Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 16 May 2018 [1]

Case C-93/17

European Commission
v

Hellenic Republic

(Failure of a Member State to fulfil obligations — Judgment of the Court establishing the failure of a Member State to fulfil its obligations — Non-implementation — Periodic penalty payment — Lump sum)

I. Introduction

1. The present case has its origins in an action brought by the European Commission against the Hellenic Republic under Article 260 TFEU for failure to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395). In that judgment, the Court found that, by failing to take, within the period prescribed, all the measures necessary in order to implement Commission Decision 2009/610/EC of 2 July 2008 on aid C 16/04 (ex NN 29/04, CP 71/02 and CP 133/05) granted by Greece to Hellenic Shipyards SA,[2] and by failing to provide the information listed in Article 19 of that decision to the Commission, the Hellenic Republic had failed to fulfil its obligations under Articles 2, 3, 5, 6, 8, 9 and 11 to 19 of that decision.

II. Legal framework

2. Article 346(1) TFEU provides:

'The provisions of the Treaties shall not preclude the application of the following rules:

…

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.'

1 Original language: French.

2 OJ 2009 L 225, p. 104.

III. Background to the dispute

3. In 1985, Hellenic Shipyards SA (Ellinika Nafpigeia AE, 'EN'), the owner of a Greek (civil and military) naval shipyard in Skaramagkas (Greece), ceased trading and was put into liquidation. Also in 1985, the State bank Elliniki Trapeza Viomichanikis Anaptixeos AE ('ETVA') acquired the majority of EN's shares. On 18 September 1995, a contract for the sale of 49% of EN's shares to its employees was signed.

4. In 1998, the Hellenic Republic decided to modernise and expand its submarine fleet. To that end, it concluded with EN a contract for the construction of four 'HDW Class 214' submarines (the 'Archimedes' contract) and a contract for the modernisation of three 'HDW Class 209' submarines (the 'Neptune II' contract).

5. For the construction and modernisation of those submarines, EN concluded subcontracts with Howaldtswerke-Deutsche Werft GmbH ('HDW') and Ferrostaal AG (together, 'HDW-Ferrostaal').

6. In 2001, the Hellenic Republic decided to privatise EN in its entirety. At the end of the privatisation procedure, HDW-Ferrostaal acquired all of EN's shares. During the course of 2005, the German group ThyssenKrupp AG bought HDW and the shares held by Ferrostaal in EN.

7. In the context of the privatisation of EN, the Hellenic Republic adopted, from 1996 to 2003, a number of measures, comprising capital injections, guarantees, counter-guarantees and loans to EN, which have been the subject matter of several decisions of the Commission and the Council of the European Union.

8. Articles 2, 3, 8, 9 and 11 to 15 of Decision 2009/610 provide that those measures constitute aid which is incompatible with the internal market.

9. According to Articles 5 and 6 of that decision, the aid specified therein, although previously authorised by the Commission, was misused, with the result that its recovery was necessary.

10. According to Article 16 of Decision 2009/610, the indemnification guarantee granted by ETVA to HDW-Ferrostaal providing for the indemnification of HDW-Ferrostaal for any State aid recovered from EN constituted aid implemented in contravention of Article 108(3) TFEU, which was also incompatible with the internal market and had to be abolished immediately.

11. Finding that the aid to be recovered had benefited only EN's civil activities, the Commission decided in Article 17 of that decision that that aid should be recovered from the assets used for the civil part of the activities of that company. [3]

12. Article 18 of Decision 2009/610 ordered the immediate and effective recovery by the Hellenic Republic of the aid as defined in Articles 2, 3, 5, 6, 8, 9 and 11 to 15 of that decision. According to that provision, the Hellenic Republic was to take the measures necessary to ensure that that decision was implemented within 4 months following the date of notification of that decision, that is to say as from 13 August 2008.

13. In view of EN's difficult economic situation, the Hellenic Republic argued that full recovery of the aid at issue could lead to the winding up of EN and thereby affect its military activities (namely the 'Archimedes' and 'Neptune II' contracts), so that recovery in full was liable adversely to affect the protection of the essential interests of the Hellenic Republic's security as referred to in Article 346 TFEU.

3 According to the Commission, the amount of aid (excluding interest) to be recovered was then provisionally estimated at approximately EUR 256 million.

14. When it was contacted by the Hellenic Republic, the Commission acknowledged that EN did not have the funds necessary to repay the aid [4] and proposed to that undertaking that the Commission would regard its decision as having been implemented if EN (i) sold its assets used for civil activities and used the proceeds of that sale to reimburse the aid to the Greek State, (ii) waived both the indemnification guarantee referred to in Article 16 of Decision 2009/610 and its exclusive rights to use land belonging to the State (namely, the dry dock concession), which it would return to the State (since the land was not necessary for its military activities), and (iii) suspended its civil activities for 10 years. On that basis, the Commission, the Hellenic Republic and EN reached an agreement in principle on 8 July 2009.

15. At the same time, the ThyssenKrupp group entered into negotiations with Abu Dhabi Mar LLC (ADM) [5] for the transfer to the latter of shares in EN. In December 2009, ADM offered to purchase 75.1% of those shares at the price of one euro, 24.9% of them remaining the property of the ThyssenKrupp group. One of the purchase conditions was that the Hellenic Republic would resolve the issue of the recovery of the State aid in a manner approved by the investor ADM.

16. In March 2010, the Hellenic Republic, ADM, ThyssenKrupp, HDW and EN concluded a framework agreement ('the Framework Agreement'), Article 11 of which referred to the obligation of the Hellenic Republic to recover the State aid and specified that 'a tripartite settlement between the [Commission], the Hellenic Republic and [EN] for the State aid recovery claims ha[d] been negotiated in July 2009 and [that] currently its final execution [was] pending'. According to that article, 'the Hellenic Republic [was] herewith undertaking to immediately take all necessary measures to secure the formal closing of the file and final settlement and completion of this procedure which is regarded by ADM as a condition precedent for the [share purchase]'. [6]

17. On 17 September 2010, the parties to that framework agreement also signed an implementation agreement ('the Implementation Agreement'), which was intended to resolve several points of dispute concerning the performance of the 'Archimedes' and 'Neptune II' contracts and to amend those contracts to take into account the new needs of the navy. That agreement provided that the liquidation of EN or any other insolvency proceedings would allow the Hellenic Republic to terminate those contracts. That agreement was approved and came into force with the adoption of Law No 3885/2010. [7]

18. On 22 September 2010, the ThyssenKrupp group sold 75.1% of the shares to Privinvest, ADM having withdrawn from the acquisition of EN. [8]

19. On 8 October 2010, taking the view that the Hellenic Republic had failed to fulfil its obligations under Decision 2009/610, the Commission brought infringement proceedings against the Hellenic Republic under Article 108(2) TFEU, seeking a declaration that it had not taken, within the prescribed periods, all the measures necessary to comply with that decision.

4 In October 2010, the total amount to be recovered, including interest, amounted to approximately EUR 539 million.

5 ADM is a group of companies specialising in the construction of warships and leisure yachts, 70% of the shares of which belong to the Al-Ain group, controlled by Sheikh Hamdan Bin Zayed Al Nahyan, with 30% belonging to the Privinvest group, controlled by a Lebanese national, Mr Safa.

6 'A tripartite settlement between the European Commission, the Hellenic Republic and [EN] for the State aid recovery claims has been negotiated in July 2009 and currently its final execution is pending. The Hellenic Republic is herewith undertaking to immediately take all necessary measures to secure the formal closing of the file and final settlement and completion of this procedure which is regarded by ADM as a condition precedent for the [share purchase].'.

7 FEK A' 171/29.9.2012.

8 It appears that the reason for the withdrawal of ADM was that the Hellenic Republic could not allow EN to use the dry dock and could not guarantee that EN would receive orders for the construction of a significant number of vessels for the Greek navy.

20. During the period from June to October 2010, the Commission and the Hellenic Republic had negotiated the commitments which that Member State and EN ought to make and implement in order to comply with Decision 2009/610 without making EN insolvent or jeopardising implementation of the 'Archimedes' and 'Neptune II' programmes for the navy.

