Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

13 May 2014*

(Failure of a Member State to fulfil obligations — Judgment of the Court finding a failure to fulfil obligations — Non-implementation — Article 260 TFEU — State aid — Recovery — Unlawful aid scheme incompatible with the internal market — Individual aid granted under that scheme — Pecuniary penalty)

In Case C-184/11,

ACTION for failure to fulfil obligations under Article 260(2) TFEU, brought on 18 April 2011,

**European Commission,** represented by C. Urraca Caviedes and B. Stromsky, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Spain,** represented by N. Díaz Abad, acting as Agent,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen (Rapporteur), E. Juhász, A. Borg Barthet and C.G. Fernlund, Presidents of Chambers, A. Rosas, A. Prechal, E. Jarašiūnas and C. Vajda, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 September 2013,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2014,

gives the following

* Language of the case: Spanish.

## Judgment

1 In its application, the European Commission claims that the Court should:

— declare that, by failing to adopt all the measures necessary to comply with the judgment of the Court of Justice in Joined Cases C-485/03 to C-490/03 *Commission* v *Spain* EU:C:2006:777 concerning the failure of the Kingdom of Spain to fulfil its obligations under Commission Decisions 2002/820/EC of 11 July 2001 on the State aid scheme implemented by Spain for firms in Álava in the form of a tax credit amounting to 45% of investments (OJ 2002 L 296, p. 1); 2002/892/EC of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Álava (OJ 2002 L 314, p. 1); 2003/27/EC of 11 July 2001 on the State aid scheme implemented by Spain for firms in Vizcaya in the form of a tax credit amounting to 45% of investments (OJ 2003 L 17, p. 1); 2002/806/EC of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Vizcaya (OJ 2002 L 279, p. 35); 2002/894/EC of 11 July 2001 on the State aid scheme implemented by Spain for firms in Guipúzcoa in the form of a tax credit amounting to 45% of investments (OJ 2002 L 314, p. 26); 2002/540/EC of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Guipúzcoa (OJ 2002 L 174, p. 31; 'the contested decisions'), the Kingdom of Spain has failed to fulfil its obligations under those decisions as well as under Article 260(1) TFEU;

— order the Kingdom of Spain to pay to the Commission a penalty payment in the amount of EUR 236 044.80 for every day of delay in complying with the judgment in *Commission* v *Spain* EU:C:2006:777, from the day on which the judgment is delivered in this case until the day on which the judgment in *Commission* v *Spain* EU:C:2006:777 is fully complied with;

— order the Kingdom of Spain to pay the Commission, from the date of the judgment in *Commission* v *Spain* EU:C:2006:777 until the date on which judgment is delivered in the present case or the date on which that Member State puts an end to the infringement, a lump sum in an amount calculated by multiplying a daily amount of EUR 25 817.40 by the number of days over which the infringement has continued; and

— order the Kingdom of Spain to pay the costs.

### Background to the dispute

2 On 11 July 2001, the Commission adopted the contested decisions, Articles 1 of which provide respectively as follows:

— Decision 2002/820:

'The State aid in the form of a 45% tax credit for investments, which, in violation of Article 88(3) [EC], has been unlawfully put into effect by Spain in Álava pursuant to Provincial Law No 22/1994 of 20 December 1994, the fifth additional provision of Provincial Law No 33/1995 of 20 December 1995, the sixth additional provision of Provincial Law No 31/1996 of 18 December 1996, as amended by point 2.11 of the derogating provision in Provincial Law No 24/1996 of 5 July 1996 on corporation tax, the eleventh additional provision of Provincial Law No 33/1997 of 19 December 1997 and the seventh additional provision of Provincial Law No 36/1998 of 17 December 1998, is incompatible with the common market';

— Decision 2002/892:

'The State aid in the form of a reduction in the tax base, unlawfully put into effect by Spain in the Province of Álava, in breach of Article 88(3) [EC], through Article 26 of Provincial Law No 24/1996 of 5 July 1996, is incompatible with the common market';

— Decision 2003/27:

The State aid in the form of a 45% tax credit for investments, unlawfully put into effect by Spain in the Province of Vizcaya, in breach of Article 88(3) of the Treaty, through the fourth additional provision of Provincial Law No 7/1996 of 26 December 1996, extended indefinitely by the second provision of Provincial Law No 4/1998 of 2 April 1998 is incompatible with the common market;

