JUDGMENT OF THE COURT (Fifth Chamber)
22 March 2001 *

In Case C-261/99,

Commission of the European Communities, represented by G. Rozet, acting as Agent, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and F. Million, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed period the measures needed to recover from the recipients thereof aid declared

* Language of the case: French.

unlawful and incompatible with the common market by Commission Decision 1999/378/EC of 4 November 1998 on aid granted by France to Nouvelle Filature Lainière de Roubaix (OJ 1999 L 145, p. 18), the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC) and under Articles 4 and 5 of that decision,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), P. Jann, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 13 July 1999, 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 needed to recover from the recipients thereof aid declared unlawful and incompatible with the common market by Commission Decision 1999/378/EC of 4 November 1998 on aid granted by France to Nouvelle Filature Lainière de Roubaix (OJ 1999 L 145, p. 18), the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC) and under Articles 4 and 5 of that decision.

2 In May and September 1996 the Commission received several complaints concerning aid which had been or might be granted by the French Government to the company Nouvelle Filature Lainière de Roubaix for the purposes of court-supervised restructuring of the SA Filiature Lainière de Roubaix group ('the disputed aid'). The complaints criticised the moratorium of eight years granted to the group by the Inter-Ministerial Committee for Industrial Restructuring for the payment of its social-security and tax debt of FRF 82 000 000 and also an application for intervention by that committee to prevent that company from becoming insolvent.

3 In response to a request for information from the Commission, the French authorities informed it, by letters of 18 June and 15 July 1996, that the SA

Filiature Lainière de Roubaix group had, since the early 1990s, been experiencing serious operational difficulties resulting in considerable cash-flow problems and arrears of social-security and tax payments. After being taken over in 1993 by Mr Verbeke, the group submitted a restructuring plan under which that debt would be paid in full, provided that the repayments were spread over a period of eight years. However, new economic and financial difficulties arose in and after 1995. The management was unable to make payments when they fell due and accordingly it lodged a declaration of cessation of payments with the Tribunal de Commerce (Commercial Court), Roubaix (France), which, on 30 April 1996, initiated the procedure for it to be placed under compulsory administration.

4 After determining that the group's economic and financial situation was such that no restructuring scheme was possible and after issuing a call for bids for acquisition of the business, the Tribunal de Commerce, Roubaix, by judgment of 17 September 1996, ordered transfer of the group to Mr Chapurlat for the price of FRF 4 278 866, the transferee having undertaken to honour the employment contracts of 225 of the 587 employees making up the workforce and to pay the sum of FRF 50 000 for each redundancy occurring in the year following the transfer. In addition, that court authorised the dismissal of 362 employees and appointed a liquidator to wind up the SA Filiature Lainière de Roubaix group, that being an automatic consequence of its judgment.

5 In September 1996, the French authorities notified the Commission of the restructuring measure which they envisaged adopting in favour of the new company set up by Mr Chapurlat under the name 'Nouvelle Filature Lainière de Roubaix', the capital of which was FRF 510 000. That aid measure, involving a total sum of FRF 40 000 000, was made up of an equity loan in the sum of FRF 18 000 000 and a grant in the sum of FRF 22 000 000.

6 The procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) concluded with the adoption of the contested decision, the operative part of which is worded as follows:

'*Article 1*

The aid in the form of an investment premium granted by France to Nouvelle Filature Lainière de Roubaix amounting to FRF 7.77 million may be considered to be compatible with the common market on the basis of Article 92(3)(c) of the Treaty.

Article 2

The aid in the form of an investment premium granted by France to Nouvelle Filature Lainière de Roubaix amounting to FRF 14.23 million is incompatible with the common market.

Article 3

1. The equity loan of FRF 18 million constitutes aid in so far as the rate applied by France is lower than the reference rate of 8.28% applicable at the time the loan was granted.

2. The aid referred to in paragraph 1 granted by France to Nouvelle Filature Lainière de Roubaix is incompatible with the common market.

Article 4

1. France shall take all necessary measures to recover from the recipient, Nouvelle Filature Lainière de Roubaix, the aid referred to in Article 2 which has already been illegally paid.

2. Repayment shall be made in accordance with the procedures and provisions of French law. The amounts to be repaid shall bear interest from the date on which the aid was paid to the recipient until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.

3. France shall without delay abolish the aid referred to in Article 3 by applying normal market conditions corresponding at least to the reference rate of 8.28% applicable at the time the loan was granted.

Article 5

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply with it.

Article 6

This Decision is addressed to the French Republic.'

7 By application lodged at the Court Registry on 25 January 1999, the French Republic brought an action for annulment of the contested decision (see Case C-17/99 *France* v *Commission* [2001] ECR I-2481).

8 Having received no information, at the end of the period laid down in Article 5 of the contested decision, as to the action taken by French authorities in response to the contested decision, on 3 February 1999 the Commission sent them a reminder indicating that, if it did not receive confirmation that the decision had been implemented, it would be constrained to bring the matter before the Court of Justice in accordance with Article 93(2) of the Treaty.

9 There was no response to that letter and therefore the Commission, noting that the French Republic had not complied with the contested decision and had not contended that implementation thereof was absolutely impossible, decided to institute the present proceedings.

