Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

28 June 2022 *

(Failure of a Member State to fulfil obligations – Liability of Member States for loss or harm caused to individuals by breaches of EU law – Breach of EU law attributable to the national legislature – Breach of the Constitution of a Member State attributable to the national legislature – Principles of equivalence and effectiveness)

In Case C-278/20,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 24 June 2020,

European Commission, represented by, J. Baquero Cruz, I. Martínez del Peral and P. Van Nuffel, acting as agents,

applicant,

v

Kingdom of Spain, represented by L. Aguilera Ruiz, S. Centeno Huerta, A. Gavela Llopis and J. Rodríguez de la Rúa Puig, acting as agents,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin, I. Jarukaitis (Rapporteur) and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra and L.S. Rossi, Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2021,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2021,

gives the following

* Language of the case: Spanish.

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by adopting and maintaining in force Article 32(3) to (6) and the second subparagraph of Article 34(1) of Ley 40/2015 de Régimen Jurídico del Sector Público (Law 40/2015 on the legal system governing the public sector) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89411) ('Law 40/2015'), and the third subparagraph of Article 67(1) of Ley 39/2015 del Procedimiento Administrativo Común de las Administraciones Públicas (Law 39/2015 on the common administrative procedure of the public authorities) of 1 October 2015 (BOE No 236, of 2 October 2015, p. 89343) ('Law 39/2015'), the Kingdom of Spain failed to fulfil its obligations under the principles of effectiveness and equivalence.

I. Spanish law

A. The Constitution

2 Article 106(2) of the Spanish Constitution ('the Constitution') provides that 'private individuals shall, under the conditions established by law, be entitled to compensation for any damage to their property or infringement of their rights, except in cases of *force majeure*, whenever such damage or infringement is the result of the operation of public services'.

B. Organic Law 6/1985

3 Ley orgánica 6/1985 del Poder Judicial (Organic Law 6/1985 on the judiciary) of 1 July 1985 (BOE No 157 of 2 July 1985, p. 20632), as amended by Organic Law 7/2015 of 21 July 2015 (BOE No 174 of 22 July 2015, p. 61593) ('Organic Law 6/1985'), provides in Article 4a(1) that 'the judges and courts shall apply [EU] law in accordance with the case-law of the Court of Justice of the European Union'.

C. Law 29/1998

4 Ley 29/1998 reguladora de la Jurisdicción Contencioso-Administrativa (Law 29/1998 governing the jurisdiction of the administrative courts) of 13 July 1998 (BOE No 167 of 14 July 1998, p. 23516), as amended by Ley 20/2013 de garantía de la unidad de mercado (Law 20/2013 on market unity) of 9 December 2013 (BOE No 295 of 10 December 2013, p. 97953) ('Law 29/1998'), states in Article 31:

'1. Applicants may request that acts and provisions that are open to challenge pursuant to the previous chapter[, entitled "Administrative activity open to challenge",] are declared unlawful and, where appropriate, annulled.

2. They may also request that a particular legal situation is acknowledged and that appropriate measures are adopted to ensure that that situation is fully restored, including compensation for loss or harm, where appropriate.'

5 Article 32(2) of that law provides:

'Where the subject matter of an action is a wrongful act, the applicant may seek a declaration that it is unlawful, an order for the cessation of that act and, where appropriate, the adoption of any other measures provided for in Article 31(2).'

6 Article 37(2) and (3) of that law reads as follows:

'2. Where a number of actions having the same subject matter are pending before a judge or court and where those actions have not been joined, that judge or court is required, after hearing the parties within a common period of five days, to hear one or more of them as a matter of priority and to stay the other actions until a ruling has been given on the first of those actions.

3. Once the judgment [of the case dealt with as a matter of priority] has become final, the registrar … shall pass it on to the applicants concerned by the stay so that they may, within five days, request the extension of its effects in accordance with the conditions laid down in Article 111, or the continuation of the proceedings, or the discontinuance of the action.'

7 Article 71(1)(d) of that law provides:

'Where the judgment upholds the contentious-administrative action:

…

(d) if a claim for compensation for loss or harm is allowed, the right to compensation shall in all cases be declared, and the party obliged to pay the compensation shall also be specified. …'

8 Under Article 110(1) of Law 29/1998:

'In matters relating to taxation, staff of the public authorities and market unity, the effects of a final judgment that has recognised a particular legal situation in favour of one or more persons may be extended to others, pursuant to that judgment, where the following conditions are satisfied:

(a) the interested parties are in the same legal situation as the persons benefiting from the judgment;

(b) the judge or court which made the decision also has territorial jurisdiction to hear and rule on their applications for recognition of that particular situation;

(c) the interested parties request the extension of the effects of the judgment within a period of one year from the final service of that judgment on the persons who were parties to those proceedings. Where an appeal is lodged in the interest of the law or for a review, that period shall begin to run from the final service of the decision giving final judgment on the appeal.'

9 Article 111 of that law provides:

'Where a decision has been taken to stay the proceedings in one or more actions in accordance with Article 37(2) and after final judgment has been given in the proceedings dealt with as a priority, the Registrar shall ask the applicants concerned by the stay to state, within five days, whether they wish to extend the effects of the judgment, or continue the stayed proceedings, or discontinue the action.

If the extension of the effects of that judgment is sought, the judge or court shall grant that extension, except where the situation provided for in Article 110(5)(b) occurs or one of the grounds for inadmissibility of the action provided for in Article 69 of this law are satisfied.'

D. General Tax Code

10 Article 221 of Ley 58/2003, General Tributaria (Law 58/2003 on the General Tax Code) of 17 December 2003 (BOE No 302 of 18 December 2003, p. 44987), in the version applicable to the facts of the case ('the General Tax Code'), provides:

'1. The procedure for recognition of the right to recover undue payments shall be initiated *ex officio* or at the request of the person concerned in the following situations:

(a) where payment of tax debts or penalties has been duplicated;

(b) where the amount paid was greater than the amount payable as a result of an administrative act or a self-assessment;

…'

E. Law 39/2015

11 Article 67 of Law 39/2015, entitled 'Applications to initiate proceedings to establish liability', provides:

'1. Interested persons may apply for civil liability proceedings to be initiated only if their right to seek compensation has not become time-barred. The right to seek compensation shall be time-barred one year after the event or act giving rise to compensation occurred or after its adverse effect became apparent. In cases of physical or psychological harm caused to individuals, the period shall run from the time of recovery or from the determination of the extent of the *sequelae*.

…

In the cases of liability referred to in Article 32(4) and (5) of Law [40/2015], the right to seek compensation shall be time-barred one year after publication in the "*Boletín Oficial del Estado*" or in the "*Official Journal of the European Union*", as appropriate, of the decision finding the rule to be unconstitutional or declaring it contrary to [EU] law.

…'

12 Article 106(4) of Law 39/2015 provides:

'When they declare a provision or an act to be void, the public authorities may determine, in the same decision, the compensation to be awarded to the persons concerned, provided that the conditions laid down in [Article] 32(2) and [in Article] 34(1) of Law [40/2015] are met …'

F. Law 40/2015

13 The preliminary title of Law 40/2015 includes a Chapter IV, entitled 'Liability of public authorities', which contains Articles 32 to 37.

14 Article 32 of that law, which concerns the principles governing the liability of public authorities, provides:

'1. Individuals shall be entitled to compensation from the relevant public authorities for any damage to their property or infringement of their rights where that damage or infringement is the result of the normal or abnormal operation of public services, except in cases of *force majeure* or of loss or harm which, by law, the individual is legally required to bear.

The annulment, by administrative means or by the contentious-administrative courts, of administrative acts or provisions shall not, in itself, give rise to a right to compensation.

2. In any event, the loss or harm claimed must be genuine, economically assessable and particular to a person or to a group of people.

3. Similarly, individuals shall also be entitled to compensation from public authorities for any damage to their property or infringement of their rights arising from the application of legislative acts that are not acts ordering the expropriation of rights which they are not required by law to bear, where the legislative acts in question so provide and subject to the conditions laid down therein.

The State legislature may also be made liable in the following situations, provided that the conditions laid down in the preceding paragraphs are satisfied:

(a) where the loss or harm stems from the application of a legislative provision declared unconstitutional, provided that the requirements referred to in paragraph 4 are met;

(b) where the loss or harm stems from the application of a provision that is contrary to [EU] law, in accordance with the provisions of paragraph 5.

4. If the loss or harm is the result of a legislative provision declared to be unconstitutional, the individual may be awarded compensation if he or she has obtained, before any court, a final decision dismissing an action brought against the administrative act that caused the loss or harm, provided that the individual invoked the unconstitutionality that was subsequently recognised.

5. If the loss or harm is the result of the application of a provision declared to be contrary to [EU] law, the individual may be awarded compensation if he or she has obtained, before any court, a final decision dismissing an action brought against the administrative act that caused the loss or harm, provided that the individual relied on the breach of [EU] law that was subsequently recognised. In addition, all the following conditions must be met:

(a) the rule of law must be intended to confer rights on individuals;

(b) the breach must be sufficiently serious; and

(c) there must be a direct causal link between the non-compliance with the obligation imposed on the responsible authority by [EU] law and the loss or harm suffered by the individuals.

6. The decision finding the legislative provision to be unconstitutional or declaring it contrary to [EU] law shall produce effects from its publication in the "*Boletín Oficial del Estado*" or in the "*Official Journal of the European Union*", as appropriate, unless otherwise provided for in that decision.

7. The responsibility of the state for the proper functioning of the Judiciary shall be governed by [Ley Orgánica 6/1985 del Poder Judicial (Organic Law 6/1985 on the judiciary) of 1 July 1985].

…'

15 Article 34 of Law 40/2015, entitled 'Compensation', provides in the second subparagraph of paragraph 1:

'In the cases of liability referred to in Article 32(4) and (5), loss or harm which occurred within five years before the date of publication of the decision finding that the legislative provision is unconstitutional or declaring the provision to be contrary to [EU] law shall be eligible for compensation, unless otherwise provided for in that decision.'

II. Pre-litigation procedure

16 Following complaints lodged by individuals, the Commission, on 25 July 2016, initiated an EU Pilot procedure against the Kingdom of Spain concerning Articles 32 and 34 of Law 40/2015. The Commission alleged a possible infringement of the principles of equivalence and effectiveness, in so far as they limit the autonomy enjoyed by the Member States when they lay down the conditions governing their liability for infringements of EU law that are attributable to them. Since that procedure was unsuccessful, it was closed and the Commission initiated infringement proceedings.

17 By letter of 15 June 2017, the Commission gave that Member State formal notice to submit its observations on its concerns regarding Articles 32 and 34 of Law 40/2015 and the third subparagraph of Article 67(1) of Law 39/2015, in the light of both those principles. By letter of 4 August 2017, that Member State presented to the Commission the reasons why it considered those provisions to be consistent with those principles.

18 Disagreeing with those explanations, the Commission, on 26 January 2018, issued a reasoned opinion in which it reiterated and expanded on the reasons why it considered that Article 32(3) to (6) and the second subparagraph of Article 34(1) of Law 40/2015 and the third subparagraph of Article 67(1) of Law 39/2005 were contrary to those principles.

19 Following a meeting with the Commission's services on 14 March 2018, the Kingdom of Spain replied to the reasoned opinion by letter of 26 March 2018, maintaining its position. However, by letter of 20 November 2018, that Member State informed the Commission that it had reconsidered its position and that it would shortly send draft legislation intended to bring Spanish law into line with the requirements of EU law. The draft was sent to the Commission on 21 December 2018.

20 Following a further meeting held on 18 March 2019, the Commission sent a document on 15 May 2019 to the Kingdom of Spain setting out the reasons which, in its view, lead to the conclusion that the draft communicated could put an end to the infringement of the principle of equivalence, without, however, putting an end to the infringement of the principle of effectiveness.

21 By letter of 31 July 2019, the Kingdom of Spain stated that the government of that Member State was not in a position to prepare new legislative proposals, as it was solely entrusted with dealing with current business (*Gobierno en funciones*).

22 In those circumstances, the Commission decided to bring the present action.

III. The action

A. Admissibility

23 The Kingdom of Spain claims that the present action is inadmissible, in so far as, by this action, the Commission seeks the redrafting of the Spanish rules on State liability, and it covers situations other than that of the liability of the State legislature, which goes beyond the subject matter of the action as defined by the reasoned opinion.

24 It should be recalled that the subject matter of an action under Article 258 TFEU for failure to fulfil obligations is determined by the Commission's reasoned opinion, so that the action must be based on the same grounds and pleas as that opinion (judgment of 24 June 2021, *Commission* v *Spain (Deterioration of the Doñana natural area)*, C-559/19, EU:C:2021:512, paragraph 160 and the case-law cited).

25 In the present case, it is true that, in its application, the Commission set out a number of general considerations relating to the rules on State liability laid down by Spanish law. Nevertheless, it is absolutely clear from the form of order sought in that application and from the arguments put forward in support of that form of order that, by the present action, the Commission seeks only a declaration from the Court that the Kingdom of Spain has failed to fulfil its obligations under the principles of effectiveness and equivalence by adopting and maintaining in force Article 32(3) to (6) and the second subparagraph of Article 34(1) of Law 40/2015 and the third subparagraph of Article 67(1) of Law 39/2015 ('the contested provisions').

26 It is apparent, moreover, from the reasoned opinion annexed to the application that the Commission referred, in that opinion, to the same provisions as those which form the subject matter of the present action.

27 Furthermore, both in the reasoned opinion and in the application, those provisions are referred to only in so far as they specifically govern the liability of the State legislature for an infringement of EU law attributable to it. In addition, in that reasoned opinion, the Commission already developed the same grounds and pleas as those set out in the application.

28 In those circumstances, the Court finds that the subject matter of the action has not been broadened. It follows that the plea of inadmissibility raised in that regard by the Kingdom of Spain must be rejected and that the present action must be declared admissible.

B. Substance

1. Preliminary observations

29 As a preliminary point, it should be recalled that the principle of State liability for loss and harm caused to individuals as a result of breaches of EU law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 29 and the case-law cited, and of 18 January 2022, *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33, paragraph 42 and the case-law cited).

30 That principle applies to any case of infringement of EU law by a Member State, irrespective of the body of the Member State whose action or omission is the cause of that infringement, including the national legislature, and irrespective of the public authority which, under the law of the Member State concerned, is in principle responsible for making reparation (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur et Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 32 and 36, and of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 46 and the case-law cited).

31 As regards the conditions for establishing the liability of the State for loss or harm caused to individuals as a result of infringements of EU law attributable to it, the Court has repeatedly held that individuals harmed have a right to compensation where three conditions are met: the rule of EU law infringed is intended to confer rights on them; the infringement of that rule is sufficiently serious, and there must be a direct causal link between that infringement and the loss or harm sustained by those individuals (judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 30 and the case-law cited, and of 18 January 2022, *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33, paragraph 44 and the case-law cited).

32 Those three conditions are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that a Member State cannot incur liability under less strict conditions on the basis of national law (judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 66, and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 37 and the case-law cited).

33 Subject to the right to reparation which thus flows directly from EU law, where the three conditions recalled in paragraph 31 above are satisfied, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or harm caused, provided that the conditions for reparation of loss or harm laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness) (judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 31 and the case-law cited, and of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 123).

34 The Commission's action must be examined in the light of the case-law referred to in paragraphs 29 to 33 above.

35 In support of that plea, the Commission puts forward two complaints alleging, first, infringement of the principle of effectiveness and, second, infringement of the principle of equivalence. The Kingdom of Spain contends, primarily, that that action must be dismissed at the outset on the ground that the Commission carried out a partial analysis of the legal remedies available in Spain allowing compensation for loss or harm caused by the State as a result of an infringement of EU law, including in the context of its legislative activity, which renders that action unfounded in its entirety. It submits, in the alternative, that neither of those two complaints is well founded.

36 It is appropriate to analyse the Kingdom of Spain's main line of argument before examining each of the complaints put forward by the Commission.

2. The Commission's focus on certain provisions of the national legal order

(a) Arguments of the parties

37 The Kingdom of Spain claims that the Commission confined itself to a partial analysis of those legal remedies, provided for in the Spanish legal system, which make it possible to remedy infringements of EU law by the public authorities. The analysis presented in support of the present action is therefore insufficient to establish the alleged failure to fulfil obligations and leads to an unlawful reversal of the burden of proof.

38 In the first place, the possibility of establishing the liability of the State legislature is merely a 'mechanism for completing the Spanish legal system' (*cláusula de cierre del sistema*), which is residual or final and cannot be viewed in isolation. It is only by taking account of the entire system of compensation for loss or harm caused by the public authorities in Spain that it is possible to determine whether the legislation on the liability of the State legislature for loss or harm caused to individuals as a result of an infringement of EU law is contrary to the principles of effectiveness and equivalence, which the Commission failed to do.

39 Thus, Spanish law provides, first of all, for a series of procedures for seeking compensation for the harmful action of the public authorities other than in cases of State liability, that is to say, first, the possibility of obtaining compensation in a contentious-administrative action against the act which caused the loss or harm, provided for in Article 31(2), Article 32(2) and Article 71(1)(d) of Law 29/1998, second, the procedure for review *ex officio* of administrative acts, provided for in Article 106(4) of Law 39/2015, in which the administration may award compensation and, third, the procedure for the recovery of undue payments in the area of taxation, provided for in Article 221 et seq. of the General Tax Code.

40 In the context of those procedures, there is no limitation on reliance on EU law or on the possibility for a national court to give a decision on compliance with EU law or to grant compensation in full. The Kingdom of Spain refers, in that regard, to Article 4a of Organic Law 6/1985, to the judgment of the Tribunal Supremo (Supreme Court, Spain) of 7 February 2012 (Case 419/2010, judgment 1425/2012, ES:TS:2012:1425), which recognised the applicant's right to reimbursement of sums paid in respect of the financing of the regulated discount on the ground that the order at issue applied a provision of a Royal Decree-Law, declared to be inapplicable because it contravened EU law, and to the case-law of the Tribunal Constitucional (Constitutional Court, Spain).

41 Next, that Member State refers to the procedural remedy allowing the effects of a judgment to be extended, provided for in Article 37(3) and in Articles 110 and 111 of Law 29/1998. This makes it possible, where the conditions laid down in those provisions are met, to recognise State liability arising from a judgment of the Court finding a national provision to be incompatible with EU law.

42 Finally, in accordance with Article 106 of the Constitution, individuals may be compensated for actions of public authorities which cause them loss or harm considered to be unlawful, that is to say loss or harm which the individual who has been harmed does not have the legal obligation to bear, where there is a causal link between that loss or harm and the administration's activity, and the action is brought within the prescribed limitation period. That procedure is implemented by Article 32 of Law 40/2015.

43 Paragraph 1 of that article envisages compensation for loss or harm suffered in the normal or abnormal operation of public services – the concept of 'public service' being understood in the broad sense of administrative action, that is to say acts and deeds of the administration, including purely material actions or omissions – and makes it possible to obtain compensation for loss or harm caused, first, by acts adopted pursuant to laws or regulations which comply with the Constitution or with the law in general, where there is an individual and particularly intense sacrifice, second, by acts adopted pursuant to regulations declared to be unlawful, where the unlawfulness arises from national or EU law, and third, by administrative acts the unlawfulness of which has been declared in an administrative procedure or in contentious-administrative proceedings, where that unlawfulness arises from national or EU law.

44 Furthermore, paragraph 4 of that article makes it possible to obtain compensation for loss or harm caused by acts adopted pursuant to laws which have been declared to be contrary to the Constitution, while paragraph 5 of that article sets out a right to compensation for loss or harm caused by acts adopted pursuant to laws which have been declared to be incompatible with EU law by the Court.

45 Therefore, the possibility of obtaining compensation on the basis of the liability of the State legislature, as regulated by paragraphs 4 and 5, is merely a specific, residual remedy available to individuals who, having already brought another action, have obtained an unfavourable decision which failed to take into account, respectively, the unconstitutionality or the incompatibility with EU law of the rule at issue.

46 In the second place, a comparative analysis of the rules on the liability of the State in Spain and the rules on the non-contractual liability of the European Union show that in no way can it be concluded that the principle of effectiveness has been infringed on the ground that a specific additional remedy such as that provided for in Article 32(5) of Law 40/2015 was introduced, since the Spanish rules are more favourable to citizens than the rules on the liability of the European Union. In particular, a non-contractual liability action against the European Union cannot be used to circumvent the inadmissibility of an annulment action against the same unlawfulness and which has the same pecuniary objectives. On the other hand, Article 32(5) of Law No 40/2015 provides a means of redress to persons whose actions have been dismissed by a final judgment, in addition to a contentious-administrative action which already permits the overlapping of an application for annulment and an action for damages. In those circumstances, the Kingdom of Spain submits that the principle of effectiveness cannot be interpreted differently depending on whether the harmful act is committed by a Member State or by an EU institution.

47 In the third place, in the absence of harmonisation at EU level, the broad discretion enjoyed by the Member States in establishing their rules on non-contractual liability would have required the Commission, before being able to determine whether the principles at issue have been infringed in Spain, to take into consideration the entire set of rules in Spain relating to compensation for loss or harm caused by the State and the case-law of the Court on the liability of the Member States and of the European Union.

48 In the fourth place, the Commission vitiated its analysis by an error of reasoning which deprived its action, in its entirety, of any basis. Article 32(5) of Law 40/2015 is intended to allow compensation for loss or harm in situations which have become final, in that they have already been rejected in a judgment by ordinary means of redress, by offering compensation which would otherwise be impossible. Although EU law allows a national court not to apply legislation on the ground that it is incompatible with EU law, it does not give it the power to annul a legislative provision with effect *erga omnes* if the national legal system does not provide for such a power, nor does it require compensation to be paid to all individuals to whom a rule of law – declared to be incompatible with EU law by a national court of any kind – has been applied. It requires only that there is a means of obtaining redress in the event of an infringement of EU law, in accordance with the principles of effectiveness and equivalence. Yet such pleas do exist in Spanish law.

49 However, the fact that a national court, hearing an action brought by an individual, held in a judgment that a legislative provision is incompatible with EU law cannot constitute a sufficient ground for another individual to be able to bring, on the basis of that judgment, proceedings to establish State liability under Article 32(5) of Law 40/2015. That approach is contrary to the principle of legal certainty. The *erga omnes* effects of a declaration of incompatibility arise only by virtue of a judgment of the Court of Justice or the Tribunal Constitucional (Constitutional Court), or in certain cases where regulatory provisions have been annulled by the courts which have been given that jurisdiction. The Commission confuses actions for damages with the rules on State liability.

50 It is therefore wrong to claim, as the Commission did during the pre-litigation procedure, that a citizen may, solely on the ground that another citizen has obtained a judgment declaring a statutory provision to be incompatible with EU law, bring a civil liability action on that ground against the State under Article 32(5) of Law No 40/2015. That remedy is available only where a judgment of the Court of Justice declares such a provision to be incompatible with EU law, precisely because of the *erga omnes* effects of such a judgment.

51 In any event, the Commission cannot call into question, on the basis of the principle of effectiveness, the actual manner in which the rules on State liability are structured in the Spanish legal system which does not make provision for a direct civil liability action against the State to be brought before a court. An individual seeking compensation for loss or harm caused by public authorities should always begin by applying to the administration for it to acknowledge the liability of the public authorities and, where appropriate, for it to uphold that claim for compensation, whether the liability arises from an act of the administration, the courts or the legislature. In the event of an express or tacit rejection of that claim, the individual would have to bring an action before an administrative court which has the task of assessing the lawfulness of the decision rejecting liability. In general, the unlawfulness is declared and compensation is obtained in such proceedings.

52 State liability arising from a declaration of incompatibility issued by the Court of Justice, provided for in Article 32(5) of Law 40/2015, constitutes another remedy, which is complementary and non-exclusive, available to those whose applications were initially rejected. The existence of that remedy does not in any way prevent national courts from disapplying legislation that is contrary to EU law and from awarding compensation in the corresponding action, or by means of an individualised action for damages. The complementary nature of that remedy is confirmed by paragraph 3 of that article, which introduces that remedy by the adverb 'also'.

53 The Commission submits that the possible existence of other remedies consistent with the principles of effectiveness and equivalence does not guarantee that the rules applicable to the liability of the State legislature are consistent with those principles. Although the contested provisions must be analysed in their context, the objective of that analysis is to determine whether those provisions, and not all the legal remedies available in the national legal system, are such as to ensure that adequate and effective means exist to uphold the rights conferred by the EU legal order where the legislature infringes EU law. As a result of those provisions, all Spanish courts, whatever the level, are required to dismiss non-contractual liability claims against the State legislature which are not supported by a previous judgment of the Court of Justice or to make a reference to the Court of Justice for a preliminary ruling before such claims can be upheld, even if they are not bound by such an obligation under Article 267 TFEU.

54 The various procedures relied on by the Kingdom of Spain have different purposes from proceedings seeking to establish the liability of the State legislature for an infringement of EU law – the only proceedings at issue in the present case. They are therefore not relevant for the purposes of the present case.

55 In particular, as regards the principle of effectiveness, the indirect means of obtaining compensation through the liability of the administration can take effect only where the Court has already held that the legislative provision at issue is contrary to EU law. In that regard, the Commission submits that, in the Spanish legal system, the judicial body responsible for reviewing administrative acts does not have jurisdiction to rule on the question whether legislative provisions are contrary to EU law. Consequently, if the administrative act which infringes EU law complies with national legislation, that court cannot, in accordance with Article 32(5) of Law 40/2015, award compensation for the loss or harm caused by that infringement without seeking a preliminary ruling, which would be contrary to the principle of effectiveness.

56 Article 32(5) of Law 40/2015 cannot be regarded as a residual provision, because it specifically governs compensation for loss or harm caused by a legislative provision that contravenes EU law. In any event, if a Member State decides to separate the liability of the State legislature from the general liability of the State, by subjecting it to specific provisions, those provisions must comply with the principles of effectiveness and equivalence.

57 As for the conditions governing the non-contractual liability of the European Union, they are also irrelevant to the present case. Only the procedural requirements laid down in Article 32(5) of Law 40/2015 are criticised on the basis of the principle of effectiveness, while the substantive conditions set out in that provision are criticised having regard to the principle of equivalence.

(b) Findings of the Court

58 As a preliminary point, it should be noted that, even if the Kingdom of Spain's argument set out in paragraphs 37 to 52 above were well founded, it would have an effect only on the assessment of the complaint alleging infringement of the principle of effectiveness. The Commission's complaint alleging infringement of the principle of equivalence is limited to comparing a civil liability action against the State legislature based on an infringement of EU law, provided for in Article 32(5) of Law 40/2015, with a civil liability action against the State legislature based on an infringement of the Constitution, provided for in Article 32(4) of that law. Thus, for the purposes of analysing the second complaint, it is, in any event, irrelevant that Spanish law also makes provision, as the case may be, for other legal remedies enabling individuals to obtain compensation for loss or harm caused to them by the public authorities as a result of an infringement of EU law.

59 That said, it should be recalled, as regards, in the first place, the Kingdom of Spain's line of argument set out in paragraphs 38 to 45 above, that, in accordance with the settled case-law of the Court in respect of the principle of effectiveness, every case in which the question arises as to whether a national procedural provision makes the exercise of rights conferred on individuals by the legal order of the European Union practically impossible or excessively difficult must be analysed by reference to the role of that provision in the proceedings, the way in which the proceedings are conducted and their special features, before the various national bodies, taking into account, where appropriate, the principles forming the basis of the national judicial system concerned, such as, inter alia, the principle of legal certainty and the necessary proper conduct of proceedings (judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraphs 36 and 37 and the case-law cited, and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 63 and the case-law cited).

60 However, it does not follow, in every case in which the Commission considers that a national procedural provision applicable to a legal remedy provided for by a Member State undermines the principle of effectiveness, that that institution is required, in order to demonstrate that its position is well founded, to examine systematically all the legal remedies available in the legal system of that Member State. According to the wording of that case-law, the assessment of compliance with the principle of effectiveness does not require an analysis of all the legal remedies available in a Member State, but a contextualised analysis of the provision which allegedly undermines that principle, which may entail, as the Advocate General has also observed in point 40 of his Opinion, the analysis of other procedural provisions applicable to the legal remedy the effectiveness of which has been called into question, or the analysis of legal remedies which have the same purpose as that remedy.

61 In the present case, the Commission's complaint alleging infringement of the principle of effectiveness relates only to certain procedural rules, laid down in the provisions referred to in paragraph 25 above, applicable to a civil liability action against the State for infringements of EU law attributable to the legislature.

62 It follows that the Kingdom of Spain's line of argument, set out in paragraphs 38 to 45 above, may establish that the complaint relating to the infringement of the principle of effectiveness is unfounded only if one or more of the procedures or legal remedies relied on by that Member State enabled individuals to obtain compensation for the loss or harm caused to them by the legislature as a result of an infringement of EU law.

63 In that respect, as regards, first of all, the procedures identified in paragraph 39 above, it must be stated that the possibility of obtaining compensation for any loss or harm in an contentious-administrative action, as provided for in Article 31(2) and Article 71(1)(d) of Law 29/1998, differs, by its nature, from the rules on the liability of the State legislature.

64 It is true that, as regards a situation in which, on the one hand, the loss or harm stems from an act or omission on the part of the legislature, contrary to EU law, and, on the other, there is an administrative act open to challenge, the Kingdom of Spain has, in its pleadings and at the hearing, inter alia referred to the judgment of the Tribunal Supremo (Supreme Court) mentioned in paragraph 40 above, in support of its position that that court recognises that the administrative courts have jurisdiction to assess the compatibility of a legislative provision with EU law in order to declare it to be inapplicable in a particular case, on the ground that it is not compatible, and accordingly in order to uphold a contentious-administrative action against the administrative act implementing that provision, and, where appropriate, in such proceedings, in order to reinstate the applicant's legal situation, in the present case through the reimbursement of sums unduly paid.

65 It cannot therefore be ruled out that the contentious-administrative remedy, provided for in Article 31(2) of Law 29/1998, affords an individual who has been harmed by an act or omission on the part of the legislature, contrary to EU law, the possibility, in certain circumstances, of having his or her rights reinstated as conferred on that individual by EU law.

66 However, it should be pointed out that it is not apparent from the material submitted to the Court that that would be the case in all circumstances in which an individual suffered loss or harm as a result of an act of the legislature, in particular where the provision of EU law alleged to have been infringed cannot, due to its lack of direct effect, have the consequence that the contested legislative provision does not apply (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 68) or where the loss or harm is the result of the legislature's failure to act.

