JUDGMENT OF THE COURT (Grand Chamber)

7 July 2009 *

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In Case C-369/07,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 3 August 2007,

Commission of the European Communities, represented by E. Righini, I. Hadjiyiannis and D.Triantafyllou, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by A. Samoni-Rantou and P. Mylonopoulos, acting as Agents, and V. Christianos and P. Anestis, dikigoroi,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and T. von Danwitz, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta (Rapporteur), K. Schiemann, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should:

— declare that, by failing to take the measures necessary to comply with the judgment delivered by the Court in Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875

concerning the failure by the Hellenic Republic to fulfil its obligations under Article 3 of Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways (OJ 2003 L 132, p. 1) ('the contested decision'), the Hellenic Republic has failed to fulfil its obligations under that decision and under Article 228 EC;

— order the Hellenic Republic to pay to the Commission a penalty payment of EUR 53 611 for each day of delay in complying with the judgment in Case C-415/03 *Commission* v *Greece* as regards the contested decision, running from the day on which judgment is delivered in the present proceedings until the day on which the judgment in Case C-415/03 is complied with;

— order the Hellenic Republic to make a lump sum payment to the Commission, to be calculated by multiplying a daily amount of EUR 10 512 by the number of days over which the infringement continues, running from the date of judgment in Case C-415/03 until the date of judgment in the present proceedings, in relation to the contested decision;

— in the alternative, in the event that the Court finds that recovery has in fact occurred, order the Hellenic Republic to make a lump sum payment to the Commission, to be calculated by multiplying a daily amount of EUR 10 512 by the number of days over which the infringement continued, from the date of judgment in Case C-415/03 until the date on which the Hellenic Republic recovered the aid declared unlawful in the contested decision, and

— order the Hellenic Republic to pay the costs.

I — Background to the dispute

2 On 11 December 2002, the Commission approved the contested decision, the enacting terms of which are worded as follows:

'Article 1

The restructuring aid granted by Greece to Olympic Airways in the form of:

(a) loan guarantees extended to the company until 7 October 1994 pursuant to Article 6 of Greek Law No 96/75 of 26 June 1975;

(b) new loan guarantees totalling USD 378 million for loans to be contracted before 31 March 2001 for the purchase of new aircraft and for investment necessary for the relocation of Olympic Airways to the new airport at Spata;

(c) easing of [Olympic Airways'] debt burden by GRD 427 billion;

(d) conversion of GRD 64 billion of the undertaking's debt to equity;

(e) a capital injection of GRD 54 billion reduced to GRD 40.8 billion in three instalments of GRD 19, 14 and 7.8 billion in 1995, 1998 and 1999 respectively

is considered to be incompatible with the common market within the meaning of Article 87(1) [EC], as the following conditions, under which the initial authorisation of the aid has been granted, are no longer met:

(a) the full implementation of the restructuring plan aimed at the achievement of the long-term viability of the company;

(b) the observance of 24 specific undertakings attached to the authorisation of the aid, and

(c) the regular monitoring of the implementation of the restructuring aid.

Article 2

The State aid which Greece has implemented in the form of tolerance of a persistent non-payment of social security obligations, of VAT on fuel and spare parts payable by Olympic Aviation, of rentals for different airports, of airport charges payable to Athens International Airport and other airports, of "spatosimo" tax is incompatible with the common market.

Article 3

1. Greece shall take the necessary measures to recover from the beneficiary the aid of GRD 14 billion (EUR 41 million) referred to in Article 1 which is not compatible with the Treaty and the aid referred to in Article 2 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

The Hellenic Republic shall inform the Commission within a period of two months from the date of notification of the present decision of the measures to be taken to comply with it.

…'

II — The judgment in Case C-415/03 *Commission* v *Greece*

3 On 24 September 2003, the Commission brought infringement proceedings against the Hellenic Republic, pursuant to Article 88(2) EC, in relation to the implementation of the contested decision.

4 In its judgment in Case C-415/03 *Commission* v *Greece*, the Court held that:

'[B]y failing to take within the prescribed period all the measures necessary for repayment of the aid found to be unlawful and incompatible with the common market — except that relating to the contributions to the national social security institution –, in accordance with Article 3 of the [contested] decision, the Hellenic Republic has failed to fulfil its obligations under that article.'

III — The pre-litigation procedure

5 On 18 May 2005, the Commission sent a letter to the Hellenic Republic requesting it to inform the Commission of the measures taken to comply with the judgment in Case C-415/03.

6 In its reply of 2 June 2005, the Hellenic Republic stated that measures to recover the aid in question from Olympic Airways were to be implemented and that the recovery procedures would be concluded within a few months' time as a result of the sale of Olympic Airways' assets and shares. The Hellenic Republic also stated that implementation of the order for the recovery of EUR 41 million in aid imposed in Article 1 of the contested decision had been suspended by the Administrative Court of

Athens pending the outcome of an action brought by Olympic Airways for annulment of that decision before the Court of First Instance of the European Communities.

7 By letter of 8 July 2005, the Hellenic Republic reaffirmed that the relevant government departments had reached the final stage of the procedure for recovery of the aid in question.

8 By letter of formal notice of 18 October 2005, the Commission then initiated the procedure under Article 228 EC for failure to comply with the judgment in Case C-415/03.

9 In its reply of 19 December 2005, the Hellenic Republic informed the Commission that it disputed the claim that the measures taken to comply with that judgment had not been notified to it. It stated that the national authorities had acted correctly and without delay in recovering the aid referred to in the contested decision.

10 On 4 April 2006, the Commission sent to the Hellenic Republic a reasoned opinion, which was notified to that Member State on 10 April 2006. In that opinion, the Commission requested the Hellenic Republic to adopt the measures necessary to comply with the judgment in question within two months of receipt of the reasoned opinion. It also stated in the opinion that, if it were obliged to bring proceedings before the Court under Article 228 EC, it would indicate the amounts to be paid by way of lump sum and penalty payment.

11 The Hellenic Republic responded to the reasoned opinion by letter of 9 June 2006, reiterating what it had indicated in its earlier letters. It also stated that Olympic Airways had brought proceedings before the Administrative Court and stated that difficulties were anticipated as regards the concluding of the national procedures for recovery of the aid at issue.

12 In such circumstances, the Commission decided to initiate proceedings before the Court.

13 By judgment in Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, the Court of First Instance annulled Articles 2 and 3 of the contested decision in so far as they relate to tolerance of persistent non-payment of airport charges owed by Olympic Airways to Athens International Airport and value added tax owed by Olympic Aviation on fuel and spare parts. The Court of First Instance dismissed the remainder of the application.

IV — Procedure before the Court

A — *The amounts of aid set out in the application*

14 In its reply, the Commission stated that, having regard to the judgment in *Olympiaki Aeroporia Ypiresies* v *Commission*, the following amounts of aid, not inclusive of interest, had yet to be recovered:

— EUR 41 million, pursuant to Article 1 of the contested decision;

— EUR 2.5 million in rentals for certain airports;

— EUR 61 million for the 'spatosimo' tax, and

— EUR 28.9 million for the set-off of debts as between the Hellenic Republic and Olympic Airways or as between certain airports and that undertaking in respect of airport charges.

15 As regards the latter amount of aid, in a response of 26 November 2008 to a written question put by the Court on 14 November 2008, the Commission confirmed that it was not necessary to recover the sum of EUR 28.9 million, referred to in recital 209 of the contested decision, since that sum did not of itself constitute State aid.

B — *The written statements given in response to the questions put by the Court*

16 On 20 October 2008, pursuant to Article 54a of the Rules of Procedure, the Court requested the Hellenic Republic to state, inter alia, the conditions under which and legal basis on which the amounts of aid to be recovered from Olympic Airways under Articles 1 and 2 of the contested decision had been offset against State debts to that company.

17 The Hellenic Republic replied, on 31 October 2008, that a certain number of Olympic Airways' debts, comprising the repayment of the capital referred to in Article 1 of the contested decision, the balance of the 'spatosimo' tax and an invoice of the Directorate for Civil Aviation ('DCA') for EUR 176 802, had been offset against damages awarded to the company under arbitration awards. The damages in question were awarded to the company by an arbitration tribunal established pursuant to an arbitration agreement provided for in Article 27 of Legislative Decree 3560/1956 validating a contract concluded between Aristotle Onasis and the State.

18 The Hellenic Republic stated that the first arbitration award, 57/2006 of 6 December 2006, relating to the first action brought on 20 March 2006 ('the arbitration award of 6 December 2006'), awarded the following damages to Olympic Airways:

— EUR 37 051 392 in respect of its early eviction from Elliniko airport;

— EUR 17 996 655 in respect of its moving to the new airport;

— EUR 75 615 756 for the damage suffered as a result of the construction of facilities at Athens International Airport;

— EUR 1 375 707 for the damage suffered as a result of the delay in the construction of facilities at Athens International Airport and the consequent obligation for Olympic Airways to use the facilities of Elliniko Airport and to be responsible for their maintenance;

— EUR 183 300 000 in respect of the additional operating costs for Athens International Airport between 29 March 2001 and 31 December 2005, by comparison with the operating costs for Elliniko Airport;

— EUR 88 026 000 special operating costs on account of longer waiting times at Athens International Airport by comparison with the former airport, between 29 March 2001 and 31 December 2005;

— EUR 3 753 472 on account of the obligation to cover the costs of the toll for the motorway which has to be used to gain access to Athens International Airport at Spata using the Attiki road, and

— EUR 250 000 000 in respect of frozen funds.

19 According to the Hellenic Republic, that first arbitration award assessed the total compensation payable to Olympic Airways on account of the damage suffered at EUR 657 118 982. Following a number of adjustments, the total compensation payable amounted to EUR 563 896 458, together with statutory interest.

20 The Hellenic Republic pointed out that, subsequently, part of the sum awarded to Olympic Airways was offset against its debts to the State. The set-off included repayment of the aid referred to in Article 1 of the contested decision and payment of the balance of the 'spatosimo' tax and the debt of EUR 176 802 in respect of the DCA invoice referred to in Article 2 of the decision.

21 The Hellenic Republic adds that, from August 2007, a number of orders for payment to Olympic Airways were issued by the State on the basis of the arbitration awards made in its favour. Because of its debts, including the amounts of aid in question, those funds were not paid to the company. The tax authorities were under a legal obligation to offset the company's debts against sums owing to it. The first payment order was sufficient to settle in its entirety the balance of the company's debts under the contested decision (a sum of approximately EUR 120 million, including interest).

22 The Hellenic Republic states that the first payment order, relating to the damages granted under the arbitration award of 6 December 2006, was document No 2516/31.8.2007 and was for EUR 601 289 003. That amount was arrived at by adding statutory interest and deducting a sum of EUR 11 550 577 from the total amount of EUR 612 839 581.

23 The Hellenic Republic observes that the various set-off arrangements were made in accordance with the following expert accountancy opinions:

— 2922 DOY/FAVE, in relation to the repayment (with interest) of the capital injection (Article 1 of the contested decision) by way of set-off against an equivalent fraction of repayment order 2516/31.8.2007, in the sum of EUR 601 289 003;

— 2927 to 2933 and 2940 DOY/FAVE, in relation to the payment (with interest) of the sums due in respect of 'spatosimo' tax (Article 2 of the contested decision) by way of set-off against an equivalent fraction of repayment order 2516/31.8.2007, and

— 2926 DOY/FAVE, in relation to payment of the rentals owing to the DCA in the sum of EUR 176 802 (invoice No 3307/98) by way of set-off against an equivalent fraction of payment order 2516/31.8.2007.

V — The failure to fulfil obligations

A — *The subject-matter of the action*

24 It should be pointed out at the outset that, having regard to the judgment of the Court of First Instance in *Olympiaki Aeroporia Ypiresies* v *Commission* and bearing in mind the indication given by the Commission concerning the amount of aid referred to at recital 209 of the contested decision, the parties remain in disagreement as to the implementation of Article 1 of the contested decision (capital injection) and compliance with the two obligations laid down in Article 2 of the decision, namely the repayment of the 'spatosimo' tax and of rentals owing to certain airports.

