Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 6 September 2012 [1]

Case C-610/10

European Commission
v

Kingdom of Spain

(Temporal applicability of Article 260(2) TFEU — Admissibility of the action — Judgment of the Court establishing a failure to fulfil obligations — Failure to comply with the judgment — Financial penalty)

1. In this case, an action has been brought by the European Commission against the Kingdom of Spain under Article 260 TFEU, following an alleged failure to comply with the judgment delivered by the Court on 2 July 2002 in *Commission* v *Spain* [2] ('the 2002 judgment'). In that judgment the Court held that, by failing to adopt the necessary measures to comply with Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments granted to Magefesa, [3] producer of domestic articles of stainless steel and small electric appliances, [4] in so far as that decision declared the aid granted to Indosa, Gursa, Migsa and Cunosa illegal and incompatible with the common market, the Kingdom of Spain had failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision. [5]

2. It should be noted that the present action concerns only the failure to comply with the 2002 judgment in relation to the aid granted to Indosa by the Autonomous Community of the Basque Country in the form of a loan guarantee of ESP 300 million paid directly to Indosa, a loan guarantee of ESP 672 million to companies belonging to the Magefesa group and an interest subsidy of ESP 9 million. As regards Gursa, Migsa and Cunosa, since 2006 the Commission has considered that Decision 91/1 was implemented, because they had ceased their activities and their assets had been sold at market price.

I – Pre-litigation procedure

3. Since 2004, the Commission and the Kingdom of Spain have exchanged a large volume of correspondence concerning compliance with the 2002 judgment. Given the considerable volume of letters exchanged, I will refer only to the most important parts of that correspondence.

1 — Original language: French.

2 — Case C-499/99 [2002] ECR I-6031.

3 — Magefesa is a Spanish holding company basically comprising four industrial companies: Industrias Domésticas SA (Indosa), Manufacturas Gur SA (Gursa), Manufacturas Inoxidables Gibraltar SA (Migsa) and Cuberta del Norte SA (Cunosa).

4 — OJ 1991 L 5, p. 18.

5 — In the 2002 judgment, the Court also ruled that the Kingdom of Spain failed to fulfil its obligations under Commission Decision 1999/509/EC of 14 October 1998 concerning aid granted by Spain to companies in the Magefesa group and their successors (OJ 1998 L 198, p. 15). However, the present action is concerned only with the alleged failure to comply with the 2002 judgment as regards Decision 91/1.

4. Since Indosa had already been declared insolvent on 19 April 1994 but continued its activities through its 100% subsidiary, namely CMD,[6] the Commission repeatedly asked the Spanish authorities for information on Indosa's state of liquidation. It urged them to take all measures necessary to bring to completion the total liquidation of that undertaking's assets and the cessation of its activities.

5. The Spanish authorities replied that the liquidation of Indosa's assets had not yet been completed, since the liquidation agreement relating to the sale of all the assets and the winding up of Indosa, approved by order of 29 September 2004, was not yet final. It was not until 30 May 2006 that the Spanish authorities informed the Commission that the agreement had become final on 2 May 2006.

6. In its letter of 26 January 2007, the Commission noted that CMD, as a 100% subsidiary of Indosa, was continuing the subsidised activity and the Commission drew the attention of the Spanish authorities to the fact that the effective implementation of Decision 91/1 required the recovery of aid incompatible with the common market from the entity which had actually received it. In response to that letter, the Spanish authorities provided information regarding the procedure for the sale of Indosa's sole asset, that is to say shares in CMD. Finally, by two letters of September 2008, the Spanish authorities stated that there had been no suitable offer for the shares in CMD and that, ultimately, the assets of Indosa had not been sold.

7. By letter of 24 October 2007, the Spanish authorities stated that the aid declared incompatible with the common market by Decision 91/1 had been registered as a claim in the insolvency of Indosa. In July 2008 the Commission requested documentary evidence, though this was not provided by the Spanish authorities.

8. By letters of 8 October 2008 and 13 November 2008, the Spanish authorities informed the Commission that CMD had been declared insolvent on 30 July 2008.

9. By letters of 18 August 2009, 7 September 2009 and 21 September 2009, the Commission asked the Spanish authorities for, first, a detailed timetable showing the date of cessation of CMD's activities and of the procedure for liquidating its assets, secondly, information on the procedure for disposing of the assets, thirdly, evidence that that disposal was carried out under market conditions and, fourthly, evidence that the aid declared incompatible with the common market was registered as a claim against CMD in the insolvency.

