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Advocate General's Opinion in Case C-369/07

Commission of the European Communities v Hellenic Republic

ADVOCATE GENERAL MENGOZZI SUGGESTS THAT THE COURT REDUCE THE FINANCIAL PENALTIES PROPOSED BY THE COMMISSION FOR THE NON-RECOVERY BY GREECE OF THE STATE AID GRANTED TO OLYMPIC AIRWAYS AND DECLARED UNLAWFUL BY THE COURT OF JUSTICE

Advocate General Mengozzi today delivered his Opinion in the case concerning Greece's failure to comply with the judgment of the Court of Justice establishing that it had failed to fulfil its obligation¹ to recover the aid granted to Olympic Airways.

In 2002 the Commission declared that certain restructuring aid that it had previously authorised was incompatible with the common market, as was certain operating aid consisting in Greece's tolerance of the persistent non-payment by Olympic Airways of social security contributions, VAT on fuel and spare parts, rentals for various airports, airport charges and the "spatosimo" tax for the modernisation and development of airports. Accordingly, the Commission directed Greece to adopt the necessary measures to recover the aid corresponding to the second instalment of the recapitalisation operation (EUR 41 million), as well as the operating aid.²

In 2003, on the view that the information obtained in the course of the pre-litigation procedure concerning the recovery of the aid was insufficient, the Commission brought infringement proceedings before the Court of Justice, which held that Greece had indeed failed to fulfil its obligations.³

In 2007, in view of the failure to comply with that judgment, the Commission brought the present action, claiming that the Court should impose on Greece both a penalty payment and a lump sum payment.

¹ Judgment delivered on 12 May 2005 in Case C-415/03.

² Decision 2003/372/EC of 11 December 2002 (OJ 2003 L 132, p. 1).

³ Judgment delivered on 12 May 2005 in Case C-415/03.

After the present action had been brought, the Court of First Instance – in an action brought by Olympic Airways – partly annulled⁴ the 2002 decision in so far as it concerned the airport charges owed to Athens International Airport and the VAT due on fuel and spare parts.

Generally speaking, Advocate General Mengozzi considers that, in proceedings for failure to comply with a judgment of the Court, it is for the Commission to provide sufficient evidence to demonstrate the ongoing nature of the infringement, and for the Member State to present an in-depth and detailed refutation of that evidence. Where the Member State maintains, as Greece does in the present case, that it has undertaken recovery by offsetting, it must provide documents which clearly show (i) the nature of the aid recipient's debts to the State as taken into account for the purposes of offsetting and (ii) the amount of those debts and the period to which they relate.

Greece contends, in the present case, that the aid received by Olympic Airways has been fully recovered. It explains that part of that aid was set off against amounts recognised as owing to Olympic Airways by various arbitration awards⁵ which, according to the Commission, involve new aid. On that point, the Advocate General considers that, in the context of infringement proceedings under Article 228 EC, the Court may not address the question whether particular recovery measures involve aid.

The failure to fulfil obligations

According to Advocate General Mengozzi, the Commission has not succeeded in proving failure to recover the aid worth EUR 41 million or failure to recover part of the tax due by way of **airport rental**⁶ or the “**spatosimo**”⁷, but the documents produced by Greece are inappropriate, in his opinion, for the purposes of showing that the balance owed by Olympic Airways on the basis of the 2002 Commission decision has in fact been paid.

The financial penalty

In the view of the Advocate General, for the purposes of determining the “seriousness coefficient” applicable, the amount of aid still to be recovered ought to be regarded as distinctly lower than the amount specified by the Commission. Account must be taken of the partial annulment of the 2002 decision by the Court of First Instance and of the fact that, so far as part of the aid declared unlawful by that decision is concerned, the Commission has not succeeded in proving failure to recover.

Mr Mengozzi therefore advocates a reduction in the penalty payment proposed by the Commission⁸ to **EUR 15 768** for each day of delay in complying with the judgment in Case C-415/03, running from the date of delivery of the judgment in the present case until the date of final compliance. The Advocate General considers it appropriate, moreover, to impose payment of a lump sum in the amount of **EUR 2 million** to penalise the continuation of the failure to fulfil

⁴ Judgment delivered on 12 September 2007 in Case T-68/03.

⁵ By way of compensation for the damage incurred through the closure, earlier than expected, of the airport at Elliniko and the transfer of Olympic Airways to the international airport at Spata, and for supplying services in the general interest free of consideration.

⁶ The amount of two invoices – for EUR 176 082.18 and EUR 478 606.91, respectively – out of the total of EUR 2.46 million quoted in the Commission decision.

⁷ EUR 38 192 997 out of a total of EUR 60 999 156.

⁸ EUR 53 611.

obligations from the date of delivery of the judgment in Case C-415/03 until the date of delivery of the judgment in the present case⁹.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: DE EL EN ES FR IT

The full text of the Opinion may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-369/07>

It can usually be consulted after midday (CET) on the day of delivery.

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⁹ The Commission had proposed that the amount payable should be calculated by multiplying the amount of EUR 10 512 by the number of days over which the infringement continued.