Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

24 January 2013*

(Failure of a Member State to fulfil obligations — State aid incompatible with the common market — Obligation of recovery — Failure to comply with a Commission Decision — Objection of inadmissibility — Res judicata by means of a previous judgment of the Court)

In Case C-529/09,

ACTION under Article 108(2) TFEU for failure to fulfil obligations, brought on 18 December 2009,

European Commission, represented by L. Flynn 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, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič, J.-J. Kasel (Rapporteur) and M. Berger, Judges,

Advocate General: V. Trstenjak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 July 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission claims that the Court should declare that, by failing to adopt, within the prescribed period, the measures necessary to comply with Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa

* Language of the case: Spanish.

group and their successors (OJ 1999 L 198, p. 15), as regards the undertaking Industrias Domésticas SA ('Indosa'), the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 288 TFEU and under Articles 2 and 3 of that decision.

Legal context

2 Recital 13 in the preamble to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) is worded as follows:

'Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas to achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision'.

3 Article 14 of that regulation, headed 'Recovery of aid', provides:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the [European Union] pursuant to Article [278 TFEU], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

4 Article 23(1) of Regulation No 659/1999 provides:

'Where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the Commission may refer the matter to the Court … direct in accordance with Article [108(2) TFEU].'

Background to the dispute

The factual background

5 Magefesa is a group of Spanish industrial companies which manufacture household goods.

6 The Magefesa group consists, inter alia, of four companies, namely Indosa, based in the Basque Country, Cubertera del Norte SA ('Cunosa') and Manufacturas Gur SA ('GURSA') based in Cantabria, and Manufacturas Inoxidables Gibraltar SA ('MIGSA') based in Andalucia.

7 As it had been experiencing serious financial difficulties since 1983, the Magefesa group was subject to an action plan which, among other things, provided for a reduction in the workforce and for the grant of aid by the Spanish central government and the regional governments of the autonomous communities of the Basque Country, Cantabria and Andalusia, where the group's various factories were situated.

8 With a view to allocating that aid, management companies were set up in the autonomous communities concerned, namely Fiducias de la cocina y derivados SA ('Ficodesa') in the Basque Country, Gestión de Magefesa en Cantabria SA in Cantabria and Manufacturas Damma SA in Andalucia.

9 As the situation nevertheless continued to deteriorate, Cunosa ceased trading at the beginning of 1994 and was declared insolvent on 13 April 1994 and MIGSA ceased trading in 1993 and was declared insolvent on 17 May 1999. GURSA was inactive as from 1994 and was subsequently declared insolvent.

10 Indosa, following an application to that effect on the part of its employees was held to have ceased making payments by a court decision of 19 July 1994, with retroactive effect to 24 February 1986. Indosa was however authorised, by a new court decision, to continue its activities to prevent the jobs of the 478 employees of the undertaking from being jeopardised.

11 As regards the management companies, Ficodesa was declared insolvent on 19 January 1995 and Manufacturas Damma SA and Gestión de Magefesa en Cantabria SA ceased trading.

The decisions of the Commission

12 The Magefesa group has been the subject-matter of two State aid procedures.

13 On 20 December 1989, the Commission adopted Decision 91/1/EEC 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), by which that institution declared unlawful and incompatible with the common market the aid granted 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.

14 The aid, which was granted by the Autonomous Community of the Basque Country and found to be unlawful and incompatible with the common market, can be broken down as follows:

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

— a loan guarantee of ESP 672 million to Ficodesa; and

— an interest subsidy of ESP 9 million.

15 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.

16 In 1997, the Commission received further complaints regarding the advantages which the undertakings in the Magefesa group had gained as a result of their failure to repay the aid declared incompatible with the common market by Decision 91/1 and the failure on the part of those undertakings to comply with their financial and fiscal obligations. That institution subsequently decided to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC, itself now Article 108

TFEU) in respect of the aid granted to those undertakings or their successors since 1989 and, on 14 October 1998, it adopted Decision 1999/509. That decision was notified to the Spanish Government on 29 October 1998.