67 In that regard, although it is true that the Kingdom of Spain submitted at the hearing that Spanish law does not draw a distinction between whether or not the provision of EU law at issue has direct effect and that the Court of Justice accepts that, solely on the basis of domestic law, a national court may disapply any provision of national law which is contrary to a provision of EU law that does not have such effect (see, to that effect, judgment of 18 January 2022, *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33, paragraph 33), the fact remains that, in the absence of an administrative act open to challenge, that legal remedy is not available to individuals, in that they may not use that remedy in order to obtain compensation for loss or harm which, whilst stemming from an act or omission on the part of the national legislature, did not materialise in an administrative act, or where the application for recognition cannot result in the adoption of such an administrative act on the basis of Article 31(2) of Law 29/1998.

68 Finally, as regards the line of argument set out in paragraph 51 above, the Kingdom of Spain argued, first, that in the procedure laid down in Article 31(2) of Law 29/1998 it was 'almost always' possible to seek compensation for loss or harm resulting from the legislature's infringement of EU law, thus implicitly acknowledging that that is not the case in every instance. Second, the fact that an individual may trigger the adoption of an administrative act by making a compensation claim before the administration does not make it possible to establish the liability of the legislature in all the situations referred to in the case-law cited in paragraphs 30 and 31 above, since the Kingdom of Spain itself referred in its written pleadings to the judgment of the Tribunal

Supremo (Supreme Court) of 18 November 2020 (Case 404/2019, judgment 1534/2020, ES:TS:2020:3936), from which it is apparent that the provision which infringed EU law must have given rise to the specific administrative activity that caused the loss or harm for which compensation is sought.

69 For all the reasons set out in paragraphs 64 to 68 above, the existence of the contentious-administrative remedy provided for in Article 31(2) of Law 29/1998 is not sufficient to reject the Commission's first complaint from the outset.

70 Similarly, neither the legal remedy provided for in Article 32(2) of Law 29/1998, which relates only to cases of wrongful acts on the part of the administration, nor the procedure for the recovery of undue payments in the area of taxation, provided for in Article 221 et seq. of the General Tax Code, which is intended solely to enable an individual to recover from the public authority concerned sums of money which the latter has, by definition, unlawfully levied, are sufficient in that respect, in particular because of their scope, which is limited to very specific fields that do not cover all of the situations in which the liability of the State legislature for an infringement of EU law may be established and give rise to compensation.

71 As regards the *ex officio* review procedure for administrative acts, provided for in Article 106(4) of Law 39/2015, it allows an administrative authority which declares an act or a provision to be void to determine, in the same decision, the compensation to be awarded to the persons concerned. However, it follows from the wording of that provision that that possibility is available only in relation to loss or harm caused by public authorities, and there is nothing to indicate that it would enable an individual to be compensated for loss or harm caused to him or her by an act or a failure to act on the part of the legislature that contravenes EU law.

72 Next, as regards the procedure allowing the effects of a judgment to be extended, pursuant to Article 110(1) of Law 29/1998, this allows the effects of a final judgment, which has recognised an individual legal situation in favour of a person, to be extended, under the conditions laid down in that provision, to other persons in the same legal situation. However, recourse to that possibility presupposes that that legal situation has been established beforehand. Consequently, even if it were accepted that it allows the acknowledgment of the national legislature's liability to be extended for an infringement of EU law attributable to that body to interested parties in the same legal situation as persons who have obtained a judgment acknowledging that liability towards them, the implementation of that extension procedure requires that that liability must have been established beforehand in an earlier action. It cannot therefore remedy the shortcomings alleged by the Commission in its first complaint.

73 The same is true of the possibility of extending the effects of a judgment, pursuant to Article 37(3) and Article 111 of Law 29/1998, which, in essence, applies only to cases which had been stayed pending the final outcome of a related case dealt with as a priority.

74 Finally, as regards the remedy which specifically makes it possible to establish the liability of the State, it should be noted that, as the Kingdom of Spain states, Article 32 of Law 40/2015 provides for various situations in which that liability may be established. However, only paragraphs 3 to 6 of that article relate specifically to the liability of the State legislature.

75 Thus, paragraph 1 of that article makes it possible for individuals to be compensated by the relevant public authorities for any damage to their property or infringement of their rights where that damage or infringement is the consequence of the normal or abnormal operation of public

services, except in cases of *force majeure* or of loss or harm which, according to the legislation, the individual is legally required to assume, since that provision stipulates that the annulment, by administrative means or by contentious-administrative proceedings, of acts or administrative provisions does not in itself give rise to a right to compensation.

76 Although that remedy may indeed be regarded as the ordinary legal remedy for establishing the liability of the State, its availability presupposes the 'operation of public services', a concept which does not refer to the legislature. Therefore, that remedy does not cover compensation for loss or harm caused directly by an act or omission on the part of the national legislature as a result of an infringement of EU law where that loss or harm cannot be attributed to an activity of the public services.

77 Moreover, as the Advocate General also observed in point 57 of his Opinion, the specific provisions relating to the liability of the State legislature, laid down in Article 32(3) to (6) of Law 40/2015, would be pointless if the remedy provided for in Article 32(1) of that law already made it possible to establish the liability of the State for loss or harm caused by the national legislature.

78 As regards the first subparagraph of Article 32(3) of that law, about which the Kingdom of Spain stated at the hearing that it was the general remedy for establishing the liability of the State, including for infringements of EU law attributable to it, it should be noted that, as the Kingdom of Spain observed, the second subparagraph of Article 32(3) stipulates that the liability of the State legislature may 'also' be established where the requirements referred to in paragraph 4 or paragraph 5 of that article are met. It must therefore be concluded that, as that Member State submits, the remedies provided for in those two paragraphs constitute additional or complementary remedies making it possible to establish the liability of the State legislature, in particular in the case of an infringement of EU law, in addition to the general legal remedy provided for in the first subparagraph of paragraph 3 of that article.

79 However, the first subparagraph makes the possibility of obtaining compensation under that provision subject to the condition that the legislative act giving rise to the loss or harm makes provision for it and that the conditions laid down in that act are satisfied. Apart from the fact that that possibility appears, from the outset, not to exist where the loss or harm results from a failure to act on the part of the legislature, the mere fact that obtaining compensation under that subparagraph is thus subject to conditions is sufficient to preclude the action provided for in that subparagraph from being regarded as a legal remedy capable of addressing the inadequacies alleged by the Commission as regards the effectiveness of the rules on the liability of the State legislature for infringements of EU law attributable to it.

80 The argument, advanced by the Kingdom of Spain at the hearing, that the first subparagraph of Article 32(3) of Law 40/2015 is interpreted broadly by the Tribunal Supremo (Supreme Court), which applies it flexibly in order to ensure effective judicial protection of the rights of individuals, cannot rebut the finding made in the preceding paragraph.

81 It should be recalled that, although the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (judgments of 8 June 1994, *Commission* v *United Kingdom*, C-382/92, EU:C:1994:233, paragraph 36 and the case-law cited, and of 16 September 2015, *Commission* v *Slovakia*, C-433/13, EU:C:2015:602, paragraph 81 and the case-law cited), the existence of case-law, even from a supreme court, cannot, in view of the fundamental nature of the principle of State liability for infringement of EU law attributable to it (see, to that effect, judgment of 9 September 2015,

Ferreira da Silva e Brito and Others, C-160/14, EU:C:2015:565, paragraph 59) and in view of the considerations set out in paragraph 76 above, suffice to ensure, with the requisite clarity and precision, that the first subparagraph of Article 32(3) of Law 40/2015 provides a remedy capable of dismissing, from the outset, the criticisms made by the Commission in its first complaint.

82 Consequently, since none of the procedures or remedies relied on by the Kingdom of Spain in paragraphs 38 to 45 above actually allows individuals to establish the liability of the State legislature in order to obtain compensation for loss or harm caused to them by infringements of EU law attributable to that State, the Commission cannot be criticised for having focused its analysis on Article 32(5) of Law 40/2015, read in conjunction with paragraphs 3, 4 and 6 of that article, and on the second subparagraph of Article 34(1) of Law 40/2015 and the third subparagraph of Article 67(1) of Law 39/2015, since those provisions are the only national provisions which specifically allow for the possibility of establishing that liability.

83 In the second place, as regards the Commission's failure to take account of the rules governing the non-contractual liability of the European Union, it follows from the case-law referred to in paragraph 59 above that the assessment of whether a procedural provision complies with the principle of effectiveness requires that that assessment be carried out not in relation to provisions laid down in other legal systems, but by reference to the importance of that provision in the proceedings as a whole, the way in which the proceedings are conducted and the special features of that provision, before the various national bodies of the Member State concerned. Accordingly, the Kingdom of Spain's criticisms of the effectiveness of the rules governing the non-contractual liability of the European Union cannot in any event lead to the Commission's first complaint being rejected at the outset.

84 In the third place, the margin of discretion which Member States enjoy when laying down their rules on liability for the loss or harm caused to individuals by infringements of EU law attributable to them does not exempt them, when exercising that discretion, from complying with their obligations deriving from EU law (see, by analogy, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 111 and the case-law cited). Consequently, they are, in particular, required to observe the principle of effectiveness when exercising that discretion.

85 In the fourth place, as regards the arguments set out in paragraphs 48 to 51 above, it must be stated that the Commission is not seeking to call into question the actual way in which the rules on the liability of the State are structured in the Spanish legal order. The sole purpose of the present action is to establish whether the rules on the liability of the State legislature, as laid down in the contested provisions, enables individuals to obtain compensation, in compliance with the principles of effectiveness and equivalence, for loss or harm caused to them by the national legislature as a result of an infringement of EU law.

86 Since, first, none of the procedures or remedies relied on by the Kingdom of Spain, referred to in paragraphs 38 to 45 above, makes it possible to establish at the outset that such is the case and, second, the general provision which, according to the statements made by that Member State at the hearing, is relevant in that regard, namely the first subparagraph of Article 32(3) of Law 40/2015, does not, as has already been found in paragraphs 79 to 81 above, provide for an effective possibility of establishing, in all of the situations in which the infringement of EU law must be compensated in accordance with the case-law referred to in paragraphs 30 and 31 above, the liability of the State legislature, it is necessary that the only remedy laid down for that purpose

for cases of infringement of EU law, that is to say the one laid down in Article 32(5) of that law, is framed in such a way, inter alia, as not to make it impossible or excessively difficult in practice to obtain compensation.

87 Lastly, since it follows from all of the foregoing that the Commission cannot be criticised for having focused the present action solely on the provisions of Spanish law relating to the State's liability for the infringements of EU law attributable to it, it cannot be held that the Commission's analysis led to an unlawful reversal of the burden of proof.

