JUDGMENT OF THE COURT (Third Chamber)

17 November 2011 *

In Case C-496/09,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 30 November 2009,

European Commission, represented by L. Pignataro, E. Righini and B. Stromsky, acting as Agents,

applicant,

v

Italian Republic, represented by G. Palmieri, acting as Agent, and F. Arena and S. Fiorentino, avvocati dello Stato,

defendant,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: V. Trstenjak,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 May 2011,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

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

— declare that, by failing to adopt all the measures necessary to comply with the judgment of 1 April 2004 in Case C-99/02 *Commission* v *Italy* [2004] ECR I-3353 concerning the recovery from the recipients of aid which, by Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment (OJ 2000 L 42, p. 1), had been found to be unlawful and incompatible

with the common market, the Italian Republic has failed to fulfil its obligations under that decision and under Article 228(1) EC;

— order the Italian Republic to pay to the Commission a daily penalty payment originally set at EUR 285 696 and subsequently reduced to EUR 244 800 for the delay in complying with the judgment in Case C-99/02 *Commission* v *Italy* from the date on which judgment is delivered in the present case until the judgment in Case C-99/02 *Commission* v *Italy* is complied with;

— order the Italian Republic to pay to the Commission a lump sum, the amount of which is to be calculated by multiplying a daily amount originally set at EUR 31 744 and subsequently reduced to EUR 27 200 by the number of days over which the failure to comply continues from the date of the judgment in Case C-99/02 *Commission* v *Italy* until the date on which judgment is delivered in the present case concerning Decision 2000/128; and

— order the Italian Republic to pay the costs.

I — Background to the dispute

2 On 11 May 1999 the Commission adopted Decision 2000/128, Articles 1 to 4 of the operative part of which read as follows:

'*Article 1*

1. The aid granted unlawfully by Italy since November 1995 for employment under the training and work experience contracts provided for in Laws Nos 863/84, 407/90,

169/91 and 451/94 is compatible with the common market and the EEA Agreement provided that it concerns:

— the creation of jobs in the recipient firm for persons who have not yet found employment or have lost their previous employment within the meaning of the guidelines on aid to employment,

— the employment of workers experiencing particular difficulties in entering or re-entering the labour market. For the purposes of this Decision, workers experiencing particular difficulties in entering or re-entering the labour market shall mean young persons under the age of 25, [university graduates] up to the age of 29 and the long-term unemployed, i.e. out of employment for more than one year.

2. Aid for training and work experience contracts which does not satisfy the conditions set out in paragraph 1 is incompatible with the common market.

Article 2

1. The aid granted by Italy under Article 15 of Law No 196/97 for the conversion of training and work experience contracts into open-ended contracts is compatible with the common market and the EEA Agreement provided that it complies with the net job creation requirement as defined in the Community guidelines on aid to employment.

The workforce employed by a firm shall be calculated without taking account of jobs resulting from the conversion and jobs created through fixed-term contracts or not guaranteeing sufficiently stable employment.

2. Aid for the conversion of training and work experience contracts into open-ended contracts which does not satisfy the requirement laid down in paragraph 1 is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the recipients the aid which does not satisfy the conditions of Articles 1 and 2 and has already been unlawfully paid.

Repayment shall be made in accordance with the procedures of Italian law. The amounts to be repaid shall bear interest from the date on which the aid was paid until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.

Article 4

Italy shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.'

II — The judgment in Case C-99/02 Commission v Italy

3 On 15 March 2002 the Commission, pursuant to Article 226 EC and on the basis of the second subparagraph of Article 88(2) EC, brought an action for failure to fulfil obligations against the Italian Republic, seeking a declaration that the Italian Republic had not adopted within the time-limit prescribed all necessary measures to recover from the recipients the aid which, by Decision 2000/128, had been found to be unlawful and incompatible with the common market, and in any event had not notified the Commission of the measures taken.

4 In point 1 of the operative part of the judgment in Case C-99/02 *Commission* v *Italy*, the Court declared that:

'… by not adopting within the time-limit prescribed all measures necessary for the recovery from the recipients of the aid which was found, according to [Decision 2000/128], to be unlawful and incompatible with the common market, the Italian Republic has failed to fulfil its obligations under Articles 3 and 4 of that decision.'

III — The administrative procedure

5 Following the judgment in Case C-99/02 *Commission* v *Italy* and in order to speed up the recovery procedure, the Commission, by letter of 7 July 2004, fixed the arrangements for recovery of the aid. In the absence of a reply from the Italian authorities, it requested, by letter of 7 December 2004, information on the state of progress of the recovery procedure.

6 Following requests for information of 28 February, 12 April, 28 June and 19 August 2005, the Italian Republic informed the Commission that 588 undertakings had received aid of more than EUR 500 000 and 871 undertakings aid between EUR 250 000 and EUR 500 000, and that by September 2005 recovery orders had been served on 1 009 out of 1 457 undertakings and numerous challenges to them had been brought by the recipient undertakings.

7 In reply to a request by the Italian Republic, the Commission, by letter of 27 October 2005, accepted that aid granted after November 1995 would not be recovered in so far as it concerned the recruitment of workers before that date. At the same time, the Commission also asked the Italian Republic why 448 recovery orders had not yet been sent to their addressees and requested information on the amounts already recovered and the amounts remaining to be recovered. It repeated those questions by letter of 9 December 2005.

8 After the Italian Republic informed the Commission that 62 undertakings had to be excluded from the recovery procedure, the Commission questioned the Italian Republic as to the reasons for that exclusion, in that the verification procedures should have been completed before the beginning of 2005, and repeated its requests for information on the state of progress of the recovery.

9 By letter of 29 March 2006, the Italian authorities informed the Commission that a further 113 undertakings had been excluded from the recovery procedure, and reported that 363 actions had been brought before the courts challenging the recovery orders. On 11 April and 6 July 2006 the Commission repeated its requests for clarification and further details and stated that it was willing to meet the Italian authorities.

10 At that meeting, which took place on 20 July 2006, the Italian Republic announced that a new administrative body was being set up to centralise the recovery procedures.

11 On 10 November 2006 the Italian authorities informed the Commission that the total amount to be recovered from 1 059 undertakings was EUR 444 738 911.88, of which EUR 2 481 950.42 had already been recovered.

12 On 19 December 2006, noting the lack of progress with the recovery procedure, the Commission reminded the Italian authorities that it was open to it to bring an action before the Court of Justice of the European Communities pursuant to Article 228(2) EC. In reply, those authorities informed the Commission, by letter of 23 March 2007, that the total amount of aid to be recovered was EUR 519 958 761.97, of which EUR 1 626 129.22 had been recovered so far.

13 On 19 July 2007 the Commission sent the Italian Republic a letter of formal notice in accordance with that provision, emphasising the inability of the Italian Republic to define clearly the number of recipients who were obliged to repay the unlawful aid concerned.

14 In reply to the letter of formal notice, the Italian Republic informed the Commission on 23 September and 7 December 2007, first, that by decree of the President of the Council of Ministers of 23 May 2007 on the rules for making a statement in lieu of a notarised document in relation to certain State aid declared incompatible by the

European Commission (GURI No 160, 12 July 2007, p. 13), it was now laid down that undertakings in receipt of unlawful aid that was incompatible with the common market could not be granted any new State aid unless they first declared that they had repaid the previous aid and, secondly, that it had opened a blocked bank account with the Banco d'Italia to enable the undertakings involved in the recovery procedure to repay the aid. The Italian Republic also pointed to objective difficulties of recovery in view of the large number of recipients and the fact that Decision 2000/128 had introduced new criteria for ascertaining the compatibility of the aid with effect from November 1995, such as workers' university degrees and the possible increase in the number of jobs following new recruitment.

15 On 1 February 2008 the Commission sent the Italian Republic a reasoned opinion in accordance with Article 228(2) EC, taking note of the practical difficulties encountered by the Italian Republic in recovering the unlawfully granted aid and of the fact that the procedures for implementing Decision 2000/128 had finally been initiated, but nevertheless observing that, more than three years after the judgment in Case C-99/02 *Commission* v *Italy*, only 0 5% of the unlawful aid in question had been recovered. The Commission invited the Italian Republic to comply with the reasoned opinion within two months from notification and to take the necessary measures to comply with that judgment.

16 In reply, the Italian authorities sent the Commission various items, drawing attention to the increase in the amounts recovered and the adoption of Decree-Law No 59 of 8 April 2008 on urgent provisions for implementing Community obligations and complying with judgments of the Court of Justice of the European Communities (GURI No 84, 9 April 2008, p. 3), intended to solve the procedural problem of the suspension of recovery orders by the Italian courts. Following the sending of that decree-law, the Commission agreed, by letters of 14 May and 23 July 2008, to suspend

for some months its decision to bring proceedings before the Court, so as to be able to assess the effect of those new rules on the recovery procedure.

17 Following a request by the Commission for a complete update of the state of progress of the recovery procedure, the Italian Republic on 11 September 2008 sent items showing a total sum to be recovered of EUR 389 712 614.57 and amounts recovered so far of EUR 37 508 710.80 as at 3 September 2008.

18 On 14 November 2008 the Italian authorities sent the Commission a fresh statement of the amounts to be recovered, reducing them to EUR 363 526 898.76, of which EUR 43 348 730.34 had now been repaid, and stated on that occasion that the compulsory recovery of the amounts was carried out by a company which had complete freedom to determine the time-limits for recovering the debts but could not, however, be called on to answer for its actions until after a period of three years from the date of being given the case.

19 On 22 June 2009 the Italian Republic informed the Commission that the sums to be recovered should be reduced to EUR 281 525 686.79, of which EUR 52 088 600.60 had been recovered to date.

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

IV — Failure to fulfil obligations

A — *Arguments of the parties*

21 As regards the alleged failure to fulfil obligations, the Commission submits that on the expiry of the period prescribed in the reasoned opinion the Italian Republic had not recovered the entire amount of the aid unlawfully paid, namely EUR 519 958 761.97, the amount stated in that Member State's letter of 23 March 2007.

22 The Commission also rules out any absolute impossibility of recovering the aid, submitting, first, that the Italian Republic never raised this during the administrative procedure and, secondly, that the conditions under which such impossibility may be recognised are manifestly not satisfied in the present case. It argues that the Court has already, in paragraph 27 of the judgment in Case C-99/02 *Commission* v *Italy*, rejected the Italian Republic's reliance in this respect on the large number of undertakings involved in the recovery procedure and on the even larger number of employees concerned.

23 The Italian Republic contests the total amount of the sums to be recovered, fixing it at EUR 251 271 032.37, while conceding that by July 2010 it had obtained repayment of only EUR 63 062 555.46, to which there should, however, be added EUR 73 353 387.28 on various bases, as shown by the information in a DVD annexed to the rejoinder.

24 On this point, the Commission accepted at the hearing that the total amount of the aid distributed was indeed EUR 251 271 032.37 and that aid to the amount of EUR 63 062 555.46 had indeed been recovered by the Italian Republic.

25 To contest the existence of a failure to fulfil obligations, the Italian Republic submits that the procedure for the recovery of the unlawful aid in question is characterised by a very special difficulty which satisfies the conditions for an absolute impossibility of a temporary nature. It points to the conditional character of Decision 2000/128. It further submits that the Italian authorities did not have the elements available for them to ascertain whether the aid was compatible with the common market. Moreover, it took all the necessary steps with respect to the undertakings concerned in order to carry out the recovery procedure. The initiation of that procedure against all the undertakings which had been exempted from social contributions and the adjustments to its legislation to that end had, moreover, made it possible to obtain the information that was essential for performing its obligation of recovery, and had led to a substantial increase in the amounts recovered. So, during the period in which the Italian authorities did not have sufficient information to implement the recovery procedures, the conditions for absolute impossibility were satisfied, while such a situation ceased once the necessary elements for those procedures became available.

B — *Findings of the Court*

26 To determine whether the Italian Republic adopted all the necessary measures to comply with the judgment in Case C-99/02 *Commission* v *Italy*, it must be ascertained whether the amounts of aid that are the subject of the present dispute were repaid by the recipient undertakings.

27 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(2) 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, and Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraph 43), in this case 1 April 2008.

28 It is common ground that on that date the aid that had been wrongly paid had not been fully recovered by the Italian authorities, and consequently that the judgment in Case C-99/02 *Commission* v *Italy* had, in part, not yet been complied with.

29 As to the Italian Republic's argument that it was temporarily absolutely impossible for it to recover the aid in question because of the large number of recipient undertakings and the non-availability of the information necessary for quantifying the sums to be recovered, it should be recalled at the outset that the Court previously refused to accept a similar argument, in paragraphs 22 and 23 of the judgment in Case C-99/02 *Commission* v *Italy*.

30 After taking note of the settled case-law under which, where the Commission's decision requiring the cessation of State aid that is incompatible with the common market has not been the subject of a direct action or where such an action has been dismissed, the only defence available to a Member State against an action for failure to fulfil obligations is that it was absolutely impossible for it to implement the decision properly, the Court pointed out, in paragraphs 22 and 23 of that judgment, that neither the apprehension of even insuperable internal difficulties nor the fact that the Member State in question finds it necessary to examine the individual situation of each undertaking concerned can justify a failure by that Member State to comply with its obligations under European Union law.

31 Furthermore, the measures taken by the Italian Republic from 2006 to remedy the difficulties of identifying and recovering the unlawful aid in question proved to be capable of advancing the recovery of that aid, as the Italian Republic indeed submits, and the delay in implementing Decision 2000/128 is essentially attributable to the lateness with which that Member State acted, not adopting those measures until more than two years at least after delivery of the judgment in Case C-99/02 *Commission* v *Italy*. It is not relevant in this respect that the Italian Republic had informed the Commission of the difficulties encountered in recovering the aid and the solutions adopted for remedying them.

32 Moreover, while it is true that the Italian Republic needed a longer period of time for identifying the recipients and the amount of the aid granted under a scheme that had been declared incompatible with the common market than if only an individual grant of aid had been concerned, that being a factor which may be taken into account in determining the basic amount of the penalty payment, it does not appear from the explanations provided by the Italian Republic that, as required for compliance with a judgment finding a failure to fulfil obligations in such a case, all the measures taken with a view to recovering the aid in question were the subject of permanent and effective monitoring.

33 The Italian Republic cannot thus validly claim that it took all the necessary measures to implement the procedure for recovery of the aid in question.