10. By letters of 21 September 2009 and 13 October 2009, the Spanish authorities replied, first, that CMD's activities ceased on 30 July 2009, secondly, that the insolvency proceedings were under way before the competent national court (without presenting a detailed timetable as requested by the Commission) and, thirdly, that they did not know whether the aid incompatible with the common market was registered as a claim against CMD. On 1 December 2009, they sent the final list of CMD's creditors approved by the competent national court. The Autonomous Community of the Basque Country was not on that list in relation to the aid declared incompatible with the common market by Decision 91/1.

11. On 20 November 2009, the Commission sent the Kingdom of Spain a letter of formal notice under Article 228(2) EC, stating that it reserved the right, once it had examined the comments of the Member State concerned, or if those comments were not sent to it within the prescribed period, to issue, where appropriate, a reasoned opinion under Article 228(2) EC.

12. In response to that letter, on 26 January 2010 the Spanish authorities informed the Commission that the 2002 judgment was in the course of being complied with, since Indosa and CMD were in the process of being wound up, had no employees and had ceased their activities.

6 — CMD was created by the insolvency administrator for Indosa, in 1994, in order to sell its production. The shares in CMD were Indosa's sole asset.

13. On 18 March 2010, the Commission sent a supplementary letter of formal notice in which it invited the Kingdom of Spain, in accordance with Article 260(2) TFEU, to submit its observations to the Commission within a period of two months from receipt of the letter. The Commission stated that it reserved the right, once it had examined the observations of the Member State concerned, or if those observations were not sent to it within the prescribed period, to bring the case before the Court under Article 260(2) TFEU.

14. The Spanish authorities responded to that supplementary letter of formal notice by letters of 2 June 2010, 9 June 2010 and 29 September 2010, from which it was clear that the Autonomous Community of the Basque Country was not listed among CMD's creditors and that it was going to be a party to the insolvency proceedings, by seeking to have Indosa's liability to the autonomous community in relation to the aid declared incompatible with the common market by Decision 91/1 registered in the schedule of liabilities. By e-mail of 7 July 2010, the Spanish authorities sent the liquidation plan for CMD which had been approved by the national court.

15. In those circumstances, on 22 December 2010 the Commission brought the present action.

II – Procedure before the Court and forms of order sought

16. By its application, the Commission requests that the Court should:

— declare that the Kingdom of Spain has failed to fulfil its obligations under Decision 91/1/EC and Article 260 TFEU, since it has failed to take all the measures necessary to comply with the 2002 judgment;

— order the Kingdom of Spain to pay to the Commission a penalty payment of EUR 131 136 for each day of delay in complying with the 2002 judgment, running from the day on which judgment is delivered in the present proceedings until the day on which the 2002 judgment is fully complied with;

— order the Kingdom of Spain to make a lump sum payment to the Commission, to be calculated by multiplying a daily amount of EUR 14 343 by the number of days over which the infringement continued, from the date of the 2002 judgment until:

  — the date on which the Kingdom of Spain recovered the aids declared unlawful by Decision 91/1, if the Court of Justice finds that those aids have in fact been recovered before judgment is delivered in the present proceedings;

  — the date of judgment in the present proceedings, if the 2002 judgment has not been fully complied with by that date;

— order the Kingdom of Spain to pay the costs.

17. The Kingdom of Spain contends that the Court should:

— dismiss the action and, in the alternative, impose a quarterly penalty payment of EUR 12 269.70 and a daily lump sum payment of EUR 44.80, and;

— order the Commission to pay the costs.

18. Acting under Article 91 of the Rules of Procedure of the Court, on 22 March 2011 the Kingdom of Spain raised an objection of inadmissibility which the Court decided to reserve until final judgment.

19. By order of 13 May 2011, the President of the Court granted leave to the Czech Republic to intervene in support of the form of order sought by the Kingdom of Spain. In its statement in intervention, the Czech Republic focussed on the issue of the admissibility of the action.

III – Assessment

A – *Admissibility of the action*

20. In its objection of inadmissibility, the Kingdom of Spain challenges the proper conduct of the pre-litigation procedure, on the ground of the absence of a reasoned opinion.

21. That objection has its origin in a reform which the Lisbon Treaty introduced into the procedure which must precede infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations.

22. The Kingdom of Spain, supported by the Czech Republic, and the Commission hold different views on whether the proper conduct of the pre-litigation procedure in this case must be evaluated on the basis of Article 228 EC, given that it was initiated by the letter of formal notice of 20 November 2009, that is to say before the entry into force of the Lisbon Treaty, or on the basis of Article 260(2) TFEU, given that that article ought to apply from the entry into force of that Treaty, even if the pre-litigation procedure commenced before that time.

23. The Kingdom of Spain considers that the application of Article 260(2) TFEU would be retroactive and would therefore infringe the principles of legal certainty and of non-retroactivity of rules providing for less favourable penalties.

24. In that regard, it should be noted that infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations must be regarded as a special judicial procedure for the enforcement of judgments, in other words as a method of enforcement.[7] The objective of such proceedings is to secure and guarantee that the law is again complied with.[8] The bringing of proceedings must be preceded by a pre-litigation procedure, the proper conduct of which constitutes an essential guarantee required by the TFEU not only in order to protect the rights of the Member State concerned, but also in order to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.[9]

25. Like that which precedes infringement proceedings, the pre-litigation procedure for infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations was, under Article 228 EC, initially comprised of two successive stages, that is to say a letter of formal notice and a reasoned opinion. In that regard, I cannot concur with the Kingdom of Spain when it says that the way in which the pre-litigation procedure was conducted was the result only of the Commission's administrative practice. As the Commission pointed out in its written observations on the objection of inadmissibility, the stages of the pre-litigation procedure were the direct consequence of Article 228 EC.

7 — See, in that regard, Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 92.

8 — See, to that effect, *Commission* v *France*, cited in footnote 7, paragraph 93.

9 — See, in that regard, Case C-508/10 *Commission* v *Netherlands* [2012] ECR, paragraph 34 and case-law cited. Although that characteristic was laid down by the Court in connection with an action for failure to fulfil obligations under Article 258 TFEU, I am of the opinion that it also applies in infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations under Article 260(2) TFEU.

26. The change brought about by the Lisbon Treaty simplifies and, therefore, accelerates the pre-litigation procedure, by removing the reasoned opinion stage. As a result, Article 260(2) TFEU makes the admissibility of infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations subject only to the condition that the Member State concerned has the opportunity to submit its observations prior to the bringing of an action. In my view, a letter of formal notice inviting the Member State concerned to submit its observations on the failure to comply with the judgment of the Court is sufficient to ensure compliance with the above condition.

27. The question arises whether Article 260(2) TFEU is applicable only to proceedings initiated after the entry into force of the Lisbon Treaty, which would mean that the letter of formal notice should have been sent to the Member State concerned after 1 December 2009, or whether it also applies to those initiated before that date, which would mean that the proper conduct of the pre-litigation procedure should be assessed on the basis of Article 260(2) TFEU for all actions brought after the entry into force of the Lisbon Treaty.

28. On that point, I agree with the Czech Republic that the answer depends on the assessment of whether Article 260(2) TFEU must be regarded as a procedural rule or rather as a substantive rule. However, contrary to what the Czech Republic claims, I do not think that that article should be regarded in itself as a substantive rule.

29. In my view, Article 260(2) TFEU has a mixed nature. It is a substantive rule, which defines and imposes financial penalties for an 'offence' of failing to comply with a judgment of the Court establishing a failure to fulfil obligations. However, with respect to the requirement for a pre-litigation procedure in which the Member State concerned may submit its observations, it is a procedural rule determining the conditions for entitlement to the rights deriving from a substantive rule. That also applies to the requirement that the application must state the amount of the lump sum payment or penalty payment.

30. In that regard, the Court has clearly stated that procedural rules are generally held to apply from the time of their entry into force. [10]

31. The situation would be otherwise if the Lisbon Treaty contained a transitional provision providing that, if the pre-litigation procedure began before 1 December 2009, it should comply with Article 228(2) EC. However, it contains no such provision.

32. Therefore, as regards Article 260(2) TFEU, the proper conduct of the pre-litigation procedure must be evaluated on the basis of that article for all actions brought after 1 December 2009, even if the letter of formal notice initiating the pre-litigation procedure was sent to the Member State concerned before that date.