10 The Commission submits, first, that, by virtue of the fourth paragraph of Article 189 of the Treaty, the contested decision is binding on the French

Republic, having been notified to it on 17 November 1998. Under that provision, that decision is 'binding in its entirety' upon the Member State to which it is addressed unless and until a decision to the contrary is given by the Community judicature.

11 The Commission adds that, in Case C-17/99, the French Government did not at any time ask the Court to suspend the operation of the contested decision or to adopt interim measures under Article 186 of the EC Treaty (now Article 243 EC).

12 It also considers that the only argument on which a Member State may rely for not implementing a Commission decision ordering the abolition and recovery of State aid which has been declared incompatible with the Treaty is that implementation is absolutely impossible. However, in this case, the French Republic has not alleged any such impossibility.

13 The Commission contends, finally, that the French Government has not discharged its duty of genuine cooperation. First, the French authorities have not, to date, made any reply whatsoever to the Commission's reminder letter of 3 February 1999 and, second, they have neither informed the Commission at any time of difficulties encountered by them in giving effect to the contested decision nor proposed alternative measures. It is apparent that the French authorities have taken no action whatsoever to recover the aid declared incompatible with the Treaty.

14 The French Government, although asserting that it is fully aware of its obligation to recover the aid in question, admits that it has taken no action to do so.

15 It maintains that it has taken steps to work out, in conjunction with the company which received the aid, possible arrangements for its recovery. Although immediate recovery of all the aid necessarily involved placing the company under compulsory administration, the French Government, which is not unfamiliar with the case-law of the Court whereby the fact that a company which received State aid declared incompatible with the Treaty no longer exists cannot justify abandoning action to recover the aid, admits that it did not seek to rely upon that situation in its dealings with the Commission.

16 The French Government adds that, in view of the case-law of the Court, an application for suspension of the operation of the contested decision in Case C-17/99 would have been unlikely to be successful.

17 It also contends that, throughout the administrative procedure, the French authorities gave a considerable amount of information to the Commission and thus fulfilled their duty to ensure genuine cooperation with it.

18 It must first be borne in mind that the system of remedies set up by the Treaty distinguishes between actions under Articles 226 and 227 EC, which are directed to obtaining a declaration that a Member State has failed to fulfil its obligations, and those under Articles 230 EC and 232 EC, which are directed to obtaining judicial review of measures adopted by the Community institutions or of failure on their part to act. 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, most recently, Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 34). It is immaterial whether such unlawfulness is pleaded in the action brought against the Member State or, as in this case, in an action for annulment of the decision at issue (Case C-17/99).

19 The position could be different only if the measure in question contained particularly serious and manifest defects such that it could be deemed non-existent (*Commission* v *Portugal*, cited above, paragraph 35).

20 That also applies to an action for failure to fulfil obligations based on the second subparagraph of Article 88(2) EC (*Commission* v *Portugal*, cited above, paragraph 36).

21 It must be observed that although, in Case C-17/99, the French Government has contended, on the basis of certain circumstances of fact, that the contested decision is unlawful, it has not alleged any defect of such a nature as to show that the measure is non-existent.

22 It must next be borne in mind that it is settled case-law that recovery of unlawful aid is the logical consequence of a finding that it is unlawful (see, in particular,

Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 16, and *Commission* v *Portugal*, cited above, paragraph 38).

23 The Court has also held that the only defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations 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, and *Commission* v *Portugal*, cited above, paragraph 39).

24 Furthermore, where a Member State, when implementing a Commission decision relating to State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences not contemplated by the Commission, it must submit those problems for consideration by the Commission, together with proposals for suitable amendments to the decision in question. In such a case the Commission and the Member State concerned must respect the principle underlying Article 5 of the EC Treaty (now Article 10 EC), which imposes a duty of genuine cooperation on the Member States and the Community institutions, and must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid (see, in particular, Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 9, and *Commission* v *Portugal*, cited above, paragraph 40).

25 In that regard, it need only be stated that, in this case, the French Government did not inform the Commission, following notification of the contested decision and the sending of the reminder letter of 3 February 1999, of any unforeseen and unforeseeable difficulties or indeed any difficulties not contemplated by the Commission which might have justified amending that decision.

26 Finally, it must be borne in mind that the decision at issue is presumed to be lawful and that, despite the existence of the action for annulment, it remains binding in all respects on the French Republic (*Commission* v *Portugal*, cited above, paragraph 57).

27 In this case, the French Republic has not asked for suspension of its obligation to recover the State aid declared incompatible with the Treaty. Consequently, whatever the conditions under which, by virtue of the case-law of the Court, such a request might be granted, the contested decision remained binding in its entirety on the French Republic, particularly as regards its obligation to recover the aid in question in the absence of suspension of the operation of the said decision at its request.

28 In view of the foregoing considerations, it must be held that, by not complying with the contested decision, the French Republic has failed to fulfil its obligations under the Treaty.

Costs

29 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 applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by failing to comply with Commission Decision 1999/378/EC of 4 November 1998 on aid granted by France to Nouvelle Filature Lainière de Roubaix, the French Republic has failed to fulfil its obligations under the EC Treaty;**

2. **Orders the French Republic to pay the costs.**

La Pergola Wathelet Jann

von Bahr Timmermans

Delivered in open court in Luxembourg on 22 March 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber