Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

27 February 2015 *

(Application for interim measures — State aid — Corporation tax scheme allowing undertakings whose tax domicile is in Spain to amortise the financial goodwill deriving from the acquisition of indirect shareholdings in undertakings whose tax domicile is abroad — Decision declaring the aid incompatible with the internal market and ordering its recovery — Application for suspension of operation of a measure — Prima facie case — Lack of any urgency)

In Case T-826/14 R,

Kingdom of Spain, represented by M. Sampol Pucurull, acting as Agent,

applicant,

v

European Commission, represented by B. Stromsky, C. Urraca Caviedes and P. Němečková, acting as Agents,

defendant,

APPLICATION for suspension of the operation of Commission Decision of 15 October 2014 on State Aid SA.35550 (2013/C) (ex 2013/NN) implemented by Spain in connection with the scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions,

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order

Background

1 In 2007, the Commission of the European Communities initiated a formal procedure under Article 88(2) EC and under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) with a view to examining the Spanish tax scheme in so far as it enabled undertakings taxable in Spain who had acquired a shareholding in a company established abroad to deduct, by way of amortisation, from the basis of assessment for corporation tax to which they were liable the financial goodwill deriving from the

* Language of the case: Spanish.

acquisition of that shareholding, registered in their accounts as a distinct intangible asset. In the Commission's view, that tax measure was intended to favour the export of capital from Spain, so as to strengthen the position of Spanish undertakings abroad and thus improve their competitiveness.

2 The Commission closed that formal examination procedure as regards the shareholdings acquired within the European Union by its Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48, 'the first decision'), in which it declared the measure at issue to be incompatible with the common market and ordered recovery of the aid granted by the Spanish authorities.

3 So far as concerns the acquisitions of shareholdings in companies established outside the Union, the formal examination procedure, which had been kept open, was closed by Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1, 'the second decision'). In the second decision, the Commission, in terms similar to those used in the first, declared the measure in question to be incompatible with the internal market in so far as it applied to acquisitions of shareholding outside the Union and ordered recovery of the aid granted by the Spanish authorities.

4 On 17 July 2013, the Commission initiated a new formal examination procedure under Article 108(2) TFEU, relating to a new administrative interpretation adopted by the Kingdom of Spain, which would have extended the scope of the initial Spanish scheme mentioned above (OJ 2013 C 258, p. 8, 'the new tax measure') to indirect acquisitions of shareholdings. That procedure — in which the Commission, under Article 11(1) of Regulation No 659/1999, required the Spanish authorities to suspend all unlawful aid deriving from application of the new tax measure — was brought to an end by the adoption of Commission Decision C(2014) 7280 final of 15 October 2014 on the State Aid SA.35550 (2013/C) (ex 2013/NN) implemented by Spain in connection with the scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions ('the contested decision').

5 In the contested decision, the Commission concluded that the new tax measure, covering indirect acquisitions of shareholdings in non-resident companies by means of the acquisition of shareholdings in non-resident holding companies, likewise constituted a State aid incompatible with the internal market which, moreover, had been granted in breach of Article 108(3) TFEU. Consequently, it ordered the Spanish authorities to recover the aid granted.

6 By two judgments of 7 November 2014 in *Autogrill España* v *Commission* (T-219/10, ECR, EU:T:2014:939), and *Banco Santander and Santusa* v *Commission* (T-399/11, ECR, EU:T:2014:938), the General Court set aside the first and second decisions (see paragraphs 2 and 3 above) on the ground — the same in both judgments — that the Spanish tax scheme mentioned above did not fulfil all the cumulative conditions referred to in Article 87(1) EC, in that it was not capable of favouring 'certain undertakings or the production of certain types of goods'. That tax scheme was available to any Spanish undertaking which had acquired a shareholding of at least 5% in a foreign company and had held that shareholding uninterruptedly for at least one year. It did not therefore relate to any particular category of undertakings or types of production but applied to a category of economic operations. The scheme was, in particular, independent of the nature of the activities of the acquiring undertaking and did not exclude from its benefit, either *de jure* or *de facto*, any category of undertaking.

Procedure and forms of order sought

7 By application lodged at the Registry of the General Court on 23 December 2014, the Kingdom of Spain sought annulment of the contested decision. In support of its application, registered as Case T-826/14, it refers in particular to the indissociable link existing between, on the one hand, the contested decision and, on the other, the first and second decisions annulled by the abovementioned judgments of the General Court, inferring that, in the same way as the initial Spanish tax scheme covered by the first and second decisions, the new tax measure with which the contested decision is concerned is not in any way selective in character.