17 By that decision, the Commission declared illegal and incompatible with the common market the aid granted by the Spanish authorities inter alia to Indosa, in the form of persistent non-payment of taxes and social security contributions, both until the date on which that undertaking was declared insolvent and subsequent to that date until May 1997.

18 By Article 2 of the same decision, the Kingdom of Spain was asked to take the measures necessary to recover that aid from the beneficiaries, since the sums to be recovered had to include the interest which had accrued between the granting of the aid and the date on which it was actually repaid.

19 Under Article 3 of Decision 1999/509, the Kingdom of Spain was required to inform the Commission within a period of two months from the date of notification of that decision of the measures to be taken to comply therewith.

20 By application lodged at the Court Registry on 28 December 1998, the Kingdom of Spain applied under Article 173 of the EC Treaty (now, after amendment, Article 230 EC, itself now Article 263 TFEU) for annulment of Decision 1999/509.

21 By judgment of 12 October 2000 in Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, the Court:

‘1. Declares that … Decision [1999/509] is annulled in so far as it includes in the amount of aid to be recovered interest falling due after Indosa and Cunosa were declared insolvent on aid unlawfully received before that declaration;

2. Dismisses the remainder of the application;

3. Orders the Kingdom of Spain to pay, in addition to its own costs, three quarters of the costs of the Commission of the European Communities.’

22 On 22 December 1999, the Commission brought an action for failure to fulfil obligations against the Kingdom of Spain under the second paragraph of Article 88(2) EC seeking a declaration that the latter had failed to adopt, within the prescribed period, the measures necessary to comply with Decisions 91/1 and 1999/509.

23 By judgment of 2 July 2002 in Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, the Court:

‘1. Declares that, first, by failing to adopt, within the prescribed period, the necessary measures to comply with … Decision [91/1], in so far as it declared the aid granted to [Indosa], [GURSA], [MIGSA] and [Cunosa] illegal and incompatible with the common market and with … Decision [1999/509], in so far as it declared the aid granted to GURSA, MIGSA and Cunosa illegal and incompatible with the common market, and second, by failing to inform the Commission, within the prescribed period, of measures taken to implement Decision 1999/509 in so far as it declared aid granted to Indosa illegal and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of those decisions;

2. For the rest, dismisses the Commission’s action;

3. Orders the Kingdom of Spain to pay the costs.’

24 As is apparent from the grounds of that judgment, the Court dismissed the Commission's action, in so far as it sought a declaration that the Kingdom of Spain had not adopted the measures necessary to comply with Decision 1999/509, on the basis of the fact that the liquidation of Indosa had been decided by the creditors' meeting, which took place on 4 July 2000.

The discussions which took place before this action was brought

25 Following the judgment in *Commission* v *Spain*, the Commission and the Kingdom of Spain exchanged voluminous correspondence regarding the recovery of the aid referred to by Decisions 91/1 and 1999/509 as well as compliance with that judgment.

26 It is apparent from the file submitted to the Court that, although Indosa was declared insolvent in 1994, it continued its activities.

27 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.

28 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.

29 In the course of 2006, the Commission found that Decisions 91/1 and 1999/509 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. As regards, by contrast, Indosa, the exchange of correspondence between the Commission and the Spanish authorities continued.

30 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.

31 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 SL ('CMD') – which had been created by Indosa's insolvency administrator in order to market that 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, the aid in question had to be recovered from CMD.

32 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.

33 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 with the common market had been registered as a claim against CMD in the insolvency.

34 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.

35 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. According to the Kingdom of Spain, Euskomenaje was authorised to carry on 'provisional activities' in order to ensure that the industrial facilities were maintained and to meet the fixed costs reducing the assets in the insolvency proceedings relating to CMD.

36 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.

37 The Commission therefore reacted in the following manner.

38 First, it brought the present action, which relates to the Kingdom of Spain's failure to implement Decision 1999/509 as regards Indosa.