B — *The implementation of the judgment in Case C-415/03 Commission v Greece*

1. Arguments of the parties

25 The Commission claims that the Hellenic Republic has not taken the measures necessary to comply with the judgment in Case C-415/03 *Commission* v *Greece*.

26 The Commission points out that the only defence available to a Member State which has failed to recover unlawful aid is to plead that it was absolutely impossible for it properly to implement the decision ordering recovery of the aid and that a Member State encountering unforeseen and unforeseeable difficulties in implementing such a decision must submit those problems to the Commission for its consideration.

27 The Commission submits that the Hellenic Republic has never claimed that it was absolutely impossible to recover the contested aid but simply that it was experiencing legal and practical difficulties. While it is true that recovery must be effected in accordance with the procedures of national law, it must be carried out in such a manner as to ensure the immediate and effective execution of the decision in question. It is not sufficient simply to activate the recovery procedure, since that procedure must achieve tangible results.

28 The Commission states in its reply that it was informed for the first time that arrangements were being made for the aid at issue to be repaid in the Hellenic Republic's defence, lodged at the Court on 23 October 2007. That Member State had never previously claimed that it had recovered that aid. The only steps communicated to the Commission had been preliminary assessments of certain categories of aid and their registration as debts to the State.

29 Given that no explanation was given to it in that regard, the Commission states that it can no longer accept either the calculations of the amounts allegedly paid or the evidence adduced by the Hellenic Republic concerning the recovery of the aid at issue.

30 The documents provided to establish that both the 'spatosimo' tax and the airport rentals have been recovered consist of a statement of the DCA of 2 October 2007 to the effect that those debts 'have been paid, offset or passed to the appropriate tax authority to be verified and recovered in accordance with the Code on the recovery of public revenue'.

31 In the Commission's opinion, such a document cannot constitute proof that repayment has been effected in compliance with all the required formalities. In any event, the defendant has failed to provide specific documentary evidence relating to account movements that could confirm that the amounts in question have actually been paid. Nor did the documentation which was attached to the Hellenic Republic's response to

the reasoned opinion contain any sufficiently precise information as to the actual recovery of the various amounts of aid.

32 The Commission states that the national authorities subsequently provided it with copies of arbitration awards but no supporting documentation or explanations as to how the amounts awarded to Olympic Airways had been determined. The question might arise, therefore, as to the extent to which the compensation awards can actually be linked to the State's obligations towards that company as regards the operation of the former Athens airport.

33 The Commission also entertains doubts as to the lawfulness of the alleged recovery measures. The documents submitted by the defendant refer to either payment of debts or set-off of credits/debts. Irrespective of the fact that any set-off occurred only in October 2007, the national authorities failed to show the legal basis on which the State was a debtor of Olympic Airways.

34 In the Commission's view, even if the Court accepts that there was recovery of the amounts of aid, Olympic Airways would not have been in a position to repay the amounts in question without a further injection of subsidies.

35 The Hellenic Republic maintains that all the aid amounts were recovered between August and September 2007. The total damages awarded to Olympic Airways by the arbitration tribunal were set off against the company's debt arrears to the State. Those debts, which were cleared by way of set-off, included the balances of aid arrears referred to in the contested decision.

36 The Hellenic Republic adds that it had informed the Commission in March 2006 that Olympic Airways had brought actions for damages against the State before the arbitration tribunal and that it had sent to the Commission on 29 January 2008, for information, copies of the awards made.

37 The Hellenic Republic maintains that it kept the Commission informed of developments in the procedures implemented to recover the amounts in question. In spite of the complexity of the operations to be carried out, the Commission did not offer the least assistance to enable the questions in respect of which the defendant Member State had sought its cooperation to be resolved by agreement, in particular the questions relating to the quantitative determination of the amounts to be recovered and the arrangements for repayment within a particular time frame.

38 The Hellenic Republic states that the sum of EUR 41 million referred to in Article 1 of the contested decision was recovered on 31 August 2007, together with accrued interest.

39 The Hellenic Republic points out that a significant part of the 'spatosimo' tax was paid before the contested decision was adopted, namely a sum of EUR 22 806 159. The evidence relating to that payment had already been sent to the Commission in 2003. The balance of that debt, namely the sum of EUR 38 192 997, was certified by the tax authorities in accordance with the Code on the recovery of public revenue. That sum, to which interest of EUR 11 336 120 was added, was recovered on 18 October 2007. The total amount paid in respect of that tax was EUR 49 529 117.

40 The Hellenic Republic states that, of the aid received in respect of rentals (EUR 2 472 719), a sum of EUR 1 818 027 was repaid by Olympic Airways in 2006 and the balance of the debt was reimbursed in 2007.

41 The Hellenic Republic adds that the measures for reimbursement of the amounts set out in the contested decision do not in any way constitute new State aid and that, in any event, the arrangements in question cannot form the subject-matter of the present proceedings.

2. Findings of the Court

42 In order to determine whether the Hellenic Republic adopted the measures necessary to comply with the judgment in Case C-415/03 *Commission* v *Greece*, it is necessary to ascertain whether the amounts of aid which are still in dispute were repaid by the recipient undertaking.

43 With regard to the period within which it was necessary to comply with that judgment, it should be recalled that, according to settled case-law, 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; Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraph 27; and Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 19).

44 In the present case, it is not disputed that, at the time the period prescribed in the reasoned opinion expired, namely on 10 June 2006, the defendant had not implemented the judgment in Case C-415/03.

45 As regards the response to the reasoned opinion in which the Hellenic Republic set out the measures for the recovery of various amounts of aid, while at the same time disclosing that Olympic Airways had brought proceedings before the administrative court and mentioning difficulties concerning the quantification of the sums to be reimbursed and complex repayment procedures, it is sufficient to call attention to the fact that, according to established case-law, a Member State cannot plead provisions,

practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see *Commission* v *Germany*, paragraph 38, and Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1, paragraph 22).