8 By a separate document lodged at the Registry of the Court on the same date, the Kingdom of Spain made the present application for interim measure, in which it claims, in essence, that the President of the General Court should:

— suspend the operation of the contested decision;

— order the Commission to pay the costs.

9 By order of 8 January 2015, the President of the General Court suspended the operation of the contested decision, under the second subparagraph of Article 105(2) of the Rules of Procedure of the General Court, until an order disposing of the present interlocutory application was made.

10 In its observations on the application for interim measures, lodged at the Registry of the General Court on 14 January 2015, the Commission contends essentially that the President of the General Court should:

— dismiss the application for an interim measure;

— order the Kingdom of Spain to pay the costs.

11 The Kingdom of Spain replied to the Commission's observations by submissions of 21 January 2015. The Commission adopted a final position on those submissions in a pleading of 29 January 2015.

Law

12 It is apparent from Articles 278 TFEU and 279 TFEU, read in conjunction with Article 256(1) TFEU, that a judge hearing applications for interim measures may, if he considers that the circumstances so require, order suspension of the application of an act contested before the General Court or prescribe the necessary interim measures. Nevertheless, Article 278 TFEU states that in principle actions are not to have suspensory effect, in so far as acts adopted by the Union institutions enjoy a presumption of legality. It is therefore only exceptionally that a judge hearing an application for interim measures may order suspension of the application of an act contested before the General Court or prescribe interim measures (see the order of 17 January 2013 in *Slovenia* v *Commission*, T-507/12 R, EU:T:2013:25, paragraph 6 and the case-law cited).

13 Furthermore, Article 104(2) of the Rules of Procedure requires applications for interim measures to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Thus, suspension of the operation of an act or other interim measures may be ordered by the judge hearing an interlocutory application if it is established that such an order is justified, at first sight, in fact and in law (prima facie case) and that it is urgent in so far as it must, in order to avoid serious and irreparable harm to the applicant's interests, be made and produce its effects before a decision is

reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of 14 October 1996 in *SCK and FNK* v *Commission*, C-268/96 P(R), ECR, EU:C:1996:381, paragraph 30).

14 In the context of that overall examination, the judge hearing the interlocutory application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (orders of 19 July 1995 in *Commission* v *Atlantic Container Line and Others*, C-149/95 P(R), ECR, EU:C:1995:257, paragraph 23, and of 3 April 2007 in *Vischim* v *Commission*, C-459/06 P(R), EU:C:2007:209, paragraph 25). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of 23 February 2001 in *Austria* v *Council*, C-445/00 R, ECR, EU:C:2001:123, paragraph 73).

15 Having regard to the material in the case-file, the judge hearing the application considers that he has all the information needed to rule on the present application for interim measures without there being any need first to hear oral argument from the parties.

Prima facie case

16 It must be noted that a number of different forms of wording have been used in the case-law to define the conditions relating to the establishment of a prima facie case, depending on the individual circumstances (see, to that effect, the order in *Commission* v *Atlantic Container Line and Others*, paragraph 14 above, EU:C:1995:257, paragraph 26).

17 Thus, that condition is satisfied where at least one of the pleas in law put forward by the applicant for interim measures in support of the main action appears, prima facie, not unfounded. That is the case, inter alia, where one of the pleas relied on reveals the existence of difficult legal issues the solution to which is not immediately obvious (see, to that effect, the order of 10 September 2013 in *Commission* v *Pilkington Group*, C-278/13 P(R), ECR, EU:C:2013:558, paragraph 67 and the case-law cited). Since the purpose of the interim proceedings is to guarantee that the final decision to be taken is fully effective, in order to avoid a lacuna in the legal protection ensured by the Court, the Court hearing the application for interim relief must restrict itself to assessing prima facie the merits of the grounds put forward in the main proceedings in order to ascertain whether there is a sufficiently large probability of success of the action (Orders of 19 December 2013, *Commission* v *Germany*, C-426/13 P(R), ECR, EU:C:2013:848, paragraph 41, and of 8 April 2014 in *Commission* v *ANKO*, C-78/14 P-R, ECR, EU:C:2014:239, paragraph 15).

