

JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2003 \*

In Case C-404/00,

**Commission of the European Communities**, represented by K.-D. Borchardt and S. Rating, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Spain**, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed period the measures necessary to comply with Commission Decision 2001/131/EC of 26 October 1999 on the State aid implemented by Spain in favour of the publicly-owned shipyards (OJ 2000 L 37, p. 22), which declares that that aid was granted illegally and is therefore incompatible with the common

\* Language of the case: Spanish.

market, the Kingdom of Spain has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and under Articles 2 and 3 of that decision,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, C. Gulmann, V. Skouris, F. Macken (Rapporteur) and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2002,

gives the following

### Judgment

1 By application lodged at the Court Registry on 7 November 2000, the Commission of the European Communities brought an action under the second

subparagraph of Article 88(2) EC for a declaration that, by not adopting within the prescribed period the measures necessary to comply with Commission Decision 2000/131/EC of 26 October 1999 on the State aid implemented by Spain in favour of the publicly-owned shipyards (OJ 2000 L 37, p. 22), which declares that that aid was granted illegally and is therefore 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.

### Applicable legislation

- 2 Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27), the application of which was extended by Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (OJ 1995 L 332, p. 1), lays down specific rules applicable to aid to that sector, which constitute an exception to the general prohibition set out in Article 87(1) EC.
- 3 By Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring (OJ 1997 L 148, p. 1), the Council approved aid for the restructuring of shipyards in various Member States, including the publicly-owned yards in Spain.
- 4 Article 1 of Regulation No 1013/97 states:

‘1. Notwithstanding the provisions of Regulation (EC) No 3094/95, for the yards under restructuring specified in paragraphs 2, 3 and 4 of this article the



The Spanish Government agrees to carry out, according to a timetable approved by the Commission and in any case before 31 December 1997, a genuine and irreversible reduction of capacity of 30 000 cgrt [compensated gross registered tonnes].’

## Factual background and Decision 2000/131

### *Factual background*

- 5 The factual background, as outlined in paragraphs 6 to 9 of the grounds of Decision 2000/131, is as follows:

‘(6) Under its August 1997 decision in State aid Case C 56/95 [OJ 1997 C 354, p. 2], the Commission [approved] State aids totalling a maximum of ESP 229 008 billion in support of the restructuring of the publicly-owned yards in Spain. The package of approved aids included “special” tax credits of up to ESP 58 billion in the period 1995 to 1999.

(7) The reason for the inclusion of these special tax credits was as follows. When the restructuring plan was originally drawn up, the yards were still part of the

INI group (Instituto Nacional de Industria) and able to reduce by 28% after-tax losses through INI, in accordance with generally applicable Spanish national legislation, offsetting losses against profits elsewhere in the group. The financial projections under the plan assumed that such tax credits would continue to be available despite the fact that as from 1 August 1995 the yards had formed part of the loss-making State holding company Agencia Industrial del Estado (AIE). Legislation was accordingly passed (Law 13/96 of 30 December [1996, BOE No 315 of 31 December 1996, p. 38974]) allowing companies in such a position to continue, up until 31 December 1999, to receive from the State equivalent amounts to what they would have been entitled under a tax consolidation system. On the basis of the forecast losses under the restructuring plan, it was estimated that these tax credits for the publicly-owned shipyards would amount to 58 billion pesetas....

- (8) On 1 September 1997, the yards were absorbed into Sociedad Estatal de Participaciones Industriales (SEPI) which, like INI, is able to take advantage of general tax consolidation rules to offset losses against profits.
- (9) The aid package was approved on the condition that the total sum, as well as the amounts per category of aid were maximum amounts. Such conditions were set to ensure that the aids were used for the purposes intended and to limit the distortive effect of the aid on the shipbuilding industry. According to the information available to the Commission within the context of its monitoring of the restructuring plan, the yards received in 1998 a special tax credit of ESP [18.451] billion, notwithstanding the fact [that] the yards also received a tax credit under general measures in 1998, corresponding to their losses in 1997, based on general Spanish tax consolidation rules, as a result of their integration [into] SEPI.'

