JUDGMENT OF THE COURT (Grand Chamber)

14 March 2006 *

In Case C-177/04,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 14 April 2004,

Commission of the European Communities, represented by G. Valero Jordana and B. Stromsky, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and R. Loosli, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Schiemann (Rapporteur), Presidents of Chambers, R. Schintgen, N. Colneric, S. von Bahr, J. Klučka, U. Lõhmus and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 October 2005,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2005,

gives the following

Judgment

1 By its application the Commission of the European Communities requested the Court to:

— declare that, by failing to take the necessary measures to comply with the judgment of 25 April 2002 in Case C-52/00 *Commission* v *France* [2002] ECR

I-3827 concerning the incorrect transposition of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), the French Republic had failed to fulfil its obligations under Article 228(1) EC;

— order the French Republic to pay to the Commission, into the 'European Community own resources' account, a penalty payment of EUR 137 150 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-52/00 *Commission* v *France* from delivery of the present judgment until the judgment in Case C-52/00 *Commission* v *France* has been complied with;

— order the French Republic to pay the costs.

Community legislation

2 The subject of Directive 85/374, which was adopted on the basis of Article 100 of the EEC Treaty (subsequently Article 100 of the EC Treaty, now Article 94 EC), is the approximation of the laws of the Member States concerning the liability of producers for damage caused by their defective products.

3 Under Article 1 of the directive, '[t]he producer shall be liable for damage caused by a defect in his product'.

4 Article 3(3) of the directive provides:

'Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.'

5 Article 7 of the directive provides that the producer is not liable under the directive if he proves:

'...

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or

...'

6 The first paragraph of Article 9 of the directive defines 'damage' for the purpose of Article 1 as

'...

(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of [EUR 500], provided that the item of property:

(i) is of a type ordinarily intended for private use or consumption, and

(ii) was used by the injured person mainly for his own private use or consumption.'

The judgment in *Commission* v *France*

7 In the operative part of the judgment in Case C-52/00 *Commission* v *France* the Court declared that

— by including damage of less than EUR 500 in Article 1386-2 of the Code civil (French Civil Code; 'the Civil Code'),

— by providing in the first paragraph of Article 1386-7 of the Civil Code that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

— by providing in the second paragraph of Article 1386-12 of the Civil Code that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of the directive,

the French Republic had failed to fulfil its obligations under Articles 9(b), 3(3) and 7 of the directive.

The pre-litigation procedure

8 The Commission, taking the view that the French Republic had not taken the necessary measures to comply with the judgment in Case C-52/00 *Commission* v *France*, sent that Member State a letter of formal notice pursuant to Article 228 EC on 20 February 2003, inviting it to submit observations within two months from receipt of the letter.

9 By letter of 27 June 2003, the French authorities sent the Commission the text of the amendments it was intended to make to the Civil Code in order to put an end to the alleged failure to fulfil obligations, which were to be put through the parliamentary procedure.

10 On 11 July 2003 the Commission sent the French Republic a reasoned opinion inviting it to take, within two months from notification of the reasoned opinion, the necessary measures to comply with the judgment in Case C-52/00 *Commission* v *France*.

11 In response to the reasoned opinion, the French authorities explained in a letter of 9 September 2003 that, as a result of pressure on the parliamentary timetable, although the proposed legislative amendments which had been notified to the Commission had been adopted at interministerial level after consulting the economic interests concerned, it had not yet been possible for them to be examined by the Parliament. They added that the Commission would be informed as soon as possible of the timetable for the adoption of the amendments.

12 Since the Commission considered that the French Republic had omitted to comply with the judgment in Case C-52/00 *Commission* v *France*, it decided to bring the present action.

Developments in the course of the present proceedings

13 In its rejoinder, the French Government relied on the fact that the Parliament had adopted Loi No 2004-1343 de simplification du droit, of 9 December 2004 (Law No 2004-1343 on simplification of the law, JORF of 10 December 2004, p. 20857; 'the 2004 Law'), Article 29 of which provides:

'I — The Civil Code is amended as follows:

1. Article 1386-2 shall read as follows:

"Article 1386-2. — The provisions of this title shall apply to compensation for damage resulting from personal injury.