18 In the present case, it need merely be observed that there is a close link between, first, the contested decision and, second, the first and second decisions mentioned in paragraphs 2 and 3 above. In fact, by way of example, the Commission submits, in paragraphs 44, 99, 116, 141, 179 and 201 of the contested decision, that the new fiscal measure extended the scope of a scheme which it had already classified as illegal and incompatible with the internal market in the first and second decisions. It adds that the measure in question cannot be justified by its aim, namely strengthening the internationalisation Spanish undertakings, because the same aim has already been pursued by the initial tax scheme which it nevertheless declared illegal and incompatible. In paragraphs 92 and 151 of the contested decision, the Commission notes, more particularly, the selective nature of the initial tax scheme, the subject of the first and second decisions, and refers to the reasoning set out in those decisions in that connection, asserting that it is irrelevant to seek to draw a distinction between direct and indirect acquisitions for the purposes of examining the selectivity of the aid.

19 Moreover, in its observations lodged on 14 January 2015 it, the Commission itself made it clear that the contested decision was closely linked to the first and second decisions which had just been annulled by the General Court.

20 It follows, at first sight, that the contested decision is based on the premise whereby the new tax measure is of a selective nature for the same reasons as those relied on by the Commission in the first and second decisions in order to classify the initial Spanish tax aid scheme as illegal and incompatible with the internal market. In its judgments in *Autogrill España* v *Commission*, cited in paragraph 6 above (EU:T:2014:939, paragraph 83), and *Banco Santander and Santusa* v *Commission*, cited in paragraph 6 above (EU:T:2014:938, paragraph 87), the General Court annulled those decisions because the Commission had failed to establish that the scheme in question was selective, having done so following a very detailed examination, both factual and legal, of the four pleas to the contrary put forward by the Commission.

21 At this stage of the present procedure, all the indications are, therefore, that the General Court, in the judgment disposing of Case T-826/14, will annul the contested decision for the same reasons as those which prompted it to annul the first and second decisions. It follows that the probability of success of the action to which the present application relates must be regarded as very high, even though the prima facie case appears, at first sight, to be particularly strong (see, to that effect and by analogy, the order of 3 December 2014 in *Greece* v *Commission*, C-431/14 P-R, ECR, EU:C:2014:2418, paragraph 24 and the case-law cited).

22 In those circumstances, it appears that the pleas and arguments put forward by the Kingdom of Spain in the main proceedings raise serious doubts as to the legality of the contested decision which it has not been possible, in the present interim proceedings, to raise in observations of the opposite party, which has remained silent, in its observations of 14 January 2015, on the condition regarding a prima facie case and confined itself to announcing that it would file appeals against the judgment in *Autogrill España* v *Commission*, cited in paragraph 6 above (EU:T:2014:939), and *Banco Santander and Santusa* v *Commission*, cited in paragraph 6 above (EU:T:2014:938). In so far as the conditions prescribed for the grant of an interim measure are interdependent (order of 4 December 2014 in *Vanbreda Risk & Benefits* v *Commission*, T-199/14 R, ECR (Extracts), EU:T:2014:1024, paragraph 194), the more or less compelling nature of a prima facie case does not fail to have an impact on the assessment of urgency. Thus, it is all the more necessary for any urgency which an applicant may plead to be taken into consideration by the judge hearing interim applications where the latter has described the prima facie case as particularly strong (see to, that effect, the order of 12 June 2014 in *Commission* v *Rusal Armenal*, C-21/14 P-R, ECR, EU:C:2014:1749, paragraph 40 and case-law cited).

23 The fact nevertheless remains that, pursuant to Article 104(2) of the Rules of Procedure, the conditions relating to a prima facie case and concerning urgency are distinct and cumulative, so that the Kingdom of Spain remains under an obligation to demonstrate the imminence of serious and irreparable harm (see, to that effect, the order in *Commission* v *Rusal Armenal*, cited in paragraph 22 above, EU:C:2014:1749, paragraph 41 and the case-law cited). It follows that, with the exception of the specific dispute concerning the award of public contracts (order in *Vanbreda Risk & Benefits* v *Commission*, cited in paragraph 22 above, EU:T:2014:1024, paragraph 162), a prima facie case, however strong, cannot make up for the lack of urgency (see order of 26 November 2010 in *Gas Natural Fenosa SDG* v *Commission*, T-484/10 R, EU:T:2010:486, paragraph 93 and case-law cited).

Urgency

24 It has consistently been held that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is incumbent on that party to produce reliable evidence that it cannot

await the outcome of the procedure in the main action without being forced personally to suffer damage of that kind (see the order of 19 September 2012 in *Greece* v *Commission*, T-52/12 R, ECR, EU:T:2012:447, paragraph 36 and the case-law cited).

25 Since the present application for interim measures has been made by the Kingdom of Spain, it must be pointed out that the Member States are responsible for interests that are regarded as general interests at national level. Consequently, they may defend them in proceedings for interim measures and seek the grant of interim measures by asserting inter alia that the contested measure could seriously jeopardise performance of their State tasks and public order (see, to that effect, the order in *Greece* v *Commission*, cited in paragraph 24 above, EU:T:2012:447, paragraph 37 and the case-law cited). The Member States may, moreover, refer to damage affecting a sector of their economy, particularly where the contested measure is liable to have unfavourable repercussions on the level of employment and on the cost of living. On the other hand, it is not sufficient for them to invoke damage that would be suffered by a limited number of undertakings where the latter, considered individually, do not constitute an entire sector of the national economy (see, to that effect, orders of 29 August 2013 in *France* v *Commission*, T-366/13 R, EU:T:2013:396, cited in paragraph 25 above, and the case-law cited).

26 It is therefore necessary to consider whether the Kingdom of Spain has succeeded in establishing that immediate implementation of the contested decision would be liable to cause its serious and irreparable damage by, in particular, severely affecting the performance of its State tasks and public policy in Spain or the functioning of an entire sector of the national economy.

27 In that context, the Kingdom of Spain contends that any recovery of the presumed aid would compel the Spanish tax administration to mobilise large staff numbers, using the services of the most skilled officials, who, instead of concentrating on their ordinary tasks, in particular measures to combat tax evasion, would have to 'squander' more than 3300 hours of working time on an activity which was manifestly contrary to the law on state aid. The damage caused by such a recovery obligation would be particularly severe since the number of employees in the Spanish administration was reduced following the austerity measures adopted at the end of 2013.

28 The Kingdom of Spain also refers to its interest in being able to provide economic operators with a legal and tax environment free of uncertainty. However, by reason of its enforceability, the contested decision would require all public authorities, both the tax administration and the courts, to act in the manner which prescribes, even though it is based in essence on an aspect which was declared void by the judgments in *Autogrill España* v *Commission*, cited in paragraph 6 above (EU:T:2014:939), and *Banco Santander and Santusa* v *Commission*, cited in paragraph 6 above (EU:T:2014:938). The legal uncertainty created by the contested decision also affects case files concerning substantial sums yet to be paid to the public treasury and affects about 100 undertakings as potential beneficiaries of the alleged aid. If the recovery of certain amounts linked to the deductions at issue were required, the Spanish administration would have to refund them, in the event of annulment of the contested decision, after several years, and to add the appropriate interest. The consequent damage for the Kingdom of Spain resulting from the difference between the interest rates applicable (for recovery, in the case of the beneficiaries affected, and default interest in the event of reimbursement by the tax administration) is clear.

29 Finally, the Kingdom of Spain alleges additional damage linked to the possibility that the Commission might continue to require implementation of the contested decision in reliance on the presumption of validity attaching to acts adopted by the institutions of the Union. Thus, upon expiry of the period of four months set in the contested decision, the Commission could bring treaty-infringement proceedings against the Kingdom of Spain and, possibly, bring the matter before the Court or require payment of a fine. Similarly, failure to implement the contested decision could be recorded in statistics published annually by the Commission Directorate General (DG) for Competition in its report on State aid, which might 'present a distorted image of the reality underlying this case'.

30 In the Commission's opinion, on the other hand, the Kingdom of Spain has not succeeded in establishing urgency.

31 In that regard, it must be stated at the outset that the Kingdom of Spain cannot validly invoke damage which would be suffered by an entire sector of the national economy. The application for interim measures refers to only 94 undertakings that would be affected by the contested decision as potential beneficiaries of the new tax measure covered by that decision. The Kingdom of Spain does not claim, or *a fortiori* demonstrate, that those 94 undertakings are representative of a specific sector of the Spanish economy and that the effect on them is liable to have unfavourable repercussions for the level of unemployment and the cost of living in a branch of the economy or a specific Spanish region. Moreover, that could hardly be the case because it is apparent from the judgments in *Autogrill España* v *Commission*, cited in paragraph 6 above (EU:T:2014:939), and *Banco Santander and Santusa* v *Commission*, cited in paragraph 6 above (EU:T:2014:938), that the Spanish tax scheme of which the new fiscal measure forms part is available to any Spanish undertaking and therefore does not focus upon any particular category of undertakings or types of production (see paragraphs 6 and 18 above).