88 Furthermore, in the light of all those considerations, the fact that the rules on the liability of the State legislature, as conceived by the contested provisions, constitute a 'mechanism for completing the Spanish legal system' does not mean either that the Commission's action, in so far as it seeks to challenge the effectiveness of that system of liability alone, should be dismissed from the outset as unfounded.

89 It follows from all the foregoing that the principal argument submitted by the Kingdom of Spain must be rejected, and the examination of the present action must continue by analysing the complaints put forward by the Commission.

3. First complaint, alleging breach of the principle of effectiveness

(a) The provisions of Article 32 of Law 40/2015

90 The Commission submits that the three cumulative conditions under Article 32(5) of Law 40/2015 governing compensation for loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law, taken in isolation or together, make it impossible or excessively difficult in practice to obtain reparation.

(1) First part, concerning the condition requiring a declaration by the Court that the provision applied is incompatible with EU law

(i) Arguments of the parties

91 The Commission observes, as a preliminary point, that the fact that compensation for loss or harm caused by the State legislature as a result of an infringement of EU law is conditional on there being a decision of the Court declaring that the legislative provision applied is incompatible with EU law stems from Article 32(5) of Law 40/2015, in so far as that provision provides that the loss or harm must be the result 'of the application of a rule declared to be contrary to EU law', read in conjunction with paragraph 6 of that article, and the third subparagraph of Article 67(1) of Law 39/2015, which refer to the publication in the *Official Journal of the European Union* of the decision declaring that EU law was infringed.

92 In that regard, the Commission submits, first, that only the decisions of the Court given in actions for a declaration of failure to fulfil obligations include a declaration that national law is incompatible with EU law. Moreover, even assuming that any decision of the Court is sufficient to satisfy the condition at issue in the context of the first part, it is settled case-law that it is not essential for the Court to have given a ruling in order for the existence of a sufficiently serious

infringement of EU law to be established and that it is contrary to the principle of effectiveness to make compensation for the loss or harm caused by an infringement of EU law attributable to a Member State subject to the requirement for a prior decision of the Court.

93 Second, the courts having jurisdiction to hear and determine a civil liability action against the State, including because of the activity of the legislature, should have jurisdiction, themselves, to give a ruling, for the purposes of the case in question, on all the conditions for establishing State liability, including the condition relating to infringement of EU law, without having to rely on an earlier judgment of the Court and without necessarily having to make a reference to the Court for a preliminary ruling or wait for a decision of the Court in an action for a declaration of failure to fulfil obligations. That does not mean that every court must be able to annul a national rule with effect *erga omnes*.

94 Third, the Commission states that the Kingdom of Spain accepts that that remedy may be exercised only if there is a prior decision of the Court, but that that is justified by the fact that, where a national court has dismissed an action brought against the administrative act which caused the loss or harm, a decision of the Court having effect *erga omnes* is necessary in order to be able, in a subsequent action for compensation, to exceed the force of *res judicata* of the decision delivered by that court and to ensure legal certainty. However, it follows from the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), that a decision dismissing an action concerning an administrative act has the force of *res judicata* before a court of any kind only as regards the validity of the administrative act, and not as regards whether or not there is a right to compensation.

95 The Kingdom of Spain contends that Spanish law does not in any way make compensation for the loss or harm caused by an infringement of EU law subject to the prior existence of a decision of the Court. Contentious-administrative actions, actions for the recovery of undue payments or actions seeking to establish State liability for acts of public authorities make no distinction and contain no stipulation to that effect.

96 Any Spanish court could declare a statutory provision to be incompatible with EU law and could, where it finds an act, an action or an omission on the part of the national legislature to be unlawful on the ground that it is incompatible with EU law, disapply that provision and, where appropriate, award the necessary compensation as a result of the annulment of the act or the action, or the declaration that the omission is unlawful, without the need for a prior decision of the Court confirming that incompatibility. The fact that a particular case, linked to a decision of the Court declaring a statutory provision to be incompatible with EU law, is provided for in Article 32(5) of Law 40/2015 does not deprive Spanish courts of such powers. In addition, any individual who considers that not all the loss or harm which he or she suffered has been made good, even though that individual has obtained the annulment of the unlawful act, may claim compensation from the administration, in accordance with Article 4a of Organic Law 6/1985 and Law 29/1998.

97 By Article 32(5) of Law No 40/2015, Spanish law provides, moreover, that, even in cases where the application for annulment of the administrative act has been dismissed and that act becomes final, the fact that it has become final may subsequently be remedied by an action for damages. However, in order thereby to go beyond the force of *res judicata* of a dismissal decision of a Spanish court, a judgment of the Court of Justice is necessary, and this does not lead to a breach of the principle of effectiveness.

98 The Commission misconstrues how the rules on State liability in Spain operate and the power of review exercised by the administrative courts. By its specific requirements, Article 32(5) of Law No 40/2015 seeks only to prevent an individual from being able to reopen compensation proceedings on the sole ground that another individual, before another national court, has obtained a favourable judgment. Only a judgment having an *erga omnes* effect can have such an effect of 'reviewing' other judgments, if legal certainty is not to be undermined, and in the Spanish legal system only certain courts have jurisdiction to annul a provision of a general nature with *erga omnes* effect.

99 Requiring the establishment of an autonomous remedy for non-contractual liability for loss or harm caused by the national legislature as a result of an infringement of EU law, by ignoring the individualised application of the statutory provision concerned and without having regard to compliance with any time limit for bringing such an action, would go well beyond the requirements of the principle of effectiveness and would negate the Member States' power to regulate the non-contractual liability of the State.

100 The Commission also makes an error with regard to the type of decision referred to in Article 32(5) of Law 40/2015. The term '*incumplimiento*' must be understood not in the sense of a 'failure to fulfil an obligation', but in the sense of 'infringement' or 'breach'. That provision therefore does not merely refer to a judgment of the Court delivered in proceedings brought under Article 258 TFEU.

(ii) Findings of the Court

101 Article 32(5) of Law 40/2015 provides that, if the loss or harm results from the application of a provision held to be contrary to EU law, an individual may be compensated if he or she has obtained, before any body, a final decision dismissing an action against the administrative act which caused the loss or harm, provided that that individual has relied on the subsequently recognised infringement of EU law, subject to the conditions set out in points (a) to (c) of Article 32(5) being satisfied. It is, moreover, common ground between the parties that the term 'provision' used in Article 32(5) must be understood as referring, like Article 32(4) of that law, to a 'legislative provision'.

102 As regards the second subparagraph of Article 34(1) of Law 40/2015, it states that, in the cases of liability referred to in Article 32(5) of that law, loss or harm which occurred within five years before the date of publication of the decision declaring the provision to be contrary to EU law may be eligible for compensation, unless otherwise provided for in that decision, while the third subparagraph of Article 67(1) of Law 39/2015 states that, in those same cases of liability, the right to seek compensation is prescribed one year after publication of that decision in the Official Journal.

103 It follows that the Commission rightly maintains that the contested provisions lay down, as a condition for an individual to be able to be compensated for loss or harm caused to him or her by an infringement of EU law attributable to the national legislature, that that infringement has previously been established by the Court.

104 However, the Court has already held that to make the reparation, by the Member State, of loss or harm which it caused to an individual in breach of EU law conditional upon the requirement that there must have been a prior finding by the Court of an infringement of EU law attributable to that Member State is contrary to the principle of the effectiveness of that law (see, to that effect,

judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 95). Similarly, it has already held that compensation for the loss or harm caused by a breach of EU law attributable to a Member State cannot be conditional on the requirement that the existence of such a breach must be clear from a preliminary ruling delivered by the Court (judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 38 and the case-law cited).

105 It follows, moreover, from the case-law referred to in paragraph 30 above that those principles are valid no matter what body of the Member State is responsible for the action or omission which results in the infringement of EU law.

106 Consequently, it is immaterial, for the purposes of assessing the merits of this part of the plea, whether, as the Commission maintains, the contested provisions require a decision by the Court finding that the Kingdom of Spain has failed to fulfil one of its obligations under EU law or whether, as that Member State maintains, those provisions must be understood as referring to any decision of the Court from which it may be inferred that an act or omission on the part of the Spanish legislature is incompatible with EU law. It follows from the case-law referred to in paragraph 104 above that, in any event, compensation for loss or harm caused by a Member State, including by the national legislature, due to an infringement of EU law cannot, without infringing the principle of effectiveness, be made subject to the Court delivering a prior decision finding that the Member State concerned has failed to fulfil its obligations under EU law or from which it is apparent that the act or omission giving rise to the loss or harm was incompatible with EU law.

107 To that end, it is nevertheless necessary to assess whether, as the Kingdom of Spain maintains, other legal remedies make it possible to establish the liability of the State legislature without, in the context of those remedies, the requirement for that prior decision of the Court to exist.

108 First of all, it has already been held in paragraphs 63 to 82 above that none of the procedures or remedies relied on by the Kingdom of Spain in paragraphs 95 and 96 or in paragraphs 38 to 45 above guarantees that an individual may, in all of the situations in which the infringement of EU law must be eligible for compensation in accordance with the case-law referred to in paragraphs 30 and 31 above, obtain appropriate compensation for the loss or harm caused to him or her by an infringement of EU law attributable to the national legislature.

109 Next, in so far as the arguments set out in paragraphs 97 to 99 above correspond, in essence, to those already rejected in paragraphs 85, 86 and 88 above, they must also be rejected for the same reasons.

110 Finally, in so far as, by that line of argument, the Kingdom of Spain claims, in essence, that, by the present action, the Commission seeks to require that a legal remedy be made available, enabling any person to establish the liability of the State legislature by disregarding any individual assessment or compliance with a time limit for bringing such an action, it must be held that that is based on an incorrect premiss as to the scope of the present action and must therefore be rejected.

111 Although, by the present action, the Commission seeks to ensure that an individual harmed by an infringement of EU law attributable to the Spanish legislature may obtain compensation for that harm, even where there is no administrative act open to challenge, that institution does not in any way call into question the condition laid down in Article 32(2) of Law 40/2015, according to

which the loss or harm for which compensation is sought must, inter alia, be individualised vis-à-vis a person or a group of persons, and which, under the second subparagraph of Article 32(3), also applies to actions under Article 32(5) of that law.

