward by the Kingdom of Spain should be rejected.

B – *Findings of the Court*

39 Before the entry into force of the Treaty of Lisbon, infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations under European Union law were governed by Article 228(2) EC.

40 Under the terms of Article 228(2) EC, if the Court found that a Member State had failed to fulfil an obligation under the EC Treaty and, subsequently, the Commission considered that that Member State had not taken the necessary measures to comply with the Court's judgment establishing that failure, the Commission – after giving the Member State concerned the opportunity to submit its observations – was to issue a reasoned opinion specifying the points on which that Member State had not complied with the judgment.

41 The pre-litigation procedure provided for in Article 228(2) EC accordingly comprised two successive stages: (i) the letter of formal notice to the Member State concerned and (ii) the issuing of a reasoned opinion addressed to that State.

42 With effect from the entry into force of the Treaty of Lisbon, Article 260(2) TEFU provides that, if the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court finding that there has been a failure to fulfil obligations, it may bring the case before the Court after giving that State the opportunity to submit its observations.

43 As is apparent from the very wording of Article 260(2) TFEU, that provision altered the conduct of the pre-litigation procedure by removing the stage relating to the issuing of a reasoned opinion. From then on, that procedure involves only one stage: the communication of formal notice to the Member State concerned.

44 The present case raises the question whether a pre-litigation procedure which was initiated before the date on which the Treaty of Lisbon entered into force – 1 December 2009 – but was still pending after that date is governed by Article 228(2) EC or by Article 260(2) TFEU.

45 It should be borne in mind in that regard that, according to the settled case-law of the Court, procedural rules are generally held to apply on the date on which they enter into force (Case C-334/08 *Commission* v *Italy* [2010] ECR I-6869, paragraph 60; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal*

Luxembourg and Others [2011] ECR I-2239, paragraph 75 and the case-law cited; Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 88; and Case C-17/10 *Toshiba Corporation and Others* [2012] ECR, paragraph 47).

46 The provisions which govern the conduct of the pre-litigation procedure and which specify, inter alia, the stages of which that procedure is to be composed form part of the relevant procedural rules applicable. The formal notice to the Member State concerned and the reasoned opinion addressed to that State are simply procedural means designed to ensure that that State meets its obligation to adopt the measures necessary to comply with the judgment of the Court establishing the failure to fulfil obligations. Accordingly, the stages in that procedure do not, as such, relate to the obligations of Member States under the Treaties or the penalties which may be imposed on them for breach of those obligations.

47 Consequently, the rules governing the conduct of the pre-litigation procedure, set out in Article 260(2) TFEU, are procedural rules applicable, as such, from the entry into force of that provision. It follows that those rules apply to any action for failure to fulfil obligations brought after the date on which they entered into force, notwithstanding the fact that the pre-litigation procedure was initiated before that date.

48 The principles of legal certainty, of the non-retroactivity of more severe penalties and of the legality of criminal offences and penalties, relied on by the Kingdom of Spain, do not call the above findings into question.

49 The principle of legal certainty requires that European Union rules enable those concerned to know precisely the extent of the obligations imposed on them, and that those persons be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (*ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, paragraph 68).

50 In that regard, it should be noted that Member States are fully aware both of their obligation to adopt the measures to comply with a judgment of the Court finding that a Member State has failed to fulfil its obligations and of the consequences which breach of that obligation may entail, as these were set out in the primary law of the European Union well before the entry into force of the Treaty of Lisbon. In those circumstances, Member States cannot rely on the principle of legal certainty in order to contest the immediate application of the new procedural rules laid down in Article 260(2) TFEU.

51 By the same token, as regards the principles of the non-retroactivity of more severe penalties and of the legality of criminal offences and penalties, it is sufficient to state that the FEU Treaty has not made any change concerning either the obligation upon Member States to adopt the measures to comply with a judgment of the Court finding that there has been a failure to fulfil obligations or the penalties which Member States risk if they breach that obligation.

52 Nor is the Kingdom of Spain justified in invoking an infringement of its rights of defence, since, in the present case, it has had the opportunity to submit its observations in response both to the letter of formal notice and to the supplementary letter of formal notice. What is more, the Kingdom of Spain was informed, by the latter letter, of the fact that the Commission intended to bring the matter before the Court pursuant to Article 260(2) TFEU.

53 As for the inference which the Kingdom of Spain draws from the judgment in *Commission* v *Greece*, that the rules set out in a new provision of a Treaty apply only if all the stages of the pre-litigation procedure took place after the entry into force of that Treaty, it must be stated that this is based on a misreading of that judgment.