32 The question remains to be examined whether the Kingdom of Spain has established, to a sufficient legal standard, that immediate implementation of the contested decision would be liable seriously to affect the performance of its State tasks and Spanish public policy.

33 In that regard, it must be borne in mind that, according to well established case-law there is urgency only if the serious and irreparable harm feared by the party requesting the interim measures is so imminent that its occurrence can be foreseen with a sufficient degree of probability. That party remains, in any event, required to prove the facts that form the basis of its claim that such harm is likely, it being clear that purely hypothetical harm, based on future and uncertain events, cannot justify the granting of interim measures (see, to that effect, the orders in *Greece* v *Commission*, cited in paragraph 24 above, EU:T:2012:447, paragraph 36, and of 11 March 2013 in *Elan* v *Commission*, T-27/13 R, EU:T:2013:122, paragraph 13).

34 In the present case, in the first place, the Commission produced as an annex to its observations a letter dated 9 January 2015 which the Director-General of its Competition Directorate had sent to the Kingdom of Spain and in which he stated that he agreed with the Spanish authorities that the contested decision was closely linked to the first and second decisions, which had just been annulled by the General Court. That letter went on to say:

'Consequently, in view of that close link, we have the honour to inform you that we shall not actively pursue, with Spain, recovery of the aid covered by the [contested] decision, until such time as the Court of Justice has given a decision on the [appeals] which the Commission has decided to bring against the aforementioned judgments of the General Court.'

35 Second, in the observations which it lodged in the present proceedings, the Commission interpreted that letter of 9 January 2015 as constituting a *de facto* extension of the period for fulfilment of the recovery obligation imposed by the contested decision until such time as the Court had given judgment on the appeals brought against the two annulling judgments. According to the Commission, 'the Spanish authorities may therefore suspend recovery without Spain thereby infringing Union law'.

36 Third, on 19 January 2015, the Commission did in fact bring appeals before the Court of Justice against the judgments in *Autogrill España* v *Commission*, cited in paragraph 6 above (EU:T:2014:939), and *Banco Santander and Santusa* v *Commission*, cited in paragraph 6 above (EU:T:2014:938).

37 It must be concluded from the three findings set out above that the harm liable to be caused to the Kingdom of Spain by recovery of the alleged State aid — namely, the pointless mobilisation of large numbers of administrative tax staff, financial losses deriving from differences between the rates of interest applicable in cases of annulment of the contested decision and subsequent reimbursement of

the sums recovered and the threat of treaty-infringement proceedings brought by the Commission, followed by the imposition of a fine — cannot, at this stage, be regarded as sufficiently imminent to justify the grant of the requested stay of implementation. In fact, the Commission has expressly stated that it has released the Spanish authorities from their recovery obligation until such time as the Court of Justice has given a decision on the appeals brought against the abovementioned judgments, and that such suspension of recovery measures was not in breach of Union law. However, a judge hearing applications for interim measures must take note and take account, in his assessment of the urgency, of that benign attitude of the Commission vis-à-vis the Kingdom of Spain, which excludes urgency.

38 None of the arguments to the contrary put forward by the Kingdom of Spain can be upheld.

39 The Kingdom of Spain contends, first, that the letter of 9 January 2015, drafted by a Commission department and not by the College of Members of the Commission, does not have the status either of a decision within the meaning of the fourth paragraph of Article 288 TFEU nor of a measure which can be adopted on the basis of Regulation No 659/1999. That letter merely represents the taking of a position, without any binding force, which does not supplement or amend the contested decision of which suspension is requested. According to the Kingdom of Spain, that means that the contested decision continues to take effect and must, under Article 14(3) of Regulation No 659/1999, be implemented by every public authority. Thus, until such time as actual suspension of the contested decision has been pronounced by the General Court, all the Spanish administrative and judicial authorities should ensure compliance with the obligations imposed by that decision, in particular the obligation to recover the aid granted.