46 Similarly, the Hellenic Republic's argument that the recovery procedure was hampered because the Commission failed to cooperate cannot be accepted.

47 The various amounts of aid to be recovered are sufficiently clear from, on the one hand, Articles 1 to 3 of the contested decision and, on the other, recitals 206 to 208 of the grounds of the decision.

48 In addition, the Court has held that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered and that it is sufficient for the Commission's decision to include information enabling the recipient to calculate the amount itself, without overmuch difficulty (see Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25, and Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 29).

49 Accordingly, the Commission was entitled to confine itself to insisting on compliance with the obligation to recover the amounts of aid in question and to leave to the competent national authorities the task of calculating the precise amount of the sums to be recovered, including interest payable on those sums due (see *Spain* v *Commission*, paragraph 26, and judgment of 14 February 2008 in Case C-419/06 *Commission* v *Greece*, paragraph 46).

50 It must be concluded that the Hellenic Republic has failed to fulfil its obligations under Article 228(1) EC.

VI — Financial penalties

51 The forms of order sought by the Commission requesting the imposition of a penalty payment and a lump sum payment are based on Commission Communication SEC (2005) 1658 of 13 December 2005 (OJ 2007 C 126, p. 15).

A — *The request for the imposition of a penalty payment*

1. Arguments of the parties

52 The Commission proposes that the Court should impose upon the Hellenic Republic a penalty payment of EUR 53 611 for each day of delay in complying with the judgment in Case C-415/03 *Commission* v *Greece*, from the day on which the Court delivers judgment in the present proceedings until such time as the breach of obligations established is brought to an end.

53 The Commission is of the view that such a penalty payment reflects the gravity and duration of the infringement and takes into account the need to endow it with a coercive and deterrent effect. For the purpose of determining the seriousness of the infringement, a coefficient of 12 was applied to reflect the importance of the Community provisions infringed and the consequences of the infringement for general and individual interests.

54 The Commission states that, up to the time when the present proceedings were initiated, the infringement had persisted for 17 months. However, that fails to take account of the current duration of the infringement, extending up to the point at which judgment is delivered by the Court, and the Court is therefore free to take into account a longer period of infringement.

55 As regards the amount of the penalty payment to be imposed, the Commission states that if the standard flat-rate amount fixed at EUR 600 is multiplied by a coefficient of 12 to reflect the seriousness of the infringement and by a coefficient of 1.7 for duration, namely a coefficient of 0.1 per month, and the result obtained is multiplied by a coefficient of 4.38 (the 'n' factor), which takes account of the ability of the defendant Member State to pay, a sum of EUR 53 611 is obtained.

56 The Hellenic Republic is of the view that, since the total State aid to be repaid was recovered within a reasonable period, the requests for the imposition of a penalty payment and a lump sum are devoid of purpose.

57 It states that, in any event, the amount of the penalty payment proposed is disproportionate and must be reduced to an appropriate extent if the Court considers that the Hellenic Republic has failed to implement fully the judgment in Case C-415/03 *Commission* v *Greece*.

2. Findings of the Court

a) Preliminary observations

58 Having found that the Hellenic Republic failed to comply with the judgment in Case C-415/03 within the period prescribed in the reasoned opinion, the Court may, in accordance with the third subparagraph of Article 228(2) EC, impose a penalty payment and/or a lump sum payment on that Member State.

59 As regards the imposition of a penalty payment, the Court has held that such a penalty is, in principle, justified only in so far as the failure to comply with an earlier judgment of

the Court continues up to the time of the Court's examination of the facts (see, to that effect, *Commission* v *Italy*, paragraphs 33, 45 and 46, and *Commission* v *Germany*, paragraph 40).

60 It is therefore necessary to ascertain whether that is the case.

b) The period over which the failure to fulfil obligations persisted

61 In order to determine whether the failure to fulfil obligations for which the defendant stands criticised continued up to the time of the Court's examination of the facts, it is necessary to consider the measures which were adopted, according to the defendant Member State, after the period prescribed in the reasoned opinion.

62 The Hellenic Republic claims that the amounts of aid at issue were recovered by way of set-off against debts mutually owed as between Olympic Airways and the State.

63 In order to demonstrate that the amounts of aid in question were repaid by means of such an operation, the Hellenic Republic submitted a number of attestations and statements, in particular the following documents:

— Annex B.11 to the defence of the Hellenic Republic (attestation of the Ministry for the Economy and Finance of 18 October 2007 on the payment of the established debts of Olympic Airways);

— Annex 2 to the Hellenic Republic's rejoinder (supporting documentation as to the situation concerning debts owed to the State, provided by the Ministry for the Economy and Finance on 29 January 2008);

— Annex E.1 to the reply to the written questions put by the Court (memorandum of 31 October 2008 concerning the payment of debts, drafted by the said Ministry for the attention of Olympic Airways);

— Annex E.6, document No 16, of the same reply (attestation of the said Ministry, of 27 August 2007, concerning the deduction of sums in relation to payment orders), and

— 10 expert accountancy opinions, bearing dates from 30 March 2006 to 31 August 2007, referred to in the same reply and entitled 'payments deemed to have set-off effect.

64 In those circumstances, it is necessary to ascertain, first, whether set-off can constitute an appropriate means of giving effect to an obligation to repay State aid and, if so, second, whether in the present case there was in fact such a set-off.

c) The choice of a means of reimbursement other than reimbursement in cash

65 As regards the means of implementing the contested decision and the judgment in Case C-415/03 *Commission* v *Greece*, it should be noted that Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) provides that recovery of State aid is to be effected without delay and in accordance with the procedures under

the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.

66 Accordingly, the Court held in Case C-209/00 *Commission* v *Germany* [2002] ECR I-11659, paragraph 32, that since there are no Community provisions on the procedure for recovery of wrongly paid amounts of aid, such financial assistance must, in principle, be recovered in accordance with the relevant procedural provisions of national law.

67 Consequently, a Member State which, pursuant to a decision of the Commission, is obliged to recover unlawful aid is thus free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of Community law (see Case C-209/00 *Commission* v *Germany*, paragraph 34).