21. In their final version,[9] those commitments were as follows:

– EN would suspend its civil activities for a period of 15 years, as from 1 October 2010;

– The assets related to EN's civil activities[10] would be sold and the proceeds from the sale would be paid to the Greek authorities. If the auction did not result in the sale of all or part of those civil assets, EN would transfer them to the Greek State by way of alternative performance of the obligation to recover the aid. In that case, the Greek State was to ensure that none of those assets were reacquired by EN or its current or future shareholders during the aforementioned period of 15 years;

– EN would give up the concession on the dry dock, the use of which was not necessary for the pursuit of its military activities. The Greek State would ensure that that concession and the land it covered were not reacquired by EN or its current or future shareholders during the aforementioned period of 15 years;

– EN would waive the indemnification guarantee referred to in Article 16 of Decision 2009/610 and would not initiate any procedure based on or relating to it. The Hellenic Republic was to rely on the invalidity of that guarantee before any judicial or extra-judicial body;

– Within 6 months of the Commission's acceptance of the list of commitments, the Hellenic Republic would provide the Commission with proof of the return of the dry dock to the Greek State and updated information on the auction of the civil assets. In addition, the Hellenic Republic would report annually to the Commission on the state of progress of the recovery of the incompatible aid, inter alia by presenting evidence that EN no longer pursued any civil activities and providing information on the ownership and use of the assets returned to the Greek State and on the use of the land covered by the dry dock concession.

22. By letter of 1 December 2010 ('the letter of 1 December 2010'), the Commission informed the Hellenic Republic that, if those commitments were fully respected and implemented within 6 months of its letter, the Commission would regard Decision 2009/610 as having been fully implemented. For the avoidance of any doubt, the Commission expressly stated that EN's assets used for its civil activities were to be sold or transferred to the Greek State within 6 months of that letter.

23. By its judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), the Court held that, by failing to take, within the prescribed period, all the measures necessary to implement Decision 2009/610 and by failing to provide to the Commission the information set out in Article 19 of that Decision, the Hellenic Republic had failed to fulfil its obligations under Articles 2, 3, 5, 6, 8, 9 and 11 to 19 of that decision.

9 EN signed its letter of commitment on 27 October 2010 and the Hellenic Republic signed its letter of commitment on 29 October 2010.

10 Those assets were 2 floating dry docks, 1 floating crane, 2 tugs, 16 plots of land owned by EN and Dry Dock No 5 with adjacent land (Parcel No 8), which were granted under concession to EN by the Greek State.

24. With regard to the letter of 1 December 2010, the Court held that 'it [was] by no means apparent from [its] content [that] it replaced Decision 2009/610, as [the Hellenic Republic] claim[ed]. That letter merely [took] formal notice of the latest commitments of the Greek authorities and state[d] that, if they were actually complied with, the Commission would consider that Decision 2009/610 h[ad] been fully implemented'. [11]

IV. The pre-litigation procedure

25. Following the delivery of the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), the Commission and the Hellenic Republic exchanged several letters on the state of progress of the recovery of the incompatible aid.

26. The Hellenic Republic has, in that context, adopted a number of legislative measures concerning EN.

27. As regards the dry dock concession, Article 169(2) of Law No 4099/2012 [12] is worded as follows:

'Compliance with the [letter of 1 December 2010].

Upon the entry into force of this Law, the right of exclusive use granted to [EN] by Article 1(15) of Law No 2302/1995, … as supplemented by Article 6(1) of Law No 2941/2011, shall be terminated in so far as it concerns that part of State-owned land ABK 266 which has a surface area of … (216 663.985 m^2) and is indicated [on the topographical plan published in Annex I to this Law], as well as the coastal zone adjoining the aforementioned public land ABK.'

28. Article 12 of Law No 4237/2014 [13] introduced a moratorium suspending any form of enforcement in relation to EN's movable and immovable property, '[on the ground that or in so far as] [14] such enforcement affects the construction and maintenance of navy submarines'.

29. In Article 26 of Law No 4258/2014, [15] the Greek State, on account of EN's failure to comply with its contractual obligations towards the Greek State under the 'Archimedes' and 'Neptune II' contracts, assigned to the navy the project for the construction and modernisation of the submarines. That provision also provided that the navy would, for no consideration, carry out the work on the submarines in EN's facilities and pay the salaries and social security contributions of the employees by way of compensation for their work.

30. On 27 November 2014, taking the view that Decision 2009/610 had not yet been implemented, the Commission sent a letter of formal notice to the Greek authorities in accordance with Article 260(2) TFEU, granting them a two-month period for implementation.

31. By letter of formal notice, the Commission noted that at that date the Greek authorities had not recovered the amount of the incompatible aid and had not provided it with information on the implementation of Decision 2009/610, adding that neither they nor EN had complied with their commitments in that letter.

32. More specifically, the Commission considered that the sale of the assets used for civil activities had not taken place and noted that EN challenged the list of assets which were to be sold.

11 Judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395, paragraph 38).

12 FEK A' 250/20.12.2012.

13 FEK A' 36/12.2.2014.

14 The provision in question uses the word 'καθόσον', which can be understood in both ways.

15 FEK A' 94/14.4.2014.

33. With regard to the dry dock concession, the Commission considered that, although Law No 4099/2012 aimed at restoring the land concerned to the Greek State, the Greek authorities had neither provided the Commission with a map delimiting the land returned to the Greek State and evidence that it was no longer used by EN nor proved that the civil activities had ceased, except by referring to a decision that EN's board of directors took to that effect on 14 April 2010 at its 130th meeting.

34. According to the Commission, the Greek authorities had neither provided evidence that the indemnification guarantee had been cancelled and had never been used nor submitted to the Commission annual reports on the implementation of Decision 2009/610.

35. Lastly, the Commission alleged that, by providing monetary assistance to EN's employees following the ending of the payment of those employees' wages, the Greek authorities had failed to fulfil their obligation not to grant further aid to EN.

36. In conclusion, the Commission recalled that more than 6 years after Decision 2009/610 the Hellenic Republic had still not implemented that decision and therefore had not complied with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395).

37. The Greek authorities replied to the letter of formal notice by letter of 23 January 2015. On the one hand, they relied on the obstructionist attitude and the absence of any cooperation on the part of EN in implementing the commitments set out in the letter of 1 December 2010. On the other hand, they invoked the need for EN to remain operational for another 18 to 20 months, in order to allow the navy to finish, in EN's facilities, the construction and modernisation of the submarines provided for in the 'Archimedes' and 'Neptune II' contracts.

38. On 4 December 2015, the Greek authorities sent to EN a recovery order for EUR 523 352 889.23, which represented approximately 80% of the amount to be recovered, including interest up until 30 November 2015. In March 2016, the Greek tax authorities adopted measures implementing the recovery order. The Greek courts rejected EN's application for a stay of execution. At the hearing, the Hellenic Republic confirmed that the actions brought by EN against those measures were still pending.

39. It was not until 3 February 2017 that the tax authorities instituted enforcement proceedings concerning EN's assets used for its civil activities, in the course of which they seized two floating docks on 21 March 2017. Moreover, on 6 February 2017, the Greek authorities served garnishee orders on three banks with which EN held accounts. However, no sums were recovered due to the absence of funds.

40. On 29 June 2017, the Greek authorities sent a letter to EN inviting it to pay the remaining 20% of the amount of aid to be recovered (including interest up until 30 June 2017), that is to say EUR 95 098 200.99. As that payment was not made, the tax authorities were instructed by letter of 31 July 2017 from the Ministry of the Economy to recover that amount.

41. On 13 October 2017, the Greek authorities brought proceedings before the Greek courts seeking to make EN subject to the special administration procedure established in Article 68 of Law No 4307/2014.[16] By its judgment No 725/2018 of 8 March 2018, the Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens, Greece) granted the request of the Greek authorities, placed EN in special administration and appointed a special administrator.