They shall also apply to compensation for damage exceeding an amount defined by decree resulting from damage to property other than the defective product itself.";

2. The first paragraph of Article 1386-7 shall read as follows:

"The vendor, hirer, except a lessor under a hire purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety defects in his products on the same basis as the producer only if the latter is unknown.";

3. The second paragraph of Article 1386-12 is repealed.

...'

14 On 23 February 2005 the French Government also sent the Commission and the Court a copy of Décret No 2005-113 pris pour l'application de l'article 1386-2 du code civil, of 11 February 2005 (Decree No 2005-113 implementing Article 1386-2 of the Civil Code, JORF of 12 February 2005, p. 2408; 'the 2005 Decree'), Article 1 of which provides:

'The amount referred to in Article 1386-2 of the Civil Code is fixed at EUR 500.'

15 In a letter of 15 April 2005 addressed to the Court and brought to the knowledge of the French Government, the Commission said that it considered that the amendments introduced by the 2004 Law and the 2005 Decree made French legislation compatible with Articles 7 and 9(b) of Directive 85/374. The Commission consequently stated that it intended to withdraw the application in so far as it sought a declaration that the French Republic had failed to fulfil its obligation to comply with the judgment in Case C-52/00 *Commission* v *France* with respect to those two provisions of the directive.

16 Since, on the other hand, it considered that the 2004 Law did not fully comply with that judgment as regards the transposition of Article 3(3) of Directive 85/374, the Commission stated in that letter that it was maintaining its application on that point, while reducing the extent of the declaration sought in that respect.

17 The Commission further stated in the letter that, because of the partial compliance with the judgment in Case C-52/00 *Commission* v *France*, it intended to reduce the amount of the penalty payment originally suggested to the Court.

18 As a result of that letter, whose terms were repeated by the Commission at the hearing, the Commission now asks the Court to:

— declare that, by failing to take certain of the measures necessary to comply with the judgment in Case C-52/00 *Commission* v *France* concerning the incorrect transposition of Directive 85/374, more particularly by continuing to regard the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the

injured person within a reasonable time of the identity of the person who supplied him with the product, the French Republic has failed to fulfil its obligations under Article 228(1) EC;

— order the French Republic to pay a penalty payment of EUR 13 715 for each day of delay in complying with that judgment, from delivery of the present judgment.

19 Taking note of the partial withdrawal resulting from the new form of order sought by the Commission and the reduction of the amount of the proposed penalty payment, the French Republic stated in a letter to the Court of 27 May 2005 that it took the view that the partial complaint maintained by the Commission in fact constituted a new complaint. That Member State for that reason repeated its request to be heard by the Court at a hearing.

The alleged failure to fulfil obligations

Preliminary considerations

20 It should be recalled to begin with that the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 30).

21 Since the Commission seeks the imposition of a penalty payment on the French Republic, it must also be ascertained whether the alleged failure to fulfil obligations has continued up to the Court's examination of the facts (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 31).

22 In the present case, it is common ground that, on the date of expiry of the period prescribed in the reasoned opinion of 11 July 2003, the French Republic had not yet taken any of the measures necessary to comply with the judgment in Case C-52/00 *Commission* v *France*.

23 The Commission has withdrawn its application in so far as it sought a declaration that that judgment had not been complied with as regards the adoption of appropriate measures for bringing French legislation into line with Articles 7 and 9(b) of Directive 85/374.

24 With respect to the complaint of failure to take the necessary measures to comply with that judgment as regards Article 3(3) of that directive, as follows from paragraph 18 above, the Commission complains that the French Republic has failed to take certain of the appropriate measures for complying with the judgment in Case C-52/00 *Commission* v *France*, by continuing to regard the supplier of a defective product as liable on the same basis as the producer where the latter cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of the person who supplied him with the product.

Admissibility

Arguments of the French Republic

25 In its letter of 27 May 2005 and at the hearing, the French Government submitted that such a reformulation during the procedure of the form of order sought in the Commission's application must be regarded as a new claim, so as to render the action inadmissible.