39 Secondly, that institution initiated the procedure provided for in Article 228 EC (now Article 260 TFEU) against the Kingdom of Spain by sending it, on 23 November 2009, a letter of formal notice by which it complained that that Member State had not acted on the judgment in *Commission* v *Spain* in so far as it relates to Decision 91/1 and concerns Indosa.

Developments after the present case was brought before the Court

40 The proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations under European Union law, referred to in the preceding paragraph, gave rise to the judgment of 11 December 2012 in Case C-610/10 *Commission* v *Spain*.

41 It is apparent from that judgment that, on 26 January 2010, the Kingdom of Spain informed the Commission that Indosa and CMD were in the process of being wound up and that they had ceased their activities.

42 By letters of 2 and 9 June 2010, the Kingdom of Spain stated, inter alia, that the Autonomous Community of the Basque Country was not on the list of CMD's creditors relating to 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 on that list.

43 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. That plan provided that all CMD's assets were to be sold to its creditors – that is to say, primarily to its employees – as partial compensation for their claims, unless a better offer was submitted within 15 days of the plan's publication. However it is apparent from that plan that the unlawful aid at issue is not listed among the acknowledged liabilities.

44 On 3 December 2010, the Autonomous Community of the Basque Country submitted an application for the registration in the schedule of liabilities, in connection with the insolvency proceedings relating to CMD, of the liability relating to the repayment of the aid granted to Indosa and declared unlawful by Decision 91/1. As the liability declared in that respect amounted to around EUR 16.5 million, that is to say a distinctly lower amount than the total amount of the aid concerned, that autonomous community corrected it several times increasing it, according to its last statement of 7 December 2011, to EUR 22 683 745, a sum which corresponds to the Commission's evaluation of the liability in question.

45 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.

46 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 premises be stopped.

47 On 10 March 2011, that Autonomous Community appealed against the order of 22 June 2010, referred to in paragraph 43 of this judgment, which approved the liquidation plan for CMD.

48 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.

49 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.

The action

50 By separate document lodged at the Court Registry on 4 March 2010, the Kingdom of Spain put forward against the Commission's action a plea of inadmissibility pursuant to Article 91(1) of the Rules of Procedure of the Court in the version applicable at that time. The Court decided, on 31 August 2010, to join that objection to the substance of the case and to examine it at the same time as the case.

The objection of inadmissibility

Arguments of the parties

51 The Kingdom of Spain pleads that the present action is inadmissible on the ground that it is contrary to the principle of *res judicata* attached to the judgment in Case C-499/99 *Commission* v *Spain*.

52 In that regard, the three conditions required by the case-law of the Court for a plea of *res judicata* to be accepted, namely that the parties, the subject-matter and the cause are the same, are satisfied in the present case. The actions are between the same parties, namely the Commission and the Kingdom of Spain, the subject-matter is identical in both cases, since what is in issue is Decision 1999/509, and the cause is the same, as the action which gave rise to the judgment in Case C-499/99 *Commission* v *Spain* is based on Article 88(2) EC, the provision to which Article 108(2) TFEU now corresponds.

53 Given that, in the judgment in Case C-499/99 *Commission* v *Spain*, the Court, in essence, held that the Kingdom of Spain had fulfilled its obligations under that decision, the present action ought to be dismissed as inadmissible since it relates to an issue on which there has already been a ruling. In paragraph 43 of that judgment, the Court confined itself to holding, as regards Indosa, that that

Member State had infringed only the obligation to inform the Commission of the measures which had already been taken and those which would be taken to recover the aid granted to that undertaking. It is apparent from paragraphs 40, 44 and 46 of that judgment that the action brought by that institution was, by contrast, dismissed in so far as it was complained that the Kingdom of Spain had not taken the measures necessary to recover the aid granted to Indosa, on the ground, according to paragraphs 33 and 35 of the abovementioned judgment, that the creditors' meeting had decided to put Indosa into liquidation.