- 6 In those circumstances, the Commission expressed doubts as to the consistency of the special tax credit of ESP 18.451 billion with the authorising decision and as to its compatibility with the common market.
- 7 Following an exchange of correspondence between the Spanish authorities and the Commission and the initiation by the Commission of the inquiry procedure under Article 88(2) EC, the Commission adopted Decision 2000/131 on 26 October 1999.

*Decision 2000/131*

- 8 At paragraph 57 of the grounds of Decision 2000/131, the Commission concluded that the publicly-owned yards in Spain had received aid in the form of special tax credits of ESP 18.451 billion which could not be legally justified. Although the overall limit on such aid payment had not been exceeded, that amount represented solely a maximum. Within that maximum the aid was to correspond only to taxable losses and was based on the assumption that the yards were unable to benefit from tax credits under Spain's general tax consolidation system. According to the Commission, this was an essential condition for approval of the aid and therefore for the compatibility of the aid with the common market pursuant to Article 87(3)(e) EC.

9 At paragraph 58 of the grounds of Decision 2000/131, the Commission found that, in the circumstances of the case, the special tax credit of ESP 18.451 billion accorded in 1998 was no longer compatible either with Article 87(3)(e) EC or with the common market for the purposes of Article 87(1) EC and thus decided that that sum, with interest, was to be recovered.

10 Accordingly, Articles 1, 2 and 3 of Decision 2000/131 provide:

*‘Article 1*

The State aid granted by Spain in favour of its publicly-owned shipyards amount[ing] to EUR 110 892 743.38 (ESP 18.451 billion), is incompatible with the common market.

*Article 2*

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



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.

### *Article 3*

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

### **The pre-litigation procedure**

- 11 Decision 2000/131 was notified to the Spanish Government by letter from the Commission of 2 December 1999.
  
- 12 By application lodged at the Court Registry on 10 February 2000, the Kingdom of Spain requested the Court to annul that decision. By judgment of 21 March 2002 in Case C-36/00 *Spain v Commission* [2002] ECR I-3243, the Court dismissed that action.

- 13 By letter of 31 January 2000, the Spanish Government informed the Commission that it had commenced consultations with the Abogacía del Estado (the State legal service responsible for judicial procedures, hereinafter ‘the Spanish legal service’) and the Ministerio de Economía y Hacienda (Spanish Ministry of Economy and Finance) in order to agree on the abolition and recovery of the aid declared illegal.
- 14 As it had not received any definite proposals for the recovery of the aid, the Commission, by letter of 24 March 2000, requested the Spanish Government to provide, within 20 working days of the date of that letter, information about the measures taken with a view to implementing Decision 2000/131.
- 15 In its letter in reply of 25 April 2000, the Spanish Government stated that the Spanish legal service had submitted a report designed to clarify the procedure to be followed in recovering the aid in issue and proposing to seek the opinion of the Consejo de Estado (Council of State) on that point. The Spanish Government also referred in its letter to the difficulty in determining whether or not, under national law, the tax paid on the amount of the aid attributable to each shipyard for the purposes of the repayment required by the Commission decision was deductible. The Government further stated that it was still awaiting the reports requested of the Spanish Ministry of Economy and Finance and the Consejo de Estado.
- 16 By letter of 23 May 2000, the Commission sent a further notice to the Spanish Government, requesting it to provide, within 20 working days of the date of that letter, substantial information concerning the recovery of the aid declared illegal.

- 17 In its reply of 14 June 2000, the Spanish Government merely requested an extension of the time-limit by which it was to communicate the measures taken in order to obtain repayment of the aid. As justification for such an extension, it relied on the recent restructuring of the public administration. By letter of 22 June 2000, the Commission refused to grant such an extension.
- 18 In those circumstances, the Commission took the view that the Kingdom of Spain had not taken the measures necessary to comply with Decision 2000/131 and decided to bring the present action.

## The action

### *Preliminary observations*

- 19 As a preliminary point, it should be borne in mind that, according to Article 3(1)(g) EC, the activities of the Community include the establishment of a system ensuring that competition in the internal market is not distorted and that, in that context, Article 87(1) EC declares any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between the Member States, to be incompatible with the common market (Case C-209/00 *Commission v Germany* [2002] ECR I-11695, paragraph 29).