112 Nor does it dispute that a civil liability action against the State legislature is to be subject to a limitation period, since it is, in principle, compatible with the principle of effectiveness to lay down reasonable time limits for bringing proceedings, even if, by definition, the expiry of those periods entails the dismissal, in whole or in part, of the action brought (see, to that effect, judgment of 7 November 2019, *Flausch and Others*, C-280/18, EU:C:2019:928, paragraph 54 and the case-law cited).

113 In the light of those factors, the first part of the first complaint must be upheld.

(2) Second part, concerning the condition that the individual harmed must have obtained, before any court, a final decision dismissing an action against the administrative act which caused the loss or harm

(i) Arguments of the parties

114 The Commission submits that, although EU law does not preclude the application of national legislation which provides that an individual cannot obtain compensation for loss or harm which he or she has wilfully or negligently failed to avert by using a legal remedy, that is true only on condition that the use of that remedy is not excessively difficult and may reasonably be required of the person harmed. Since that requirement is imposed in absolute and unconditional terms by Article 32(5) of Law 40/2015, it is contrary to the principle of effectiveness.

115 Neither the fact that a civil liability action against the State legislature constitutes a supplementary mechanism for the ordinary rules on State liability, nor the fact that it is necessary to protect legal certainty, nor the fact that, in Spain, there are other procedural remedies for asserting the rights conferred by EU law makes it possible to remedy that infringement of the principle of effectiveness.

116 Furthermore, the administration often confines itself to adopting regulatory acts applying legislative provisions, without having any discretion, and national legislatures are in a special position in relation to EU law, since they must comply with primary and secondary EU law as a whole. Consequently, direct infringements of EU law by national legislatures are neither unusual nor difficult to envisage.

117 Moreover, it is irrelevant from the point of view of the principle of effectiveness that the final judgment required may have been delivered by any court, since it is the very requirement of such a judgment that is incompatible with that principle in that no exception is provided for in cases in which the exercise of the legal remedy required causes the persons harmed excessive difficulties or cannot reasonably be required of them.

118 The Kingdom of Spain claims, first of all, that the condition at issue in the context of the second part of the first plea is imposed because of the complementary nature of the rules on the liability of the State legislature and the need to reconcile the principle of compensation for loss or harm caused by the legislature with the principle of legal certainty. It is unlikely that loss or harm could be caused by an act of the legislature in the absence of any administrative implementing act and, in

order to determine the existence of a right to compensation, it would in any event be necessary to assess on a case-by-case basis the unlawfulness of the loss or harm suffered, since a declaration that a provision is incompatible with EU law does not automatically give rise to a right to compensation.

119 Where the complaint is based on the incompatibility of legislation with EU law, the individual should therefore justify the reasons why that legislation causes him or her individualised loss or harm and demonstrate that its cause is the 'application of the legislation'. In the absence of any basis justifying the existence of a 'harmful event', it is not possible to bring a civil liability action. Individuals cannot claim that laws having extensive temporal effects and which are incompatible with EU law give rise to a right to compensation that is unlimited in time.

120 Next, although a final decision dismissing a prior action is required, it is not necessary for the judicial remedies to have been exhausted, since the final decision may, under Article 32(5) of Law 40/2015, have been obtained 'before any court'.

121 Finally, and in any event, the Tribunal Supremo (Supreme Court) interprets the condition at issue in this part of the plea in a manner favourable to individuals, which ensures compliance with the principle of effectiveness.

(ii) Findings of the Court

122 Article 32(5) of Law 40/2015 provides that, if the loss or harm results from the application of a legislative provision declared to be contrary to EU law, an individual may be compensated only on condition, inter alia, that he or she has obtained, before any court, a final decision dismissing an action against the administrative act which caused the loss or harm.

123 As regards the liability of a Member State for infringement of EU law, the Court of Justice has previously held that national courts may inquire whether the persons harmed had shown reasonable diligence in order to avoid the loss or harm, or limit its extent and whether, in particular, they had availed themselves in good time of all the legal remedies available to them. Indeed, it is a general principle common to the legal systems of the Member States that the persons harmed must show reasonable diligence in limiting the extent of the loss or harm, or risk having to bear the loss or harm themselves. On the other hand, it would be contrary to the principle of effectiveness to require persons harmed to have recourse systematically to all the legal remedies available to them if that would give rise to excessive difficulties or could not reasonably be required of them (see, to that effect, judgment of 24 March 2009, *Danske Slagterier*, C-445/06, EU:C:2009:178, paragraph 60 to 62 and the case-law cited, and of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 140 to 142 and the case-law cited).

124 Consequently, although EU law does not preclude the application of national legislation which provides that an individual cannot obtain compensation for loss or harm which he or she has wilfully or negligently failed to avert by utilising a legal remedy, it is only on condition that the use of that remedy does not give rise to undue hardship or may reasonably be required of the injured party (see, to that effect, judgment of 24 March 2009, *Danske Slagterier*, C-445/06, EU:C:2009:178, paragraph 69).

125 In the present case, as the Advocate General also observed in point 82 of his Opinion, that is precisely what is provided for in Article 32(5) of Law 40/2015. By challenging in good time the administrative act as a result of which the loss or harm occurs, the individual concerned may, in principle, prevent the occurrence of loss or harm, or at least limit its extent.

126 Furthermore, that provision does not require the individual to have exhausted all the legal remedies available to him or her, but only that a final decision has been obtained in an action brought against that administrative act, before any court, which is likely to make it easier to satisfy that condition.

127 It must be stated, however, that, as the Commission submits, where the loss or harm results from an act or omission on the part of the legislature contrary to EU law, without there being an administrative act which the individual may challenge, that provision makes it impossible to obtain compensation, since the individual harmed cannot, in such a situation, bring an action such as that required. In that regard, in the light of the case-law referred to in paragraph 124 above, it cannot be accepted that the individual harmed in such a situation is required, by active conduct, to bring about the adoption of an administrative act which he or she could subsequently challenge, since such an act could not, in any event, be regarded as having caused the alleged loss or harm.

128 Consequently, Article 32(5) of Law 40/2015 is contrary to the principle of effectiveness, in that it does not provide for any exception for cases in which the exercise of the remedy which it requires would give rise to undue hardship or could not reasonably be required of the person harmed, which would be the case where the loss or harm stems from an act or omission on the part of the legislature, contrary to EU law, without there being an administrative act open to challenge.

129 In that regard, the claim that it is unlikely that loss or harm could be the immediate result of an act or omission on the part of the national legislature does not affect that assessment. First, the fact that, in the absence of any provision for exceptions such as those described in the preceding paragraph, the principle of effectiveness will only rarely be undermined cannot justify infringement of that principle. Second, in view of the specific obligations of national legislatures concerning the transposition of EU law into domestic law, it is not in fact unusual for their activity to be the immediate cause of loss or harm sustained by individuals.

130 Similarly, the fact that the exercise of a prior remedy seeking to avoid or limit loss or harm cannot, in accordance with the principle of effectiveness, be required in cases in which the exercise of that remedy would give rise to undue hardship, or cannot reasonably be required of the person harmed, does not mean that an individual seeking to establish liability on the part of the State legislature is relieved of the obligation to demonstrate, in an action with such a purpose, that the conditions needed to establish that liability in his or her particular case are satisfied. The Kingdom of Spain's arguments, set out in paragraphs 118 and 119 above, must therefore be rejected.

131 The assertion that the Tribunal Supremo (Supreme Court) interprets the contested condition in a manner favourable to individuals must be rejected for reasons similar to those set out in paragraph 81 above.

132 Consequently, the second part of the first complaint must be upheld in so far as Article 32(5) of Law 40/2015 makes compensation for loss or harm caused to individuals by the Spanish legislature subject to the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or

harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge.

(3) Third part, concerning the condition that the individual harmed must have claimed infringement of EU law in the action against the administrative act which caused the loss or harm

(i) Arguments of the parties

133 The Commission submits that the condition that the individual harmed must have claimed an infringement of EU law in the action against the administrative act which caused the loss or harm appears to limit the right to compensation to cases in which the infringed provision of EU law has direct effect, whereas State liability could be established even in the event of an infringement of a provision of EU law which has no such effect.

134 Since, according to the Commission, where the infringed provision of EU law does not have direct effect, individuals cannot obtain protection of their rights before the national courts through the disapplication of domestic law and the application of EU law, it would be superfluous, so far as that type of provision is concerned, to require the person harmed to have claimed the infringement of EU law in prior judicial proceedings. Therefore, that condition makes it excessively difficult to obtain compensation for loss or harm caused by the national legislature as a result of an infringement of EU law.

135 That finding cannot be called into question by the fact that individuals may rely on any provision of EU law in proceedings for the annulment of an administrative act, since national courts are required to disapply a national measure and to protect directly the rights conferred by EU law only in the case of provisions of EU law having direct effect.

136 The Kingdom of Spain reiterates that that condition is imposed because of the supplementary nature of the rules on the liability of the State legislature and the need to reconcile the principle of compensation for loss or harm caused by the legislature with the principle of legal certainty. Thus, the obligation to rely on an infringement of EU law in a prior action is not excessive, since all applicants are required to exercise their rights diligently, and Article 32(5) of Law 40/2015 allows the reopening of compensation proceedings in situations which have become final.

137 Furthermore, Spanish law in no way limits the right to compensation to cases in which the infringed provision of EU law has direct effect. Since that scenario has no basis in the contested provisions and the Commission bears the burden of proof, this part of the plea should therefore be rejected. In any event, first, the obligation for an individual to bring a prior action alleging an infringement of EU law does not mean that only a provision having direct effect may be relied on in that action, since arguments based on the incompatibility of Spanish law with EU law may be raised irrespective of the direct effect of the rule of EU law relied on. Second, the Tribunal Supremo (Supreme Court) interprets that obligation in a manner favourable to individuals.

(ii) Findings of the Court

138 Article 32(5) of Law 40/2015 provides, among the conditions governing the possibility for an individual to be compensated for loss or harm resulting from an infringement of EU law attributable to the national legislature, that that individual must have pleaded, in an action brought against the administrative act which caused the loss or harm, the infringement of EU law that was subsequently recognised.

139 As a preliminary point, it should be made clear that it is necessary to analyse this part of the plea only in so far as the exercise of such a remedy may validly be required of individuals harmed having regard to the considerations set out in paragraphs 125 to 128 above.