16 FEK A' 246/15.11.2014.

V. The procedure before the Court

42. On 22 February 2017 the Commission brought the present proceedings under Article 260(1) TFEU. The Commission claims that the Court should:

– declare that, by failing to take measures to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), the Hellenic Republic has failed to fulfil its obligations under Article 260(1) TFEU;

– order the Hellenic Republic to pay a penalty payment of EUR 37 974 for each day of delay in complying with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), from the day on which judgment is delivered in the present case until the day on which the judgment delivered in that previous case has been complied with;

– order the Hellenic Republic to pay a lump sum of EUR 3 828 per day from the date of delivery of the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), until the date of delivery of the judgment in the present case or until the date of compliance with the judgment delivered in that previous case, if that judgment is complied with before the judgment in the present case is delivered, and

– order the Hellenic Republic to pay the costs.

43. The Hellenic Republic contends that the Court should:

– dismiss the action brought by the Commission, and

– order the Commission to pay the costs.

VI. The arbitral proceedings

A. The arbitral proceedings before the International Chamber of Commerce (ICC)

44. The Framework Agreement and the Implementation Agreement[17] contain arbitration clauses under which any dispute concerning those agreements must be settled by arbitration in accordance with the ICC Arbitration Rules. Those clauses provide that the arbitral tribunal is to sit in Athens (Greece) and to rule in accordance with Greek law.

45. By its request for arbitration of 11 January 2013, EN and its shareholders[18] brought arbitral proceedings (ICC Case No 18675/GZ/MHM/AGF/ZF) against the Hellenic Republic for breach of those agreements and of the contracts for the construction and modernisation of the submarines concluded in the context of those agreements (non-payment of the sums due). Among other claims, EN and its shareholders sought damages for the Hellenic Republic's breach of its commitment to resolve the issue of recovery of the State aid in a manner consistent with Article 11 of the Framework Agreement. In that regard, EN and its shareholders complain of the prohibition imposed by the Hellenic Republic on accepting orders for other States' navies and on obtaining the concession for the dry dock once again.

17 See points 16 and 17 of this Opinion.

18 The ThyssenKrupp group is not a party to those proceedings.

46. By its request for arbitration of 23 April 2014, the Hellenic Republic brought, on the basis of the same arbitration clause, arbitral proceedings (ICC Case No 20215/AGF/ZF)[19] against EN and its shareholders for breach of the Implementation Agreement and of the contracts for the construction and modernisation of the submarines, in particular breach of the obligation to deliver the submarines under the conditions laid down and within the periods prescribed. In the context of those arbitral proceedings, the Hellenic Republic alleges that EN failed to cooperate with it in implementing the commitments set out in the letter of 1 December 2010.

47. On 27 May 2014, EN and its shareholders lodged an application for interim measures, requesting that the ICC arbitral tribunal stay the execution of two decisions of the Minister for National Defence and one decision of the Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece) relating to the dispute concerning the construction and modernisation of the submarines.

48. By interim order of 14 October 2014, the ICC arbitral tribunal dismissed the application. It held that Article 12 of Law No 4237/2014 applied to all private and public creditors, including the Hellenic Republic and its institutions, and prohibited any enforcement in relation to EN's assets.[20]

49. On 12 May 2016, EN and its shareholders lodged another application for interim measures, asking the ICC arbitral tribunal to stay the execution of the recovery order issued by the Greek authorities on 4 December 2015.[21] They also asked the ICC arbitral tribunal to prohibit the Greek authorities from initiating any insolvency proceedings against EN during the arbitral proceedings.

50. By interim order of 5 August 2016, the ICC arbitral tribunal rejected that application of EN and its shareholders, ruling that it could not interfere in the implementation of Decision 2009/610.[22] It ruled, however, that recovery of the aid could render EN insolvent and therefore prohibited the Hellenic Republic from adopting a measure to nationalise EN, from taking control of EN's administration or from making EN and its assets subject to insolvency proceedings, without first informing that tribunal.[23]

51. On 10 April 2017, EN and its shareholders once again lodged an application for interim measures, asking the ICC arbitral tribunal to adopt protective measures which would prohibit the Hellenic Republic from making EN subject to the special administration procedure established in Article 68 of Law No 4307/2014.

52. By decision of 27 June 2017, the ICC arbitral tribunal recalled that its award was imminent. It therefore ruled that the opening of a special administration procedure against EN would have the effect of depriving EN's shareholders of their control over the company and that the special administrator chosen by creditors might take decisions affecting EN's position in the arbitral proceedings. In that context, the ICC arbitral tribunal ordered the Hellenic Republic to refrain from any measure that could change control over EN until the final award is made.[24]

19 Case pending.

20 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF), interim order of 14 October 2014, paragraphs 111 to 114. See also, to that effect, *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF/AYZ) final award of 29 September 2017, paragraphs 619 to 620.

21 See point 38 of this Opinion.

22 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF), interim order of 5 August 2016, paragraphs 75, 76 and 92(1).

23 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF), interim order of 5 August 2016, paragraphs 84 to 86 and 92(2).

24 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF/AYZ), decision of 27 June 2017, paragraphs 19 to 24.

53. By its final award, the ICC arbitral tribunal ruled, in so far as concerns the present case, that EN had legitimately agreed to relinquish the dry dock concession and that, consequently, the Hellenic Republic had not infringed Article 11 of the Framework Agreement in that regard. It also ruled that by not authorising EN to accept orders for the construction of warships for other countries, the Hellenic Republic had infringed that provision. However, in the absence of a causal link between that infringement and the damage suffered by EN and its shareholders, that arbitral tribunal did not order the Hellenic Republic to pay damages for that infringement. [25]

54. At the hearing, the Hellenic Republic informed the Court that it had brought an action for annulment of that award before the Greek courts. Those proceedings are still pending.

B. The arbitral proceedings before the International Centre for the Settlement of Investment Disputes (ICSID)

55. In their capacity as investors in EN, Mr Iskandar Safa and Mr Akram Safa, Lebanese nationals and Privinvest shareholders, initiated arbitral proceedings against the Hellenic Republic before the ICSID, in accordance with Article 9 of the Agreement between the Lebanese Republic and the Hellenic Republic on encouragement and reciprocal protection of investments, concluded on 24 July 1997 ('the Greece/Lebanon Bilateral Investment Treaty'). [26]

56. Iskandar and Akram Safa take the view that a number of the decisions and measures by the Greek authorities, including the prohibition on accepting orders for vessels for foreign navies, constitute an infringement of the protection granted to Lebanese investors in Greece by the Greece/Lebanon Bilateral Investment Treaty.

57. Those proceedings are currently pending, the applicants having filed their memorial on the merits on 31 October 2017. Its contents were notified to the Commission on 9 March 2018.

58. At the hearing, the Commission informed the Court of Iskandar and Akram Safa's applications, which appear to repeat several arguments put forward in the ICC arbitral proceedings, including, in particular, the alleged assurances that the Hellenic Republic gave them concerning non-recovery of the aid, the rights to use the dry dock and the prohibition on accepting orders for the construction of vessels for the navies of other States.

59. The Commission requested that the Court make clear in its judgment that, in view of the fundamental nature of Articles 107 and 108 TFEU for the legal order of the European Union, the Hellenic Republic is required not to comply with an arbitral award made by the ICSID arbitral tribunal, in so far as it orders the Hellenic Republic to pay damages in respect of any recovery of the aid or the measures taken for that purpose, such as the liquidation of EN.

25 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF/AYZ) final award of 29 September 2017, paragraphs 1427 to 1634 (under 'Claim 4: EU State aid').

26 See *Iskandar Safa and Akram Safa* v *Hellenic Republic* (ICSID Case No ARB/16/20), registered by the Secretary-General of ICSID on 5 July 2016.

VII. The failure to fulfil obligations

A. Arguments of the parties

60. According to the Commission, the Hellenic Republic has failed to fulfil its obligation to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), since it has not recovered 'a single euro' from EN in accordance with Decision 2009/610 or applied the alternative performance measures as set out in its letter of 1 December 2010.

61. As regards Decision 2009/610, the Commission claims that, far from implementing that decision, the Hellenic Republic has prevented any enforcement against EN by introducing the moratorium provided for in Article 12 of Law No 4237/2014. [27]

62. As regards the letter of 1 December 2010, the Commission submits that the Hellenic Republic has not complied with any of the commitments contained therein. [28] It adds that instead of complying with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) the Greek authorities appear to have granted new aid to EN in the form of the financial assistance provided to its employees.