- 20 In the interest of ensuring the effectiveness of that prohibition, the Commission is competent, when it has found that aid is incompatible with the common market, to decide that the State concerned must abolish or alter it. To be of practical effect, this abolition or modification may include an obligation to require repayment of aid granted in breach of the EC Treaty (see Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 13).
- 21 The Member State to which a decision requiring recovery of illegal aid is addressed is obliged under Article 249 EC to take all measures necessary to ensure implementation of that decision (see Case C-209/00 *Commission v Germany*, cited above, paragraph 31).
- 22 Since there are no Community provisions on the procedure for recovery of wrongly paid amounts, illegal aid must, in principle, be recovered in accordance with the relevant procedural provisions of national law (see, to that effect, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 24).
- 23 Moreover, that case-law was confirmed by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), in particular Article 14(3) thereof, which provides that recovery is to be effected without delay and in accordance with the procedures laid down by the national law of the Member State concerned (see Case C-209/00 *Commission v Germany*, paragraph 33).

- 24 A Member State which, pursuant to a decision of the Commission, is obliged to recover illegal aid is thus free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of Community law (see Case C-209/00 *Commission v Germany*, paragraph 34).
- 25 Finally, where a Member State fails to comply with the obligation to recover illegal aid, the Commission is entitled to seek from the Court a declaration that the Treaty has been infringed, either under Article 226 EC or under Article 88(2)EC, the latter action being simply a variant of the procedure for a failure to comply with obligations which has been adapted to the specific problems affecting competition in the common market which have been caused by the maintenance of State aids which have been declared illegal (see Case C-209/00 *Commission v Germany*, paragraph 37).
- 26 It is settled case-law that, in proceedings for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to provide the Court with the evidence necessary to enable it to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 6).
- 27 However, the Member States are obliged, by virtue of Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular of ensuring that the provisions adopted by the institutions pursuant to the Treaty are applied (see *Commission v Netherlands*, cited above, paragraph 7).

*Arguments of the parties*

- 28 The Commission maintains that the Spanish authorities have not adopted all the measures necessary for the implementation of Decision 2000/131. Even though the Kingdom of Spain considered that Decision 2000/131 was illegal and had brought an action for its annulment, it was required to comply with that decision within the prescribed period. Under the fourth paragraph of Article 249 EC, a Commission decision remains binding in its entirety upon the State to which it is addressed until the Court decides otherwise.
- 29 In the Commission's submission, although the Spanish Government took an initial step towards implementing Decision 2000/131, by embarking on consultations concerning the procedures for recovering the tax credits granted to the group of publicly-owned shipyards in Spain, it is not established that it adopted any measure in order to recover those tax credits following the letter of 22 June 2000 from the Commission to the Kingdom of Spain.
- 30 The only argument on which a Member State may rely as a ground for not implementing a decision of the Commission ordering it to cancel and recover State aid declared incompatible with the Treaty is that it is absolutely impossible to implement that decision. However, the Spanish Republic has not, in this case, claimed any such impossibility.
- 31 The Spanish Government's argument that it is difficult to determine whether, under national law, the taxes paid on the amount of the aid attributable to each naval yard for the purpose of the repayment required by Decision 2000/131 are or are not deductible does not satisfy the requirement that it must be absolutely

impossible to implement the decision. In the Commission's view, there is nothing to prevent recovery of the aid granted to each naval yard before deduction of any tax which may have been imposed, subject to reimbursement of that amount should that prove necessary under national law.

- 32 The Commission also rejects the Spanish Government's argument that the recent restructuring of the public administration justifies a further extension of the deadline for communicating the measures taken to ensure recovery of the aid declared illegal, since such restructuring also fails to satisfy the requirement that it must be absolutely impossible to implement the decision.
- 33 In its defence, the Spanish Government states, first of all, that the decision is void for the reasons asserted in *Spain v Commission*, cited above.
- 34 Furthermore, there was no failure to fulfil obligations on the date on which the action was brought, since the Spanish Government had begun to take the measures to comply with Decision 2000/131, in particular by embarking upon consultations in order to implement that decision in accordance with national law, and since those measures had been communicated to the Commission by the letter of 31 January 2001.
- 35 The report of the Spanish Ministry of Economy and Finance was necessary in order to clarify the procedure to be followed to recover the aid declared illegal. The government contends that, as stated in that report, the aid was paid in the form of contributions by AIE and SEPI and not in the form of special tax credits. It follows that the recovery procedure must correspond to administrative procedures rather than to fiscal procedures.