26 It submits, in particular, that it is apparent both from paragraph 36 of the judgment in Case C-52/00 *Commission* v *France* and from the Commission's application and reply in those proceedings that, in that case, the Commission confined itself to complaining that the French Republic had failed to lay down in its legislation that the supplier's liability arises only as an alternative to the producer's liability, where the producer cannot be identified.

27 The Commission never, on the other hand, claimed in those proceedings that the French Republic had failed to fulfil its obligations under Article 3(3) of Directive 85/374 by not expressly excluding the supplier's liability where he has informed the injured person of the name of his own supplier.

28 It follows that such a failure to fulfil obligations could not have been found to exist by the Court in its judgment in Case C-52/00 *Commission* v *France*, as moreover is confirmed by the operative part of that judgment, which declared merely that the French Republic had failed to fulfil its obligations, inasmuch as its legislation provided that the supplier of a defective product was liable 'in all cases' on the same basis as the producer.

29 In those circumstances, it is inadmissible for the Commission, in the present proceedings, to allege a failure to comply with that judgment in the new terms set out in paragraph 18 above. According to the French Government, the adoption of the 2004 Law on the contrary complied fully with the judgment in Case C-52/00 *Commission* v *France*, with respect to Article 3(3) of Directive 85/374, since that law has the consequence that the supplier of a defective product is no longer liable 'in all cases' on the same basis as the producer.

30 The French Government further submits that the new claim thus formulated by the Commission is also inadmissible because the Commission did not inform the French Republic in due time that the new version of Article 1386-7 of the Civil Code, which had been communicated to it at draft stage during the pre-litigation procedure, was not capable of putting an end to the alleged infringement.

31 According to the government, it was for the Commission, in accordance with its duty of loyal cooperation under Article 10 EC, to inform the French Republic as early as possible of any objections which there might be to the new provisions it was intending to adopt. One of the purposes of the pre-litigation procedure is precisely to enable the Member State concerned to place itself as quickly as possible in a position of complete conformity with Community law.

Findings of the Court

32 It must be recalled, first, that in the operative part of its judgment in Case C-52/00 *Commission* v *France* the Court declared that the French Republic had failed to fulfil its obligations under Article 3(3) of Directive 85/374, by providing in the first

paragraph of Article 1386-7 of the Civil Code that the supplier of a defective product is to be liable in all cases and on the same basis as the producer.

33 Regardless of the precise terms in which the Commission may have formulated its arguments in support of the form of order sought in its application, that declaration by the Court proceeds from the finding that the French legislation in force did not exempt the supplier from the liability which as a general rule is the producer's in any of the cases in which Article 3(3) of Directive 85/374 provides for such an exemption.

34 The finding thus made by the Court refers inter alia to the case where such an exclusion of the supplier's liability is the result of his having informed the injured person within a reasonable time of the identity of his own supplier.

35 Moreover, it is permissible for the Commission to limit the extent of the failure to fulfil obligations which it asks the Court to find under Article 228 EC, so as to take account of partial measures to comply with the judgment in Case C-52/00 *Commission* v *France* adopted during the present proceedings before the Court.

36 In the present case, since the Commission would, as is apparent from paragraph 22 above, have been entitled to seek a declaration that the French Republic had failed to fulfil its obligations under Article 228(1) EC because it had not, by the date on which the period prescribed in the reasoned opinion expired, made provision for exclusion of suppliers' liability in any of the cases referred to in Article 3(3) of Directive 85/374, it cannot be criticised for seeking such a declaration with respect to one of those cases only, as a result of the adoption by that Member State of partial measures for compliance with the judgment in Case C-52/00 *Commission* v *France* (see, by analogy, Case C-174/91 *Commission* v *Belgium* [1993] ECR I-2275, paragraphs 8 to 12).

37 As follows from the Court's case-law, the requirement that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision cannot go so far as to mean that in every case the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited. The Court has concluded in particular that, where legislation is altered during the pre-litigation procedure, the action may relate to provisions of national law which are not the same as those referred to in the reasoned opinion (see, in particular, Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 29).

38 Nothing prevents that from also being the case where legislation is altered after the action has been brought and the complaint maintained by the Commission as regards the altered legislation was necessarily included in the complaint alleging a complete failure to comply with a judgment of the Court (see, by analogy, with respect to Article 226 EC, Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 40).