63. As regards the Hellenic Republic's reliance on Article 346(1) TFEU during the pre-litigation procedure, the Commission notes that the Greek authorities never claimed that it was absolutely impossible to recover the aid but argued that, in view of the economic situation of EN, recovery would have led to the winding up of EN and its liquidation, which would have had a negative impact on the essential interests of the security of Greece since it would have threatened the performance of the 'Archimedes' and 'Neptune II' contracts for the construction and modernisation of the submarines.

64. However, according to the Commission, its letter of 1 December 2010 allowed the Greek authorities to implement Decision 2009/610 without jeopardising the essential interests of the security of the Hellenic Republic, but those authorities failed to comply with the commitments to which that letter refers.

65. Moreover, the Commission disputes the very validity, at the present time, of the security interests relied on by the Hellenic Republic, since the Greek authorities never explained why it was necessary for the construction and modernisation of the submarines to take place in the facilities of EN rather than in those of other Greek naval shipyards, particularly after the navy was given responsibility for the submarine construction and modernisation project under Article 26 of Law No 4258/2014.

66. The Hellenic Republic contends that it has taken all the measures necessary to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395).

67. With regard to Decision 2009/610, the Hellenic Republic relies on the difficulties which it encountered both in identifying the assets used for the civil activities and in implementing Article 17 of that decision, according to which the aid was to be recovered from those assets of EN.

68. According to the Hellenic Republic, Article 12 of Law No 4237/2014 does not constitute a measure rendering recovery of the aid more difficult, since the moratorium which it introduced precludes enforcement of claims only to the extent that such enforcement may affect EN's military activities. It states that the adoption of the recovery orders and the initiation of proceedings for their enforcement prove that that provision does not make implementation of Decision 2009/610 more difficult.

27 See point 28 of this Opinion.

28 See points 20 and 22 of this Opinion.

69. In addition, the steps taken to recover, first, 80% and then the remaining 20% of the amount of aid to be recovered constitute implementation of that decision.

70. With regard to the letter of 1 December 2010, the Hellenic Republic referred to the absence of any cooperation on the part of EN, though this was necessary for implementing the commitments contained in that letter.

71. In that regard, in so far as concerns the sale of EN's assets used for civil activities, the Hellenic Republic argues, first, that EN had taken no steps to that end and, secondly, that the Greek authorities could not unilaterally divest EN of those assets without encountering serious legal complications, particularly in the arbitral proceedings.

72. As regards the dry dock concession, the Hellenic Republic is of the view that, by means of Article 169(2) of Law No 4099/2012, it has fully complied with its obligation to terminate that concession and to recover the land concerned. It takes the view that the return of the land at issue to the Greek State is established by the copies of the registration of that transaction in the register of mortgages which the Greek authorities communicated to the Commission.

73. As regards the prohibition on EN pursuing its civil activities for a period of 15 years as from 1 October 2010, the Hellenic Republic maintains that the decision to that effect taken on 14 April 2010 by the board of directors of EN at its 130th meeting is sufficient to fulfil the commitment made in the letter of 1 December 2010. The Hellenic Republic also states that there is not the slightest evidence that EN pursued any civil activities during the period of prohibition.

74. With regard to the guarantee referred to in Article 16 of Decision 2009/610, the Hellenic Republic submits that, according to the letter of 1 December 2010, it was incumbent on EN not to initiate proceedings on the basis of or in connection with the indemnification guarantee. In so far as the Hellenic Republic is concerned, it has the obligation only to rely on the invalidity of that guarantee before any judicial or extra-judicial body. Such an opportunity has not yet presented itself.

75. As regards, lastly, the evidence which the Greek authorities were required to provide to the Commission in accordance with the letter of 1 October 2010, the Hellenic Republic states that EN did not publish any reports after 30 September 2011, because of its poor economic situation and the absence of civil activities. The Hellenic Republic adds that, given the absence of any cooperation on the part of EN, it does not see how it could have compelled EN to provide the Commission with a list of the works carried out within the shipyard.

76. Finally, in the absence of any cooperation on the part of EN in implementing Decision 2009/610 as provided for in the letter of 1 December 2010, the Hellenic Republic submits that, in principle, EN should be the subject of insolvency proceedings. However, with a view to the performance of the 'Archimedes' and 'Neptune II' contracts in the EN shipyard and since the opening of insolvency proceedings would cover all the assets of EN, both civil and military, the Hellenic Republic argues that implementing Decision 2009/610 by opening insolvency proceedings and, if appropriate, by liquidating EN would conflict with the essential interests of the security of the Hellenic Republic, as protected by Article 346(1) TFEU.

B. Assessment

77. From the outset, it should be noted that it is settled case-law that, in the context of 'twofold infringement' proceedings, the reference date to be used for assessing whether there has been an infringement is the deadline set in the letter of formal notice issued under Article 260(2) TFEU.[29]

78. In the present case, since on 27 November 2014 the Commission sent the Hellenic Republic a letter of formal notice in accordance with Article 260(2) TFEU, the reference date for establishing whether there has been an infringement is the date of expiry of the two-month deadline set in that letter, that is to say 27 January 2015.

1. Decision 2009/610

79. It is clear that the Hellenic Republic had failed to implement Articles 2, 3, 5, 6, 8, 9 and 11 to 15 of Decision 2009/610 by that date, since it had not taken any measures to recover the aid. Indeed, a partial recovery order for the amount of EUR 523 352 889.23, representing some 80% of the amount to be recovered, was adopted only on 4 December 2015,[30] that is to say more than 10 months after the reference date.

80. In my view, the question whether Article 12 of Law No 4237/2014 prevents, as the Commission maintains, recovery of the aid is not relevant, since, even if that is how its ambiguous wording is to be interpreted,[31] a national law cannot justify a failure to implement a Commission decision such as that at issue in the present case or, a fortiori, a failure to comply with a judgment of the Court.

81. As regards Article 16 of Decision 2009/610, which imposes on the Hellenic Republic the obligation to cancel the guarantee granted by ETVA to HDW-Ferrostaal, it should be pointed out that that guarantee was granted by ETVA, a bank which has not been owned by the Greek State since 2002. In that context, even though the Hellenic Republic can no longer ensure the waiver of the guarantee by ETVA's legal successor, the Hellenic Republic did not argue at the hearing that it would be legally impossible for it to cancel the guarantee at issue by means of a law or other legislative measure having that effect. However, such a measure had not been taken by the reference date. It therefore failed to implement Article 16 of Decision 2009/610.

82. Since the implementation of Articles 17 to 19 of Decision 2009/610 depends on the implementation of Articles 2, 3, 5, 6, 8, 9 and 11 to 15, it is clear that, on the reference date, the Hellenic Republic had failed to implement Articles 17 to 19 of that decision and therefore failed to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395).

2. Reliance on Article 346(1) TFEU by the Hellenic Republic

83. The Hellenic Republic relies on Article 346(1) TFEU to justify non-implementation of Decision 2009/610, by arguing that the opening of insolvency proceedings against EN in order to recover the incompatible aid would jeopardise the performance of the 'Archimedes' and 'Neptune II' contracts and thus conflict with the essential interests of the Hellenic Republic's security.

29 See judgments of 17 October 2013, *Commission* v *Belgium* (C-533/11, EU:C:2013:659, paragraph 32); of 13 May 2014, *Commission* v *Spain* (C-184/11, EU:C:2014:316, paragraph 35); of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 27); *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraph 45); and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 49).

30 See point 38 of this Opinion.

31 The ICC arbitral tribunal shares the view of the Commission concerning the interpretation of Article 12 of Law No 4237/2014. See points 28 and 48 of this Opinion.

84. That argument must be rejected for three reasons.

85. Firstly, on the one hand, implementation of a decision to recover incompatible aid does not necessarily and inevitably entail the winding up of an undertaking in difficulty such as EN. There are domestic remedies which allow that undertaking to defend itself at national level against recovery measures and which may enable it to avoid serious and irreparable harm resulting from recovery of the aid, such as the harm which might arise as a result of liquidation. [32] Indeed, liquidation is but a last resort for recovery of the aid.