- 36 The Spanish Government also relies on the need for the report of the Spanish legal service, in which it is stated that the sums to be recovered are regarded as public-law revenue and that their recovery is possible by means of the administrative enforcement procedure, with the prerogatives and guarantees of the general budgetary law. None the less, it states in that regard that there is no experience of recovering aid paid by a State company having separate personality from the State and subject to private law, such as SEPI, and that it is therefore difficult to regard the sums to be recovered by the latter as public-law revenue and thereby benefiting from those prerogatives. It is therefore necessary to make use of civil-law procedures and the ordinary courts.
- 37 In those circumstances, the Spanish Government maintains that it needed the Consejo de Estado's report in order to determine whether Decision 2000/131 procures a credit to SEPI, whether the recovery procedure is the one provided for in civil law or whether it is necessary to use the administrative procedures and whether, if SEPI should fail to take action, the State may require implementation of the decision by administrative means.
- 38 The Spanish Government further maintains that there was not sufficient time to be able to assess the failure of that Member State to fulfil its obligation to recover certain unlawful aid (see Case C-350/93 *Commission v Italy* [1995] ECR I-699 and Case C-280/95 *Commission v Italy* [1998] ECR I-259). The Spanish authorities did not even have time to obtain the legal reports referred to at paragraphs 35 to 37 of the present judgment, which determined the most rapid and the most legally correct procedure for recovering the aid in issue, or to evaluate the social effects of such recovery.
- 39 Finally, it was only after payment of all the sums referred to in the authorisation decision and after all the conditions laid down therein had been satisfied that, according to the Spanish Government, the Commission indicated that the aid paid to the publicly-owned shipyards had become unlawful in part for failure to fulfil an allegedly essential condition.



*Findings of the Court*

- 40 It must be borne in mind that the system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 226 EC and 227 EC, which permit a declaration that a Member State has failed to fulfil its obligations, and those contained in Articles 230 EC and 232 EC, which permit judicial review of the lawfulness of measures adopted by the Community institutions, or the failure to adopt such measures. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision (see, in particular, Case 226/87 *Commission v Greece* [1988] ECR 3611, paragraph 14; Case C-74/91 *Commission v Germany* [1992] ECR I-5437, paragraph 10; and Case C-404/97 *Commission v Portugal* [2000] ECR I-4897, paragraph 34).
- 41 The position could be different only if the measure in question contained such particularly serious and manifest defects that it could be deemed non-existent (*Commission v Greece*, cited above, paragraph 16; Case C-74/91 *Commission v Germany*, paragraph 11; and *Commission v Portugal*, paragraph 35).
- 42 That finding also applies in an action for failure to fulfil obligations brought under the second subparagraph of Article 88(2) EC.
- 43 In this connection, it must be stated that, although the Spanish Government has, by referring to the arguments which it raised in *Spain v Commission*, cited above, disputed the classification as State aid of the tax credits granted to the publicly-owned shipyards, on the basis of various points of fact, it has not pleaded any defect of a nature such as to call in question the actual existence of Decision 2000/131.

- 44 It is settled case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful and that that consequence cannot depend on the form in which the aid was granted (see, in particular, Case C-183/91 *Commission v Greece* [1993] ECR I-3131, paragraph 16, and *Commission v Portugal*, paragraph 38).
- 45 In accordance with a consistent line of decisions, where a Commission decision requiring the cessation of State aid incompatible with the common market has not been the subject of a direct action or where such an action has been dismissed, the only defence available to a Member State in opposing an infringement action by the Commission under Article 88(2) EC is to plead that it was absolutely impossible for it to implement the decision properly (Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 16; Case C-261/99 *Commission v France* [2001] ECR I-2537, paragraph 23; and Case C-499/99 *Commission v Spain* [2002] ECR I-6031, paragraph 21).
- 46 The fact that a Member State can only plead in its defence against such an action that implementation was absolutely impossible does not prevent a State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission, from submitting those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on aid (see Case C-350/93 *Commission v Italy*, cited above, paragraph 16; *Commission v France*, cited above, paragraph 24; Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 31; and *Commission v Spain*, cited above, paragraph 24).