68 It follows that, in principle, so long as it is provided for under the national legal system as a mechanism for extinguishing debts, a set-off operation can constitute an appropriate means by which State aid may be recovered.

69 The Hellenic Republic has confirmed that the Greek Civil Code makes provision for such a legal mechanism.

70 As regards the substantive basis of the set-off which it is claimed occurred, the defendant, in reply to questions put by the Court, submitted to it a copy of the arbitration award of 6 December 2006, under which the State was ordered to pay damages under a number of heads to Olympic Airways.

71 It follows from that award that the arbitration tribunal found, inter alia, that Olympic Airways had suffered financial damage as a result of its early eviction from Elliniko Airport, its enforced move to the new Athens International Airport at Spata, the construction of facilities at that airport, additional and special costs incurred in operating that airport and the freezing of funds.

72 Without prejudice to the application of Community rules on State aid, it must therefore be held that, for the purposes of these proceedings, the Hellenic Republic has demonstrated that there was a debt payable to Olympic Airways of EUR 601 289 003, which is considerably greater than the total amount of aid in question.

73 In those circumstances and having regard to the repayment obligation in the contested decision and the judgment in Case C-415/03 *Commission* v *Greece*, it is necessary to consider whether the purported set-off was carried out in such a manner as to discharge that obligation.

d) The burden of proof

74 It should be pointed out, first, that, according to established case-law, in the context of proceedings under Article 228 EC, it is for the Commission to provide the Court with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations (see Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 73).

75 Where, in such proceedings, the Commission has provided sufficient evidence to suggest that the breach of obligations complained of has persisted, it is for the Member State concerned to challenge, in a detailed manner, the substantive content of that evidence and to prove that the breach has ceased (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 56).

76 With regard to the arguments put forward by the Commission in these proceedings, it should be noted that it rejected the set-off mechanism chosen, not only in the course of the written procedure but also at the hearing. It reiterated, in particular, its view that the measures communicated to it by the defendant were insufficient for the purpose of demonstrating that the contested decision and the judgment in Case C-415/03 had been implemented.

77 At the hearing, the Commission stated in particular, in reply to a question put by the Court, that even if set-off may, in principle, be accepted as a valid legal mechanism, the manner in which the set-off was effected in the present case must be rejected.

78 If the damages were correctly awarded by the arbitration tribunal to Olympic Airways, that company should have at its disposal accountancy documentation relating to the set-off which proves that such an operation actually took place. A simple declaration that the amounts of aid in question were offset is insufficient.

79 As regards the quality of the evidence relating to the implementation of a decision requiring the recovery of illegal aid, the Court has held that, where a Member State recovers such aid by means other than a cash payment, it must provide the Commission with all the information enabling it to establish that the means chosen constitute an appropriate means of implementing the decision (see Case C-209/00 *Commission* v *Germany*, paragraph 40).

80 The Court also stated, at paragraph 43 of that judgment, that although a Member State may recover illegal aid by means other than a cash payment, it must ensure that the measures it chooses are sufficiently transparent to enable the Commission to satisfy itself that they are suitable for the purpose of eliminating, in full compliance with Community law, the distortion of competition caused by that aid.

81 The Court went on to state, at paragraphs 57 and 58 of that judgment, that such measures must have the same effect as that of repayment by way of a transfer of funds and any measure adopted in order to fulfil an obligation to recover illegal aid must be a suitable instrument for re-establishing the conditions of competition which have been distorted by the grant of that illegal aid and be capable of being identified as such by the Commission and other interested parties.

82 In the light of those considerations, the Court must determine whether, as a result of the documents submitted, the Hellenic Republic has proved that it implemented the contested decision and the judgment in Case C-415/03 *Commission* v *Greece* with regard to the three categories of aid which remain the subject-matter of these proceedings.

e) The amount of aid paid in the form of a capital injection

83 In accordance with Article 3(1) of the contested decision, read in conjunction with Article 1 of the decision, the Hellenic Republic was required to recover from Olympic Airways a total sum of EUR 41 million in respect of the contribution made.

84 Since the Hellenic Republic has claimed that that sum was repaid by way of a set-off operation, it must be determined whether the documents submitted may be regarded as establishing that that obligation was discharged in accordance with the principles set out at paragraphs 79 to 81 above.

85 In that connection, the defendant has submitted, inter alia, a memorandum of 31 October 2008 from the Ministry for the Economy and Finance to Olympic Airways.

86 It is apparent from the wording of that memorandum that 'the debt of EUR 41 085 840 which has been certified in accordance with the Code on the recovery of public revenue and arises from the obligation to reimburse the capital injection paid to the company on 9 October 1998 was repaid in full (both capital and interest) on 31 August 2007 and itemised in the accounts under No 2922 as deemed to have paid by way of set-off against an amount which would otherwise have had to be paid by the tax authorities to Olympic Airways on account of a State debt to that company, which is identified in Payment Order No 2516/31 August 2007', issued by the Hellenic Republic in favour of Olympic Airways in the sum of EUR 601 289 003 on the basis of the arbitration award of 6 December 2006.

87 Moreover, with regard to its obligation to Olympic Airways arising under that arbitration award, the Hellenic Republic confirmed that the national authorities were under a legal obligation to offset that company's debts against the sum which was to have been paid to it.

88 The Court considers that, with that document, the defendant has proven that there was repayment of the amount of aid paid in the form of a capital injection.

f) The amount of aid relating to the 'spatosimo' tax

89 In accordance with Article 3(1) of the contested decision, the Hellenic Republic was required to recover from Olympic Airways, inter alia, aid in the form of tolerance of persistent non-payment by that company of the tax for the modernisation and development of airports, known as the 'spatosimo tax', totalling EUR 60 999 156 (recital 208 of the decision).

90 Since the defendant maintains that part of that sum, namely EUR 22 806 158, was repaid before the contested decision was adopted, it must be observed that, even if that

amount was repaid before judgment was delivered on 12 May 2005 in Case C-415/03, the Hellenic Republic has failed in any event to provide any documentation capable of supporting that assertion.