54 The preliminary objection of inadmissibility raised in the dispute which gave rise to the judgment in *Commission* v *Greece* was based on the premiss that the pre-litigation procedure had been initiated before the entry into force of the EU Treaty in the version in force prior to the Treaty of Lisbon. In order to reject that objection, it was sufficient for the Court to state that, contrary to the assertions made by the Member State concerned, all the stages of that procedure had taken place after the entry into force of that Treaty. However, it cannot be inferred from that judgment that, if one of those stages had been completed before the entry into force of that Treaty, the Court would have reached the opposite conclusion.

55 Nor can the arguments put forward by the Kingdom of Spain in the alternative succeed. As regards the claim that Article 260(2) TFEU did not remove the stage relating to the issuing of a reasoned opinion during the pre-litigation procedure, reference must be made to the findings made in paragraph 43 above. As regards the argument relating to the first paragraph of Article 288 TFEU, it is sufficient to state that that provision is unrelated to the procedure provided for in Article 260(2) TFEU.

56 In those circumstances, the preliminary objection of inadmissibility raised by the Kingdom of Spain must be rejected.

VI – The failure to fulfil obligations

A – *Arguments of the parties*

57 The Commission claims that the Kingdom of Spain did not take the measures necessary to comply with the judgment in *Commission* v *Spain* as regards the unlawful aid granted to Indosa ('the unlawful aid in question'). Although Indosa was declared insolvent as of 1994, that aid has been neither recovered nor registered as a claim in the insolvency of that company.

58 Furthermore, notwithstanding the declaration that Indosa was insolvent, its activities have been continued, initially by Indosa itself and subsequently by its wholly-owned subsidiary, CMD. Furthermore, the transfer of Indosa's assets to CMD was carried out in a non-transparent way and without a competitive tendering procedure.

59 As regards CMD, a company which was subsequently also declared insolvent, the Commission maintains that the Spanish authorities have not shown that the liability relating to the repayment of the unlawful aid in question was registered in the schedule of liabilities in the insolvency proceedings relating to CMD before the expiry of the period prescribed in the supplementary letter of formal notice. The final list of liabilities which was sent to the Commission on 1 December 2009 did not reproduce the list relating to the repayment of that aid, a point which was expressly confirmed by the Spanish authorities in their letters of 2 and 9 June 2010.

60 The Kingdom of Spain, on the other hand, contends that it has taken all possible steps to comply with Decision 91/1 and with the judgment in *Commission* v *Spain*.

61 As regards, in the first place, the registration of the liability relating to the repayment of the unlawful aid in question in the schedule of liabilities in the CMD insolvency proceedings, the Kingdom of Spain contends that the Autonomous Community of the Basque Country took a series of steps, described in paragraph 23 above, to register that liability.

62 As regards, in the second place, the cessation of the subsidised activities, the Kingdom of Spain concedes that those activities were continued in CMD's premises through Euskomenaje. The Kingdom of Spain argues, however, that it took the steps necessary to put an end to those activities.

63 As regards, in the third place, the sale of CMD's assets, the Kingdom of Spain contends, referring to the judgment in Case C-496/09 *Commission* v *Italy* [2011] ECR I-11483, that it is sufficient, for the purposes of complying with an obligation to recover aid which is unlawful and incompatible with the common market, for the liability relating to the repayment of the aid in question to be registered in the schedule of liabilities, and that the sale at market price of the assets of the recipient of that aid is accordingly no longer required.

64 Lastly, the Kingdom of Spain contends that public creditors had not been able to hasten CMD's liquidation, which was being carried out under court supervision and in accordance with the procedure provided for under the national legislation applicable.

B – *Findings of the Court*

65 In order to determine whether the Kingdom of Spain adopted all the measures necessary to comply with the judgment in *Commission* v *Spain*, it must be ascertained whether the amounts of unlawful aid in question were repaid by the recipient undertakings. It must be stated in that regard that the dispute before the Court relates solely to the aid granted to Indosa.

66 It should be noted at the outset that, according to the settled case-law of the Court concerning Article 228(2) EC, the reference date for assessing whether there has been a failure to fulfil obligations under that provision is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 30, and Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraph 43).

67 As Article 260(2) TFEU removed from infringement proceedings the stage relating to the issuing of a reasoned opinion, as has been pointed out in paragraph 43 above, the reference date which must be used for assessing whether there has been a failure to fulfil obligations is that of the expiry of the period prescribed in the letter of formal notice issued under that provision.

68 In the present case, as the Commission sent the Kingdom of Spain a supplementary letter of formal notice, the reference date referred to in the preceding paragraph is that of the expiry of the period prescribed in that letter, namely 22 May 2010.

69 It is common ground that, as at that date, the unlawful aid in question paid to Indosa had not been recovered from that company.

70 Furthermore, it is not disputed that that aid must be recovered from CMD, the company which was declared insolvent on 30 June 2008 after succeeding Indosa, itself declared insolvent on 19 April 1994.

71 If the aid unlawfully paid has to be recovered from an undertaking which is insolvent or subject to insolvency proceedings the purpose of which is to realise the assets and clear the liabilities, it is settled case-law that the fact that that undertaking is in difficulty or insolvent does not affect the obligation of recovery (see, inter alia, Case C-280/05 *Commission* v *Italy*, paragraph 28 and the case-law cited).

72 It is also settled case-law that the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved through registration of the liability relating to the repayment of the aid in question in the schedule of liabilities (see, to that effect, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14; Case C-142/87 *Belgium* v *Commission*, [1990] ECR I-959, '*Tubemeuse*', paragraphs 60 to 62; Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 85; and Case C-331/09 *Commission* v *Poland* [2011] ECR I-2933, paragraph 60).

73 In the present case, it is common ground that the Autonomous Community of the Basque Country did not submit an application for registration of the liability relating to the repayment of the unlawful aid in question in the schedule of liabilities in the CMD insolvency proceedings until 10 June 2010, it being stated that that application related only to a minimal part of the aid in respect of which repayment had been required by Decision 91/1. That application subsequently underwent a number of corrections, the last of which was submitted on 7 December 2011. All those steps took place after the expiry of the period prescribed in the supplementary letter of formal notice.

74 It must thus be held that, as of 22 May 2010 – the date on which the period prescribed in the supplementary letter of formal notice expired – the liability relating to the repayment of the unlawful aid in question had not been registered in the schedule of liabilities in the CMD insolvency proceedings.

75 In those circumstances, the Kingdom of Spain cannot claim that, within the prescribed period, it took all the measures necessary to comply with the judgment in *Commission* v *Spain*.

76 Consequently, it must be held that, by failing, by the date of expiry of the period prescribed in the supplementary letter of formal notice issued by the Commission under Article 260(2) TFEU, to take all the measures necessary to comply with the judgment in *Commission* v *Spain*, relating, inter alia, to the recovery from Indosa of aid which, under Decision 91/1, was found to be unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under Article 260(1) TFEU.

VII – Financial penalties

A – *Penalty payment*

1. Arguments of the parties

77 The Commission submits that the imposition of financial penalties in the present case is necessary, given that, more than 22 years after the adoption of Decision 91/1, the activities in respect of which the unlawful aid was awarded are still continuing, initially through CMD and subsequently through Euskomenaje.

78 As regards the developments which took place after the expiry of period prescribed in the supplementary letter of formal notice, the Commission submits that they did not put an end to the failure to fulfil obligations established in the judgment in *Commission* v *Spain*.

79 While accepting that the liability relating to the recovery of the unlawful aid in question was finally registered in the schedule of liabilities following the order of 4 April 2012 of the Juzgado de lo Mercantil No 2 of Bilbao, the Commission submits that Euskomenaje is continuing the subsidised activities in CMD's premises.

80 Furthermore, the Commission states that the CMD liquidation plan provided for the sale of its assets to its former employees, who had in the meantime created Euskomenaje in order to continue the subsidised activities. Although it is true that the approval of that plan was annulled by an order of the Audiencia Provincial of Bizkaia of 16 January 2012, that annulment has no effect on the ongoing use by Euskomenaje of CMD's assets. The administrators in the CMD insolvency authorised Euskomenaje to use its assets free of charge in the interim.

81 As regards the amount of the penalty payment, the Commission – taking as its basis its communication SEC(2005) 1658 of 13 December 2005 on the application of Article 228 EC (OJ 2007 C 126, p. 15), updated on 20 July 2010 (SEC(2010) 923) – proposes that it be calculated by multiplying a standard flat-rate amount by a coefficient for seriousness and a coefficient for duration. The result obtained would then be multiplied by an amount reflecting the ability of the defaulting Member State to pay and the number of votes it has in the Council of the European Union.

82 In the present case, the Commission considers that a penalty payment of EUR 131 136 per day is appropriate to the circumstances and proportionate to the failure to fulfil obligations in question and to the ability to pay of the Member State concerned. That amount is obtained by multiplying a flat-rate amount of EUR 640 per day by a coefficient for seriousness of 5 on a scale of 1 to 20, a coefficient for duration of 3 on a scale of 1 to 3 and, lastly, a fixed amount known as 'the n factor' reflecting the Kingdom of Spain's ability to pay, namely 13.66.

83 As regards, first of all, the seriousness of the infringement, the Commission states that the provisions of the FEU Treaty on State aid are of a vital nature. Furthermore, the recovery of the unlawful aid in question should not have met with major difficulties as that recovery had to be effected from a single company. As regards, secondly, the duration of the infringement, the failure to fulfil obligations has persisted for a period of more than 22 years, namely as from the notification of Decision 91/1. As regards, lastly, the frequency of the penalty payment, the Commission submits that it should be daily.