- 47 However, the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled the difficulties to be overcome (see Case 94/87 *Commission v Germany* [1989] ECR 175, paragraph 10; *Commission v Italy*, paragraph 14; and *Commission v Spain*, paragraph 25).
- 48 First of all, contrary to the Spanish Government's assertion that until the relevant date for the finding of an infringement, the measures necessary to implement Decision 2000/131 in accordance with national law had been taken, the Spanish Government had embarked only on consultations concerning the procedures for recovering the aid declared illegal and had taken no actual steps *vis-à-vis* the Spanish publicly-owned shipyards for the purpose of recovering the aid.
- 49 Nor is it apparent from the documents in the file that it was absolutely impossible to begin to obtain repayment of the aid from those shipyards.
- 50 As regards, first, the allegedly non-fiscal nature of the aid in question, owing to the fact that it was paid in the form of contributions by AIE and SEPI, and not in the form of special tax credits, it must be borne in mind that, as the Court stated at paragraph 44 of this judgment, the obligation to abolish aid by means of recovery cannot depend on the form in which the aid was granted.

- 51 As regards, next, the alleged legal complexity of the recovery operation, owing to the difficulty in determining whether the applicable procedure is that provided for in civil law or whether it is appropriate to have recourse to the administrative procedure, it must be observed that although, in the absence of Community provisions relating to the procedure applicable to the recovery of illegal aid, such recovery must take place, in principle, in accordance with the relevant provisions of national law. Such provisions must however be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration (see *Commission v Portugal*, paragraph 55).
- 52 The need to await the report of the Consejo de Estado in order to determine the most appropriate recovery procedure could not therefore make it impossible to implement Decision 2000/131.
- 53 Furthermore, although it is true that the Spanish Government communicated the report of the Spanish legal service to the Commission, the fact none the less remains that, in spite of repeated requests by the Commission, it failed to provide the Commission with the information necessary for it to be able to assess the recovery procedure followed by the Spanish authorities and to ascertain the dates on which Decision 2000/131 would be implemented.
- 54 The Spanish Government merely stated that the national authorities did not have the time necessary to evaluate the social repercussions of the recovery of the aid declared illegal and claimed that irreparable damage might be caused to the publicly-owned shipyards and also to the workers employed in those yards and that the recent restructuring of the administration made it necessary to extend the deadline set for communicating the measures taken to implement Decision 2000/131.

- 55 In that regard, it is settled law that the apprehension of internal difficulties cannot justify a failure by a Member State to comply with its obligations under Community law (see, to that effect, Case C-52/95 *Commission v France* [1995] ECR I-4443, paragraph 38; Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 55; *Commission v Italy*, paragraph 16, and *Commission v Portugal*, paragraph 52).
- 56 Finally, the Spanish Government's argument that the Commission initiated the action within an unusually short time after notification of Decision 2000/131 cannot justify the failure to implement that decision.
- 57 In the light of the foregoing, it must be held that, by not adopting within the prescribed period the measures necessary to comply with Decision 2000/131, which declares that the aid granted to the publicly-owned shipyards was granted unlawfully and is therefore incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under Articles 2 and 3 of that decision.

## Costs

- 58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for the Kingdom of Spain to be ordered to pay the costs and since the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by not adopting within the prescribed period the measures necessary to comply with Commission Decision 2000/131/EC of 26 October 1999 on the State aid implemented by Spain in favour of the publicly-owned shipyards, which declares that that aid was granted unlawfully and is therefore incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under Articles 2 and 3 of that decision;
2. Orders the Kingdom of Spain to pay the costs.

Schintgen

Gulmann

Skouris

Macken

Colneric

Delivered in open court in Luxembourg on 26 June 2003.

R. Grass

J.-P. Puissechet

Registrar

President of the Sixth Chamber