91 The letter from the DCA of 2 October 2007, which forms Annex B.15 to the Hellenic Republic's defence and refers to sums paid by Olympic Airways totalling EUR 22 806 158 in respect of the 'spatosimo' tax, states that, on 24 September 1999, Olympic Airways paid the sum of EUR 3 445 793 and, on 29 June 2001, the sum of EUR 19 360 365.

92 Irrespective of the fact that those purported payments were made long before the action was brought in the case which gave rise to the judgment of 12 May 2005 in Case C-415/03, in which the Court found that the contested decision had not been complied with, it should be observed that the letter of 2 October 2007 simply states that Olympic Airways actually paid those amounts and it follows that that letter cannot constitute proof that the aid was repaid.

93 Lastly, the proofs of payment of the amounts referred to in the letter of the Ministry of Transport and Communication of 26 June 2003, which was sent to the Commission and in forms Annex B.19 to the defence, cannot constitute adequate proof either. As regards the payment slips issued by Olympic Airways, which are annexed to that letter, it must be noted, as the Commission observed, that none of those documents bears in the appropriate box the stamp of the bank receiving the payment. Moreover, the documents submitted are dated June 2001, none of them bearing the date 24 September 1999, the date on which, according to the letter of 2 October 2007, part of the total amount of EUR 22 806 158 was paid.

94 It must therefore be concluded that the defendant Member State has failed to prove that the sum of EUR 22 806 158 was reimbursed in respect of aid relating to the 'spatosimo' tax.

95 As regards the remaining amount of that tax (EUR 38 192 997), the Hellenic Republic has submitted to the Court, inter alia, the memorandum of 31 October 2008 from the Ministry for the Economy and Finance to Olympic Airways.

96 It is apparent from the wording of that memorandum that Olympic Airways' 'spatosimo' debts for the period covered by the contested decision 'were settled in full on 31 August 2007 and itemised in the accounts under No 2927, No 2928, No 2929, No 2930, No 2931, No 2932, No 2933 and No 2940 as deemed to have been paid by way of set-off against an amount that would otherwise have had to be paid by the tax authorities to Olympic Airways on account of a State debt to that company, which is identified in payment order No 2516/31 August 2007'.

97 The Court considers that the defendant has proved with that document that the remaining amount of the 'spatosimo' tax was repaid.

98 It follows from the foregoing that the Hellenic Republic has failed to demonstrate to the requisite legal standard that aid in the sum of EUR 22 806 158 relating to the 'spatosimo' tax was reimbursed by Olympic Airways.

g) The amount of aid relating to airport rentals

99 In accordance with Article 3(1) of the contested decision, the Hellenic Republic was required to recover from Olympic Airways aid in the form of non-payment of airport rentals in the sum of EUR 2.46 million (recital 206 of the decision).

100 As to how that aid element was to be recovered, in its defence the Hellenic Republic, on the one hand, stated that it had recovered a sum of EUR 1 818 027 and, on the other, referred, inter alia, to the information provided in reply to the reasoned opinion, according to which four invoices totalling EUR 1 087 141 issued by the DCA had been the subject of a number of adjustments and set-offs.

101 It should be observed, as stated by the Advocate General at points 54 to 56 of his Opinion, that the documentation produced by the Hellenic Republic, namely the DCA invoices, documents relating to the necessary corrigenda, the new replacement invoices and statements concerning the set-off of debts mutually owed as between Olympic Airways and the DCA, do not disclose with the requisite degree of precision how the airport rentals owing were repaid, the tables provided in that connection containing, moreover, a number of inconsistencies as to the amounts of the various invoices and the periods in question.

102 That documentation cannot therefore be regarded as establishing that the sums in question were recovered, as alleged.

103 It remains to be examined whether the contested decision was implemented with regard to the payment of the two other invoices issued by the DCA.

104 First, as regards the sum of EUR 176 082, corresponding to DCA invoice No 3307/98, it is evident from the wording of the memorandum of 31 October 2008 from the Ministry for the Economy and Finance to Olympic Airways that that sum 'was paid in full on 31 August 2007 and itemised in the accounts under No 2926 as deemed to have been paid by way of set-off (a total amount of EUR 352 808 principal and interest) against an amount which would otherwise have had to be paid by the tax authorities to Olympic Airways on account of a State debt to that company, which is identified in Payment Order No 2516/31/August 2007'.

105 The Court considers that the defendant has proved with that document that the amount of aid in question relating to part of the airport rentals was repaid.

106 Second, with regard to the repayment of the sum of EUR 478 606 corresponding to DCA invoice No 4175/99, it should be observed, as pointed out by the Advocate General at point 58 of his Opinion, that the documents produced by the defendant in its defence, namely the Ministerial Decree of 2 October 2007 relating to the set-off arrangement, a letter from the DCA to Olympic Airways dated 17 October 2007, to which is appended a detailed statement of the amounts involved in the set-off arrangement, and a letter from the DCA to Olympic Airways dated 19 October 2007 confirming that the debt identified in invoice No 4175/99 was offset, together with interest, in accordance with that decree, constitute sufficient evidence that the sum in question was repaid in relation to airport rentals.

107 Consequently, the contested decision was complied with in so far as concerns the payment of the two DCA invoices in question totalling EUR 654 688.

108 It is apparent from the above considerations that the Hellenic Republic has failed to demonstrate to the requisite legal standard that the total amount of aid relating to airport rentals was reimbursed by Olympic Airways.

h) Conclusion

109 It follows from all the foregoing considerations that the Hellenic Republic has failed to demonstrate to the requisite legal standard that part of the 'spatosimo' tax (see paragraph 94 above) and part of the airport rentals were repaid by Olympic Airways (see paragraph 102 above).

110 Accordingly, the Court considers that an order imposing a penalty payment on the Hellenic Republic constitutes an appropriate financial means by which to induce that Member State to take the measures necessary to put an end to the infringement established and to ensure full compliance with the contested decision and the judgment in Case C-415/03 *Commission* v *Greece*.

B — *The amount of the lump sum payment*

1. Preliminary observations

111 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 (see Case C-304/02 *Commission* v *France*, paragraph 86, and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 58).