— Decision 2002/806:

'The State aid in the form of a reduction of the tax base, unlawfully put into effect by Spain in the Province of Vizcaya, in breach of Article 88(3) [EC], through Article 26 of Provincial Law No 3/1996 of 26 June 1996, is incompatible with the common market';

— Decision 2002/894:

'The State aid in the form of a 45% tax credit for investments, unlawfully put into effect by Spain in the Province of Guipúzcoa, in breach of Article 88(3) [EC], through the 10th additional provision of Provincial Law No 7/1997 of 22 December 1997, is incompatible with the common market';

— Decision 2002/540:

'The State aid in the form of a reduction of the tax base, unlawfully put into effect by Spain in the Province of Guipúzcoa, in breach of Article 88(3) [EC], through Article 26 of Provincial Law No 7/1996 of 4 July 1996, is incompatible with the common market.'

3 Article 2 of each of the contested decisions calls on the Kingdom of Spain to abolish the aid scheme in question in so far as it continues to produce effects.

4 Article 3 of each of those decisions is drafted in the following terms:

'1. Spain shall take all necessary measures to recover from the recipients the aid referred to in Article 1 which has been unlawfully made available to them.

…

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipients up to the date of its recovery. The interest shall be calculated on the basis of the reference rate used for calculating the subsidy equivalent for regional aid.'

5 Article 4 of each of those decisions provides:

'Spain shall inform the Commission, within two months of the date of notification of this Decision, of the measures taken to comply with it.'

## The judgment in *Commission* v *Spain*

6 On 19 November 2003, pursuant to Article 88(2) EC, the Commission brought six actions for failure to fulfil obligations against the Kingdom of Spain, seeking, inter alia, a declaration by the Court that that Member State had failed to adopt, within the prescribed periods, all the measures necessary to comply with Articles 2 and 3 of each of the contested decisions.

7 In its judgment in *Commission* v *Spain* EU:C:2006:777, delivered on 14 December 2006, the Court held that the Kingdom of Spain has failed to fulfil its obligation to take the measures necessary to comply with Articles 2 and 3 of those decisions.

## The pre-litigation procedure

8 By letters of 21 December 2006 and 7 March 2007, the Commission asked the Kingdom of Spain to supply information regarding the measures adopted to comply with the judgment in *Commission* v *Spain* EU:C:2006:777.

9 By a letter of formal notice of 11 July 2007, the Commission initiated the proceeding provided for in Article 228(2) EC, pointing out that it had not received any information regarding the measures adopted by the Kingdom of Spain to comply with that judgment.

10 In response to that letter of formal notice, on 11 September 2007 the Kingdom of Spain sent the Commission information regarding the recipients of the aid schemes at issue in that judgment ('the aid schemes at issue'), the amounts to be recovered in order to ensure compliance with that judgment and the measures adopted for their recovery.

11 On 3 October 2007, at the request of the Kingdom of Spain, a meeting was held with the Commission services in order to state the methods to be used with a view to determining the amounts of aid to be recovered. Subsequently, the Kingdom of Spain and the Commission exchanged various correspondence regarding the enforcement of the contested decisions and the methods applied to ensure that enforcement.

12 On 27 June 2008, the Commission sent the Kingdom of Spain, under Article 228(2) EC, a reasoned opinion signed on 26 June 2008, in which it considered that that Member State had not adopted all the measures necessary which compliance with the judgment in *Commission* v *Spain* EU:C:2006:777 required. In that reasoned opinion, it noted in particular that the fact that only part of the aide granted under the aid schemes at issue ('the unlawful aid at issue') had been recovered and that the information received by the Commission did not enable identification of all the recipients of the aid schemes at issue, nor allow it to be ascertained how the Spanish authorities had reached the conclusion that part of the unlawful aid at issue should not be recovered. Furthermore, it requested the Kingdom of Spain to comply with that opinion within two months of its notification by adopting the measures necessary to comply with that judgment.

13 By a letter of 28 August 2008, the Spanish authorities responded to the reasoned opinion, stating that they believed that the Commission was not taking account of all the information previously provided and explaining the method applied to determine the amount of the unlawful aid at issue which was to be recovered.

14 Subsequently, two new meetings were organised between the Spanish authorities and the Commission and various correspondence was exchanged in order to state precisely the measures which the Kingdom of Spain had to adopt with a view to ensuring compliance with the judgment in *Commission* v *Spain* EU:C:2006:777.