140 By this part of the plea, the Commission confines itself to challenging the conformity with the principle of effectiveness of the general obligation, imposed on the individual harmed, to plead, in an action before bringing a civil liability action, which may be required of that person in order to avoid loss or harm or to limit its extent, the infringement of EU law given that such a plea must necessarily fail where the provision of EU law concerned has no direct effect, since reliance on such a provision is not capable, in the absence of direct effect, of avoiding or limiting the loss or harm suffered.

141 In that regard, although, as the Commission submits, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 68), that consideration is, nevertheless, without prejudice to the possibility for that court to disapply, on the basis of national law, any provision of national law which is contrary to a provision of EU law that does not have such a legal effect (judgment of 18 January 2022, *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33, paragraph 33).

142 In addition, the binding character of provisions of EU law, even if they do not have direct effect, places on national courts an obligation to interpret national law in conformity with those provisions (see, to that effect, judgments of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paragraphs 6 and 8, and of 21 January 2021, *Whiteland Import Export*, C-308/19, EU:C:2021:47, paragraph 30). That obligation is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and it cannot serve as the basis for an interpretation of national law *contra legem* (see, to that effect, judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 110, and of 18 January 2022, *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33, paragraph 28).

143 In the light of those factors, the Commission's argument must be rejected in so far as, by that argument, the Commission submits that only provisions of EU law having direct effect could properly be relied on in an action brought against the administrative act giving rise to the loss or harm, since it cannot be ruled out, as the Kingdom of Spain also stated at the hearing, that the powers of the national courts do not vary depending on whether or not the provision of EU law at issue has direct effect and whether that court has, under domestic law, more extensive powers than those conferred on it by EU law. Furthermore, a provision of EU law which does not have direct effect may also, depending on the case, be relied on in order to obtain an interpretation of national law that is in conformity with EU law.

144 So far as is relevant, it must, however, be stated that the requirement that the individual harmed, at the stage prior to the action being brought against the administrative act giving rise to the loss or harm and seeking to prevent or limit that loss or harm, must have already pleaded the infringement of EU law which is subsequently recognised, failing which he or she will not be able to obtain compensation for the loss or harm suffered, may amount to an excessive procedural complication, contrary to the principle of effectiveness. At such a stage, it may be excessively difficult, or even impossible, to anticipate what infringement of EU law will ultimately be recognised by the Court.

145 In those circumstances, the third part of the first complaint must be rejected.

(b) The provisions of the third subparagraph of Article 67(1) of Law 39/2015 and of the second subparagraph of Article 34(1) of Law 40/2015

(1) Arguments of the parties

146 The Commission submits that the principle of effectiveness is also infringed, first, by the third subparagraph of Article 67(1) of Law 39/2015, under which the right to seek compensation is time-barred one year after publication in the Official Journal of the decision declaring the statutory provision in question to be contrary to EU law and, second, by the second subparagraph of Article 34(1) of Law 40/2015, which limits the loss or harm that may be compensated to that which occurred within the five years preceding the date of that publication, unless otherwise provided for in that decision.

147 In the first place, it would not be acceptable to cause the limitation period for an action to start to run from a date which depends on a decision of the Court that is not necessary in order for a national court to be able not only to find that the State is liable, but also to oblige the Member State concerned to make good the loss or harm caused as a result of an infringement of EU law. That would have the effect of making the prior decision of the Court a constituent element of the liability of the State legislature, as is confirmed, moreover, by the wording of Article 32(5) of Law 40/2015, in breach of the Court's case-law.

148 In the second place, limiting the recoverable loss or harm to that which occurred within the five years preceding the publication of the decision declaring the provision at issue to be contrary to EU law infringes the principle of effectiveness in two respects. First, such a time limit cannot be established on the basis of a date that is dependent on a decision of the Court which cannot be demanded. Second, such a limitation would be contrary to the principle of full compensation for the loss or harm, which is inherent in the principle of effectiveness, since full compensation for the loss or harm is required by the case-law of the Court, including the award of default interest.

149 Although, in principle, EU law does not preclude the application of a five-year limitation period to claims made against the State, provided that it is applied to similar claims under domestic law, it is clear in the present case that, since the system created by Article 32(5) and (6) of Law 40/2015 requires a long legal process, it is more than likely that more than five years will elapse before the Court gives its decision. Therefore, because of the length of the procedure provided for in Article 32(5) of Law 40/2015, consideration of the reference set out in the second subparagraph of Article 34(1) of that law could prevent full compensation for the loss or harm suffered.

150 As for the stipulation that the temporal limitation of the recoverable loss or harm is five years 'unless otherwise provided for' in the decision declaring the statutory provision to be contrary to EU law, it is to be found, not in the second subparagraph of Article 34(1) of Law 40/2015, but in Article 32(6) of that law. It does not therefore relate to an option offered to a national court before which a claim for compensation has been brought, but only to the content of a decision of the Court.

151 As regards, in the first place, the starting point of the limitation period for the action at issue, the Kingdom of Spain replies that, since the requirement for a prior judgment of the Court of Justice is not contrary to the principle of effectiveness, the Commission's criticism in that regard must be rejected. In any event, any Spanish court could declare that a statutory provision is contrary to EU law, without the Court of Justice giving a decision to that effect.

152 Moreover, first, given that the loss or harm is the result, in the present case, of a rule of law having general effect, that period cannot begin to run until publication of the judgment finding that that rule of law is unlawful, since only that publication makes it possible for that illegality and, consequently, the loss or harm to be acknowledged. Publication in an official journal is one of the most effective means of disclosing a legal event.

153 Furthermore, the fact that the period begins to run from the date of publication of the judgment does not mean that an action cannot be brought before that date using ordinary legal remedies and the general rules on the liability of public authorities, referred to in Article 106 of the Constitution and governed by Article 32(1) of Law 40/2015.

154 In the second place, as regards the time limitation for the recoverable loss or harm, the Kingdom of Spain maintains that is clear from paragraphs 68 and 69 of the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980), that, notwithstanding a declaration of incompatibility with EU law, it is necessary to comply with definitive legal situations. In that regard, it emphasises once again that Article 32(5) of Law 40/2015, like paragraph 4 of that article, refers to an additional situation in which a time limit is re-opened that would be closed by application of ordinary legal remedies, which would make it possible to obtain compensation in cases where, in principle, any compensation would be precluded. Paragraph 5 therefore lays down a rule of law favourable to individuals, allowing a civil liability action to be brought, the outcome of which is liable to be contrary to a decision which has already acquired the force of *res judicata*.

155 In any event, an individual could obtain full compensation for his or her loss or harm by bringing appropriate actions before they become time-barred, and in that regard the Kingdom of Spain refers to the first subparagraph of Article 34(1) of Law 40/2015, applicable to the general case of the liability of public authorities, referred to in Article 32(1) of that law.

156 Moreover, the case-law does not provide that compensation is payable for all loss or harm connected with acts that are already time-barred. It would be disproportionate to require absolute compensation for laws that have been in force for decades. Full compensation is not an absolute principle, and the potential consequences for the State Treasury should be taken into account.

157 Finally, since the second subparagraph of Article 34(1) of Law 40/2015 states that it applies 'unless otherwise provided for in [the decision declaring the provision to be contrary to EU law]', the court ruling on the civil liability action could vary the compensation according to the circumstances and decide not to apply the time limitation for the recoverable loss or harm, as provided for in that provision.

(2) Findings of the Court

158 In the first place, as regards the part of the Commission's argument concerning the third subparagraph of Article 67(1) of Law 39/2015, it should be recalled that that provision provides that, in the cases of liability referred to in Article 32(5) of Law 40/2015, the right to claim compensation is time-barred one year after the publication in the Official Journal of the decision declaring the statutory provision to be contrary to EU law. Furthermore, the Commission criticises the third subparagraph of Article 67(1) of Law 39/2015 only in so far as that provision sets the date when the limitation period for a civil liability action against the State legislature starts to run for infringements of EU law attributable to it.

159 Since, as has been stated in paragraph 106 above, compensation for loss or harm caused to an individual by the national legislature as a result of an infringement of EU law cannot, without infringing the principle of effectiveness, be made subject to the condition that there must be a decision of the Court finding that the Member State concerned has failed to fulfil its obligations under EU law or from which it is apparent that the act or omission giving rise to the loss or harm is incompatible with EU law, the publication of such a decision in the Official Journal likewise cannot, without infringing that principle, constitute the only possible starting point of the limitation period for an action seeking to establish the liability of that legislature for infringements of EU law attributable to it.

160 In that regard, it is necessary to reject the Kingdom of Spain's assertion that an individual who is harmed can obtain full compensation for his or her loss or harm on the basis of the ordinary legal remedies and by means of the general rules on the liability of public authorities laid down in Article 32(1) of Law 40/2015. First, as is apparent from paragraphs 63 to 82 above, none of the other procedures or remedies relied on by the Kingdom of Spain guarantees that State liability for infringements of EU law attributable to the national legislature may be established in all circumstances in which an individual suffers loss or harm as a result of such an infringement by the legislature. Second, the existence of such a decision, according to the actual wording of the contested provisions, constitutes a condition which necessarily must be satisfied even before such an action can be brought.

161 Consequently, it must be held that the part of the Commission's argument relating to the starting point of the limitation period, laid down in the third subparagraph of Article 67(1) of Law 39/2015, is well founded in so far as that provision covers only cases in which there is a decision of the Court declaring that the statutory provision applied is incompatible with EU law.

162 In the second place, as regards the temporal limitation of the recoverable loss or harm, it should be recalled that the second subparagraph of Article 34(1) of Law 40/2015 provides that, in the case of liability referred to in Article 32(5) of that law, loss or harm which occurred within five years preceding the date of publication of the decision declaring the statutory provision at issue to be contrary to EU law may be compensated, unless otherwise provided for in that decision.

163 It must therefore be held that that provision has the effect of limiting, in cases of liability of the State legislature for infringements of EU law attributable to it, the loss or harm that may be compensated to that sustained in the five years preceding the date of publication in the Official Journal of the Court's decision finding that the Kingdom of Spain has failed to fulfil its obligations under EU law or from which it is apparent that the act or omission on the part of the legislature giving rise to that loss or harm is incompatible with EU law.