39 By imputing, in the course of the proceedings, its complaints against the old version of Article 1386-7 of the Civil Code, which led to the finding of a failure to fulfil obligations in the judgment in Case C-52/00 *Commission* v *France*, to the new version of that article which replaced it during the present judicial proceedings, the Commission did not alter the subject-matter of the dispute (see, by analogy, with respect to Article 226 EC, Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 11).

40 Not to accept a complaint as admissible in such a case would furthermore induce the Commission to maintain, perhaps against its will, the entire complaint originally made, which would be in the interests neither of the defendant Member State nor of the proper administration of justice.

41 Second, the admissibility of the complaint thus reformulated by the Commission also cannot be affected by the circumstance that, although it was aware during the pre-litigation procedure that the French Republic proposed to adopt the provision which was subsequently enacted in the form of the new Article 1386-7 of the Civil Code, the Commission did not inform that Member State that such a national provision would not transpose correctly Article 3(3) of Directive 85/374, as it did not provide for the supplier to be exempted from liability where he informs the injured person within a reasonable time of the identity of his own supplier.

42 That circumstance did not make it impossible for the French Republic to put an end to the infringement previously found by the Court, and did not interfere with that Member State's rights of the defence, any more than it affected the definition of the subject-matter of the dispute brought before the Court by the Commission's application.

43 It should be recalled, moreover, that the procedure laid down in Article 228 EC is based on the objective finding that a Member State has failed to fulfil its obligations (Case C-304/02 *Commission* v *France*, paragraph 44).

44 The complaint as reformulated by the Commission in the course of the proceedings is therefore admissible.

Substance

Arguments of the French Republic

45 On the substance, the French Government submits that the fact that the new version of Article 1386-7 of the Civil Code does not expressly exempt the supplier from the liability which is as a general rule the producer's where the supplier informs the injured person within a reasonable time of the identity of his own supplier does not constitute a failure to fulfil the obligation to implement Article 3(3) of Directive 85/374.

46 On being questioned at the hearing as to the scope of that provision of the Civil Code, the government argued, first, that it follows from the Court's case-law that a word-for-word transposition of the wording of a directive is not required in all circumstances and, second, that the supplier's possibility of informing the injured person of the identity of his own supplier will in practice be of only secondary importance, where the producer himself remains unidentified, and that in such a case the supplier will moreover be able to have recourse to his own supplier.

Findings of the Court

47 The new version of Article 1386-7 inserted in the Civil Code by the 2004 Law did not fully comply with the judgment in Case C-52/00 *Commission* v *France*, such compliance including an obligation to exempt the supplier from the liability which is basically the producer's in all cases in which Article 3(3) of Directive 85/374 provides for such exemption.

48 It should be recalled that, according to settled case-law, each Member State is bound to implement directives in a manner that fully meets the requirements of clarity and certainty in legal situations imposed by the Community legislature, in the interests of the persons concerned. To that end, the provisions of a directive must be implemented with unquestionable binding force and with the requisite specificity, precision and clarity (see, inter alia, Case C-354/99 *Commission* v *Ireland* [2001] ECR I-7657, paragraph 27). The provisions intended to transpose a directive must thus create a legal situation that is sufficiently clear, precise and transparent that individuals can ascertain the full extent of their rights and obligations and, where appropriate, rely on those rights before the national courts (see, inter alia, Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 6).

49 It is apparent from the clear and precise wording of Article 3(3) of Directive 85/374 that that provision is intended to confer certain rights on injured persons which they are able to assert against suppliers in the precise circumstances it defines. Conversely, the provision gives rise to the corresponding obligations, also precise and circumscribed, on the part of those suppliers.

50 That provision provides in particular that the supplier cannot incur the liability imputed by Directive 85/374 to the producer where he informs the injured person within a reasonable time of the identity of his own supplier.

51 In the present case, it is common ground that such an exclusion of liability does not follow from the wording of the new version of Article 1386-7 of the Civil Code. Consequently, such a provision does not fully transpose Article 3(3) of Directive 85/374.

