

OPINION OF ADVOCATE GENERAL
GEELHOED

delivered on 7 March 2002¹

1. In this case the Commission seeks a declaration that, by not taking within the prescribed period the measures necessary to implement the Commission Decision of 26 October 1999 on the State aid implemented by Spain in favour of the publicly-owned shipyards² ('the 1999 decision') declaring certain aid measures unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision.

3. On reaching the view that the Kingdom of Spain had wrongly granted special fiscal aid for restructuring to the publicly-owned shipyards, the Commission adopted the 1999 decision. So far as is relevant here, the operative part of that decision reads as follows:

'Article 1

The State aid granted by Spain in favour of its publicly-owned shipyards, amounting to EUR 110 892 743.38 (ESP 18 451 billion), is incompatible with the common market.

I — Facts and procedure

2. I have given a full account of the facts of this case in points 2 to 12 of my Opinion of 11 October 2001 in Case C-36/00 *Spain v Commission*, to which I shall refer for the sake of brevity.

Article 2

1. Spain shall take the necessary measures to recover from the recipient the aid referred to in Article 1.

¹ — Original language: Dutch.

² — OJ 2000 L 37, p. 22.

2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall bear interest from the date on which it was made available to the recipient until recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aids.

5. By letter of 24 March 2000, the Commission requested the Spanish Government to inform it what measures had been taken to comply with the 1999 decision. By letter of 25 April 2000, the Spanish Government replied that the Abogacía del Estado had in the meantime submitted its report and that it was still awaiting the reports which it had requested from the Ministry of Economy and Finance and the Council of State.

Article 3

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

6. By letter of 23 May 2000, the Commission again asked the Spanish Government for clarification regarding the steps which had been taken in the meantime to implement the 1999 decision. In its response of 14 June 2000, the Spanish Government merely requested a new time-limit for notifying its implementation of the decision. It justified such a delay on the ground that the public administration had recently been restructured. By letter of 22 June 2000, the Commission refused to grant that request. By application of 25 October 2000, received at the Court Registry on 7 December 2000, it brought this action against the Kingdom of Spain.

4. The 1999 decision was notified to the Spanish Government by letter of 2 December 1999. The Spanish Government acknowledged receipt of the decision by letter of 31 January 2000. In that letter it also informed the Commission that it had entered into consultations with the Abogacía del Estado (Spanish legal service) and the Ministry of Economy and Finance in order to secure the repayment of the aid declared incompatible. Finally, it announced its intention of bringing an action for the annulment of the 1999 decision. That action is the subject matter of the abovementioned Case C-36/00.

II — Assessment

7. The Commission's arguments in support of its application are concise. It submits that although the Spanish Government did

make a start on implementing the 1999 decision by consulting the Ministry of Economy and Finance and the Abogacía del Estado, it then took no further steps, either before or after the sending of the Commission's letter of 22 June 2000, to recover the aid granted.

8. The Commission is of the opinion that, in the light of the Court's case-law on this point, the Spanish Government cannot plead that it was absolutely impossible for it to implement the decision. The reason given by the Spanish Government in its letter of 25 April 2000, namely that there was legal uncertainty as to the deductibility of the taxes which had been paid on the amounts which the shipyards concerned were required to repay pursuant to the 1999 decision, does not, according to the Commission, constitute absolute impossibility of implementation. There is nothing to prevent the recovery of those amounts, after adjustment by the amount of the taxes paid thereon, provided that, in the light of the opinion on the matter yet to be delivered by the Council of State, that adjustment can still be reversed.

9. Nor does the Commission consider the restructuring of the public administration a valid argument for delaying the recovery of the aid wrongly paid. Organisational changes do not as such constitute 'absolute impossibility' within the meaning of the

Court's case-law. In its letter of 14 June 2000, the Spanish Government even omits to explain how the recovery of the aid could be delayed by that restructuring.

10. Finally, the Commission points out that the Spanish Government had indisputably still taken no implementing measures at the time when the 1999 decision should have been implemented, that is to say, two months after its notification to the Spanish Government on 2 December 1999. Nor did the Spanish Government implement the decision within the additional period of 20 working days, which the Commission had allowed it by letter of 24 March 2000.

11. The Spanish Government puts forward two arguments which, in its view, show that the Commission's application should be dismissed.

12. First, it is of the opinion that the Commission did not allow a reasonable period of time to elapse before coming to the conclusion that Spain had failed to fulfil its obligation to implement the 1999 decision, with all the consequences which flowed from that. It refers in this connection to the approach adopted by the Commission towards Italy in the circumstances which gave rise to the Court's judgments in Case C-350/93 *Commission v Italy* [1995] ECR I-699 and Case C-280/95 *Commission v Italy* [1998] ECR I-259. In those

cases, four and two years respectively had elapsed following notification of the relevant decisions ordering the recovery of illegally granted aid.