164 In that regard, although, in the absence of relevant provisions of EU law, it is for the domestic legal system of each Member State to determine the extent of the compensation and the rules relating to the assessment of the loss or harm caused by an infringement of EU law, the national rules setting the criteria for determining the extent of that compensation and those rules relating to assessment must, inter alia, abide by the principle of effectiveness (see, to that effect, judgments of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 93 and the case-law cited, and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 39). Thus, the Court has repeatedly held that compensation for loss or harm caused to individuals as a result of infringements of EU law must be commensurate with the loss or harm sustained (see judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 82, and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 46), in that it must, where appropriate, enable the loss or harm actually sustained to be made good in full (see, to that effect, judgments of 2 August 1993, *Marshall*, C-271/91, EU:C:1993:335, paragraph 26, and of 15 April 2021, *Braathens Regional Aviation*, C-30/19, EU:C:2021:269, paragraph 49).

165 In the present case, it is sufficient to note that, by providing in the second subparagraph of Article 34(1) of Law 40/2015 that loss or harm caused by the legislature to individuals as a result of an infringement of EU law can be compensated only if it has occurred in the five years preceding the date of publication of a decision of the Court finding that the Kingdom of Spain has failed to fulfil its obligations under EU law or from which it is apparent that the act or omission on the part of the legislature giving rise to that loss or harm is incompatible with EU law, the Kingdom of Spain prevents individuals who have been harmed from being able to obtain, in all cases, appropriate compensation for their loss or harm.

166 Indeed, addition to the fact that compensation for loss or harm caused by the legislature as a result of an infringement of EU law cannot, in any event, be subject to the existence of such a decision, that condition has the effect, having regard to the length of the procedure at the end of which such a decision is delivered, namely proceedings for a declaration of a failure to fulfil obligations, within the meaning of Article 258 TFEU, or a reference for a preliminary ruling under Article 267 TFEU, of rendering it impossible in practice, or excessively difficult, to obtain such compensation. In addition, the duration of the proceedings is increased by the application of Article 32(5) of Law 40/2015, to which Article 34(1) of that law refers, and which requires a final decision dismissing the action brought against the administrative act which caused the loss or harm.

167 That condition is therefore also contrary to the principle of effectiveness. In that regard, the Kingdom of Spain cannot, for the same reasons as those already set out in paragraphs 85, 86 and 88, and in paragraphs 63 to 82 above, respectively, derive any useful argument either from the fact that Article 32(5) of Law 40/2015 constitutes an additional remedy or from the other procedures or remedies on which it relies.

168 Similarly, the reference in the second subparagraph of Article 34(1) of Law 40/2015 to the fact that it may be 'otherwise provided for in that decision' is of no assistance to that Member State since it is unequivocally clear from that provision that the term 'decision' refers, as regards the loss or harm resulting from an infringement of EU law attributable to the legislature, to the 'decision … declaring the rule contrary to [EU] law', that is to say to a decision of the Court.

169 In the light of the foregoing considerations, it must be held that the part of the Commission's argument concerning the temporal limitation of the recoverable loss or harm, provided for in the second subparagraph of Article 34(1) of Law 40/2015, is well founded.

170 Consequently, the first complaint, alleging infringement of the principle of effectiveness, must be upheld in part.

4. Second complaint, alleging infringement of the principle of equivalence

(a) Arguments of the parties

171 By its second complaint, the Commission submits that, by laying down, respectively, in Article 32(5)(a) and (b) of Law 40/2015, as a condition for establishing the liability of the State legislature in the event of an infringement of EU law, that the rule of law infringed must be intended to confer rights on individuals and that that infringement must be sufficiently serious, the Kingdom of Spain fails to fulfil its obligations under the principle of equivalence.

172 According to that institution, it follows from the Court's case-law that the principle of equivalence is relevant for the purpose of assessing not only the procedural conditions governing civil liability actions against the State for the loss or harm which it causes in breach of EU law, but also the substantive conditions governing the commencement of those actions. Consequently, the fact that Article 32(5) of Law 40/2015 reproduces the three conditions which, in accordance with the case-law of the Court, are sufficient to establish the liability of a Member State for the loss or harm caused to individuals in breach of EU law is irrelevant, since, if the principle of equivalence is not to be infringed, national law may impose those three conditions only if they also apply to similar domestic claims for compensation.

173 In the present case, the two conditions referred to in paragraph 171 above are not laid down in Article 32(4) of Law 40/2015 as regards establishing the liability of the State legislature in the event of an infringement of the Constitution, even though it follows from the judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39), that, having regard to their purpose and essential elements, civil liability actions against the State brought on the basis of an infringement of EU law by a statutory provision and those brought on the basis of an infringement of the Constitution by a statutory provision, established by the Tribunal Constitucional (Constitutional Court), are similar for the purposes of applying the principle of equivalence.

174 The Kingdom of Spain contends that the second complaint put forward by the Commission is unfounded, in that the two actions in question cannot be regarded as similar. Cases of the unconstitutionality of legislation may differ greatly from cases where a rule of law is incompatible with EU law, since certain cases of unconstitutionality may not, inter alia, concern the infringement of the rights of individuals. Moreover, there is a substantial difference between State liability arising from an infringement of EU law and that arising from a declaration that

legislation is unconstitutional, in that the latter entails the invalidation *ex tunc* of the legislation, with the result that administrative acts adopted under legislation subsequently declared to be unconstitutional are also vitiated. That is not the case with a decision of the Court declaring a failure to fulfil obligations or a decision given in preliminary ruling proceedings.

175 Moreover, even if those two actions were similar, Article 32(5) of Law 40/2015 merely codifies the conditions laid down by the case-law of the Court, with a view to increasing legal certainty. Those conditions are inherent in the rules on the liability of the State in Spain, including in cases of liability resulting from a declaration that a legislative provision is unconstitutional. It is therefore, in any event, merely a formal difference.

(b) Findings of the Court

176 In accordance with what has already been stated in paragraph 33 above, subject to the right to compensation which is directly based on EU law where the conditions set out in paragraph 31 above are met, it is on the basis of national law on liability that the Member State must make reparation for the consequences of the loss or harm which it has caused by infringing EU law.

177 In the absence of EU rules in the matter, it is for the internal legal order of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, with the principle of equivalence requiring, however, that the conditions laid down by national legislation in the matter of compensation for loss or harm are not less favourable than those governing similar domestic actions (see, to that effect, judgments of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, paragraphs 41 to 43 and the case-law cited, and of 19 May 2011, *Iaia and Others*, C-452/09, EU:C:2011:323, paragraph 16 and the case-law cited).

178 The principle of equivalence thus seeks to set limits on the procedural autonomy enjoyed by the Member States when they implement EU law and when the latter does not make provision in that regard. It therefore follows that, as regards State liability for infringement of EU law, that principle is intended to apply only where that liability is established on the basis of EU law and, therefore, where the relevant conditions, as recalled in paragraph 31 above, are satisfied (see, by analogy, judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraph 92).

179 As the Advocate General also observed in point 122 of his Opinion, that principle cannot form the basis for an obligation on the part of the Member States to allow a right to compensation to arise under conditions more favourable than those laid down by the case-law of the Court.

180 In the present case, the Commission seeks, by its second complaint, to call into question, not the conditions under which the principle of State liability for infringements of EU law attributable to that State is implemented in Spain, as clarified by the Court, but the actual conditions under which the State legislature may incur liability for infringements of EU law attributable to that State, as they are defined in Spanish law, and, moreover, it is common ground that they reproduce faithfully the conditions laid down in the case-law of the Court.

181 As is apparent from the finding made in paragraph 179 above, even if the conditions for establishing the liability of the State legislature for infringements of EU law attributable to it are less favourable than the conditions for establishing the liability of the State legislature for a breach of the Constitution, the principle of equivalence is not intended to apply to such a situation.

182 The Court has already repeatedly made it clear that, if Member States can make provision for their liability to be established under less restrictive conditions than those laid down by the Court, then that liability must be regarded as being established not on the basis of EU law but on the basis of national law (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 66, and of 8 July 2021, *Koleje Mazowieckie*, C-120/20, EU:C:2021:553, paragraph 62 and the case-law cited).

183 In general, the principle of equivalence is not, moreover, to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law (judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 34 and the case-law cited).

184 It must be pointed out again that, it is true, as the Commission states, that the Court has repeatedly made it clear that both the formal and material conditions laid down by national legislation on compensation for loss or harm caused by Member States as a result of an infringement of EU law cannot, in particular, be less favourable than those relating to similar domestic claims (see, to that effect, judgments of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, paragraph 43; of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 98 and 99 and the case-law cited; and of 17 April 2007, *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraph 89 and the case-law cited). The fact remains, as is apparent from the actual wording of that case-law, that that clarification still relates to the conditions laid down by national legislation on compensation for loss or harm once the right to compensation has arisen on the basis of EU law.

185 It follows that the second complaint is based on a misreading of the Court's case-law. Accordingly, it must be rejected as unfounded.

186 Having regard to all the foregoing, it must be held that, by adopting and maintaining in force the contested provisions, the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness, in that those provisions make compensation for the loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law subject to:

– the condition that there is a decision of the Court declaring that the statutory provision applied is incompatible with EU law;

– the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge;

– a limitation period of one year from the publication in the Official Journal of the decision of the Court declaring that the statutory provision applied is incompatible with EU law, without covering cases in which such a decision does not exist, and

– the condition that compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date of that publication, unless otherwise provided for in that decision.

IV. Costs

187 Pursuant to Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 138(3) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

188 Since the Commission and the Kingdom of Spain have each applied for costs against the other and since each has failed on one or more heads of claim, they must each bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Declares that, by adopting and maintaining in force Article 32(3) to (6) and the second subparagraph of Article 34(1) of Ley 40/2015 de Régimen Jurídico del Sector Público (Law 40/2015 on the legal system governing the public sector) of 1 October 2015 and the third subparagraph of Article 67(1) of Ley 39/2015 del Procedimiento Administrativo Común de las Administraciones Públicas (Law 39/2015 on the common administrative procedure of the public authorities) of 1 October 2015, the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness, in that those provisions make compensation for the loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law subject to:

– **the condition that there is a decision of the Court of Justice declaring that the statutory provision applied is incompatible with EU law;**

– **the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge;**

– **a limitation period of one year from the publication in the *Official Journal of the European Union* of the decision of the Court of Justice declaring that the statutory provision applied is incompatible with EU law, without covering cases in which such a decision does not exist, and**

– **the condition that compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date of that publication, unless otherwise provided for in that decision;**

2. Dismisses the action as to the remainder;

3. Orders the European Commission and the Kingdom of Spain each to bear their own costs.

[Signatures]