33. With regard to the Kingdom of Spain's argument that the principle of legal certainty would be infringed by the application of Article 260(2) TFEU in this case, I am able to draw inspiration from the case-law of the Court concerning the principle of legitimate expectations, according to which that principle cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules. [11] I consider that that ruling also applies by analogy to the relationship between the principle of legal certainty and the principle of the immediate application of a procedural rule.

10 — See Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 75 and case-law cited; Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 88, and Case C-17/10 *Toshiba Corporation and Others* [2012] ECR, paragraph 47.

11 — Case C-168/09 *Flos* [2011] ECR I-181, paragraph 53 and case-law cited.

34. In that regard, it remains necessary to note that the Kingdom of Spain cannot claim that, as a result of the evaluation of the proper conduct of the pre-litigation procedure on the basis of Article 260(2) TFEU, it would not be in a position to ascertain unequivocally what its rights and obligations are and to take steps accordingly, as the principle of legal certainty requires.[12] Indeed, even before the Lisbon Treaty the obligation to take the measures necessary to comply with the judgment of the Court already existed under the Union legal order and the Kingdom of Spain was actually informed, by the supplementary letter of formal notice of 18 March 2010, of the fact that the Commission intended to bring the matter before the Court under Article 260(2) TFEU, immediately after the Kingdom of Spain submitted its observations.

35. With regard to the other argument of the Kingdom of Spain, to the effect that the application of Article 260(2) TFEU would infringe the principle of non-retroactivity of rules imposing less favourable penalties, it is sufficient to point out that the Lisbon Treaty has introduced no changes concerning penalties for failure to comply with a judgment of the Court.

36. To conclude, in the present case the Kingdom of Spain had the opportunity, before the action was brought, to submit observations on the infringement alleged by the Commission, as required by Article 260(2) TFEU. This is borne out by the letter of formal notice of 20 November 2009 and the supplementary letter of formal notice of 18 March 2010, by which the Commission invited the Kingdom of Spain to submit its observations on the failure to comply with the 2002 judgment. I am of the opinion that the pre-litigation procedure was conducted in accordance with Article 260(2) TFEU and, for that reason, I propose that the Court should dismiss the objection of inadmissibility raised by the Kingdom of Spain.

B – *The infringement*

37. In the 2002 judgment, the Court found that the Kingdom of Spain, by failing to adopt the necessary measures to comply with Decision 91/1, had failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of Decision 91/1. Compliance with the 2002 judgment thus presupposes the implementation of Decision 91/1 and the implementation of that decision presupposes the recovery of the aid declared unlawful.

38. Accordingly, the finding that the Kingdom of Spain failed to fulfil its obligations under Article 260(1) TFEU depends on whether it has recovered, from the recipients, the aid declared unlawful by Decision 91/1. It should be recalled that the action in the present case concerns only the aid granted to Indosa by the Autonomous Community of the Basque Country.

39. With regard to the change which the Lisbon Treaty made to the pre-litigation procedure preceding infringement proceedings for failure to comply with a judgment of the Court establishing a failure to fulfil obligations, it is first of all necessary to redefine the reference date for assessing whether there has been an infringement. According to the settled case-law on Article 228(2) EC, that date was the date of expiry of the period prescribed in the reasoned opinion.[13]

40. The reasoned opinion stage having been abolished, the reference date for assessing whether there has been an infringement within the meaning of Article 260(2) TFEU should, by analogy with the case-law on Article 228(2) EC, be the date of expiry of the period prescribed in the letter of formal notice or, possibly, in the supplementary letter of formal notice for the submission of observations by the Member State concerned. In the present case, that is 22 May 2010.

12 — See, to that effect, *ThyssenKrupp Nirosta* v *Commission*, cited in footnote 10, paragraph 81.

13 — Case C-496/09 *Commission* v *Italy* [2011] ECR I-11483, paragraph 27 and case-law cited.