84 The Kingdom of Spain takes the view that there is no need to impose financial penalties in this case, in view, inter alia, of the developments designed to ensure compliance with Decision 91/1 and the judgment in *Commission* v *Spain* which took place after the expiry of the period prescribed in the supplementary letter of formal notice.

85 In the first place, the steps taken by the Autonomous Community of the Basque Country for the purposes of registering the liability relating to the recovery of the unlawful aid in question, as described in paragraph 23 above, resulted, inter alia, in the order of 4 April 2012, by which the Juzgado de lo Mercantil No 2 of Bilbao allowed the registration in favour of that Community of a claim of EUR 22 683 745 relating to the recovery of that aid. Furthermore, the amount of aid concerned is EUR 22 469 459 and not EUR 22 683 745, contrary to the Commission's estimations.

86 In the second place, by order of 12 January 2011, the Juzgado de lo Mercantil No 2 of Bilbao ordered the cessation of CMD's activities and the closure of its places of business. The Autonomous Community of the Basque Country also submitted an application to that court on 3 March 2011, requesting that the activities being carried on by Euskomenaje in CMD's facilities actually be stopped.

87 As regards the use by Euskomenaje of Magefesa's industrial property rights, one of which is the trade mark Magefesa, the Kingdom of Spain contends that the Magefesa liquidation plan provides for the direct assignment of those rights to Euskomenaje. The Autonomous Community of the Basque Country opposed that plan, however, and requested that the use of those rights be frozen. That Community also proposed that the transfer of those rights be carried out by means of a competitive tendering procedure following advertising throughout the European Union. Those proposals did not however come to anything.

88 In the third place, while maintaining that the initial CMD liquidation plan, approved by the order of the competent national court of 22 June 2010, provided for an open, unconditional and transparent tendering procedure, the Kingdom of Spain contends that the Autonomous Community of the Basque Country brought an appeal against that order. On 16 January 2012, that order was set aside by the Audiencia Provincial of Bizkaia, which ordered CMD's assets to be liquidated under conditions of competition which were free and transparent.

89 In any event, the Kingdom of Spain argues – referring to the judgment in Case C-496/09 *Commission* v *Italy* – that, in order to show that Decision 91/1 and the judgment in *Commission* v *Spain* have been complied with, it is sufficient to prove that the national authorities have made an effort to have the liability relating to the unlawful aid in question registered in the schedule of liabilities.

90 The Kingdom of Spain argues that the amount of the penalty payment proposed by the Commission is disproportionate. It contends in that regard that the present proceedings relate only to one of the four companies in the Magefesa group which received that aid. For that reason, the flat-rate amount should be a quarter of the amount proposed by the Commission, namely EUR 160 per day.

91 Furthermore, as the unlawful aid in question was granted by an Autonomous Community which accounts for 6.24% of the Spanish gross domestic product ('the GDP') and national law requires the Spanish Government to pass on the penalties which may be imposed in the present case to the infra-State bodies which are liable for the non-compliance with European Union law, the flat-rate amount should, according to the Kingdom of Spain, be fixed at EUR 9.98 per day, corresponding to 6.24% of EUR 160 per day.

92 The Kingdom of Spain proposes that the coefficient for the seriousness of the infringement should be fixed at 1, given that the national authorities did everything possible to comply with the judgment in *Commission* v *Spain*. Furthermore, the volume of the sales made by Indosa, CMD and Euskomenaje between 1986 and 2010 decreased, in real terms, by 77.7%, while the remaining staff represents barely 3.3% of the staff in 1986. The relevant market share held by Indosa in 2002 was much stronger than that held by Euskomenaje in 2010, which went from 8.4% to 4.1%. That information shows the net reduction in the distortion of competition attributable to the pursuit of the activities in question by Euskomenaje.

93 According to the Kingdom of Spain, the coefficient relating to the duration of the infringement should be fixed at 1, since that duration should in the present case be assessed in the light of the average duration of insolvency proceedings in Spain, namely 1 114 days.

94 Consequently, the Kingdom of Spain proposes that the penalty payment should amount to EUR 136.33 per day.

95 The Kingdom of Spain contends that the frequency of the penalty payment should not be daily, but quarterly, since, under national law, court-appointed administrators submit their reports quarterly.

2. Findings of the Court

a) Initial observations

96 Having held that the Kingdom of Spain failed, within the period prescribed in the supplementary letter of formal notice, to comply with the judgment in *Commission* v *Spain*, the Court may impose on that Member State the payment of a penalty payment if the failure to fulfil obligations continues up to the time of the Court's examination of the facts (Case C-369/07 *Commission* v *Greece*, paragraph 59 and the case-law cited).

97 It is important therefore to ascertain whether that is the case.

b) The period over which the failure to fulfil obligations persisted

98 In order to determine whether the failure to fulfil obligations of which the Kingdom of Spain stands criticised continued up until the Court's examination of the facts, it is necessary to consider the measures which were adopted, according to that Member State, after the period prescribed in the supplementary letter of formal notice.