34 In those circumstances it must be held that, by failing, by the date of expiry of the period prescribed in the reasoned opinion issued by the Commission on 1 February 2008 pursuant to Article 228 EC, to take all the measures needed to comply with the judgment in Case C-99/02 *Commission* v *Italy* concerning the recovery from the recipients of the aid which was found to be unlawful and incompatible with the

common market by Decision 2000/128, the Italian Republic has failed to fulfil its obligations under that decision and Article 228(1) EC.

V — Financial penalties

35 Since the Court has found that the Italian Republic did not comply with the judgment in Case C-99/02 *Commission* v *Italy* within the period prescribed in the reasoned opinion, it may, in accordance with the third subparagraph of Article 228(2) EC, impose a lump sum or penalty payment on that Member State.

36 It is 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 European Union law from recurring (Case C-407/09 *Commission* v *Greece* [2011] ECR I-2467, paragraph 29 and the case-law cited).

37 The Commission's suggestions cannot bind the Court and merely constitute a useful point of reference. Similarly, guidelines such as those in the communications of the Commission are not binding on the Court but contribute to ensuring that the action brought by the Commission is transparent, foreseeable and consistent with legal certainty (Case C-369/07 *Commission* v *Greece*, paragraph 112 and the case-law cited).

A — *Penalty payment*

1. Arguments of the parties

38 The Commission, referring to the method of calculation set out in its communication SEC(2005) 1658 of 13 December 2005 on the application of Article 228 EC, as updated by communication SEC(2010) 923 of 20 July 2010, 'Application of Article 260 of the Treaty on the Functioning of the European Union. Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings' ('the 2010 communication'), considers that a daily penalty payment originally fixed at EUR 285 696 and reduced to EUR 244 800 pursuant to the 2010 communication, calculated on the basis of a basic flat-rate amount of EUR 600 multiplied by a coefficient for seriousness of 8, a coefficient for duration of 3 and an *n* factor of 17, is proportionate to the seriousness and duration of the infringement, in view of the need to give the penalty payment a coercive and deterrent effect.

39 The Commission submits, first, that the rules of the EC Treaty on State aid are a cornerstone of the realisation of the internal market, as appears in particular from the structure of Article 87 EC and the case-law of the Court. Secondly, the harmful effects of the non-recovery of the unlawful aid are all the greater in that the aid amounted to a considerable sum and was paid to a large number of undertakings, which moreover belonged to various economic sectors. It also relies on the fact that the duration of the infringement on the date when the action was brought before the Court was 62 months. It further argues that its assessment is confirmed by paragraphs 118 to 120 of the judgment in Case C-369/07 *Commission* v *Greece*.

40 The Italian Republic submits that the amount of the penalty payment sought by the Commission is disproportionate and incorrect. The amount takes no account of the progress made in complying with the obligation incumbent on the Italian Republic, as a result of which the equivalent of 70 % of the sums to be recovered has in fact been repaid by the undertakings concerned, or of the intrinsic difficulties of the recovery. It argues further that the coefficient for seriousness is disproportionate and that it should be fixed at 1, having regard to the coefficient of 4 proposed by the Commission in Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141 concerning questions of human health and the environment.

41 The Italian Republic submits, finally, that the Court must adjust the amount of the penalty payment to the progress made in complying with the obligation incumbent on the Member State concerned, as it did in *Commission* v *Spain*. The lack of such an adjustment is in itself a serious error affecting the calculation proposed by the Commission.

2. Findings of the Court

(a) The principle of imposing a penalty payment

42 The Court has held that the imposition of a penalty payment is in principle justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (Case C-369/07 *Commission* v *Greece*, paragraph 59 and the case-law cited).

43 Also, in the case of the recovery of State aid that is incompatible with the common market, the Court's case-law and recital 13 in the preamble to and 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) require the Member State which has paid the aid actually to recover it without delay, in order to ensure the effectiveness of the Commission's decision to order recovery of the unlawfully paid aid (see, to that effect, Case C-232/05 *Commission* v *France* [2006] ECR I-10071, paragraphs 42, 43 and 50).

44 In the present case it is clear that, on the date of the closure of the oral procedure, a substantial part of the aid in question had not been recovered, thereby impeding the restoration of effective competition as envisaged by recital 13 in the preamble to Regulation No 659/1999.

45 In those circumstances, the Court considers that an order imposing a penalty payment on the Italian Republic is an appropriate financial means by which to encourage the Italian Republic to take the necessary measures to put an end to the infringement established and to ensure full compliance with Decision 2000/128 and the judgment in Case C-99/02 *Commission* v *Italy*.

(b) Imposition of the penalty payment

46 For the purpose of imposing the penalty payment in the present case, the Court must determine first the form of the penalty payment, secondly the basic amount of that payment, and thirdly the conditions under which it will cease to be payable.

(i) The form of the penalty payment

47 To determine the form of the penalty payment, account must be taken of the special character, adduced by the Italian Republic, of the operations for recovery of the aid paid under the scheme that was declared incompatible with the common market by Decision 2000/128.