15 In those circumstances, on 18 April 2011 the Commission brought the present action.

## Developments during the present proceedings

16 Following various successive communications by the Kingdom of Spain of information and documents concerning the recovery of the unlawful aid at issue, the Commission stated, on 30 October 2013 that it was satisfied that that Member State had fulfilled its obligations under the judgment in *Commission* v *Spain* EU:C:2006:777.

17 Consequently, the Commission considers that it is no longer necessary to require the Kingdom of Spain to make a penalty payment. Nevertheless, it retains its claim for an order requiring the Kingdom of Spain to pay a lump sum.

## Admissibility of the action

### *Arguments of the parties*

18 The Kingdom of Spain argues that the Commission's action must be dismissed, since it does not state the amounts of the unrecovered unlawful aid, which correspond to each of the failures to fulfil obligations alleged, each of the contested decisions and each of the recipients of the aid schemes at issue respectively.

19 The Commission is of the opinion that its application gives sufficient details of the amounts which had not been recovered and that the Kingdom of Spain is in a position easily to calculate the sums in question in respect of each of the contested decisions.

### *Findings of the Court*

20 By virtue of Article 21 of the Statute of the Court of Justice of the European Union and Article 38(1) of the Court's Rules of Procedure, in the version in force at the date of commencement of the Commission's action, the Commission must, in any application made under Article 260 TFEU, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see, by analogy, Case C-52/90 *Commission* v *Denmark* EU:C:1992:151, paragraph 17, and Case C-281/11 *Commission* v *Poland* EU:C:2013:855, paragraph 53).

21 In that regard, it is clearly apparent from both the grounds and the form of order sought in the Commission's application that it complains that the Kingdom of Spain has not adopted all the measures necessary which compliance with the judgment in *Commission* v *Spain* EU:C:2006:777 requires, since it has failed to recover a significant part of the unlawful aid at issue.

22 With regard more particularly to the lack of details in the application as regards the breakdown of the amount of unrecovered aid, it must be borne in mind that, where compliance with decisions relating to aid schemes is concerned, it is for the authorities of the Member State involved to verify the individual situation of each undertaking concerned (see, to that effect, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* EU:C:2011:368, paragraphs 63, 64 and 121, and Case C-613/11 *Commission* v *Italy* EU:C:2013:192, paragraph 40), given that those authorities are in the best position to determine the exact amounts to be repaid (Case C-441/06 *Commission* v *France* EU:C:2007:616, paragraph 39). It follows therefrom that the Commission may, during an aid recovery proceeding, merely insist that the obligation to repay the

amounts of aid at issue be fulfilled and leave the national authorities to calculate the exact amount of the sums to be recovered (see, to that effect, Case C-369/07 *Commission* v *Greece* EU:C:2009:428, paragraph 49).

23 In those circumstances, the requirement for precision and coherence in the application instituting the proceedings cannot mean that the Commission is required, when bringing an action for failure to fulfil obligations relating to the adoption of measures necessary to comply with a judgment having found a failure by a Member State to fulfil its obligation to recover unlawful aid, to state in its application the exact amount of aid to be recovered under a certain decision or, *a fortiori*, from each recipient under an aid scheme declared unlawful and incompatible with the internal market.

24 In consequence, the plea of inadmissibility made by the Kingdom of Spain must be rejected.

**The failure to fulfil obligations**

*Arguments of the parties*

25 The Commission submits that, by failing to recover the entirety of the unlawful aid at issue, the Kingdom of Spain has failed to fulfil its obligations under the contested decisions and under the judgment in *Commission* v *Spain* EU:C:2006:777.

26 It points out, in particular, that the arguments put forward by the Spanish authorities for failing to recover part of that aid, alleging that that aid is compatible with the internal market, that a deduction with a ceiling of EUR 100 000 pursuant to the rules on *de minimis* aid was applicable and that retroactive tax deductions had to be taken into account, are not well founded or are not supported by sufficient evidence. The Commission also notes that not all the payment orders issued by the Spanish authorities were paid.

27 It deduces therefrom that the amounts not recovered at the time its action was brought represent approximately 87% of the total of the unlawful aid at issue to be recovered.

28 The Kingdom of Spain disputes the overall assessment made by the Commission and is of the opinion that the unlawful aid at issue in respect of which there was a recovery obligation have been recovered.