13. In the present case, by contrast, the Commission let only a few months elapse before bringing infringement proceedings. In the Spanish Government's opinion, such inequality of treatment is all the more flagrant since, in contrast to the circumstances of Case C-280/95, the Commission gave no advance warning whatsoever, during the period for which the aid was guaranteed, that the special fiscal aid, which it finds illegal in the 1999 decision, would encounter objections. It was only after the completion of the whole process of granting the aid and of the shipyard restructuring to which it was linked that the Commission made known its objections. The Spanish Government refers in this connection to its arguments in Case C-36/00. It concludes that the Commission brought the present infringement proceedings after an unusually and unreasonably short time. The Spanish authorities were not even given time to seek the necessary legal advice on implementing the decision, or to assess the social consequences thereof.

14. Second, the Spanish Government disputes the claim that it was in breach of its obligations at the time the action was

brought, since it had taken all the measures necessary to implement the decision in accordance with national law. It explains this argument by stating that the status of the aid to be recovered was not clear under national law. The Ministry of Economic Affairs and Finance first had to provide advice on the matter. It then had to be established whether it was necessary to recover the overpaid aid by recourse to administrative tribunals or to civil courts. On this point, according to the report of the Abogacía del Estado, it was necessary to consult the Council of State. The Spanish Government explained this to the Commission in its letter of 25 April 2000. The latter did not comment on the preference, expressed by the Spanish Government, for following the correct procedures under national law, but merely granted Spain an extra period of 20 days before bringing infringement proceedings.

15. In assessing the Commission's application, I shall confine myself exclusively to the subject-matter thereof, namely the claim that the Spanish Government failed to implement the 1999 decision by not taking, or not taking in time, the measures necessary to recover the aid wrongly paid to the shipyards concerned. I expressly leave aside here the issues connected with the action brought by the Spanish Government in Case C-36/00 for the annulment of the 1999 decision. On those matters, I refer to my Opinion of 11 October 2001 in the abovementioned case.

16. I also note, as a preliminary point, that under Article 242 EC the action for annulment in Case C-36/00 does not have suspensory effect. It is true that, pursuant to that article, the Court may, if it considers that circumstances so require, order that application of the contested act be suspended. However, the Kingdom of Spain has made no request to that effect, either in Case C-36/00 or in the present case. It must therefore be assumed that the 1999 decision is binding on Spain in its entirety.

17. According to the settled case-law of the Court of Justice and the Court of First Instance, the intention in imposing the obligation to recover illegally granted aid is to restore the situation which existed before the illegally granted aid was paid. Put in more economic terms, that means rectifying the distortion of the conditions of competition brought about by the illegal intervention of the authorities. That concern also underlies the strict requirements which the Court attaches to the duty of compliance incumbent on Member States with regard to the recovery of wrongly granted aid. The only ground of defence accepted by the Court is the absolute impossibility of implementing the decision properly.³

18. Implementing the decision properly also entails implementing it in time. The time within which restoration of the distorted conditions of competition takes place is certainly not without economic importance. In sensitive markets, undertakings which profit from illegally granted State aid may well distort the conditions of competition in such a way that the competitive structure is permanently altered. The legal obligation to comply with the prescribed period for the recovery of wrongly granted aid also serves the legal interest protected by Article 87 EC: undistorted competition within the common market. I infer from that that the stringent requirements which the Court attaches to the justification of failure to comply, or failure to comply properly, with the obligation to recover aid also apply to failure to comply with that obligation in time. The criterion of absolute impossibility also applies to that obligation.

19. Examined in the light of that criterion, the Spanish Government's first ground of defence, namely that in this case, in comparison with the approach adopted by it in other cases, the Commission acted with unusual and unreasonable speed in bringing infringement proceedings, cannot be accepted. By its very nature, such a defence cannot establish that timely implementation of the 1999 decision was absolutely impossible. For that reason alone it must be rejected.

³ — Case 52/84 *Commission v Belgium* [1986] ECR 89, paragraph 14, Case 94/87 *Commission v Germany* [1989] ECR 175, paragraph 8, Case C-183/91 *Commission v Greece* [1993] ECR I-3131, paragraph 10, and Case C-280/95 *Commission v Italy*, cited in point 12 of this Opinion, paragraph 13.