48 As regards the invariable nature of the amount of the penalty payment proposed by the Commission, it appears that it will be particularly difficult for the Italian Republic in the short term to reach full compliance with Decision 2000/128, and hence with the judgment in Case C-99/02 *Commission* v *Italy*, in view of the fact that the operations involved relate to a large number of undertakings.

49 In view of that special factor, it is conceivable that the Italian Republic will manage significantly to increase the extent of its implementation of Decision 2000/128 but not to implement it fully in the short term. If the amount of the penalty payment were invariable, it would continue to be due in its entirety for as long as the Member State concerned had not achieved complete implementation of the decision. In those circumstances, a penalty which takes account of the progress which the Member State may have made in complying with its obligations appears appropriate to the particular circumstances of the present case and hence proportionate to the infringement that has been found (see, by analogy, *Commission* v *Spain*, paragraphs 48 and 49).

50 It must also be observed that, in the case of the recovery of unlawful State aid, it is for the Member State concerned to demonstrate to the Commission that the aid has been recovered, as follows from the principle of sincere cooperation, in order to ensure that the provisions of the Treaty are fully observed, and as follows in the present case from Article 4 of Decision 2000/128 (see, to that effect, Case C-369/07 *Commission*

v *Greece*, paragraph 75). Consequently, for calculating the penalty payment in the present case, recovery of the aid can be taken into account only on condition that the Commission has been informed of it and has been able to assess the adequacy of the evidence communicated to it in this respect.

51 In the light of the foregoing, for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the infringement that has been established, the amount of the payment must be fixed having regard to the progress made by the defendant Member State in implementing Decision 2000/128 (see, to that effect, *Commission* v *Spain*, paragraph 50), in so far as it appears from the documents in the case that that State is capable of providing direct and reliable evidence of implementation, so that the fixing of such a variable penalty payment proves to be practicable. In the present case, the Italian Republic annexed to its rejoinder a DVD containing evidence in the form of payment slips directly and reliably attesting the movements of funds representing the recovery of the unlawful aid repaid so far. The Commission, in answer to a written question, stated that those payment slips for the individual undertakings, correlated with the amounts stated in the summary tables also annexed to the rejoinder, bear out the Italian Republic's claims as to the amount of aid so far recovered, namely EUR 63 062 555. In those circumstances, the production of such payment slips by the Italian Republic may be regarded as the provision of direct and reliable evidence of compliance with its obligations in the present case.

52 That being so, the Italian Republic should be ordered to pay a periodic payment calculated by multiplying a basic amount by the percentage of the unlawful aid that has not yet been recovered, or not shown to have been recovered, compared to the total amount not yet recovered on the date of delivery of the present judgment (see, by analogy, *Commission* v *Spain*, paragraph 50).

53 For calculating the penalty payment in the present case, recovery of the aid may be taken into account only on condition that the Commission has been informed of it and has been able to assess the adequacy of the evidence communicated to it in this respect (see, to that effect, Case C-369/07 *Commission* v *Greece*, paragraph 75).

54 The periodicity of the penalty payment should therefore be fixed by determining it on a half-yearly basis, so as to allow the Commission to assess the state of progress of the recovery operations by reference to the situation prevailing at the end of that period, while allowing the defendant Member State the time needed to compile and transmit to the Commission the evidence capable of establishing, for the period in question, the recovery of the sums wrongly paid.

55 Consequently, the penalty payment will be quantified on a half-yearly basis and its amount calculated by multiplying a basic amount by the percentage of the unlawful aid that has not yet been recovered, or not shown to have been recovered, at the end of the period concerned, compared to the total amount not yet recovered on the date of delivery of the present judgment.

(ii) The basic amount of the penalty payment

56 It should be recalled that, 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-369/07 *Commission* v *Greece*, paragraph 114 and the case-law cited).

57 In the assessment carried out by the Court, the basic criteria which must be taken into account in order to ensure that a penalty payment has coercive force with a view to the uniform and effective application of European Union law 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 non-compliance on public and private interests and to the urgency of compliance by the Member State concerned with its obligations (Case C-369/07 *Commission* v *Greece*, paragraph 115 and the case-law cited).

58 As to the duration of the infringement, it is settled case-law that it is for the Court to assess the duration by reference to the time at which it assesses the facts, not the time at which the case is brought before it by the Commission (see, to that effect, Case C-369/07 *Commission* v *Greece*, paragraph 116 and the case-law cited).

59 Since the Italian Republic has been unable to show that it has put an end to its failure to comply fully with the judgment in Case C-99/02 *Commission* v *Italy*, as found in paragraph 44 above, that failure must be regarded as having continued for more than seven years, which is a very considerable period of time.

60 As to the seriousness of the infringement, the vital nature of the Treaty rules on competition must be recalled, in particular those on State aid, which are the expression of one of the essential tasks with which the European Union is entrusted. At the time of the Court's assessment of the appropriateness and the amount of the present penalty payment, that vital nature is apparent from Article 3(3) TEU, namely the establishment of an internal market, and from Protocol No 27 on the internal market and competition, which forms an integral part of the Treaties in accordance with Article 51 TEU, and states that the internal market includes a system ensuring that competition is not distorted.