54 The Kingdom of Spain adds that, as regards the obligation to inform the Commission of the measures adopted to implement Decision 1999/509 within the prescribed period, it is apparent from paragraph 42 of the judgment in Case C-499/99 *Commission* v *Spain* that, in accordance with Article 3 of that decision, that period expired on 29 December 1998, with the result that that obligation would now be impossible to meet.

55 The Commission submits that the Court should reject the plea of inadmissibility put forward by the Kingdom of Spain.

56 That institution submits in that regard that it is settled case-law that, in an action for failure to fulfil obligations, *res judicata* extends only to the matters of fact and law actually or necessarily settled by a judgment of the Court (see, inter alia, Case C-462/05 *Commission* v *Portugal* [2008] ECR I-4183, paragraph 23, and Case C-526/08 *Commission* v *Luxembourg* [2010] ECR I-6180, paragraph 27).

57 More specifically, in accordance with the same case-law, if there is a change in the circumstances of the case, it is for the Commission to decide whether that change constitutes a fundamental change in the premiss which the Court took as the basis for its earlier judgment and, if so, the Commission is entitled to bring a new action.

58 That is specifically the case here.

59 In paragraph 33 of its judgment in Case C-499/99 *Commission* v *Spain*, the Court took as its basis the premiss that '[a] meeting of creditors took place on 4 July 2000 to decide whether Indosa should continue or stop trading, and it approved the liquidation of the company within four months'.

60 It subsequently became apparent however that, contrary to what had been agreed at that meeting of creditors, Indosa was not put into liquidation, but its activities were on the contrary continued, initially directly by Indosa itself and then, subsequently, through CMD, which is its subsidiary.

61 Consequently, the fundamental factual premisses on which the judgment in Case C-499/99 *Commission* v *Spain* was based have not proved true. The facts referred to in the previous paragraph constitute new matters, which were not settled by that judgment, with the result that the subject-matter of the present case is different from that of the case which gave rise to that judgment.

62 Furthermore, the Commission could not have brought an action against the Kingdom of Spain before the Court under Article 260(2) TFEU, inasmuch as, at the time, the Court had not yet held that that Member State had failed to fulfil the obligation to recover the unlawful aid paid to Indosa as required by Decision 1999/509.

63 The Commission adds that, if the Court upholds the objection of inadmissibility, that institution would be deprived of the instruments which the FEU Treaty puts at its disposal in order to oblige a Member State to implement a decision which is taken for the purpose of remedying the distortion of competition created by aid which was declared incompatible with the common market. The view argued for by the Kingdom of Spain would thus render redundant the legislation relating to the monitoring of State aid and likewise the decision which found that the aid at issue in the present case was unlawful.

Findings of the Court

64 First, it is important to bear in mind the importance, in both the legal order of the European Union and the legal systems of the Member States, of the principle of *res judicata* (see *Commission* v *Luxembourg*, paragraph 26 and the case-law cited).

65 The Court has already held that that principle is also applicable to infringement proceedings (*Commission* v *Luxembourg*, paragraph 27).

66 It follows from well-established case-law of the Court that *res judicata* however extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (*Commission* v *Luxembourg*, paragraph 27 and the case-law cited).

67 For the purpose of ascertaining whether the Commission has infringed the principle of *res judicata* by bring the present action, it is necessary to examine whether, having regard to the factual and legal background of the two sets of proceedings concerned, the present case and that which gave rise to the judgment in Case C-499/99 *Commission* v *Spain* are essentially identical in fact and in law (*Commission* v *Luxembourg*, paragraph 28).

68 More specifically, it is a question of assessing whether the subject-matter of the present case is the same as that which gave rise to the judgment in C-499/99 *Commission* v *Spain* (see, to that effect, *Commission* v *Portugal*, paragraph 27).