29 That Member State submits in particular that the compatibility with the internal market of those individual grants of aid should not be assessed on the basis of the Guidelines on national regional aid (OJ 1998 C 74, p. 9) and that in any event that aid meets the requirement relating to the incentive effect set out in those Guidelines or the conditions set out in other special rules.

30 Furthermore, it submits that the application of the rules laid down in the Commission notice on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) enables the Spanish authorities not to recover the amounts granted to the recipients of the aid schemes at issue which do not exceed the ceiling of EUR 100 000 for each period of three years laid down in that notice.

31 In addition, the Kingdom of Spain argues that it must be able retroactively to grant to the recipients of those aid schemes the tax deductions provided for under national legislation, which were not applied to them because they had received the unlawful aid at issue.

32 That Member State also rejects the Commission's allegations as regards a failure to enforce the payment orders and disputes the calculation of the interest on a compound basis proposed by the Commission.

*Findings of the Court*

33 To determine whether the Kingdom of Spain adopted all the necessary measures to comply with the judgment in *Commission* v *Spain* EU:C:2006:777, it must be ascertained whether the amounts of the unlawful aid at issue were repaid by the recipient undertakings.

34 In that regard, it must be borne in mind that, in accordance with the settled case-law of the Court concerning Article 228(2) EC, the reference date for the assessment of whether there has been a failure to fulfil obligations under that provision 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* EU:C:2005:444, paragraph 30, and *Commission* v *Greece* EU:C:2009:428, paragraph 43).

35 Since the FEU Treaty abolished the reasoned opinion stage in infringement proceedings under Article 260(2) TFEU, the reference date for assessing whether there has been an infringement for the purpose of Article 260 TFEU is the date of expiry of the period prescribed in the letter of formal notice issued in accordance with the first subparagraph of Article 260(2) (Case C-610/10 *Commission* v *Spain* EU:C:2012:781, paragraph 67, and Case C-576/11 *Commission* v *Luxembourg* EU:C:2013:773, paragraph 29).

36 Nevertheless, where the proceedings for failure to fulfil obligations have been brought on the basis of Article 228(2) EC and a reasoned opinion has been issued before the date of entry into force of the Treaty of Lisbon, namely 1 December 2009, the reference date is the date of expiry of the period prescribed in the reasoned opinion (see, to that effect, Case C-533/11 *Commission* v *Belgium* EU:C:2013:659, paragraph 32).

37 It follows that, given that, in the present case, the Commission issued the reasoned opinion on 26 June 2008, the reference date for the assessment of whether there has been a failure to fulfil obligations is the date of expiry of the period prescribed in that reasoned opinion, namely 27 August 2008.

38 It is not in dispute that, at that date, the unlawful aid at issue which was to be recovered had not been recovered in full by the Spanish authorities.

39 Although the Kingdom of Spain puts forward various arguments in connection with the amount of the unlawful aid at issue to be recovered or which had actually been recovered, it is clear from the written statements given in response to the questions put by the Court and the details given at the hearing that the Kingdom of Spain accepts that, although all those arguments are admissible and well founded, a substantial part of the aid to be recovered in order to comply with the judgment in *Commission* v *Spain* EU:C:2006:777 had not been recovered at the expiry of the period prescribed by the Commission in the reasoned opinion.

40 The Kingdom of Spain cannot therefore reasonably argue that, within that period, it took all the measures necessary in order successfully to recover the unlawful aid at issue.

41 Consequently, it must be held that, by failing to take, by the date on which the period prescribed in the reasoned opinion issued by the Commission on 26 June 2008 expired, all the measures necessary to comply with the judgment in *Commission* v *Spain* EU:C:2006:777, the Kingdom of Spain has failed to fulfil its obligations under Article 260(1) TFEU.

## The financial penalties

*The application for individualisation of the degree of the failure to enforce each of the contested decisions*

Arguments of the parties

42 The Kingdom of Spain claims that the Court is required to state, for each of the contested decisions, the sums which have not yet been recovered, since that Member State is obliged, by virtue of its domestic law, to pass on the penalties imposed by the Court to the infra-State entities responsible for the infringement of EU law.