61 The recovery of aid that is incompatible with the common market aims to remove the distortion of competition caused by the competitive advantage the recipient of the aid has enjoyed in the market compared with its competitors, thereby restoring the situation prior to the payment of the aid (see, to that effect, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 27).

62 Moreover, recovery penalises not only the incompatibility of the aid but also the Member State's failure to fulfil the twofold obligation set out in Article 108(3) TFEU, under which that State must, first, inform the Commission of its plans to grant or alter aid and, secondly, must not put the proposed measures into effect until the procedure has resulted in a final decision.

63 Finally, it should be added that in the present case, apart from the fact that the unlawful aid in question is particularly harmful to competition because of its large amount, the unusually large number of recipients and its being paid regardless of the economic sector of the recipients, as the Commission rightly points out, it is common ground that a substantial part of the aid has not yet been recovered, or that proof of recovery has not been provided to the Commission.

64 For all that, as became apparent at the hearing, the Italian Republic and the Commission agree on the total amount of aid distributed, EUR 251 271 032.37. The Commission also accepts that aid of a total amount of EUR 63 062 555 must be regarded as having been recovered.

65 As to the ability to pay of the Italian Republic, the Court has repeatedly held that the method of calculation proposed by the Commission, in which the basic amount is multiplied by a specific coefficient applicable to the Member State concerned, is an appropriate means of reflecting that State's ability to pay while keeping the variation between the Member States within a reasonable range (Case C-369/07 *Commission* v *Greece*, paragraph 123 and the case-law cited). The recent development of inflation and the gross domestic product in the Member State in question must therefore be taken into account, as the Commission did pursuant to the 2010 communication.

66 To determine the basic amount of the penalty payment in the present case, the Court must also, however, have regard to the particular features of the recovery of aid granted under the aid scheme that has been declared incompatible with the common market, as mentioned in paragraph 32 above.

67 Applying the above considerations, the Court considers that in the present case it is appropriate to impose a penalty payment of a basic amount of EUR 30 million per half-year.

68 Consequently, the Italian Republic must be ordered to pay to the Commission, into the 'European Union own resources' account, a penalty payment of an amount calculated by multiplying the basic amount of EUR 30 million by the percentage of the unlawful aid that has not yet been recovered, or not shown to have been recovered, at the end of the period concerned, compared to the total amount not yet recovered on the date of delivery of the present judgment, for every six months of delay in implementing the necessary measures to comply with the judgment of 1 April 2004 in

Case C-99/02 *Commission* v *Italy*, from the present judgment until compliance with the judgment of 1 April 2004.

(iii) Termination of the penalty payment

69 As stated in paragraph 51 above, it is for the Member State concerned to provide the Commission with direct and reliable evidence that Decision 2000/128 has been implemented and the unlawful aid actually recovered.

70 If the unlawful aid is repaid by the recipient undertaking, the Italian Republic is required to produce payment slips attesting to all movements of funds claimed to represent the repayment of part of the unlawful aid to be recovered.

71 In other cases, the nature of the evidence required should be adjusted to the particular features of the factual situations encountered by the Member State in question in the course of its recovery operations.

72 In cases in which the aid has to be recovered from undertakings which are bankrupt or subject to bankruptcy proceedings whose purpose is to realise the assets and clear the liabilities, it is settled case-law that the fact that undertakings are in difficulties

or bankrupt does not affect the obligation of recovery (see, inter alia, Case C-280/05 *Commission* v *Italy*, paragraph 28 and the case-law cited).

73 It is also settled case-law that the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved by registration of the liability relating to the repayment of the aid in question in the schedule of liabilities (Case C-331/09 *Commission* v *Poland* [2011] ECR I-2933, paragraph 60 and the case-law cited).

74 For the purpose of calculating the penalty payment in the present case, the Italian Republic is therefore required to provide the Commission with evidence of the registration of the liabilities in question in the bankruptcy proceedings. If it is not possible to do this, the Italian Republic must report everything capable of showing that it has made every effort to that end. In particular, should the application to register a liability be refused, it must provide proof that it has initiated all procedures under national law capable of challenging that refusal.

75 Consequently, contrary to the Commission's claims, the Italian Republic cannot be required, for the purpose of calculating the penalty payment in the present case and where bankrupt undertakings or undertakings involved in bankruptcy proceedings are concerned, to prove not only the registration of the liabilities against them but also the sale of their assets under market conditions. As the Italian Republic rightly submits, the sums which have not yet been recovered from undertakings in bankruptcy, but which that State has made its best efforts to recover, should not be taken into account for the purpose of allowing the Commission's application relating to the payment of the penalty payments due in accordance with the present judgment. Otherwise that penalty payment would no longer be appropriate and proportionate to the infringement that has been found, in accordance with paragraph 49 above, in that it would impose on the Italian Republic a financial burden deriving from the very

nature of bankruptcy proceedings and from their irreducible length, over which that State has no direct influence.