112 Accordingly, the Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those contained in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by that institution is transparent, foreseeable and consistent with legal certainty (see *Commission* v *Portugal*, paragraph 34).

113 As regards the imposition of a penalty payment, the Court has held that such a penalty must be decided upon according to the degree of persuasion needed in order for the Member State which has failed to comply with a judgment establishing a breach of obligations to alter its conduct and bring to an end the infringement established (see Case C-304/02 *Commission* v *France*, paragraph 91).

114 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 established and the ability to pay of the Member State concerned (see Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraph 41; Case C-304/02 *Commission* v *France*, paragraph 103, and Case C-177/04 *Commission* v *France*, paragraph 61).

115 Accordingly, in the assessment carried out by the Court, 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, its degree of seriousness and the ability of the Member State concerned to pay. In applying those criteria, the Court is required to have regard, in particular, to the effects of its failure to comply on public and private interests and to the urgency for the Member State concerned to fulfil its obligations (see Case C-304/02 *Commission* v *France*, paragraph 104; Case C-177/04 *Commission* v *France*, paragraph 62; and *Commission* v *Portugal*, paragraph 39).

2. The duration of the infringement

116 The Court is required to determine the duration of the infringement. The duration 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 (see Case C-177/04 *Commission* v *France*, paragraph 71, and *Commission* v *Portugal*, paragraph 45).

117 In those circumstances, since the Hellenic Republic has been unable to demonstrate that its failure to comply with its obligation to implement fully the judgment in Case C-415/03 *Commission* v *Greece* has actually come to an end, that failure must be regarded as having persisted for more than four years, which is a considerable period of time.

3. The seriousness of the infringement

118 Attention must be drawn in this connection to the vital nature of the Treaty rules on State aid, as pointed out by the Advocate General at point 72 of his Opinion.

119 The rules governing the contested decision and the judgment in Case C-415/03 *Commission* v *Greece* are the expression of one of the essential tasks with which the European Community is entrusted under Article 2 EC, namely the establishment of a common market and the promotion of a high degree of competitiveness and convergence of economic performance. That task is also referred to in Article 3(1)(g) EC, which provides that the activities of the Community are to include a system ensuring that competition in the internal market is not distorted.

120 The importance of the Community rules infringed in this case is reflected, in particular, in the fact that repayment of unlawfully paid State aid eliminates the distortion of competition caused by the competitive advantage afforded by the aid and, by repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market (see, to that effect, Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 75).

121 It should be added that it is particularly important to monitor State aid granted to air transport operators, since the market in question is, by its very nature, a cross-border market.

122 As regards the infringement established in the present case, the amounts of aid which the defendant has failed to prove were repaid form a relatively small part of the overall

sum at issue in the contested decision and the judgment in Case C-415/03 *Commission* v *Greece*.

4. The ability of the defendant Member State to pay

123 With regard to the Commission's suggestion of multiplying the basic amount by a specific coefficient applicable to the Hellenic Republic, the Court has ruled on numerous occasions that that method of calculation is an appropriate means of reflecting the ability to pay of the Member State concerned while keeping the variation between Member States within a reasonable range (see *Commission* v *Greece*, paragraph 88; *Commission* v *Spain*, paragraph 59; Case C-304/02 *Commission* v *France*, paragraph 109; and Case C-177/04 *Commission* v *France*, paragraph 75).

5. Conclusion

124 In the light of the foregoing, the Court considers that it is appropriate to impose a penalty payment of EUR 16 000.

6. The date on which the penalty payment is to take effect and its frequency

125 Having regard to the foregoing considerations relating to the lack of proof concerning the repayment of two elements of aid, namely part of the 'spatosimo' tax and part of the airport rentals (see paragraphs 94 and 102 above), the Court considers that it is appropriate to defer the point at which the penalty payment takes effect until one

month after judgment has been delivered in the present case, in order to enable the defendant Member State to demonstrate that it has brought the infringement to an end.

126 As regards the frequency of the penalty payment, the defendant must be ordered to pay it on a daily basis.

127 In view of all those considerations, the Hellenic Republic must be ordered to pay to the Commission, into the 'European Community own resources' account, a penalty payment of EUR 16 000 for each day of delay in adopting the measures necessary to comply with the judgment in Case C-415/03 *Commission* v *Greece*, from one month after the day on which judgment is delivered in the present case until the day on which the judgment in Case C-415/03 is complied with.

C — *Whether a penalty payment and a lump sum payment should be imposed cumulatively*

1. Arguments of the parties

128 The Commission submits that, in the present case, the Court must impose both a penalty payment and a lump sum payment. It is of the view that it is necessary to impose a lump sum payment because every prolonged failure to comply with a ruling of the Court undermines the principle of legality and legal certainty, particularly in the field of State aid. In that field, there should be immediate and effective compliance with a Commission decision and, *a fortiori*, a judgment of the Court establishing a failure to implement such a decision by recovering unlawfully granted financial assistance.

129 With regard to the fact that the Court of First Instance annulled the contested decision in part, the Commission argues that that cannot have any effect on the determination of the amount of the lump sum payment.

130 The Commission considers that the sum proposed is not excessive. At least two years elapsed after judgment was delivered in Case C-415/03 *Commission* v *Greece* before any of the aid in question was actually recovered. Even if the Court were to accept that the sums in question were repaid between August and October 2007, the recovery of aid almost five years after the initial decision and over two years after the Court gave its ruling cannot in any case be regarded as compliance on the part of the Member State in question with its obligations.

131 The Commission has explained that, in determining the seriousness of the infringement, it based its decision, not on the different categories of aid or on the amounts to be recovered, but on the adverse effects on economic operators and by reference to the importance of the Treaty rules on State aid. The fact that more than five years after the adoption of the contested decision the measures taken by the Hellenic Republic have still not accomplished the recovery of the amounts of aid set out in the decision constitutes a serious infringement of Community law.

132 In any event, the Commission takes the view that, even if the Court were to find that the amounts of aid have been repaid, a lump sum payment must be imposed with effect until the date on which those amounts were repaid in full.

