



**Advocate General Sharpston proposes that the Court impose a fine of €50 million on Spain for failing to recover aid illegally granted in the Basque Country**

*By not recovering all the aid before this case was brought, Spain has failed to comply with a 2006 judgment ordering the recovery*

Between 1994 and 1997, the three provinces of the Basque Country (Álava, Vizcaya and Guipúzcoa) each introduced two separate fiscal measures which remained in force until 1999 or 2000: a tax credit for businesses of 45% of investments, and a degressive four-year reduction of the tax base for new businesses, none of which were declared to the Commission.

In 2001, the Commission adopted six decisions finding these measures to be State aid incompatible with the common market and requiring Spain to recover that aid<sup>1 2</sup>.

In November 2003, taking the view that Spain had failed to adopt the measures necessary to comply with those decisions, the Commission brought six infringement actions before the Court of Justice. By judgment of 14 December 2006<sup>3</sup>, the Court held that Spain had failed to adopt the measures necessary to recover the aid and ordered its recovery.

In April 2011, considering that Spain had still not recovered the aid, the Commission asked the Court to declare that Spain had failed to comply with the 2006 judgment and to fine that Member State €64 543 000.

In her Opinion issued today, Advocate General Eleanor Sharpston notes that Spain accepts that much of the recovery has taken place since these proceedings were brought. On 30 October 2013, the Commission informed the Court that it was satisfied that the aid had now been recovered in full, together with interest, the last payment of which was made on 15 October 2013. However, Spain and the Commission disagree regarding the calculation and total amount of the aid to be recovered. Spain emphasises that the disputed aid has finally been recovered with a view to limiting any penalty imposed by the Court, but without admitting that it must legally be recovered. As neither the 2001 decisions nor the 2006 judgment identified the incompatible aid it is necessary – regardless of the fact that all the aid has now been recovered – for the Court to determine how much Spain was required to recover. However, she points out that the documentation submitted by both parties has been voluminous and not best calculated to assist the Court in that regard.

<sup>1</sup> Decision 2002/820/EC of 11 July 2001 (OJ 2002 L 296, p. 1); Decision 2002/892/EC of 11 July 2001 (OJ 2002 L 314, p. 1); Decision 2003/27/EC of 11 July (OJ 2003 L 17, p. 1); Decision 2002/806/EC of 11 July 2001 (OJ 2002 L 279, p. 35); Decision 2002/894/EC of 11 July 2001 (OJ 2002 L 314, p. 26) and Decision 2002/540/EC of 11 July 2001 (OJ 2002 L 174, p. 31).

<sup>2</sup> The authorities of the Basque provinces brought six actions before the Court of First Instance seeking annulment of these decisions. The actions had no suspensive effect with regard to the obligation to recover the aid. (10,11) On 9 September 2009 these actions were dismissed (Joined Cases [T-227/01 to T-229/01](#), [T-265/01](#), [T-266/01](#) and [T-270/01](#), Joined Cases [T-230/01 to T-232/01](#) and [T-267/01 to T-269/01](#), see also Press Release No [73/09](#)). Appeals by authorities of the Basque provinces were dismissed on 28 July 2011 (Joined Cases [C-471/09 P to C-473/09 P](#); Joined Cases [C-474/09 P to C-476/09 P](#), see also Press Release No [78/11](#)).

<sup>3</sup> Joined Cases [C-485/03 to C-490/03](#) *Commission v Spain*.

The Advocate General considers that the need to recover the disputed aid falls to be assessed in accordance with the 1998 regional aid guidelines. In her view, the 'incentive requirement' in those guidelines permits the non-recovery only of aid for which it is established that the application was submitted before work started on the investment project.

Miss Sharpston then examines the applicability of the *de minimis* rule<sup>4</sup>, according to which aid measures did not need to be declared to the Commission if, in particular, the total aid granted to any one enterprise did not exceed €100 000 gross (or gge) over any period of three years. In recovering the aid in the form of a tax base reduction for new businesses, the Spanish authorities originally deducted €100 000 per three-year period from the amount to be recovered from each beneficiary. Advocate General Sharpston considers that the Spanish authorities were not entitled to do so.

In some cases, Spain originally reduced the amount which it sought to recover by retrospectively applying certain tax deductions established by the tax legislation. The Commission considers that Spain should also recover this money. In this regard, the Advocate General points out that these deductions were not alleged to form part of any of the tax credit schemes which were found to constitute unlawful State aid. They were mentioned neither in the 2001 decisions nor in the 2006 judgment, and the infringement alleged in the present proceedings is failure to comply with that 2006 judgment. Consequently, whether the deductions were correctly granted in accordance with national law is a question which falls outside the scope of these proceedings.

In the light of these conclusions, the Advocate General estimates that in round figures, a total principal sum of €322 million fell to be recovered at the date of the 2006 judgment, some 10% lower than the €358 million suggested by the Commission. She further proposes that the Court consider the amount of interest due also to be 10% lower than the figures given by the Commission. Some 14% of the total had been recovered by the date the present proceedings were brought. The remaining 86% was recovered after the commencement of these proceedings, between September 2011 and October 2013.

With regard to the financial penalty for this infringement, Advocate General Sharpston considers that the imposition of a lump sum fine is appropriate as a dissuasive measure. The amount of illegal aid concerned and the delay in recovery are both considerable, and it appears that the Spanish authorities have devoted a good deal of time and energy to attempting to minimise the amounts to be recovered, often by entering into excessive detail entailing further delay. The Advocate General examines the Commission's guidelines and the Court's past judgments in comparable cases, without finding any common approach between the two.

In the light of all the circumstances, the Advocate General suggests that the Court imposes on Spain a lump sum fine of €50 million. She does not see any cogent reason to increase or reduce that amount. It is a significant sum – higher than any lump sum previously imposed by the Court – likely to have a strong dissuasive effect for all Member States without there being any need to raise it. Yet the infringement is a serious one, involving State aid in amounts – higher than any previously in issue in any similar case – such as seriously to affect trade between Member States, over a considerable period of time. In fact, recovery did not begin to take place to any significant extent until more than four years had elapsed after the 2006 judgment.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. 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 are now beginning their deliberations in this case. Judgment will be given at a later date.

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<sup>4</sup> Article 2 of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30), since replaced.

**NOTE:** An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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

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