41. Since Indosa and its subsidiary, that is to say CMD, are insolvent, it is appropriate to draw attention to the case-law concerning the recovery of aid from insolvent undertakings. According to that case-law, 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 by registration of the liability relating to the repayment of the aid in question in the schedule of liabilities.[14] However, registration of the liability relating to the repayment of the aid in question in the schedule of liabilities can satisfy the requirement for recovery only if, where the State authorities have been unable to recover the full amount of aid, the insolvency proceedings result in the winding up of the undertaking, that is to say in the definitive cessation of its activity, which the State authorities are able to bring about in their capacity as shareholders or creditors.[15]

42. That case-law lays down two cumulative conditions which must be fulfilled for the aid declared unlawful by the Commission decision to be considered recovered. The first condition is the registration of the liabilities relating to the repayment of the aid in question in the schedule of debts in the insolvency and the second is the definitive cessation of the activity subsidised by the aid in question.

43. With regard to the first condition, in the present case it is not disputed that on the reference date, that is to say 22 May 2010, the liabilities relating to the repayment of the aid granted to Indosa by the Autonomous Community of the Basque Country were not registered in the schedule of debts in CMD's insolvency proceedings.

44. It is apparent from the file that the first statement of liability of EUR 16 828.34 was presented by the Autonomous Community of the Basque Country on 10 June 2010, that is after the date of expiry of the period prescribed in the supplementary letter of formal notice. Moreover, the declared amount was not correct. The new statement of liability, this time of EUR 16 498 499, was presented on 3 December 2010. That statement was corrected by the statement of 23 February 2011 for EUR 22 469 459 and, finally, by the statement of 7 December 2011 for EUR 22 683 745. It is clear from the hearing that, following the competent national court's decision of 4 April 2012, liabilities amounting to EUR 22 683 745 were finally registered in CMD's insolvency proceedings.

45. Since the two conditions for determining whether aid declared unlawful by Commission decision has been recovered are cumulative in the case of an insolvent undertaking and I have just shown that one of those conditions has not been fulfilled, I am of the opinion that there is no need to examine whether the second condition has been fulfilled in order to find that there has been a failure by the Kingdom of Spain to fulfil its obligations on the basis of Article 260(2) TFEU.

46. Under those circumstances, it must be found that, by failing to take, by the date of expiry of the period prescribed in the supplementary letter of formal notice for the submission of observations on the alleged infringement under Article 260(2) TFEU, all measures necessary to comply with the 2002 judgment on the recovery of the aid which Decision 91/1 declared unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under that decision and Article 260(1) TFEU.

14 — *Commission* v *Italy*, cited in footnote 13, paragraph 73.

15 — Judgment of 13 October 2011 in Case C-454/09 *Commission* v *Italy*, paragraph 36 and case-law cited.

C – *The penalty payment*

47. The Commission, referring to the method of calculation set out in its communication SEC(2005) 1658 of 13 December 2005 on the application of Article 228 EC,[16] as updated by communication SEC(2010) 923 of 20 July 2010, proposes a daily penalty payment amounting to EUR 131 136. It is of the opinion that that penalty payment, calculated on the basis of a basic flat-rate amount of EUR 640 multiplied by a coefficient for seriousness of 5, a coefficient for duration of 3 and an *n* factor of 13.66, is proportionate to the seriousness and duration of the infringement, in view of the need to give the penalty payment a coercive and deterrent effect.

48. The Commission justified the imposition of a penalty payment by the fact that the aid in question has not yet been recovered and, therefore, Decision 91/1 and the 2002 judgment have still not been complied with. In its written observations, the Commission referred to three conditions necessary for the aid to be regarded as recovered. First, the loans deriving from the aid in question must be registered in the schedule of debts, secondly, the subsidised activity must cease and, thirdly, Indosa's assets must be sold at market price, following an open, unconditional and transparent tendering procedure.

49. At the hearing, the Commission changed its line of argument on that point. It argued that even if the liabilities resulting from the aid in question were ultimately, that is to say on 4 April 2012, registered in the schedule of debts, the Kingdom of Spain's alleged infringement continued, since the subsidised activity did not cease. It therefore appears that the Commission abandoned the condition as to the sale of the assets at market price.

50. As for the Kingdom of Spain, it is of the opinion that, in this case, there is no need to impose financial penalties, since the national authorities have done their utmost to recover the aid declared unlawful by Decision 91/1 and, consequently, it is impossible for any kind of financial penalties to modify their behaviour. With regard, in particular, to a penalty payment, the Kingdom of Spain relied on *Commission* v *Italy*,[17] to argue that because the liabilities relating to the recovery of the aid declared unlawful by Decision 91/1 were registered in CMD's insolvency proceedings, the 2002 judgment was finally complied with and that, for that reason, there is no need to impose a penalty payment.