99 In that regard, it should be pointed out that, as was observed in paragraph 72 above, if the undertaking which received the aid declared unlawful and incompatible with the common market has been declared insolvent, the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved through registration of the liability relating to the repayment of such aid in the schedule of liabilities.

100 In the present case, the Autonomous Community of the Basque Country requested, on 10 June 2010, the registration of a liability in the amount of EUR 16 828.34 relating to the recovery of the unlawful aid in question. As that amount was manifestly lower than the total amount of the aid concerned, that Community corrected it a number of times, and that amount was increased, according to the Community's last declaration on 7 December 2011, to EUR 22 683 745, a sum which tallies with the Commission's estimates of the liability in question. By order of the Juzgado de lo Mercantil No 2 of Bilbao of 4 April 2012, that claim was registered against CMD in the amount of EUR 22 683 745.

101 In the light of those latest developments, there is no need to examine the Kingdom of Spain's claim that the amount of aid concerned is EUR 22 469 459 and not EUR 22 683 745.

102 It must therefore be held that the liability relating to the repayment of the unlawful aid in question has been registered in the schedule of liabilities in the CMD insolvency proceedings.

103 However, and contrary to the assertions made by the Kingdom of Spain, that fact is not in itself sufficient to mean that the obligation to comply with the judgment in *Commission* v *Spain* has been met.

104 As the Court has ruled on numerous occasions, registration of the liability relating to the repayment of the aid in question in the schedule of liabilities can meet the recovery obligation only if, where the State authorities are unable to recover the full amount of aid, the insolvency proceedings result in the winding up of the undertaking which received the unlawful aid, that is to say, in the definitive cessation of its activities (see, to that effect, *Commission* v *Belgium*, paragraphs 14 and 15; *Commission* v *Poland*, paragraphs 63 to 65; and Case C-454/09 *Commission* v *Italy* [2011] ECR, paragraph 36).

105 It is important to bear in mind, in that regard, that the purpose underlying the recovery of aid declared incompatible with the common market is to remove the distortion of competition caused by the competitive advantage which the recipient of the aid has enjoyed in the market as compared with its competitors, thereby restoring the situation which existed before the aid was paid (see, to that effect, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 27, and *Commission* v *Poland*, paragraph 56).

106 However, where the undertaking which received the unlawful aid is insolvent and a company has been created to continue some of the activities of the insolvent undertaking, the pursuit of those activities may, where the aid concerned is not recovered in its entirety, prolong the distortion of competition brought about by the competitive advantage which that company enjoyed in the market as compared with its competitors. Accordingly, such a newly created company may, if it retains that advantage, be required to repay the aid in question. That is inter alia the case where it is established that that company continues genuinely to derive a competitive advantage because of the receipt of that aid, especially where it acquires the assets of the company in liquidation without paying the market price in return or where it is established that the effect of that company's creation is circumvention of the

obligation to repay the aid (see, to that effect, *Germany* v *Commission*, paragraph 86). That applies, in particular, if the payment of a market price is not sufficient to cancel out the competitive advantage linked to receipt of the unlawful aid.

107 In such a case, the registration in the schedule of liabilities of the liability relating to the aid declared unlawful and incompatible with the common market is not sufficient, on its own, to make the distortion of competition thus created disappear.

108 The foregoing considerations are not invalidated by the judgment in Case C-496/09 *Commission* v *Italy*. It does not emerge from that judgment that, despite the fact that the aid in question had not been recovered in its entirety, the recipient could continue its activities because the liability relating to the aid had been registered in the schedule of liabilities in the insolvency proceedings relating to the recipient.

109 It is stated in paragraph 69 above that, in the present case, the unlawful aid in question has not in fact been recovered. It must therefore be ascertained whether, at the time of the Court's examination of the facts, there is an enduring competitive advantage linked to receipt of that aid.

110 In that regard, a number of items in the file placed before the Court show that Euskomenaje continues to derive genuine benefit from that advantage. The successive developments in the CMD insolvency proceedings suggest that the objective of those developments was to ensure that the subsidised activities continued, even though the unlawful aid in question had not been fully recovered.