76 In cases in which the unlawful aid in question has to be recovered from undertakings against which individual protective or enforcement measures have been adopted without success, it is for the Member State concerned to take and then communicate to the Commission all measures enabling repayment of the unlawful aid to be obtained and, if need be, measures aimed at the judicial liquidation of those undertakings, so that that State can enforce its claims against their assets (see, to that effect, C-280/05 *Commission* v *Italy*, paragraph 28 and the case-law cited). Consequently, it is for the Member State to demonstrate, first, that bankruptcy proceedings have been taken against the undertakings concerned and, secondly, that the claims against them have been registered in accordance with the principles set out in paragraphs 72 to 74 above.

77 In cases in which the unlawful aid in question has to be recovered from undertakings which have ceased to exist, proof that they have been removed from the registers suffices to show that they do not exist and consequently that it is impossible to recover the aid.

78 Finally, in cases in which orders for recovery of the unlawful aid in question are challenged in the national courts, it is for the Member State concerned, in accordance with the requirement actually to recover aid that is incompatible with the common market, to contest any national decision depriving the Commission's decision of effect, in particular on grounds relating, as in the present case, to the application of limitation rules (see, by analogy, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraphs 34 and 38) or rules of evidence. Consequently, for similar reasons to those stated in paragraph 74 above, proof that such efforts have been made suffices to

exclude the aid concerned from the volume of as yet unrecovered aid to be taken into account for calculating the penalty payment.

B — *Lump sum*

1. Arguments of the parties

79 The Commission, referring to the calculation method set out in its communication of 13 December 2005 as updated by the 2010 communication, considers that a lump sum of a daily amount originally fixed at EUR 31 744 and reduced pursuant to the 2010 communication to EUR 27 200, calculated on the basis of a basic flat-rate amount of EUR 200 multiplied by a coefficient for seriousness of 8, a coefficient for duration of 3 and an *n* factor of 17, multiplied by the number of days for which the infringement has lasted from 1 April 2004 to the date of delivery of the present judgment, is appropriate to the seriousness of the infringement and has the necessary deterrent force.

80 As regards its method of calculation, the Commission submits that this must depend in each individual case on all the relevant factors, in particular the duration of the infringement after the judgment establishing it, the public and private interests involved and the conduct of the Italian Republic. In view of the fact that the Italian Republic has not complied with its obligations 10 years after the adoption of Decision 2000/128 and 6 years after the judgment in Case C-99/02 *Commission* v *Italy*, and of the fact that the aid in question was paid regardless of the economic sector of the recipients and essentially benefited Italian undertakings, the Commission considers that the proposal submitted to the Court is appropriate.

81 The Italian Republic submits that the amount of the lump sum is disproportionate to its conduct and the possible harm caused by the alleged infringement, having regard in particular to Case C-304/02 *Commission* v *France*. The Italian Republic emphasises the special circumstances of the case in connection with the intrinsic complexity of Decision 2000/128 and the impossibility of implementing it swiftly, and also its positive conduct during the procedure.

2. Findings of the Court

(a) The principle of the imposition of a lump sum payment

82 Having regard to the objectives of the procedure provided for in Article 228(2) EC, the Court is empowered, in the exercise of the discretion conferred on it in connection with that article, to impose a penalty payment and a lump sum payment cumulatively (see, to that effect, Case C-304/02 *Commission* v *France*, paragraph 83).

83 The imposition of a lump sum payment must depend in each individual case on all the relevant factors relating both to the characteristics of the infringement established and to the conduct of the Member State involved in the procedure initiated under Article 228 EC. That provision confers a wide discretion on the Court in deciding whether or not to impose such a penalty (Case C-369/07 *Commission* v *Greece*, paragraph 144 and the case-law cited).

84 In the present case, besides the seriousness of the infringement as established in paragraphs 60 to 63 above, it should be noted that on the date of the closure of the oral procedure, more than 7 years after the date of delivery of the judgment in Case C-99/02 *Commission* v *Italy* and more than 12 years after the adoption of Decision 2000/128 on 11 May 1999, the Italian Republic was still unable to establish precisely the definitive total amount of the aid to be recovered, as may be seen from its rejoinder.

85 Furthermore, it was not until at best two years after the delivery of the judgment in Case C-99/02 *Commission* v *Italy* that the first coherent measures were adopted by the Italian Republic to remedy the difficulties of identifying and recovering the aid that had been declared unlawful and incompatible by Decision 2000/128, as is apparent from paragraphs 10 to 19 above and was admitted by the Italian Republic at the hearing. In particular, Decree-Law No 59 of 8 April 2008, intended to solve the procedural problem caused by the Italian courts suspension of the orders for recovery of the unlawful aid in question, was not enacted until after the period prescribed in the reasoned opinion of 1 February 2008 had expired, and provided only an imperfect solution to the delay in recovering the aid covered by that decision (see, by analogy, Case C-304/09 *Commission* v *Italy* [2010] ECR I-13903, paragraphs 40 to 42, and Case C-305/09 *Commission* v *Italy* [2010] ECR I-3225, paragraphs 38 to 40).