69 Secondly, it must be pointed out that the means of redress provided for by the second subparagraph of Article 108(2) TFEU is merely a variant of the action for failure to fulfil obligations, specifically adapted to the special problems which State aid poses for competition within the internal market (see judgment in Case C-378/98 *Commission* v *Belgium* [2001] ECR I-5107, paragraph 24 and the case-law cited).

70 In the context of proceedings under Article 258 TFEU, the Court has repeatedly held that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion and that any subsequent changes cannot be taken into consideration (see, inter alia, *Commission* v *Belgium*, paragraph 25).

71 Furthermore, it is apparent from the settled case-law of the Court that the relevant date for the assessment of a failure to fulfil obligations brought pursuant to the second paragraph of Article 108(2) TFEU is, on account of the fact that that provision does not provide for a pre-litigation phase in contrast to Article 258 TFEU and that therefore the Commission does not issue a reasoned opinion allowing the Member State concerned a certain period within which to comply with European Union law, as a rule that set out in the decision which that Member State denies not implementing (see, inter alia, Case C-331/09 *Commission* v *Poland* [2011] ECR I-2933, paragraph 50 and the case-law cited; Case C-354/10 *Commission* v *Greece* [2012] ECR, paragraph 61; and Case C-485/10 *Commission* v *Greece* [2012] ECR, paragraph 31).

72 As regards the prescribed period in the present case, Article 3 of Decision 1999/509 set out a period of two months from the date of notification of that decision for the Kingdom of Spain to inform the Commission of the measures to be taken to comply therewith.

73 As that decision was notified to the Kingdom of Spain on 29 October 1998, the two-month period set out in Article 3 thereof thus expired on 29 December 1998.

74 However, in the present case, the fact remains that, as has already been stated in paragraph 28 of this judgment, in the course of the long discussions which took place between the parties regarding the recovery of the aid at issue, the Commission prescribed, in its letter of 16 December 2005, a new period, which expired on 25 January 2006, for that Member State to comply with its obligations under Decision 1999/509.

75 The period prescribed in Article 3 of Decision 1999/509 must therefore be regarded as having been replaced by that resulting from the letter of 16 December 2005, with the result that it is the latter period which is relevant for the purpose of assessing the failure to fulfil obligations alleged by the Commission in the present case (see, to that effect, *Commission* v *Belgium*, paragraph 28; *Commission* v *Poland*, paragraph 50; and Case C-485/10 *Commission* v *Greece*, paragraph 31).

76 It follows that, for the purpose of assessing the alleged failure to fulfil obligations in the present proceedings, the Court finds it necessary to examine the factual and legal situation which existed on 25 January 2006 and that, therefore, the relevant date in the present case is far later than 2 July 2002 on which the judgment in Case C-499/99 *Commission* v *Spain* was delivered.

77 In those circumstances, it cannot reasonably be claimed that the present case and that which gave rise to the judgment in Case C-499/99 *Commission* v *Spain* have the same subject-matter.

78 As was stated in paragraphs 67 and 68 of this judgment, it is one of the necessary conditions for the first judicial decision to be accorded the force of *res judicata* in the light of the present case that the subject-matter of the two cases in question is identical, in the sense that they are based on the same factual and legal situation.

79 Consequently, the objection of inadmissibility put forward by the Kingdom of Spain based on the *res judicata* attached to the judgment in Case C-499/99 *Commission* v *Spain* must be rejected.

Substance

Arguments of the parties

80 The Commission complains that the Kingdom of Spain did not adopt the measures necessary to comply with Decision 1999/509 as regards the recovery of the unlawful aid granted to Indosa.

81 Although that undertaking was declared insolvent as of 1994, that aid has been neither recovered from it nor registered as a claim in the insolvency of that undertaking.

82 In addition, 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.

83 As regards CMD, a company which was subsequently also declared insolvent, the Commission maintains that the Spanish authorities have not yet recovered the unlawful aid in question from that undertaking and that they have not moreover registered the liability relating to the repayment of that aid in the schedule of liabilities in the insolvency proceedings relating to that undertaking.