111 In particular, it emerges from the case-file that:

— the CMD liquidation plan, which was approved by an order of the Juzgado de lo Mercantil No 2 of Bilbao of 22 June 2010, provided, in essence, that all of that company's assets would be sold as a whole to its creditors – primarily its former employees – as partial compensation for their claims, although the liability relating to the unlawful aid in question was not at the time one of the liabilities acknowledged;

— shortly before that plan was approved, Euskomenaje, the activities of which are in essence identical to those carried on until then by CMD, had just been specifically created by CMD's former employees;

— the CMD liquidation plan 'clearly' pursued 'the objective of continuing the subsidised activities through a newly created company which would not assume liability for CMD's debts', according to a letter sent on 17 February 2011 by the Basque Government to the Chairman of Euskomenaje's Board of Directors;

— Euskomenaje uses Magefesa's industrial property, including the trade mark Magefesa, which was assigned to it directly, that is to say, without a competitive tendering procedure and for no consideration, as emerges, inter alia, from the letters of 3 December 2010 and 10 March 2011 sent by the Autonomous Community of the Basque Country to the Juzgado de Primera Instancia (Court of First Instance) No 10 of Bilbao;

— the opposition of the Autonomous Community of the Basque Country to the abovementioned assignment was unsuccessful;

— although, on appeal lodged by the Autonomous Community of the Basque Country after the case had been brought before the Court, the CMD liquidation plain was annulled by order of 16 January 2012 of the Audiencia Provincial of Bizkaia, CMD's insolvency administrators had in the meantime authorised the provisional transfer of the company's assets to Euskomenaje until the conclusion of the CMD liquidation procedure, that transfer being effected for no consideration,

without advertising, without a transfer of title deeds and in a manner 'at variance with the elementary principles of managing liquidation proceedings', as is apparent, inter alia, from the letter referred to in the third indent of this paragraph;

— notwithstanding the order of 12 January 2011 deciding that CMD's activities were to cease and its places of business to be closed, Euskomenaje is still manufacturing domestic articles in CMD's facilities, making use of its buildings, machines and industrial property, as is apparent from the application submitted by the Autonomous Community of the Basque Country on 3 March 2011 to the Juzgado de lo Mercantil No 2 of Bilbao, specifically requesting that the activities of Euskomenaje which were still taking place in CMD's facilities be stopped.

112 In view of that evidence in the file placed before the Court, it must be held that the competitive advantage linked to the receipt of the unlawful aid in question still exists, with the result that the registration, meanwhile, of the liabilities relating to the recovery of that aid in the schedule of liabilities is not sufficient to bring the situation into conformity with Decision 91/1 and the judgment in *Commission* v *Spain*.

113 In the light of the foregoing, it must be held that the failure to fulfil obligations of which the Kingdom of Spain stands criticised continued up until the Court's examination of the facts.

114 In those circumstances, the Court considers that an order imposing a penalty payment on the Kingdom of Spain is an appropriate financial means by which to encourage the Kingdom of Spain to take the measures necessary to put an end to the infringement established and to ensure full compliance with Decision 91/1 and the judgment in *Commission* v *Spain*.

c) The amount of the penalty payment

i) Initial observations

115 It is for the Court to assess in each case, in the light of the circumstances of the case, the financial penalties to be imposed (see Case C-304/02 *Commission* v *France*, paragraph 86, and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 58).

116 For those purposes, the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the Commission's actions are transparent, foreseeable and consistent with legal certainty (see Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1, paragraph 34, and Case C-369/07 *Commission* v *Greece*, paragraph 112).

117 As regards the imposition of a penalty payment, the Court has held that such a penalty must be decided upon according to the degree of pressure needed in order to persuade the defaulting Member State to comply with a judgment establishing a failure to fulfil obligations and to alter its conduct in order to bring to an end the infringement complained of (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 91).

118 In exercising its discretion, it is for the Court to set the penalty payment at a level that is both appropriate to the circumstances and proportionate to the infringement established and to the ability to pay of the Member State concerned (see Case C-304/02 *Commission* v *France*, paragraph 103, and Case C-177/04 *Commission* v *France*, paragraph 61).

119 Accordingly, in the assessment carried out by the Court, the criteria which must be taken into account in order to ensure that penalty payments have coercive force and that European Union law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness

and the ability of the Member State concerned to pay. In applying those criteria, the Court is required to have regard, in particular, to the effects on public and private interests of failure to comply and to the urgency with which the Member State concerned must be induced to fulfil its obligations (see Case C-304/02 *Commission* v *France*, paragraph 104; Case C-177/04 *Commission* v *France*, paragraph 62; and *Commission* v *Portugal*, paragraph 39).

ii) The duration of the infringement

120 The duration of the infringement must be assessed by reference to the time when the Court assesses the facts, not the time at which the case is brought before it by the Commission (see Case C-177/04 *Commission* v *France*, paragraph 71, and *Commission* v *Portugal*, paragraph 45).

121 In those circumstances, since the Kingdom of Spain has been unable to demonstrate that its failure to comply with its obligation to implement fully the judgment in *Commission* v *Spain* has actually come to an end, that failure must be regarded as having persisted for more than 10 years, which is an exceptionally long period of time.

122 Furthermore, regard must be had to the fact that more than 22 years have elapsed between the adoption of Decision 91/1 and the Court's examination of the facts.