51. However, in the event that the Court should consider that it is appropriate to impose such penalties, the Kingdom of Spain proposes a quarterly penalty payment of EUR 12 269.70 calculated on the basis of a basic flat-rate amount of EUR 9.98[18] multiplied by a coefficient for seriousness of 1, a coefficient for duration of 1, an *n* factor of 13.66 and, on account of the quarterly application of a penalty payment, a factor of 90.

52. Having regard to the parties' arguments set out above, it is first of all appropriate to determine whether the Kingdom of Spain's alleged infringement based on the failure to comply with the 2002 judgment continued up to the time of the Court's examination of the facts, as required by the case-law concerning the imposition of a penalty payment.[19]

53. As I stated earlier in this Opinion, compliance with the 2002 judgment presupposes the implementation of Decision 91/1 and the implementation of that decision presupposes the recovery of the aid declared unlawful.

16 — OJ 2007 C 126, p. 15.

17 — Cited in footnote 13.

18 — The basic flat-rate amount proposed by the Kingdom of Spain is calculated by multiplying the uniform basic flat-rate amount of EUR 640 set in Commission Communication SEC(2005) 1658 of 13 December 2005 by 25% (since the failure relates to only one of the four undertakings of Magefesa which received the unlawful aid after Decision 91/1) and by 6.24% (since the alleged infringement concerns aid granted by the government of a region which represents 6.24% of Spain's gross domestic product).

19 — See, to that effect, judgment of 17 November 2011 in *Commission* v *Italy*, cited in footnote 13, paragraph 42.

54. I have also noted that, for an undertaking which is insolvent, as in the present case, the case-law imposes two cumulative conditions which must be fulfilled for the aid declared unlawful by the Commission decision to be regarded as recovered, that is to say registration of the liabilities relating to the recovery of the aid in the schedule of debts in the insolvency and the definitive cessation of the activity subsidised by the aid in question. [20]

55. I am of the opinion that the existence of those two cumulative conditions is not called into question by *Commission* v *Italy*, [21] even though the Kingdom of Spain inferred therefrom that a Member State fulfils the obligation to recover unlawful State aid by registering the liabilities at issue in the insolvency proceedings. It is true that, in that judgment, the Court linked the requirement for recovery of the unlawful State aid to the registration of the liabilities in the insolvency proceedings and, simultaneously, expressly rejected the condition as to the sale of the undertaking's assets at market price. [22] However, that does not mean that the Court abandoned the condition as to the cessation of the activity subsidised by the unlawful State aid, which derives from earlier settled case-law. [23]

56. In the present case, the fact remains that, on the date of the end of the oral procedure in this case, liabilities amounting to EUR 22 683 745 relating to the recovery of the aid granted to Indosa by the Autonomous Community of the Basque Country were registered in CMD's insolvency proceedings.

57. The problematic issue is whether the activity subsidised by the aid declared unlawful by Decision 91/1 actually ceased.

58. Although Indosa was declared insolvent in 1994, the activity at issue was pursued through CMD. The latter was also declared insolvent in 2008 and, according to the Kingdom of Spain, the cessation of its activities became definitive following the order of 24 July 2009 made by the competent national court concerning the termination of the employment contracts of all its personnel. However, the Kingdom of Spain itself acknowledged, in its written response to questions from the Court, that the activity in CMD's facilities continued through Euskomenaje, established on 3 September 2009, which uses CMD's premises to manufacture and market products which CMD previously manufactured. That was possible under the authorisation, granted by CMD's insolvency administrators, provisionally to transfer CMD's assets to Euskomenaje.

59. It is true that the Kingdom of Spain has established that the Basque Government took a series of measures to prevent Euskomenaje from pursuing activity on CMD's premises. Nevertheless, the fact remains that, on the date of the end of the oral procedure in this case, Euskomenaje was still pursuing the same activities in CMD's facilities. That fact was confirmed at the hearing, by the Kingdom of Spain itself.

60. I consider that it has been sufficiently established that the condition as to the definitive cessation of the activity subsidised by the unlawful aid was not in this case satisfied on the date of the end of the oral procedure and, therefore, that the State aid declared unlawful by Decision 91/1 cannot be regarded as recovered. For that reason, it is appropriate to impose on the Kingdom of Spain a penalty payment for the purpose of inducing it to put an end as soon as possible to the alleged infringement, which would otherwise tend to persist. [24]

20 — See points 40 and 41 of this Opinion.