84 Furthermore, following the cessation of CMD's activities, the competitive advantage resulting from the unlawful aid was retained by Euskomenaje, an undertaking created by the former employees of CMD for the purpose of continuing the activities which had until then been carried on by CMD. All of that

suggests that that transaction once again served to circumvent the obligations stemming from the liquidation of the company which received the unlawful aid, as the transfer of CMD's assets to Euskomenaje was effected without advertising and for no consideration.

85 The Kingdom of Spain, on the other hand, contends that it has taken all the steps in its power to ensure compliance with Decision 91/1.

86 In that regard, that Member State submits in essence that, as regards, in the first place, the registration of the liability relating to the repayment of the unlawful aid in question in the CMD insolvency proceedings, the Autonomous Community of the Basque Country took a series of steps to that end.

87 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. That Member State argues, however, that it took the steps necessary to put an end to those activities.

88 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.

89 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. Various difficulties which are not contingent on the will of the Kingdom of Spain explain the delays in the liquidation process. The non-recovery of the aid granted is due to the fact that the undertakings in question are insolvent.

Findings of the Court

90 As a preliminary point, it must be borne in mind that, as the Court has repeatedly held, recovery of unlawful aid is the logical consequence of the finding that it is unlawful (see, inter alia, *Commission* v *Poland*, paragraph 54 and the case-law cited).

91 Consequently, the Member State to which a decision requiring recovery of illegal aid is addressed is obliged under Article 288 TFEU to take all measures necessary to ensure implementation of that decision. This must result in the actual recovery of the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid (see *Commission* v *Poland*, paragraphs 55 and 56).

92 Under Article 14(3) of Regulation No 659/1999, the recovery of aid declared unlawful and incompatible by a decision of the Commission must, as is also apparent from recital 13 in the preamble to that regulation, be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of that decision, a condition which reflects the requirements of the principle of effectiveness laid down by the case-law of the Court (see *Commission* v *Poland*, paragraph 59, and Case C-243/10 *Commission* v *Italy* [2012] ECR, paragraph 36).

93 In order to assess the merits of the present action, it is therefore important to ascertain whether the amounts of unlawful aid in question were repaid within the prescribed period by the undertaking which received them.

94 It must be stated at the outset that the case before the Court relates only to the aid granted to Indosa and declared incompatible with the common market by Decision 1999/509.

95 It must be borne in mind in that regard that, in accordance with the settled case-law of the Court, the reference date for the application of the second subparagraph of Article 108(2) TFEU is that provided for in the decision failure to implement which is denied or, where appropriate, that subsequently fixed by the Commission (see, inter alia, Case C-485/10 *Commission* v *Greece*, paragraph 31).

96 As has already been stated in paragraphs 74 to 76 of this judgment, the relevant date in the present case is that on which the period prescribed by the Commission in its letter of 16 December 2005 expired, namely 25 January 2006.

97 In the present case, it is common ground that, as at 25 January 2006, the unlawful aid which Indosa had received had not been recovered from that undertaking. It must moreover be stated that, as regards that undertaking, none of the sums referred to by Decision 1999/509 had been recovered as at the date of the hearing in the present case.

98 Such a situation is clearly incompatible with the Member State's obligation actually to recover the sums owed and obviously constitutes a breach of the duty to implement that decision immediately and effectively.

99 It is also settled case-law that the only defence available to a Member State against an application by the Commission under Article 108(2) TFEU for a declaration that it has failed to fulfil its obligations is to plead that it was absolutely impossible for it properly to implement the decision of that institution ordering the recovery of the aid in question (see, inter alia, *Commission* v *Poland*, paragraph 69 and the case-law cited).

100 In the present case, the Kingdom of Spain has not even made such a claim that it was absolutely impossible for it to implement the decision.