86. On the other hand, on the reference date, the Hellenic Republic had not even issued the recovery order for the aid, although such an order would not have rendered EN insolvent [33] or impaired the essential interests of the Hellenic Republic's security. The Hellenic Republic had therefore not taken the most essential step in initiating recovery of the aid.

87. Moreover, there was nothing to prevent it from applying to the Greek courts for EN to be put into special administration, which was already possible by the reference date (that is to say 27 January 2015), though the Hellenic Republic did not take this step until 17 October 2017, more than 2 years later.

88. Secondly, Article 346(1) TFEU must be interpreted strictly, [34] to the effect that 'measures connected with the production of or trade in arms, munitions and war material must not adversely affect the conditions of competition in the internal market as regards other products, that is to say those which are not intended for specifically military purposes'. [35]

89. However, non-recovery of the incompatible aid granted for EN's civil activities has the opposite effect to that intended by that provision, in that it allows the distortion of competition to continue. In that regard, the fact that EN does not in fact pursue a civil activity does not mean that there has not been a distortion of competition.

90. Thirdly, and lastly, even if the argument of the Hellenic Republic was well founded, it would still be necessary to hold that the commitments set out in the letter of 1 December 2010 were established by mutual agreement of the Commission, the Hellenic Republic and EN to implement Decision 2009/610 without undermining the essential interests of the security of the Hellenic Republic. [36] As the Court has held, that letter '[has not] replaced Decision 2009/610, … [and] merely takes formal notice of the latest commitments of the Greek authorities [and] states that, if they were actually complied with, the Commission would consider that Decision 2009/610 has been fully implemented'. [37] However, the Hellenic Republic has not complied with its commitments.

32 See order of the President of the Court of 14 December 2011, *Alcoa Trasformazioni* v *Commission* (C-446/10 P(R), not published, EU:C:2011:829, paragraph 46 and case-law cited).

33 See, to that effect, judgment of 9 July 2015, *Commission* v *France* (C-63/14, EU:C:2015:458, paragraph 54).

34 See judgments of 7 June 2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35), and of 28 February 2013, *Ellinika Nafpigeia* v *Commission* (C-246/12 P, not published, EU:C:2013:133, paragraph 17).

35 Judgment of 28 February 2013, *Ellinika Nafpigeia* v *Commission* (C-246/12 P, not published, EU:C:2013:133, paragraph 20).

36 See points 20 and 21 of this Opinion.

37 Judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395, paragraph 38).

3. Non-compliance with the commitments set out in the letter of 1 December 2010

(a) Suspension of EN's civil activities

91. With regard to the suspension by EN of its civil activities for a period of 15 years, it should first be noted that, in its letter of commitment of 27 October 2010, EN had accepted that suspension and had stated that it would provide, in that regard, a decision by its board of directors as proof of that suspension. [38]

92. However, the decision taken on 14 April 2010 by EN's board of directors at its 130th meeting, and on which the Hellenic Republic relies, does not relate to that commitment, since that decision dates from before EN's letter of commitment of 27 October 2010 and contains no decision suspending civil activities for a period of 15 years. On the contrary, it simply states that 'non-naval activity is entirely suspended at present'.

93. Next, as is clear from the final award of the ICC arbitral tribunal, Privinvest clearly expressed by letter of 24 November 2010 its disagreement with the commitments made by EN in its letter of 27 October 2010 signed by the former management, including, in particular, the prohibition on reacquisition of the civil assets and the dry dock concession. [39] Since its majority shareholder disagreed with those commitments, it does not surprise me that EN's board of directors never took a formal decision to suspend civil activities.

(b) The sale of the civil assets or their return to the Greek State

94. With regard to the sale of the assets linked to EN's civil activities, it was agreed between the Greek authorities and EN that if the auction did not result in the sale of all or part of those civil assets, EN would transfer them to the Greek State as an alternative means of performing the obligation to recover the aid.

95. Even if EN has in no way cooperated with the Greek authorities to implement that commitment, [40] the fact remains that the Greek State has not used the public authority instruments at its disposal to seize and recover those assets.

96. In that regard, the Hellenic Republic argues that it could not unilaterally divest EN of those assets without encountering serious legal complications and, in particular, the deterioration of its position in the ICC arbitral proceedings brought against it by EN and its shareholders. [41]

97. In their arbitral proceedings, EN and its shareholders alleged that the Hellenic Republic intended to expropriate or nationalise EN by means of the implementation of Decision 2009/610 or compliance with the commitments contained in the letter of 1 December 2010.

38 That question is separate from the question whether EN has de facto suspended its civil activities because of the absence of work.

39 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF/AYZ) final award of 29 September 2017, paragraphs 341 to 348.

40 See point 93 of this Opinion.

41 The arbitral proceedings initiated in the present case demonstrate that commercial arbitral tribunals are required to deal with issues of EU law, including in State aid matters. The fact that such tribunals are in principle excluded from making references to the court for a preliminary ruling (which the Court has recently confirmed even for arbitral tribunals established by agreements between Member States (see, inter alia, judgment of 6 March 2018, *Achmea*, (C-284/16, EU:C:2018:158, paragraphs 45 to 49)) poses a problem for the uniform application and interpretation of EU law, particularly in its most sensitive areas, such as EU competition and State aid law.

98. By its interim order,[42] the ICC arbitral tribunal had indeed prohibited the Hellenic Republic from taking measures to nationalise, seize or take possession of EN's assets without first informing it.

99. Moreover, such an acquisition of EN's civil assets could have adversely affected the position of the Hellenic Republic in the ICSID arbitral proceedings brought against it by Iskandar and Akram Safa for infringement of the protection granted to Lebanese investors in Greece by the Greece/Lebanon Bilateral Investment Treaty.

100. However, none of those circumstances constitutes a justification for failing to take the measures necessary to comply with the commitments set out in the letter of 1 December 2010 in order to implement Decision 2009/610, above all in the light of the fact that, by signing the letter of commitments of 27 October 2010, EN had agreed to the takeover by the Greek State of its assets used for civil activities in the event that it was not possible to auction them.

(c) The dry dock concession

101. The concession for the dry dock was granted to EN by Article 1(15) of Law No 2302/1995. Consequently, it could be terminated only by legislative provision and was indeed terminated by Article 169(2) of Law No 4099/2012.

102. However, both the ICC Arbitral Tribunal and the Monomeles Protodikeio Athinon (Court of First Instance (single judge)), Athens, found that EN never returned the public land covered by the dry dock concession.[43] Since EN and its shareholders challenged the commitment which it had made in its letter of 27 October 2010 to return that land to the Greek State, EN never did return the land in question.

103. Therefore, the Commission correctly maintains that Article 169(2) of Law No 4099/2012 is not sufficient in itself to implement the commitment at issue.

(d) The indemnification guarantee

104. As regards the indemnification guarantee referred to in Article 16 of Decision 2009/610, it should be noted that, according to the letter of 1 December 2010, EN would waive that guarantee and bring no proceedings on the basis of or in connection with it. It does not appear from the file that such a waiver was made or that the Hellenic Republic cancelled that guarantee by legislative means.[44] It therefore failed to comply with that commitment.

(e) The annual reports

105. Finally, as regards the annual reports relating to the implementation of Decision 2009/610 which the Greek authorities were to draw up and submit to the Commission, they had to contain evidence that EN was no longer pursuing any civil activity and information on the status (ownership and use) of the assets recovered by the Greek authorities.

42 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF), provisional order of 5 August 2016, paragraphs 79 to 86 and 92(2).

43 See *Hellenic Shipyards and Others* v *Hellenic Republic* (ICC Case No 18675/GZ/MHM/AGF/ZF/AYZ) final award of 29 September 2017, paragraphs 373, 374, 422, 424 and 573 to 578, and judgment No 725/2018 of 8 March 2018 of the Monomeles Protodikeio Athinon (Court of First Instance (single judge) Athens), p. 13.

44 See point 81 of this Opinion.

106. Even if it could be accepted that, in the absence of annual reports drawn up by EN, it was difficult for the Greek authorities to provide evidence of the suspension of civil activities, the fact remains that the Greek authorities have failed to recover, in accordance with the commitment set out in the letter of 1 December 2010, EN's assets used for its civil activities. Accordingly, nor was it possible for the Hellenic Republic to comply with the commitment to draw up the annual reports at issue, concerning the ownership and use of the recovered civil assets.