21 — Cited in footnote 13.

22 — *Commission* v *Italy*, cited in footnote 13, paragraphs 74 and 75.

23 — *Commission* v *Italy*, cited in footnote 15, paragraph 36 and case-law cited.

24 — See, to that effect, Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 58.

61. As regards the amount of the penalty payment, the Court has repeatedly ruled to the effect that the penalty payment should be set so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned. The basic criteria in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay. In applying those criteria, it is necessary to have regard in particular to the effects of its failure to comply on private and public interests and to the urgency of requiring the Member State concerned to fulfil its obligations. [25]

62. With regard to the first criterion, that is to say the duration of the infringement, in this case more than ten years have elapsed since the date of delivery of the 2002 judgment with which the Kingdom of Spain has failed to comply. That is obviously a very considerable period of time. It must be added that it is the longest period of time on which the Court has had to adjudicate in infringement proceedings for failure to comply with a judgment establishing a failure to fulfil obligations. For that reason, I concur with the Commission that in this case it is appropriate to apply the highest coefficient for duration, that is to say 3.

63. With regard to the second criterion, that is to say the seriousness of the infringement, the Court has already drawn attention to the vital nature of the EC Treaty rules on State aid which are the subject-matter of Decision 91/1 and the 2002 judgment. The importance of the rules infringed in this case is reflected, in particular, in the fact that repayment of unlawfully paid State aid eliminates the distortion of competition caused by the competitive advantage afforded by the aid and removes from the recipient the advantage which it had enjoyed over its competitors. [26]

64. However, on that point, it is necessary in my view to take into consideration the progress in implementing Decision 91/1 and complying with the 2002 judgment which was made after the present action was brought. I would emphasise, in particular, two facts: the first is that the liabilities relating to repayment of the aid granted to Indosa were ultimately registered in CMD's insolvency proceedings and the second is that the national authorities have taken action to bring about the definitive and not merely the formal cessation of the activity subsidised by the unlawful State aid, even though their efforts have not as yet attained the desired outcome.

65. Those two facts justify, in my view, lowering the coefficient for seriousness proposed by the Commission to level 4.

66. With regard to the third criterion, that is to say the ability to pay of the Member State concerned, the Court has held that the method of multiplying the basic amount by a coefficient specific to that Member State is an appropriate means of reflecting that State's ability to pay while keeping the variation between the Member States within a reasonable range. [27] It follows that, in this case, it is appropriate to use an *n* factor of 13.66 for the Kingdom of Spain.

67. Using the proposed coefficients leads to a penalty payment of EUR 104 909 for each day of delay in complying with Decision 91/1 and the 2002 judgment.

68. As for the periodicity of the penalty payment, I consider that a penalty payment calculated on a daily basis is, in the present case, the most appropriate to put an end as soon as possible to the Kingdom of Spain's alleged infringement.

25 — See Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraphs 114 and 115.

26 — See *Commission* v *Greece*, cited in footnote 25 above, paragraphs 118 and 120.

27 — *Commission* v *Italy*, cited in footnote 13, paragraph 65 and case-law cited.

D – *The lump sum*

69. The Commission considers that, having regard to all the legal and factual circumstances pertaining to the Kingdom of Spain's alleged infringement, the effective prevention of future repetition of similar infringements of European Union law requires the adoption of a dissuasive measure, such as a lump sum payment. With regard to the amount of the lump sum payment, it proposes multiplying the amount of EUR 14 343[28] by the number of days which elapsed between the 2002 judgment and the date on which the Kingdom of Spain complied with its obligations or, failing that, the date of the judgment in the present case.

70. In the event that the Court deems it necessary to impose a lump sum payment, the Kingdom of Spain proposes an amount of EUR 44.80 per day, calculated on the basis of a basic flat-rate amount of EUR 3.28[29] multiplied by a coefficient for seriousness of 1 and by an *n* factor of 13.66.