123 Such a duration is particularly open to criticism in the present case because the recipients of the aid declared unlawful and incompatible with the common market by Decision 91/1 were few in number; they were identified by name in that decision and in the judgment in *Commission* v *Spain*; and the exact sums to be recovered were specified in the decision. In those circumstances, compliance with the judgment in *Commission* v *Spain* should not have met with major difficulties.

124 Nor can the average duration of insolvency proceedings, relied upon by the Kingdom of Spain in order to explain its delay in complying with the judgment in *Commission* v *Spain*, justify such a delay, especially given that the Kingdom of Spain did not really take any steps to put an end to the failure to fulfil obligations in question until a short time before the date on which the case was brought before the Court by the Commission and, for the most part, not even until after that date, as is apparent from paragraphs 23 to 31 above.

iii) The seriousness of the infringement

125 As regards the seriousness of the infringement, the vital nature of the rules of the FEU Treaty on State aid must be borne in mind (Case C-369/07 *Commission* v *Greece*, paragraph 118).

126 The rules on which both Decision 91/1 and the judgment in *Commission* v *Spain* are based are the expression of one of the essential tasks with which the European Union is entrusted under Article 3(3) TEU – namely the establishment of an internal market – and under Protocol No 27 on the internal market and competition, which, pursuant to Article 51 TEU, forms an integral part of the Treaties and under which the internal market is to include a system ensuring that competition is not distorted (see Case C-496/09 *Commission* v *Italy*, paragraph 60).

127 The importance of the European Union rules infringed in a case such as this is reflected, in particular, in the fact that repayment of aid declared unlawful and incompatible with the common market eliminates the distortion of competition caused by the competitive advantage afforded by the aid and that, by repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market (see, to that effect, Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22, and *Germany* v *Commission*, paragraph 75).

128 As regards the breach of obligations established in the present case, it is important to note that the judgment in *Commission* v *Spain* has been complied with as regards three of the four recipients of the unlawful aid to which Decision 91/1 relates. Furthermore, it is common ground that the aid granted to Indosa constitutes approximately no more than a fifth of the total amount of the aid covered by that decision and the judgment in *Commission* v *Spain*.

129 That being so, it is not disputed that no part of the aid granted to Indosa has yet been recovered.

130 Furthermore, although the Kingdom of Spain has very recently taken a series of steps which reflect a genuine wish to put an end to the failure to fulfil obligations in question, it is common ground that those steps were taken only a short time before the date on which the Commission brought the case brought before the Court and even, for the most part, after that date. For many years, therefore, the Kingdom of Spain did not make the required effort.

iv) The Kingdom of Spain's ability to pay

131 As regards the Kingdom of Spain's ability to pay, it is necessary to take into account recent trends in inflation and the GDP of that Member State at the time of the Court's examination of the facts.

132 In that regard, the Kingdom of Spain's argument that the ability to pay must, in the present case, reflect that of the Autonomous Community of the Basque Country and not that of the Member State itself cannot be accepted. It is sufficient to recall in that respect that the fact that a Member State has conferred on its regions responsibility for the recovery of aid which is unlawful and incompatible with the common market cannot have any bearing on the application of Article 260 TFEU. While each Member State may freely allocate internal central and regional powers as it sees fit, the fact remains that the Member State alone is responsible towards the European Union under Article 260 TFEU for compliance with obligations arising under European Union law (see, in connection with Article 226 EC, Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 38).

v) The frequency of the penalty payment

133 As regards the frequency of the penalty payment, the Kingdom of Spain must be ordered to pay it on a daily basis.

134 In that regard, the Kingdom of Spain's request that the penalty payment be imposed on a quarterly basis cannot be accepted, in view, first, of the extremely long duration of the breach of obligations established and, secondly, of the urgent need to put an immediate end to that breach.

vi) Conclusion

135 In the light of the foregoing, the Court holds that the imposition of a penalty payment in the amount of EUR 50 000 per day is appropriate.

136 In view of all those considerations, the Kingdom of Spain must be ordered to pay to the Commission, into the 'European Union own resources' account, a penalty payment of EUR 50 000 for each day of delay in adopting the measures necessary to comply with the judgment in *Commission* v *Spain*, from the date on which judgment is delivered in the present case until the date on which the judgment in *Commission* v *Spain* is complied with.

B – *The lump sum*

1. Arguments of the parties

137 In order to calculate the lump sum, the method proposed by the Commission consists in adopting a basic amount set at EUR 210 per day, multiplied by (i) a coefficient for seriousness and an 'n' factor, the values of which are identical to those proposed for the calculation of the penalty payment (5 and 13.66 respectively), and (ii) the number of days for which the failure to fulfil obligations has continued. The amount of the lump sum should therefore be equal to the result of multiplying EUR 14 343 by the number of days which have elapsed between the date on which the judgment in *Commission* v *Spain* was delivered and that on which the Member State complies with its obligations or, failing that, the date on which the present judgment is delivered.