107. It follows from the foregoing that the Hellenic Republic has not implemented its commitments set out in the letter of 1 December 2010. It therefore deprived itself of the opportunity to implement Decision 2009/610 without undermining the essential interests of its security. In so far as it was able to implement the commitments contained in the letter of 1 December 2010 and failed to do so, it cannot rely on Article 346(1) TFEU, even if such conduct was, partially or wholly, dictated by its defence strategy in the arbitral proceedings between it and EN and the shareholders of that undertaking.

108. In those circumstances, it should be held that, by failing to take all the measures necessary to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), the Hellenic Republic failed to fulfil its obligations under Article 260(1) TFEU.

VIII. The financial penalties

109. If the Court rules that the Hellenic Republic has failed to comply with the judgment of the Court of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), it may, in accordance with the second subparagraph of Article 260(2) TFEU, impose a penalty payment and/or a lump sum payment on that Member State.

110. Given that the two penalties proposed by the Commission are different in nature, it is necessary to consider separately the issue of whether it is appropriate to order the Hellenic Republic to make a penalty payment and the issue of whether it is appropriate to order it to pay a lump sum, and, if necessary, the issue of the amount of those penalties.

A. The penalty payment

1. Arguments of the parties

111. On the basis of its communication on the application of Article 260 TFEU,[45] the Commission requests that the Court order the Hellenic Republic to pay a daily penalty payment of EUR 34 974.

112. According to that communication, the amount of the daily penalty payment is calculated by multiplying a standard flat-rate amount of EUR 670 by a coefficient for seriousness and a coefficient for duration.[46] The result obtained is then multiplied by an 'n' factor, reflecting both the ability of the defaulting Member State to pay and the number of votes it has in the Council.

45 See Commission Communication SEC(2005) 1658 of 13 December 2005 (OJ 2007 C 126, p. 15), as updated by the Commission Communication — Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings (OJ 2017 C 431, p. 3). In the present case, the Commission used its Communication C(2015) 5511 final of 5 August 2015.

46 The coefficient for seriousness ranges from '1 to 20'. The coefficient for duration is '0.10' per month of the duration of the infringement.

113. In order to determine the coefficient for seriousness (from '1 to 20'), the Commission took into account the fundamental nature of the rules of the TFEU on State aid, the detrimental effect which the incompatible and unrecovered aid has had on the naval sector, the significant amount of the aid to be recovered, the fact that the Hellenic Republic has so far not recovered a single euro and the repetition of the unlawful conduct of that Member State in the field of State aid. On that basis, it fixed the coefficient for seriousness of the infringement at a value of '5'.

114. As regards the duration of the infringement, the Commission took into account the 48 months which had elapsed between the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), and the date on which it brought the matter before the Court, namely 22 July 2016. On that basis it fixed the coefficient for duration at the maximum possible, that is to say, at a value of '3'.

115. The Hellenic Republic challenges the coefficients for the seriousness and duration of the infringement used by the Commission. In that regard, it argues that the Commission failed to take into account a number of factors which mitigate the seriousness of the infringement, such as the fact that EN has engaged in no civil activity since 2010 and thus no longer exerts any competitive pressure on other companies in the naval sector. It also relies on several difficulties which it encountered when implementing Decision 2009/610, including, in particular, the decision of the ICC arbitral tribunal of 27 June 2017.[47] Lastly, it disputes the alleged repetition on its part of the unlawful conduct in the field of State aid. For those reasons, it submits that the coefficients for seriousness and duration cannot be greater than '1'.

116. With regard to the ability to pay, the Commission proposes using the special 'n' factor that is the most up to date on the date of delivery of the judgment. According to the Commission communication, that factor is calculated on the basis of the following formula:[48]

$$\sqrt{\frac{GDP\ n}{GDP\ Lux} \times \frac{Votes\ n}{Votes\ Lux}}$$

117. As regards Greece, the most recent Commission communication sets that factor at 3.17.[49]

118. The Hellenic Republic maintains that the special 'n' factor applied must be as recent as possible in order to take account of the substantial reduction in Greece's GDP. It criticises the Commission for not taking into account the actual state of the Greek economy and the fact that the country is still subject to a macroeconomic adjustment programme because it cannot finance itself effectively on the financial markets. Finally, it takes the view that the special 'n' factor is not correctly calculated, since, as from 1 April 2017, the FEU Treaty definitively abandoned the weighted voting system within the Council[50] and replaced it with a system of double majority of Member States and populations, according to which each Member State has only one vote in the Council. The Hellenic Republic thus argues that the Member States whose population and GDP are comparable to its own have suffered a serious decline in their influence within the Council.

47 See points 51 and 52 of this Opinion.

48 GDP n = gross domestic product (GDP) of the Member State concerned, in millions of euros, GDP Lux = GDP of Luxembourg, Votes n = number of votes each Member State concerned has in the Council under the weighting laid down in Article 205 TEC, Votes Lux = number of votes of Luxembourg.

49 See Commission Communication — Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings (OJ 2017 C 431, p. 3).

50 See Article 16(4) TEU and Article 3(3) of Protocol (No 36) on transitional provisions (OJ 2012 C 326, p. 322).

2. Assessment

119. According to settled case-law, 'the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts'.[51] Moreover, the periodic penalty must be imposed only if the failure to fulfil obligations persists on the date of delivery of the judgment to be given in the present case.[52]

120. In the present case, I consider that the failure to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) has persisted at least until delivery of this Opinion. The Hellenic Republic has implemented neither Decision 2009/610 nor all the commitments set out in the letter of 1 December 2010. Although the special administration of EN[53] is a necessary step for the recovery of the aid declared incompatible by Decision 2009/610, it is not in itself sufficient to support the conclusion that the Hellenic Republic has fulfilled its obligations under that decision.

121. In those circumstances, I consider that the imposition on the Hellenic Republic of a penalty payment constitutes an appropriate means of ensuring full compliance with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395).

122. As regards the amount of that penalty payment and the form it should take, the Court has held that 'it is for the Court, in the exercise of its discretion, in accordance with settled case-law, to set the penalty payment in such a way that it is both appropriate to the circumstances and proportionate to the infringement established and the ability of the Member State concerned to pay … The Commission's proposals concerning the penalty payment cannot bind the Court and constitute merely a useful point of reference. Similarly, guidelines such as those set out in the communications of the Commission are not binding on the Court but contribute to ensuring that the Commission's own actions are transparent, foreseeable and consistent with legal certainty when that institution makes proposals to the Court … In proceedings under Article 260(2) TFEU relating to a failure to fulfil obligations on the part of a Member State that has persisted notwithstanding the fact that that same failure to fulfil obligations has already been established in a first judgment delivered under … Article 258 TFEU, the Court must remain free to set the penalty payment to be imposed in an amount and in a form that the Court considers appropriate for the purposes of inducing that Member State to bring to an end its failure to comply with the obligations arising under that first judgment of the Court'.[54]

123. According to that same case-law, 'for the purposes of determining the amount of penalty payments, the basic criteria which must be taken into consideration in order to ensure that penalty payments have coercive effect and that EU law is applied uniformly and effectively are, in principle, the seriousness of the infringement, its duration and the capacity of the Member State concerned to pay. In applying those criteria, regard must be had, in particular, to the effects on public and private interests of the failure to comply and to the urgent need for the Member State concerned to be induced to fulfil its obligations'.[55]

51 Judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 47) and case-law cited. See also, to that effect, judgment of 2 December 2014, *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraph 87), and judgment of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 61).

52 See judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 51).

53 See point 41 of this Opinion.

54 Judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 52) and case-law cited. See also, to that effect, judgment of 2 December 2014, *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraphs 95 and 96 and case-law cited).

55 Judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 53 and case-law cited). See also, to that effect, judgment of 2 December 2014, *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraph 97); of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 70); and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 92).

124. As regards, in the first place, the seriousness of the infringement, it should be recalled that the TFEU rules on State aid are of a vital nature since they are the expression of one of the essential tasks with which the European Union is entrusted under Article 3(1)(c) TFEU.[56]

125. In the present case, it is sufficient to note that the Greek authorities have not as yet recovered a single euro of the incompatible aid so as to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395). On the contrary, the amount to be recovered is continuously increasing by the interest payable and, at the time of the hearing, exceeds EUR 670 million, that is to say more than 2.6 times the initial amount.

