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Court of Justice of the European Union

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Judgment in Joined Cases C-465/09 P to 470/09 P
Territorio Histórico de Vizcaya - Disputación Foral de Vizcaya and Others v
Commission

The Court of Justice upholds the Commission's decisions finding that the Basque tax exemptions granted to newly-established undertakings are State aid incompatible with the common market

The regional authorities involved may not rely on the length of the procedure conducted by the Commission, as they contributed to the situation themselves by failing to cooperate and notify the aid

Under Spanish legislation, the Territorios Históricos of Álava, Vizcaya and Guipúzcoa (Spain) may, under certain conditions, organise the tax systems within their respective territories.

In that context, in 1993 those three territories introduced corporation tax exemptions over ten years, for newly established firms. To qualify for the exemption, the firms had to satisfy certain conditions, in particular they had to start their business with a minimum paid-up capital of €120 202, invest a minimum of €480 810 in tangible fixed assets and create at least 10 jobs. Those exemption measures were not notified to the Commission when they were adopted, whereas any new State aid must be notified beforehand to the Commission and may not, in principle, be implemented unless the Commission has declared it compatible with the EC Treaty.

Following a complaint made in 1994 to the Commission by the Cámara de Comercio e Industria de la Rioja (Chamber of Commerce and Industry of La Rioja, Spain), the Federación de empresas de la Rioja (La Rioja Business Federation) and a number of companies, the Commission informed them, by letter of 18 July 1995, that it was examining the Spanish tax system and the systems of fiscal autonomy in force in the Member States. It added that it would decide on how to follow up on that complaint once those questions were clarified and that it would communicate its decision to them.

In January 1996 the Commission requested information from the Spanish authorities on the beneficiaries of the measures at issue. That request was never answered sufficiently.

On 5 January 2000, the Commission received a fresh complaint relating to the corporation tax exemption granted to an undertaking established in Álava. The complaint came from a company which was a competitor of that beneficiary undertaking. As that complaint made it possible to establish the existence of an undertaking which was a beneficiary under the disputed tax systems and established in Álava, on 28 November 2000 the Commission notified the Spanish authorities of its decision to initiate the formal investigation procedure in relation to the measures at issue.

On conclusion of that procedure, the Commission held, by three decisions of 20 December 2001¹, that the exemption measures at issue were State aid incompatible with the common market. The Commission therefore instructed Spain to abolish them and to recover from the beneficiaries aid already made available to them.

¹ Decisions 2003/28/EC, 2003/86/EC and 2003/192/EC on State aid schemes in the form of corporation tax exemption implemented by Spain in 1993 for certain newly established firms in respectively Álava, Vizcaya and Guipúzcoa (respectively OJ 2003 L 17, p. 20; OJ 2003 L 40, p. 11; and OJ 2003 L 77, p. 1).

Following actions brought by the Territorios Históricos of Álava, Guipúzcoa and Vizcaya, the Court of First Instance (now the General Court) upheld the Commission's decisions². The General Court held, in particular, that those tax exemptions constituted prohibited operating aid and could not be classified as investment or employment aid. The General Court also rejected the plea in law that those tax measures were 'existing aid' which could not be the subject of a decision to recover aid already paid but only, should the situation arise, of a decision of incompatibility producing effects for the future.

The Territorios Históricos of Álava, Guipúzcoa and Vizcaya then brought the present appeals before the Court of Justice in order to have the General Court's judgment set aside.

By its judgment today, the Court of Justice dismisses those appeals.

In particular, the Court of Justice finds that the General Court was correct in holding that the Commission had not authorised the disputed tax systems before receiving the 2000 complaint and adopting the decision to initiate the formal investigation procedure. In so doing, the Court rejects the appellants' argument to the effect that, in 2001, the disputed systems ought to have been considered as existing aid which could not be the subject of a decision to recover aid already paid.

On that point, the Court adds that, in matters of State aid, the existence of a Commission decision in respect of a State measure must be ascertainable on the basis of objective factors and reflect **a clear and definitive statement of its position**. Accordingly, since there was no such statement, it cannot be considered that the Commission had authorised, explicitly or implicitly, the disputed tax systems after it received the 1994 complaint and in 2000 initiated a fresh preliminary investigation into those systems. Similarly, an authorisation of the disputed tax systems cannot be inferred from mere silence on the part of the Commission.

Moreover, the Court of Justice holds that the General Court did not disregard the procedural rules on the taking of evidence and the right to a fair trial in dismissing the appellants' request to have the Commission ordered to include in the case-file all documents relating to the 1994 complaint. In that regard, the Court observes that the appellants have not established the existence of a clear and definitive statement of the Commission's position which is favourable to the disputed systems. It adds that, apart from two documents already produced in the case, the appellants' request did not identify the specific documents which were requested or the objective factors in them liable to support the appellants' arguments. The Court accordingly finds that the General Court was correct in rejecting that request, as it did not contain any serious indicia such as to give grounds for believing that one of the documents production of which was requested could be relevant for resolving the dispute.

Lastly, the Court considers that since the appellants did not cooperate with the Commission by providing it with the information requested, they may not rely on the argument that the procedure was excessively long or on the principle of legitimate expectations in order to challenge the recovery of the aid granted under the disputed tax systems.

In that regard, the Court observes that a Member State which requests permission to grant aid by way of derogation from the Treaty rules is bound by a **duty to cooperate** with the Commission. This is all the more true for a Member State such as in the present case, which failed to notify the Commission of a State aid scheme, contrary to the requirements of the EC Treaty. The Court further observes that the appellants **did not provide a specific reply to the request sent by the Commission to the Spanish authorities on 19 January 1996 concerning the identity of the beneficiaries under the disputed tax systems**. That being so and given that it was only further to the complaint made in 2000 that the Commission learned of the existence of an undertaking which received exemptions under the tax systems at issue, the Court considers that the length of time

² Joined Cases [T-30/01 to T-32/01](#) and [T-86/02 to T-88/02](#) *Diputación Foral de Álava and Others v Commission*. See also Press Release [73/09](#).

which elapsed between the receipt of that complaint until the adoption of the final decisions on 20 December 2001 cannot be regarded as excessive.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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