138 Relying on the same arguments as those put forward regarding the penalty payment, the Kingdom of Spain proposes that the basic amount of the lump sum be divided by four to reflect the fact that there has been compliance with the judgment as regards three of the four recipients of the unlawful aid in question and, subsequently, multiplied by 6.24% to take account of the fact that that figure corresponds to the Basque Country's share in the Spanish GDP. The basic amount would thus be EUR 3.28. The same coefficient for seriousness and the same fixed 'n' factor as that proposed in respect of the penalty payment would subsequently have to be applied. The amount of that lump sum should therefore be equal to the result of multiplying EUR 44.80 by the number of days for which the failure to fulfil obligations has continued.

139 The Kingdom of Spain also contends that the period from the date on which it filed the objection of inadmissibility in the present case and the date on which the Court rules on that objection should be subtracted, for the purposes of calculating the lump sum, from the number of days for which the failure to fulfil obligations has continued.

2. Findings of the Court

140 It should be noted at the outset that, in exercising the discretion conferred on it in such matters, the Court is empowered to impose a penalty payment and a lump sum payment cumulatively (Case C-369/07 *Commission* v *Greece*, paragraph 143).

141 The decision whether to impose a lump sum payment must, in each individual case, depend on all the relevant factors pertaining both to the particular nature of the infringement established and to the individual conduct of the Member State involved in the procedure initiated pursuant to Article 260 TFEU. That provision confers a wide discretion upon the Court in deciding whether or not to impose such penalties (see, to that effect, Case C-369/07 *Commission* v *Greece*, paragraph 144).

142 In the present case, all the legal and factual circumstances culminating in the breach of obligations established indicate that, if the future repetition of similar infringements of European Union law is to be effectively prevented, a dissuasive measure must be adopted, such as a lump sum payment.

143 Accordingly, it is for the Court, in exercising its discretion, to determine the amount of the lump sum payment in a manner that is appropriate to the circumstances and proportionate both to the breach that has been established and the ability to pay of the Member State concerned (Case C-369/07 *Commission* v *Greece*, paragraph 146).

144 Relevant considerations in this respect include factors such as the length of time for which the breach of obligations complained of has persisted since the judgment establishing it was delivered, and the seriousness of the infringement (see Case C-496/09 *Commission* v *Italy*, paragraph 94).

145 The circumstances to be taken into account are, in particular, those referred to in the considerations set out in paragraphs 120 to 130 above, relating to the duration and seriousness of the infringement. It has thus been established that (i) the failure to fulfil obligations has persisted for more than 10 years since the date of delivery of the judgment in *Commission* v *Spain* and for more than 22 years since the date on which Decision 91/1 was adopted and (ii) compliance with that judgment should not have met with major difficulties, given that the recipients of the unlawful aid in question were few in number, they were identified by name and the sums to be recovered were specified in that decision.

146 The Kingdom of Spain's claim set out in paragraph 139 above cannot succeed, given that the Court's examination of the preliminary objection of inadmissibility raised by that Member State in the present case has no connection with the duration of the breach of obligations complained of.

147 On the basis of all those factors, the Court finds that the circumstances of the present case will be reflected fairly if the lump sum which the Kingdom of Spain will have to pay is set at EUR 20 million.

148 The Kingdom of Spain must therefore be ordered to pay to the Commission, into the 'European Union own resources' account, a lump sum of EUR 20 million.

VIII – Costs

149 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Spain has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of the Rules of Procedure, under which Member States which have intervened in the proceedings are to bear their own costs, it must be held that the Czech Republic is to bear its own costs.

On those grounds, the Court (Grand Chamber) hereby

1. **Declares that, by failing, by the date of expiry of the period prescribed in the supplementary letter of formal notice issued on 18 March 2010 by the European Commission pursuant to Article 260(2) TFEU, to adopt all the measures necessary to comply with the judgment of 2 July 2002 in Case C-499/99 *Commission* v *Spain*, relating, inter alia, to the recovery from Industrias Domésticas SA of aid which, under Commission Decision 91/1/EEC of 20 December 1989 concerning aid in Spain which the central and several autonomous governments granted to Magefesa, producer of domestic articles of stainless steel and small electric appliances, was found to be unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders the Kingdom of Spain to pay to the European Commission, into the 'European Union own resources' account, a penalty payment of EUR 50 000 for each day of delay in adopting the measures necessary to comply with the judgment in *Commission* v *Spain*, from the date of delivery of the present judgment until the date on which the judgment in *Commission* v *Spain* is complied with;**

3. **Orders the Kingdom of Spain to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 20 million;**

4. **Orders the Kingdom of Spain to pay the costs;**

5. **Orders the Czech Republic to bear its own costs.**

[Signatures]