Findings of the Court

43 In that regard, it must be pointed out that the allocation of internal central and regional powers cannot have any bearing on the application of Article 260 TFEU, since the Member State concerned is responsible towards the European Union for compliance with obligations arising under EU law (see, to that effect, *Commission* v *Spain*, EU:C:2012:781, paragraph 132).

44 It follows that a finding of a failure to fulfil obligations made by the Court in the procedure provided for in Article 260(2) TFEU cannot depend on the particular features of the internal organisation of the Member State concerned.

45 Furthermore, it follows from the considerations in paragraph 22 of this judgment that it is for the Kingdom of Spain to verify the individual situation of each undertaking concerned and to determine the exact amounts of the aid which should have been recovered under the contested decisions, taking into account the indications given in those decisions.

46 That application made by the Kingdom of Spain must therefore be rejected.

*The lump sum*

Arguments of the parties

47 The Commission is of the opinion that all the legal and factual elements surrounding the failure to fulfil obligations established constitute an indication that the effective prevention of future similar repeat infringements of EU law requires the adoption of a deterrent such as an order for payment of a lump sum.

48 On the basis of its Communication of 13 December 2005, entitled ‘Application of Article 228 of the EC Treaty’ [SEC(2005) 1658] (OJ 2007 C 126, p. 12), as updated by the Communication of the Commission of 20 July 2010, entitled ‘Action under Article 260 of the Treaty on the Functioning of the European Union - Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings’ [SEC(2010) 923/3], it proposes that the amount of the lump sum be calculated by ascertaining, initially, the daily amount resulting from the multiplication of a standard flat-rate amount by coefficients for seriousness and duration, and then by the ‘n’ factor for the country, which takes account of the Member State’s capacity to pay and the number of votes which it has at the Council of the European Union. Subsequently, that daily amount should be multiplied by the number of days for which the infringement lasted to obtain the total amount of the lump sum.

49 As regards the duration of the infringement, the Commission considers that the failure to fulfil obligations established has lasted for 2 500 days from the date of delivery of the judgment in *Commission* v *Spain* EU:C:2006:777. That duration is the result of the wish of the Kingdom of Spain to delay the recovery of the unlawful aid at issue, by failing to inform the Commission of certain difficulties encountered until after the issue of the reasoned opinion, namely more than eight years after the adoption of the contested decisions.

50 With regard to the seriousness of the infringement, that institution recalls the fundamental nature of the provisions of the FEU Treaty as regards State aid. It also points out that more than 100 undertakings received aid under the aid schemes at issue and that the seriousness of the infringement found is shown by the amount of the unrecovered aid, which amounts to EUR 569 041 135.75, that is to say, 87% of the total amount to be recovered. It notes, furthermore, that this is not the first case in which the Kingdom of Spain has failed to fulfil its obligation immediately and effectively to recover unlawful aid which is incompatible with the internal market.

51 Taking those factors into account, the Commission considers that a lump sum of EUR 64 543 500 is appropriate to the circumstances and proportionate to the infringement in question and to the capacity to pay of the Member State concerned. That amount is obtained by multiplying a daily amount of EUR 25 817.40, obtained by multiplying a standard flat-rate amount of EUR 210 per day, a seriousness coefficient of 9 on a scale of 1 to 20 and an 'n' factor of EUR 13.66 by the number of days of the infringement lasted, set at 2 500.

52 The Kingdom of Spain notes, firstly, that the Court is not bound by the methodology used by the Commission, which derives from the communication referred to in paragraph 48 of this judgment.

53 It points out, next, that the delay in the recovery of certain sums is not the result of a failure to comply with the judgment in *Commission* v *Spain* EU:C:2006:777, but of a divergence as regards the criteria applicable in the aid recovery procedure, the duration of which is, in part, the fault of the Commission.

54 In addition, the Kingdom of Spain disputes the seriousness of the infringement, arguing that, in the present case, the Commission is exercising for the first time its powers in the field of State aid as regards tax measures, which puts into perspective the importance of the rules allegedly infringed in the present case. The seriousness coefficient ought therefore to be set at 1.

55 Moreover, it is of the opinion that it is appropriate to take into account the fact that the infringement in question concerns only one region, which enjoys significant autonomy and represents 6.24% of the Spanish gross domestic product (GDP), by setting the standard flat-rate at EUR 13. That specificity implies a reduction in the seriousness of the failure to fulfil obligations since it restricts its consequences on public and private interests.