40 In that regard, it must be observed that appraisal of the urgency of the adoption by a judge hearing applications for interim measures to adopt such measures depends on the factual situation of the parties seeking such measures. In other words, the alleged urgency is established only if that party is actually exposed to the imminent and real risk of suffering serious and irreparable harm, whereas a purely theoretical and hypothetical risk is not sufficient for that purpose. Thus, the mere existence of a legal obligation cannot, in principle, create circumstances of urgency for the person concerned necessitating the grant of the provisional measure, for so long as no binding implementation measure has been adopted with a view to ensuring fulfilment of that obligation.

41 By way of example, it is settled case-law that, in interlocutory proceedings concerned with a Commission decision ordering recovery of State aid, it is incumbent on the beneficiary of that aid to demonstrate, before the judge hearing interim applications, that the internal remedies offered by the applicable national law to oppose immediate recovery of the aid at national level do not enable it, by relying in particular on its financial situation, to avoid suffering serious and irreparable harm. If that is not demonstrated, that is to say if the beneficiary can in fact obtain protection from a national court, the Union judge hearing interim applications will conclude that there is no urgency in the proceedings pending before him (see, to that effect, the order in *Elan* v *Commission*, cited in paragraph 33 above, EU:T:2013:122, paragraph 23 and the case-law cited) and that is so despite the fact that the Commission decision continues to produce its legal effects and regardless of whether the protection granted at national level is in conformity with Union law. Moreover, for so long as the national authorities, required by a Commission decision to recover State aid, to refrain *de facto* from making a mandatory order for its repayment, the risk for the beneficiary of having to make such repayment is not sufficiently imminent to justify suspension of that decision (see, to that effect, the order in *France* v *Commission*, cited in paragraph 25 above, EU:T:2013:396, paragraph 29 and the case-law cited).

42 In that context, it is necessary to reject as irrelevant to interlocutory proceedings the thesis defended by the Kingdom of Spain according to which it is appropriate to draw a distinction between the binding legal force of the contested decision, adopted by the College of Commissioners, and a mere

statement of position by a Commission department, as expressed in the letter of 9 January 2015 from the Director-General of the DG for Competition, and in the observations lodged by members of the Commission's Legal Service in the course of the present interim proceedings.

43 First, it is recognised that the Commission is entitled to waive, at any stage of a judicial procedure concerning a decision adopted by the College of Members of the Commission, the execution of that decision (see, to that effect, the order in *France* v *Commission*, cited in paragraph 25 above, EU:T:2013:396, paragraph 40), it being understood that any such waiver may be issued by members of the Commission Legal Service empowered to represent it in the litigation in question. The Kingdom of Spain has not stated that the Commission staff members exceeded the limits of their authority when they indicated in these proceedings that the letter of 9 January 2015 constituted a *de facto* extension of the period for fulfilment of the recovery obligation imposed by the contested decision until a decision is given by the Court of Justice on the abovementioned appeals and that the Spanish authorities could therefore suspend such recovery without infringing Union law (see paragraph 35 above).

44 Second, it is the relevant Commission department, and not the College of the Members of the Commission acting on their own initiative, which proposes the adoption, if necessary, of the requisite measures to commence proceedings to compel the national authorities to fulfil a decision, to issue a warning to them or to penalise their failure to act. In those circumstances, the Kingdom of Spain has at present nothing to fear from the Commission, the relevant department thereof, the Competition Directorate, having given it an assurance that suspension of the recovery measures would not prompt it to commence treaty-infringement proceedings, likely to be followed by the imposition of a fine. In view of the promise given by that department, it also appears very improbable that the latter would be preparing to 'present a distorted image of the reality underlying this case' in its report on State aid (see paragraph 29 above), even supposing that such a publication might be liable to cause serious and irreparable harm to the Kingdom of Spain.

45 It follows that the Kingdom of Spain has not established that the condition regarding urgency was fulfilled by reason of the damaging consequences of recovery of the alleged aid for the functioning of the national, and in particular the fiscal, administration.

46 In any case, in the event of the Commission abandoning its benign attitude to the Spanish authorities and requiring them, at a given moment, to proceed without delay to effect the recovery required by the contested decision, it would be open to the Kingdom of Spain to invoke that fact once more and submit a further application for interim measures under Article 109 of the Rules of Procedure.