52 As to the argument that the fact that the supplier is not exempted from liability where he informs the injured person of the identity of his own supplier is of no great consequence in practice and therefore does not constitute an infringement of the directive, it need only be recalled that, even assuming that fact to have been established, non-compliance with an obligation imposed by a rule of Community law in itself constitutes a failure to fulfil obligations and the fact that the non-compliance has had no adverse effects is irrelevant (see, in particular, Case C-150/97 *Commission* v *Portugal* [1999] ECR I-259, paragraph 22).

53 Furthermore, as appears from paragraph 40 of the judgment in Case C-52/00 *Commission* v *France*, the Court previously held that the possibility afforded to the supplier under the old version of Article 1386-7 of the Civil Code of joining the producer had the effect of multiplying proceedings, a result which the direct action against the producer available to the injured person under the conditions provided for in Article 3 of Directive 85/374 is precisely intended to avoid. The same reasoning applies with respect to the possibility afforded to the supplier of joining his own supplier, in the system introduced by the new version of Article 1386-7.

54 It follows that that provision did not fully transpose Article 3(3) of Directive 85/374, and consequently that it did not fully comply with the judgment in Case C-52/00 *Commission* v *France*.

55 In the light of all the foregoing, the conclusion must be that, by continuing to regard the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of the person who supplied him with the product, the French Republic has failed to take the necessary measures to comply fully with the judgment in Case C-52/00 *Commission* v *France* as regards

the transposition of Article 3(3) of Directive 85/374, and has thereby failed to fulfil its obligations under Article 228 EC.

56 Since the failure to fulfil obligations on the part of the French Republic has thus been shown still to subsist at the date of the Court's examination of the facts, the Commission's proposal of a penalty payment must now be examined.

Financial penalty

57 With respect to the infringement thus identified, the Commission now asks, as is apparent from paragraph 18 above, for the French Republic to be ordered to pay a penalty payment of EUR 13 715 for each day of delay in complying fully with the judgment in Case C-52/00 *Commission* v *France* from the date of the present judgment.

58 It is for the Court to assess in each case, in the light of the circumstances of the case, the financial penalties to be imposed (Case C-302/04 *Commission* v *France*, paragraph 86).

59 It must also be recalled that the procedure laid down in Article 228(2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, and thereby of ensuring that Community law is in fact applied by that State. The measures provided for by that provision,

namely a lump sum and a penalty payment, are both intended to achieve this objective (Case C-304/02 *Commission* v *France*, paragraph 80).

60 An order imposing a penalty payment and/or a lump sum is not intended to compensate for damage which may have been caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the infringement that has been established. The financial penalties imposed must therefore be decided on according to the degree of persuasion needed for the Member State in question to alter its conduct (Case C-304/02 *Commission* v *France*, paragraph 91).

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

62 In that light, and as the Commission suggested in its communication of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2), the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, the seriousness of the infringement, and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations (see, in particular, Case C-304/02 *Commission* v *France*, paragraph 104).

63 In the present case, the Court's task is to determine, according to the degree of persuasion which appears to it to be needed, the appropriate financial penalties to induce the Member State concerned to comply with the judgment in Case C-52/00 *Commission* v *France*.

64 In the light of the circumstances of the case, first, the payment of a penalty payment is a suitable means and the imposition of a lump sum does not appear appropriate.

65 Second, as regards the seriousness of the infringement, and in particular the effects on private and public interests of failure to comply with that judgment, as the Commission itself accepted in its letter of 15 April 2005 and at the hearing, the infringement remaining after the adoption of the 2004 Law and the 2005 Decree is not particularly serious, even though it is clearly important that the French Republic should put an end to it as soon as possible, in accordance with its obligation under Article 228(1) EC.

66 The cases in which there may still be liability on the part of the supplier contrary to the provisions of Article 3(3) of Directive 85/374 have been considerably reduced as a result of the adoption of the new version of Article 1386-7 of the Civil Code, so that it cannot be argued that there is still a serious interference with the objectives of the directive or with public or private interests.

67 In those circumstances, the coefficient of 1 (on a scale from 1 to 20) proposed by the Commission is an adequate reflection of the degree of seriousness of the infringement subsisting at the date of the Court's examination of the facts.