101 In any event, it is important to bear in mind that, first, the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant Member State merely invokes the legal, political or practical difficulties with which it was confronted in implementing the decision concerned, without taking any real steps to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing that decision which could have enabled those difficulties to be overcome and that, secondly, alleged internal difficulties which are encountered when implementing the decision of the Commission cannot justify a failure by that Member State to comply with its obligations under European Union law (see *Commission* v *Poland*, paragraphs 70 and 72).

102 Accordingly, the explanations provided by that Member State in its defence, which are based on alleged difficulties of an internal nature, cannot in any event be accepted in order to justify the failure to comply with Decision 1999/509.

103 As regards the fact, relied on by the Kingdom of Spain, that Indosa, and also CMD which succeeded it, were declared insolvent and that recovery of the aid in question was made impossible by the absence of assets, it must be pointed out that, if the aid unlawfully paid has to be recovered from an undertaking which is insolvent or subject to proceedings the purpose of which is to realise the assets and clear the liabilities, the Court has repeatedly held that the fact that that undertaking is in difficulty or insolvent does not affect the obligation of recovery (see Case C-610/10 *Commission* v *Spain*, paragraph 71 and the case-law cited).

104 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 (Case C-610/10 *Commission* v *Spain*, paragraph 72 and the case-law cited).

105 In the present case, it is common ground that, as at the relevant date of 25 January 2006, the unlawful aid in question had not been so registered.

106 Having regard to the particular circumstances of the present case, it must, moreover, be stated that, contrary to what the Kingdom of Spain submits, even if the liability relating to the aid in question had been registered in the schedule of liabilities within the prescribed period, the completion of that formality would not, in itself, have been sufficient to meet the obligation to comply with Decision 1999/509 and make the distortion of competition created by the receipt of that aid disappear.

107 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 (Case C-610/10 *Commission* v *Spain*, paragraph 104 and the case-law cited).

108 In the present case, it is however established that not only had Indosa not been wound up as at 25 January 2006, but, what is more, its activities were continued through CMD and then through Euskomenaje.

109 However, where the undertaking which received the unlawful aid is insolvent and a new company has been created to continue 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 undertaking 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 undertaking 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. 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. The foregoing considerations are moreover not invalidated by the judgment in Case C-496/09 *Commission* v *Italy*, relied on by the Kingdom of Spain (Case C-610/10 *Commission* v *Spain*, paragraphs 106 and 108).

110 In that regard, it is important to state that, in the present case, the Kingdom of Spain did not adopt, within the prescribed period, any measures to ensure recovery of the unlawful aid in question.

111 First, the Autonomous Community of the Basque Country did not submit an application for registration of a part of the liability relating to the repayment of the unlawful aid in the schedule of liabilities in the CMD insolvency proceedings until 3 December 2010. Furthermore, as is apparent from paragraphs 23 and 73 of Case C-610/10 *Commission* v *Spain*, the liability declared in this respect related to the aid declared unlawful by Decision 91/1, whereas the present case relates to the aid referred to by Decision 1999/509.

112 Secondly, it was not until 3 March 2011 that that autonomous community submitted an application to the Juzgado de lo Mercantil No 2 of Bilbao requesting that the activities of Euskomenaje which were taking place in CMD's premises be stopped.

113 In the light of all of the foregoing, it must therefore be concluded that the Kingdom of Spain cannot reasonably claim to have complied with Decision 1999/509, with the result that the action brought by the Commission must be regarded as well founded in its entirety.

114 Therefore, it must be held that, by failing to adopt, within the period prescribed, the measures necessary to comply with Decision 1999/509 as regards Indosa, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 288 TFEU and under Articles 2 and 3 of that decision.

Costs

115 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.

On those grounds, the Court (First Chamber) hereby

1. **Declares that, by failing to adopt, within the prescribed period, the measures necessary to comply with Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors, as regards the undertaking Industrias Domésticas SA, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 288 TFEU and under Articles 2 and 3 of that decision;**

2. **Orders the Kingdom of Spain to pay the costs.**

[Signatures]