56 The Kingdom of Spain submits, finally, that the fact that the Court has found in two other cases that that Member State has failed to fulfil its obligations under the State aid rules is irrelevant.

57 It deduces from those factors that the daily amount used for the calculation of the lump sum ought to be limited to EUR 177.58.

Findings of the Court

58 As a preliminary point, it must be borne in mind that 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, such as an order for payment of a

lump sum, in particular for preventing similar infringements of EU law from recurring (Case C-121/07 *Commission* v *France* EU:C:2008:695, paragraph 59, and Case C-279/11 *Commission* v *Ireland* EU:C:2012:834, paragraph 66).

59 An order to pay a lump sum is based essentially on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period after the judgment initially establishing it was delivered (*Commission* v *France* EU:C:2008:695, paragraph 58, and Case C-241/11 *Commission* v *Czech Republic* EU:C:2013:423, paragraph 40).

60 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 260 TFEU. In that respect, that provision confers a wide discretion on the Court in deciding whether or not to impose such a penalty (see, to that effect, *Commission* v *Spain* EU:C:2012:781, paragraph 141, and *Commission* v *Luxembourg* EU:C:2013:773, paragraphs 58 and 59).

61 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 (Case C-70/06 *Commission* v *Portugal* EU:C:2008:3, paragraph 34, and *Commission* v *Greece* EU:C:2009:428, paragraph 112).

62 In the present case, the Court takes the view that it is necessary to take into consideration the following facts in order to rule on the application for an order for payment of a lump sum made by the Commission.

63 Firstly, as regards the duration of the failure to fulfil obligations established, it is not in dispute that the recovery process of the unlawful aid at issue extended over more than five years after the delivery of the judgment in *Commission* v *Spain* EU:C:2006:777.

64 It is settled case-law that the Member State concerned must actually recover the sums owed, belated recovery after the prescribed time-limits have expired not satisfying the requirements of the EC Treaty (see, to that effect, Case C-496/09 *Commission* v *Italy* EU:C:2011:740, paragraph 86 and the case-law cited).

65 In that regard, it must be pointed out that the argument put forward by the Kingdom of Spain, that the delay observed in the enforcement of the judgment in *Commission* v *Spain* EU:C:2006:777 was warranted by the existence of a divergence of views with the Commission arising as a result of the lack of a relevant precedent, cannot succeed.

66 Although it is true that some of the problems referred to by that Member State during the recovery procedure of the unlawful aid at issue were of an unprecedented nature, it follows from the established case-law of the Court that if, in giving effect to a decision of the Commission in State aid matters, a Member State encounters unforeseen or unforeseeable difficulties or perceives consequences overlooked by the Commission, it must submit those problems for consideration by the Commission together with proposals for suitable amendments to the decision in question (Case C-354/10 *Commission* v *Greece* EU:C:2012:109, paragraph 70, and Case C-411/12 *Commission* v *Italy* EU:C:2013:832, paragraph 38).

67 It is apparent from the file submitted to the Court that the Spanish authorities did not contact the Commission before receiving the letter of formal notice and did not begin to submit the problems encountered to that institution in detail until almost two years after the delivery of the judgment in *Commission* v *Spain* EU:C:2006:777.

68 It follows therefrom that the infringement of which the Kingdom of Spain is accused lasted for a considerable period which in any event had no relation to the difficulties in recovering the aid paid under schemes that had been declared unlawful and incompatible with the internal market.

69 As regards, secondly, the seriousness of the infringement, the vital nature of the rules of the EC Treaty on State aid must be borne in mind (*Commission* v *Greece* EU:C:2009:428, paragraph 118, and *Commission* v *Spain* EU:C:2012:781, paragraph 125).

70 The rules governing the contested decision and the judgment in *Commission* v *Spain* EU:C:2006:777 are the expression of one of the essential tasks with which the European Union is entrusted under Article 2 EC, namely the establishment of a common market, and under 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 (see, to that effect, *Commission* v *Greece* EU:C:2009:428, paragraph 119).

71 The importance of the EU rules infringed in a case such as this is reflected, in particular, in the fact that repayment of aid declared unlawful and incompatible with the internal market eliminates the distortion of competition caused by the competitive advantage afforded by the aid and that, by repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market (see, to that effect, *Commission* v *Spain* EU:C:2012:781, paragraph 127).