71. With respect to the lump sum payment, it should be recalled that the imposition of such a type of financial penalty cannot be made automatically in the case of a failure to fulfil obligations under Article 260(1) TFEU. According to the Court, that provision of the TFEU confers a wide discretion upon the Court in deciding whether or not to impose such sanctions[30] having regard to all the relevant factors pertaining to both the particular nature of the infringement established and the conduct of the Member State involved.[31]

72. I consider that, in this case, it is in particular the duration of the infringement which militates in favour of the imposition of a lump sum payment. A considerable period of time has elapsed, in so far as it is more than ten years since the delivery of the 2002 judgment with which the Kingdom of Spain has failed to comply.

73. Moreover, the Court has already recognised that repeated engagement in unlawful conduct in a field of Union law may be a criterion for the imposition of a lump sum payment,[32] which is consistent, in my view, with the preventive nature of financial penalties[33]. In the case of the Kingdom of Spain, the Court has on several occasions found failures to fulfil obligations in connection with the non-implementation of Commission decisions declaring State aid unlawful and incompatible with the common market, inter alia in its judgments of 20 September 2007 in *Commission* v *Spain* [34] and 14 December 2006 in *Commission* v *Spain*.[35]

28 — The amount of EUR 14 343 is the result of multiplying a basic flat-rate amount of EUR 210 by a coefficient for seriousness of 5 and a factor of 13.66.

29 — Like the basic flat-rate amount in the case of a penalty payment, the basic flat-rate amount proposed by the Kingdom of Spain for the lump sum payment is the result of multiplying by 25% and by 6.24% the uniform basic flat-rate amount of EUR 210 set in Commission Communication SEC(2005) 1658 of 13 December 2005.

30 — See, to that effect, *Commission* v *France*, cited in footnote 24, paragraph 63, and *Commission* v *Greece*, cited in footnote 25, paragraph 144.

31 — See, to that effect, *Commission* v *France*, cited in footnote 24, paragraph 62; Case C-568/07 *Commission* v *Greece* [2009] ECR I-4505, paragraph 44; Case C-109/08 *Commission* v *Greece* [2009] ECR I-4657, paragraph 51, and Case C-369/07 *Commission* v *Greece*, cited in footnote 25, paragraph 144.

32 — See, to that effect, *Commission* v *France,* cited in footnote 24, paragraph 67, and *Commission* v *Italy,* cited in footnote 13, paragraph 91.

33 — With regard to the preventive nature, see *Commission* v *France,* cited in footnote 24, paragraph 59.

34 — Case C-177/06 [2007] ECR I-7689.

35 — Joined Cases C-485/03 to C-490/03 [2009] ECR I-11887.

74. As regards the lump sum, it should be noted at the outset that the Court is not bound by the Commission proposal and that the determination of that amount falls within its discretion.[36] The lump sum payment must be set in such a way that it is, first, appropriate to the circumstances and, secondly, proportionate both to the infringement that has been established and to the ability to pay of the Member State concerned. The relevant factors in this respect include matters such as the length of time for which the breach of obligations has persisted since the judgment establishing it was delivered and the seriousness of the infringement.[37]

75. In the light of the considerations put forward in points 62 to 64 of this Opinion concerning the duration and seriousness of the Kingdom of Spain's alleged infringement, I consider that the amount of EUR 20 million is appropriate to the circumstances in this case.

IV – Conclusion

76. Having regard to the foregoing considerations, I propose that the Court should:

— declare that, by failing to take, by the date of expiry of the period prescribed in the supplementary letter of formal notice for the submission of observations on the alleged infringement under Article 260(2) TFEU, all measures necessary to comply with the judgment of 2 July 2002 in Case C-499/99 *Commission* v *Spain*, relating to the recovery of the aid which Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel, and small electric appliances declared unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under that decision and Article 260(1) TFEU;

— order the Kingdom of Spain to pay to the European Commission, into the 'European Union own resources' account, a penalty payment of EUR 104 909 for each day of delay in adopting the measures necessary to comply with the judgment in *Commission* v *Spain*, cited above, from one month after the day on which judgment is delivered in the present case until the day on which the judgment of 2 July 2002 is complied with;

— order the Kingdom of Spain to pay to the European Commission, into the 'European Union own resources' account, a lump sum payment of EUR 20 million;

— order the Kingdom of Spain to pay the costs.

36 — See, to that effect, *Commission* v *France*, cited in footnote 24, paragraph 64.

37 — *Commission* v *Italy*, cited in footnote 13, paragraphs 93 and 94.