47 The Kingdom of Spain nevertheless contends that, in any event, the Spanish courts must guarantee its citizens that all the appropriate inferences will be drawn from the infringement of the last sentence of Article 108(3) TFEU, as regards the reimbursement of the aid granted in breach of that provision. Those courts will therefore have to take all necessary measures to ensure compliance with the contested decision, for so long as it is not suspended by the General Court, in so far as it requires the recovery of illegal and incompatible aid. As regards the letter of 9 January 2015 (see paragraph 34 above) and the declarations made in the present proceedings (see paragraph 35 above), they are merely positions expressed by the Commission which cannot be regarded as binding on the national court (see, to that effect, the judgment of 13 February 2014 in *Mediaset*, C-69/13, ECR, EU:C:2014:71, paragraph 28).

48 However, that argument cannot be upheld. It need merely be pointed out that the Kingdom of Spain must establish in this case that immediate implementation of the contested decision would be liable seriously to undermine the performance of its State tasks and Spanish public policy (see paragraph 25 above). It does not claim, nor *a fortiori* does it demonstrate, that the Spanish courts are already involved or are liable to be involved in proceedings seeking to ensure that fulfilment of the recovery obligation imposed by the contested decision, to such an extent that the functioning of the Spanish

judicial system might thereby be seriously compromised. Nor does it refer to the filing of applications for recovery before the Spanish courts which, by reason of their nature and scope, might have profound and disturbing repercussions for public policy.

49 In any event, the Kingdom of Spain itself refers only to 94 undertakings which, being subject to an order for recovery of illegally granted aid (see paragraph 31 above), might be affected by the contested decision. The processing of such a number of applications does not really seem likely to affect the sound functioning of the Spanish judicial system. Moreover, in the context of such proceedings, the national court, without being legally bound by the above-mentioned positions taken by the Commission, would have to take account thereof, having regard to the principle of sincere cooperation, as a factor in its assessment, in so far as the information contained in those statements of position is intended to facilitate the accomplishment of the task of the national authorities in implementing the recovery decision (see, to that effect, the judgment in *Mediaset*, cited in paragraph 47 above, EU:C:2014:71, paragraph 31).

50 The Kingdom of Spain refers, finally, to its interest in being able to provide economic operators with a legal and fiscal environment free of uncertainty. It considers that, having regard to the legal uncertainty created by the Commission, maintenance of the effects of the contested decision does not leave room for clear guidance either for the tax administration or for the national courts or for undertakings, the latter being themselves required, by means of self-assessment, to make an annual calculation of the amount of corporation tax which they must pay.

51 In that regard, it must be pointed out that the legal uncertainty deplored by the Kingdom of Spain was not created by the contested decision and cannot therefore be eliminated by a stay of execution of that decision. It was at an early stage, when the Commission opened the formal examination procedure to consider a new fiscal measure, that it raised doubts as to the legality of that measure and its compatibility with the internal market, requiring the Spanish authorities to suspend all the illegal aid deriving from the application of that measure (see paragraph 4 above). That uncertainty will persist at least until the Court has given a decision on the appeals which the Commission has filed against the judgments in *Autogrill España* v *Commission*, cited in paragraph 6 above (EU:T:2014:939), and *Banco Santander and Santusa* v *Commission*, cited in paragraph 6 above (EU:T:2014:938) (see paragraph 36 above). Moreover, it does not seem that any such uncertainty raises insurmountable obstacles for undertakings, national courts and the tax administration. It should be open to undertakings, in connection with their self-assessment, to apply the new tax measure, on a provisional basis, subject to an express reservation regarding the future decision of the Court of Justice, whereas the tax administration and the national courts can either take provisional decisions subject to the same reservation or suspend cases pending before them whilst awaiting a decision from the Court of Justice.

52 Having regard to the foregoing, this Court can only find that the Kingdom of Spain has not succeeded in establishing that, if no stay of execution of the contested decision were granted, it would imminently suffer serious and irreparable harm. The condition concerning urgency is not therefore satisfied.

53 Consequently, the application for interim measures must be rejected for lack of urgency, without there being any need to weigh up the interests involved (see, to that effect, the order of 14 December 1999 in *DSR-Senator Lines* v *Commission*, C-364/99 P(R), ECR, EU:C:1999:609, paragraph 61).

54 In those circumstances, the order of 8 January 2015 must be revoked (see paragraph 9 above).

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The application for interim measures is dismissed;

2. The order of 8 January 2015 made in case T-826/14 R is revoked;

3. Costs are reserved.

Luxembourg, 27 February 2015.

E. Coulon
Registrar

M. Jaeger
President