126. The fact that, according to the Hellenic Republic, EN no longer pursues civil activities has no bearing on the seriousness of the infringement, since it in no way detracts from the economic advantage which EN obtained in the form of the incompatible State aid received when it did pursue such activities.

127. In those circumstances, I consider that, in using a coefficient for seriousness of '5', the Commission did not correctly take into account the seriousness of the infringement in its proposal for a penalty payment.

128. Although in the case giving rise to the judgment of 7 July 2009, *Commission* v *Greece* (C-369/07, EU:C:2009:428), the Court imposed a daily penalty payment of EUR 16 000, a sum which, according to the Commission, corresponds in the present case to a coefficient for seriousness of '3', the Court had accepted that 'the amounts of aid which the [Hellenic Republic] ha[d] failed to prove were repaid form[ed] a relatively small part of the overall sum at issue in the [Commission's] decision'.[57]

129. In the present case, there has been a complete failure to recover the aid or to implement the commitments set out in the letter of 1 December 2010. It seems to me, therefore, that a coefficient for seriousness of '5' is not at all appropriate to the circumstances of the present case.[58]

130. As regards, in the second place, the duration of the infringement, which must be assessed at the time when the Court assesses the facts,[59] I note that almost 6 years have elapsed since the date of delivery of the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395). The duration of the infringement is therefore considerable.

131. Although Article 260(1) TFEU does not specify the period within which a judgment must be complied with, it follows from settled case-law that the importance of immediate and uniform application of EU law means that the process of compliance must be initiated at once and completed as soon as possible.[60]

56 See judgment of 7 July 2009, *Commission* v *Greece* (C-369/07, EU:C:2009:428, paragraphs 118 to 121 and case-law cited). See also, to that effect, judgment of 11 December 2012, *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraphs 125 to 127).

57 See judgment of 7 July 2009, *Commission* v *Greece* (C-369/07, EU:C:2009:428, paragraph 122).

58 In the case giving rise to the judgment of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444) the Commission used a coefficient for seriousness of '10'. It complained of the French Republic's failure to comply with EU provisions on the measurement of minimum mesh sizes, inadequate controls enabling undersized fish to be offered for sale and laxness on the part of the French authorities in taking action in respect of infringements. At the hearing, the Commission stated that in certain 'twofold infringement' cases involving State aid it had used coefficients for seriousness of up to '7 or 8'.

59 See judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 57 and case-law cited).

60 See judgments of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 77 and case-law cited), and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 100).

132. In the third place, as regards the capacity of the Hellenic Republic to pay, the Court has consistently accepted that, in order to calculate financial penalties, account should be taken of the GDP of the Member State concerned and the number of its votes in the Council. [61]

133. As regards GDP, the Court has previously held in relation to the Hellenic Republic, whose GDP has fallen sharply since 2010 following the crisis of its sovereign debt, that it was necessary to take account of recent trends in its GDP. [62]

134. To that end, account must be taken of the fact that Greece's GDP fell by 25.5% between 2010 and 2016. [63]

135. As regards the criterion of the number of votes the Hellenic Republic has in the Council, it is necessary to take into account that, as that Member State points out, the weighted voting system no longer exists.

136. On the other hand, the double majority system established by Article 16(4) TEU provides that 'a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union'.

137. However, none of those new criteria is capable of adequately replacing the criterion of the number of votes in the Council's decision-making mechanism.

138. Concerning the majority of Member States, and in contrast to the weighted voting system, all Member States are equal in that each of them has a single vote. In those circumstances, the formula used by the Commission [64] can no longer apply.

139. With regard to the population, it cannot be excluded that some Member States with a given population may have a lower capacity to pay than other Member States with a smaller population. That criterion is also irrelevant for calculating the penalty payment.

140. For those reasons, I conclude that it is necessary to abandon the criterion of the number of votes of the Member State concerned in the Council, which the Court has already done in its judgment of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98), since the number of votes no longer plays a part in the Council's decision-making process and the new rule in Article 16(4) TEU provides no satisfactory criterion for determining the capacity of the Member State concerned to pay. [65]

141. In the light of those circumstances, including in particular the significant amount of aid to be recovered and the duration of the infringement, and taking into account the need to induce the Hellenic Republic to bring to an end the failure to fulfil obligations complained of, I consider it appropriate to set a six-monthly penalty payment instead of a daily penalty payment.

61 See, to that effect, judgments of 4 July 2000, *Commission* v *Greece* (C-387/97, EU:C:2000:356, paragraph 88); of 25 November 2003, *Commission* v *Spain* (C-278/01, EU:C:2003:635, paragraph 59); of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 48); and of 4 June 2009, *Commission* v *Greece* (C-109/08, EU:C:2009:346, paragraph 42).

62 See judgments of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 58), and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 101).

63 See judgment of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 101). At the hearing, neither the Commission nor the Hellenic Republic provided more recent figures.

64 See point 116 of this Opinion.

65 It would be appropriate for the Commission to adapt its communication to the new rule on qualified majority decisions in the Council.

142. I note that the Commission had prescribed a period of 4 months for the implementation of Decision 2009/610[66] and that the Commission had given a period of 6 months to the Hellenic Republic and EN for implementation of the commitments set out in the letter of 1 December 2010. It seems clear to me that this is because the steps to be taken in order to implement that decision or comply with the commitments set out in that letter, such as the sale of assets by auction or the taking of legislative measures to terminate the dry dock concession, cannot be taken from one day to the next. This is of particular importance now since EN has been put into special administration, a procedure which, according to Article 69 of Law No 4307/2014, may last up to 12 months.

143. As regards the amount of the penalty payment, I note that in the case giving rise to the judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405), which concerned the environment, the Court imposed a six-monthly penalty payment of EUR 14 520 000, since the Hellenic Republic had not taken any measure to comply with the judgment of 6 October 2005, *Commission* v *Greece* (C-502/03, not published, EU:C:2005:592), whereas the Commission had proposed a daily penalty payment of EUR 71 193.60 (which would have corresponded to a six-monthly penalty payment of EUR 12 814 848).

144. In view of the foregoing, and more particularly the seriousness and duration of the infringement, but also the fall in Greece's GDP in recent years, I propose setting the six-monthly penalty payment at EUR 9 500 000, that is to say approximately 1.5% of the amount of the aid to be recovered.[67]

145. While the Court may impose a decreasing penalty payment to take account of any progress made by the Member State concerned, I consider that an increasing penalty payment may also be imposed in the event that the Member State continues to fail to comply with the first judgment of the Court. In the present case, the penalty payment could increase by EUR 2 000 000 every 6 months until the Hellenic Republic complies fully and completely with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395).

146. Having regard to all the foregoing considerations, I propose that the Court order the Hellenic Republic to pay to the Commission, into the 'European Union own resources' account, from the day on which judgment is delivered in the present case and until the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) has been complied with, a six-monthly penalty payment of EUR 9 500 000, which will be increased by EUR 2 000 000 for each six-month period following the first six-month period after judgment is delivered in the present case, until the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) has been complied with.

B. The lump sum payment

1. Arguments of the parties

147. As regards the amount of a lump sum payment, the Commission proposes that the Court determine that amount by multiplying a daily amount by the number of days over which the infringement continues.

66 See Article 18(5) of that decision.

67 The Commission's proposal would result in a six-monthly amount of approximately EUR 6 300 000.

148. For the purpose of calculating the lump sum payment, the Commission proposes applying the same coefficient for seriousness, that is to say '5', and the same 'n' factor as in the context of the periodic penalty payment. On the other hand, the flat-rate amount for calculating the lump sum payment would be fixed at EUR 220 per day. By contrast with the calculation of the periodic penalty payment, a coefficient for duration would not be applied.

149. On that basis, the Commission proposes the adoption of a lump sum payment calculated by multiplying the amount of EUR 3 828 by the number of days which will have elapsed between the date on which the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) was delivered and the date on which the Hellenic Republic fulfils its obligations or, failing that, the date on which the judgment in the present case is delivered.