72 In that regard, the fact, referred to by the Kingdom of Spain, that the contested decisions constitute the first case in which the Commission has exercised its powers in the field of State aid as regards the direct taxation of undertakings, assuming it to be proven, is not, in any event, such as to reduce the interest in the recovery of the unlawful aid at issue following the classification in the contested decisions of the schemes under which it was granted.

73 In the present case, the unlawful aid in question is particularly harmful to competition because of its large amount and the unusually large number of recipients regardless of the economic sector of the recipients (see, by analogy, *Commission* v *Italy* EU:C:2011:740, paragraph 63).

74 In addition, although there remain substantial differences between the parties after completion of the present procedure concerning the degree of the failure to enforce the contested decisions at the date of the expiry of the period prescribed in the reasoned opinion, if the argument of the Kingdom of Spain, submitted in answer to a question from the Court, that the sum to be recovered at the date of delivery of the judgment in *Commission* v *Spain* EU:C:2006:777 was EUR 179.1 million and at the date of introduction of the present case was EUR 91 million can be accepted, it is not in dispute, firstly, that, in absolute terms, the amounts of the unlawful aid still outstanding were considerable and accepted as such by that Member State and, secondly, that more than half of those amounts had not been recovered at the latter date.

75 Thirdly, it must be noted that the Kingdom of Spain has already been the subject of a number of judgments finding a failure to fulfil obligations because it had not immediately and effectively recovered aid declared unlawful and incompatible with the internal market.

76 Apart from the finding of a failure immediately and effectively to comply with the contested decisions made in the judgment in *Commission* v *Spain* EU:C:2006:777, the failure to comply with which has given rise to the present proceedings, a number of other findings of failure to fulfil obligations have been made by the Court, inter alia in the judgments in Cases C-499/99 *Commission* v *Spain* EU:C:2002:408, C-404/00 *Commission* v *Spain* EU:C:2003:373, C-177/06 *Commission* v *Spain* EU:C:2007:538 and C-529/09 *Commission* v *Spain* EU:C:2013:31.

77 Furthermore, in the judgment in *Commission* v *Spain* EU:C:2012:781, the Court has held that, by failing to adopt all the measures necessary to comply with the judgment in *Commission* v *Spain* EU:C:2002:408, the Kingdom of Spain had failed to fulfil its obligations under Article 260(1) TFEU.

78 Where a Member State repeatedly engages in unlawful conduct in such a manner in a specific sector governed by EU rules, this may be an indication that effective prevention of future repetition of similar infringements of EU law may require the adoption of a dissuasive measure, such as a lump sum payment (*Commission* v *France* EU:C:2008:695, paragraph 69 and *Commission* v *Ireland* EU:C:2012:834, paragraph 70).

79 Having regard to the foregoing considerations, the Court considers that it is justifiable in the present case to order the Kingdom of Spain to pay a lump sum.

80 As regards the amount of that lump sum, account must be taken, in addition to the considerations set out in paragraphs 63 to 78 of the present judgment, of the capacity to pay of the Kingdom of Spain (see, to that effect, *Commission* v *Spain* EU:C:2012:781, paragraph 131).

81 However, the argument put forward by the Kingdom of Spain that the amount of the lump sum ought to be reduced since the infringement affected only one autonomous region, not the entirety of its territory, cannot succeed.

82 Contrary to the submissions of that Member State, that fact cannot give rise to an attenuation of the seriousness of the failure to fulfil obligations, which results in particular, having regard to the considerations in paragraphs 69 to 73 of the present judgment, from the extent of the distortion of competition caused by the failure to fulfil obligations established, assessed taking account of the amount of the unlawful aid at issue, the number of its recipients and the multisectoral nature of the aid schemes in question.

83 On the basis of those factors, the circumstances of the case are fairly assessed by setting the amount of the lump sum which the Kingdom of Spain will have to pay at EUR 30 million.

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

## Costs

85 Under Article 138(1) 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 United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to take, by the date on which the period prescribed in the reasoned opinion issued by the Commission on 26 June 2008 expired, all the measures necessary to comply with the judgment in Joined Cases C-485/03 to C-490/03 *Commission* v *Spain* EU:C:2006:777, the Kingdom of Spain has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders the Kingdom of Spain to pay to the European Commission, into the 'European Union own resources' account, a lump sum of EUR 30 million;**

3. **Orders the Kingdom of Spain to pay the costs.**

[Signatures]