20. For the sake of completeness, I would add the following. Under the second paragraph of Article 88(2) EC, the Commission may refer the matter to the Court directly if a Member State does not comply with a decision addressed to it within the prescribed time. There is nothing in that provision to prevent the Commission from monitoring strictly compliance with the times for implementation which it prescribes in its decisions requiring Member States to recover illegally granted aid. As I stated above in point 18, there may be compelling arguments in favour of such strict monitoring. Moreover, according to the Court's settled case-law, the fact that the Commission has allowed a longer period of default in other cases can never be invoked to justify a Member State's own failure to fulfil its obligations.⁴

21. Finally, the Spanish Government also brings forward in support of that ground of defence arguments based on the Commission's acts or omissions in its monitoring of the implementation of the restructuring of the Spanish publicly-owned shipyards and the public financing thereof. Those arguments were put forward in Case C-36/00 in order to contest the validity of the 1999 decision. In this case, where the issue is

compliance with that decision, they cannot be invoked to justify the Spanish Government's failure to fulfil its obligations.

22. In its second ground of defence, the Spanish Government relies in essence on the argument that, in view of the legal uncertainties and complications entailed by recovery of the wrongly granted aid under national law, careful implementation of the decision was not possible within the prescribed period of two months. To support this contention, it refers to the need first to consult the Ministry of Economic Affairs and Finance, the Abogacía del Estado and the Council of State.

23. That ground of defence is also unfounded, in my opinion.

24. The Court has systematically rejected reliance on alleged absolute impossibility where the Member State concerned merely informed the Commission of the political and legal difficulties involved in implementing the decision, without first taking any specific steps, of whatever nature, vis-à-vis the undertakings concerned, to recover the aid, and without putting forward to the Commission any suggestions as to how the problems which have arisen might be resolved. Consequently, any plea of absolute impossibility of timely implementation cannot be based on a mere assumption that problems exist. On the

⁴ — This principle was formulated as early as 1976 in Case 52/75 *Commission v Italy* [1976] ECR 277; then reiterated *inter alia* in Case 325/82 *Commission v Germany* [1984] ECR 777.

contrary, it must be supported by the demonstrable failure of attempts made in good faith to recover the aid, all in close cooperation with the Commission, in accordance with Article 10 EC, in order to overcome any obstacles.

25. The Spanish Government's second ground of defence in this case will have to be examined in the light of those stringent requirements, which Advocate General Fennelly summarised from the Court's case law in his Opinion in Case C-280/95.⁵

26. The correspondence exchanged since 2 December 1999 between the Spanish Government and the Commission merely shows that the Spanish Government confined itself to requesting opinions from three bodies as to possible legal problems which could arise in implementing the decision. To that end, by letters of 25 April 2000 and 14 June 2000, long after the period for implementing the decision had expired on 2 February 2000, it twice requested extensions of time.

27. The letters from the Spanish Government give no indication of any specific attempt which it undertook extrajudicially, vis-à-vis the publicly-owned shipyards con-

cerned or the publicly-owned holding company of which they formed part, to recover the illegal aid. In view of the fact that the shipyards concerned are State-owned undertakings which operate as part of a publicly-owned holding company, such a step should have been taken as a matter of course. Nor does that correspondence give any indication of diligence displayed in seeking the advice, such as, for example, by conferring urgent status on the requests for opinions or by setting a deadline for them.

28. Likewise, the Spanish Government's plea, put forward at least six months after the notification of the decision on 2 December 1999, that the delay was due to an administrative reorganisation, does not give the impression of great diligence. Unlike an ordinary shopkeeper, who can close his shop for alterations, the public authorities must always continue to discharge their public obligations during internal reorganisations. That also applies to the public obligations which the national authorities have under Community law.

29. On that basis alone, it must be concluded that the Spanish Government's second ground of defence also is untenable and that the Commission's application for a declaration that it failed to fulfil its obligation to implement the 1999 decision is well founded.

30. I observe for the sake of completeness that it is not apparent from the documents

⁵ — See point 13 of the Opinion in the case cited above in point 12 of this Opinion.

before the Court that the Spanish Government took any further steps to implement the decision before the Commission brought the present proceedings by application of 25 October 2000. The defence lodged by the Spanish Government consists of a list of the legal problems and complications which implementation of the decision would entail under Spanish law. However, it does not mention any judicial or extrajudicial steps which it took vis-à-vis the undertakings concerned. Nor does it show that the Spanish Government made any attempt after June 2000, in consultation and cooperation with the Commis-

sion, to reach an acceptable solution for the elimination as such of the competitive advantage which the shipyards concerned still enjoy as a result of the aid declared illegal.

31. In its application, the Commission also applies for Spain to be ordered to pay the costs. Since the Commission's action is well founded, that application should be granted, in accordance with Article 69 of the Rules of Procedure.

III — Conclusion

32. For the reasons set out above, I propose that the Court should:

- (1) declare that, by not taking within the prescribed time the measures necessary to implement the Commission Decision 2000/131 of 26 October 1999 declaring certain aid measures in favour of the group of Spanish publicly-owned shipyards illegal and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision;
- (2) order the Kingdom of Spain to pay the costs.