150. The Hellenic Republic has not submitted arguments specific to the lump sum payment. In so far as, for the purposes of its calculation, the Commission uses criteria identical to those used for calculating the periodic penalty payment, such as the seriousness and duration of the infringement, it is necessary to take into account the arguments presented by the Hellenic Republic in relation to the periodic penalty payment.

2. Assessment

151. The Court has already held that, in exercising the discretion conferred on it in such matters, it is empowered to impose a penalty payment and a lump sum payment cumulatively.[68]

152. According to the Court, 'an order to pay a lump sum is based essentially on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period after the judgment initially establishing it was delivered'.[69]

153. Moreover, 'the imposition of a lump sum payment must depend in each individual case on all the relevant factors relating both to the characteristics of the failure to fulfil obligations established and to the conduct of the Member State involved in the procedure initiated under Article 260 TFEU. In that connection, that provision confers a wide discretion on the Court in deciding whether to impose such a penalty'.[70]

154. In the present dispute, as the Commission points out, there has been repeated unlawful conduct on the part of the Hellenic Republic in the context of State aid.[71] That factor and, in particular in the present case, the failure to recover a single euro in order to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) are sufficient indications that effective prevention of future repetition of similar infringements of EU law may require the adoption of a dissuasive measure, such as the imposition of a lump sum payment.[72]

68 See judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 71 and case-law cited), and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 116 and case-law cited).

69 Judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 72 and case-law cited).

70 Judgment of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 73 and case-law cited), and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 117 and case-law cited).

71 See judgments of 7 July 2009, *Commission* v *Greece* (C-369/07, EU:C:2009:428); of 1 March 2012, *Commission* v *Greece* (C-354/10, not published, EU:C:2012:109); of 17 October 2013, *Commission* v *Greece* (C-263/12, not published, EU:C:2013:673); of 9 November 2017, *Commission* v *Greece* (C-481/16, not published, EU:C:2017:845); and of 17 January 2018, *Commission* v *Greece* (C-363/16, EU:C:2018:12).

72 See, to that effect, judgments of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 74), and *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraphs 115 and 116).

155. Accordingly, the Court fixes that sum in an amount appropriate to the circumstances of the present case and proportionate to the infringement.[73] In that context, it takes into account the seriousness established, its duration and the capacity of the Member State concerned to pay.[74]

156. There are several elements in the present case which cast doubt on the existence of a genuine intention on the part of the Greek authorities to implement Decision 2009/610 or to implement in full their commitments contained in the letter of 1 December 2010.

157. In that regard, it should be noted that, in Article 11 of the Framework Agreement, the Hellenic Republic had essentially promised EN and its shareholders (old and new) that it would obtain from the Commission a definitive undertaking that Decision 2009/610 would be implemented without EN being required to repay the amounts of aid; that promise was made in March 2010, that is to say even before the Commission had approved the list of commitments set out in the letter of 1 December 2010 and before EN had formally accepted them.

158. However, the Hellenic Republic could not reasonably make that promise to EN and its acquirers, even though it was required by ADM (and subsequently by Privinvest) as a precondition for the purchase of 75.1% of the shares of EN.[75] Indeed, such a promise, which disregards the mandatory nature of EU State aid law, is invalid.

159. Moreover, the Greek authorities did not regard recovery of the incompatible aid as a priority and, on the contrary, by taking measures which were indeed necessary for that purpose but which were insufficient and also carried out extremely slowly, they acted in such a way that recovery has ultimately been delayed. On account of that dilatory conduct, the amount of aid to be recovered has increased, with default interest, from EUR 256 000 000 to EUR 670 000 000.

160. For example, the Greek authorities did not send the first recovery order for the incompatible aid to EN until 4 December 2015,[76] that is to say 11 months after the Commission's letter of formal notice and more than 3 years after the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395). They applied for EN to be put into special administration only on 13 October 2017, that is almost 2 years after the first recovery order was issued.

161. Moreover, even when it appeared that EN and its shareholders would not cooperate in implementing the commitments contained in the letter of 1 December 2010, the Hellenic Republic took no steps to open insolvency proceedings or the special administration procedure against EN in order to recover the aid, even though the Greek courts rejected EN's application for a stay of execution with respect to the recovery orders.[77]

162. It is true that, by the interim order of 5 August 2016, the ICC arbitral tribunal had prohibited the Hellenic Republic from opening insolvency proceedings against EN without informing that tribunal in advance and, by the decision of 27 June 2017, had ordered the Hellenic Republic to refrain from any measure that could change control over EN until the final award was made, a prohibition which included the special administration procedure.

73 See, to that effect, judgments of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraph 75), and *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraph 117); of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 94), and of 22 February 2018, *Commission* v *Greece* (C-328/16, EU:C:2018:98, paragraph 119).

74 See, to that effect, judgments of 2 December 2014, *Commission* v *Greece* (C-378/13, EU:C:2014:2405, paragraphs 76 and 77 and case-law cited), and *Commission* v *Italy* (C-196/13, EU:C:2014:2407, paragraph 118 and case-law cited).

75 See points 15 and 16 of this Opinion. The ICC arbitral tribunal thus completely failed to take into account the fact that the Hellenic Republic could not allow EN to accept orders for the construction of warships for other countries, since Article 346(1) TFEU protects only the essential interests of the security of the Member State concerned. Thus, such orders, above all for third countries, constitute a civil activity which is prohibited by the letter of 1 December 2010 and which EN had waived the right to carry out in its letter of commitment of 27 October 2010.

76 See point 38 of this Opinion.

77 See point 38 of this Opinion.

163. However, the law applicable to the dispute between EN, its shareholders and the Hellenic Republic is Greek law and the ICC arbitral proceedings are subject to that law, since it was provided that the ICC arbitral tribunal would sit in Athens (Greece). Given that EU law forms part of Greek law,[78] on the one hand, that tribunal could not reasonably prevent the Hellenic Republic from opening insolvency proceedings against EN as a measure of last resort to recover the incompatible aid and, on the other hand, the Hellenic Republic cannot rely on the orders of that tribunal to justify non-implementation of Decision 2009/610.

164. On the basis of the foregoing and taking into account the 25.5% fall in Greece's GDP between 2010 and 2016, I consider it appropriate to propose that the Court order the Hellenic Republic to pay a lump sum of EUR 13 000 000, that is approximately 2% of the aid to be recovered.

IX. Concluding remark

165. At the hearing, the Commission sought clarification from the Court regarding the implementation by the Hellenic Republic of an arbitral award which would be made in the ICSID arbitral proceedings and ordering it to pay damages in respect of any recovery of the aid or the measures taken for that purpose, such as the liquidation of EN.[79]

166. In the forthcoming judgment in this case, the Court may deal only with the complaints relied on by the Commission in its letter of formal notice addressed to the Hellenic Republic. The Commission's request for clarification cannot be treated as such.

167. Accordingly, that request of the Commission can be made only in the context of separate infringement proceedings seeking to establish that, in complying with such an award, the Hellenic Republic has failed to fulfil its obligations under the FEU Treaty.

168. Finally, in any event, there exists at present no award in the ICSID arbitral proceedings concerned.

X. Costs

169. Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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 applied for costs against the Hellenic Republic and the Hellenic Republic's failure to fulfil its obligations has been established, the latter must be ordered to pay the costs.

XI. Conclusion

170. In the light of the foregoing considerations, I propose that the Court should:

(1) Rule that, by failing to take steps to comply with the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395), the Hellenic Republic has failed to fulfil its obligations under Article 260(1) TFEU.

(2) Order the Hellenic Republic to pay to the European Commission, into the 'European Union own resources' account, from the day on which judgment is delivered in the present case and until the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) has

78 See judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 41).

79 See points 58 and 59 of this Opinion.

been complied with, a six-monthly penalty payment of EUR 9 500 000, which will be increased by EUR 2 million for each six-month period following the first six-month period after judgment is delivered in the present case, until the judgment of 28 June 2012, *Commission* v *Greece* (C-485/10, not published, EU:C:2012:395) has been complied with.

(3) Order the Hellenic Republic to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 13 000 000.

(4) Order the Hellenic Republic to pay the costs.