86 It is settled case-law that the Member State must actually recover the sums owed, belated recovery after the prescribed time-limits have expired not satisfying the requirements of the Treaty (see, to that effect, Case C-305/09 *Commission* v *Italy*, paragraph 27 and the case-law cited).

87 The justifications put forward by the Italian Republic in this regard, namely that the delay in complying with the judgment was attributable to internal difficulties connected with the complexity of the measures to be taken to identify the recipients of the unlawful aid in question and recover the aid from them, cannot be accepted. As

the Court has repeatedly held, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under European Union law (see, inter alia, Case C-568/07 *Commission* v *Greece* [2009] ECR I-4505, paragraph 50), and the elimination of unlawful aid by means of recovery is the logical consequence of the finding that it is unlawful and that consequence cannot depend on the form in which the aid was granted (see, to that effect, *Commission* v *Poland*, paragraph 54 and the case-law cited).

88 It is thus clear that the infringement of which the Italian Republic is accused lasted for a quite considerable period which in any event had no relation to the difficulties in recovering the aid paid under a scheme that had been declared unlawful and incompatible with the common market.

89 Moreover, the Court considers that the legal and factual context of the infringement established may be an indication that effective prevention of future repetition of similar infringements of European Union law may require the adoption of a deterrent measure (see, to that effect, Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 69).

90 In particular, the Italian Republic has already been the subject of a number of judgments on the basis of Article 88(2) EC holding that it has failed to fulfil its obligations by not immediately and actually recovering aid paid under schemes declared unlawful and incompatible with the common market.

91 In addition to the finding of failure immediately and actually to implement Decision 2000/128 made in the judgment in Case C-99/02 *Commission* v *Italy*, the failure to comply with which gave rise to the present proceedings, several other findings of failure to fulfil obligations have been made by the Court, in particular in Case C-207/05

Commission v *Italy*, Case C-280/05 *Commission* v *Italy*, Case C-304/09 *Commission* v *Italy* and Case C-305/09 *Commission* v *Italy*.

92 Having regard to the foregoing, the Court considers that it is justifiable in the present case to order the Italian Republic to pay a lump sum.

(b) The amount of the lump sum payment

93 If the Court decides to order a lump sum payment, it must, in the exercise of its discretion, set the payment in such a way that it is, first, appropriate to the circumstances and, secondly, proportionate both to the infringement that has been established and to the ability to pay of the Member State concerned (see Case C-407/09 *Commission* v *Greece*, paragraph 31).

94 The relevant factors in this respect include matters such as the length of time for which the breach of obligations has persisted since the judgment establishing it was delivered and the seriousness of the infringement (see, to that effect, Case C-369/07 *Commission* v *Greece*, paragraphs 147 and 148 and the case-law cited).

95 To offset the considerations set out in paragraphs 58 to 63, 84 and 85 above relating to the duration and seriousness of the infringement, account should be taken of the points raised by the Italian Republic to show that the recovery of the unlawful aid in question was made more difficult by the fact that it had been paid under an aid scheme, that Decision 2000/128 had made the compatibility of the aid subject to conditions, and that implementation of the decision therefore meant that the Italian

Republic first had to identify the recipients of the aid and the amounts received by each of them.

96 On the basis of all those factors, the Court considers that the circumstances of the case are fairly assessed by setting the amount of the lump sum which the Italian Republic will have to pay, under the third subparagraph of Article 228(2) EC, at EUR 30 million.

97 The Italian Republic must therefore be ordered to pay to the Commission, into the 'European Union own resources' account, a lump sum of EUR 30 million.

VI — Costs

98 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 has applied for costs and the Italian Republic's failure to fulfil its obligations has been established, the Italian Republic must be ordered to pay the costs.

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

1. **Declares that, by failing, by the date of expiry of the period prescribed in the reasoned opinion issued by the Commission of the European Communities**

on 1 February 2008 pursuant to Article 228 EC, to take all the measures needed to comply with the judgment of 1 April 2004 in Case C-99/02 Commission v Italy concerning the recovery from the recipients of the aid which was found to be unlawful and incompatible with the common market by Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment, the Italian Republic has failed to fulfil its obligations under that decision and Article 228(1) EC;

2. **Orders the Italian Republic to pay to the European Commission, into the 'European Union own resources' account, a penalty payment of an amount calculated by multiplying the basic amount of EUR 30 million by the percentage of the unlawful aid that has not yet been recovered, or not shown to have been recovered, at the end of the period concerned, compared to the total amount not yet recovered on the date of delivery of the present judgment, for every six months of delay in implementing the necessary measures to comply with the judgment of 1 April 2004 in Case C-99/02 Commission v Italy, from the present judgment until compliance with the judgment of 1 April 2004;**

3. **Orders the Italian Republic to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 30 million.**

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

[Signatures]