133 With regard to the amount of the lump sum payment to be imposed, the Commission considers that a calculation based on a daily amount of EUR 200 reflects the seriousness of the infringement and has regard to the need to ensure that that sum is endowed with deterrent effect. If that amount is multiplied by a factor of 12 to reflect the seriousness of the infringement and by a coefficient of 4.38, which takes account of the Hellenic Republic's ability to pay, a total sum of EUR 10 512 is obtained.

134 The Hellenic Republic is of the view that, in any event, the cumulative application of the penalties provided for in Article 228 EC is disproportionate, in particular in the light of the fact that the penalties in question pursue the same objective, namely to secure compliance by the Member State concerned and effective application of Community law through financial pressure so that the infringement in question is brought to an end. Consequently, the measures should be selected separately and not cumulatively, on the basis of which of the two penalties is the more appropriate.

135 The Hellenic Republic also maintains that the starting point for calculating the penalties laid down in Article 228 EC must be understood to be the date of expiry of the period prescribed in the reasoned opinion and not the date of the Court's judgment establishing the infringement.

136 The Hellenic Republic states that the judgment in Case C-415/03 *Commission* v *Greece* was complied with within a reasonable period, namely two years after it was delivered and one year after the expiry of the period prescribed in the reasoned opinion. Account should also be taken of the technical difficulties entailed in the matter and the lack of cooperation on the part of the Commission in the implementation of the contested decision.

137 The Hellenic Republic submits that the amount of aid to be recovered has a direct bearing on the determination of the seriousness of the infringement, since the effects of the infringement of Community legislation on public and private interests depend on the amount of such aid. It is self-evident that, the smaller the amount of aid, the more limited is the disruption of free competition in the air transport sector. Consequently, in so far as the Court of First Instance found that the payment of certain sums specified in the contested decision was compatible with Community law, the seriousness of the infringement is mitigated.

138 The Hellenic Republic adds that the internal market in the sector in question cannot have been affected by Olympic Airlines, given that that company did not take over from

Olympic Airways. The latter company, which ceased to be engaged in flight operations in 2003, operates only in the ground assistance sector and there has therefore been no distortion of competition in the air transport sector.

139 Lastly, the Hellenic Republic is of the view that, should the Court consider it necessary to impose a lump sum payment, the sum proposed by the Commission is disproportionate and should be reduced to an appropriate degree.

2. Findings of the Court

a) Whether the two penalties should be cumulated

140 It should be noted, first, that the procedure laid down in Article 228(2) EC is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, thereby ensuring that Community law is in fact applied, and 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).

141 The Court therefore held at paragraphs 81 and 82 of that judgment that application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case and, that being so, recourse to both types of penalty provided for is not precluded.

142 It is therefore for the Court, in each case, in the light of the circumstances of the case before it and the degree of persuasion and deterrence which appears to it to be required,

to determine the financial penalties appropriate for making sure that the judgment which previously established the breach is complied with as swiftly as possible and preventing similar infringements of Community law from recurring (see Case C-304/02 *Commission* v *France*, paragraph 97, and Case C-121/07 *Commission* v *France* [2008] ECR I-0000, paragraph 59).

143 Therefore, the Court is empowered, in exercising the discretion conferred on it in the field in question, to impose a penalty payment and a lump sum payment cumulatively.

b) Whether the imposition of a lump sum payment is appropriate

144 The decision whether to impose a lump sum payment must, in each individual case, depend on all the relevant factors pertaining to both the particular nature of the infringement established and the individual conduct of the Member State involved in the procedure instigated pursuant to Article 228 EC (see Case C-121/07 *Commission* v *France*, paragraph 62). That provision confers a wide discretion upon the Court in deciding whether or not to impose such sanctions (see paragraph 63 of that judgment).

145 As regards the present case, the Court considers that all the legal and factual circumstances pertaining to the infringement established indicate that effective prevention of future repetition of similar infringements of Community law requires the adoption of a dissuasive measure, such as a lump sum payment (see Case C-121/07 *Commission* v *France*, paragraph 69).

c) The amount of the lump sum payment

146 If the Court decides to impose a lump sum payment, it must do so, in exercising its discretion, in a manner that is appropriate to the circumstances and proportionate both to the breach that has been established and the ability to pay of the Member State concerned (see *Commission* v *Spain*, paragraph 41).

147 The relevant factors to be taken into account include, in particular, factors such as how long the breach of obligations has persisted since the judgment which initially established it was delivered and the public and private interests involved (see Case C-304/02 *Commission* v *France*, paragraph 114, and Case C-121/07 *Commission* v *France*, paragraph 64).

148 The circumstances to be taken into account are, in particular, those referred to in the considerations set out at paragraphs 117 to 122 above, relating to the duration and seriousness of the infringement.

149 On the basis of those factors, the circumstances of the case are fairly assessed by setting the amount of the lump sum which the Hellenic Republic will have to pay at EUR 2 million.

150 The Hellenic Republic must therefore be ordered to pay to the Commission, into the 'European Community own resources' account, a lump sum of EUR 2 million.

VII — Costs

151 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. Since the Commission applied for costs and the Hellenic Republic's failure to fulfil its obligations has been established, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to adopt, by the date on which the period prescribed in the reasoned opinion expired, the measures necessary to comply with the judgment in Case C-415/03 *Commission* v *Greece* concerning repayment of the aid found to be unlawful and incompatible with the common market in accordance with Article 3 of Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways, the Hellenic Republic has failed to fulfil its obligations under that decision and under Article 228(1) EC;**

2. **Orders the Hellenic Republic to pay to the Commission of the European Communities, into the 'European Community own resources' account, a penalty payment of EUR 16 000 for each day of delay in adopting the measures necessary to comply with the judgment in Case C-415/03 *Commission* v *Greece*, from one month after the day on which judgment is delivered in the present case until the day on which the judgment in Case C-415/03 is complied with;**

3. **Orders the Hellenic Republic to pay to the Commission of the European Communities, into the 'European Community own resources' account, a lump sum of EUR 2 million;**

4. **Orders the Hellenic Republic to pay the costs.**

[Signatures]