68 Third, however, as regards the coefficient relating to the duration of the infringement, the Commission's suggestion that this should be fixed at 1.3 (on a scale from 1 to 3) cannot be accepted.

69 The Commission submits that that coefficient was established in accordance with a new method of calculation decided on by it at its meeting of 2 April 2001, under which the coefficient relating to the duration of the infringement is calculated from a base of 0.10 a month counting from the seventh month after the delivery of the judgment which has not been complied with, with a maximum of 3. As 19 months passed between the judgment in Case C-52/00 *Commission* v *France* and the Commission's decision of 16 December 2003 to institute the present proceedings, it suggests that the coefficient for the duration of the infringement should be fixed at 1.3.

70 It should be observed that while guidelines such as those in the notices published by the Commission may indeed contribute to ensuring the transparency, predictability and legal certainty of that institution's actions, it nevertheless remains the fact that exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which in any event cannot bind the Court (see, in particular, Case C-304/02 *Commission* v *France*, paragraph 85). That applies inter alia to the scale for the coefficient relating to the duration of the infringement and the criteria for determining that coefficient.

71 That coefficient must be determined by the Court. For that purpose the duration of the infringement must be assessed by reference to the time when the Court assesses the facts, not the time at which the case is brought before it by the Commission, and the Court's discretion is moreover not limited by the scale of 1 to 3 proposed by the Commission.

72 It is not disputed in the present case that compliance with the judgment in Case C-52/00 *Commission* v *France* required only the adoption of some measures of transposition into national law, which were moreover clearly defined.

73 It is clear that, regardless of the partial compliance with the judgment in Case C-52/00 *Commission* v *France*, which itself took place only with great delay, the failure of the French Republic to fulfil its obligation to comply fully with that judgment has lasted for a considerable period of time, since nearly four years have elapsed since that judgment was delivered.

74 In those circumstances, a coefficient of 3 appears appropriate to take account of the duration of the infringement.

75 Fourth, the Commission's suggestion of multiplying a base amount by a coefficient of 21.1, based on the gross domestic product of the French Republic and the number of votes it has in the Council of the European Union, is an appropriate way of reflecting that Member State's ability to pay, while keeping the variation between Member States within a reasonable range (see, in particular, Case C-304/02 *Commission* v *France*, paragraph 109).

76 Multiplication of the base amount of EUR 500 by the coefficients fixed at 21.1 (ability to pay), 1 (seriousness of the infringement) and 3 (duration of the infringement) leads in the present case to an amount of EUR 31 650 for each day of delay.

77 As regards, fifth, the frequency of the penalty payment, in a case such as the present one concerning compliance with a judgment of the Court which involves the adoption of a legislative amendment, a penalty imposed on a daily basis should be chosen.

78 In the light of all the above considerations, the French Republic must be ordered to pay to the Commission, into the 'European Community own resources' account, a penalty payment of EUR 31 650 for each day of delay in taking the necessary measures to comply fully with the judgment in Case C-52/00 *Commission* v *France* from delivery of the present judgment until full compliance with the judgment in that case.

Costs

79 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(5), on application by a party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

80 In the present case, the French Republic has been unsuccessful as regards the claim maintained by the Commission. The partial withdrawal by the Commission was the result of the partial and belated adoption by the French Republic of the necessary measures to comply with the judgment in Case C-52/00 *Commission* v *France*.

81 The French Republic must therefore be ordered to pay the costs.

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

1. **Declares that, by continuing to regard the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of the person who supplied him with the product, the French Republic has failed to take the necessary measures to comply fully with the judgment in Case C-52/00 *Commission* v *France* as regards the transposition of Article 3(3) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, and has thereby failed to fulfil its obligations under Article 228 EC;**

2. **Orders the French Republic to pay to the Commission of the European Communities, into the 'European Community own resources' account, a penalty payment of EUR 31 650 for each day of delay in taking the necessary measures to comply fully with the judgment in Case C-52/00 *Commission* v *France* from delivery of the present judgment until full compliance with the judgment in that case;**

3. **Orders the French Republic to pay the costs.**

[Signatures]